Nos. 6, 9, 10, 12 and 60

In the Supreme Court of the United States

OCTOBER TERM, 1963

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

CHARLES F. BARR, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

SIMON BOUIE, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

ROBERT MACK BELL, ET AL., PETITIONERS

v.

STATE OF MARYLAND

JAMES RUSSELL ROBINSON, ET AL., APPELLANTS

v.

STATE OF FLORIDA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 6

WILLIAM L. GRIFFIN, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 9

CHARLES F. BARR, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 10

SIMON BOUIE, ET AL., PETITIONERS

v.

CITY OF COLUMBIA

No. 12

ROBERT MACK BELL, ET AL., PETITIONERS

v.

STATE OF MARYLAND

No. 60

JAMES RUSSELL ROBINSON, ET AL., APPELLANTS

v.

STATE OF FLORIDA

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA AND THE COURT OF APPEALS OF MARYLAND AND ON APPEAL FROM THE SUPREME COURT OF FLORIDA

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed pursuant to the Court's order of November 18, 1963, inviting the Solicitor General, pursuant to his suggestion, to file a brief expressing

the views of the United States upon "the broader constitutional issues which have been mooted" in these cases.

We confine the brief to those issues, but believe it appropriate to note two somewhat narrower grounds specially applicable to *Robinson* v. *Florida*, No. 60, which came to our attention in preparing to argue the broader issues.

1. At the time petitioners Robinson *et al.* were arrested, there was in effect a regulation of the Florida Board of Health applicable to restaurants (Florida State Sanitary Code, Chapter VII, Section 6), which provided: [1]

> Toilet and lavatory rooms must be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms must be provided for their use. Each toilet room shall be plainly marked, viz: "White Women," "Colored Men," "White Men," "Colored Women."

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[1] *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published in July 1960 (one month before petitioners were arrested), prescribed (pp. 140–141):

"4.6.7—Toilet and hand washing facilities

"(a) Basic requirement—In every food and drink service establishment adequate toilet and hand washing facilities shall be available for employees and guests. Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment. Toilet rooms shall not open directly into a room in which food or drink is prepared, stored or served."

The substance of the regulation quoted in the text was reissued on June 26, 1962, and is now part of Florida Administrative Code, Chapter 170C, Section 8.06. See pp. 99–100, *infra*.

While the regulation does not require segregation in the parts of the restaurant where customers are eating, the regulation not only gives official support to the principle of racial segregation but puts the proprietor who desires to serve both races indiscriminately to the financial burden of providing duplicate toilets and lavatories.[2] Thus, the regulation would seem to impose sufficient State pressure to bring the case within *Peterson* v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267.

2. The views expressed by Mr. Justice Stewart in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 726, would also seem to require reversal in the *Robinson* case.

Chapter 509 of Florida Statutes Annotated sets forth a comprehensive code of regulation for public lodging and public food service establishments. Section 509.092, however, provides—

> Public lodging and public food service establishments are declared to be private enterprises and the owner or manager of public lodging and public food service establishments shall have the right to refuse accommodations or service to any person who is objectionable or undesirable to said owner or manager.

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[2] A restaurant serving fewer than 100 people at one time would be required to have one toilet and one lavatory for women, one toilet, one urinal and one lavatory for men, provided that no Negroes were accommodated. If Negroes were accommodated, the facilities would have to be duplicated. See *A Manual of Practice for Florida's Food and Drink Services,* supra, p. 141.

It is undisputed that petitioners were refused service only because they were either Negroes or in the company of Negroes (R. 19–20, 29).

Section 509.141, the statute under which petitioners were convicted, authorizes the manager to eject any person who, in his opinion, is a—

> person whom it would be detrimental to such * * * restaurant * * * for it any longer to entertain.

The managers invoked this section because they believed that enforcing segregation accorded with the wishes of a majority of the people of the county and any contrary course would be detrimental to the business.

The statute in *Burton* v. *Wilmington Parking Authority* allowed a proprietor to refuse to serve—

> persons whose reception or entertainment by him would be offensive to the major part of his customers * * *.

In *Burton,* Mr. Justice Stewart said—

> There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment.

Here, as in *Burton,* there is no suggestion in the record that any appellant *as an individual* was a person deemed detrimental to the business because personally offensive to other customers. Whites were automatically served and Negroes and groups contain-

ing Negroes were automatically excluded. Here, as in *Burton*, therefore, the highest court of the State has construed its legislation as authorizing a discriminatory classification based exclusively upon color.[3] Such a law is invalid equally with the Delaware legislation, and the convictions thereunder should be reversed.[4]

We turn now to the broader issue.

QUESTION PRESENTED

In four of these five cases petitioners peacefully entered premises thrown open by the proprietor to the general public for the service of food and refreshments; in the fifth, they entered an amusement park offering entertainment to the public at large. In each

[3] See also the statement of the trial court at R. 36. The instant case would seem even clearer than *Burton*, for the statute was enacted in 1957 in a context of systematic segregation.

[4] It has been suggested that Mr. Justice Stewart's opinion in *Burton* v. *Wilmington Parking Authority* should be read as saying that there was no suggestion in the record that appellant's race made him "offensive to the major part of [the restaurant's] customers." Examination of the record makes it plain that this cannot be the meaning. The case was decided on cross motions for summary judgment. The third affirmative defense asserted the restaurant's right as a private business to refuse refreshment "to persons whose reception or entertainment would be offensive to the major part of its customers and would injure its business," and that the defendant "is therefore not bound to serve the plaintiff in its restaurant." Transcript of Record, p. 8, No. 164, October Term, 1960. On motion for summary judgment, that allegation would be taken as true. The nub of the matter, therefore, was that plaintiff was refused service not as an offensive individual but upon the ground that a majority of the customers desired a racial classification. The situation in the instant case is the same.

case, although otherwise acceptable, petitioners were refused service and asked to leave on the ground that they were Negroes or were in the company of Negroes. This was done pursuant to the proprietor's policy of denying service to Negroes as a class, although he rendered service to all other members of the public, without discrimination, to the extent of his facilities. In three of the cases Negroes were invited into the premises to buy goods, and their patronage was sought for all purposes except the service of food to be eaten there in the presence of white patrons.

In each instance petitioners refused to leave the premises when requested. They were arrested by the local police, prosecuted and subsequently convicted of criminal trespass or an equivalent crime. The relevant State laws afforded Negroes and non-Negroes technical equality in the limited sense that they gave no member of the public an enforcible right to entertainment or service in the establishments involved.[4]

The question presented is whether the convictions are invalid under the equal protection clause of the Fourteenth Amendment, when it appears (as we shall argue)—

(1) that the convictions gave legal effect to a community-wide practice under which non-Negroes are automatically served in establishments of public accommodation while Negroes are automatically segre-

[4] The briefs previously filed in these cases present full statements of the facts and proceedings below. We have epitomized the essential elements to the extent necessary to present the broad constitutional issue.

gated or excluded in order to stigmatize them as members of an inferior race, and

(2) that the practice is an integral part of the fabric of a caste system woven of threads of both State and private action.

ARGUMENT

INTRODUCTORY

For nearly a century, a nation dedicated to the faith that all men are created equal nonetheless tolerated Negro slavery and still more widely espoused, in laws and public institutions, as well as private life, the thesis that the Negro is a servile race destined to be set apart as an inferior caste neither sharing nor deserving equal rights and opportunities with other men. A great war resulted. At the end the Thirteenth, Fourteenth and Fifteenth Amendments not only abolished human bondage but purported to eradicate the imposed public disabilities based upon the false thesis that the Negro is an inferior caste. Before their government, the Amendments taught, in the eyes of the law, all men—men of all races—are created equal.

Slavery was in fact abolished. The twin promise of civil equality failed of immediate performance. State laws were enacted, customs were promoted by public and private action, institutions and ways of life were established, all upon the pervasive thesis that, although human bondage was forbidden, Negroes were still an inferior caste to be set apart, neither sharing nor entitled to equality with other men.

One of the pivotal points in the State-promoted system of public segregation and subjection became separation in all places of public transportation, entertainment or accommodation.[5] There the brand of inferiority burns the deepest; there the wrong is the greatest; for there no element of private association, personal choice or business judgment enters the decision—only the willingness to join in the imposition of the public stigma of membership in an inferior caste. There the Negro asks most insistently whether we mean our declarations and constitutional recitals of human equality or are content to live by, although we do not profess, the theories of a master race.

That is the question petitioners raised when they entered and sought service in these places of public accommodation. They raised the question in various forms. They raised a moral, and therefore in a sense

[5] Throughout this brief we frequently use the term "places of public accommodation" as a convenient shorthand description of the soda fountains or lunch counters, restaurants and amusement park involved in these cases. The phrase seems apt to describe all establishments which throw their premises open to the public at large (except for any racial restrictions), which invite the patronage of the general public without selection either in the invitation or rendition of service, and which furnish lodging, food or drink, entertainment, amusement or similar services. The meaning might extend far enough to include gasoline service stations which "feed" the automobiles, just as the adjacent restaurant feeds the traveler. The exact limits are unimportant for it is the characteristics of the soda fountains or lunch counters, restaurants and amusement park described later in this brief that are legally significant and the expression is merely a shorthand way of describing them. If other establishments were shown to have the same characteristics, the same legal consequences would follow.

a personal question, as they presented it to the proprietors of the establishments in which they were arrested. The question became legislative as the demonstrations pressed the Congress and the States to consider whether to require establishments holding themselves out to the public to serve all members of the public without regard to race. It became a question for government, also, when the managers of the establishments called upon State authority to support a right to evict petitioners and thus join in maintaining the system of stigmatizing Negroes an inferior caste. When the State intervened, a constitutional issue was raised—how far and in what circumstances does the Fourteenth Amendment permit a State to support the system of public segregation of Negroes for the purpose of stigmatizing them as an inferior caste.

Only the last question is here. It is manifestly different from both the moral question posed for the individual and the policy questions presented to Congress and State authorities, but it is nonetheless related to the ideal of civil equality. While the Fourteenth Amendment does not lay upon individuals and non-governmental institutions the standards of conduct applicable to the States and does not compel a State to exercise all its regulatory power to abolish all forms of private (*i.e.*, non-governmental) discrimination, the Amendment does reach State-sponsored inequality in every form. In the *Civil Rights Cases*,

109 U.S. 3, 11, the Court drew the fundamental distinction:

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. * * *

The distinction is deeply imbedded not only in our fundamental law but in our national life. It is essential to a free, pluralistic society. It is a product of our moral philosophy, which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil. Freedom, in this sense, is freedom to be foolish as well as wise, to be wrong as well as right. While the State may sometimes limit the choice, especially in the regulation of business conduct, there is room for legislative judgment. Nothing in the Constitution prevents a State which has always scrupulously stayed its hand, from continuing to prefer the course of private self-determination, at least for those who have not opened their premises to the public and perhaps even for those whose businesses are affected with a public interest. It would be equally false to ideals secured by the Thirteenth, Fourteenth and Fifteenth Amendments, however, to permit a State to use the cloak of private choice to hide affirmative State support for a caste system heavily infused with governmental action.

We unqualifiedly accept the fundamental distinction laid down in the *Civil Rights Cases*. Moreover, in applying it, we take for granted the proposition that the mere fact of State intervention through the courts

or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. In a civilized community, where legal remedies and sovereign authority have been substituted for private force, private choice in the use of property or business or social relations often depends upon the support of sovereign sanctions. Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudice is not enough to convict the State of denying equal protection of the laws.

But that is not this case. We deal here not with individual action but with a community-wide, public custom of denying Negroes the opportunity of breaking bread with their fellow men in public places in order to subject them to a stigma of inferiority as an integral part of the fabric of a caste system woven of threads of both State and private action. The refusal to allow an individual to eat at a lunch counter generally open to all orderly members of the public, when viewed in isolation, can be fairly described in legal terms as a businessman's exercise of the right to select his customers, or as the property owner's exercise of the right to choose whom he will permit upon his premises. Depending upon his motive, the manager's act may be petty, vindictive, immoral, a harsh business judgment, or even justifiable; but in the absence of statute his right is absolute. But history and an appreciation of current institutions

(whose meaning is partly a product of history) show that racial segregation in places of public accommodation cannot be viewed as merely a series of isolated private decisions concerning the use of property or choice of customers, or even as a widespread private custom unrelated to governmental action. The incidents are not separable. The custom is infused with official action both in its origins and implementation. The legal concepts applicable to isolated incidents are not more adequate to capture the truth of racial segregation in places of public accommodation than chemical formulas for body content are sufficient to describe mankind. By way of illustration, Hitler's pogroms were not mere instances of assault, battery and malicious destruction of property.

To break the institution into its components even for the purposes of analysis loses some of the reality, but in our argument we emphasize, first, that the essence of the practice of racial segregation in places of public accommodation is not the management of property or the selection of customers but the stigmatization of the Negro as an untouchable member of an inferior caste. Its only function is to preserve, despite the Thirteenth, Fourteenth and Fifteenth Amendments, the essence of the earlier disabilities associated with slavery but extended more widely through the Nation. Segregation in places of public accommodation does not involve the management of property or selection of customers in any true sense. These are public places, made so by the proprietors' voluntarily inviting the public at large to use them. Between proprietor and customer there is only the

most casual and evanescent of all business relationships. Any orderly person is served, always and automatically, except those branded as members of an inferior race. There is none of the continuity or selectivity that enters into employment; and none of the personal contact or need for mutual trust, confidence and compatibility that characterizes the doctor-patient and lawyer-client relationships. The virtual irrelevance of the legal concepts of private property is vividly demonstrated by the practice of many department stores. They solicit the patronage of Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority—that is important, not presence on the premises or the character of customers.

Second, we show that the practice of stigmatizing Negroes as an inferior caste by refusing to serve them in places of public accommodation together with their fellow men is a product of State action in the narrowest sense, although not currently required by law, because it is an important and inseparable part of a system of segregation established by a combination of State and private action. When the Thirteenth, Fourteenth and Fifteenth Amendments outlawed slavery and sought also to eradicate the public disabilities relegating Negroes to the status of an inferior caste, respondents and some sister States were unwilling to eliminate all vestiges of the caste system from their jurisprudence, official policies and public insti-

tutions and leave the development of business, professional and social relations to private choice. State statutes and municipal ordinances, on a wide scale, required segregation in places of public accommodation, upon common carriers, and in places of public entertainment. State laws provided for segregation in related areas such as schools, court houses and public institutions. State policies expressed, in countless other ways, the notion that Negroes should be treated as an inferior caste. The community-wide fabric of segregation thus was filled with the threads of law and government policy woven by government through the warp of custom laid down by private prejudice. The system is all of a piece. Segregation in places of public accommodation cannot be severed and appraised in isolation. One cannot tell what would happen if the threads of State law and State policy were pulled from the cloth, save that manifestly it would be changed.

After developing these two points in the hope of clarifying the true nature of the institution with which the cases are concerned, we return to the legal question—whether a State which has fostered the practice of racial segregation in places of public accommodation in order to preserve the stigma upon the Negro as an inferior caste, contrary to the promise of the Thirteenth, Fourteenth and Fifteenth Amendments, may now, consistently with the requirements of the Fourteenth Amendment, use the sovereign authority of its police and courts to sanction the eviction of Negroes, pursuant to the practice, as an exercise of private choice.

It is a settled principle that a State cannot exculpate itself merely by showing that the racial segregation or some other invasion of fundamental interests was contingent upon the decision of private individuals. *Shelley* v. *Kraemer,* 334 U.S. 1; *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Lombard* v. *Louisiana,* 373 U.S. 267; *Railway Employees' Dept.* v. *Hanson,* 351 U.S. 225. This is not to retract our previous acknowledgement that neither recognition of a right of private choice in a business subject to public regulation nor the use of State power to safeguard the choice once made is automatically sufficient to implicate the State for the purposes of the Fourteenth Amendment. It is to assert, in a complex, civilized community where public and private action are interwoven and interdependent, that the determination of a State's responsibility under the Fourteenth Amendment depends upon a judgment upon the size and importance of the elements of State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantees.

The framers of the Thirteenth, Fourteenth and Fifteenth Amendments were not content merely to forbid human bondage. They were equally determined to remove the widespread public disabilities, associated with slavery, that branded the Negro an inferior caste excluded from the promise that in America all men are created equal. This is the heart of the guarantees of the privileges and immunities of citizens, of equal voting rights, and of equal protection of the laws.

The Fourteenth Amendment, it must be emphasized required major changes in State laws: the old slave codes were to be repealed; civil disabilities in owning property, in contracting and in the laws of inheritance were to be eradicated; there were to be no State barriers to business opportunities and the professions; nor were the States left free passively to watch Negroes suffer individual wrongs at the hands of private persons in situations in which the State would intervene to protect non-Negroes.

On the other hand, the Amendments left most social and business associations to private choice. Where the law did not compel social intercourse, business associations and other private relationships among whites, the Amendment did not require them between whites and Negroes. Whether a Negro won equality and acceptance in the private world outside the sphere of government once freed from the public stigma of civil disabilities would depend upon his own capacities and efforts, hampered perhaps by personal prejudices but freed from the caste system.

In historical terms it can hardly be denied that any State intervention in support of the preservation of the caste system in an everyday element of public life defeats the promise of the Amendments. In stricter legal terminology, the elements of State "involvement" in these cases are sufficient, we submit, to carry State "responsibility" for the constitutional injustice.

The State is involved because its police intervened, its officials prosecuted the petitioners, and its courts convicted and sentenced them as a result of racial dis-

crimination. The discrimination became operative through the State's action. The State cannot close its eyes to what all other men see.

The State is further involved because the discrimination occurred in public places, voluntarily thrown open by the proprietors to the community at large. It occurred in a segment of public life in which the rights and duties—the relationships between the proprietor and the invited public—have always been a special concern of the legal system. In each of the respondent States, but especially in Florida, the relationship between these places of public accommodation and the general public is so closely supervised as to involve the State in all its aspects.

The States are involved through their support of the system of segregation. For both the Negro and the white supremacists, discrimination in places of public accommodation is a pivotal point in the caste system. The respondents and neighboring States commanded segregation for many years on a broad front. Between State policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and executive action confirmed and strengthened the prejudices, and also prevented individual variations from the solid front. State involvement under such conditions is too clear for argument, even though segregation might be the proprietor's choice in the absence of legislation. Cf. *Peterson* v. *Greenville*, 373 U.S. 244.

State responsibility does not end with the bare repeal of laws commanding segregation in places of public accommodation. The very history of the caste system belies the claim of legal innocence when the State, in these and similar cases, intervenes to support its central stigma. The State is responsible for the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts carried through a chain of cause and effect until the connection between the wrong and the consequences has become too attenuated to be a substantial factor in the harm. Until time and events have attenuated the connection, the respondents continue to bear responsibility for the conditions, which they shared in creating, that result in branding Negroes an inferior caste. They have not wiped the slate clean.

We recognize that treating the discrimination as a consequence of State action for the purposes of imposing a measure of State responsibility will, to a corresponding extent, lessen the opportunities and protection for private choice. Decision here requires striking a balance with liberty and equality in opposing scales. The "liberty" asserted is hardly consequential. These are all business premises thrown open to the public. The proprietors have voluntarily foregone virtually all power of choice concerning the customers they serve. There is no element of personal selection or personal judgment. Non-Negroes are served automatically; Negroes are automatically

segregated or excluded. With rare exceptions there is no other basis of choice.

There may be instances where the racial choice is purely private in the sense that the proprietor would make it even if the States had been truly neutral and no community system of segregation had been preserved. While our reasoning would sweep them under the one conclusion until the caste system is eliminated from public places, there is no unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system and his acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U.S. 375, 396; *Terry* v. *Adams,* 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the caste system, which is a product of State involvement. Cf. *Texas & N.O.R. Co.* v. *Brotherhood of Railway & S.S. Clerks,* 281 U.S. 548; *National Labor Relations Board* v. *Southern Bell Co.,* 319 U.S. 50.

These problems, moreover, lie in an area where there is little basis for the plea of private rights. The proprietors of places of public accommodation

open their property and business to public use. While the dedication cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements for the purposes of the Fourteenth Amendment. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U.S. 501, 506.

The choice of affirmative remedies for State involvement in a system of segregation in places of public accommodation rests with Congress under Section 5 of the Fourteenth Amendment. We do not argue that Negroes would have a direct action against such an establishment to secure the services of food or admission to entertainment. Our contention is simply that a State which has contributed to this evil custom may not constitutionally take steps to aid its enforcement in public places. The same reasoning that interdicts State action in the form of arrests and criminal prosecution equally condemns State support for the caste stigma in the recognition of a legal privilege to use private force against the person. Whoever first resorts to violence is guilty of a breach of the peace, be he the Negro seeking to enter and be served or the operator seeking to evict him. The State may punish such disturbances of public order without discrimination. The failure to accord either party that normal protection against an aggressor upon racial grounds would also be a denial of equal protection of law.

Beyond this point, the question is for Congress. Congress alone can meet the present national crisis arising from the system of segregation by removing the fundamental injustice in places of public accommodation. Neither petitioners nor the United States is arguing that the Court should undertake to hold that places of public accommodation must serve all members of the public alike without regard to race or color. The Court, being subject to judicial and constitutional limitations, cannot solve the whole problem. There is judicial power, nevertheless, to scrutinize a State's contribution to the injustice and to invalidate any convictions flowing from affirmative State involvement. After a century of frustration, it is not too much for petitioners to ask that, whatever action the Congress may take, the barriers raised by the Thirteenth, Fourteenth and Fifteenth Amendments to any continued State support for the caste system should be made unmistakably plain.

I

THE REFUSAL TO ALLOW NEGROES TO EAT WITH OTHER MEMBERS OF THE PUBLIC OR TO SHARE AMUSEMENT IN THESE PLACES OF PUBLIC ACCOMMODATION WAS AN INTEGRAL PART OF A WIDER SYSTEM OF SEGREGATION ESTABLISHED BY A COMBINATION OF GOVERNMENTAL AND PRIVATE ACTION TO SUBJECT NEGROES TO CASTE INFERIORITY

At the heart of these cases lies the necessity for understanding the human significance of the institutions with which we deal. The courts below reasoned

that the States had not violated the Fourteenth Amendment because under their law no one has a legal right to be served in a place of public accommodation and anyone, white or Negro, is subject to prosecution and conviction if he refuses to leave the private property at the proprietor's request. The decisions look only to technical legal equality or right and no-right in the immediate context. The courts below dealt in terms of the abstract legal concepts of property rights, trespass, freedom of association, and business choice without going behind the formulae to see what is actually involved.

In our view that approach is fundamentally wrong. We argue below the legal error of confining the focus so narrowly (Point II, pp. 64 ff.), but first we seek to catch the truth of these events. A department store's refusal to serve a Negro at its lunch counter is not, in truth, either for the Negro, the proprietor or the community, an isolated act of personal antipathy. Nor is the exclusion from an amusement park. All are based upon an invidious classification applied by the proprietor automatically and invariably. Each proprietor acts pursuant to a community-wide practice. The practice serves the function of branding Negroes inferior to other men. It is an integral part of a caste system, based upon racial segregation, established by a combination of State and private ac-

tion. No other discrimination based upon race, nationality or religion is the same.[6]

Because the question for decision turns upon an appreciation of these simple, institutional facts, we develop them in some detail before discussing their legal significance. Full presentation requires a study of the system of segregation as it followed in the wake of Negro slavery, but we concentrate first upon the facts pertaining to discrimination in places of public accommodation: lunch counters, restaurants and an amusement park are here involved.

A. ACTS OF RACIAL DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION ARE PARTS OF A COMMUNITY-WIDE PRACTICE STIGMATIZING NEGROES AN INFERIOR CASTE

When these cases arose, the practice of excluding or segregating Negroes in lunch counters, lunch rooms, restaurants, bars, hotels, and places of public amusement was almost universal in the former slave States. The pervasiveness of the discrimination is

[6] The reasoning does not apply with the same force, if at all, in jurisdictions where there has been no governmental support for the caste system and where the discrimination is uneven. Racial discrimination, even in these instances, might be regarded as the fringes of a single fabric; or distinctions could be drawn based upon differences in fact. The question seems more academic than practical. No cases have arisen under such conditions, so far as we know, and none seems likely to arise. Thirty States outside the old slave-holding areas have enacted equal public accommodations laws. See p. 31, n. 22, *infra*.

too notorious to require documentation. It is perhaps most dramatically illustrated by consulting the list of the cities where protest demonstrations have occurred in the last four years.[7] Though it obviously

[7] While no complete list is available, protests directed specifically against segregation in privately-owned places of public accommodation have occurred in at least the following communities:

Alabama: Birmingham, Gadsden, Huntsville, Mobile, Montgomery, Selma, Tuskegee.

Arkansas: Helena, Little Rock, Pine Bluff.

Delaware: Dover, Newark, Smyrna, Wilmington.

Florida: Bradenton, Clearwater Beach, Daytona Beach, De Land, Dunnellon, Gainesville, Jacksonville, Lakeland, Melbourne, Merritt Island, Miami, Ocala, Panama City, Pensacola, St. Augustine, St. Petersburg, Sarasota, Tallahassee, Tampa, Winter Haven.

Georgia: Albany, Americus, Athens, Atlanta, Augusta, Brunswick, Columbus, Savannah, Valdosta, Warner Robins.

Kentucky: Henderson, Lexington, Louisville.

Louisiana: Baton Rouge, Clinton, Hammond, New Orleans, Plaquemine, Shreveport.

Maryland: Annapolis, Baltimore, Cambridge, Catonsville, Crisfield, Cockeysville, Gwynn Oak, Ocean City, Prince Georges County, Silver Spring.

Mississippi: Clarksdale, Greenville, Greenwood, Jackson.

Missouri: Berkeley, Kansas City, St. Louis.

North Carolina: Chapel Hill, Charlotte, Concord, Dunn, Durham, Elizabeth City, Enfield, Fayetteville, Gastonia, Goldsboro, Greensboro, Henderson, High Point, Kinston, Lexington, Monroe, Mount Airy, New Bern, New Salem, Oxford, Raleigh, Rocky Mount, Salisbury, Shelby, Southport, Statesville, Thomasville, Williamston, Wilmington, Wilson, Winston-Salem.

South Carolina: Anderson, Beaufort, Charleston, Columbia, Denmark, Florence, Newberry, Orangeburg, Rock Hill, Southport, Sumter.

Tennessee: Chattanooga, Clarksville, Humboldt, Jackson, *Knoxville, Memphis, Moscow, Nashville, Oak Ridge, Somerville.*

Texas: Amarillo, Austin, Galveston, Houston, Kerrville, Longview, Marshall, San Antonio.

gives only a partial sampling of the areas involved, the list includes several cities in each of the Southern and border States, and reflects a generalized practice of segregation even in the most public of all places of public accommodation, the dime store, drug store or department store lunch counter.[8] While the demonstrations met with a measure of success, usually in a very narrow area,[9] and other forces have had their influence, the overall picture is not greatly changed. Even a partial record of State prosecutions involving attempts to break down the color barrier in places of public accommodation is eloquent testi-

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Virginia: Arlington, Charlottesville, Danville, Farmville, Hampton, Hopewell, Leesburg, Lynchburg, Newport News, Norfolk, Petersburg, Portsmouth, Prince Edward, Richmond, Suffolk.

West Virginia: Bluefield, Charleston, Huntington, Wheeling.

This incomplete list is compiled on the basis of a study of the demonstrations from February 1, 1960, through March of the same year by Professor Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L.J. 315, a report by the Southern Regional Council for the same two-month period, *The Student Protest Movement: Winter 1960* (April 1, 1960, *rev.*), and a survey of news reports made in the Department of Justice covering only the six-month period from May 20, 1963, to November 21, 1963. During the latter period, our reports show at least 663 demonstrations of this kind in the Southern and Border States.

[8] See pollitt, *op. cit.*, *supra*.

[9] An analysis of informal reports through October 15, 1963, indicates that many communities have desegregated lunch counter, but not other eating places, or hotels or theatres. It is also clear that, while many of the larger cities of the Southern and Border States have abandoned segregation in at least some accommodations, there has been very little desegregation in the smaller cities and towns, where most of the Negro population lives.

mony of the survival of the discrimination.[10] Indeed, the number of such cases in this Court alone is instructive.[11]

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[10] The Southern Regional Council asserts that more than 20,083 persons engaged in demonstrations against Negro discrimination in the 11 Southern States were arrested during 1963. See *Civil Rights: Year-End Summary* (Southern Regional Council, Inc., Dec. 31, 1963, mimeograph), p. 1. Another report by the same organization indicates that during the first nine months of 1961 at least 1190 persons were arrested in Florida and South Carolina alone in connection with protests against racial discrimination in places of public accommodation. See, *The Student Protest Movement: A Recapitulation* (Southern Regional Council, Inc., September, 1961), pp. 5, 10.

[11] 1960 Term: *Boynton* v. *Virginia*, 364 U.S. 454; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715.

1961 Term: *Garner* v. *Louisiana*, *Briscoe* v. *Louisiana*, *Hoston* v. *Louisiana*, 368 U.S. 157; *Bailey* v. *Patterson*, 368 U.S. 346, 369 U.S. 31; *In re Shuttlesworth*, 369 U.S. 35; *Turner* v. *City of Memphis*, 369 U.S. 350; *Taylor* v. *Louisiana*, 370 U.S. 154.

1962 Term: *Peterson* v. *Greenville*, 373 U.S. 244; *Shuttlesworth* v. *City of Birmingham*, 373 U.S. 262; *Lombard* v. *Louisiana*, 373 U.S. 267; *Gober* v. *Birmingham*, 373 U.S. 374; *Avent* v. *North Carolina*, 373 U.S. 375 (remanded); *Randolph* v. *Virginia*, 374 U.S. 97 (remanded); *Henry* v. *Virginia*, 374 U.S. 98 (remanded); *Thompson* v. *Virginia*, 374 U.S. 99 (remanded); *Wood* v. *Virginia*, 374 U.S. 100 (remanded); Cf. *Edwards* v. *South Carolina*, 372 U.S. 229; *Wright* v. *Georgia*, 373 U.S. 284.

1963 Term: *Drews* v. *Maryland*, No. 3; *Williams* v. *North Carolina*, No. 4; *Fox* v. *North Carolina*, No. 5; *Griffin* v. *Maryland*, No. 6, certiorari granted, 370 U.S. 935, reargument ordered, 373 U.S. 920; *Mitchell* v. *Charleston*, No. 8; *Barr* v. *Columbia*, No. 9, certiorari granted, 374 U.S. 804; *Bouie* v. *Columbia*, No. 10, certiorari granted, 374 U.S. 805; *Bell* v. *Maryland*, No. 12, certiorari granted, 374 U.S. 805; *Robinson* v. *Florida*, No. 60, probable jurisdiction noted, 374 U.S. 808; *Hamm* v. *Rock Hill*, No. 105; *NAACP* v. *Webb's City*, No. 362; *Lupper* v. *Arkansas*, No. 432. Cf. *Ford* v. *Tennessee*, No. 15 (leased municipal auditorium).

Nor does the discrimination result from a temporary and accidental concurrence of independent decisions by the operators of the establishments involved. Though not immemorial,[12] the prevailing practices have persisted for 60 or 70 years without interruption, often as part of the statutory law, almost invariably, it would appear, with official encouragement.[13] It is today a public custom, in many respects a legal institution. The consequence is a rigid system which imposes itself with very little regard for the personal choice of the business operator.

Typically, the storeowner or restaurateur is not shaping his own policy, but deferring to broader pressures. He may be governed by the will of the community, including his customers, or he may be acting in part through loyalty to his fellows who expect him to "hold the line." Usually, he also is influenced by official pleas or attitudes.[14] As the records in these very cases make plain, the proprietor who segregates is almost never deciding for himself: he is merely adhering to a preexisting custom,[15] which often, until very recently, was embodied in the official legal code. Nor is there an entirely free choice whether to conform or not. In many instances, no doubt, acquiescence is willing, even enthusiastic. But those who are otherwise inclined are carried with the

[12] As we show later, pp. 50–53, *infra*, segregation in its present pervasive and rigid form is a relatively recent phenomenon. See, generally, Woodward, *The Strange Career of Jim Crow* (1955).

[13] See Section B, *infra*.

[14] See, *e.g.*, *Lombard* v. *Louisiana*, 373 U.S. 267.

[15] See the government's initial brief in these cases, pp. 11, 13, 16, 22.

tide. Experience shows that no change in the established pattern can be expected without the concerted action of most of the businessmen in the locality in any given group.[16]

While the records are not conclusive, it seems plain that the discrimination was part of a community-wide practice in the present cases. The 1957 annual report of the Commission on Inter-racial Problems and Relations to the Governor and General Assembly, p. 13, reveals that 91 percent of all public facilities in Baltimore then excluded or segregated Negroes. Even in 1962, change had been "slow and inconsistent." *Id.*, 1962, p. 23. In *Robinson* v. *Florida*, No. 60, the Shell's City restaurant was following "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" (R. 30). The record in the *Barr* and *Bouie* cases is less explicit, but there appears to be little doubt that segregation was the rule in Columbia, South Carolina, at the time of the incidents in question.

Furnishing food and entertainment in a place of public accommodation does not involve any selection of customers or business associates in the usual sense of the word, even when Negroes are excluded, nor

[16] See, *e.g.*, the testimony of Mayor Morris of Salisbury, Md., Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., pp. 324–326.

does the practice of discrimination turn upon any judgment concerning the character or even the color of the persons whom the owner is willing to permit upon his premises. The unique quality of the choice to establish arbitrary racial segregation at lunch counters and in restaurants and amusement parks results partly from the public character of the premises and partly from the evanescent nature of the relationship between the proprietor and his customers.

We notice first the public character of the establishment. Whether it is a lunch counter, a restaurant, a hotel or place of amusement or entertainment, it is open to the public at large. The fact is reflected in several aspects of the law. The establishment is usually licensed and is often minutely regulated by the State or a municipal subdivision.[17] That was true even before the modern proliferation of State regulation. What is more, the law has traditionally concerned itself with regulating admission to such establishments. Beginning with the early common law rule requiring innkeepers, "victuallers" and public

[17] See Brief for Petitioners in Nos. 9, 10 and 12, p. 53, n. 28; Brief for the Appellant in No. 60, pp. 19–21, nn. 6–17.

carriers [18] to serve all, the right to service in places of public accommodation has been viewed as a question of public interest, the resolution of which should not depend on the wishes of the business owner. The early State public accommodation laws of the Nineteenth Century, both North [19] and South,[20] the federal Civil Rights Act of 1875,[21] and, indeed, the compulsory segregation laws affecting this area, all disclose the same attitude, which is today reflected in public ac-

[18] "* * * if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller." 3 Blackstone, *Commentaries* (Lewis ed., 1897), p. 166.

"A Victualling house is a house where persons are provided with victuals, but without lodging." 3 Stroud, *Judicial Dictionary* (1903), p. 2187.

See also Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Col. L. Rev. 514 (1911); Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156 (1903). Cf. Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. of Pa. L. Rev. 809 (1942).

[19] Between 1865 and 1897, Massachusetts, Kansas, New York, Connecticut, Iowa, New Jersey, Ohio, Colorado, Illinois, Indiana, Michigan, Minnesota, Nebraska, Rhode Island, Pennsylvania, Washington, Wisconsin and California enacted more or less comprehensive laws barring discrimination in places of public accommodation. For a detailed study of those statutes, see Stephenson, *Race Distinctions in American Law* (1910), pp. 111–153. Such a law was also passed in the District of Columbia. See *District of Columbia* v. *Thompson*, 346 U.S. 100; see, also, *Railroad Company* v. *Brown*, 17 Wall. 445.

[20] As we show later, during the period of Reconstruction, Louisiana, South Carolina, Georgia, Arkansas, Mississippi and Florida adopted more or less broad public accommodation laws. See notes 83–85, *infra*.

[21] 18 Stat. 335.

commodation laws in 30 of the 50 States [22] and the District of Columbia.[23]

The public character of such places is also reflected in other aspects of the legal system. They are treated as public under criminal laws prohibiting gaming, vulgar language and similar misconduct in "public places." [24] Tort liability for negligence is imposed as

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[22] Alaska: Stat. § 11.60.230 (1962); California: Civ. Code § 51; Colorado: Rev. Stat. § 25–1–1 (1953); Connecticut: Gen. Stat. § 53–35 (1962 Supp.); Idaho: Code § 18–7301 (1963 Supp.); Illinois: Stat. § 38–13.1 (1961); Indiana: Stat. § 10–901 (1963 Supp.); Iowa: Code § 735–1 (1962); Kansas: § 21–2424 (1961 Supp.); Maine: Rev. Stat. § 137–50 (1963 Supp.); Maryland: Code § 49B–11 (1963 Supp.); Massachusetts: Laws § 272–92A (1956); Michigan: Stat. § 28.343 (1962); Minnesota: Stat. § 327.09 (1947); Montana: Rev. Code § 64–211 (1962); Nebraska: Rev. Stat. § 20–101 (1954); New Hampshire: Rev. Stat. § 354.1 (1963 Supp.); New Jersey: Stat. § 10:1–2 (1960); New Mexico: Stat. § 49–8–3 (1963 Supp.); New York: Civ. R. § 40; North Dakota: Code § 12–22–30 (1963 Supp.); Ohio: Rev. Code § 2901.35 (1954); Oregon: Rev. Stat. § 30.670 (1961); Pennsylvania: Stat. § 18–4654 (1963); Rhode Island: Gen. Laws § 11–24–1 (1957); South Dakota: ch. 58, Laws 1963; Vermont: Stat. § 1451 (1958); Washington: Rev. Code § 49.60.215 (1962); Wisconsin: Stat. § 942.04 (1958); Wyoming. Stat. § 6–83.1 (1963 Supp.).

[23] D.C. Code § 47–2907 (1961).

[24] See, *e.g.*, *Drews* v. *Maryland*, 167 A. 2d 341 (Md. 1961), pending on petition for certiorari, No. 3, this Term (conviction for refusal to leave amusement park under statute prohibiting disorderly conduct in a "place of public resort or amusement"); *Nelson* v. *Natchez*, 19 So. 2d 747 (Miss. 1944) (conviction for profanity in restaurant under ordinance prohibiting profanity in a "public place"); *Hamilton* v. *State*, 104 So. 345 (Ala. 1925) (conviction for profanity at carnival under statute prohibiting profanity in a "public place"); *Yarbrough* v. *State*, 102 So. 321 (Ala. 1924) (same). See, also, *Garner* v. *Louisiana*, 368 U.S. 157 ("disturbing the peace" at lunch counters); *Thompson* v. *Louisville*, 362 U.S. 199 ("loitering" and "disorderly conduct" in café).

if the premises were a street or public square. For example, the owner of Shell's City or the Taylor Drug-store would be liable to one passing through the premises as a shortcut even though he had no intention to make a purchase. *Restatement Torts,* Section 330(d); *Renfro Drug Co.* v. *Lewis,* 149 Tex. 507, 235, S.W. 2d 609; cf. *Carlisle* v. *J. Weingarten, Inc.,* 137 Tex. 220, 152 S.W. 2d. 1073 ("The most essential factor to be considered in determining this issue is whether the premises were public or private.").

If the law has long regulated admission to places of public accommodation, it is because they are truly public service establishments. They perform an important function in serving the commonplace needs of the whole community. Appropriately, they hold themselves out as open to the general public; and they are open in fact, except for the color line. Neither in theory, nor in practice, is there any basis for the claim made here that such businessmen "select" their customers. Their admission policy is wholly indiscriminate. As Professor Thomas P. Lewis has said:

> There is probably no expectation, with or without a legal basis, which is more firmly established than the expectation of the average person that he will be served in places of public accommodation. The expectation is cemented in the private enterprise system which created the accommodations. They exist to serve; it would be absurd in the extreme to imagine *that* a place built and designed to serve the people would be used in a way inconsistent with the purpose for which it was built and inconsistent

with the use which will allow it to survive and prosper.[25]

The establishments in question are also public in another respect. Not only do they *perform* a service of public importance and invite the community at large to enjoy it, but they are *public places in something* of the same sense as are the public streets, the public squares, the public parks. This is particularly true of an amusement park like Glen Echo (No. 6) and of public conveyances (not here involved), but to some extent it also characterizes drugstore lunch counters (Nos. 9 and 10), a department store restaurant (No. 60), and a sizable urban restaurant (No. 12), which are mere temporary resting places on a journey "downtown." In each instance, a relatively large group congregates and the service is offered and received "in public." It is a place where the relationship between the manager and his customers, and between one customer and another (unless they choose a closer association) is distant. There is no privacy, no intimacy. It is the relationship of strangers engaged in a public transaction.

The public locale has another relevance. It transforms the discrimination against the Negro who is excluded or ejected into a public affront, performed before an audience and usually with reference to that

[25] The quoted excerpt is from a paper entitled *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, (p. 14), which was delivered at a conference on "Discrimination and the law," sponsored by the University of Chicago and the Anti-Defamation League of B'nai B'rith, November 22–23, 1963. Publication is pending.

audience. The humiliation is the greater. The openness of the locale also discourages any violation of the prevailing code, for no breach of the color line can pass unnoticed.

It is absurd here to speak of an intrusion on privacy. Nor is there any real question of "association." The relationship is too casual, too ephemeral, too public, for any such claim. The proprietor makes no choice, except for the color line. This is not a home or club where private, personal, social intercourse is involved. It is unlike almost any other business relationship. Most economic relationships involve a significant personal factor—for example, those between an author and his publisher, a lawyer and his client, the owner of a home and his lodger, employers of many descriptions and their employees. In many instances, also, the relationship is one of considerable duration; again, the employment relationship is a case in point. Here there is no element of trust and confidence, no continuity, no personal association. The activity involved is as "everyday" and automatic as walking down the street, boarding a bus or posting a letter. When the ordinary citizen enters a drugstore and asks for a cup of coffee at the lunch counter, he assumes that his ancestry, his attributes and his personal qualities are wholly irrelevant and that the only requirement is the possession of ten cents. The same is true when he takes his child for a ride on the carousel in the local amusement park. One who goes to the back door of a restaurant to ask for a job as cook or waiter or to obtain a contract for supplying meat to the proprietor assumes, as a matter of common experience,

that the owner may make his decision to accept or reject the offer partly on the basis of personal considerations, perhaps wholly irrational or unworthy ones, but the reverse is true when one enters the front door as just another customer, cash in hand. If this seems so commonplace as hardly to require statement, it is because the absence of personal selection in places of public accommodation is an integral and unquestioned aspect of modern society.

Three of the cases now before the Court (Nos. 9, 10 and 16) demonstrate the truth of these observations. At Shell's City, at the Eckerd's Pharmacy and at the Taylor Drug Store, the Negro applicant for lunch-counter service is freely admitted in the other departments of the same store, or (as in No. 9) permitted to enter the lunchroom and order food but only for consumption off the premises. Elsewhere, the anomalies are even more pointed, as when Negro patrons are allowed to eat standing, but not seated, or at the stool counter, but not in a booth.[25] And the same distinctions apply in other accommodations. We need only cite the familiar exception of the train or street car Jim Crow laws which permit a Negro woman to ride in the forward section of the car if accompanying

[25] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 Duke L. J. 315, 317; C. Johnson, *Patterns of Segregation* (1943). See, also, *The Student Protest Movement, Winter 1960*, Southern Regional Council Special Report (mimeograph).

A drugstore in Danville, Virginia, while serving Negroes Pepsi-Cola in paper cups (for which there was a one-cent additional charge), refused them Coca Cola and would not furnish a glass. *Cook* v. *Patterson Drug Co.*, 185 Va. 516, 39 S.E. 2d 304 (1946).

a white child.[27] The Negro is acceptable as licensee upon the premises and as a customer. All that is objectionable is the assertion of human equality involved in breaking bread with other men.

The only possible conclusion is that segregation in places of public accommodation is a symbolic act, the sole purpose and effect of which is to stigmatize the Negro as an inferior race, not entitled to full equality even in the public life of the community. The notion of the racial inferiority of the Negro dates from the earliest days of slavery. It was conceived to justify the continued bondage of the African who had been enslaved as a "heathen" but was now a Christian.[28] And, whether supported by Biblical citations[29] or biological theories,[30] it prevailed as an official philosophy through the mid-Nineteenth Century. Chief Justice Taney stated that, when the Constitution was adopted, Negroes "had for more than a century before been regarded as being of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect." *Scott* v. *Sandford,* 19 How. 393, 407.

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[27] See, *e.g.*, S.C. Code (1962), § 58–1333.

[28] See Frazier, *The Negro in the United States* (1957), pp. 24–25; Woodson, *The Negro in Our History* (6 ed., 1932), pp. 82–87.

[29] See, *e.g.*, *Pirate* v. *Dalby*, 1 Dallas 167, 168. The Biblical references are examined in Weyl, *The Negro in American Civilization* (1960), pp. 14–15.

[30] For some of these doctrines, see Weyl, *op. cit.*, pp. 114–115.

The supposed inferiority of the race at once explained its enslavement and was demonstrated by the slave status of most Negroes.[31] But the principle of course applied also to free Negroes and they were accordingly viewed and treated as inferiors.[32] The attitude is illustrated by an opinion of Chief Justice Lumpkin of the Georgia Supreme Court in 1853:

> [W]e maintain, that the *status* of the African in Georgia, whether bond or free, is such that he has no civil, social, or political rights or capacity, whatever, except such as are bestowed upon him by Statute; * * * that the social and civil degradation, resulting from the taint of blood, adheres to the descendants of Ham in this country, like the poisoned tunic of Nessus; that nothing but an Act of the Assembly can purify, by the salt of its grace, the bitter fountain—the *"darkling sea."* [33]

[31] As George Bernard Shaw observed, the same rationale prevailed long after slavery was abolished. In 1903, he said that "the haughty American Nation * * * makes the negro clean its boots and then proves the moral and physical inferiority of the negro by the fact that he is a shoeblack." Shaw, *Man and Superman* (1916 ed.), p. xviii.

[32] The degraded state of the free Negro before the Civil War is treated at some length in Weyl, *op. cit.*, pp. 52–62; Frazier, *op. cit.*, pp. 59–81; Dumond, *Antislavery* (1961), pp. 119–132; Wright, *The Free Negro in Maryland* (1921).

[33] *Bryan* v. *Walton*, 14 Ga. 185, 198. It is needless to add that the Georgia Assembly granted few rights to the Negro, free or slave. See the relevant statutes collected in II Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 101–109.

It is basically the same doctrine that survives today in the institution of segregation.[34] We have only to listen to its modern exponents.[35] The argumentation of the late Senator Bilbo will sufficiently show the line of descent:

> The principle of segregation of the white and Negro races in the South is so well known that it requires no definition. Briefly and plainly stated, the object of this policy is to prevent the two races from meeting on terms of social equality. By established practice, each race maintains its own institutions and promotes its own social life. The residential areas of the towns are segregated; separate schools are maintained;

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[34] See, *e.g.*, Konvitz & Leskes, *A Century of Civil Rights* (1961), pp. 3–37, 255–272; Frazier, *op. cit.*, pp. 671–674; Tumin, *Desegregation* (1958), pp. 190–191; Myrdal, *An American Dilemma* (Rev. ed., 1962), pp. 577–589, 592–599; Cash, *The Mind of the South* (1941), pp. 123–139; Woofter, *Southern Race Progress—The Wavering Color Line* (1957), pp. 135–145; Dollard, *Caste and Class in a Southern Town* (1957 ed.), pp. 62, 351–353; Handlin, *Race and Nationality in American Life* (1957), pp. 44–47; Allport, *The Nature of Prejudice* (1954), pp. 304, 438; Saenger, *The Social Psychology of Prejudice* (1953), pp. 256–257.

[35] See, *e.g.*, Cleghorn, "The Segs," *Esquire* (January 1964), pp. 71, 133–136 (interviews with leading exponents of segregation); George, *The Biology of the Race Problem* (1962) (Report Prepared by Commission of the Governor of Alabama); Putnam, "This is the Problem!", *The Citizen* (Citizens' Councils of America, Nov. 1961), pp. 12–33; Collins, *Whither Solid South* (1947), pp. 75–81; Bilbo, *Take Your Choice, Separation or Mongrelization* (1947), pp. 54–55, 82–93; Shufeldt, *The Negro, A Menace to American Civilization* (1907), pp. 105–123; Page, *The Negro: The Southerner's Problem* (1904), pp. 54–55, 292–293; Lewinson, *Race, Class, and Party* (1932), pp. 82, 84 (statements by post-Reconstruction Southern legislators). See also statements quoted in Lomax, *The Negro Revolt* (1962), p. 27.

separate accommodations are provided for the members of each race in public places and on the trains, busses and street cars.

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* * * demands [for equality] must necessarily be based on the acceptance of the doctrine of the equality of the two races and the denial of the inferiority of the Negro. If racial differences do not exist, then these writers are asking for equality for equal races, but if differences do exist, then they are asking for equality for unequals and the very basis of their argument is refuted. * * *

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History and science refute the doctrine of the equality of the white and Negro races which is proclaimed by the proponents of racial equality in the United States today. There are inequalities and differences between the white and black races, and all the history of civilization affirms that the superior position belongs to the Caucasian. * * *

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If any Negro reads this chapter and has just reason to think that he does not possess the inferior qualities of mind, body, and spirit which the greatest and most reliable scientists—students of the comparative qualities of the races—have pointed out, then let him thank God for that portion of white blood which flows through his veins because of the sin of miscegenation on the part of one or more of his ancestors."[16]

[16] Bilbo, *op. cit.* at 49, 82, 93.

The notion of racial inferiority doubtless pervades all contemporary discrimination against the Negro. Yet, it is often disguised in other fears and prejudices, and sometimes plays only a small part in the hostility of the white.[37] Here, however, in the area of public accommodations, the dogma of Negro inferiority is obviously the only operative force. Denying the Negro the right to sit to eat in a public place, because white persons are eating, is plainly to tell him he is "not good enough." [38] It is a pure symbolism, directly borrowed from the etiquette of slavery.[39] There can be no doubt that the unvarying repetition of such a gratuitous insult in denying a common privilege marks the public degradation of the race.

B. THE STATES HAVE SHARED IN ESTABLISHING THE SYSTEM OF RACIAL SEGREGATION OF WHICH DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION IS AN INSEPARABLE PART

In the communities from which these cases arise and in thousands of other cities and towns forced segregation in places of public accommodation is practiced without the legal compulsion upon the proprietors found in such instances as *Peterson* v. *Greenville,* 373 U.S. 244. To portray it as a purely private custom, however, is quite erroneous. As the *Peterson* case shows, the practice has often been required by law in the very kind of establishments with which

[37] See, *e.g.*, Myrdal, *op. cit.*, pp. 582–586; Cash, *op. cit.*, pp. 123–139.

[38] L. Smith, *Killers of the Dream* (1949), pp. 19, 29.

[39] Doyle *The Etiquette of Race Relations in the South* (1937), pp. 18–20, 22, 60.

these cases are concerned. Far more important, the practice of segregation at places like lunch counters, restaurants and amusement parks is an inseparable aspect of the entire system of public racial segregation, and that system is the product of a combination of private action and State action violative of the Fourteenth Amendment.

We are not concerned with the distant past. State action prior to the Fourteenth Amendment is irrelevant. The interrelationships between segregation where food and amusement are furnished and other parts of the system cannot be understood, however, nor can the full significance of the States' activities be described, without a sketch of the historical background.

Slavery and the Free Negro before the Civil War

Of slavery itself little need be said. It is enough to remember that slaves were treated in law as the property of their masters and were accordingly wholly deprived of any social, civil or political rights. To say they were viewed as "inferiors" is to understate. As the spirit of abolition increased, and perhaps as a sense of guilt grew stronger, the defense of the institution not unnaturally grew more severe. If the Supreme Court of Florida represented the official attitude, it is difficult to exaggerate the temper of the times:

"There is no evil against which the policy of our laws is more pointedly directed than that

> of allowing slaves to have any other status than that of pure slavery. * * *[40]

More revealing for our purpose, however, is the legal status of the free Negro in the United States before the War, for here the disabilities inflicted could only be justified on the ground of the inferiority of the whole race. Whatever their motives,* the fact is that most of the States (including many that had abolished slavery) seriously disadvantaged the "free person of color" and thereby branded him an inferior being. He was generally disenfranchised, was barred from coming into most States, and his movements, even within his own State, were seriously curtailed.[42] But it was in the slave States that the law treated him most harshly.

Thus, in Maryland, every Negro was presumed a slave unless he could prove otherwise.[43] Even when recognized as a freeman, he could neither vote[44] nor

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[40] *Miller* v. *Gaskins*, 11 Fla. 73, 78 (1864).

[41] The free Negro was a source of anxiety for a number of reasons: he might arouse the slaves to dissatisfaction and insurrection; might enter into competition with white labor; might plunder, rob, or murder whites; and finally might offend simply by being a misfit in an otherwise bifurcated society. See Dumond, *Antislavery* (1961), pp. 119–125; Weyl, *The Negro in American Civilization* (1960), pp. 52–58; Doyle, *The Etiquette of Race Relations in the South* (1937), pp. 85–93.

[42] See II Hurd, *The Law of Freedom and Bondage in the United States* (1862), pp. 2–218; Dumond, *op. cit.*; Weyl, *op. cit.*; Doyle, *op. cit.*

[43] *Burke* v. *Joe*, 6 Gill. & Johns. 136 (1834); *Hall* v. *Mullin*, 5 Har. & Johns. 190, 192 (1821). For the similar rule obtaining elsewhere, see cases reported in Wheeler, *Law of Slavery* (1837), pp. 392–408.

[44] Md. Laws, 1801, ch. 90; 1809, ch. 83; 1810, ch. 33; Md. Constitution, 1851, Art. I, § 1. These provisions, and those cited in notes 45–49, *infra*, are set out in II Hurd, *op. cit.*, pp. 19–24.

testify in court, except as against another Negro.[45] He could not engage in certain occupations,[46] or freely contract with respect to his own labor;[47] and he was subject to greater pains and penalties for offenses,[48] liable to being sold as a slave and deported from the State.[49] We refer to the opinion of Roger Taney (later Chief Justice) while Attorney General of the United States:

> The African race in the United States even when free, are everywhere a degraded class, and exercise no political influence. The privileges they are allowed to enjoy, are accorded to them as a matter of kindness and benevolence rather than of right. They are the only class of persons who can be held as mere property, as slaves. And where they are nominally admitted by law to the privileges of citizenship, they have no effectual power to defend them, and are permitted to be citizens by the sufferance of the white population and hold whatever rights they enjoy at their mercy. They were never regarded as a constituent portion of the sovereignty of any state. But as a separate and degraded people to whom the sovereignty of each state might accord or withhold such privileges as they deemed proper. They were not looked upon as citizens by the contracting parties who formed the Constitution. They were evidently not supposed to be

[45] Laws 1801, ch. 109; 1846–1847, ch. 27.
[46] [illegible] ch. 80; Code 1860, Art. 66, § 74.
[47] [illegible] 1854, ch. 273; Code 1860, Art. 66, §§ 76–87.
[48] [illegible] 1825–1826, ch. 93.
[49] [illegible]–1857, ch. 229, § 9; Code 1860, Art. 66, § 53.

> included by the term *citizens*. And were not intended to be embraced in any of the provisions of that Constitution but those which point to them in terms not to be mistaken.
>
> * * * Our constitutions were not formed by the assistance of that unfortunate race nor for their benefit. They were not regarded as constituent members of either of the sovereignties and were not therefore intended to be embraced by the terms, *citizens of each state*.[50]

In Florida, his condition was no better. There the free Negro required a "guardian" without whom he could not contract.[51] Encouraged to re-enslave himself,[52] he was taxed for the privilege of remaining free.[53] Worst of all was the lot of the freedman in South Carolina: there, too, Negroes were taxed and required to have guardians.[54] The official hostility of South Carolina toward the free Negroes is best shown in the enactment of 1823 (7 Stat. 463) which provided for the imprisonment of colored seamen during the stay of any vessel in a local port, a law enforced in defiance of the judgment of Mr. Justice Johnson, sitting on circuit, and an opinion of the Attorney General, that it was unconstitutional.[55] We add only the report of a law passed on the eve of secession which required every free Negro in South Carolina

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[50] Swisher, *Roger B. Taney* (1936), p. 154.

[51] Fla. Laws 1847–1848, ch. 155; 1856, ch. 794, 795. For these provisions and those cited in notes 52 and 53, *infra*, see II Hurd, *op. cit.*, pp. 190–195.

[52] *Id.*, 1858–1859, ch. 860.

[53] *Id.*, 1842, ch. 32.

[54] 7 S.C. Stat., 461, §§ 2, 7 (1822). See II Hurd, *op. cit.*, p. 97.

[55] Weyl, *The Negro in American Civilization* (1960), pp. 60–61; 1 Op. Atty. Gen. 659 (1824).

literally to wear a badge, identifying him by name, occupation and number.[56]

Emancipation and its aftermath

It is against this background that the Thirteenth Amendment was adopted. In light of the condition of the nominally free Negro in the South, it is fair to suppose that it was viewed as a charter of freedom for all Negroes, slave or not. Indeed, the Civil Rights Act of 1866,[57] passed as implementing legislation, does not distinguish between the new freedman and the old. It was the Negro as a race that was intended to be given civil equality, to be freed of the badge of inferiority which had been imposed on all persons of color. So also, when the slaveholding States enacted their Black Codes in 1865 and 1866, recognizing the abolition of slavery as such, but subordinating the Negro in a hundred other ways, they did not distinguish between the former slave and the free person of color. They dealt indiscriminately with every person "tainted" with Negro blood, to the extent of 1/8th or even 1/16th.[58] All were equally disadvantaged and set apart as an inferior people.

The tenor of these post-war codes is sufficiently known. Some openly and directly disabled the Negro

[56] II Hurd, *op. cit.*, p. 100 (these enactments are not to be found in the laws of 1860. Hurd states they were reported in the "public journals" of the time).

[57] 14 Stat. 27.

[58] The substance of most of these codes is given in McPherson, *Political History of the United States During the Period of Reconstruction* (1871), pp. 29–44, and in 1 Fleming, *Documentary History of Reconstruction* (1906), pp. 273–312 (1906).

from meaningful participation in the public life of the community. Thus, in Mississippi, the freedman was effectively kept a servant on the plantation by provisions which recognized his right to purchase and inherit personal property, but not real property,[59] and forbade his renting or leasing real estate except in incorporated towns, where authorized by the local authorities;[60] which required him to be employed by a written contract,[61] except by official license, revocable at will;[62] permitted minor Negroes to be forcibly "apprenticed";[63] and provided for the arrest and return of both classes to their employer for breach of the contract.[64] The injustice here was flagrant: While the Negro was sparingly granted some new rights—the right to marry, but not with whites,[65] the right to testify, but only when Negroes were involved in the proceeding[66]—they were, at the same time, held to "the same duties and liabilities existing among white persons—to support their indigent families, and all colored persons," and were accordingly taxed for that purpose.[67]

The laws of Mississippi are perhaps extreme in their unwillingness to allow the Negro to find a new life, in freedom. But other codes reflect the same at-

[59] Mississippi Laws 1865, ch. 4, § 1.
[60] *Ibid.*
[61] *Id.*, ch. 4, § 6.
[62] *Id.*, ch. 4, § 5.
[63] *Id.*, ch. 5, § 1.
[64] *Id.*, ch. 4, §§ 7, 8; ch. 5, § 4.
[65] Id., ch. 4, §§ 2, 3.
[66] *Id.*, ch. 4, § 4.
[67] *Id.*, ch. 6, § 6.

titude, differing only in degree. The legislation of South Carolina, for instance, was plainly calculated to preserve the old order, the parties now being denominated "master and servant."[68] The series of laws there begins with one entitled "An Act preliminary to the legislation induced by the Emancipation of Slaves," which officially creates a class, including all Negroes, mulattoes and mestizoes, and their descendants, who have not 7/8ths or more "Caucasian blood," labelled "persons of color," and declares that "although such persons are not entitled to social or political equality," they shall enjoy certain specified rights, including the benefit of legal proceedings, "subject to * * * modifications" to be made.[69] There follow statutes creating special crimes for "persons of color,"[70] imposing different penalties for crimes common to both races,[71] and establishing separate judicial procedures,[72] regulating in detail the relationship of "master and servant,"[73] and disabling the Negro from engaging in the sale, for his account, of any agricultural product,[74] from manufacturing or retailing spirits,[75] or, for that matter, from carrying on any trade or business, "besides that of husbandry, or that of a servant," except by special license from

[68] See S.C. Acts 1865, p. 295 (No. 4733, § XXXV).
[69] *Id.*, p. 271 (No. 4730).
[70] *Id.*, pp. 271, 276 (No. 4731, §§ I, XXII).
[71] *Id.*, pp. 271, 272, 277 (No. 4731, §§ I, IV, XXIV, XXVII).
[72] *Id.*, pp. 279–280, 281, 283, 286, 286–287 (No. 4732, §§ V, VII, XX, XXIX, XXXI, XXXII, XXXIII).
[73] *Id.*, pp. 292–299 (No. 4733, §§ XV–LXXI).
[74] *Id.*, p. 274 (4731, § X).
[75] *Id.*, p. 275 (4731, § XIV).

the district judge.[76] Finally come the "pauper" and "vagrancy" laws[77] which appear to have served much the same purpose as enactments of a more recent day against "disturbing the peace," "disorderly conduct," and "trespass."[78]

In Florida, the situation was much the same.[79] We need only notice the law enacted in January 1866, making it a misdemeanor for any "person of color" to "intrude himself into any religious or other public assembly of white persons, or into any railroad car or other public vehicle set apart for the exclusive accommodation of white people."[80] The rest was left to the towns and cities where "the free white male inhabitants over the age of twenty-one years" were permitted to elect a local government "with full power and authority * * * to license and regulate retailers of liquor and taverns," to "license and regulate theatrical and other public amusements," and to "provide for the interior police and good government" of the community.[81]

It was to combat the spirit of these black codes that Congress enacted the Civil Rights Act of 1866 and proposed the Fourteenth Amendment. Reconstruction followed. While segregation in schools

[76] *Id.*, p. 299 (No. 4733, § LXXII).

[77] *Id.*, pp. 300–304 (No. 4733, §§ LXXXI–XCIX).

[78] See, *e.g.*, testimony taken by the Joint Committee on Reconstruction, House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, pp. 61, 126, 177; *Freedom to the Free* (United States Commission on Civil Rights, 1963), p. 33.

[79] See Fla. Laws 1865–1866, pp. 23–39.

[80] *Id.*, p. 25, ch. 1,466, § 14.

[81] *Id.*, pp. 41–43, ch. 1,479, §§ 1, 3.

sometimes remained,[82] several Southern States enacted more or less broad laws banning racial discrimination in places of public accommodation.[83] South Carolina enacted such laws in 1869, and ~~also~~ 1870, covering common carriers and all businesses "for which a license is required by law" or "under a public rule" and expressly referring to theatres and "places of amusement or recreation."[84] The Florida statute of 1873[85] provided:

> * * * no citizen of this State shall, by reason of race, color, or previous condition of servitude, be excepted or excluded from the full and equal enjoyment of any accommodation, advantage, facility, or privilege furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers, or lessees of theatres or other places of public amusement; by trustees, commissioners, superintendents, teachers, and other officers of common schools and public institutions of learning, the same being supported by moneys derived from general taxation, or authorized by law, also of cemetery associations and benevolent associations, supported or authorized in the same way: *Provided,* That private schools,

[82] See *e.g.*, Ala Laws 1868, p. 148; Ala. Laws 1873, p. 176; Ala. Const. 1875, Art. XIII, § 1, Ark Laws 1873, p. 423; Ga. Laws 1872, p. 69; Ky. Laws 1873–1874, p. 63; Tenn. Laws 1868–1869, p. 14.

[83] Ark. Laws 1873, pp. 15–19; Ga. Laws 1870, pp. 398, 427–428; La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1873, p. 156; Miss. Laws 1873, p. 66. For South Carolina and Florida statutes, see notes following.

[84] 14 S.C. Stat. 179, 386.

[85] Fla. Laws 1873, p. 25, ch. 1947.

cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by voluntary contributions, shall remain according to the terms of the original establishment.

Jim Crow and segregation

As soon as Reconstruction ended in 1877, and often before, segregation in public schools was established or resumed. That is true of the three States at bar,[86] where the official policy continued uninterruptedly, at least until this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483.[87] The undeviating public example must have had its effect. And segregation in the schools doubtless educated a new generation in the theory of the Negro's inferiority which required his being kept apart. So, also, the reiterated legal ban on interracial marriages, or miscegenation,[88] must have impressed upon any who were otherwise disposed that the "accepted," "official" doctrine viewed the Negro as an untouchable. Yet, for a time, there was little segregation, in fact or in law, in

[86] Maryland: Laws 1870, ch. 392, pp. 555–556; Laws 1872, ch. 377, pp. 650–651; Laws 1898, ch. 273, pp. 814–817; South Carolina: Const. 1895, Art. XI, § 8; Acts 1896, No. 63, p. 171; Acts 1906, No. 86, pp. 133–137; Florida: Const. 1885, Art XII, § 12; Laws 1895, ch. 4335, p. 96.

[87] See Fla. Stat. (1960), § 228.09; S.C. Code (1962), §§ 21-751, 21-809, 22-3; Md. Code (1957), Art. 65A, § 1; Art. 77, §§ 226, 279.

[88] Maryland: Laws 1884, ch. 264, p. 365; South Carolina: Acts 1879, p. 3; Const. 1895, Art III, § 33, p. 20; Florida: Laws 1881, ch. 3283, pp. 86, 753; Const. 1885, Art. XVI, § 24; Laws 1903, ch. 5140, p. 76.

places of public accommodation.[89] Neither Florida nor South Carolina, though now free of federal interference, immediately repealed its anti-discrimination statute,[90] and Maryland (though never "reconstructed") acquiesced in the removal of such Jim Crow regulations as had existed.[91]

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[89] See, Woodward, *The Strange Career of Jim Crow* (1955), pp. 15–26.

[90] The Florida law is preserved in the codification of 1881. Fla. Digest 1881, ch. 19, pp. 171–172, and was not repealed until 1892. See Fla. Laws 1891, ch. 4055, p. 92; Fla. Rev. Stat. 1892, p. VIII. The similar South Carolina statute was retained in the 1882 Code (§§ 1369, 2601–2609) and was repealed in 1887 and 1889. See S.C. Acts 1886–1887, No. 288, p. 549; *id.* 1888–1889, No. 219, p. 362. See, also, Tindall, *South Carolina Negroes, 1877–1900*, pp. 291–293.

[91] Prior to 1870, the street car company in Baltimore had followed the practice of relegating Negroes to the front platform of the cars where they were unable to sit and were exposed to the elements. In April, 1870, U.S. Circuit Court Judge Giles ruled this practice discriminatory, awarded damages to a Negro who had been ejected from a seat inside the street car and held that the railway company was required to furnish its Negro passengers with accommodations comparable to that furnished white passengers. *Thompson* v. *The Baltimore City Passenger Railway Co.*, reported in *Baltimore American*, April 30, 1870, p. 1, col. 6, p. 2, col. 1. Pursuant to this ruling the railway company designated certain cars for "colored persons" but editorial comments in the *Baltimore American* indicate that voluntary desegregation on these cars took place at the initiative of white patrons. *Baltimore American*, November 11, 1871, p. 2, col. 2; November 14, 1871, p. 2, col. 1. In 1871, a Negro challenged the establishment of separate cars and the jury, charged by Judge Bond that a person seeking transportation might not be ejected from a car "because of color only," awarded him $40. *Fields* v. *Balitimore City Passenger Railway Co.*, reported in *Baltimore American*, November 14, 1871, p. 4, col. 3; *Baltimore Sun*, November 13, 1871, p. 4, col. 2.

But this more benevolent official attitude was not to endure. Jim Crow laws applicable to trains and street cars began to appear. Among the States here involved, Florida leads with an 1887 statute requiring separate first-class railroad cars for the two races.[92]

This decision was widely approved as illustrated by the following editorial comment from the *Baltimore American*, November 14, 1871, p. 2, col. 1:

"THE COLORED CAR QUESTION

"We congratulate our community on the disappearance yesterday of the sign-boards on the cars of the City Passenger Railway—'*Colored Persons admitted to this Car.*'

"We think that our most intelligent merchants, as well as all others who are looking to the commercial and industrial advancement of Baltimore, will heartily thank Judge Bond for his decision in the Passenger Railway case, at least so far as it has caused the prompt disappearance from the cars of the Company of those badges of a dead prejudice, which ought to have been removed long since. * * *

"When our city was crowded with strangers from all parts of the country attending the great convocations here, this relic of a dead prejudice was the subject of constant remark. It had disappeared from the cars everywhere except here in Baltimore, and although assured it rather represented the prejudice of a private corporation than the sentiment of the people, they expressed surprise that our Courts allowed them to thus trifle with law and justice. It was at this time that we appealed to the Company to cease flaunting in the face of strangers this badge of shame, and not to await the action of the Courts to compel an impartial enforcement of the law. We cannot keep pace with the progress of the age in liberal and humanitarian sentiment if such things are allowed, and it becomes the duty of all who are looking to a brighter future for our city to make haste to get rid of any remnant of feeling that would indicate that we are not a law-abiding and liberal-minded people."

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[92] Fla. Laws 1887, ch. 3743, p. 116.

A decade later, in 1898, South Carolina adopted a similar provision,[93] specifying, however, that "any first-class coach may be divided into apartments, separated by a substantial partition, in lieu of separate coaches."[94] It is typical of the general pattern toward pervasiveness and rigidity that two years later the divided coach was decreed insufficient separation, the new law requiring altogether separate cars, and that the Jim Crow rule was extended to the entire train, not solely the first-class coaches.[95] The Maryland legislation, beginning in 1904,[96] followed the same course.[97]

Once begun, the march of segregation legislation continued. The Jim Crow rule was now applied to all common carriers, including steamboats[98] and street cars.[99] While once only the conveyances themselves had been segregated, the new laws decreed separate waiting rooms and ticket windows.[100] The injunction and the penalty, originally running against the carrier alone, were now made applicable to the reluctant passenger also: not only must the company furnish

[93] S.C. Acts 1898, No. 483, p. 777–778.

[94] *Id.*, § 2.

[95] S.C. Acts 1900, No. 262, pp. 457–459.

[96] Md. Laws 1904, ch. 109, p. 186.

[97] Md. Laws 1908, ch. 292, p. 86. See, also, Fla. Laws 1909, ch. 5893, § 1, p. 407, banning the divided care except by special permission from the railroad commission.

[98] See, *e.g.*, Md. Laws 1904, ch. 110, p. 188; Md. Laws 1908, ch. 617, p. 85; S.C. Acts 1904, No. 249, p. 438.

[99] See, *e.g.*, Fla. Laws 1907, ch. 5617, p. 99; Md. Laws 1908, ch. 248, p. 88; S.C. Acts 1905, No. 477, p. 954.

[100] See, *e.g.*, Fla. Laws 1907, ch. 5619, p. 105.

separate accomodations, but the user must obey the sign under the threat of criminal sanctions.[101]

The State next turned to its own institutions. Public school segregation was continued, and separation was decreed for State prisons,[102] reformatories,[103] asylums,[104] hospitals.[105] Later, they would enact segregation in public parks, playgrounds and beaches.[106] But the legislators did not concern themselves only with governmentally operated facilities. We have already noticed the continuing official bar on interracial marriages.[107] Very early, the State also expressly prohibited mixed private schools,[108] and Florida, at least, made it a crime for white teachers to teach Negro children or the reverse.[109] While the regulation of privately owned places of public accommodation, other than common carriers, was, quite naturally, largely left to the municipalities, statewide leg-

[101] See Fla. Laws 1905, ch. 5420, p. 99; Fla. Laws 1907, ch. 5617, § 6, p. 100; Md. Laws 1904, ch. 109, § 4, p. 187; Md. Laws 1904, ch. 110, § 3, p. 188; S.C. Acts 1900, No. 262, § 5, pp. 457–458.

[102] See, *e.g.*, Fla. Laws 1905, ch. 5447, § 1, p. 132; Fla. Laws 1909, ch. 5967, p. 171; S.C. Acts 1906, No. 86, pp. 133, 136–137; S.C. Acts 1911, No. 110, p. 169.

[103] S.C. Acts 1898, No. 483, p. 777–778.

[103] Md. Laws 1870, ch. 392, p. 706; Md. Laws 1882, ch. 291, p. 445; Fla. Laws 1897, ch. 4167, pp. 107–108; Fla. Laws 1909, ch. 5967, pp. 171–172; S.C. Acts 1900, No. 246, pp. 443–444.

[104] Baltimore Ordinances 1888, § 34–43; Md. Laws 1910, ch. 250, pp. 234, 237–240; S.C. Acts 1918, No. 398, pp. 729, 731.

[105] Md. Code 1912, § 199A.

[106] S.C. Acts 1934, No. 893, p. 1536.

[107] See note 88, *supra*.

[108] Fla. Laws 1895, ch. 4335, p. 96.

[109] Fla. Laws 1913, ch. 6490, p. 311.

islation sometimes set the example here too. Thus, in 1906, South Carolina required segregation of station restaurants and "eating houses" serving passengers,[110] and later enjoined circuses and travelling shows to provide separate entrances for each race.[111] There was, finally, a law keeping the races apart in poolrooms and billiard halls.[112]

Where the central State government did not act directly, segregation was promulgated by the municipal authorities. Illustrative are the segregation provisions of the City Code of Greenville, South Carolina, repealed on May 28, 1963, after this Court's decision in *Peterson* v. *Greenville,* 373 U.S. 244. An entire chapter of that Code is devoted to "Segregation of Races." Explicitly announcing an "intent and purpose * * * to provide for the separation or segregation of races in the city,"[113] it proceeds, methodically, to define "white" and "colored" blocks,[114] and decrees segregation in housing,[115] churches,[116] schools,[117] hotels,[118] stores,[119] restaurants, cafes, and all other places serving food, including lunch counters,[120] and transportation.[121] Elsewhere in the Code it is made generally unlawful "for any colored person to

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[110] S.C. Acts 1906, No. 52, p. 76

[111] S.C. Acts 1917, p. 48 (S.C. Code (1962), § 5–19).

[112] S.C. Acts 1924, p. 895 (S.C. Code (1962), § 5–503).

[113] Greenville City Code (1953), § 31–4.

[114] *Id.*, § 31–1.

[115] *Id.*, § 31–2, 9, 10.

[116] *Id.*, § 31–5.

[117] *Id.*, § 31–6.

[118] *Id.*, § 31–7.

[119] *Id.*, § 31–7.

[120] *Id.*, § 31–8. See, also, *id.*, § 16–35, requiring restaurants to provide separate toilets for white and colored employees.

[121] *Id.*, § 31–12 *et seq.*; § 37–30.

enter upon or go through any of the city cemeteries or grounds connected therewith, used exclusively for the burial of white persons * * *."[122]

While the number of similar municipal regulations is not known, it is clear that the example just recited is not atypical.[123] The City Code of Greenwood, S.C., amended only last June, was quite similar.[124] Some of the provisions elsewhere are truly bizarre.[125] One

[122] *Id.*, § 8–1.

[123] See, *e.g.*, Birmingham, Ala. Code (1944): restaurants (§ 369); theatres (§ 859); poolrooms (§ 939); restrooms (§ 1110); housing (§ 1604); Montgomery, Ala. Code (1952): restrooms (§ 13–25); restaurants (§ 10–14); theatres (§ 34–5); poolrooms (§ 25–5); parks and swimming pools (§ 28A–2); athletic contests (§ 28A–5); Selma, Ala. Code (1956 Supp.): recreational facilities (§ 627–1); restaurants (§ 627–6); Atlanta, Ga. Code (1942): public assemblies (§ 36–64); parks (§ 38–31); theatres (§ 56–15); Augusta, Ga. Code (1952): barbershops (§ 8–2–26); Monroe, La. Code (1958): cemeteries (§ 7–1); bars (§ 4–24); New Orleans, La. Code (1956): bars (§ 5–61.1); Shreveport, La. Code (1955): housing (§ 8.2); toilets (§§ 8.3, 11–47); loitering by whites in Negro districts a form of vagrancy (§ 24–56); restaurants (§ 24–36); Meridian, Miss. Code (1962): jails (§ 17–97); Natchez, Miss. Code (1954): cemeteries (§ 5.6); Jackson, Miss. Code (1938): cemeteries (§ 546); Asheville, N.C. Code (1945): housing (§ 3–23–636); cemeteries (§ 2–5–109); sexual relations (§ 2–7–120); Charlotte, N.C. Code (1961): restrooms (§ 13–13–11); poolrooms (§ 11–11–2(b)); Danville, Va. Code (1962): cemeteries (§ 18–13); Norfolk, Va. Code (1950): cemeteries (§ 9–30). Some of these ordinances have been repealed or amended during 1962 and 1963.

[124] Greenwood City Code (1952), ch. 24.

[125] See, *e.g.*, Montgomery, Ala., Code (1952) ch. 20–28 and Gadsden, Ala., Code § 8–18 (1946), which provide in pertinent part:

"It shall be unlawful for a negro and a white person to play together * * * in the city in any game of cards, dice, dominoes or checkers * * *."

Charlotte, N.C., Code (1961) § 13–13–15(a) provides in pertin-

obviously degrading provision common to most Southern municipalities, and perhaps to all, is the requirement of the "Southern Standard Building Code" that "where negroes and whites are accommodated there shall be separate toilet facilities provided for the former, marked 'For Negroes Only'." [126] By virtue of a regulation of the State Administrative Code,[127] that is the law of Florida even today. And where municipal laws do not explicitly provide for segregation in places of public accommodation, there are related laws. Thus, in addition to a rather recent regulation providing for segregation in bars and in restaurants serving liquor,[127a] Baltimore City at one time or another decreed segregation in housing and

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ent part: "No person shall give a public exhibition * * either on canvas or otherwise, of any prize fight * * * wherein the contestants * * * are persons of different races."

In 1917, the New Orleans, La., Commission Council adopted an ordinance prescribing a specific area of the city wherein Negro houses of prostitution could be maintained and prohibiting peripatetic Negro prostitutes from plying their trade in other parts of the city. New Orleans, La., Comm'n Council Ord. No. 4485 (1917).

[126] Southern Standard Building Code 1957–58, § 2002.1. See *e.g.*, Spartanburg, S.C., City Code (1958), §§ 28–45, 28–76(a); Spartanburg Plumbing Code (1961), § 921.1.

[127] Fla. Adm. Code, ch. 170C, § 8.06. See *Bohler* v. *Lane* (S.D. Fla.), 204 F. Supp. 168, 172–173. The same practice obtained in Maryland until 1960. See *Jones* v. *Marva Theatres, Inc.* (D. Md.), 180 F. Supp. 49.

[127a] See *DeAngelis* v. *Board* (Baltimore City Ct.), 1 R.R.L.R. 370 (1955), holding the regulation unconstitutional.

use of land,[128] in municipal parks and playgrounds [129] and in a free library.[130] Tampa, Florida, prohibits the operation of any "public inn, restaurant, or other place of public accommodation and refreshment" serving Negroes in a "white community," without the consent of a majority of the white residents.[131] Until 1961, Jacksonville, in the same State, segregated buses [132] and taxicabs,[133] and, for a time at least, expressly required separation of the races in all taverns.[134]

While there are important variations from State to State, and even from one town to another, the basic pattern has been the same. Some communities, like those here involved, have not explicitly compelled racial segregation in places of public accommodation. Yet, there can be no doubt that each of the States at bar, until very recently, has encouraged those practices.

Here, as elsewhere, the official philosophy of the Negro's inferiority was affirmed in the legal defini-

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[128] Ordinance #610, December 19, 1910; Ordinance #664, April 7, 1911; Ordinance #692, May 15, 1911; Ordinance #839, September 25, 1913.

[129] See *Boyer* v. *Garrett* (4th Cir.), 183 F. 2d 582, certiorari denied, 340 U.S. 912; *Law* v. *Mayor and City Council of Baltimore* (D. Md.), 78 F. Supp. 346; *Dawson* v. *Mayor and City Council of Baltimore City* (4th Cir.), 220 F. 2d 386, affirmed, 350 U.S. 877.

[130] *Kerr* v. *Enoch Pratt Free Library of Baltimore City* (4th Cir.), 149 F. 2d 212, certiorari denied, 326 U.S. 721.

[131] Tampa City Code (1937), § 18–107.

[132] Jacksonville City Code (1953), §§ 39–65, 39–70.

[133] *Id.*, §§ 39–15, 39–17.

[134] Jacksonville City Code (1917), § 439. While the provision is not incorporated in the more recent codes, no express repeal was found.

tion of the race, branding as "tainted" any person with so much as 1/8th Negro ancestry,[135] in the strict ban on interracial marriages,[136] and by a construction of the libel law which recognized it as an insult, actionable *per se*, to be wrongly called a Negro.[137] Here, as elsewhere, compulsory school segregation laws taught white children from the first that Negroes were inferiors and impressed on colored children that they were not fit to share a schoolhouse with the white. Here, as elsewhere, the State set an example by officially segregating all its own facilities. And here, as elsewhere, until very recent days, the story of segregation legislation has had only one direction, becoming ever more rigid and more pervasive, as though to give legal support to a threatened institution.

We do not mean to disparage the differences even among the former slave-holding States in their past and present laws dealing with segregation. Maryland's laws and official policies have been far less rigid than those of South Carolina. Some states have vehemently pursued an official policy of segregation, while others have taken first steps to adapt themselves to constitutional requirements: Louisiana's rigid insistence upon preserving segregation, which illustrates one extreme, is described at pages 59–78 of our brief

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[135] Fla. Stat. § 1.01(6) (1961); Md. Code 27, § 398 (1957); S.C. Const. Art. III, § 33.

[136] Fla. Const., Art. XVI, § 24; Fla. Stat. 741.11–741.16 (1964); Md. Code (1957), Art. 27, § 398; S.C. Const., Art. III, § 33; S.C. Code § 20–7 (1962).

[137] See Annotation, 46 A.L.R. 2d 1287 (1956); *Bowen* v. *Independent Publishing Company*, 230 S.C. 509, 96 S.E. 2d 564.

in *Avent* v. *North Carolina* and companion cases (Nos. 11, 58, 66, 67, and 71, October Term, 1962). Although thirty States have equal public accommodations laws, neither respondents nor any of the States that promoted segregation have wiped the slate clean.[138]

We are concerned with institutions—not with blame. If there is to be blame for the revival of the caste system in the face of the Thirteenth, Fourteenth and Fifteenth Amendments, it should rest upon the Nation. Our point is that the respondents and some sister States massively contributed to the system of segregation by laws and official action. Between State law and private custom there was a symbiotic relation; they nourished each other and together produced the institution.

There can be no doubt that the State laws discussed above contributed to the establishment and practices of segregation in places of public accommodation. The legislation requiring segregation in public conveyances and upon carriers came too close to restau-

[138] Thus, each of the respondent States still retains school segregation laws on its statute books. See note 87, *supra*. With respect to Florida, see, also, *Florida* ex rel. *Hawkins* v. *Board of Control*, 347 U.S. 971, 350 U.S. 413, 355 U.S. 839. Segregation on common carriers remains the statutory law of Florida and South Carolina. Fla. Stat. (1958), §§ 352.03–352.18; S.C. Code (1962), §§ 58–714 through 58–720, 58–1331 through 58–1340, 58–1491 through 58-1496. South Carolina's law requiring segregated eating at station restaurants is still on the books. S.C. Code (1962), § 58–551. And all three States still prohibit miscegenation and interracial marriages. See Md. Code (1957), Art. 27, § 398; Fla. Stat. (1964), §§ 741.11–741.16; S.C. Code (1962), § 20–7. While Maryland has recently adopted a public accommodations law, it is expressly inapplicable to several counties of the State. Md. Laws 1963, ch. 227.

rants, theatres and other public places to have no influence upon them. No one can seriously argue that the South Carolina law requiring segregation in station restaurants and "eating houses" serving passengers [139] did not strengthen the practice of stigmatizing Negroes as inferiors by denying them the privilege of eating with whites; nor is it unlikely that the State law encouraged municipalities and licensing authorities to adopt similar local regulations.[140] Even as the discriminatory laws were being enacted, Florida and South Carolina were repealing earlier laws, applicable to places of public accommodation. The South Carolina laws of 1869 and 1870 banning racial discrimination by all licensed businesses were eliminated in 1887 and 1889.[141] Florida followed suit in 1892,[142] and, in 1957, expressly declared restaurants and hotels "private" establishments, free to exclude as they chose.[143] Such enactments cannot be read as legal abstractions. In the context of "private attitudes and pressures" toward Negroes at the time of their enactment a "repressive effect" was bound to follow the "exercise of

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[139] S.C. Code (1962), § 58–551.

[140] We have already noticed ordinances in Greenville and Greenwood, S.C., requiring segregation in places of public accommodation. See notes 113–122, 124, *supra*.

[141] See note 90, *supra*.

[142] *Ibid.* Other States waited longer. See, *e.g.*, La. Acts 1954, No. 194, repealing former La. R.S. 4:3–4 (originally La. Acts 1869, p. 37).

[143] See Fla. Stat. (1962) § 509.092. See, also, the statute involved in No. 60, Fla. Stat. (1962). § 509.141. Four other States (all former slave States) have comparable laws expressly permitting places of public accommodation to refuse service. Ark. Stat. Ann., § 71–1801; Del. Code Ann., § 24–1501; Miss. Code Ann. § 2046.5; Tenn. Code Ann. § 62–710.

governmental power." See *Anderson* v. *Martin*, No. 51, this term, decided January 13, 1964, slip opinion, p. 4.

One aspect of the inevitable interaction between segregation in restaurants and other aspects of the system finds a current illustration in Florida. As recently as 1962 the State Board of Health reissued a revised regulation requiring restaurants to provide separate toilet and lavatory rooms wherever colored persons are accommodated (Florida Administrative Code, Chapter 170C, Section 8.06).[144] Not only does this official statement of State policy promote the view that colored persons should be segregated from whites as inferiors, but it has the very practical consequence of discouraging restaurants from accommodating all members of the public equally. Excepting very large restaurants, the financial burden of providing duplicate facilities would be too heavy.

Institutionally, segregation in restaurants, lunch counters and amusement parks is part and parcel of the pervasive, official system of segregation which carries literally from cradle to grave.[145] If it were

[144] The substance of the earlier regulation was identical. See p. 2, *supra*. The text of the current regulation is set out at pp. 99–100, *infra*.

[145] See, *e.g.*, the Louisiana pattern of laws set forth in the concurring opinion of Mr. Justice Douglas in *Garner* v. *Louisiana*, 368 U.S. 157, at 179–181. For similar laws elsewhere, see Murray, *States Laws on Race and Color* (1950), and Greenberg, *Race Relations and American Law* (1959), pp. 372–400. See, generally, Mangum, *The Legal Status of the Negro* (1940).

While there are not explicit statutes in each State for each activity, those set out below doubtless reflect the official view, at least until very recently, in the States at bar.

otherwise possible to view the practices reflected in the cases at bar as individual instances of truly private preference, that assumption becomes absurd in a community which until very recently required the Negro to begin life in a segregated neighborhood,[146] attending separate schools,[147] using segregated parks, playgrounds, swimming pools,[148] which later kept him apart at work,[149] at play,[150] at worship,[151] even at court[152] and while going from one place to another,[153] which confined him in segregated hospitals[154] and prisons,[155] and finally relegated him to a separate burial place.[156] It is this rigidity, this pervasiveness, which makes unique in the American context the discrimination against the Negro. There is no comparable instance in this country of a massive phenomenon which affects some 10 million people in every aspect of life. It has been infused with State support throughout its history.

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[146] See, *e.g.*, City Code of Spartanburg, S.C. (1949), § 23–51.

[147] See, *e.g.*, Fla. Stat. (1961), § 228.09.

[148] See, *e.g.*, the action of the City Commission of Miami directing the resegregation of municipal swimming pools, reported at 4 R.R.L.R. 1066.

[149] See, *e.g.*, S.C. Code (1962), § 40–452, requiring separation in cotton textile factories.

[150] See, *e.g.*, Emergency Ordinance No. 236 of the City of Delray Beach, Fla., reprinted in 1 R.R.L.R. 733 (1956), excluding Negroes from the public beaches.

[151] See, *e.g.*, City Code of Greenville, S.C. (1953), § 31–5.

[152] See, *e.g.*, *Johnson* v. *Virginia*, 373 U.S. 61.

[153] See, *e.g.*, City Code of Greenville, S.C. (1953), § 31–12.

[154] Md. Code Ann. (1939), Art. 59, § 61.

[155] See, *e.g.*, Fla. Stat. (1960), §§ 950.05–950.08; Md. Code (1957), Art. 78A, § 14.

[156] See, *e.g.*, City Code of Danville, Va. (1962), § 18.13.

II

FOR A STATE TO GIVE LEGAL SUPPORT TO A RIGHT TO MAINTAIN PUBLIC RACIAL SEGREGATION IN PLACES OF PUBLIC ACCOMMODATION, AS PART OF A CASTE SYSTEM FABRICATED BY A COMBINATION OF STATE AND PRIVATE ACTION, CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS

We have shown that the refusal to allow Negroes to eat or mingle with whites in these places of public accommodation is a community-wide practice enforced, with State support where necessary, in places regulated by the States and heavily affected with a public interest, and that the practice is an integral part of a system of segregation established by a combination of governmental and non-governmental action and designed to preserve the very caste system that the Thirteenth, Fourteenth and Fifteenth Amendments sought to eradicate. We now submit the legal proposition that for a State to support that practice, either by arrests and criminal prosecution or by recognizing a privilege of self-help, violates the Fourteenth Amendment.

The argument is essentially that where racial discrimination becomes operative through a combination of State and private action the State's responsibility depends upon an appraisal of the significance of all the elements of State involvement in relation to the elements of private choice. Thus, while we stress the presence of the State in the arrests and prosecution, we do not urge that such State action in support of private discrimination is alone enough

to constitute a State denial of equal protection of the laws. Similarly, although it might be argued that the State's influence upon the system of segregation, of which discrimination in places of public accommodation is an integral part, is enough to bring the cases within the principle of *Peterson* v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267, we do not press the argument that far. We rely upon the State's antecedent involvement only as one of the elements in the total complex. Again, while we do not assert that a State violates the Fourteenth Amendment merely by failing to require the proprietor of a place of public accommodation to serve Negroes equally with other members of the public, we do nevertheless urge that the States' close association with such establishments through licensing and regulation constitutes a further element of State involvement and also indicates that the imposition of State responsibility would effectuate the basic purpose of the Thirteenth, Fourteenth and Fifteenth Amendments.[157]

[157] It may be useful also to distinguish another line of analysis. There is considerable ground for arguing that the Fourteenth Amendment imposes upon the States a duty to provide equality of treatment under the law for all members of the public without regard to race in establishments which the proprietor voluntarily throws open to the general public to such an extent that legal protection of the public is a normal part of the legal system. Although there is little direct evidence, the history of the Reconstruction Period furnishes no little support for that thesis. In addition to materials cited at pp. 114–143 below, see Roche, *Civil Liberty in the Age of Enterprise,* 31 U. of Chi. L. Rev. 103, 107–112; Peters, *Civil Rights and State Action,* 3 Notre Dame Lawyer 303; cf. Harris, *The Quest for Equality* (1960), 42–43. The trend of constitutional

A. WHERE RACIAL DISCRIMINATION BECOMES EFFECTIVE BY CONCURRENT STATE AND INDIVIDUAL ACTION, THE RESPONSIBILITY OF THE STATE UNDER THE FOURTEENTH AMENDMENT DEPENDS UPON THE IMPORTANCE OF THE ELEMENTS OF STATE INVOLVEMENT COMPARED WITH THE ELEMENTS OF PRIVATE CHOICE.

Petitioners were convicted as a result of racial discrimination. There was discrimination when they were refused service. It became operative again when they were arrested, tried and convicted of crime. The

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thinking after 1877 points in the opposite direction, but the decisions invalidating direct federal legislation do not require the latter conclusion because all appear to be based upon the absence of any showing that the State failed to provide a remedy for the alleged invasions of individual rights. In the *Civil Rights Cases*, 109 U.S. 3, the Court expressly assumed the availability of a State remedy. See pp. 73–77 below. In *United States* v. *Cruikshank*, 92 U.S. 542, apparently there was no allegation of a wilful default in State protection. *United States* v. *Harris*, 106 U.S. 629, 639–640, states that the gravamen of the charge was that the accused "conspired to deprive certain citizens of the United States and of the State of Tennessee of the equal protection accorded them by the laws of Tennessee." The Solicitor General's brief in the *Harris* case made no contention based upon a technical or practical lack of State protection.

If a State's failure to provide equal protection violates Section 1, then Congress, under Section 5, has power to enact legislation appropriate to securing the equality. In default of Congressional action the victims might lack a direct remedy, for the refusal of the proprietors could be distinguished from the default of the State, but certainly the Court would invalidate any State action, such as arrests and convictions, that enhanced the inequality which the State was constitutionally required to eliminate.

In view of the elements of affirmative State involvement present in these cases, we mention but do not pursue the foregoing line of analysis.

facts can hardly be disputed. Though one may argue the legal consequences, neither the State authorities nor this Court could blind itself to what all the world knows.

If the State, in addition to making the arrests and entering the convictions, had fixed the rule that no Negro should be served there would be a plain violation of the Fourteenth Amendment. If the State had never intervened, and had no duty to act,[158] there would equally plainly be no violation of constitutional rights. The difficulty in the present case is that the discrimination becomes operative through a combination of State and private action.

The resulting problem, though novel in the present particular, is not unfamiliar. In a complex society governmental and private action are increasingly often entwined as well as interdependent. The State acts in many forms and through many channels. Private activity may not only depend upon State permission and State sanctions, but it may benefit from or be stimulated by State subsidies, State regulation and other forms of aid or direction. The cases that have reached the courts are alone enough to demonstrate that invidious discrimination and interference with aspects of individual liberty are increasingly often the product of combinations of private *and* gov-

[158] We do not argue that there is such a duty. See pp. 9–10, 65, no. 157, 20–21, above.

ernmental action.[159] In such a situation there is no

[159] Cases where lessees of or buyers from the State have discriminated: *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (refusal to serve Negro in private restaurant located in public building and leased from the State); *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971, reversing and remanding 202 F. 2d 275 (C.A. 6) (municipally owned amphitheater leased to private association); *Jones* v. *Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md.) (city owned theater leased to private corporation); *Coke* v. *City of Atlanta, Ga.*, 184 F Supp. 579 (N.D. Ga.) (city owned restaurant leased to private corporation); *Lawrence* v. *Hancock*, 76 F. Supp. 1004 (S.D. W. Va.) (city owned swimming pool leased to private corporation); *McDuffie* v. *Florida Turnpike Authority* (not officially reported, see 7 R.R.L.R. 505) (restaurant leased by private party from State turnpike authority); *Department of Conservation & Development* v. *Tate*, 231 F. 2d 615 (C.A. 4) (threatened lease of state park to private persons who would discriminate); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5) (refusal to serve Negroes in cafeteria leased from state and located in courthouse).

Cases where the State required or encouraged segregation by statute or official conduct: *Lombard* v. *Louisiana*, 373 U.S. 267 (refusal to serve Negro in private restaurant in city where public officials encouraged and recommended restaurant segregation); *Peterson* v. *Greenville*, 373 U.S. 244 (refusal to serve Negro in private restaurant in city where ordinance required restaurant segregation); *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.) (State law requiring private common carrier to segregate passengers); *McCabe* v. *A.T. & S.F. Ry Co.*, 235 U.S. 151 (racial discrimination by railroad permitted by state law); *Turner* v. *City of Memphis*, 369 U.S. 350 (State law requiring segregation in private restaurant located in public airport).

Cases where private groups whose power to act derives from State or federal law discriminated: *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192 (federal law conferred exclusive

simple formula for distinguishing State denials of equal protection from individual invasions of the same interests.

Mindful of the variety and complexity of the forms of State action and their relation to racial discrimination and other invasions of fundamental rights, the Court has eschewed the "impossible task" of formulating fixed rules and has sifted the facts and weighed the circumstances of each case in order to attribute "its true significance" to "nonobvious involvement of the State in private conduct." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. "The ultimate substantive question is * * * whether the character of the State's involvement in an arbitrary discrimina-

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bargaining rights on union which discriminated against Negroes).

Cases where the State delegated a governmental function to a private entity: *Terry* v. *Adams*, 345 U.S. 461 (delegation of election function by State to private group which excluded Negroes); *Smith* v. *Allwright*, 321 U.S. 149 (same); *Marsh* v. *Alabama*, 326 U.S. 501 (delegation by State of power to exclude religious solicitors from "company town" and conviction for trespass for refusal to leave).

Cases where the State was involved financially or otherwise in creating or maintaining the private entity which discriminated: *Simkins* v. *Moses H. Cone Hospital*, No. 8908 (C.A. 4, November 1, 1963) (private hospital refusing Negro patients pursuant to statutory authorization although hospital constructed under federal and state plan); *Smith* v. *Holiday Inns of America, Inc.*, 220 F. Supp. 1 (M.D. Tenn.) (private motel located on urban renewal land sold to proprietor who refused to accommodate Negroes); *Kerr* v. *Enoch Pratt Free Library*, 149 F. 2d 212 (C.A. 4) (large-scale public financial support of library which excluded Negroes).

tion is such that it should be held *responsible* for the discrimination." Mr. Justice Harlan concurring in *Peterson* v. *Greenville,* 373 U.S. 244, 249. The required judgment *upon the whole* seems not essentially different in method from the determination of other forms of legal liability for the results of mingled causes.

One of the guiding principles is that a State cannot exculpate itself merely by showing that a private person made the effective determination to engage in invidious discrimination or some other invasion of fundamental rights. Just as there may be two legal causes of injury to the person or property, so State and private responsibility are not mutually exclusive. There are numerous decisions, both in this Court and elsewhere, holding that a State has violated the Fourteenth Amendment where its participation facilitates or encourages discrimination but leaves the decision to private choice. In *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, the State was involved through ownership of the building and there was continuing mutual interdependence as well as association between the State parking facility and the private restaurant; the actual decision to exclude Negroes from the restaurant was made by the restaurant alone. In *Lombard* v. *Louisiana,* 373 U.S. 267, government officials encouraged the discrimination but the decision was private. Mr. Justice Harlan urged in dissent that the State involvement was insufficient if

the decision to discriminate was private, but his view was rejected by the Court.[160]

The principle is not confined to cases of racial discrimination. In *Railway Employees' Dept.* v. *Hanson,* 351 U.S. 225, the federal statute merely removed legal obstacles to private agreements which the parties might conclude or reject, but this was unanimously held sufficient to subject the consequences of the resulting agreements to scrutiny under the First and Fifth Amendments. Compare *Steele* v. *Louisville & N. R. Co.,* 323 U.S. 192; *International Ass'n of Machinists* v. *Street,* 367 U.S. 740. See, also, *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451.

States have also been held responsible where their sole participation was to permit and carry out an exercise of private right. In the *Girard Trust* case the public authorities did no more than give effect to a private individual's testamentary instructions concerning the disposition and use of his property as a public trust. *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230. The State, through a municipal subdivision,

[160] See, also, *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5) (signs designating "white" and "colored" terminal waiting rooms unlawful despite lack of enforcement since signs encourage segregation); *Kerr* v. *Enoch Pratt Free Library,* 149 F. 2d 212 (C.A. 4) (library supported mainly with public funds); *Simpkins* v. *Moses H. Cone Hospital,* C.A. 8908 (C.A. 4, November 1, 1963) (private hospital constructed with federal funds according to state plan and authorized by law to discriminate); *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5) (leased restaurant in courthouse building); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (C.A. 4) (lease of state park to private persons); *Smith* v. *Holiday Inns of America, Inc.,* 220 F. Supp. 1 (M. D. Tenn.) (sale of urban renewal land to private motel corporation).

was continuously and intimately involved because it acted as trustee; the element of individual freedom was diluted by the lapse of a century since the testator's death; but the fact remains that the State was only giving effect to a private decision. *Shelley* v. *Kraemer,* 334 U.S. 1, is still closer to the point for there the State action consisted solely of a legal system which recognized a private right to negotiate covenants running with the land and which enforced such private covenants even when racially discriminatory. Manifestly, there would have been no racial discrimination but for the private choice; and the State did nothing to encourage it. The core of the decision appears to be the judgment that, in that instance of discrimination, which was a product of private contract combined with jural recognition, the elements of law were so significant in relation to the elements of private choice as to require the conclusion of State, as well as private responsibility. See pp. 88–89 below. Accord: *Barrows* v. *Jackson,* 346 U.S. 249.[161]

[161] It may be suggested that in the *Girard Trust* case the State was required to determine whether an applicant was white or Negro, and that in *Shelley* v. *Kraemer* and other cases of restrictive covenants the State gave judgment to the plaintiff only after satisfying itself of the race of the prospective purchaser; whereas in the present cases, the States were evicting the persons deemed objectionable by the managers without the States' inquiring into race or color. Other cases show this difference to be unimportant. In *Peterson* and *Lombard*, as here, the State could say that it proceeded against persons identified as objectionable by the managers *without* asking their race or color. While those cases can be distinguished on the ground that the vice was anterior State intervention looking to race, the distinction is not applicable to *Burton*, where the State could have proved a criminal tres-

There is nothing to the contrary in the *Civil Rights Cases,* 109 U.S. 3, even though they deal with discrimination in places of public accommodation. There the State was not involved in the discrimination either by action or inaction. In issue was the power of Congress under the Thirteenth and Fourteenth Amendments to require the operators of inns, public conveyances, theatres and other places of public amusement to make their facilities equally available to citizens of every race and color, even though there was no showing that the State law failed to secure such rights. The decision was that Congress lacked power to enact the legislation (*id.* at 13).

> * * * until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority.

The refusal of service was then held to be only a private wrong against the argument that the carriers, inns and theatres involved were quasi-public concerns acting for the State. The predicate of the rul-

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pass without showing Burton's color. In a case like *International Association of Machinists* v. *Street*, the reason for the employees' failure to pay dues would not have to be proved to invoke the union shop agreement; yet the employees were allowed to offer the proof in challenging the constitutionality of the governmental action.

ing, however, was that the States not only gave no support to the discrimination but would afford the injured party a remedy.

Discussing in general terms the need for some State involvement to invoke the civil rights guaranteed by the Constitution, the Court reasoned that the wrong done by one individual to another did not impair the constitutional right because the individual aggressor, unless shielded by State law or State authority, "will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed" (109 U.S. at 17). Coming to the Civil Rights Act of 1875, the Court assumed 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 citizens which no State can abridge or interfere with." It observed that, far from positing State failure to secure those rights, the Act of 1875 (*id.* at 19)—

> supersedes and displaces State legislation on the same subject, or only allows it permissive force. It ignores such legislation and assumes that the matter is one that belongs to the domain of national regulation.

The rather plain implication that the Court knew, or at least assumed the States to have laws protecting the very rights in question was made explicit shortly after (*id.* at 25):

> Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to fur-

> nish proper accommodation to all unobjectionable persons who in good faith apply for them.

The same understanding, including also places of amusement, is the predicate of the key passage expressing in the form of a rhetorical question the Court's final judgment upon the issue of State responsibility for the allegedly individual acts of discrimination (*id.* at 24):

> Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, *properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?* [Emphasis added.]

The foregoing passages appear essential to the Court's reasoning. Justice Bradley, who wrote the opinion, had earlier expressed in private correspondence the view that the Fourteenth Amendment laid upon the States an affirmative obligation to secure equality for the freedmen, including the duty to enact protective legislation. Although he later modified his view—but not in relation to businesses normally under a duty of public service—still there is no indication that he was slow to find State involvement.[162]

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[162] "* * * Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient State legislation. I (?) say unfriendly or insufficient: for the XIVth Amendment not only prohibits the *making* or *enforcing of laws* which shall *abridge* the privileges of the citizen; but prohibits the states from *denying* to all persons within its jurisdiction the equal protection of the laws. *Deny-*

The assumption that State law, evenly administered, would usually provide redress for the denial of access to the inns or hotels, carrier, opera house and theatre was not unreasonable. The common law covered most situations within the Act. Many States were enacting still broader equal public accommodation laws.[163] Of

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ing includes inaction as well as action. And denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." From an unpublished draft of a letter by Justice Bradley to Circuit Judge (later Justice) William B. Woods, March 12, 1871, on file, The New Jersey Historical Society, Newark, New Jersey. Attached to the drafts of two letters, including the one to Judge Woods, was a note by Justice Bradley stating: "The views expressed in the foregoing letters were much modified by subsequent reflection, so far as relates to the power of Congress to pass laws for enforcing social equality between the races."

The most convenient source of the pertinent excerpts from the Bradley Papers is *Roche, Civil Liberty in the Age of Enterprise*, 31 U. of Chi. L. Rev. 103, 108–110.

[163] See, for instance: Acts and Resolves of Massachusetts, 1865, ch. 277, p. 650 (no distinction, discrimination or restriction on account of race or color in any licensed inn, public place or amusement, public conveyance, or public meetings); *Ibid;* Jan. sess., 1866, p. 242 (theatres) (Stephenson, *Race Discriminations in American Law* (1910), p. 112.)

New York Statutes, IX, pp. 583–84 (prohibition of race distinctions in inns, public conveyances, theaters, other public places of amusement, common schools, public institutions of learning, cemeteries) (Stephenson, p. 115).

Laws of Florida, 1873, chapt. 1947 (prohibited discrimination on account of race, color, or previous condition of servitude in full and equal enjoyment of the accommodations of inns, public conveyances, licensed theaters, other places of public amusement, common schools, public institutions of learning, cemeteries, benevolent associations supported by general taxation) (Stephenson, pp. 115–116).

Acts of Louisiana, 1869, p. 37; 1870, p. 57 (prohibited discrimination on account of race or color by common carriers,

the five cases before the Court, two involved plain violations of a State statute and two may well have been covered by the common law. Only in one instance—the case involving refusal of a parlor coach seat on a railroad in Tennessee—is it probable that the State would have denied redress, and plainly the Court did not examine that case separately to ascertain whether the State had sanctioned discrimination.[164]

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inkeepers, hotel keepers, keepers of public resorts.); *Id.*, 1873, pp. 156–57 (provided that all persons, without regard to race or color must have "equal and impartial accommodations" on public conveyances, in inns, and other places of public resort) (Stephenson, p. 116).

Acts of Arkansas, 1873, pp. 15–19 (same accommodations to be furnished to all by common carriers, keepers of public houses of entertainment, inns, hotels, restaurants, saloons, groceries, dram-shops or other places where liquor was sold, public schools, and benevolent institutions supported in whole or in part by general taxation) (Stephenson, p. 116).

See also notes 19, 83–85, *supra;* notes 228–236, 241–243, infra.

[164] *United States* v. *Stanley* involved a Kansas inn (hotel). Probably it was covered by the common law but Kansas Laws 1874, p. 82, specifically barred racial discrimination.

United States v. *Ryan*, involved a California theatre. The earliest legislation prohibiting discrimination in theatres was Laws 1893, p. 220. See also, Laws 1897, p. 137. However, the common law duty was extended broadly; for example, to a watering place. See *Willis* v. *McMahon*, 89 Cal. 156 (1891).

In *United States* v. *Nichols*, the Missouri inn or hotel was presumably subject to the common law duty. Indeed, in his brief in the *Civil Rights Cases*, the Solicitor General said: "I premise that upon the subject of *inns* the common law is in force in Missouri * * *." Brief for the United States, Nos. 1, 2, 4, 460, Oct. Term, 1882, p. 8.

United States v. *Singleton* involved the New York opera house. A State statute barred racial discrimination by "theatres or other places of amusement." Laws 1873, p. 303; Laws 1881, p. 541.

The basic distinction between State and private action, stemming from the *Civil Rights Cases*, has important implications in determining what degree of State involvement will carry State responsibility for the purposes of the Fourteenth Amendment. See pp. 84–88 below. The cases hold, however, only that the Amendment gives the federal Congress no power to deal with individual wrongs (not affecting interstate commerce) where there is no State involvement hostile to the right to equal treatment and where State law is available to secure redress. As we read the facts and the opinion, the cases do not even reach the question whether the State is sufficiently involved for there to be a violation of the Fourteenth Amendment when the State fails to secure a right of equal treatment in places of public accommodation. *A fortiori* those decisions do not deal with State recognition of, and sanctions for, an asserted private right to evict Negroes from places of public accommodation as members of an untouchable caste. *A multo fortiori* they do not deal with the only question here—State recognition and sanctions for discrimination in public places where the racial practices of the

Robinson v. *Memphis*, etc. *R.R.* was a private suit growing out of the refusal of accommodations in a railroad parlor coach. The common law duty seems plain but Tennessee Laws 1875, p. 216, expressly repealed the common law rule. Laws 1881, p. 211, however, amended the 1875 statute to require a carrier to furnish separate but equal first class accommodations. The pertinent dates in the *Robinson* case do not appear in the official report, but the Court stated that, as far as it was aware, the public carrier was bound to furnish equal accommodations. 109 U.S. at 25.

proprietors are an integral part of a system of segregation, as a mark of caste, which was adopted and promoted by a mixture of governmental and private action.

There are no other decisions in this Court even arguably inconsistent with our submission that where racial discrimination becomes operative through State and individual action, the State cannot insulate itself from responsibility merely by showing that the decision to discriminate was private. In such a situation, as in other instances of intermingled State and private action, the judgment depends, in the last analysis, upon the size and importance of the elements of State involvement in relation to the elements of private action, both measured from the standpoint of the fundamental aims of the constitutional guarantee. In the present cases the elements of State involvement, measured from that standpoint, outweigh the elements of private action. The State is involved through the arrests and prosecution, where the effect was to enforce the community-wide stigma in virtually all places of public accommodation. The State is also involved because, in weaving the fabric of forced segregation as a means of preserving a caste system, its laws and official policies helped to fill the warp laid down by private prejudice. The State is intimately associated with systematic racial discrimination in places of public accommodation because it has traditionally assumed responsibility over their duties to the public to which they open their business, and the State actually regulates most aspects of the relation-

ship. Conversely, the special character of these establishments emphasizes the minimal significance of the elements of private choice.

We elaborate these points in the next section.

B. IN THE PRESENT CASES THE ELEMENTS OF STATE INVOLVEMENT ARE SUFFICIENTLY SIGNIFICANT, IN RELATION TO THE ELEMENTS OF PRIVATE CHOICE, TO CARRY RESPONSIBILITY UNDER THE FOURTEENTH AMENDMENT.

1. *The States are involved through the arrest, prosecution and conviction of petitioners*

It is beyond dispute that the respondents have provided official sanctions for the imposition of a racial stigma through the intervention of the police, the prosecutor and the courts. While any proprietor is legally free to abandon the practice of racial segregation, the substantial effect of the States' intervention in support of the community-wide practice whenever it is challenged, is to give the practice the force of law insofar as Negroes are concerned, much as if it were an ordinance forbidding Negroes to enter and seek service in any restaurant or lunch counter where whites are eating. Respondents may not deny knowledge of what all the world knows—that they are prosecuting those whose sole offense was peacefully to insist on being treated like other members of the public in a place to which the general public was invited. Cf. *Child Labor Tax Case,* 259 U.S. 20, 37; *United States* v. *Rumely,* 345 U.S. 41, 44.

Before turning to the other elements of State involvement, it is important to digress, first to empha-

size that we would equate police intervention and criminal prosecution with any State recognition of a legal privilege to engage in aggression against a Negro who has peacefully entered and peacefully seeks the same service the proprietor is offering to the public at large, and second, to mark the limits to our reliance upon the arrests and judicial proceedings.

(a) We are not contending that the intervention of the police and the subsequent convictions are a *sine qua non* of State involvement. If the State is involved when it supplies sovereign or physical power in the form of a policeman, the State must be involved when it gives the proprietor the privilege to use force as his own policeman. The reasoning that interdicts State action in the form of arrests and criminal prosecution, when sufficiently associated with the other elements of State involvement as in the present cases, is equally applicable to any jural recognition of a privilege to engage in private aggression. State action for the purposes of the Fourteenth Amendment may take the form of judge-made law as well as legislation. *American Federation of Labor* v. *Swing,* 312 U.S. 321; *Cantwell* v. *Connecticut,* 310 U.S. 296.

We distinguish here between (i) the State's failure to impose an affirmative duty, thus leaving the proprietor of the place of public accommodation free to refuse service, and (ii) the State's creation of a privilege authorizing the proprietor to invade what would normally be the protected interests of another, notably the interest in bodily security. The former

implies indifference. The latter puts the State's *imprimatur* upon the aggression.[165]

In our view, therefore, the Supreme Court of Delaware erred in *State* v. *Brown*, 195 A. 2d 379, in saying that the proprietor of a place of public accommodation has a privilege of using reasonable force to remove Negroes from his establishment pursuant to a policy of racial discrimination. If the Negro seeks police assistance or sues for a battery, State law becomes no less involved than when the proprietor invokes its assistance. The normal rule is that the State will give relief against personal aggression. To make an exception, based upon the proprietor's decision to enforce the community's caste system, is no less a State denial

[165] The foregoing distinction does not involve the complexity present in *Rice* v. *Sioux City Memorial Park Cemetery*, 347 U.S. 942, and *Black* v. *Cutter Laboratories*, 351 U.S. 292. In those cases the party complaining of deprivation of constitutional rights had no cause of action unless based upon contract—the contract for the cemetery lot in one case and the promise not to discharge without just cause in the other. The defendant was asserting an exception—the clause excluding non-Aryans in the one case and the supposed reservation, written in by the State court, making Communist affiliations ground for discharge in the other. Thus, the argument for respondents was essentially that no more State action was involved in the refusal to excise part of the contract and enforce the remainder than in standing entirely aside. The dissenting Justices concluded that there was a distinction. See the dissenting opinion of Mr. Justice Douglas joined by the Chief Justice and Mr. Justice Black in *Black* v. *Cutter Laboratories*, 351 U.S. 292, 302.

of equal protection than substituting State assistance for private force.[166]

Of course, no one has a privilege of self-help to gain service in a place of public accommodation or to enter by force over the owner's objection. The rule applies whether the refusal be rightful or wrongful. Even if the right exists (which we do not argue), it cannot be enforced by aggression.

These principles go far to meet any problem of maintaining public order that might be supposed to result from reversal of these convictions. Whoever first resorts to violence is guilty of a breach of the peace be he a Negro seeking to enter and obtain service or a proprietor seeking to evict him. The police may quell, and the State may punish, such disturbances of public order without discrimination. Any failure of public officials to act because of racial prejudice would be unconstitutional discrimination subject to redress under the Civil Rights Act, 28 U.S.C. 1343. *Lynch* v. *United States,* 189 F. 2d 476 (C. A. 5); *Catlette* v. *United States,* 132 F. 2d 902 (C. A. 4); *Picking* v. *Pennsylvania Railroad Company,* 151 F.

[166] The above principle was quickly recognized in cases involving restrictive covenants. Although the cases in this Court involved affirmative State action providing sanctions for the covenants, it was soon held that they were not available as a defense. *Clifton* v. *Puente*, 218 S.W. 2d 272 (Tex. Civ. App.); *Capitol Federal Savings & Loan Ass'n* v. *Smith*, 316 P. 2d 252 (S. Ct. Colo.) (action to quiet title).

2d 240 (C.A. 3). See, also, *Monroe* v. *Pape,* 365 U.S. 167.

In the absence of legislation by Congress the net result may be that some proprietors of places of public accommodation find themselves unable to evict Negroes whom they are unwilling to serve. The dilemma is of their own making. One who pursues a public calling in which he permits the general public to enter his premises is hardly in a position to complain of the incongruity if he then refuses upon invidious grounds to serve some members of the same public to which he opened his business. Though only legislation can provide a complete solution, the resulting stand-off is no more likely, in our judgment, to result in demonstrations and disturbances than a decision rejecting the argument we have presented.

(b) In arguing that the State's provision of legal sanctions is an element of State involvement pointing towards State responsibility, we do not urge that such State action is always enough to implicate the State for the purposes of the Fourteenth Amendment, leaving for analysis only the question whether the result conforms to the substantive requirements of the Fourteenth Amendment (*i.e.,* involves an invidious classification or a deprivation of other fundamental rights).[167]

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[167] Henkin, *Shelley* v. *Kraemer, Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 So. Cal. L. Rev. 208 (1957); Van Alstyne and Karst, *State Action,* 14 Stan. L. Rev. 3 (1961). Cf. Williams, *The Twilight of State Action,* 41 Texas Law Review 347 (1963).

The latter argument seems to invite sharp curtailment of the scope for State and private choice and would certainly increase the role of constitutional adjudication.

To hold that a householder, lawyer or businessman may admit or exclude guests at his absolute discretion, however wise, capricious or immoral, but that he may not look to public authority to safeguard the right where the State could not constitutionally make the same choice, would deny the right to the poor and powerless and invite the rich or strong to recall the age of private armies. Manifestly, the same is true of business premises and a wide variety of places maintained by institutions such as schools, colleges, and charitable institutions. The constitutional doctrine expounded in *State* v. *Brown,* 195 A. 2d 379, also raises grave prospects of public disorder, for we feel no confidence that the owners of places of public accommodation would not be challenged and then exercise a privilege of self-help.

One escapes the latter difficulty, but only at the expense of increasing the former, by saying that a State acts not only through its police, prosecutors and judicial commands but also when its law recognizes a right, privilege or immunity; and that recognition of a privilege of self-help would therefore violate the Amendment. We agree that recognition of a privilege of self-help, like the intervention of the police, is indubitably State action (see pp. 20, 81–84 above), but to say that either form of State action is alone enough to make the State responsible for the private person's discrimination would subject a wide

variety of heretofore private decisions to the limitations of the Fourteenth Amendment as if they were made by the government. May a lawyer select clients, and a doctor patients, whimsically or only upon reasonable grounds? May a private school, endowed by its founders as a charitable corporation for the education of Episcopalians, prefer applicants of that faith over Jews or Roman Catholics? May it terminate the tenure of a teacher who avows atheism? May a popular distributor of detergents discharge an executive whose speeches and political associations with right or left wing extremists, in the judgment of the management, injure its public relations? Would the case be different if there were no risk of injury to the business but the other executives found the association highly distasteful? A State could not constitutionally command such discrimination and interference with individual freedom. Must its law therefore withhold all legal recognition of the right of private persons to engage in them?

The extent of such difficulties would depend upon whether the rule was that the State is responsible under the Fourteenth Amendment whenever its law failed to protect the claimed constitutional right, *i.e.*, did not impose a legal duty upon others in favor of the claimant, or only when the State recognized a privilege to take aggressive action. We consider the distinction significant (see pp. 65, 81–84 above), but we do not pause to consider it in this context because it is clear that the withholding of criminal sanctions, civil remedies and the privilege of affirmative self-help would greatly reduce the field for private choice.

Of course, the State would be required to withhold recognition of a right of private choice only when the ensuing discrimination or interference with other fundamental interests is not counterbalanced by a constitutional interests of the actor equal to that which he has invaded, such as the householder's constitutional right of privacy, which would include the right to choose his guests. For although there is State responsibility in such case, it is said, the State is barred only from arbitrary and capricious action.[168] If the requirement of a counterbalancing interest of constitutional magnitude is seriously proposed, then the contention is really that wherever a State can legislate to prohibit discrimination or to secure civil liberties, the issue cannot be left to private choice without offending the Amendment. If other interests will suffice, the substantive restriction upon private action is less severe, but there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States—but only this Court—could exercise the final judgment.

The preservation of a free and pluralistic society would seem to require substantial freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view

[168] See Henkin, *op. cit. supra.*

were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.

Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

To go to the other extreme and hold that State sanctions for private choice are irrelevant to the question of the State's responsibility is untenable upon both precedent and principle. See pp. 67–72 above. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" (*Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722).

We read *Shelley* v. *Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators[169] and two State courts,[170] but in our view the decision rests more

[169] See n. *167*, *supra*.

[170] *State* v. *Brown*, *supra*; *Abstract Investment Co.* v. *William O. Hutchinson*, 22 Cal. Reptr. 309 (D.C. App. 2d Dist., 1962).

solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. Nor are they typically found in isolation. Their function is to cover whole neighborhoods. The developer of a housing tract and his immediate grantees who execute the covenants have usually scattered long before enforcement of their covenant is sought by newcomers in the neighborhood against a willing buyer and willing seller who are strangers to the original transaction. The series of covenants becomes in effect a local zoning ordinance binding those in the area subject to the restriction without their consent. *Cf. Buchanan* v. *Warley,* 245 U.S. 60. Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions. Essentially the same principle has been applied in quite different contexts. *E.g., Railway Employees' Dept.* v. *Hanson,* 351 U.S. 225; cf. *Steele* v. *Louisville & N. R.,* 323 U.S. 192; *International Ass'n of Machinists* v. *Street,* 367 U.S. 740.

In *Shelley* v. *Kraemer* there were no elements of State involvement except the force that State law gave to private covenants. The State was found to be significantly involved, however, because the elements of law bulked large, for the reasons just stated, in relation to the elements of private freedom. A similar argument might be made in the present case. We do

not rely upon it, however, or even urge that the provision of criminal sanctions for an exercise of normal private choice is ever enough, standing by itself, to implicate the State in a denial of equal protection. For in the present cases there are two additional elements of State involvement.

2. The States are involved in the practice of discriminating against Negroes in places of public accommodation because of their role in establishing the system of segregation of which it is an integral part

For many years the States commanded segregation on a wide front. Between official policy and the prejudices and customs of the dominant portions of the community there was a symbiotic relation. The prejudices and customs gave rise to State action. Legislation and municipal ordinances, as well as executive policy, confirmed and strengthened the prejudices, and often forbade individual variations from the solid front. We summarized these elements of State involvement at pages 40–63 above.

Peterson v. *Greenville,* 373 U.S. 244, and *Lombard* v. *Louisiana,* 373 U.S. 267, establish the principle that a State is responsible for discrimination which it has commanded or officially encouraged even though segregation might be the proprietor's choice if uninfluenced. Where the discrimination is the product of a combination of State and private action, the State cannot disclaim responsibility upon the ground that the discrimination would have occurred even though the State had stayed its hand.[171]

[171] Compare the familiar rule applicable to joint or concurrent tortfeasors. Prosser, *Torts* (1941 ed.), pp. 323–325, 330.

In the present cases there are no laws commanding segregation in these places of public accommodation. The State's encouragement of the system is more remote in time and place, and in its influence upon the conduct of the proprietors.[172] Nevertheless, the State's prior involvement is material in determining its responsibility for the discrimination inherent in the challenged convictions. Having shared in the creation of a practice depriving Negroes of the kind of equality the Fourteenth Amendment was intended to secure, the State should not be free to turn its back and deny involvement through the momentum its action has generated. The law is filled with instances of liability for the consequences of negligent or wrongful acts until the connection between the wrong and the consequences becomes too attenuated.

In one sense, every event forever influences the course of history. A boy throws a stone into a pond; the ripples spread; the water level rises; the history of that pond is forever altered. We urge no such doctrine. Our view is that here, as with personal liability for the consequences of wrongful conduct, the issue "is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent." 1 Street, *Foundations of Legal Liability* (1906) 110. The necessity for judgment is inescapable. The question is whether a State's previous action still carries a momentum making it a "substantial factor" in the cur-

[172] But see Florida Administrative Code, Chapter 170C, Section 8.06, discussed pp. 2–3, 62 above and pp. 99–100 below.

rent practice of discrimination which the State is now helping to enforce. Cf. *Restatement Torts,* § 431. Here the State's previous action was so massive and continued so long as to leave no doubt that the official policy still exerts substantial influence upon the customs of the community.

Nor is the question one of fault. Even one who without fault puts another in a position of exposure to injury has a duty to act to prevent the danger from eventuating or to minimize the damage if harm occurs. *Simonsen* v. *Thorin,* 120 Neb. 684, 234 N.W. 628; *Slavin* v. *State,* 249 App. Div. 72, 291 N.Y. Supp. 721; *Restatement Torts* § 321. One who makes an innocent misrepresentation must communicate the truth to the recipient as soon as he learns that the representation was false. Prosser, *Torts* (1941 ed.), p. 723; *Restatement Torts* § 551(2). Similarly, until time and events have attenuated that connection, the State continues to bear constitutional responsibility for the conditions it has shared in creating by branding Negroes as an inferior caste.

Again, the point must not be pressed too far. We do not say that prior State support for the system of racial segregation always makes the proprietor's action State action, or even that the involvement shown here would alone carry State responsibility. There are other important elements of State involvement in these cases, and we rely upon them equally. What we do say here is that the past legislation has constitutional materiality because its momentum is still substantial in the realm of public accommoda-

tions. To that extent, a State which has drawn a color line may not suddenly assert that it is color blind.

3. *The States are involved in the discrimination because of their traditional acceptance of responsibility for, and detailed regulation of, the conduct of the proprietors of places of public accommodation towards the general public to which they have opened their businesses*

Petitioners were convicted of trespass for remaining in establishments which the proprietors had thrown open to the general public whose patronage they solicited. The invitation ran to the general public. There is no other way to describe it, unless it be to say that the invitation was to all members of the public except Negroes, and not even the proprietors were willing to announce their policies publicly in that fashion.[173] The invitation is a critical element in several aspects of the cases,[174] but not least because the resulting concern of the State brings important elements of State involvement.

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[173] The record in each of these cases shows that there was no public notice at the entrance or similar announcement that Negroes would not be served. No. 6, R. 44–46; No. 9, R. 20, 37; No. 10 (no evidence of any sign or notice); No. 12 (policy communicated only by oral statements), R. 23–24, 27–28; No. 60, R. 15–17, 19.

[174] The discrimination occurs in a public place which is part of the normal public life of the community. The opening of the premises to public use gives the resulting relationship that casual and evanescent nature that distinguishes it from virtually all others. The proprietor who thus opens his premises thereby subjects himself to a greater degree to the constitutional rights of others. See pp. 12–13, 17, 19–20, 29–36, *supra*, and 104–111, *infra*.

(a) At common law those who engaged in such callings had a duty to serve all members of the public equally to the limits of their capacity. Special rules were applicable to their rates and liability. Such was the innkeeper who, if he had available room, could not refuse to receive a guest who was ready and able to pay him a reasonable compensation. *White's Case* (1558) 2 Dyer 158b; *Wærbrook* v. *Griffin* (1609), 2 Brownl. 254; *Lane* v. *Cotton* (1701), 12 Mod. 472; *Bennett* v. *Mellor* (1793), 5 Term R. 273; *Thompson* v. *Lacy* (1820), 3 Barn. & Ald. 283; see, generally, Storey, *Bailments*, §§ 475, 476 (7th ed., 1863); 5 Bacon, *Abridgement of the Law—Inns and Innkeepers*, pp. 230, 232 (1852); 3 Blackstone, *Commentaries*, p. 166 (Lewis ed., 1897). But the list was not so limited; at one time or another it apparently included the common carrier, the miller, the ferryman, the wharfinger, the baker, the farrier, the cartman and the hackney-coachman each of whom, it was said, "pursues a public employment and exercises 'a sort of public office.'" See *Munn* v. *Illinois*, 94 U.S. 113, 131–132. We do not urge the discountenanced argument that such establishments are *per se* State instrumentalities (*Civil Rights Cases, supra*),[175] but say only that the State's traditional relation to businesses that hold themselves and their premises out to the public at large distinguishes other business activities and puts the businesses affected with a public interest in a segment of community life where the relationship between proprietor and customer is less a product of

[175] But see Mr. Justice Douglas concurring in *Lombard* v. *Louisiana*, 373 U.S. 267, 274, 281–282.

contract or voluntary association than of the legal system.

Indeed, it is a fair inference that in a relationship so dominated by law, rather than contract or private choice, the State, if it did not approve the practice, would require its abolishment. Compare *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451, 462. The inference is confirmed by experience. During the debates upon civil rights measures between 1865 and 1880 it seems to have been assumed that such businesses had a duty to serve all members of the public not subject to racial disabilities, and that the guarantee of equal protection therefore would secure the same right for Negroes.[176] This Court made the assumption in the *Civil Rights Cases*.[177] During that same period equal public accommodations laws were widely adopted outside the former slave-holding States.[178] They fell into comparative desuetude during a period of indifference to civil equality but are effective in thirty States today.[179] The course of events in two of the three States at bar is even more illustrative. South Carolina and Florida both enacted equal public accommodations laws in the period prior to the *Civil Rights Cases*, but repealed them later.[180] The Florida State Board of Health is presently enforcing an order requiring separate wash rooms and toilet facilities for whites and Negroes.

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[176] See pp. 123–136, *infra*.
[177] See pp. 73–77, *supra*.
[178] See nn. 19, 163, *supra*.
[179] See n. 22, *supra*.
[180] See notes 84, 85, 90.

From this standpoint it is irrelevant that the States have chosen not to subject restaurants, amusement parks and similar establishments to the duty of inns and common carriers to serve all members of the public without discrimination. The class of "businesses affected with a public interest" is not closed for constitutional purposes. Restaurants and amusement parks, like inns and public conveyances, hold themselves out to the general public and open up their premises for public use. This characteristic distinguishes them from the many other activities which the State may constitutionally regulate because of their effect upon the general welfare but which do not involve opening the business or premises to the public. For our argument is not that the State is constitutionally responsible for all non-governmental action which it has the power to prevent,[181] but only that its traditional supervision of the special class of businesses whose relation to the public is largely defined by law quickens the readiness to find responsibility through other elements of State involvement.

(b) The detailed State supervision over the establishments in which petitioners were arrested constitutes an element of State involvement. For where a State regulates most aspects of a business's relation-

[181] To say that the possession of State powers to prohibit any private discrimination which would be invidious in a State official is enough to render the State responsible under the Fourteenth Amendment would raise grave concern about the possibility of preserving a distinction between public and private action. There are few activities or institutions in which a State lacks power to prohibit racial discrimination. Such a view of State action therefore raises, still more sharply, the difficulties raised by broad interpretations of *Shelley* v. *Kraemer*. See pp. 84–88 above.

ship to the general public to which it has opened its premises, the State can hardly say that it has no relation to the narrow segment in which it chooses to stay its hand.

In *Robinson* v. *Florida,* No. 60, petitioners were arrested in a Miami restaurant operated by Shell's City, Inc. The State has assumed pervasive responsibility for the conduct of restaurants towards the general public to which they have opened their premises. Chapter 509 of the Florida Statutes Annotated provides for the appointment of a Hotel and Restaurant Commissioner with power to inspect at least twice annually "every public lodging and food service establishment," and to issue such rules and regulations as may be necessary to carry out the chapter (Sec. 509.032). Chapter 509 itself establishes a detailed code of regulation for "public lodging establishments" and "public food service establishment." No restaurant may be operated without licenses from both the State and municipality (Sec. 509.271; Code of Miami, Chap. 35). Section 509.221 prescribes general sanitary measures and like requirements for protecting the public health, including plumbing, lighting, heating, ventilation and cooling. An infinitely more detailed set of regulations has been issued by the Commissioner. Florida Administrative Code, ch. 175–1, 175–2, 175–4. The State, County and City Boards of Health also appear to have jurisdiction.[182]

[182] Fla. Stat. Ann., Chs. 381, 154; Sanitary Code of Florida, ch. 170C–16; Dade County Code, § 2–77; Code of Miami, ch. 25; *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission,* published by the State Board of Health and State Hotel and Restaurant Commission, 1960.

Section 509.211 of the Florida Statutes prescribes safety regulations and requires all plans for the erection or remodeling of any building for use as a public food service establishment to be submitted for approval by the Hotel and Restaurant Commission.

The State's supervision extends beyond health and safety. For example, it covers representations concerning the food and other forms of advertising. Section 509.292 forbids misrepresenting "the identity of any seafood or seafood products to any of the patrons or customers of such eating establishments." The Commissioner, under his power to issue regulations, has prohibited the publication or advertisement of false or misleading statements relating to food or beverages offered to the public on the premises (Florida Administrative Code, Sec. 175–4.02). There is also general and ill-defined supervision over the character, and thus the practices, of the proprietors of public eating establishments. House Bill No. 86, approved May 16, 1963, authorizes the suspension or revocation of a restaurant's license when any person interested in its operation "has been convicted within the last past five years in this state or any other State, or the United States, of * * * any * * * crime involving moral turpitude." The Commissioner's regulations provide that licenses may be issued only "to establishments operated, managed or controlled by persons of good moral character," and the Commissioner is instructed to ascertain that "no establishment licensed by this commission shall engage in any misleading advertising or unethical practices as de-

fined by this chapter and all other laws now in force or which may be hereafter enacted" (Sec. 509.032).

Florida's official involvement goes still farther. The Commission's regulations require that "[a]chievement rating cards shall be conspicuously displayed." Florida Administrative Code, Sec. 175–1.03 The State has created an Advisory Council for Industry Education which employs a Director of Education for the lodging and food service industry whose basic role is "to develop and blend together an educational program offered for the entire industry." We do not know the details of the achievement rating program or of the work of the Advisory Council but, while they may not deal explicitly with racial discrimination, they undoubtedly cover every other aspect of the relationship between a "public food service" establishment and all members of the public.

Florida law even touches upon, although it does not deal directly with, discrimination in the selection of clientele. A related statute prohibits advertising that an establishment practices religious discrimination, although it permits similar advertisements of racial discrimination. Fla. Stat. (1962 Supp.), § 871.04. The State Board of Health has an outstanding regulation applicable to restaurants, which provides (Florida Administrative Code, Chapter 170C, Section 8.06):

> Toilet and lavatory room shall be provided for each sex and in case of public toilets or where colored persons are employed or accommodated separate rooms shall be provided for their use. Each toilet room shall be plainly marked, *viz.*: "White Women," "Colored Men," "White

> Men," "Colored Women;" *provided,* that separation based upon race shall be waived where such separation is determined to be in conflict with federal law or regulation.[183]

The regulation plainly puts the State approval on racial discrimination. As a practical matter it encourages the exclusion of Negroes from restaurants that serve white persons by putting the proprietors of other establishments to the expense of supplying dual facilities.[184]

A State that has so pervasively regulated the conduct of public food service establishments cannot disclaim association with the racial practices of their proprietors in the admission and exclusion of members of the public. The reason, we think, is this: Under most circumstances the Fourteenth Amendment permits a State to close its eyes to private conduct either upon the ground that the problem lacks sufficient public importance or because it should be left to the interplay of a free society. However, when widespread discrimination exists in businesses which have been thrown open to the general public by their proprietors and are being regulated by the State in pervasive detail, one can be reasonably certain that the State's failure to act results not from distaste for interference

[183] *A Manual of Practice for Florida's Food and Drink Services based on the Rules and Regulations of the Florida State Board of Health and State Hotel and Restaurant Commission*, published by the State Board of Health and State Hotel and Restaurant Commission, 1960, also sets forth this requirement (§ 4.6.7).

[184] This regulation alone may well be ground for reversing the convictions in the Florida case. See pp. 2–3 above.

with private determinations, but from a willingness to have the public discrimination continue. Compare *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451, 462.

Whatever the logical rationale there is little room for dissent from the practical judgment that detailed State supervision over a business as a whole creates a closer degree of involvement in the enterprise's treatment of a segment of the public than if the State had stood aside. One who intrudes into a situation voluntarily cannot disclaim further responsibility with the same ease as a bystander. The volunteer who takes an injured person into his charge has a duty to use care even though he was free to play the Levite rather than the Good Samaritan. " * * * he is regarded as entering voluntarily into a relation of responsibility, and hence as assuming a duty." Prosser, *Torts,* p. 194 (1941). The owner of land may leave it to nature even though rocks careen into a village,[185] but he is liable for harm done by what is put there by himself or his predecessors in possession.[186] The master who appoints a servant cannot disclaim responsibility for acts causing harm closely related to what he authorized even though he forbade that particular conduct;[187] nor can a principal deny liability upon contracts made by his agent in violation of his instructions if they are within the general area in which the

[185] *Pontardawe, R.C.* v. *Moore-Gwyn,* 1 Ch. 656, 98 L.J. Ch. 424; See Prosser, *Torts* (1955) p. 430.

[186] *Restatement Torts,* § 364.

[187] See, *e.g., Hinson* v. *United States,* 257 F. 2d 178, 181, 183 (C.A. 5).

agent was authorized to contract.[188] Much the same notion underlies the doctrine that one who voluntarily assumes control over the conduct of another is liable to third persons for the harm the other does, even though there may be no element of reliance; as where the owner of a car fails to restrain the driver[189] or a hospital permits a charlatan to treat a patient on the premises.[190] And where one voluntarily assumes a relationship such as that of a carrier to its passenger, or a warden to his prisoner, or a department store to persons on the premises,[191] there is a duty to use care to protect them from injuries by strangers. Here the State both undertook control over the conduct of public restaurants and also assumed the role of public protector.

A similar intuitive appraisal lies behind *Burton* v. *Wilmington Parking Authority, supra.* There the State's presence was felt in the ownership of the property, in the close relation, both physical and commercial, between its activities and the restaurant's business, and in the State's continuing relation as the landlord who selected the tenant. Here, the State's involvement is felt in its continuous supervision over the premises and virtually all aspects of the business, in the traditional legal duties of businesses affected with a public interest, in the influence which its offi-

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[188] See, *e.g.*, *Kidd* v. *Thomas A. Edison, Inc.*, 239 Fed. 405 (S.D.N.Y.) (L. Hand, J.).

[189] See *Grant* v. *Knepper*, 245 N.Y. 158, 160, 161, 156 N.E. 650 (Cardozo, J.); Mechem, *Outlines of the Law of Agency* (4th ed.) § 382.

[190] *Hendrickson* v. *Hodkin*, 276 N.Y. 252, 11 N.E. (2d) 899.

[191] Prosser, *Torts* (1955) pp. 188–189, and cases cited.

cials can exert through their wide discretionary power both as licensing authority and through performance ratings. As in *Burton* the State flag over the building, though legally irrelevant, seemed to signify its involvement in the discrimination, so here the State "licenses" held by these places of public accommodation, while perhaps also legally irrelevant, still symbolize the State's substantial involvement in all aspects of their treatment of the public.[192]

The degree of actual regulation of restaurants in Maryland [193] and South Carolina,[194] and of amusement

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[192] There are too many kinds of licenses to attribute constitutional significance to the possession of any license. Some licenses give the holders a special privilege to conduct for the benefit of the public a business in a field not open to unrestricted entry. In such cases the grant of one license excludes other applicants, and the possession of a State license by one who follows a practice of invidious discrimination against part of the public in effect shuts off the victims from facilities that would otherwise be available. In such a case, the State is responsible under the Fourteenth Amendment. See, *e.g.*, *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 535 (C.A. 5). In most cases, however, the license is only a technique of examination, taxation or regulation. It carries no duty to serve any member of the public. The State's responsibility for the licensee's conduct is surely no greater than if the business were taxed, inspected or regulated without the issuance of a license. *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847 (C.A. 4); *Wood* v. *Hogan*, 215 F. Supp. 53, 58 (W.D. Va.); *McKibbin* v. *Michigan C. & S.C.*, 369 Mich. 69, 119 N.W. 2d 557, 566; *Madden* v. *Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697, certiorari denied, 332 U.S. 761.

[193] Md. Code (1957), Art. 56, §§ 178–179; Art. 43, §§ 200, 202, 203, 209; Baltimore City Code (1950), Art. 12, §§ 24 and 107.

[194] S.C. Code (1962), §§ 35–51 through 35–54, 35–130 through 35–136, 35–142; Ordinances of the City of Columbia, §§ 12–27 through 12–33; § 2–73.

parks in Maryland,[195] is much less than in Florida. The State's association with their practices is proportionately diluted but not, we think, to the point where it ceases to be relevant. South Carolina, like Florida, enacted and later repealed a law requiring public establishments serving food to refrain from racial discrimination.[196] Maryland recently enacted such a statute.[197] Both the Maryland and South Carolina restaurants and the Maryland amusement park are in the special category of enterprises that issue a general invitation to the public, and are therefore affected with a public interest.

4. *These cases involve no substantial element of private choice*

Where racial discrimination becomes operative through a combination of private and governmental action, the elements of private choice and State involvement tend to be opposite sides of the same coin; as the latter increase in importance the former tend to recede. It is useful, nonetheless, to sift the facts and weigh the circumstances from the private point of view.

The salient feature is still that the proprietor of the place of public accommodation, like a carrier, has thrown his premises open to the public at large and invited its members, without personal selection, to be his business guests. Few enterprises, if any, issue a

[195] Md. Code (1957), Art. 25, § 14, Art. 27, § 506; Montgomery County Code (1960), §§ 15–7, 15–8, 15–11; Chapter 75.

[196] See notes 84, 90, *supra*.

[197] Maryland Laws (1963), Chs. 227, 228 (adding §§ 11 through 15 to Article 49B of the Code).

similar invitation. Even the largest corporations do not hold themselves out as offering employment to the public at large, nor do they forego all elements of personal selection. Doctors, lawyers, architects and accountants limit their clientele by one standard or another. Private schools and colleges reserve the right to pick and choose. The proprietor of a place of public accommodation however, as well as a public conveyance, expects to take and is expected to take all orderly persons, subject to rare restrictions pertaining to such matters as attire.[198] The character of his decor, advertising and service, as well as his prices, may influence the character of his patrons. Publishers and writers may frequent one restaurant and "the fight crowd" another; but if a table is available, even a philistine will be served among litterateurs.

The invitation is general and individual choice is excluded because the relationship between proprietor and customer in a place of public accommodation is entirely casual and evanescent. The inevitable consequence is that lunch counters, restaurants, theatres, amusement parks and like enterprises exercise the technical legal right to select their customers only to the extent of enforcing an impersonal racial ban, excluding or segregating Negroes. Furthermore, although there are areas in which some places of public accommodation serve all members without discrimination while others enforce segregation, the instant cases come from communities in which segregation has been an almost community-wide custom. The individual proprietor exercises little personal choice.

[198] See pp. 28–36 above.

It is also plain that the custom of excluding or segregating Negroes in places where whites are served is not really even a choice concerning the races with whom one will do business, or whom one will license to enter his property. The insubstantiality of the legal concepts of private property and choice of customers in this context is vividly demonstrated by the practice of three of the stores in which petitioners were arrested. It appears that Shell's City, the establishment involved in *Robinson* v. *Florida,* No. 60, is a large store whose Vice President and General Manager testified that "Shell's City does not have the official opinion that it is detrimental to their business for Negroes to purchase products in other parts of their store;" that "Negroes are permitted in the premises;" and that "they are permitted to do business with Shell's City" (R. 24). In *Bouie* v. *City of Columbia,* No. 10, the petitioners were arrested in Eckerd's Drug Store. The manager testified that the store was open to Negroes and that Negroes were "welcome to do business with Eckerd's" (R. 24). The facts in the *Barr* case are even more striking. It too involved a drug store that advertised itself as being a complete department store. The co-owner and manager testified that he invited Negroes into the store just like all other members of the public; that they traded in large numbers; and that they were even invited into the back area where food was served, provided that they took "an order to go" instead of eating food among whites (R. 19). These and other cases which previously have come before the Court show that the proprietors solicit the patronage of

Negroes, invite them onto the property and into the store, make sales in other departments—some even furnish food to eat away from the counter—but then they deny the Negro the privilege of breaking bread with other men. Manifestly, it is the stigma—the brand of inferiority that is important—not presence on the premises or reluctance to enter into a business relation. The legal concepts are merely a tool for enforcing obeisance.

The real particulars behind abstract nouns become crucial when striking the balance between "liberty" and "equality" inherent in determining whether there is enough State involvement to carry State responsibility under the Fourteenth Amendment.[199] See Mr. Justice Harlan concurring and dissenting in *Peterson* v. *Greenville,* 373 U.S. 244, 248, 250. The equality is freedom from caste. The liberty is freedom of personal choice, but for the most part only in the sense of a choice to act or refrain from acting in concert with others in maintaining the fabric of a caste system.

No doubt there are some instances in which the proprietor would decide to exclude Negroes upon truly individual grounds even though there were no system of segregation and the customary practice were to serve all members of the public. Obviously the opportunities for this kind of arbitrary choice are

[199] In his concurring and dissenting opinion in *Peterson* v. *Greenville*, 373 U.S. 244, 250, Mr. Justice Harlan said—

"Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality."

reduced by treating State recognition of a privilege to evict Negroes as a denial of equal protection of the law on the ground that the racial discrimination occurs in the public life of the community and is a cornerstone in a State-supported caste system. At least until the consequences of the State's prior involvement died out, the proprietor who has an idiosyncratic prejudice against Negroes remote from the caste system would be denied State support along with others whose preferences were affected by the caste system. If it were possible to isolate the community practice, and the community practice had no significant influence on the individual's decision, the special cases, perhaps, should be the subject of a special rule.[200] Since the effort would be fruitless, the extraordinary case must yield to the general rule, as was held in *Peterson* and *Lombard* when the Court rejected Justice Harlan's view.

There is no significant unfairness in this conclusion. When the proprietor of a place of public accommodation discriminates against Negroes in a community which practices segregation, he knows that he is joining in the enforcement of a caste system. He takes the system as he finds it, infused with State sponsorship and support. That his motives may be different, his individual action innocent, is not controlling. When they become part of a community pattern so infused with prior State action as to

[200] Such is not the case here. In addition to the managements' disavowal of antipathy to Negroes, there is considerable indication that the policy was adopted in conformity to community practice. See p. 28, *supra*.

render further State sanctions a denial of equal protection of the law, the unique proprietor's acts take on the color of the community practice and suffer the common disability resulting from the community wrong. "[T]hey are bound together as the parts of a single plan. The plan may make the parts unlawful." *Swift & Co.* v. *United States,* 196 U.S. 375, 396; *Terry* v. *Adams,* 345 U.S. 461, 470, 476 (Mr. Justice Frankfurter concurring). The risk that some proprietors may lose State protection for an arbitrary choice not influenced by the State's previous conduct is not great enough to permit the continuance of support for the tainted system. When an employer has dominated and supported a labor organization, the organization will be forever disestablished even though the employer's misconduct has ceased, even though some employees may freely prefer it, and even though a majority of the employees might vote to have it represent them. *Texas & N.O. R. Co.* v. *Brotherhood of Railway & S.S. Clerks,* 281 U.S. 548; *National Labor Relations Board* v. *Southern Bell Co.,* 319 U.S. 50. When the overwhelming tendency is clear, but no exact solution can be tailored because of the impracticability of a detailed psychological inquiry into the current effect of past events and community attitudes upon each individual mind, the necessity of dealing with the situation in the large justifies a remedy going somewhat beyond the exact consequences of the wrongdoing.

These problems, moreover, lie in an area where there is little appeal to the plea of private right. The proprietors of places of public accommodation open

their property and business to public use as part of the normal public life of the community. Segregation in such places is like segregation in a park or on the street: it is akin to a restraint against circulating as freely as other members of the public. Indeed, it is not without significance that the opening of a business affected with a public interest at common law was likened by Chief Justice Waite, quoting Lord Chief Justice Hale, to a man's setting out a street upon his own land. *Munn* v. *Illinois,* 94 U.S. 113, 150. While the dedication alone cannot supply affirmative elements of State involvement, it is relevant in weighing the significance of those elements of State involvement that are present against the possible interference with private right, for the purpose of determining whether those elements are sufficient to implicate the State in violation of the Fourteenth Amendment. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh* v. *Alabama,* 326 U.S. 501, 506. Petitioners have a constitutional right to be free from the consequences of all significant State encouragement or support for discrimination in places of public accommodation, whether the encouragement be past or present. When that right conflicts with the proprietor's claim of private right in a place of public accommodation, *Marsh* v. *Alabama* teaches that the former should prevail.

When one goes behind the abstract nouns it becomes apparent, therefore, that any balance to be

struck here between "liberty" and "equality" is no different from the balance struck by the framers of the Fourteenth Amendment and by this Court in earlier cases. Freedom from association with Negroes in places of public accommodation—the only freedom actually asserted—is indistinguishable from freedom from such association in government buildings,[201] in the court house,[202] or, indeed, on the streets and in public squares.[203] In performing civil duties, such as serving on a grand or petit jury,[204] or in attending public schools,[205] the equality asserted is the same—freedom from the stigma of inferiority. We are not asking the Court to strike a novel balance.

C. THE IMPOSITION OF STATE RESPONSIBILITY WOULD GIVE EFFECT TO THE HISTORIC PURPOSES OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS

The central fact of these cases is that the States seek immunity to support the continuance of a caste system in the public life of the community that it was the central purpose of the Thirteenth, Fourteenth and Fifteenth Amendments to destroy. The three Amendments cannot be severed from their history or from each other in dealing with the tragic consequences of Negro slavery. Other forms of invidious discrimination, even by reason of race, creed or nationality, have a different significance in the community and therefore may have a different constitutional status. The

[201] *Derrington* v. *Plummer*, 240 F. 2d 922 (C.A. 5).
[202] *Johnson* v. *Virginia*, 373 U.S. 61.
[203] See pp. 122–123, 136–137, *infra*.
[204] *Strauder* v. *West Virginia*, 100 U.S. 303.
[205] *Brown* v. *Board of Education*, 349 U.S. 294.

controlling philosophy of interpretation was stated in the *Slaughter-House Cases*, 16 Wall. 36, 67, 71–72:

> The most cursory glance at these articles [of amendment] discloses a unity of purpose, when taken in conjunction with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. * * *
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> * * * no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of 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. * * *
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> * * * * *
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> We do not say that no one else but the negro can share in this protection. * * * But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The unity is also pertinent in reading the Congressional debates. The Thirteenth Amendment, its implementing legislation (the abortive first supplementary Freedmen's Bureau Bill which failed of enact-

ment after it had been vetoed by President Johnson;[206] the second supplementary Freedmen's Bureau Bill, varying in minor respects from the first, which was enacted into law and extended the life, and enlarged the powers, of the Freedmen's Bureau;[207] and the Civil Rights Act of 1866 which originated as a companion measure to the first supplementary Freedmen's Bureau Bill),[208] the Fourteenth and Fifteenth Amendments, the Ku Klux Act of 1871,[209] and the Civil Rights Act of 1875[210] were all parts of a continuing legislative process. Many of the same Senators and Congressmen had the leading roles throughout the debates. Oftentimes, what they said and did in connection with one proposal helps to show their understanding of another.[211]

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[206] S. 60, 39th Cong., 1st Sess., Cong. Globe, p. 943.

[207] 14 Stat. 173.

[208] 14 Stat. 27.

[209] 17 Stat. 13.

[210] 18 Stat. 335.

[211] In view of the pressure of time, we do not attempt to summarize the Congressional history of the Thirteenth, Fourteenth and Fifteenth Amendments. The most pertinent studies are: Supplemental Brief for the United States on Reargument and the Appendix thereto in *Brown* v. *Board of Education*, Nos. 1, 2, 4, 8, and 10, October Term, 1953; Kendrick, *Journal of the Joint Committee on Reconstruction* (1914); James, *The Framing of the Fourteenth Amendment* (1956); Flack, *The Adoption of the Fourteenth Amendment* (1908); tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951); Harris, *The Quest for Equality* (1960); Collins, *The Fourteenth Amendment and the States* (1912); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1 (1955); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 Stan. L. Rev. 3 (1954); Warsoff, *Equality and the Law* (1933); Randall, *The Civil War and Reconstruction* (1937); Nye, *Fettered Freedom* (1949).

The thrust of the movement was to make Negroes free and equal members of the community sharing the public rights and privileges and enjoying the opportunities of other men. During slave-holding days Negroes were not only held in bondage as if chattels; even when free they were subjected throughout the country to the elaborate disabilities of a caste system. See pp. 42–45 above. After the Civil War, Southern States promptly enacted "Black Codes" imposing disabilities so harsh as to make the emancipated Negroes "slaves of society," even though no longer the chattels of individual masters.[212] See pp. 45–48 above. Those disabilities, both the old and the new, were the central target of a movement whose ideal was to apply to all men the Declaration that "all men are created equal."

The legislation began in the Thirty-Ninth Congress.[213] One group, apparently a majority, found authority to remove the disabilities by federal legislation under Section 2 of the Thirteenth Amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., 322, 474–476 (remarks of Senator Trumbull), 503 (remarks of Senator Howard), 1124, 1159. Representative Ward had articulated that view while the Thirteenth Amend-

[212] Cong. Globe, 39th Cong., 1st Sess., p. 39.

[213] The 39th Congress considered (1) a bill introduced by Senator Wilson of Massachusetts (S. 9, 39th Cong., 1st Sess.) to maintain the freedom of the inhabitants in the rebelling States; (2) the first supplementary Freedmen's Bureau Bill (S. 60), which originated, in part, from the Wilson bill; and (3) S. 61, the bill which became the Civil Rights Act of 1866 (14 Stat. 27). It also enacted (after the submission of the Fourteenth Amendment to the States), the second supplementary Freedmen's Bureau Bill (14 Stat. 173).

ment was under consideration (Cong. Globe, 35th Cong., 2d Sess., p. 177):

> . . . we are now called upon to sanction a joint resolution to amend the Constitution so that all persons shall be equal under the law without regard to color, and so that no person shall hereafter be held in bondage.[24]

Another group doubted the sufficiency of existing constitutional authority and sought a new amendment. *E.g.*, Cong. Globe, 39th Cong., 1st Sess., pp. 500, 1034, 1268, 1290–1293. Among the latter was Representative Bingham, later the principal author of section 1 of the Fourteenth Amendment. *Id.*, at 1291–1292. But for both groups the overall purpose was the same: it was to remove the disabilities, old and new, North and South, that belied the equality announced in the Declaration of Independence.

To secure that ideal the proponents sought to guarantee equal "civil rights." The exact contours of the term went undefined. "Civil rights" were contrasted with "social rights," for which the proponents disclaimed concern (*id.*, 1117, 1159), and "political rights," which at first they were reluctant to espouse (*id.*, 476, 599, 606, 1117, 1151, 1154, 1159, 1162, 1833), although the more liberal view prevailed in the Fifteenth Amendment. Quite possibly "civil rights," in

[24] See also *id.* at 154; Cong. Globe, 35th Cong., 1st Sess., p. 2989. Senator Yates expounded this view in the debates on the Fourteenth Amendment. He asserted that the Thirteenth Amendment "did not confer freedom upon the slave, or upon anybody, without conferring upon him the safeguards of freedom, the rights, franchises, privileges that appertain to an American citizen or to freedom, in the proper acceptation of that term." Cong. Globe, 39th Cong., 1st Sess., p. 1837.

this context, meant rights in areas conventionally ruled by law (*id.*, 476–477, 1117, 1122, 1291), which would include the relationships between members of the public and businesses affected with a public interest. Whatever the difficulty of exact definition, there is no doubt of the purpose to obliterate both the vestiges of slavery and also the caste system. "'All men are created equal' excludes the idea of race, color, or caste," Senator Morrill of Maine declared. (*Id.*, 570–571.) Representative Hubbard of Connecticut similarly asserted that the words "caste, race, color" were unknown to the Constitution. He viewed the various proposals to protect the civil rights of freedmen as evidence that the nation was "fast becoming what it was intended to be by the fathers—the home of liberty and an asylum for the oppressed of all the races and nations of men." (*Id.* at 630.)[215] To Mr. Donnelly of Minnesota, it was "as plain * * * as the sun at noonday, that we must make all citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men." (*Id.* at 589.) Senator Wilson declared, "The whole philosophy of our action is * * * that we cannot degrade any portion of our population, or put a stain upon them, without leaving heartburnings and difficulties that will endanger the

[215] Mr. Garfield of Ohio spoke in a similar vein, declaring that "The spirit of our Government demands that there shall be no rigid, horizontal strata running across our political society, through which some classes of citizens may never pass up to the surface; but it shall be rather like the ocean where every drop can seek the surface and glisten in the sun" (*id.*, App. p. 67). See also *id.* at 111.

future of our country. * * * [T]he country demands * * * the elevation of a race." (*Id.* at 341.) Senator Trumbull, who was not one of the so-called Radicals, described the purpose as to "secure to all persons within the United States practical freedom" and "privileges which are essential to freemen" (*id.* at 474–475).

The Civil Rights Act of 1866 was passed over President Johnson's veto, although its most sweeping terms were narrowed.[216] The Act links the Thirteenth and Fourteenth Amendments, for the Fourteenth Amendment put an end to the debate over the powers of Congress under the Thirteenth. Sections 1 and 5 of

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[216] Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, provided:

"*That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States;* and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." (Emphasis added.)

The original bill contained, in lieu of the italicized material above, the following clause:

"That there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery."

The circumstances and significance of the change are discussed at p. 139 *infra*.

the Fourteenth Amendment, according to one group in Congress, would put the principles of the Civil Rights Act of 1866 into the Constitution beyond the reach of a new Congress. See Cong. Globe, 39th Cong., 1st Sess., pp. 2459, 2462, 2465, 2467, 2538; see, also, *Monroe* v. *Pape,* 365 U.S. 167, 171; Harris, *The Quest for Equality* (1960), p. 40. Others thought that it would provide the Act with a surer constitutional foundation. *Id.* at 2461, 2511, 2961; Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 94. It is not unnatural, therefore, that the aim to abolish the inequalities associated with caste found expression in the debates on the Fourteenth Amendment. Senator Howard of Michigan, in reporting the resolution to the Senate on behalf of the Joint Committee on Reconstruction, announced that it "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another" (Cong. Globe, 39th Cong., 1st Sess., p. 2766). Senator Doolittle wished "to put an end forever not only to slavery but to the aristocracy that was founded upon it * * *." (*Id.* at 2897.) [217]

The broad generalizations must be read in the light of history and applied to current institutions with an

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For many similar references, see, *id.* at 2498, 2503, 2530, 2531, 2459, 2510, 2539, 2961, 3034. In the debates on the Stevens "apportionment" amendment, which was a precursor of the present section 2 of the Fourteenth Amendment, Senator Sumner indicated that, in his view, Congress had decreed, in the Civil Rights Act of 1866, "that colored persons shall enjoy the same civil rights as white persons; in other words, that, with regard to civil rights, there shall be no Oligarchy, Aristocracy, Caste, or Monopoly, but that all should be equal before the law without distinction of color" (*id.* at 684).

understanding of their underlying significance. The declarations of equality were aimed at well-known disabilities, associated with caste, that barred Negroes from being equal members of the public. In 1865 a Negro who was barred from a train or other public conveyance, or from an inn or like place of public accommodation, was subjected to a special disability because of his race. In 1960, these petitioners were subjected to an identical stigma because of their race. In each case the discrimination was solely a mark of caste.

We do not overlook either the force of the direct opposition or the doubts of the moderates, both of which helped to shape the Fourteenth Amendment. See pp. 137–143 below. It will be helpful, however, first to note the evidence bearing upon the specific problem of equality in places of public accommodation. The evidence convincingly shows, despite the paucity of direct references, that unequal access to public places, including inns, hotels, public conveyances, and places of public amusement, fell in the general category of disabilities with which the framers were concerned.

1. The framers were undoubtedly concerned about freedom of movement in the broadest sense. In the Thirty-Ninth Congress, while denouncing the Black Codes as "inconsistent with the idea that these freedmen have rights," Senator Wilson asserted that the freedmen were as free as he was "to work when they please, to play when they please, *to go where they please* * * *" (*id.* at 41) (emphasis added). The Black Codes should be annulled so that

> [T]he man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that *he can go where he pleases,* work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; *that the rights and guarantees of the good old common law are his,* and that he walks the earth, proud and erect in the conscious dignity of a free man * * *. [*Id.* at 111; emphasis added.] [218]

Senator Sherman of Ohio, who objected to the Wilson bill because it did not specify what rights were to be protected, favored an attempt at a more precise definition. "For instance," he explained, Congress could agree that every man should have the right, *inter alia,* "to go and come at pleasure * * *" (*id.* at 42). That was "among the natural rights of free men" (*ibid.*). Senator Trumbull thought it was "idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, and who cannot enforce his rights" (*id.* at 43). Introducing the first supplementary Freedmen's Bureau Bill, Trumbull pronounced it to be the duty of Congress to declare null and void all laws which would not permit the Negro, *inter alia,* "to buy and sell, and to go where he

[218] Wilson's bill would have rendered null and void all State laws, statutes, acts, ordinances, rules and regulations "whereby or wherein any inequality of civil rights and immunities * * * is recognized, authorized, established or maintained," by reason of color, race, or previous condition of servitude (Globe, 39th Cong., 1st Sess., p. 39).

pleases" (*id.* at 322).[219] Again in the debates upon S. 61, the bill which became the Civil Rights Act of 1866, Senator Trumbull, who introduced it, mentioned "the right to go and come at pleasure" as one of the fundamental rights secured by the bill. *Id.* at 477.[220]

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[219] Sections 7 and 8 of the first supplementary Freedman's Bureau Bill applied only to those States in which the ordinary course of judicial proceedings had been interrupted by the rebellion. Under section 7 the President was given the duty to extend military protection and jurisdiction over all cases where any of the civil rights or immunities of white persons were denied to anyone in consequence of local law, custom or prejudice, on account of race, color, or previous condition of servitude; or where different punishment or penalties were inflicted on Negroes than were prescribed for white persons committing like offenses. The rights specifically enumerated in the section were the right to make and enforce contracts; to sue; be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and "to have full and equal benefit of all laws and proceedings for the security of person and estate * * *." The eighth section made it a misdemeanor for any person "under color of any State or local law, ordinance, police, or other regulation or custom," to deprive anyone on account of race or color or previous condition of servitude "of any civil right secured to white persons * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 318.)

[220] As originally introduced, the Civil Rights Bill (S. 61) contained a provision stating that "there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery or involuntary servitude * * *." (Cong. Globe, 39th Cong., 1st Sess., p. 474.) This provision was in the bill when Trumbull uttered the words quoted in the text. The provision was deleted before enactment, *id.* at 1366, but plainly the Act invalidated any racial restrictions upon freedom of movement. See p. 117 n. 216 *supra*.

Some of the Black Codes barred Negroes from towns or other specified areas, and forbade their movement at certain hours,[221] but the purpose of securing the "right to come and go at pleasure" must have been to remove barriers to freedom of movement in the public life of the community.[222] Even in 1866 equal opportunities to use trains and public conveyances and to stop at inns and hotels were essential to civil equality. The soda fountain, the lunch counter and the roadside restaurant were unknown, but today the premises of those places of public accommodation

[221] An ordinance of the City of Opelousas, Louisiana, referred to in the Report of General Schurz on conditions in the South (Senate Executive Document No. 2, 39th Cong., 1st Sess., pp. 92–93) and in the Congressional debates (Cong. Globe, 39th Cong., 1st Sess., pp. 516–517), provided, *inter alia*, that "no negro or freedman shall be allowed to come within the limits of the town of Opelousas without special permission from his employers, specifying the object of his visit and the time necessary for the accomplishment of the same"; that "every negro or freedman who shall be found on the streets of Opelousas after ten o'clock at night without a written pass or permit from his employers shall be imprisoned and * * * pay a fine"; that "[n]o negro or freedman shall reside within the limits of the town * * *" if not "in the regular service of some white person or former owner * * *"; nor, with narrow exceptions, engage in public meetings or congregations within the town limits without permission of the mayor or the president of the Board of Police: nor "sell, barter, or exchange any articles of merchandise or traffic within the limits of Opelousas without permission in writing from his employer or the mayor or president of the board * * *."

[222] A witness before the Joint Committee on Reconstruction testified that the people of Virginia were "reluctant even to consider and treat the negro as a free man, to let him have his half of the sidewalk or the street crossing." House Report No. 30, 39th Cong., 1st Sess., Testimony, Part II, p. 4.

serve a function little different from the public square a century earlier. See pp. 136–137 below.

2. Both the civil rights legislation and the Fourteenth Amendment sought to guarantee equality before the law. Members of the public not suffering from racial disability had long had a legal right to use public conveyances and to enter and obtain service in inns, hotels and, quite possibly, places of public entertainment and amusement. Removal of the racial disability, therefore, would extend that same legal right to enter and be served, to Negroes. The logic is so inescapable that we may feel sure that any member of Congress would have answered affirmatively if he had been asked in 1868 whether the Civil Rights Act of 1866 and the Fourteenth Amendment would have the effect of securing Negroes the same right as other members of the public to use hotels, trains and public conveyances.[223]

The Congressional debates between 1864 and 1874 reflect an awareness of the right conferred by the common law to nondiscriminatory service in many places of public accommodation, such as inns, hotels,

[223] There is also some indication that the courts followed this reasoning. In *Ferguson* v. *Gies*, 82 Mich. 358, 365 (1890), where a Negro had sued for damages arising from the refusal of a restaurant owner to serve him at a table reserved for whites, the Michigan Supreme Court held that a Michigan statute enacted in 1885, prohibiting the denial of "full and equal" privileges of inns, restaurants, eating houses, barber shops, public conveyances and theatres to any citizen, was only declaratory of the common law; that prior to the time when Negroes were made citizens of the State unjust discrimination in such public places would have given a white man a claim for damages; and that the Negro had gained a similar right on becoming a citizen.

and common carriers.[224] The subject was discussed at some length in connection with bills to ban discrimination and segregation on trains and street cars in the District of Columbia.[225] Some thought that theatres and places of public amusement generally were also subject to the common law rule.[226] While perhaps they were wrong, such institutions, it was well known, were regulated, and in a sense created, by the law and therefore subject to special responsibilities. See the debates on the Civil Rights Act of 1875, discussed pp. 130–135 below.

3. The proponents of the abortive Freedmen's Bureau Bill and the Civil Rights Act of 1866 never denied the frequent charge that those measures would grant Negroes the right to equal treatment in places of public accommodation. The apparent reason is that they regarded the "charge" true; as we have explained, it was the inevitable consequence of making Negroes equal with other members of the public before the law even in the narrowest sense of the words.

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[224] See the remarks of Senator Sumner (Cong. Globe, 42nd Cong., 2d Sess., p. 381–383); remarks of Senator Harlan of Iowa (38th Cong., 1st Sess., p. 839); remarks of Senator Pratt of Indiana (2 Cong. Rec. 4081–4082).

[225] Note especially the argument of Reverdy Johnson, a conservative Senator and notable constitutional lawyer. (Cong. Globe, 38th Cong., 1st Sess., p. 1156–1157.) For a general discussion of this legislation and the attitude of the post-Civil War Congresses towards discrimination in public conveyances and places of public accommodation, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131.

[226] 2 Cong. Rec. 4081.

During the debate in the House on the first supplementary Freedmen's Bureau Bill, Representative Rousseau, of Kentucky, who opposed the bill, suggested that the grant of equal "civil rights and immunities" gave Negroes the same privileges in theatres and railway cars. With respect to the latter, he expressly defied the proponents of the bill to "combat that position." (Cong. Globe, 39th Cong., 1st Sess., App. 70). Although he was frequently interrupted, his construction of the bill was not disputed. (*Id.* at App. 68–71.) Representative Dawson, of Pennsylvania, observed that the bill constituted only a part of a broad policy to enforce equality for Negroes so that they should be "* * * admitted to the same tables at hotels [and] to occupy the same seats in railroad cars." (*Id.* at 541.)

After the Freedmen's Bureau Bill passed the House, it was vetoed by the President, in part because it failed to define the "'civil rights and immunities' which are thus to be secured to the freedman by military law. * * *" (*Id.* at 916.) Senator Davis of Kentucky, speaking in support of the veto, protested that "commingling with [white persons] in hotels, theaters, steamboats, and other civil rights and privileges, were always forbid to free negroes," until recently granted by Massachusetts. (*Id.* at 936.) Although Senator Trumbull delivered a long speech in opposition to the veto, he did not question Senator Davis's assertion that such rights were secured by the bill. (*Id.* at 936–943.) Indeed, Senator Trumbull remarked that he should "rejoice" when the Southern States "shall abolish all civil distinctions between

their inhabitants on account of race or color; and when that is done one great object of the Freedmen's Bureau will have been accomplished." (*Id.* at 943.)

The first Freedmen's Bureau Bill failed to become law, although, on July 16, 1866, it was re-enacted with minor changes over a second presidential veto. 14 Stat. 173. After the first veto was upheld, the Civil Rights Bill was taken up, debated at length, passed by both Houses and then vetoed. (*Id.* at 1679.) In the course of the debate on the veto, Senator Davis objected to the bill, declaring, as he had declared with respect to the Freedmen's Bureau Bill, that it obliterated discrimination between the races with respect to the facilities of steamboats, railway cars, and hotels.[227] The veto was overriden, without debate in the House.

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[227] Sen. Davis said (*id.* at Appendix 183):

"[T]his measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any 'ordinance, regulation, or custom,' as well as by 'law or statute.'

* * * * *

"But there are civil rights, immunities, and privileges 'which ordinances, regulations, and customs' confer upon white persons everywhere in the United States, and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations * * * are established by ordinances, regulations, and customs. This bill proposes to break down and sweep them all away, and to consummate their destruction * * *."

4. The general public understanding of the Civil Rights Act of 1866, which was the direct precursor of the Fourteenth Amendment (see pp. 117–118 above), seems to have been that it would open to Negroes public conveyances and places of public accommodation and amusement. The best survey is Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 11–54. Flack concludes (p. 45)—

> There also seems to have been a general impression among the press that negroes would, by the provisions of the bill, be admitted, on the same terms and conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

He also cites (pp. 46–47) accounts of numerous incidents showing a similar widespread belief among members of the public.

5. The understanding is further reflected in the equal public accommodations laws enacted during the Reconstruction Period. Many of the Southern States passed such laws between 1868 and 1873. Thus, as early as April, 1868, the people of Louisiana ratified a new constitution expressly providing that:

> All persons shall enjoy equal rights and privileges, upon any conveyance of a public character; and all places of business, or of public resort, or for which a license is required by either State, parish, or municipal authority, shall be deemed places of a public character, and shall be opened to the accommodation and patronage of all persons, without distinction or discrimination on account of race or color. * * *

And the constitutional [228] mandate was carried out by implementing legislation in 1869, [229] in 1870, [230] and again in 1873.[231] South Carolina followed with a similar enactment in 1869.[232] In the ensuing years, equal public accommodation laws were passed in Georgia (1870), [233] Arkansas (1873), [234] Mississippi (1873), [235] and Florida (1873).[236]

There can be no doubt that these measures were enacted in response to the Fourteenth Amendment. To be sure, they were the product of "reconstructed" legislatures, in which Negroes, for the first time, participated. In some cases, perhaps, they were dictated by federal authorities. At the least, they reflect a contemporary view that freedom from discrimination in public places of accommodation was part of the promise of equal protection. This was the view of the military authorities administering the Reconstruction program,[237] presumably in accordance with the will of

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[228] La. Const. 1868, Art. 13.

[229] La. Acts 1869, p. 37. See *Hall* v. *De Cuir*, 95 U.S. 485.

[230] La. Acts 1870, p. 57.

[231] La. Acts 1873, p. 156. In addition, the Louisiana legislature asked Congress to adopt Sumner's supplementary civil rights bill (*infra*, p. 132), pending in 1872. La. Acts, 1872, p. 29.

[232] 14 S.C. Stat. 179. See, also, the statute of 1870 reprinted in 2 Fleming, *op. cit.*, pp. 285–288.

[233] Ga. Laws 1870, pp. 398, 427–428.

[234] Ark. Laws 1873, pp. 15–19.

[235] Miss. Laws 1873, p. 66.

[236] Fla. Laws 1873, p. 25, ch. 1947.

[237] See, *e.g.*, G. O. No. 32, 2d Military District (applicable to North Carolina and South Carolina), in 1 Fleming, *op. cit.*, pp. 435, 437:

"8. In public conveyances on railroads, highways, streets, or navigable waters no discrimination because of color or caste shall be made, and the common rights of all citizens thereon shall be recognized and protected. * * *"

Congress. It was a view that apparently gained some general acceptance in the South.[238] The most perceptive exposition was made by Justice Horatio Simrall for the Supreme Court of Mississippi, in 1873, in *Donnell* v. *State*, 48 Miss. 661. A Kentuckian by birth, Justice Simrall was a law professor, plantation owner and a Mississippi State Legislator before the Civil War. He served for nine years on Mississippi's highest court, the last three as Chief Justice, and later lectured at the University of Mississippi which granted him an honorary doctorate.[239] In upholding the equal public accommodation law of Mississippi, Justice Simrall, after noting that "The 13th, 14th and 15th amendments of the constitution of the United States, are the logical results of the late civil war, now more distinctly seen than immediately succeeding its termination" (*id.* at 675), pointed out that "The fundamental idea and principle pervading these amendments, is an impartial equality of rights and privileges, civil and political * * *" (*id.* at 677), and he then sustained the Mississippi equal public accom-

[238] We have already noticed that these equal accommodation laws were not immediately repealed when Reconstruction ended. See note 90, *supra*. Nor were they mere dead-letter, at least for a time. See, *e.g.*, *Donnell* v. *State*, 48 Miss. 661; *Saunnet* v. *Walker*, 27 La. Ann. 14, affirmed, 92 U.S. 90; *Joseph* v. *Bidwell*, 28 La. Ann. 382. It is also worth noting that some responsible Southerners were arguing for freedom from racial discrimination in places of public accommodation. See, *e.g.*, Cable, "The Freedman's Case in Equity" (1884) and "The Silent South" (1885), in Cable, *The Negro Question* (Turner ed., 1958), pp. 56–82, 85–131.

[239] V *National Cyclopedia of American Biography* (1907), p. 456. See also, XXXVIII *id.*, pp. 225–226; Rowland, *Courts, Judges and Lawyers of Mississippi* 1798–1935 (1935), pp. 98–99.

modations law as applied to a theatre which sought to segregate a Negro patron.[240] Cf. *Coger* v. *The North West. Union Packet Co.*, 37 Iowa 145 (1873) (refusal of a steamship company to serve Negro in main cabin violated both State constitution and the Fourteenth Amendment).

Nor were those in the "occupied" States of the Confederacy alone in this understanding of the Fourteenth Amendment. Other States, subject to no federal intervention, were responding in similar vein to the command of the Amendment. Massachusetts had already enacted an equal accommodation law in 1865,[241] New York did so in 1873,[242] Kansas in 1874,[243] and fifteen other States were to follow their lead before the turn of the century.[244]

6. Granting that the membership of both Houses of Congress had undergone some changes and that opinions expressed after the event must be read with caution, the presence of Senators and Representatives who had been prominent on the Committee of Fifteen on Reconstruction and in the consideration of the Fourteenth Amendment gives both the debate upon, and the enactment of, the Civil Rights Act

[240] The argument of the Attorney General of Mississippi is even more explicit in relating the public accommodations law to the Thirteenth and Fourteenth Amendments; he argued that without such a statute there would be a plausible pretext for interference by the federal government to enforce by appropriate legislation the equal protection of the laws. 48 Miss. at 664–673.

[241] Mass. Acts 1865, p. 650.

[242] N.Y. Laws 1873, p. 303.

[243] Kan. Laws 1874, p. 82.

[244] See n. 19, *supra*.

of 1875 significance as an exposition of the original understanding. Both confirm the view that the Fourteenth Amendment was expected to bring equality in places of public accommodation and amusement, and to authorize Congress to enact appropriate legislation when a State denied this form of equal protection of the laws.

The Civil Rights Act of 1875 originated with a bill introduced by Senator Sumner on December 20, 1871, to amend the Civil Rights Act of 1866. The bill in its original form provided that all persons, without distinction of race or color, should be entitled to "equal and impartial" enjoyment of any accommodation, advantage, facility, or privilege furnished by inns, public conveyances, theaters, or other places of public amusement, public schools, churches and cemeteries.[244a] In explaining his bill, Sumner declared:

> The new made citizen is called to travel for business, for health, or for pleasure, but here his trials begin. The doors of the public hotel, which from the earliest days of our jurisprudence have always opened hospitably to the stranger, close against him, and the public conveyances, which the common law declares equally free to all alike, have no such freedom for him. He longs, perhaps, for respite and relaxation at some place of public amusement, duly licensed by law, and here also the same adverse discrimination is made.[245]

[244a] Cong. Globe, 42d Cong., 2d Sess., p. 244.
[245] Cong. Globe, 42d Cong., 2d Sess., p. 381.

After quoting Holingshed, Story, Kent and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner continued:

> As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so it must be with the theatre and other places of public amusement. Here are institutions whose peculiar object is the "pursuit of happiness," which has been placed among the equal rights of all.[246]

Sumner's bill, which had been adversely reported in 1870 and 1871, was introduced on December 20, 1871, and attached as an amendment to the Amnesty Bill. The Amnesty Bill, as amended, failed to secure the requisite two-thirds vote, but there were thirty-three affirmative to nineteen negative votes, which seemingly indicates that a great majority thought that the amendment was constitutional. Among the majority were fifteen Senators who had participated in the consideration of the Fourteenth Amendment.[247]

Senator Sumner's bill was not considered in the House at that Congress. A resolution was offered declaring that it would be contrary to the Constitution

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[246] *Id.* at 382–383. See also 2 Cong. Rec. 11 ("Our colored fellow-citizens must be admitted to complete equality before the law. In other words, everywhere, *in everything regulated by law*, they must be equal with all their fellow-citizens. There is the simple principle on which this bill stands.") [Emphasis added.] See, also, Cong. Globe, 42d Cong., 2d Sess., p. 381 ("The precise rule is Equality before the Law; * * * that is, that condition before the Law in which all are alike—being entitled *without any discrimination to the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law* * * *.") [Emphasis added.]

[247] Flack, *The Adoption of the Fourteenth Amendment* (1908), 259–260.

for Congress to force mixed schools upon States or to pass any law interfering with churches, public carriers, or innkeepers, such subjects of legislation belonging exclusively to the States. The resolution was defeated by a vote of eighty-four to sixty-one. Among those voting against the resolution—and thus to sustain the power of Congress—were Representatives Bingham, Dawes, Garfield, Hoar and Poland, all active in Congress' submission of the Fourteenth Amendment to the States.[248]

In the Forty-third Congress Representatives Butler of Massachusetts, Chairman of the House Judiciary Committee, reported a bill which was in all material respects the same as Sumner's bill, and which ultimately (after the provisions with respect to schools, churches, and cemeteries were eliminated in committee) was enacted as the Civil Rights Act of March 1, 1875. Butler, like Sumner, declared that the purpose of the bill was to secure equality in public establishments licensed by law:[249]

> The bill gives to no man any rights which he has not by law now, unless some hostile State statute has been enacted against him. He has no right by this bill except what every member on this floor and every man in this District has and every man in New England has, and every man in England has by the common law and the civil law of the country. Let us examine it for a moment. Every man has a right to

[248] Cong. Globe, 42d Cong., 2d Sess., 1582.

[249] 2 Cong. Rec., 43d Cong., 1st Sess., 340. See, also, 3 Cong. Rec., 43d Cong., 2d Sess., 1005, 1006.

> go into a public inn. Every man has a right to go into *any place of public amusement or entertainment for which a license by legal authority is required.* [Emphasis added.]

During the same session, Senator Sumner again presented his bill. It was reported to the Senate on April 29, 1874, by Senator Frelinghuysen, who argued that Congress had power to pass the bill under its power to implement the equal protection clause:[250]

> Inns, places of amusement, and public conveyances are established and maintained by private enterprise and capital, but bear that intimate relation to the public, appealing to and depending upon its patronage for support, that the law has for many centuries measurably regulated them, leaving at the same time a wide discretion as to their administration in their proprietors. This body of law and this discretion are not disturbed by this bill, except when the one or the other discriminates on account of race, color, or previous servitude.

In addition to Senator Frelinghuysen, Senators Morton,[251] Edmunds,[252] and Boutwell,[253] who had been a member of the Reconstruction Committee, all ex-

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[250] 2 Cong. Rec., 43d Cong., 1st Sess., 3452.

[251] Senator Morton said (*id.* at Appendix 361):

"* * * the very highest franchise that belongs to any citizen of the United States as such is the right to go into any State and there to have the equal enjoyment of every public institution, whether it be the court, whether it be the school, or whether it be the public conveyance, or whether it be any other public institution, for pleasure, business, or enjoyment, created or regulated by law."

[252] *Id.* at 4171.

[253] *Id.* at 4116.

pressed the opinion that the rights enumerated in the Sumner Bill were secured by the Fourteenth Amendment. The Sumner Bill passed the Senate on May 23, 1874, by a vote of 29 to 16.[254] There were nine Senators supporting the bill who had taken part in the enactment of the Fourteenth Amendment. Only two Senators who voted for the Amendment were opposed.[255]

The House, however, took up the Butler bill, which was almost identical with the Sumner bill. It passed the House on February 4, 1875,[256] the Senate on February 27, 1875,[257] and became law on March 1, 1875.[258]

The Civil Rights Act of 1875 manifestly went beyond the power of Congress under the Fourteenth Amendment insofar as it attempted to create a direct federal right to equal service in places of public accommodation without a finding that a State had denied equal protection of its laws. *Civil Rights Cases,* 109 U.S. 3. Curiously, the bill's sponsors appear to have been proceeding upon the theory that the legislation was necessitated by the failure of some States to secure that equality (see p. 133 above), yet they failed to recite the justification in the bill and the Solicitor General did not urge it in his argument. The Court then assumed both that the right to nondiscriminatory treatment in places of public accommodation was secured by the Fourteenth Amend-

[254] *Id.* at 4176.
[255] Flack, *Adoption of the Fourteenth Amendment* (1908), 270, 271.
[256] 3 Cong. Rec., 43d Cong., 2d Sess., 1011.
[257] *Id.* at 1870.
[258] *Id.* at 2013.

ment and, also, that the right was in fact protected by the States. The decision rests upon those assumptions. 109 U.S. at 19, 21, 24. See also pp. 73–77 above.

Taking together all the evidence under the foregoing heads, it is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes from the public conveyances and places of public accommodation with which they were familiar, and thus to assure Negroes an equal right to enjoy these aspects of the public life of the community. The disability, then, as now, was plainly of caste. Removing it was within the broad purposes of the Amendments.

While the thrust of history points towards the conclusion that the Amendments were intended to secure Negroes equal treatment in places of public accommodation, in two respects events outstripped the framers' foresight. First, a whole new class of establishments grew up, notably the lunch counters, soda fountains, restaurants and numerous places of amusement now so familiar in the public life of the community. Second, the law of many jurisdictions, instead of extending to these new public enterprises the traditional duty of those engaged in public callings, retrenched and gave no person a legal right to enjoy their facilities.[259]

The first development hardly affects the case. It is a constitution we are interpreting, and the framers

[259] But see the remarks of Representative Lawrence upon the Civil Rights Act of 1866 for implied general recognition of a State's power to enlarge or contract the civil rights of all citizens. Cong. Globe, 39th Cong., 1st Sess., 1832.

of the Amendments appear to have been well aware that they were writing a constitution. See Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 59–64 (1955). Today's widely known places of public accommodation have some characteristics of the inn and common carrier, and some of the streets and public squares. Both were within the conception of the framers. If the proliferation of commercial establishments has made men less dependent than formerly upon the proprietor who pursues a public calling, the easier access to the premises and the increasingly casual nature of the contacts in the new places of public accommodation now make exclusion even more plainly a mark of caste. In the circumstances of our times eviction from a lunch counter, public restaurant or amusement park is scarcely different from the earlier inhibitions against coming and going upon the street or in the public square. Any personal contacts are more casual and evanescent than the relationships between travelers in the carriers and inns of the mid-nineteenth century.

The second development raises a serious difficulty. The expectation, as we have said, was that Negroes would be secured a right to equal treatment in places of public accommodation under State law by virtue of the constitutional compulsion to extend to them the same familiar legal right possessed by other members of the public. Withholding the legal right from everyone cut part of the ground from under the expectations and thus raises a question whether the dominant intent was to secure equality in places of

public accommodation as segments of public life closely regulated by law, or was to provide such equality only to the extent of applying the same legal doctrines to members of both races without regard to the resulting discrimination in fact.

The answer would be easier if the question did not involve one of the critical issues in the evolution of the Fourteenth Amendment. The dominant purpose of its sponsors was to eradicate the caste system. Dealing with constitutional rights, they must have been concerned with substance, not form; and plainly racial discrimination in places of public accommodation was a substantial mark of caste. Yet across the forward thrust of the dominant purpose cut two arguments which had considerable influence upon the Senators and Representatives who held the balance of power. One argument was that the civil rights bills asserted, and the proposed constitutional amendments would give Congress, excessive power to legislate directly concerning rights and duties which had been, and ought to be, the domain of the States (Cong. Globe, 39th Cong., 1st Sess., pp. 113, 363, 499, 598, 623, 628, 936, 1268, 1270–1271, 2940; App. p. 158). The other was that the radicals' excessive zeal was leading them to impose equality upon the whole community, not only in civil rights but also in social and political rights (*id.* at 343, 477, 541, 606, 1122, 1157). In this context there was criticism of the vagueness of the measures (*id.* at 41, 96, 342, 1157, 1270–1271) and possibly some tendency to exaggerate their scope (*id.* at 601–602; App. p. 70).

At one time the latter objection seems to have carried weight with the moderates and to have influenced Representative Bingham, who was the principal author of Section 1 of the Fourteenth Amendment.[260] Before the Civil Rights Act of 1866 could be enacted, general language forbidding "discrimination in civil rights or immunities" was eliminated so that the Act conferred equality in respect of specific rights plus "full and equal benefit of all laws and proceedings for the security of person and property."[261]

Whether this criticism also influenced the drafting of the Fourteenth Amendment seems questionable, but the effect of the argument against superseding State laws is plain. Representative Bingham's original equal rights amendment as reported by the Joint Committee on Reconstruction on February 26, 1866 read:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).[262]

Had that language been adopted, Congress would have had unquestionable power to secure "equal protection

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[260] Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 22–24 (1955).

[261] See n. 216, *supra*.

[262] Journal of the Joint Committee on Reconstruction, S. Doc. No. 711, 63d Cong., 3d Sess., p. 17, hereafter cited as "Committee Journal."

in the rights of life, liberty and property," without regard to State law. Within the area of "the rights of life, liberty and property" there would have been no room for arguing a technical equality of no-right; substantial equality, as Congress judged it, would have become the test.

The Bingham equal rights amendment was abandoned in the face of overwhelming opposition to giving Congress direct power to legislate regardless of the States, but its core was carried forward into the first and fifth sections of the Fourteenth Amendment with important modifications:

> *Section 1.* * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> *Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The revision makes it plain that Congress may legislate to secure equal protection only when there has been a denial of equal protection by a State.

It is more difficult to sense where the balance was struck upon the question of the scope of the promised equality. Professor Bickel, whose reading of the history is more restrained than that of many current commentators, concludes that "the new phrase, while it did not necessarily, and certainly not expressly, carry greater coverage than the old, was neverthe-

less roomier, more receptive to 'latitudinarian' construction" (Bickel, *op. cit.*, 61), but he also emphasizes the phrase *"of the laws"* (*id.* at 45). Quite possibly the upshot was that the framers, by granting exact equality in the formal rules of law and nothing more, sidestepped the problem of defining "civil rights" except as it might enter into the interpretation of the privileges and immunities clause.[263] Certainly the proponents of the amendment emphasized the idea of equal laws. This was the explanation given by Thaddeus Stevens, who introduced the resolution in the House (Cong. Globe, 39th Cong., 1st Sess., p. 2459):

> This amendment * * * allows Congress to correct the unjust legislation of the States, insofar that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way. * * * Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.

Senator Howard, opening the debate in the Senate, explained that the equal protection clause (*id.* at 2765):

> abolishes all class legislation in the States and does away with the injustice of subjecting one

[263] A thorough historical investigation of the intent of the framers with respect to equality of treatment in places of public accommodation would have to go behind the *Slaughter-House Cases*, 16 Wall. 36, to consider whether this was not originally conceived to be one of the privileges and immunities of citizens.

> caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.

Yet the guarantee of equal protection suggests more than a guarantee of equal legal formulas. It was read later to mean equality "in everything regulated by law" and "the equal enjoyment of all institutions, privileges, advantages and conveniences created or regulated by law."[264] At that time the area thus described was well defined; it was roughly coextensive with the public life of the community. Nor was some vagueness objectionable. The amendment was primarily intended to lay a foundation for future congressional action; then, as now, men were willing to resolve differences by leaving the final incidence of imprecise words to be unfolded by the future. There is ample evidence that the framers intended to give Congress power to act when the States failed to give equal protection in the actual administration of the laws,[265] and so well informed a man as Justice Bradley believed at one time that the obligation involved a duty to enact protective legislation.[266] Beyond doubt the scope of the guarantee was limited, but there is scant reason to suppose that it was limited to techni-

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[264] 2 Cong. Rec., 43d Cong., 1st Sess., p. 11; Cong. Globe, 42d Cong., 2d Sess., p. 381.

[265] Cong. Globe, 39th Cong., 1st Sess., pp. 2465, 2542.

[266] See p. 75, *supra*; see also Harris, *The Quest for Equality* (1960), p. 37.

cal inequalities in the laws themselves and did not extend to segments of public life that the laws customarily regulated. The narrower reading, as applied to today's places of public accommodation, poses the stark incongruity of a community-wide stigma of racial inferiority, in a State-regulated area of public life, flourishing in the face of the promise of the Amendments.

We pursue the inquiry no further. There is no need to determine in these cases whether a State's failure to grant Negroes a right to equal treatment in places of public accommodation involves a denial of equal protection of the laws, and, if so, whether Congress, in order to remedy a State's default, may provide the right by direct legislation. Wherever the purposive and limiting forces that shaped the Amendment reached equilibrium as applied to a situation in which the State has scrupulously refrained from acting, the consensus surely was not one of reluctance to provide for the invalidation of the slightest affirmative State interference on the side of caste. The very closeness of the balance with respect to the duty to provide equality in all public vehicles or places of public accommodation implies ready condemnation, at least in that area, of any product of unequal legislation.

Here respondents have never been truly neutral. The community-wide fabric of segregation is filled with threads of law and governmental policy woven by the State through a warp of custom laid down by historic prejudice. Discrimination in places of public accommodation is an indivisible part of that fabric.

It cannot be severed from the community-wide system of segregation and examined in isolation even in areas where State law never dealt with it directly. Past involvement in the larger scheme forbids a present posture of aloof indifference in places thrown open by the proprietor to the public life of the community. The States must at least take the trouble to notice what they have done and what is the effect of their current action. If the real consequence of a suit, whether civil or criminal, is to lend support to discrimination against the Negro in places of public *accommodation—discrimination that the State has* helped to encourage—then the State must stay its hand. Whether or not the State must act, it may not, under such circumstances, keep its finger on the scale in favor of the caste system.

That is the whole of our argument. That much, we submit, is compelled by the legitimate expectation of the framers of the Amendments in the light of contemporary realities. It is unimportant that the framers failed to foresee either the succession of events or the precise forms of State involvement. "* * * no human purpose possesses itself so completely in advance as to admit of final definition. Life overflows its moulds and the will outstrips its own universals. * * * It should be, and it may be, the function of the profession to manifest such purposes in their completeness if it can achieve the genuine loyalty which comes not from obedience, but from the according will, for interpretation is a mode of the will and understanding is a choice." L. Hand, *The Speech of Justice,* 29 Harv. L. Rev. 617, 620 (1916).

After a century it is not too much to say that the States must scrupulously avoid continuing to support, even indirectly, a stigma serving no function but to preserve public distinctions of caste which the Amendments promised to eliminate.

CONCLUSION

The judgments of conviction should be reversed.

Respectfully submitted.

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