SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1963.

Robert Mack Bell et al., Petitioners, v. State of Maryland. | On Writ of Certiorari to the Court of Appeals of the State of Maryland.

[June 22, 1964.]

Mr. Justice Douglas, with whom Mr. Justice Goldberg concurs as respects Parts II–V, reversing and directing dismissal of the indictment.

I.

I reach the merits of this controversy. The issue is ripe for decision and petitioners, who have been convicted of asking for service in Hooper's restaurant, are entitled to an answer to their complaint here and now.

On this the last day of the Term, we studiously avoid decision of the basic issue of the right of public accommodation under the Fourteenth Amendment, remanding the case to the state court for reconsideration in light of an issue of state law.

This case was argued October 14 and 15, 1963—over eight months ago. The record of the case is simple, the constitutional guide lines well marked, the precedents marshalled. Though the Court is divided, the preparation of opinions laying bare the differences does not require even two months, let alone eight. Moreover, a majority reach the merits of the issue. Why then should a minority prevent a resolution of the differing views?

The laws relied on for vacating and remanding were enacted June 8, 1962, and March 29, 1963—long before oral argument. We did indeed not grant certiorari until June 10, 1963. Hence if we were really concerned

with this state law question, we would have vacated and remanded for reconsideration in light of those laws on June 10, 1963. By now we would have had an answer and been able to put our decision into the mainstream of the law at this critical hour. If the parties had been concerned, they too might have asked that we follow that course. Maryland adverted to the new law merely to show why certiorari should not be granted. At the argument and at our conferences we were not concerned with that question, the issue being deemed frivolous. Now it is resurrected to avoid facing the constitutional question.

The whole Nation has to face the issue; Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, north as well as south; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue in other words consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense.

The clash between Negro customers and white restaurant owners is clear; each claims protection by the Constitution and tenders the Fourteenth Amendment as justification for his action. Yet we leave resolution of the conflict to others, when, if our voice were heard, the issues for the Congress and for the public would become clear and precise. The Court was created to sit in troubled times as well as in peaceful days.

There is a school of thought that our adjudication of a constitutional issue should be delayed and postponed as long as possible. That school has had many stout defenders and ingenious means have at times been used to avoid constitutional pronouncements. Yet judge-made rules, fashioned to avoid decision of constitutional

questions, largely forget what Chief Justice Marshall wrote in *Fletcher* v. *Peck*, 6 Cranch 87, 137–138:

> "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

Much of our history has shown that what Marshall said of the encroachment of legislative power on the rights of the people is true also of the encroachment of the judicial branch, as where state courts use unconstitutional procedures to convict people or make criminal what is beyond the reach of the states. I think our approach here should be that of Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 177, where the Court spoke with authority though there was an obviously easy way to avoid saying anything:

> . "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the consti-

tution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened.

For these reasons I reach the merits; and I vote to reverse the judgments of conviction outright.

II.

The issue in this case, according to those who would affirm, is whether a person's "personal prejudices" may dictate the way in which he uses his property and whether he can enlist the aid of the state to enforce those "personal prejudices." With all respect, that is not the real issue. The corporation that owns this restaurant did not refuse service to these Negroes because "it" did not like Negroes. The reason "it" refused service was because "it" thought "it" could make more money by running a segregated restaurant.

In the instant case, G. Carroll Hooper, president of the corporate chain owning the restaurant here involved, testified concerning the episode that gave rise to these convictions. The reasons were wholly commercial ones:

"I sat at the table with him and two other people and reasoned and talked to him why my policy was

not yet one of integration and told him that I had two hundred employees and half of them were colored. I thought as much of them as I did the white employees. I invited them back in my kitchen if they'd like to go back and talk to them. *I wanted to prove to them it wasn't my policy, my personal prejudice,* we were not, that I had valuable colored employees and I thought just as much of them. I tried to reason with these leaders, told them that *as long as my customers were the deciding who they want to eat with, I'm at the mercy of my customers. I'm trying to do what they want. If they fail to come in, these people are not paying my expenses, and my bills.* They didn't want to go back and talk to my colored employees because every one of them are in sympathy with me and that is we're in sympathy with what their objectives are, with what they are trying to abolish. . . ." (Italics added.)

Here, as in most of the sit-in cases before us, the refusal of service did not reflect "personal prejudices" but business reasons.[1] Were we today to hold that segregated restaurants, whose racial policies were enforced by a State, violated the Equal Protection Clause, all restaurants would be on an equal footing and the reasons given in this and most of the companion cases for refusing service to Negroes would evaporate. Moreover, when corporate restaurateurs are involved, whose "personal prejudices" are being protected? The stockholders'? The directors'? The officers'? The managers'? The truth is, I think, that the corporate interest is in making money, not in protecting "personal prejudices."

[1] See Appendix II.

III.

I leave those questions to another part of this opinion,[2] and turn to an even more basic issue.

I now assume that the issue is the one stated by those who would affirm. The case in that posture deals with a relic of slavery—an institution that has cast a long shadow across the land, resulting today in a second-class citizenship in this area of public accommodations.

The Thirteenth, Fourteenth, and Fifteenth Amendments had "one pervading purpose . . . we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases*, 16 Wall. 36, 71.

Prior to those Amendments, Negroes were segregated and disallowed the use of public accommodations except and unless the owners chose to serve them. To affirm these judgments would remit those Negroes to their old status and allow the States to keep them there by the force of their police and their judiciary.

We deal here with public accommodations—with the right of people to eat and travel as they like and to use facilities whose only claim to existence is serving the public. What the President said in his State of the Union Message on January 8, 1964, states the constitutional right of all Americans, regardless of race or color, to be treated equally by all branches of government:

> "Today Americans of all races stand side by side in Berlin and Vietnam.
>
> "They died side by side in Korea.
>
> "Surely they can work and eat and travel side by side in America."

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[2] See Appendix I.

The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; [3] the discrimination in these sit-in cases is a relic of slavery.[4]

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[3] For accounts of the Black Codes see Fleming, The Sequel of Appomattox (1919), pp. 94–98; Sen. Ex. Doc. No. 6, 39th Cong., 2d Sess.; Vol. I Oberholtzer, A History of the United States Since the Civil War (1917), pp. 126–127, 136–137, 175. They are summarized as follows by Morison and Commager, The Growth of the American Republic (1950), pp. 17–18:

"These black codes provided for relationships between the whites and the blacks in harmony with realities—as the whites understood them—rather than with abstract theory. They conferred upon the freedmen fairly extensive privileges, gave them the essential rights of citizens to contract, sue and be sued, own and inherit property, and testify in court, and made some provision for education. In no instance were the freedmen accorded the vote or made eligible for juries, and for the most part they were not permitted to testify against white men. Because of their alleged aversion to steady work they were required to have some steady occupation, and subjected to special penalties for violation of labor contracts. Vagrancy and apprenticeship laws were especially harsh, and lent themselves readily to the establishment of a system of peonage. The penal codes provided harsher and more arbitrary punishments for blacks than for whites, and some states permitted individual masters to administer corporal punishment to 'refractory servants.' Negroes were not allowed to bear arms or to appear in all public places, and there were special laws governing the domestic relations of the blacks. In some states laws closing to the freedmen every occupation save domestic and agricultural service, betrayed a poor-white jealousy of the Negro artisan. Most codes, however, included special provisions to protect the Negro from undue exploitation and swindling. On the whole the black codes corresponded fairly closely to the essential fact that nearly four million ex-slaves needed special attention until they were ready to mingle in free society on more equal terms. But in such states as South Carolina and Mississippi there was clearly evident a desire to keep the freedmen in a permanent position of tutelage, if not of peonage."

[*Footnote 4 is on p. 8*]

The Fourteenth Amendment says "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The Fourteenth Amendment also makes every person who is born here a citizen; and there is no second or third or fourth class of citizenship. See, *e. g.*, *Schneider* v. *Rusk*, 377 U. S. —, —.

We deal here with incidents of national citizenship. As stated in the *Slaughter-House Cases*, 16 Wall. 36, 71-72, concerning the *federal rights* resting on the Thirteenth, Fourteenth, and Fifteenth Amendments:

> ". . . no one can fail to be impressed with the one pervading purpose found in them all, lying at the

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[4] Other "relics of slavery" have recently come before this Court. In *Hamilton* v. *Alabama*, 376 U. S. —, we reversed a judgment of contempt imposed on a Negro witness under these circumstances:

"Cross examination by Solicitor Rayburn:

"Q. What is your name, please?

"A. Miss Mary Hamilton.

"Q. Mary, I believe—you were arrested—who were you arrested by?

"A. My name is Miss Hamilton. Please address me correctly.

"Q. Who were you arrested by, Mary?

"A. I will not answer a question—

"By Attorney Amaker: The witness's name is Miss Hamilton.

"A. —your question until I am addressed correctly.

"The Court: Answer the question.

"The Witness: I will not answer them unless I am addressed correctly.

"The Court: You are in contempt of court—

"Attorney Conley: Your Honor—your Honor—

"The Court: You are in contempt of this court, and you are sentenced to five days in jail and a fifty dollar fine."

Additional relics of slavery are mirrored in recent decisions: *Brown* v. *Board of Education*, 347 U. S. 483 (segregated schools); *Johnson* v. *Virginia*, 373 U. S. 61 (segregated courtroom); *Peterson* v. *Greenville*, 373 U. S. 244 and *Lombard* v. *Louisiana*, 373 U. S. 267 (segregated restaurants); *Wright* v. *Georgia*, 373 U. S. 284 and *Watson* v. *Memphis*, 373 U. S. 526 (segregated public parks).

> foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the 15th Amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

When we deal with Amendments touching the liberation of people from slavery, we deal with rights "which owe their existence to the Federal Government, its national character, its Constitution, or its laws." *Id.*, at 79. We are not in the field of exclusive municipal regulation where federal intrusion might "fetter and degrade the State governments by subjecting them to control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character." *Id.*, at 78.

There has been a judicial reluctance to expand the content of national citizenship beyond racial discrimination, voting rights, the right to travel, safe custody in the hands of a federal marshal, diplomatic protection abroad, and the like. See *Slaughter-House Cases, supra; Logan* v. *United States*, 144 U. S. 263; *United States* v. *Classic*, 313 U. S. 299; *Edwards* v. *California*, 314 U. S. 160; *Kent* v. *Dulles*, 357 U. S. 116. The reluctance has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation. See *Madden* v. *Kentucky*, 309 U. S. 83, overruling *Colgate* v. *Harvey*, 296 U. S. 404. But those fears have no relevance here, where we deal with Amendments whose dominant purpose was to guarantee the freedom of

the slave race and establish a regime where national citizenship has only one class.

The manner in which the right to be served in places of public accommodations is an incident of national citizenship and of the right to travel is summarized in H. R. Rep. No. 914, Pt. 2, 88th Cong., 1st Sess., pp. 7–8:

> "An official of the National Association for the Advancement of Colored People, testified before the Senate Commerce Subcommittee as follows:
>
> " 'For millions of Americans this is vacation time. Swarms of families load their automobiles and trek across country. I invite the members of this committee to imagine themselves darker in color and to plan an auto trip from Norfolk, Va., to the gulf coast of Mississippi, say, to Biloxi. Or one from Terre Haute, Ind., to Charleston, S. C., or from Jacksonville, Fla., to Tyler, Tex.
>
> " 'How far do you drive each day? Where and under what conditions can you and your family eat? Where can they use a rest room? Can you stop driving after a reasonable day behind the wheel or must you drive until you reach a city where relatives or friends will accommodate you and yours for the night? Will your children be denied a soft drink or an ice cream cone because they are not white?'
>
> "In response to Senator Pastore's questions as to what the Negro must do, there was the reply:
>
> " 'Where you travel through what we might call hostile territory you take your chances. You drive and you drive and you drive. You don't stop where there is a vacancy sign out at a motel at 4 o'clock in the afternoon and rest yourself; you keep on driving until the next city or the next town where you know

somebody or they know somebody who knows somebody who can take care of you.

" 'This is the way you plan it.

" 'Some of them don't go.'

"Daily we permit citizens of our Nation to be humiliated and subjected to hardship and abuse solely because of their color."

As stated in the first part of the same Report, p. 18:

"Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 per cent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."

When one citizen because of his race, creed, or color is denied the privilege of being treated as any other citizen in places of public accommodation, we have classes of citizenship, one being more degrading than the other. That is at war with the one class of citizenship created by the Thirteenth, Fourteenth, and Fifteenth Amendments.

As stated in *Ex parte Virginia,* 100 U. S. 339, 344–345, where a federal indictment against a state juge for discriminating against Negroes in the selection of jurors was upheld:

"One great purpose of these amendments was to raise the colored race from that conditon of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress."

IV.

The problem in this case, and in the other sit-in cases before us, is presented as though it involved the situation of "a private operator conducting his own business on his own premises and exercising his own judgment" [5] as to whom he will admit to the premises.

The property involved is not, however, a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public. As my Brother GOLDBERG says, it is a "civil" right, not a "social" right, with which we deal. Here it is restaurant refusing service to a Negro. But so far as principle and law are concerned it might just as well be a hospital refusing admission to a sick or injured Negro (cf. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959), or a drug store refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home.

The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy.

Joseph H. Choate, who argued the Income Tax cases (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 534), said:

> "I have thought that one of the fundamental objects of all civilized government was the preservation

[5] Wright, The Sit-in Movement: Progress Report and Prognosis, 9 Wayne L. Rev. 445, 450 (1963).

> of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. That is what Mr. Webster said in 1820, at Plymouth, and I supposed that all educated, civilized men believed in that."

Charles A. Beard had the theory that the Constitution was "an economic document drawn with superb skill by men whose property interests were immediately at stake." An Economic Interpretation of the Constitution of the United States (1939), p. 188. That school of thought would receive new impetus from an affirmance of these judgments. Seldom have modern cases (cf. the ill-starred *Dred Scott* decision, 19 How. 393) so exalted property in suppression of individual rights. We would reverse the modern trend were we to hold that property voluntarily serving the public can receive state protection when the owner refuses to serve some solely because they are colored.

There is no specific provision in the Constitution which protects rights of privacy and enables restaurant owners to refuse service to Negroes. The word "property" is, indeed, not often used in the Constitution, though as a matter of experience and practice we are committed to free enterprise. The Fifth Amendment makes it possible to take "private property" for public use only on payment of "just compensation." The ban on quartering soldiers in any home in time of peace, laid down by the Third Amendment, is one aspect of the right of privacy. The Fourth Amendment in its restrictions on searches and seizures also sets an aura of privacy around private interests. And the Due Process Clauses of the Fifth and Fourteenth Amendments lay down the command that no person shall be deprived "of life, liberty,

or *property* without due process of law." (Italics added.) From these provisions those who would affirm find emanations that lead them to the conclusion *that the* private owner of a restaurant serving the public can pick and choose whom he will serve and restrict his dining room to *whites* only.

Apartheid, however, is barred by the common law as respects innkeepers and common carriers. There were, to be sure, criminal statutes that regulated the common callings. But the civil remedies were made by judges who had no written constitution. We, on the other hand, live under a constitution that proclaims equal protection under the law. Why then, even in the absence of a statute, should *apartheid* be given constitutional sanction in the restaurant field. That was the question I asked in *Lombard* v. *Louisiana*, 373 U. S. 267. I repeat it here. Constitutionally speaking, why should Hooper Food Co., Inc., or People's Drug Stores—or any other establishment that dispenses medicines or food—stand on a higher, *more* sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers?

The debates on the Fourteenth Amendment show, as my Brother GOLDBERG points out, that one of its purposes was to grant the Negro "the rights and guarantees of the good old common law." *Post*, at 10. The duty of common carriers to carry all, regardless of race, creed, or color, was in part the product of the inventive genius of judges. See *Lombard* v. *Louisiana*, 373 U. S., at 275–277. We should make that body of law the common law of the Thirteenth and Fourteenth Amendments so to speak. Restaurants in the modern setting are as essential to travelers as inns and carriers.

Are they not as much affected with a public interest? Is the right of a person to eat less basic than his right to

travel, which we protected in *Edwards* v. *California*, 314 U. S. 160? Does not a right to travel in modern times shrink in value materially when there is no accompanying right to eat in public places?

The right of any person to travel *interstate* irrespective of race, creed, or color is protected by the Constitution. *Edwards* v. *California*, *supra*. Certainly his right to travel *intrastate* is as basic. Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensable to travel either interstate or intrastate.

V.

The requirement of Equal Protection, like the guarantee of Privileges and Immunities of citizenship, is a constitutional command directed to each State.

State judicial action is as clearly "state" action as state administrative action. Indeed, we held in *Shelley* v. *Kraemer*, 334 U. S. 1, 20, that "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

That case involved suits in state courts to enforce restrictive covenants in deeds of residential property whereby the owner agreed that it should not be used or occupied by any person except a Caucasian. There was no state statute regulating the matter. That is, the State had not authorized by legislative enactment the use of restrictive covenants in residential property transactions; nor was there any administrative regulation of the matter. Only the courts of the State were involved. We held without dissent in an opinion written by Chief Jus-

tice Vinson that there was nonetheless state action within the meaning of the Fourteenth Amendment:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." *Id.*, at 18.

At the time of the *Shelley* case there was to be sure a Congressional Civil Rights Act that guaranteed all citizens the same right to purchase and sell property "as is enjoyed by white citizens." *Id.*, at 11. But the existence of that statutory right, like the existence of a right under the Constitution, is no criterion for determining what is or what is not "state" action within the meaning of the Fourteenth Amendment. The conception of "state" action has been considered in light of the degree to which a state has participated in depriving a person of a right. "Judicial" action alone has been considered ample in hundreds of cases. Thus, "state action" took place *only by judicial action* in cases involving the use of coerced confessions (*e. g., Chambers* v. *Florida*, 309 U. S. 227), the denial to indigents of equal protection in judicial proceedings (*e. g., Griffin* v. *Illinois*, 351 U. S. 12), and the action of state courts in punishing for contempt by publication. *Bridges* v. *California*, 314 U. S. 252.

Maryland's action against these Negroes was as authoritative as any case where the State in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts.

The owners of the residential property in *Shelley* v. *Kraemer* were concerned, as was the corporate owner of this Maryland restaurant, over a possible decrease in the value of the property if Negroes were allowed to enter. It was testified in *Shelley* v. *Kraemer* that white purchasers got better bank loans than Negro purchasers:

> "A. Well, I bought 1238 north Obert, a 4-family flat, about a year ago through a straw party, and I was enabled to secure a much larger first deed of trust than I would have been able to do at the present home on Garfield.
>
> "The Court: I understand what you mean: it's easier to finance?
>
> "A. Yes, easier to finance through white. That's common knowledge.
>
> "Q. You mean if property is owned by a white person it's easier to finance it?
>
> "A. White can secure larger loans, better loans. I have a 5% loan."

In *McGhee* v. *Sipes*, a companion case to *Shelley* v. *Kraemer*, a realtor testified:

> "I have seen the result of influx of colored people moving into a white neighborhood. There is a depression of values to start with, general run down of the neighborhood within a short time afterwards. I have, however, seen one exception. The colored people on Scotten, south of Tireman have kept up their

property pretty good and enjoyed them. As a result of this particular family moving in the people in the section are rather panic-stricken and they are willing to sell—the only thing that is keeping them from throwing their stuff on the market and giving it away is the fact that they think they can get one or two colored people in there out of there. My own sales have been affected by this family. . . .

"I am familiar with the property at 4626 Seebaldt, and the value of it with a colored family in it is fifty-two hundred, and if there was no colored family in it I would say sixty-eight hundred. I would say seven thousand is a fair price for that property."

While the purpose of the restrictive covenant is in part to protect the commercial values in a "closed" community (see *Hundley* v. *Gorewitz*, 132 F. 2d 23, 24), it at times involves more. The sale to a Negro may bring a higher price than a sale to a white. See *Swain* v. *Maxwell*, 355 Mo. 448, 196 S. W. 2d 780, 785. Yet the resistance to having a Negro as a neighbor is often strong. All-white or all-Caucasian residential communities are often preferred by the owners.

An occupant of a "white" area testified in *Hodge* v. *Hurd*, another companion case to *Shelley* v. *Kraemer*:

". . . we feel bitter towards you for coming in and breaking up our block. We were very peaceful and harmonious there and we feel that you bought that property just to transact it over to colored people and we don't like it, and naturally we feel bitter towards you. . . ."

This witness added:

"A. The complexion of the person doesn't mean anything.

"Q. The complexion does not?

"A. It is a fact that he is a negro.

"Q. I see, so no matter how brown a negro may be, no matter how white they are, you object to them?

"A. I would say yes, Mr. Houston. . . . I want to live with my own color people."

The preferences involved in *Shelley* v. *Kraemer* and its companion cases were far more personal than the motivations of the corporate managers in the present case when they declined service to Negroes. Why should we refuse to let state courts enforce *apartheid* in residential areas of our cities but let state courts enforce *apartheid* in restaurants? If a court decree is state action in one case, it is in the other. Property rights, so heavily underscored, are equally involved in each case.

The customer in a restaurant is transitory; he comes and may never return. The colored family who buys the house next door is there for keeps—night and day. If "personal prejudices" are not to be the criterion in one case they should not be in the other. We should put these restaurant cases in line with *Shelley* v. *Kraemer*, holding that what the Fourteenth Amendment requires in restrictive covenant cases it also requires from restaurants.

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the Equal Protection guaranteed by the Fourteenth Amendment against abridgment by the states. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the "state" violates the Fourteenth Amendment.

I would reverse these judgments of conviction outright, as these Negroes in asking for service in Hooper's restaurant were only demanding what was their constitutional right.

APPENDIX I.

In the sit-in cases involving eating places last Term and this Term, practically all restaurant or lunch counter owners whose constitutional rights were vindicated below are corporations. Only two out of the 20 before us are noncorporate, as Appendix III shows. Some of these corporations are small, privately owned affairs. Others are large, national or regional businesses with many stockholders:

S. H. Kress & Co., operating 272 stores in 30 states, its stock being listed on the New York Stock Exchange; McCrory Corporation, with 1,307 stores, its stock being listed on the New York Stock Exchange; J. J. Newberry Co., with 567 stores of which 371 serve food, its stock being listed on the New York Stock Exchange; F. W. Woolworth Co., with 2,130 stores, its stock also being listed on the New York Stock Exchange; Eckerd Drugs, having 17 stores with its stock traded over-the-counter. F. W. Woolworth has over 90,000 stockholders; J. J. Newberry about 8,000; McCrory over 24,000; S. H. Kress over 8,000; Eckerd Drug about 1,000.

At the national level most "eating places," as Appendix IV shows, are individual proprietorships or partnerships. But a substantial number are corporate in form; and even though in numbers they are perhaps an eighth of the others, in business done they make up a much larger percentage of the total.

Those living in the Washington, D. C., metropolitan area know that it is true in that area—the hotels are incorporated; Howard Johnson Co., listed on the New York Stock Exchange, has 650 restaurants and over 15,000 stockholders; Hot Shoppes, Inc. has 4,900 stockholders; Thompson Co. (involved in *District of Columbia* v. *Thompson Co.*, 346 U. S. 100) has 50 restaurants in this country with over 1,000 stockholders and its stock is listed on the New York Stock Exchange; Peoples Drug Stores, with a New York Stock Exchange listing, has nearly 5,000 stockholders. See Moody's Industrial Manual (1963 ed.).

All the sit-in cases involve a contest in a criminal trial between Negroes who sought service and state prosecutors and state judges who enforced trespass laws against them. The corporate beneficiaries of these convictions, those whose constitutional rights were vindicated by these convictions, are not parties to these suits. The beneficiary in the present case was Hooper Food Co., Inc., a Maryland corporation; and as seen in Appendix IV, "eating places" in Maryland owned by corporations, though not a fourth in number of those owned by individuals or partnerships, do nearly as much business as the other two combined.

So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmance? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights personal to him are involved? Why should his interests—his associational rights—make it possible to send these Negroes to jail?

Who, in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the board of directors?

The Court in *Santa Clara Co.* v. *Southern Pacific R. Co.*, 118 U. S. 394, interrupted counsel on oral argument to say, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny

to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does." 118 U. S., at 396. Later the Court held that corporations are "persons" within the meaning of the Due Process Clause of the Fourteenth Amendment. *Minneapolis R. Co. v. Beckwith*, 129 U. S. 26, 28. While that view is the law today, it prevailed only over dissenting opinions. See the dissent of MR. JUSTICE BLACK in *Connecticut General Co.* v. *Johnson*, 303 U. S. 77, 85; and my dissent in *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 576. MR. JUSTICE BLACK said of that doctrine and its influence:

> ". . . of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one per cent invoked it in protection of the negro race, and more than fifty per cent asked that its benefits be extended to corporations." *Connecticut General Co. v. Johnson, 303 U. S., at 90.*

A corporation, like any other "client," is entitled to the attorney-client privilege. See *Radiant Burners, Inc.*, v. *American Gas Assn.*, 320 F. 2d 314. A corporation is protected as a publisher by the Freedom of the Press Clause of the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *New York Times Co.* v. *Sullivan*, 376 U. S. 254. A corporation, over the dissent of the first Mr. Justice Harlan, was held entitled to protection against unreasonable searches and seizures by reason of the Fourth Amendment. *Hale* v. *Henkel*, 201 U. S. 43, 76–77. On the other hand the privilege of self-incrimination guaranteed by the Fifth Amendment cannot be utilized by a corporation. *United States* v. *White*, 322 U. S. 694. "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *Id.*, at 698.

We deal here, we are told, with personal rights—the rights pertaining to property. One need not share his home with one he dislikes. One need not allow another to put his foot upon his private domain for any reason he desires—whether bigoted or enlightened. In the simple agricultural economy that Jefferson extoled, the conflicts posed were highly personal. But how is a "personal" right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races? How can that so-called right be elevated to a constitutional level? How is that corporate right more "personal" than the right against self-incrimination?

The revolutionary change effected by an affirmance in these sit-in cases would be much more damaging to an open and free society than what the Court did when it gave the corporation the sword and the shield of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Affirmance finds in the Constitution a corporate right to refuse service to anyone "it" chooses and to get the State to put people in jail who defy "its" will.

More precisely, affirmance would give corporate management vast dimensions for social planning.[1]

[1] The conventional claims of corporate management are stated in Ginzberg and Berg, Democratic Values and The Rights of Management (1963), pp. 153–154:

"The founding fathers, despite some differences of opinion among them, were of one mind when it came to fundamentals—the best guarantee of freedom was the retention by the individual of the broadest possible scope for decision-making. And early in the nation's history, when the Supreme Court decided that the corporation possessed many of the same rights as individuals, continuity was maintained in basic structure, the corporate owner as well as the individual had wide scope for decision-making. In recent decades, another extension of this trend became manifest. The agents of owners—the managers—were able to subsume for themselves the authorities inherent in ownership. The historical record, then, is clear. The right to do what one likes with his property lies at the very foundation of our historical experience. This is a basis for

Affirmance would make corporate management the arbiter of one of the deepest conflicts in our society: corporate management could then enlist the aid of state police, state prosecutors, and state courts to force *apartheid* on the community they served, if *apartheid* best suited the corporate need; or, if its profits would be better served by lowering the barriers of segregation, it could do so.

Veblen, while not writing directly about corporate management and the racial issue, saw the danger of leaving fundamental, governmental decisions to the managers or absentee owners of our corporate enterprises:

> "Absentee ownership and absentee management on this grand scale is immune from neighborly personalities and from sentimental considerations and scruples.
>
> "It takes effect through the colorless and impersonal channels of corporation management, at the hands of businesslike officials whose discretion and responsibility extend no farther than the procuring of a reasonably large—that is to say the largest obtainable—net gain in terms of price. The absentee owners are removed out of all touch with the working personnel or with the industrial work in hand, except such remote, neutral and dispassionate contact by proxy as may be implied in the continued receipt of a free income; and very much the same is true for the business agents of the absentee owners, the investment-bankers and the staff of responsible corporation officials. Their relation to what is going on, and to the manpower by use of which it is going on, is a fiscal relation. As industry, as a process of workmanship and a production of the means of life, the work in hand has no meaning for the absentee

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management's growing concern with the restrictions and limitations which have increasingly come to characterize an arena where the widest scope for individual initiative previously prevailed."

owners sitting in the fiscal background of these vested interests. Personalities and tangible consequences are eliminated and the business of governing the rate and volume of the output goes forward in terms of funds, prices, and percentages." Absentee Ownership (1923), pp. 215–216.

The point is that corporate motives in the retail field relate to corporate profits, corporate prestige, and corporate public relations.[2] Corporate motives have no tinge of

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[2] "Fred Harvey, president of Harvey's Department Store in Nashville, says that when his store desegregated its lunch counters in 1960 only 13 charge accounts were closed out of 60,000. 'The greatest surprise I ever had was the apparent "so-what" attitude of white customers,' says Mr. Harvey.

"Even where business losses occur, they usually are only temporary. At the 120-room Peachtree Manor Hotel in Atlanta, owner Irving H. Goldstein says his business dropped off 15% when the hotel desegregated a year ago. 'But now we are only slightly behind a year ago and we can see we are beginning to recapture the business we initially lost,' declares Mr. Goldstein.

"William F. Davoren, owner of the Brownie Drug Co. in Huntsville, Ala., reports that though his business fell a bit for several weeks after lunch counters were desegregated, he's now picked up all that he lost. Says he: 'I could name a dozen people who regarded it as a personal affront when I started serving Negroes, but have come back as if nothing had happened.'

"Even a segregation-minded businessman in Huntsville agrees that white customers frequently have short memories when it comes to the race question. W. T. Hutchens, general manager of three Walgreen stores there, says he held out when most lunch counter operators gave in to sit-in pressures last July. In one shopping center where his competition desegregated, Mr. Hutchens says his business shot up sharply and the store's lunch counter volume registered a 12% gain for the year. However, this year's business has dropped back to pre-integration levels 'because a lot of people have forgotten' the defiant role his stores played during the sit-ins, he adds.

"Some Southern businessmen who have desegregated say they have picked up extra business as a result of the move.

"At Raleigh, N. C., where Gino's Restaurant was desegregated this year, owner Jack Griffiths reports only eight whites have walked out

an individual's choice to associate only with one class of customers, to keep members of one race from his "property," to erect a wall of privacy around a business in the manner that one is erected around the home.

At times a corporation has standing to assert the constitutional rights of its members, as otherwise the rights peculiar to the members as individuals might be lost or impaired. Thus in *NAACP* v. *Alabama*, 357 U. S. 449, the question was whether the N. A. A. C. P., a membership corporation, could assert on behalf of its members a right personal to them to be protected from compelled disclosure by the State of their affiliation with it. In that context we said the N. A. A. C. P. was "the appropriate party to assert these rights, because it and its members are

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after learning the establishment served Negroes, and he says, 'we're getting plenty of customers to replace the hard-headed ones.'

"In Dallas, integration of hotels and restaurants has 'opened up an entirely new area of convention prospects,' according to Ray Bennison, convention manager of the Chamber of Commerce. 'This year we've probably added $8 million to $10 million of future bookings because we're integrated,' Mr. Bennison says." Wall Street Journal, July 15, 1963, pp. 1, 12.

As recently stated by John Perry:

"The manager has become accustomed to seeing well-dressed Negroes in good restaurants, on planes and trains, in church, in hotel lobbies, at United Fund meetings, on television, at his university club. Only a few years ago, if he met a Negro at some civic or political meeting, he understood that the man was there because he was a Negro; he was a kind of exhibit. Today it is much more likely that the Negro is there because of his position or profession. It makes a difference that everyone feels.

"The manager is aware that companies other than his are changing. He sees it happening. He reads about it. It is talked about, usually off the record and informally, at business gatherings. So, in due course, questions are shaped in his mind: 'How can we keep in step? How can we change, without making a big deal of it? Can we do it without a lot of uproar?'" Business—Next Target for Integration, March-April, 1963, Harvard Business Rev., pp. 104, 111.

in every practical sense identical." *Id.*, at 459. We felt, moreover, that to deny the N. A. A. C. P. standing to raise the question and to require it to be claimed by the members themselves "would result in nullification of the right at the very moment of its assertion." *Ibid.* Those were the important reasons governing our decision, the adverse effect of disclosure on the N. A. A. C. P. itself being only a make-weight. *Id.*, at 459–460.

The corporate owners of a restaurant, like the corporate owners of streetcars, buses, telephones, and electric light and gas facilities, are interested in balance sheets and in profit and loss statements. "It" does not stand at the door turning Negroes aside because of "its" feelings of antipathy to black-skinned people. "It" does not have any associational rights comparable to the classic individual store owner at a country crossroads whose store, in the dichotomy of an Adam Smith, was indeed no different from his home. "It" has been greatly transformed, as Berle and Means, The Modern Corporation and Private Property (1932), made clear a generation ago; and "it" has also transformed our economy. Separation of power or control from beneficial ownership was part of the phenomenon of change:

> "This dissolution of the atom of property destroys the very foundation on which the economic order of the past three centuries has rested. Private enterprise, which has molded economic life since the close of the middle ages, has been rooted in the institution of private property. Under the feudal system, its predecessor, economic organization grew out of mutual obligations and privileges derived by various individuals from their relation to property which no one of them owned. Private enterprise, on the other hand, has assured an owner of the instruments of production with complete property rights over those instruments. Whereas the organization of feudal

economic life rested upon an *elaborate* system of binding customs, the organization under the system of private enterprise has rested upon the self-interest of the property owner—a self-interest held in check only by competition and the conditions of supply and demand. Such self-interest has long been regarded as the best guarantee of economic efficiency. It has been assumed that, if the individual is protected in the right both to use his own property as he sees fit and to receive the full fruits of its use, his desire for personal gain, for profits, *can be relied* upon as an effective incentive to his efficient use of any industrial property he may possess.

"In the quasi-public corporation, such an assumption no longer holds. . . . it is no longer the individual himself who uses his wealth. Those in control of that wealth, and therefore in a position to secure industrial efficiency and produce profits, are no longer, as owners, entitled to the bulk of such profits. Those who control the destinies of the typical modern corporation own so insignificant a fraction of the company's stock that the returns from running the corporation profitably accrue to them in only a very minor degree. The stockholders, on the other hand, to whom the profits of the corporation go, cannot be motivated by those profits to a more efficient use of the property, since they have surrendered all disposition of it to those in control of the enterprise. The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use. It consequently challenges the fundament economic principle of individual initiative in industrial enterprise." *Id.*, at 8–9.

By like token the separation of the atom of "property" into one unit of "management" and into another of "absentee ownership" has in other ways basically changed the relationship of that "property" to the public.

A corporation may exclude Negroes if "it" thinks "it" can make more money doing so. "It" may go along with community prejudices when the profit and loss statement will benefit; "it" is unlikely to go against the current of community prejudice when profits are endangered.[3]

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[3] The New York Times stated the idea editorially in an analogous situation on October 31, 1963. P. 32:

"When it comes to speaking out on business matters, Roger Blough, chairman of the United States Steel Corporation, does not mince words.

"Mr. Blough is a firm believer in freedom of action for corporate management, a position he made clear in his battle with the Administration last year. But he also has put some severe limits on the exercise of corporate responsibility, for he rejects the suggestion that U. S. Steel, the biggest employer in Birmingham, Ala., should use its economic influence to erase racial tensions. Mr. Blough feels that U. S. Steel has fulfilled its responsibilities by following a non-discriminatory hiring policy in Birmingham, and looks upon any other measures as both 'repugnant' and 'quite beyond what a corporation should do' to improve conditions.

"This hands-off strategy surely underestimates the potential influence of a corporation as big as U. S. Steel, particularly at the local level. It could, without affecting its profit margins adversely or getting itself directly involved in politics, actively work with those groups in Birmingham trying to better race relations. Steel is not sold on the retail level, so U. S. Steel has not been faced with the economic pressure used against the branches of national chain stores.

"Many corporations have belatedly recognized that it is in their own self-interest to promote an improvement in Negro opportunities. As one of the nation's biggest corporations, U. S. Steel and its shareholders have as great a stake in eliminating the economic imbalances associated with racial discrimination as any company. Corporate

Veblen stated somewhat the same idea in Absentee Ownership (1923), p. 107:

> ". . . the arts of business are arts of bargaining, effrontery, salesmanship, make-believe, and are directed to the gain of the business man at the cost of the community, at large and in detail. Neither tangible performance nor the common good is a business proposition. Any material use which his traffic may serve is quite beside the business man's purpose, except indirectly, in so far as it may serve to influence his clientele to his advantage."

By this standard the bus company could refuse service to Negroes if "it" felt "its" profits would increase once *apartheid* were allowed in the transportation field.

In the instant case, G. Carroll Hooper, president of the corporate chain owning the restaurant here involved, testified concerning the episode that gave rise to these convictions. His reasons were wholly commercial ones, as we have already seen.

There are occasions when the corporation is little more than a veil for man and wife or brother and brother; and disregarding the corporate entity often is the instrument for achieving a just result. But the relegation of a Negro customer to second-class citizenship is not just. Nor is fastening *apartheid* on America a worthy occasion for tearing aside the corporate veil.

APPENDIX II.

A. In *Green* v. *Virginia*, 1963 Term, No. 761, the purpose or reason for not serving Negroes was ruled to be immaterial to the issues in the case.

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responsibility is not easy to define or to measure, but in refusing to take a stand in Birmingham, Mr. Blough appears to have a rather narrow, limited concept of his influence."

B. In the following cases, the testimony of corporate officers shows that the reason was either a commercial one or, which amounts to the same thing, that service to Negroes was not in accord with local custom:

1. *Bouie* v. *City of Columbia*, 1963 Term, No. 10.

Dr. Guy Malone, the manager of the Columbia branch of Eckerd Drugs of Florida, Inc., testified:

"Q. Mr. Malone, is the public generally invited to do business with Eckerd's?

"A. Yes, I would say so.

"Q. Does that mean all of the public of all races?

"A. Yes.

"Q. Are Negroes welcome to do business with Eckerd's?

"A. Yes.

"Q. Are Negroes welcome to do business at the lunch counter at Eckerd's?

"A. Well, we have never served Negroes at the lunch counter department.

"Q. According to the present policy of Eckerd's, the lunch counter is closed to members of the Negro public?

"A. I would say yes.

"Q. And all other departments of Eckerd's are open to members of the Negro public, as well as to other members of the public generally?

"A. Yes.

"Q. Mr. Malone, on the occasion of the arrest of these young men, what were they doing in your store, if you know?

"A. Well, it was four of them came in. Two of them went back and sat down at the first booth and started reading books, and they sat there for about fifteen minutes. Of course, we had had a group about a week prior to that, of about fifty, who came into the store.

"Mr. Perry: Your Honor, I ask, of course, that the prior incident be stricken from the record. That is not responsive to the question which has been asked, and is not pertinent to the matter of the guilt or innocence of these young men.

"The Court: All right, strike it.

"Mr. Sholenberger: Your Honor, this is their own witness.

"Mr. Perry: We announced at the outset that Mr. Malone would, in a sense, be a hostile witness.

. . . . .

"Q. And so, when a person comes into Eckerd's and seats himself at a place where food is ordinarily served, what is the practice of your employees in that regard?

"A. Well, it's to take their order.

"Q. Did anyone seek to take the orders of these young men?

"A. No, they did not.

"Q. Why did they not do so?

"A. Because we didn't want to serve them.

"Q. Why did you not want to serve them?

"A. I don't think I have to answer that.

"Q. Did you refuse to serve them because they were Negroes?

"A. No.

"Q. You did say, however, that Eckerd's has the policy of not serving Negroes in the lunch counter section?

"A. I would say that all stores do the same thing.

"Q. We're speaking specifically of Eckerd's?

"A. Yes.

"Q. Did you or any of your employees, Mr. Malone, approach these defendants and take their order for food?

"A. No."

2. *Robinson* v. *Florida,* 1963 Term, No. 60.

A Vice President of Shell City, Inc., testified:

"Q. Why did you refuse to serve these defendants?

"A. Because I feel, definitely, it is very detrimental to our business to do so.

"Q. What do you mean 'detrimental'?

"A. Detrimental because it would mean a loss of business to us to serve mixed groups."

Another Vice President of Shell's City, Inc., testified:

"Q. You have several departments in your store, do you not?

"A. Yes. Nineteen, I believe. Maybe twenty.

"Q. Negroes are invited to participate and make purchases in eighteen of these departments?

"A. Yes, sir.

"Q. Can you distinguish between your feeling that it is not detrimental to have them served in eighteen departments and it is detrimental to have them served in the nineteenth department, namely, the lunch counter?

"A. Well, it goes back to what is the custom, that is, the tradition of what is basically observed in Dade County would be the bottom of it. We have—

. . . . .

"Q. Would you tell me what this custom is, that you are making reference to, that would prevent you from serving Negroes at your lunch counter?

"A. I believe I already answered that, that it is the customs and traditions and practice in this county—not only in this county but in this part of the state and elsewhere, not to serve whites and colored people seated in the same restaurant. That's my answer.

"Q. Was that the sole reason, the sole basis, for your feeling that this was detrimental to your business?

"A. Well, that is the foundation of it, yes, but we feel that at this time if we went into a thing of trying to break that barrier, we might have racial trouble, which we don't want. We have lots of good friends among colored people and will have when this case is over.

"Q. Are you familiar with the fact that the Woolworth Stores in this community have eliminated this practice?

"Mr. Goshgarian: To which the State objects. It is irrelevant and immaterial.

"The Court: The Objection is sustained."

3. *Fox* v. *North Carolina*, 1963 Term, No. 5.

Mr. Claude M. Breeden, the manager of the McCrory branch in Raleigh, testified:

"I just don't serve colored. I don't have the facilities for serving colored. Explaining why I don't serve colored. I don't have the facilities for serving colored. I have the standard short order lunch, but I don't serve colored. I don't serve colored because I don't have the facilities for serving colored.

"COUNSEL FOR DEFENDANT: What facilities would be necessary for serving colored?

"SOLICITOR FOR STATE: Objection.

"The COURT: Sustained.

"WITNESS CONTINUES: It is not the policy of my store to discriminate and not serve Negroes. We have no policy against discrimination. I do not discriminate and it is not the custom in the Raleigh Store to discriminate. I do not have the facilities for serving colored and that is why I don't serve colored."

4. *Mitchell* v. *City of Charleston*, 1963 Term, No. 8.

Mr. Albert C. Watts, the manager of the S. H. Kress & Co. outlet in Charleston, testified:

"Q. . . . What type of business is Kress's?

"A. Five and Ten Cent variety store.

"Q. Could you tell us briefly something about what commodities it sells—does it sell just about every type of commodity that one might find in this type establishment?

"A. Strictly variety store merchandise—no appliances or anything like that.

"Q. I see. Kress, I believe it invites members of the public generally into its premises to do business, does it not?

"A. Yes.

"Q. It invites Negroes in to do business, also?

"A. Right.

"Q. Are Negroes served in all of the departments of Kress's except your lunch counter?

"A. We observe local custom.

"Q. In Charleston, South Carolina, the store that you manage, sir, does Kress's serve Negroes at the lunch counter?

"A. No. It is not a local custom.

"Q. To your knowledge, does the other like businesses serve Negroes at their lunch counters? What might happen at Woolworth's or some of the others?

"A. They observe local custom—I say they wouldn't.

"Q. Then you know of your own knowledge that they do not serve Negroes? Are you speaking of other business such as your business?

"A. I can only speak in our field, yes.

"Q. In your field, so that the other stores in your field do not serve Negroes at their lunch counters?

"A. Yes, sir."

5. *Hamm* v. *City of Rock Hill*, 1963 Term, No. 105.

Mr. H. C. Whiteaker, the manager of McCrory's in Rock Hill, testified:

"Q. All right. Now, how many departments do you have in your store?

"A. Around twenty.

"Q. Around twenty departments?

"A. Yes, sir.

"Q. All right, sir, is one of these departments considered a lunch counter or establishment where food is served?

"A. Yes, sir. That is a separate department.

. . . . . .

"Q. Now, I believe, is it true that you invite members of the public to come into your store?

"A. Yes, it is for the public.

"Q. And is it true, too, that the public to you means everybody, various races, religions, nationalities?

"A. Yes, sir.

"Q. The policy of your store as manager is not to exclude anybody from coming in and buying these three thousand items on account of race, nationality or religion, is that right?

"A. The only place where there has been exception, where there is an exception, is at our lunch counter.

"Q. Oh, I see. Is that a written policy you get from headquarters in New York?

"A. No, sir.

"Q. It is not. You don't have any memorandum in your store that says that is a policy?

"A. No, sir.

. . . . . .

"Q. Is it true, then, that if, that, well, even if a man was quiet enough, and a Communist, that he could sit at your lunch counter and eat, according to the policy of your store right now? Whether you knew he was a Communist or not, so his political beliefs would not have anything to do with it, is that right?

"A. No.

"Q. Now, sir, you said that there was a policy there as to Negroes sitting. Am I to understand that you do serve Negroes or Americans who are Negroes, standing up?

"A. To take out, at the end of the counter, we serve take-outs, yes, sir.

"Q. In other words, you have a lunch counter at the end of your store?

"A. No, I said at the end, they can wait and get a package or a meal or order a coke or hamburger and take it out.

"Q. Oh, to take out. They don't normally eat it on the premises?

"A. They might, but usually it is to take out.

. . . . .

"Q. Of course, you probably have some Negro employees in your store, in some capacity, don't you?

"A. Yes, sir.

"Q. They eat on the premises, is that right?

"A. Yes, sir.

"Q. But not at the lunch counter?

"A. No, sir.

. . . . .

"Q. Oh, I see, but generally speaking, you consider the American Negro as part of the general public, is that right, just generally speaking?

"A. Yes, sir.

"Q. You don't have any objections for him spending any amount of money he wants to on these 3,000 items, do you?

"A. That's up to him to spend if he wants to spend.

"Q. This is a custom, as I understand it, this is a custom instead of a law that causes you not to want him to ask for service at the lunch counter?

"A. There is no law to my knowledge, it is merely a custom in this community."

C. The testimony in the following cases is less definitive with respect to why Negroes were refused service.

In *Griffin* v. *Maryland*, 1963 Term, No. 6, the president of the corporations which own and operate Glen Echo Amusement Park said he would admit Chinese, Filipinos, Indians and, generally, anyone but Negroes. He did not elaborate, beyond stating that a private property owner has the right to make such a choice.

In *Barr* v. *City of Columbia*, 1963 Term, No. 9, the co-owner and manager of the Taylor Street Pharmacy said Negroes could purchase in other departments of his store and that whether for business or personal reasons, he felt he had a right to refuse service to anyone.

In *Williams* v. *North Carolina*, 1963 Term, No. 4, the president of Jones Drug Company said Negroes were not permitted to take seats at the lunch counter. He did say, however, that Negroes could purchase food and eat it on the premises so long as they *stood* some distance from the lunch counter, such as near the back door.

In *Lupper* v. *Arkansas*, 1963 Term, No. 432, and *Harris* v. *Virginia*, 1963 Term, No. 57, Misc., the record discloses only that the establishment did not serve Negroes.

APPENDIX III.

Corporate [1] Business Establishments Involved In The "Sit-in" Cases Before This Court During The 1962 Term And The 1963 Term. Reference (other than the record in each case): Moody's Industrial Manual (1963 ed.).

1. Gus Blass & Co. Department Store.
   Case: *Lupper* v. *Arkansas*, 1963 Term, No. 432.

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[1] The only "sit-in" cases not involving a corporation are *Barr* v. *City of Columbia*, 1963 Term, No. 9, and *Daniels* v. *Virginia*, 374 U. S. 500. In *Barr*, the business establishment was the Taylor Street Pharmacy, which apparently is a partnership; in *Daniels*, it was the 403 Restaurant in Alexandria, Virginia, an individual proprietorship.

Location: Little Rock, Arkansas.
Ownership: Privately owned corporation.

2. Eckerd Drugs of Florida, Inc.
   Case: *Bouie* v. *City of Columbia*, 1963 Term, No. 10.
   Location: 17 retail drug stores throughout Southern States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 1,000.
   Stock traded: Over-the-counter market.
3. George's Drug Stores, Inc.
   Case: *Harris* v. *Virginia*, 1963 Term, No. 57, Misc.
   Location: Hopewell, Virginia.
   Ownership: Privately owned corporation.
4. Gwynn Oak Park, Inc.
   Case: *Drews* v. *Maryland*, 1963 Term, No. 3.
   Location: Baltimore, Maryland.
   Ownership: Privately owned corporation.
5. Hooper Food Company, Inc.
   Case: *Bell* v. *Maryland*, 1963 Term, No. 12.
   Location: Several restaurants in Baltimore, Maryland.
   Ownership: Privately owned corporation.
6. Howard Johnson Co.
   Case: *Henry* v. *Virginia*, 374 U. S. 98.
   Location: 650 restaurants in 25 States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 15,203.
   Stock traded: New York Stock Exchange.
7. Jones Drug Company, Inc.
   Case: *Williams* v. *North Carolina*, 1963 Term, No. 4.
   Location: Monroe, North Carolina.
   Ownership: Privately owned corporation.

8. Kebar, Inc. (lessee from Rakad, Inc.).
   Case: *Griffin* v. *Maryland*, 1963 Term, No. 6.
   Location: Glen Echo Amusement Park, Maryland.
   Ownership: Privately owned corporation.

9. S. H. Kress & Company.
   Case: *Mitchell* v. *City of Charleston*, 1963 Term, No. 8; *Avent* v. *North Carolina*, 373 U. S. 375; *Gober* v. *City of Birmingham*, 373 U. S. 374; *Peterson* v. *City of Greenville*, 373 U. S. 244.
   Location: 272 stores in 30 States.
   Ownership: Publicly owned corporation.
   Number of shareholders: 8,767.
   Stock traded: New York Stock Exchange.

10. Loveman's Department Store (food concession operated by Price Candy Company of Kansas City).
    Case: *Gober* v. *City of Birmingham*, *supra*.
    Location: Birmingham, Alabama.
    Ownership: Privately owned corporation.

11. McCrory Corporation.
    Case: *Fox* v. *North Carolina*, 1963 Term, No. 5; *Hamm* v. *City of Rock Hill*, 1963 Term, No. 105; *Lombard* v. *Louisiana*, 373 U. S. 267.
    Location: 1,307 stores throughout the United States.
    Ownership: Publicly owned corporation.
    Number of shareholders: 24,117.
    Stock traded: New York Stock Exchange.

12. National White Tower System, Incorporated.
    Case: *Green* v. *Virginia*, 1963 Term, No. 761.
    Location: Richmond, Virginia, and other cities (number unknown).
    Ownership: Apparently a privately owned corporation.

13. J. J. Newberry Co.
    Case: *Gober* v. *City of Birmingham, supra.*
    Location: 567 variety stores in 46 States; soda fountains, lunch bars, cafeteries and restaurants in 371 stores.
    Ownership: Publicly owned corporation.
    Number of shareholders: 7,909.
    Stock traded: New York Stock Exchange.

14. Patterson Drug Co.
    Case: *Thompson* v. *Virginia,* 374 U. S. 99; *Wood* v. *Virginia,* 374 U. S. 100.
    Location: Lynchburg, Virginia.
    Ownership: Privately owned corporation.

15. Pizitz's Department Store.
    Case: *Gober* v. *City of Birmingham, supra.*
    Location: Birmingham, Alabama.
    Ownership: Privately owned corporation.

16. Shell City, Inc.
    Case: *Robinson* v. *Florida,* 1963 Term, No. 60.
    Location: Miami, Florida.
    Ownership: Privately owned corporation.

17. Thalhimer Bros., Inc., Department Store.
    Case: *Randolph* v. *Virginia,* 374 U. S. 97.
    Location: Richmond, Virginia.
    Ownership: Privately owned corporation.

18. F. W. Woolworth Company.
    Case: *Gober* v. *City of Birmingham, supra.*
    Location: 2,130 stores (primarily variety stores) throughout the United States.
    Ownership: Publicly owned corporation.
    Number of shareholders: 90,435.
    Stock traded: New York Stock Exchange.

APPENDIX IV.

Legal form of organization—by kind of business.

Reference: United States Census of Business, 1958, Vol. I.

Retail trade—Summary Statistics (1961).

A. United States.

	Establishments (number)	*Sales ($1,000)*
Eating places:		
Total	229,815	$11,037,644
Individual proprietorships	166,003	5,202,308
Partnerships	37,756	2,062,830
Corporations	25,184	3,723,295
Cooperatives	231	13,359
Other legal forms	64	35,852
Drug stores with fountain:		
Total	24,093	$3,535,637
Individual proprietorships	13,549	1,294,737
Partnerships	4,368	602,014
Corporations	6,140	1,633,998
Cooperatives	9	(withheld)
Other legal forms	27	"
Proprietary stores with fountain:		
Total	2,601	132,518
Individual proprietorships	1,968	85,988
Partnerships	446	(withheld)
Corporations	185	21,090
Cooperatives	.....	.....
Other legal forms	2	(withheld)
Department stores:		
Total	3,157	13,359,467
Individual proprietorships	19	(withheld)
Partnerships	64	85,273
Corporations	3,073	13,245,916
Cooperatives	1	(withheld)
Other legal forms	.....	.....

B. State of Maryland.[2]

	Establishments (*number*)	*Sales* (*$1,000*)
Eating places:		
Total	3,223	175,546
Individual proprietorships	2,109	72,816
Partnerships	456	30,386
Corporations	628	71,397
Other legal forms	30	947
Drug stores, proprietary stores:		
Total	832	139,943
Individual proprietorships	454	42,753
Partnership	139	(withheld)
Corporations	235	76,403
Other legal forms	4	(withheld)
Department stores:		
Total	43	247,872
Individual proprietorships	.....	.....
Partnerships	.....	.....
Corporations	43	247,872
Other legal forms	.....	.....

APPENDIX V.

State Antidiscrimination Laws.

(*As of March 18, 1964.*)

(PREPARED BY THE UNITED STATES COMMISSION ON CIVIL RIGHTS.)

State	*Privately owned public accommodations*	*Private employment*	*Private housing*	*Private schools*	*Private hospitals*
Alaska	[1] 1959	[1] 1959	1962	----	[2] 1962
California	1897	1959	1963	----	[2] 1959
Colorado	1885	1957	1959	----	----
Connecticut	1884	1947	1959	----	[2] 1953
Delaware	1963	1960	----	----	----

[1] A division into stores with or without fountains, furnished for the United States, is not furnished for individual States.

[*Footnotes are on pp. 43–44*]

State	Privately owned public accommodations	Private employment	Private housing	Private schools	Private hospitals
Hawaii	----	1963	----	----	----
Idaho	1961	1961	----	----	----
Illinois	1885	1961	----	[2] 1963	[4] 1927
Indiana	1885	1945	----	----	[2] 1963
Iowa	1884	1963	----	----	----
Kansas	1874	1961	----	----	----
Kentucky [5]	----	----	----	----	----
Maine	1959	----	----	----	[2] 1959
Maryland [6]	1963	----	----	----	----
Massachusetts	1865	1946	1959	1949	1953
Michigan [7]	1885	1955	----	----	----
Minnesota	1885	1955	1961	----	[2] 1943
Missouri	----	1961	----	----	----
Montana	1955	----	----	----	----
Nebraska	1885	----	----	----	----
New Hampshire	1961	----	1961	----	[2] 1961
New Jersey	1884	1945	1961	1945	1951
New Mexico	1955	1949	----	----	1957
New York	1874	1945	1961	1945	1945
North Dakota	1961	----	----	----	----
Ohio	1884	1959	----	----	[2] 1961
Oregon	1953	1949	[8] 1959	[8] 1951	[2] 1961
Pennsylvania	1887	1955	1961	1939	1939
Rhode Island	1885	1949	----	----	[2] 1957
South Dakota	1963	----	----	----	----
Vermont	1957	1963	----	----	[2] 1957
Washington [10]	1890	1949	----	1957	[2] 1957
Wisconsin	1895	1957	----	----	----
Wyoming	1961	----	----	----	[3] 1961

The dates are those in which the law was first enacted; the underlining means that the law is enforced by a commission. In addition to the above, the following cities in States without pertinent laws have enacted antidiscrimination ordinances: Albuquerque, N. Mex. (housing); Ann Arbor, Mich. (housing); Baltimore, Md. (employment); Beloit, Wis. (housing); Chicago, Ill. (housing); El Paso, Tex. (public accommodations); Ferguson, Mo. (public accommodations); Grand Rapids, Mich. (housing); Kansas City, Mo. (public accommodations); Louisville, Ky. (public accommodations); Madison, Wis. (housing); Oberlin, Ohio (housing); Omaha, Nebr. (employment); Peoria, Ill. (housing); St. Joseph, Mo. (public accommodations); St. Louis, Mo. (housing and public accommodations); Toledo, Ohio (housing); University City, Mo. (public accommodations); Yellow Springs, Ohio (housing); and Washington, D.C. (public accommodations and housing).

[1] Alaska was admitted to the union in 1959 with these laws on its books.

[2] Hospitals are not enumerated in the law, however, a reasonable interpretation of the broad language contained in the public accommodations law could include various health facilities.

[3] The law appears to be limited to business schools.

[4] Hospitals where operations (surgical) are performed are required to render emergency or first aid to any applicant if the accident or injury complained of could cause death or severe injury.

[5] In 1963, the Governor issued an executive order requiring all executive departments and agencies whose functions relate to the supervising or licensing of persons or organizations doing business to take all lawful action necessary to prevent racial or religious discrimination.

[6] The law exempted 11 counties; in 1964, the coverage was extended to include all of the counties.

[7] See 1963 Mich. Atty. Gen. opinion holding that the State Commission on Civil Rights has plenary authority in housing.

[8] The statute does not cover housing *per se* but it prohibits persons engaged in the business from discriminating.

[9] The statute relates to vocational, professional, and trade schools.

[10] In 1962, a Washington lower court held that a real estate broker is within the public accommodations law.