CIVIL RIGHTS.

SPEECH

OF

HON. THOMAS F. BAYARD,

OF DELAWARE,

IN THE

UNITED STATES SENATE,

FEBRUARY 26, 1875.

"If this bill become a law, it will never be sanctioned by public opinion or the sentiment of the people; it will not be sustained by the courts: and, as was once said of an invalid judgment of a court, 'it will go forth without authority and will return without respect.'"

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1875.

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The Senate having under consideration the bill (H. R. No. 796) to protect all citizens in their civil and legal rights—

Mr. BAYARD said:

Mr. PRESIDENT: The measure now before the Senate has been here upon other occasions in a different form from that in which it is now presented. On those occasions those with whom I act politically in this body signified at great length their reasons of opposition. These objections were, however, made before the Supreme Court of the United States had passed upon the question of congressional power which is involved in the measure which I now propose to consider. The invalidity of acts like this, the utter absence of power in the Congress of the United States to assume jurisdiction over the internal affairs of the States, was then charged by the minority in both Houses of Congress, and was demonstrated over and over again in argument, but as usual without avail. The opposition to this bill, Mr. President, will be useless to prevent its passage, but I can speak with confidence of the fate which I believe this bill will meet at the hands of an intelligent and independent judiciary. I do not believe there is a section or a provision in this bill which is in accord with the meaning and the spirit of the Constitution of the United States; and this Congress, in attempting to enact such measures into law, are assuming powers which a proper regard for the oath they have taken should prevent.

Mr. President, we have here a most high-sounding title; an act proposing nothing less than "to protect all citizens in their civil and legal rights." It would seem in a breath to constitute an entire scheme of government, and the preamble following this title is quite as magniloquent and in keeping:

> Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,
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> *Be it enacted*, &c.—
>
> What is this act.
> That roars so loud, and thunders in the index?

Why, Mr. President, it would require the voice of a trumpet to give full, sonorous justice to such swollen phrases. If we had been told the preamble came from the hand of Mr. Joseph Surface, that celebrated master of fine sentiment, I should have thought the production well worthy of the author.

But, Mr. President, are we thus to proceed to enact, like any other "friends of humanity," great fundamental principles into law without regard to the character and extent of the powers delegated to us as legislators and the limitations placed by our own oaths in accepting the Constitution as our guide in framing laws?

Now, sir, under what clause of the Constitution are we to find power for this proposition? We are told that the fourteenth amendment of the Constitution gives us warrant. What does it provide? In section 1—and it is in the first section alone that this power is suggested—we find that—

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

Here in the first sentence is a simple declaration of the citizenship of persons within the United States; and as we all know, the effect of that declaration has been not to give any new rights, privileges, and immunities, but simply to enlarge the class of those who were to be entitled to "the privileges and immunities" of citizens of the United States.

The second section of the fourth article of the original Constitution provided—

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

There had been prior to the adoption of the fourteenth amendment a denial to certain classes, owing to alleged disabilities, to be considered citizens of the United States, although they might be citizens of some particular State. The Constitution, as amended, provided that—

> *All* persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States* and of the State wherein they reside.

There we find a simple declaration, and thus far no grant of power other than had existed prior to that time. Further—

> 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.

I apprehend that it is in this language which inhibits any "State" from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States that warrant for the bill we are now considering is supposed by its advoctes to be found. The second section of this fourteenth article merely provides for the apportionment of representation and punishes the refusal to allow representation for persons who are disfranchised. The third section prohibits any person having taken up arms against the United States and being engaged in insurrection or rebellion from holding an office under the United States or under a State except that disability be removed by a vote of two-thirds of Congress. The fourth section provides for the inviolability of the public debt of the United States and prevents the possible payment of any debt of a government engaged in hostility to the United States. All therefore that we find is that if there be any warrant whatever for this measure in the Constitution it must be found in the second paragraph of the first section which forbids *any State* from abridging the privileges and immunities *of citizens of the United States* and inhibits *any State* from depriving any person of life, liberty, or property without due process of law.

Now, Mr. President, this bill refers in no way to life, liberty, or property. No suggestion has been made that any one within a State

is deprived of either, or that this act is intended to remedy any such legislation by any State. The act must be intended to enforce the privileges and immunities of a citizen of the United States, withheld from such citizen by some State law, and if the matters pointed out in this bill shall be shown to be privileges and immunities of citizens of the United States, that is to say, privileges and immunities which belong to them because of *such* citizenship, then we can see there may be justification for this proceeding on the part of Congress. To put my proposition in plain words, if the privilege of entering an inn in the State of Pennsylvania or of entering upon a steamboat or a railway chartered by the laws of that State, or of entering a theater or a concert hall or any place of amusement in the State of Pennsylvania—privileges, conveniences or pleasures, which have their existence within that State by virtue of the laws of that State and cannot have existence beyond the boundary of that State simply because the laws of the State cease to have power beyond the State limits—if it can be shown that the fact of my right in Pennsylvania to purchase a ticket to enter a theater or to obtain accommodation at a hotel is a privilege and immunity by reason of my citizenship of the United States, and that the Government is bound to protect me in that under the fourteenth amendment, then there may be warrant for this bill. But what power did this amendment mean to confer on Congress? Did it mean to give the United States power to protect citizens in their rights *as citizens of the United States*, or did it go further and propose to protect them in their rights as citizens *of the State?* There is the precise line. There are certain rights and privileges belonging to citizens of the United States—long and well known and defined—but there are innumerable other rights and privileges derived from the State laws and regulations and enjoyed in right of citizenship of a State, and not by virtue of Federal citizenship. If the Government of the United States has the power to enter a State and take control of that vast domain of rights under the State regulation which a citizen acquires by virtue of the State laws which are regulated by the State, which are conferred by the State, which heretofore always in the history of this Government have been protected by the State, and the State alone—if the United States can assume guardianship of all those, then the State laws and the State governments are absolutely worse than useless; they are mere laughing-stocks existing only at the pleasure of Congress and the Executive, liable to be disturbed, modified, or overthrown as pleasure or caprice shall dictate without regard to State constitutions or supposed reservations of power in the States or the people.

This is no extreme view of mine. It has been distinctly proclaimed by the Supreme Court of the United States, and as I understand it every judge who has passed upon this question, whether concurring in the opinion of the court or dissenting because of his refusal to apply the principle to the particular case in question, has nevertheless agreed in recognizing the distinction I have referred to and its necessary effect. Let me read the language of Mr. Justice Miller in 1873 in delivering the opinion of the Supreme Court in the Slaughter-house case:

> It would be the vainest show of learning to attempt to prove by citations of authority that, up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other exceptions, the entire domain of

the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation; but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction, followed by the reversal of the judgments of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments nor by the Legislatures of the States which ratified them.

The same declaration in substance is repeated in the dissenting opinion delivered in the case, and I do not understand these doctrines to be denied by any member of the Supreme Court. The question in the case then under consideration was in the application of the doctrine to the facts then before the court; a majority being of opinion the "rights and privileges" involved in the consideration were not those pertaining to the plaintiffs in error *as citizens of the United States*, but were left solely to the jurisdiction and control of the State constitution and laws of Louisiana, and some of the judges dissenting on that issue. The court moderately stated that it would radically change the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people if a different construction were admitted and the whole domain of the State control of internal affairs was handed over to the will of Congress. Why, sir, it would give to Congress a veto on every act of every State Legislature, and it would be far better at once to save the useless trouble and expense of the State governments and allow the entire legislation, local and general, of the thirty-seven States to be conducted in these two Houses of Congress. But, as I said, all the judges agreed as to the proper domain of the State and the Federal governments. Mr. Justice Swayne, delivering his dissenting opinion in the same case, says:

The citizen of a State has the same fundamental rights as a citizen of the United States, and also certain others, local in their character, arising from his relation to the State, and in addition, those which belong to the citizen of the United States, he being in that relation also. There may thus be a double citizenship, each having some rights peculiar to itself. *It is only over those which belong to the citizen of the United States* that the category here in question throws the shield of its protection. All those which belong to the citizen of a State, except as to bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, *are left to the guardianship of the bills of rights, constitutions, and laws of the states respectively.* Those rights may all be enjoyed in every State by the citizens of every

other State by virtue of clause 2, section 4, article 1, of the Constitution of the United States as it was originally framed. This section does not in anywise affect them; such was not its purpose.

I could read the dissenting opinions of other judges, showing that they all concur in the principle in the case then before them. Some of them considered that there was a violation by a law of Louisiana of the fundamental rights and immunities and privileges which belong to citizens as citizens of the United States, those "immunities and the privileges" which the original Constitution secured and which had been theretofore defined by Mr. Justice Washington in the case of Corfield *vs.* Coryell, and whose definition had been accepted from that day to this, and is cited in the very case from which I read, and is found later in a case decided in 1873, in 17 Wallace, The Railroad *vs.* Burnell. Soon after the Slaughter-house cases came the case of Bradwell *vs.* The State, where a woman proposed to test her right and privilege to be admitted to practice law in the courts of the State of Illinois, which by the judgment of the supreme court of that State was refused her. She sued out a writ of error in the Supreme Court of the United States upon that judgment, and it was ably and eloquently argued in her behalf by an advocate no less distinguished than the Senator from Wisconsin, [Mr. CARPENTER,] and no counsel appeared on the other side. The whole battery of the learning, the ingenuity, and the eloquence of that distinguished Senator of which we are constantly witnesses was displayed without a returning shot before that court; and yet there was a unanimous opinion adverse to her admission. In delivering the opinion, which was concurred in by every member, (Mr. Justice Bradley stating a different reason for the opinion,) the court said:

> We agree with him, (Mr. CARPENTER,) that there are privileges and immunities belonging to citizens of the United States in that relation and character, and that it is these *and these alone* which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State or in any case to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the the State and Federal courts, who were not citizens of the United States or of any State. But on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that *as to the courts of a State*, it would relate to citizenship *of the State* and as to Federal courts, it would relate to citizenship of the United States.
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> The opinion just delivered in the Slaughter-house cases renders elaborate argument in the present case unnecessary; for unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal Government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license. (16 Wallace, 139.)

Again, there is a case which afterward arose at the October term, 1873, Bartemeyer *vs.* The State of Iowa; and the syllabus of the case, the whole meaning of the case, was that the fourteenth amendment does not interfere with the police powers of the State. Mr. Justice Bradley gave the opinion; Mr. Justice Field concurred. Mr. Justice Field was the judge who led the dissent, and chiefly expressed it, to the opinion of the court in the Slaughter-house cases, and therefore by some it might have been supposed that he differed with the doctrine laid down by the court in the decision of those cases, which excluded the Federal Government from any interference with the control of the rights of the citizens of a State in regard to those rights which belong to them otherwise than as citizens of the United States. But so far as the doctrine which I am contending for was concerned,

the court were unanimous. Said Mr. Justice Field in the case of Bartemeyer in 1873:

> No one has ever pretended, that I aware of, that the fourteenth amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The judges who dissented from the opinion of the majority of the court in the Slaughter-house cases never contended for any such position. But, on the contrary, they recognized the power of the State in its fullest extent, observing that it embraced all regulations affecting the health, good order, morals, peace, and safety of society, that all sorts of restrictions and burdens were imposed under it, and that when these were not in conflict with any constitutional prohibition or fundamental principles, they could not be successfully assailed in a judicial tribunal.

Mr. President, it would seem to me impossible in the face of such language as this, proceeding from a court entirely unanimous, that Senators could suppose such an act as we are now considering could stand for one instant the test of judicial criticism. The assumption of this bill is that under the fourteenth amendment to the Constitution, inhibiting a State from establishing or enforcing inequality, Congress has become the guardian of each individual in a State, can enter a State, control all its internal affairs in order to secure the enjoyment of each individual's supposed rights, and the constitution and laws of the State itself. Let us examine this category of the alleged rights, privileges, and immunities supposed to need congressional aid and warrant congressional interference for their maintenance and supervision. Hotels, public conveyances, and places of public amusement. What utter bathos, Mr. President, does this single paragraph which I read a while ago contain? The act is entitled "An act to protect all persons in their civil and legal rights," a scheme of government in a single line, with a preamble declaring that it is the duty of a government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political, and declaring the appropriate object of legislation to be to enact great fundamental principles into law;" and then we find such a terrible fall from so great a height of argument to daily hotel life, to every-day carriage in railways, to visits to theaters and concert halls, and these are gravely and sonorously proclaimed "fundamental principles," and full and equal enjoyment is enjoined.

Mr. President, how are these institutions of pleasure or convenience—the theater, the inn, the public railway, or steamboat—created? In every case by private means, sometimes by State aid, and oftentimes sustained by State acts of incorporation. There is not one that does not owe its existence to State law or custom, and which has its lawful existence only within a State, and subject to State law and regulation. Some States may tax them by requiring a license for hotels and theaters; others may not and do not; some may forbid them *in toto;* others may encourage them in the most liberal manner; but all are founded and conducted by private individual or corporate enterprise, not in any case I can now recall by a State as a State institution. Bear this in mind, for the fourteenth amendment is addressed entirely to States and never to people, and there seems to me to have been a very strange confusion in the minds of those who draughted this bill, under the fourteenth amendment, in referring to "nativity, race, color, or persuasion, religious or political," when the fourteenth amendment contains no such language, and no reference to such subjects is to be found in any part of it. The fifteenth amendment relates only to the right to vote, and forbids any State to abridge that right by reason of "race, color, or previous condition,"

but the fourteenth amendment has no reference whatever to such subjects. There is not a word of sex or of race, of age or of color, of nativity or of religion—not a word in any way, express or implied, in the language of the amendment under which this statute is supposed to find its warrant.

It is difficult to comprehend the confusion of mind in which such a bill was conceived and matured—no wonder all constitutional limitations were disregarded or not perceived.

If there can be imagined any domestic institutions designed and used in the comfortable daily life of our people and now almost essential to society, surely they are our hotels, public conveyances, and theaters, which almost more than any others may be described as necessarily and peculiarly lying among the immense mass of legislative powers, which embrace everything in the territory of a State not surrendered to the General Government, which can be most advantageously exercised by the States. In searching for subjects peculiarly within the cognizance of State control one would at once select the identical institutions which are mentioned in this bill. If I wished to give examples of such matters as were especially and necessarily within the control of State regulations and laws, I would select these identical institutions which are now sought to be invaded by Federal law. To talk of their use and enjoyment as "fundamental rights" is simply to talk nonsense. To talk of them as rights belonging in any way or in any way flowing from a man's relation to the Government of the United States is equally absurd. If you wish to know their nature and necessary limitations, inquire into the source of their creation, what made them, what can unmake and destroy them, and do so lawfully? What is that? It is the power of the State in which these institutions are found. To the State's control, and necessarily to its protection and to its regulation, must be confided the rights or the privileges that flow from institutions created by its laws and by its laws alone. If the right grew from the Government of the United States, its laws can enforce and protect; but if the right has its root in the constitution and laws of a State, then to its source of existence alone can it look for enforcement and protection. Any other rule would throw our entire system of government into inextricable confusion.

The language I read just now describing this "immense mass of legislative powers, which embrace everything in the territory of a State," was used first by Chief Justice Marshall in 1824 in the case of Gibbons *vs.* Ogden, and it has been cited by the Supreme Court of the United States with admiring acceptance from that day until this, and by every court in the country that has been called upon to pass upon questions defining the constitutional barriers of power between the States and the Federal Government.

Now, does it not appear too absurd, almost impossible, to imagine Congress gravely proposing that the great Federal Government of our Union shall be attending to the duties of a hotel clerk; that we shall be examining into the relative advantages and condition of the bed-rooms of an inn, or deliberating upon the measure of duty of the head waiter at a hotel, legislating so that equal enjoyment at the *table d'hôte* is given to the guests, or supervising the railway conductor, and taking care by law that he assigns equally good seats to all the passengers, or, assuming the functions of the theatrical manager or his usher, shall insist that he have always present in his mind the dignity and power of the great Government of the United States. No other illustration is needed to exhibit the absurdity of this bill

of this night, afford us much-needed rest we shall again resume the consideration of this question to-morrow. Other gentlemen may desire to express their views upon it, and therefore I shall leave the question.

There are many objections of a social nature which I should have proposed to state, but I have confined myself to what I am aware is a very imperfect statement of the legal and constitutional objections to the enactment of this bill. It required nothing original in argument. The simple citation of those doctrines which have been applied to cases entirely at one with that which we are now considering, leaves me in no doubt that the bill which we are considering has not a single constitutional feature; that it seeks to create a confusion between the lines of State and Federal authority fatal to good government, and which I trust will be set right by the courts when they shall have the opportunity.

I had intended to discuss the section invading the jury systems of the States, and would have desired to enlarge upon the importance of a sound jury system to every State, and of the great difficulties attending its regulation. But time forbids, and I know I speak to deaf ears in this Chamber. In deciding upon the right to practice law as a profession before State courts, the Supreme Court, in the case of Bradwell, to which I have referred, have certainly laid down the doctrine which excludes the supposed right to sit on juries from the category of those rights intended to be secured and protected by the Federal power under the fourteenth amendment; and I cannot doubt the result whenever this bill shall come before them. In that confidence, I will not prolong my remarks or weary myself or the attention of the Senate.