

**PART TWO**  
**THE FIRST AMENDMENT AND THE RIGHT TO ENGAGE**  
**IN THE MASS PROTEST OF STATE-ENFORCED**  
**SOCIAL INEQUALITY BASED ON RACE**

**THE MONTGOMERY BUS BOYCOTT**  
**THE 1960 SIT-INS**  
**&**  
**THE 1961 FREEDOM RIDES**

The issue of social equality was central to the Civil Rights Movement, and Brown v. Board's overturning, in 1954, of Plessy v. Ferguson, 163 U.S. 537 (1896). In Plessy, the Supreme Court had viewed constitutional citizenship as recognizing that the new status of black citizens in America included civil rights, meaning only the right to make contracts and to own, lease or convey property, to sue and be sued, and arguably to enjoy the right of free speech and the free exercise of religion. But the Fourteenth Amendment was not held to specifically subsume political rights, and Plessy explicitly held that social equality or inequality was a matter of human interaction, not to be included in any constitutional definition of civil rights. See J. Balkin, "Plessy, Brown and Grutter: A Play in Three Acts," 26 Cardozo Law Review 1689 (2005).

Thus, although Brown v. Board was decided in the context of public education, the issue of social inequality based on race became an immediate focus of the Direct Action Campaign for Civil Rights in the south, and Browder v. Gayle, 142 F. Supp. 707 (1956), the Montgomery Bus Boycott case, was the seminal event that would eventually lead to the 1960 sit-ins and the 1961 Freedom Rides. The event that provoked the Browder case, and the boycott itself, is one of the few popularly known specific events in Civil Rights Movement History: The arrest of Rosa Louise McCauley Parks for refusing to give up her seat on a city bus so that a white passenger would not have to stand. Through the efforts of the Montgomery Improvement Association, the legal history of the Browder case itself, and the boycotting of the City's buses by black citizens who depended on such transportation, became the first example of Dr. King's observation that "when legal action and protest for rights [under The First Amendment's complementary guarantees] work together, both become more effective."

The class action plaintiffs in the Bus Boycott case sought a declaratory judgment that Alabama state statutes and ordinances of the City of Montgomery providing for and enforcing racial segregation on "privately" operated buses abridged the privileges and immunities of plaintiffs and denied them equal protection of the laws under the Fourteenth Amendment, as well as rights guaranteed them by Sections 1981 and 1983 of the Civil Rights Act. The case came before a three-judge court under the authority of 28 U.S.C., § 2281, and 28 U.S.C., §§ 1331 and 1343 (Federal question jurisdiction and the jurisdiction of three-judge federal District Courts).

Following the arrest of Ms. Parks on December 5, 1955, and throughout January 1956, the newly formed Montgomery Improvement Association attempted, without success, to negotiate with the city commission and bus company officials for a plan to desegregate city buses. When the City refused the measured suggestions of the Association (and its inaugural leader, 26 year-old Dr. Martin Luther King, Jr.), Fred Gray, a young, black Montgomery attorney, filed the eventual civil action. The Browder case was brought by a group of plaintiffs who had been required at one time or another, to comply with state and city laws requiring separate accommodations for white and “colored” passengers on any commercial vehicle operated by any motor transportation company within the state of Alabama and the City of Montgomery. Browder became the first major civil rights case to come before Judge Johnson following his appointment (in October 1955) by President Eisenhower as a federal District Judge.

The bus company, relying on the allegation that its bus system was “privately owned,” argued that the segregation of the races on buses within the City of Montgomery was valid pursuant to state law and city ordinance. The three-judge court disagreed and held that state statutes and city ordinances that required the racial segregation of passengers on the buses of a common carrier in the City of Montgomery violate the Due Process and Equal Protection Clauses of the federal Constitution’s Fourteenth Amendment. Throughout the case, for 381 days, black citizens of Montgomery engaged in a mass protest of the segregation of the City’s buses by refusing to ride the buses. This mass boycott was an example of the First Amendment’s guarantees that can be seen as unique, *i.e.*, the decision to engage in verbal mass criticism of City segregation law, while also engaging in silent expression by walking or carpooling, rather than using the buses.

Judge Johnson and federal Circuit Judge Richard Rives recognized that people may associate in their private affairs without raising Fourteenth Amendment questions, but reasoned that there was a constitutionally recognized difference between voluntary adherence to custom, and the enforcement of racial segregation by law. [The U.S. Supreme Court had already ruled, in 1948 and 1950, in Morgan v. Virginia, 328 U.S. 373, and Henderson v. United States, 339 U.S. 816, that statutes requiring segregated seating for “Negro” passengers on interstate buses and railroad cars unconstitutionally burdened interstate commerce, citing cases construing the Fourteenth Amendment. Perhaps more significantly, Judges Johnson and Rives, in the Browder panel decision, held explicitly (2-1), for the first time, that in Brown v. Board of Education, the Supreme Court had formally repudiated the “separate but equal” doctrine of Plessy v. Ferguson (That Brown I had indeed overturned Plessy). In November 1956, the Supreme Court affirmed the panel decision in Browder [*See* 352 U.S. 903] and the City’s buses were accessible to passengers without regard to race.

Although Browder had overturned Plessy on Fourteenth Amendment grounds, four years later the separate but equal mythology of Plessy v. Ferguson was enforced by southern law to continue to allow blacks only segregated access to public accommodations, including stores and theaters, where they spent money as customers, but were denied other services and were physically segregated from white customers. Although countless individual acts of courage challenged the continued racial segregation of places of public accommodation, two examples stand out: The 1960 sit-ins in

Greensboro, North Carolina, Nashville, Tennessee, and Montgomery, Alabama, and the 1961 Freedom Rides. These protests of segregation would attract youth to the Movement, giving the Direct Action Campaign new energy, and would provoke a new southern strategy of resistance to federally protected First Amendment activity. This resistance was characterized by the use of so-called local "breach of peace" laws to arrest and jail *peaceful* demonstrators, a strategy which revealed the complicity of law enforcement in the abuse of the legal process and *de facto* complicity in white violence targeting the protestors. This misguided use of so-called local "breach of peace" laws was a deliberate "trick" to suppress or ignore federal First Amendment rights of assembly and symbolic speech because they were applied to arrest peaceful protestors who were, in fact, the victims of the attacks by white segregationists, or to arrest protestors on the ground that their mere presence would provoke a danger of white physical reaction.

On Monday, February 1, 1960, four freshmen students at North Carolina A & T College took four seats at the lunch counter of a Woolworth's department store in Greensboro. When Joe McNeil, Ezell Blair, Frank McCain, and David Richmond engaged in this peaceful protest of the policy of racial segregation at public and private lunch counters, they were following the footsteps of James Farmer and C.T. Vivian who had led peaceful protests at segregated restaurants in Chicago and Peoria, Illinois long before this time, and other civil rights activists who had participated in such "sit-ins" throughout a dozen southern cities in the late 1950's – but they were also beginning a new era in the civil rights struggle.

This new era revealed a relationship between the resolve of the Montgomery Movement, and the youth in other cities who were ready to expand the challenge to racial segregation by exercising their First Amendment freedom to engage in the peaceful mass protest that had been adopted in Montgomery. The involvement of youth was critical to the identity of the Movement's challenge to social inequality from then on. This new cohort, who eventually became the Movement's fourth alliance, The Student Nonviolent Coordinating Committee, were still enrolled in colleges and universities; but most of them had been born in the segregated south and had felt its indignity from childhood; and they were ready to be schooled in nonviolent protest. An illustrative personal narrative is thus important before we move on to the seminal case law.

Rip Patton was a 21-year-old music major at Tennessee State University (Then Tennessee A & I University) when he joined the Nashville Movement in 1960, and participated, along with Diane Nash, John Lewis, and others, in the first nonviolent protest workshops mentored by James Lawson, then a second-year graduate student at Vanderbilt University. The "Lawson Workshops" were conducted to train students in peaceful "Gandhian protest" in preparation principally for the 1960 lunch-counter sit-ins and related protests of segregated seating at movie theaters and other public commercial and recreational facilities such as public parks and swimming pools in Nashville.

Hundreds of students in Nashville, and throughout the South, challenged the operation and maintenance of "white only" lunch counters, restaurants, theaters, libraries, parks and playgrounds, water fountains, and restrooms. It is well documented in the books, newsreels and documentaries that describe this era, that on all too many occasions,

the students who participated these peaceful demonstrations were assaulted by angry whites, and then subjected to spurious criminal charges *that they – not those who had assaulted them – were guilty of disorderly conduct or breach of peace*. More specifically, the white assailants were violating classic criminal law and the civil common law of assault and battery, and the protestors' activities were exercises of classic First Amendment speech and assembly under federal law. Legal rights under criminal and civil law were turned upside down solely to sustain the malevolent desire of white supremacists to preserve racial segregation.

What has not been properly emphasized is the fundamental impact that this aspect of the civil rights movement also had on the students' right to attend the colleges and universities in which they were enrolled. Despite fundamental constitutional principles of free speech, association, and the protest of grievances against state apartheid laws, politically motivated characterizations of these demonstrations as disruptive of a university's business, or contrary to its image, subjected students to summary expulsion. The most popularly cited case on this aspect of both free speech and due process is a case challenging the expulsion of St. John Dixon, Bernard Lee, Marzette Watts, Edward English Jones, Joseph Peterson, and Elroy Embry from Alabama State College. The case came before federal judge Frank Johnson as Dixon v. Alabama State Board of Education, Gov. John Patterson, et al., 186 F. Supp. 945 (M.D. Ala. 1960); on appeal, 294 150 (5<sup>th</sup> Cir. 1961).

The six named students sought a preliminary and permanent injunction to restrain the State Board of Education and the College's president from depriving them of their status as students in good standing. On February 25, 1960 (the same month as the Woolworth lunch counter sit-in at Greensboro, NC), St. John Dixon and approximately 28 other students had entered the publicly owned lunchroom in the Montgomery County Courthouse, a facility that refused to serve black citizens. The sit-in was planned, and its purpose was to make a statement that the students had a constitutional right to seek service in a public, tax-supported lunch facility (*i.e.*, to challenge the racial segregation of public facilities).

Their request to be served was denied, the lunch grill was closed, and the students were told to leave. When they refused to leave, the police were called. Immediately, John Patterson, who was Governor of Alabama and chairman of the State Board of Education (and who later became known for his open defiance of attempts to enforce federal law, including his refusal to protect freedom riders from white mob attacks in Alabama in May of 1961) advised (more accurately *directed*) H. Councill Trenholm, the institution's President, to institute expulsion or other disciplinary action (It is beyond doubt that President Trenholm acted at the direction of the Governor, with great professional and personal reservation).

On February 26, several hundred black students from the College attended the trial of a fellow student at the Montgomery County Courthouse. Following the trial, the students filed two by two from the courthouse and marched approximately two miles back to the college. The next day, another several hundred students participated in mass

demonstrations in Montgomery and Tuskegee. In response to the students' actions, the student body was told that the demonstrations and meetings were disrupting the orderly conduct of business at the college and adversely affecting the work of other students. Bernard Lee filed a protest with the Governor, and on March 1 approximately six hundred students at the College engaged in hymn singing and speeches on the steps of the State Capitol.

Following "investigations" by the State Attorney General's staff, and the College, Dixon, Lee, Watts, Jones, Peterson, and Embry were described by the College as having a central role in the student demonstrations. Without further notice to the students, or any hearing where they would have an opportunity to respond to these allegations, the Board of Education voted unanimously to direct Dr. Trenholm to expel nine students, and place twenty others on probation. The students were notified of their summary expulsion, and other students were warned against further demonstrations, in factually unsupported, and arguably feigned language characterizing the demonstrations as calculated to incite riots. In response to the College's action (which was, under the Constitution, state action), approximately two thousand black students held a meeting at a church near the campus, and criticized the expulsions.

Shortly thereafter, the named students consulted with attorney Fred Gray and filed a federal lawsuit, alleging that the College had expelled them without regard to any valid rule or regulation concerning student conduct, and that its action reflected retaliation, punishment, or intimidation for their lawful attempt to be served at a publicly owned and operated lunch grill in the Courthouse. Invoking their rights as national citizens, they alleged that such unilateral and summary actions by the College (as *state action*) violated their *federal* First Amendment and Fourteenth Amendment rights. Fred Gray took the case as a First Amendment case, *i.e.*, a case of state retaliation for the students' protest of racial segregation.

Nevertheless, although the students' legal counsel did not intend to limit the case to alleged violations of due process, Judge Johnson saw the singular issue to be whether the students were entitled to protection under the Fourteenth Amendment's Due Process Clause. In language not controversial in itself, he explained that a state board of education is authorized to adopt rules regulating student conduct, and that the right of a student to matriculate is conditioned upon the student's compliance with the rules of the institution. Judge Johnson felt constrained to respect college rules, which stated only in general terms that students "should conduct themselves in a manner becoming future teachers in the public schools of Alabama, ...show a spirit of loyalty to the institution...and give willing...obedience to the President and faculty."

Such language could of course have been interpreted as facially depriving students of any entitlement to matriculation, except at the whim of the College's president and faculty. The quoted language would be a clear violation of The First Amendment rights of any public university student today. However, Judge Johnson avoided that issue and unfortunately exercised broad judicial deference, affording colleges unique status among public institutions, even though colleges and universities

exist to further academic freedom. Thus public universities, of all places, should be a safe haven for a peaceful mass protest of racial discrimination in places of public accommodation. Judge Johnson's decision to acknowledge that segregation was a proper matter of federal concern, simply makes strange his decision to effectively separate it from his definition of the issue in Dixon, and his decision on the question of the parameters of judicial deference to public universities.

Notwithstanding that the students had both a contractual and constitutional relationship with the state university in which they were enrolled, Judge Johnson held that the student plaintiffs had no entitlement to a statement of grounds for their expulsion, or a hearing, in the absence of an affirmative rule of the college or the state conferring such a right. He did so, even though he impliedly recognized the students' First Amendment right to free speech – making it clear that, in his mind, the legality of the sit-ins was not at issue in the case. Judge Johnson did make it very clear that his opinion should not be read to condone any policy of race discrimination in the operation of publicly owned and maintained lunchrooms – the very reason Fred Gray, the students' attorney, took their case. (Again, to Mr. Gray this was a case about the First Amendment right to protest against state sanctioned racial segregation). But contrary to his subsequent First Amendment decisions in other cases, Judge Johnson recognized the inherent relationship between the request for service as a planned methodology generally employed to draw attention to segregationist practices, and the publicizing and protesting of those practices directly through boycotts, or indirectly by demonstrations, news releases, and similar First Amendment activities. But the plaintiffs' student status, and Judge Johnson's judicial deference to higher education institutions, unquestionably influenced his decision.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed Judge Johnson, on the issue of due process, but failed to take the opportunity to make this a true First Amendment case – which it was. The opinion of a divided court was written by Judge Richard Rives, for himself and Judge John Minor Wisdom. Judge Ben Cameron dissented. The singular issue before the court was “whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct.” Judges Rives and Wisdom held that it did. Judge Rives immediately captured the factual premise of the due process issue by observing that the misconduct for which the students were expelled had never been specified by Alabama State College's President or the Board of Education. The College's President had admitted in testimony that the notice of expulsion he sent to the student plaintiffs specified no ground for expulsion, but instead referred generally to “this problem of Alabama State College.”

Referring to the trial court's findings, Judge Rives held that there was no evidence that all of the student plaintiffs had participated in any demonstration other than the lunch grill sit-in. More importantly, the Governor's own statements suggested that the expulsions were based upon (1) the students' criticism of the State Board, and (2) the State's undifferentiated fear, absent any factual support, that if something were not done, white violence might occur at the College or in the County. Finally, the State Superintendent testified that his vote for expulsion was based solely upon the belief that

students had the right to demonstrate only with the consent of the President of the College, an observation made in total disregard for the basic guarantees of the First Amendment's speech, association, press, and petition clauses.

Judge Rives observed that the assertion of due process entitlements by the student plaintiffs could not be dismissed with the simple observation that the right to attend a public college or university is not in and of itself a constitutional right. Moreover, the College could not, acting as the State, condition the privilege of enrollment upon a waiver of the constitutional right to due process. Re-affirming the fundamental observations of the Supreme Court's unanimous opinion in Brown v. Board of Education, Judge Rives wrote that the students' opportunity for higher education directly affected their livelihood and their capacity as citizens. Adding that it would be unlikely that a public college would accept a student expelled from another public college of the same state, he described the students' interest in remaining at Alabama State College as "an interest of extremely great value."

Anticipating the contrapuntal argument, Judge Rives singularly connected the First and Fourteenth Amendments, cautioning public colleges and universities that the existence of a rule did not, *per se*, immunize the university from a charge of arbitrary dismissal, where there was evidence that the dismissal was in retaliation for the students' First Amendment right to protest an act of discrimination by a public facility based solely on the race of the students. Understanding Judge Johnson's basic commitment to civil rights, Judge Rives suggested that Judge Johnson might have reached the same conclusion at the trial level, had he not felt bound by precedent affording complete discretion to colleges and universities in matters of discipline. However, he noted that the precedent upon which Judge Johnson's opinion relied involved the right of private, not public, universities to determine the preconditions to expulsion by rule, because the relationship between a student and a private university is contractual, not constitutional.

Recognizing the relationship between the First and Fourteenth Amendments, Judge Rives announced the court's famous holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct. His words took on a paradigmatic quality, and universities began to envision a new era in student life – identified by the recognition of constitutional principles affording students fundamental protections against arbitrary, summary, or retaliatory dismissal, especially for exercising their federally protected rights under The First Amendment. Professor Charles Alan Wright would later emphasize in his 1969 Oliver Wendell Holmes lecture at Vanderbilt University, that Dixon was a special constitutional case. When the Movement gained the momentum of the sit-ins in 1960, southern state politicians and other public officials perceived that the Direct Action Campaign could be slowed by revoking the good standing of college and university students who participated in protest activities. *Dixon v. Alabama State Board* at least *theoretically put an end to that strategy!*

While maintaining a substantial measure of judicial deference to educational administrators, Judges Rives and Wisdom were unwilling to allow universities to define,

*ipse dixit*, what was detrimental to the university's image or well-being, in an era when southern university presidents were directly influenced by southern governors committed to white supremacy and segregation. Viewing other First Amendment cases – which gave substantive protection to student speech and academic freedom, associational rights, and the student press – as central to any paradigm of student freedom, Dixon regarded these substantive rights as meaningless in the absence of procedural safeguards preventing summary suspension or expulsion of students for their exercise of the First Amendment. See C. A. Wright, "The Constitution on the Campus," 22 Vand. Law. Rev. 1027 (1969).

The Freedom Rides: In his book, *Unlikely Heroes*, Professor Jack Bass writes that with election of John F. Kennedy, the Department of Justice became actively engaged in the issue of civil rights. However, it can be said that the new administration's priorities focused on voting rights and efforts to support the admission of black students to previously all-white southern state universities. In contrast, Dr. King, and other Movement leaders challenged the entire system of race-based classism – including the continued practice of racial segregation, even in interstate travel. With the energy gained from the sit-ins, the Direct Action Campaign sought to test the Supreme Court's latest decision on the issue of social segregation raised in Plessy. The case was Boynton v. Virginia, 364 U.S. 454 (1960), which took up the question of segregated facilities in interstate bus terminals operated by the Greyhound and Trailways bus companies.

Boynton had an established legal history, which had already rejected Plessy's approval of social segregation in public transportation in the context of interstate travel. In 1946, the Supreme Court had held, in Irene Morgan v. Commonwealth of Virginia, 328 U.S. 373 (1946), that provisions of the Virginia Code of 1942, requiring the separation of passengers, based on race, on both interstate and intrastate motor carriers, were invalid as applied to passengers of interstate bus lines, because such state enforced racial segregation burdened interstate commerce in violation of Art. I, §8, cl. 3 of the U.S. Constitution (The Commerce Clause).

Following the Irene Morgan decision, the Congress of Racial Equality (CORE) and the Fellowship of Reconciliation, led by Bayard Rustin, James Peck, James Farmer, and George Houser, developed the concept of the "freedom rides" and tested the Boynton case by organizing a few small integrated groups who boarded Greyhound and Trailways buses with the purpose of riding together from Washington to Richmond and thereafter throughout the South. The participants in these early freedom rides (known as the Journey of Reconciliation) were arrested in North Carolina and many, including Rustin (later a principal organizer of the August 1963 March on Washington), spent up to a month in state prisons, and on chain gangs. See R. Arsenault, *Freedom Riders: 1961 and the Struggle for Racial Justice* (Oxford Univ. Press 2006).

In Boynton the Supreme Court considered the racially motivated denial of food service by a restaurant inside a bus terminal used by the Trailways bus company. Bruce Boynton, a Howard University law student, bought a Trailways bus ticket from Washington D.C. to Montgomery, Alabama. At a stop in Richmond, Boynton entered the "white-only" section of the Trailways terminal to get something to eat. When he refused



the directive of a waitress and the Assistant Manager of the facility to move to the “colored” section of the restaurant, he was arrested and later convicted of a misdemeanor and fined ten dollars, for violation of Virginia Statutes. On appeal, Boynton claimed that, as an interstate bus traveler, he was on the restaurant premises lawfully and the refusal to serve him in the “white only” section constituted discrimination based on color in violation of the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution.

The Virginia Supreme Court affirmed the conviction. Avoiding a direct Fourteenth Amendment question, the United States Supreme Court held that the Interstate Commerce Act, which had been interpreted to prohibit racial discrimination in interstate railroad dining cars, contained language that also prohibited such discrimination at an interstate bus terminal’s dining facilities. The Court noted that the Act explicitly included “interstate transportation facilities and property operated or controlled by a motor carrier” within the definition of “services” and “transportation.” Such language, the Court held, applied to the bus terminal restaurant in question whether or not the restaurant itself was owned and operated by the carrier.

Although the restaurant [arguably the offending entity] was an alleged independent entity that leased space from the carrier, the federal court held that the carrier had volunteered to make terminal and restaurant facilities and services available to its interstate passengers as a regular part of their transportation. Where the terminal and restaurant cooperated in this specific undertaking, the terminal *and* restaurant were obligated to perform these services without discrimination on the basis of race in the service provided by the restaurant to the carrier’s interstate passengers. The restaurant was designed as an integral part of the bus terminal, and a substantial portion of its business was related to the serving of Trailways passengers. Indeed, the lease agreement explicitly provided that Trailways was constructing a bus station with built-in facilities for the operation of a restaurant, soda fountain, and newsstand – and the restaurant corporation had the exclusive right to sell food usually sold in restaurants and lunch counters.

The Court held that these terms of the lease constituted a recognition by the parties that the restaurant existed, as a part of the terminal facility, to serve the essential need of interstate passengers to be able to get food conveniently on their journey. The restaurant existed for the sole purpose of fulfilling that need, and Boynton had a right to seek service in the restaurant, without being assigned to a separate area designated for black passengers – because of the Act’s requirement that service be provided by interstate carriers without discrimination on the basis of race. Two Justices dissented, reasoning that the Act did not reach the facility in question unless it was owned, operated, or controlled by Trailways itself. The dissenting Justices declined to recognize the language of the lease agreement between Trailways and the restaurant corporation as constituting control by Trailways, and held that the restaurant was owned and controlled by a “non-carrier” that was unaffiliated with Trailways or any other interstate carrier. In rejecting the dissent’s argument, the majority opinion in Boynton shows how the United States Supreme Court used venerable concepts drawn from contract law to hold an interstate carrier responsible for the actions of the carrier that discriminated against customers in

violation of the Interstate Commerce Act. Recall that, when Boynton sat in a section designated “Whites Only,” and ordered a sandwich and tea, the server advised him that he was to move to the “Colored” section of the restaurant. When he declined to do so, he asserted that he was an interstate bus passenger, whereupon he was arrested, tried, convicted, and fined under Virginia law.

Boynton’s appeal of his conviction, and the resultant litigation required a careful analysis of three contracts: the contract of carriage between Mr. Boynton and Trailways, which was evidenced by the ticket he purchased; the contract between Mr. Boynton and the restaurant, which normally would have been evidenced by a receipt upon completion of the meal; and the contract between Trailways and the restaurant, whereupon the restaurant received the exclusive right to sell food and related items to passengers in the terminal. Trailways argued that it was responsible to Mr. Boynton only for the contract of carriage, which was without question governed by the Interstate Commerce Act, and sought to distance itself from any contract between Mr. Boynton and the restaurant. This strategy was designed to ensure that the Boynton-restaurant contract would be subject to Virginia law, which at that time enforced discrimination, rather than the Interstate Commerce Act, which prohibited discrimination based on race.

Rejecting this argument, the majority in Boynton used the contractual concept of delegation of duty, coupled with the contract between Trailways and the restaurant, to bring the restaurant’s discrimination against Mr. Boynton within the purview of the Interstate Commerce Act. To understand the Court’s analysis, consider the following language from the Restatement (Second) of Contracts, §318:

- (1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.
- (2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.
- (3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

Although the Court did not explicitly cite this section of the Restatement, the Restatement language is instructive in understanding the Court’s holding. First, although the Court did not go so far as to expressly hold that Trailways had a duty to provide terminal restaurants for its passengers, it did note that interstate passengers have to eat and that “the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey....” Second, even if Trailways did not have a duty to provide terminal restaurants for its passengers, the Court held that Trailways chose to provide such a service. Trailways had, without doubt, undertaken to provide dining services to interstate passengers, through its contract with the restaurant in its terminal.

Thus, Trailways could delegate to the restaurant the duty it had undertaken to provide its interstate passengers with dining services (rather than owning and operating

the restaurant itself), but would not, under §318(3), thereby be excused from its own duty to comply with the Interstate Commerce Act. The purpose of the terminal building, including the restaurant, was solely to serve the needs of Trailways bus passengers. The restaurant was designed and built into the structure from the very beginning for this purpose and was thus clearly considered an “essential and necessary” service.

The Freedom Rides brought to the surface the ongoing clash of state law and federal law, again through the state use of so-called "breach of peace" laws as a state strategy for not just distinguishing, but ignoring, the Supreme Court's decision in Boynton v. Virginia. The Freedom Rides were also unique in that, from the beginning, they strengthened the relationship between black and white students and other citizens to challenge southern resistance to Boynton – a relationship that provoked southern white violence targeting both black and white students, as described in our video interviews. And finally, as our interview with John Seigenthaler recalls in detail, the sit-ins and Freedom Rides are an encapsulation of the story of the interdependence that defined the relationship between the Kennedy White House and Justice Department and the Direct Action Campaign for Civil Rights. That relationship would be tested as southern state legal systems continued the effort to perpetuate racial segregation and to retaliate against those who exercised their First Amendment right to protest racial injustice.

These significant aspects of this legal history are presented in the personal narrative of Rip Patton; the unique personal narratives of David and Winonah Myers; and the commentary of C.T. Vivian, who was a principal leader of the Direct Action Campaign from the sit-ins in 1960 to the voting rights campaign in Selma in 1965, and who reveals the big picture of social activism, and the emerging necessary relationship between law and direct protest supported by The First Amendment.

[After completing the readings in Part Two, the reader is encouraged to access the Oral Histories Section of this web site's Home Page, and view Professor Robert Bickel's interviews with Rip Patton, David and Winonah Myers, and C.T. Vivian.

### **Ernest “Rip” Patton:**

Rip Patton was a student at Tennessee State University when he joined The Student Nonviolent Coordinating Committee (SNCC) in 1960, participating in the Lawson Nonviolence Workshops, the Nashville sit-ins, and other protests of segregation in Nashville. He joined the Freedom Rides in 1961 and was in the first group to make it to Jackson, Mississippi, where he was arrested for entering a “white only” Greyhound Bus Station waiting room. His group also included John Lewis, Hank Thomas, and James Farmer. The group was ultimately sent to Mississippi's infamous Parchman Penitentiary. He knew Dr. King, Fred Shuttlesworth, and C.T. Vivian, and recalls the full range of stories that defined the Civil Rights Movement. In this interview, Mr. Patton tells, in his own words, the typical story of Movement veterans, including childhood memories of racial segregation, his decision to join the Civil Rights Movement, and the personal encounter with southern resistance and southern state laws that resisted Brown's mandate under the “guise” of a pre-civil war interpretation of state's rights.

### **David Meyers and Winonah Beamer Meyers:**

David and Winonah Beamer Meyers tell the unique story of two white college students from Ohio who joined the Movement because of a nontraditional higher education experience at a historically black college, deeply shared views of the personal responsibility to support the struggle for racial equality, and the belief that every citizen should demand that government live up to the principles of equality embodied in the Constitution. In this interview, they recall the experiences and lessons of the Civil Rights Movement through a unique lens, which challenges traditional assumptions and perspectives about race, and explain why we should see social justice as based in classic philosophy. Their story is unique in its message of the connection between a liberal arts higher education, a unique racial experience, and the perceived *necessity* to personally challenge injustice when federal constitutional rights are ignored or violated by a state judicial culture that is complicit in mob violence based on racial hatred.

**Reverend C. T. Vivian** is one of the principal figures of the Civil Rights Movement, known not simply for his leadership, but for his pioneering sit-in efforts, and his courage during the 1961 freedom rides and 1965 voting rights efforts in Selma, Alabama. Before his work with Dr. Martin Luther King, Jr., and his seminal role in SCLC, Reverend Vivian had participated with James Farmer in CORE's direct action campaigns against segregation in Chicago and Peoria, Illinois, almost a decade before the 1955 Montgomery Bus Boycott. Featured in the PBS account of the Movement in *Eyes on the Prize*, C.T. Vivian's tireless presence on the front lines of the direct action campaigns against segregation spanned three decades.

In this brief but powerful interview, he explains the connection between law and direct action efforts to overcome racial inequality, the experiences with cultural racism in the northern civil rights campaign, and with "Jim Crow" Apartheid laws in the more popularly studied southern civil rights movement. His commentary is especially important to the current discourse about Constitutional theory, and provides a unique opportunity to emphasize the moral premise of the Fourteenth Amendment and thus the continuing importance of the role of law in advancing the principle of equality identified with Brown v. Board, and what we mean by social justice].