SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1963.

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

[June 22, 1964.]

Mr. Justice Goldberg, with whom The Chief Justice joins, and with whom Mr. Justice Douglas joins as to Parts II–V, concurring.

I.

I join in the opinion and the judgment of the Court and would therefore have no occasion under ordinary circumstances to express my views on the underlying constitutional issue. Since, however, the dissent at length discusses this constitutional issue and reaches a conclusion with which I profoundly disagree, I am impelled to state the reasons for my conviction that the Constitution guarantees to all Americans the right to be treated as equal members of the community with respect to public accommodations.

II.

The Declaration of Independence states the American creed: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This ideal was not fully achieved with the adoption of our Constitution because of the hard and tragic reality of Negro slavery. The Constitution of the new Nation, while heralding liberty, in effect declared all men to be free and equal—except black men who were to be neither free nor equal. This inconsistency reflected a fundamental

departure from the American creed, a departure which it took a tragic civil war to set right. With the adoption, however, of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, freedom and equality were guaranteed expressly to all regardless "of race, color, or previous condition of servitude." [1] *United States* v. *Reese*, 92 U. S. 214, 218.

In light of this American commitment to equality and the history of that commitment, these Amendments must be read not as "legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." *United States* v. *Classic*, 313 U. S. 299, 316. The cases following the 1896 decision in *Plessy* v. *Ferguson*, 163 U. S. 537, too often tended to negate this great purpose. In 1954 in *Brown* v. *Board of Education*, 347 U. S. 483, this Court unanimously concluded that the Fourteenth Amendment commands equality and that racial segregation by law is inequality. Since *Brown* the Court has consistently applied this constitutional standard to give real meaning to the Equal Protection Clause "as the revelation" of an enduring constitutional purpose.[2]

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[1] See generally Flack, The Adoption of the Fourteenth Amendment (1908); Harris, The Quest for Equality (1960).

[2] *E. g.*, *Anderson* v. *Martin*, 375 U. S. 399; *Goss* v. *Board of Education*, 373 U. S. 683; *Watson* v. *City of Memphis*, 373 U. S. 526; *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *City of Greenville*, 373 U. S. 244; *Johnson* v. *Virginia*, 373 U. S. 61; *Turner* v. *City of Memphis*, 369 U. S. 350; *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Boynton* v. *Virginia*, 364 U. S. 454; *Gomillion* v. *Lightfoot*, 364 U. S. 339; *Cooper* v. *Aaron*, 358 U. S. 1. As Professor Freund has observed, *Brown* and the decisions that followed it "were not an abrupt departure in constitutional law or a novel interpretation of the guarantee of equal protection of the laws. The old doctrine of separate-but-equal, announced in 1896, had been

The dissent argues that the Constitution permits American citizens to be denied access to places of public accommodation solely because of their race or color. Such a view does not do justice to a constitution which is color blind and to the Court's decision in *Brown* v. *Board of Education*, which affirmed the right of all Americans to public equality. We cannot blind ourselves to the consequences of a constitutional interpretation which would permit citizens to be turned away by all the restaurants, or by the only restaurant, in town. The denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States.

The Thirteenth, Fourteenth and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life. Under our Constitution distinctions sanctioned by law between citizens because of race, ancestry, color or religion "are by their very nature odious to a free people whose institutoins are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. We make no racial distinctions between citizens in exacting from them the discharge of public responsibilities: The heaviest duties of citizenship—military service, taxation, obedience to laws—are imposed evenhandedly upon black and white. States may and do impose the burdens of state citizenship upon Negroes and the States in many ways benefit from the equal imposition of the duties of federal citizenship. Our fundamental law which insures such an equality of public burdens, in my view, similarly

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steadily eroded for at least a generation before the school cases, in the way that precedents are whittled down until they finally collapse." Freund, The Supreme Court of the United States (1961), p. 173. See, *e. g.*, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637.

insures an equality of public benefits. This Court has repeatedly recognized and applied this fundamental principle to many aspects of community life.[3]

III.

Of course our constitutional duty is "to construe, not to rewrite or amend, the Constitution." *Post*, at 25 (dissenting opinion of MR. JUSTICE BLACK). Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the Framers. We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve.

In 1873, in one of the earliest cases interpreting the Thirteenth and Fourteenth Amendments, this Court observed:

> "[N]o one can fail to be impressed with the one pervading purpose found in . . . all [these Amendments], lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . ." *Slaughter-House Cases*, 16 Wall. 36, 71.

A few years later, in 1880, the Court had occasion to observe that these Amendments were written and adopted "to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States." *Ex parte Virginia*, 100 U. S. 339, 344–345. In that same Term, the Court in *Strauder* v. *West Virginia*, 100 U. S. 303, 307, stated that the recently adopted Fourteenth Amendment must "be

[3] See *supra*, note 2.

construed liberally, to carry out the purposes of its framers." Such opinions immediately following the adoption of the Amendments clearly reflect the contemporary understanding that they were "to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights that, under the law, are enjoyed by white persons . . . ." *Neal* v. *Delaware*, 103 U. S. 370, 386.

The historical evidence amply supports the conclusion of the Government, stated by the Solicitor General in this Court, that:

> "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 subject of segregation in public conveyances and accommodations was quite familiar to the Framers of the Fourteenth Amendment.[4] Moreover, it appears that the contemporary understanding of the general public was that freedom from discrimination in places of public accommodation was part of the Fourteenth Amendment's promise of equal protection.[5] This view was readily accepted by the Supreme Court of Mississippi in 1873 in *Donnell* v. *State*, 48 Miss. 661. The Mississippi Supreme

[4] See, *e. g.*, Cong. Globe, 38th Cong., 1st Sess., 839; Cong. Globe, 38th Cong., 1st Sess., 1156–1157; Cong. Globe, 42d Cong., 2d Sess., 381–383; 2 Cong. Rec. 4081–4082. For the general attitude of post-Civil War Congresses towards discrimination in places of public accommodation, see Frank and Munro, The Original Understanding of "Equal Protection of the Laws," 50 Col. L. Rev. 131, 150–153 (1950).

[5] The Civil Rights Act of 1866, 14 Stat. 27, which was the precursor of the Fourteenth Amendment, did not specifically enumerate such rights but, like the Fourteenth Amendment, was nevertheless under-

Court there considered and upheld the equal accommodations provisions of Mississippi's "civil rights" bill as applied to a Negro theater patron. Justice Simrall, speaking for the court, noted that the "13th, 14th and 15th amendments of the constitution of the United States, are the logical results of the late civil war," *id.*, at 675, and concluded that the "fundamental idea and principle pervading these amendments, is an impartial equality of rights and privileges, civil and political, to all 'citizens of the United States' . . . ," *id.*, at 677.[6]

In *Strauder* v. *West Virginia*, *supra*, this Court had occasion to consider the concept of civil rights embodied in the Fourteenth Amendment:

> "What is this but declaring that the law in the States shall be the same for the black as for the white; that

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stood to open to Negroes places of public accommodation. See Flack, *op. cit.*, *supra*, note 1, at 45 (opinion of the press); Frank and Munro, *supra*, note 4, at 150–153; Lewis, The Sit-In Cases: Great Expectations, 1963 Sup. Ct. Rev. 101, 145–146. See also *Coger* v. *The North West. Union Packet Co.*, 37 Iowa 145; *Ferguson* v. *Gies*, 82 Mich. 358. The Government, in its brief in this Court, has agreed with these authorities: "[W]e 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."

[6] Justice Simrall, a Kentuckian by birth, was a plantation owner and a prominent Mississippi lawyer and Mississippi State Legislator before the Civil War. Shortly before the war, he accepted a chair of law at the University of Louisville; he continued in that position until the beginning of the war when he returned to his plantation in Mississippi. He subsequently served for nine years on the Mississippi Supreme Court, the last three years serving as Chief Justice. He later lectured at the University of Mississippi and in 1890 was elected a member of the Constitutional Convention of Mississippi and served as chairman of the judiciary committee. 5 National Cyclopedia of American Biography (1907), 456; 1 Rowland, Courts, Judges and Lawyers of Mississippi 1798–1935 (1935), 98–99.

all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." *Id.*, at 307–308.

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"*The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect.* It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Id.*, at 310. (Emphasis added.)

The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14 Stat. 27. and to place that legislation beyond the power of congressional repeal.[7] The origins of sub-

[7] Cong. Globe, 39th Cong., 1st Sess., at 2459, 2462, 2465, 2467, 2538; Flack, *op. cit., supra*, note 1, at 94; Harris, *op. cit., supra*, note 1, at 30–40; McKitrick, Andrew Johnson and Reconstruction (1960), 326–363; Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1328–1332 (1952). A majority of the courts that considered the Act of 1866 had accepted its consti-

sequently proposed amendments and legislation lay in the 1866 bill and in a companion measure, the Freedmen's Bureau bill.[8] The latter was addressed to States "wherein, in consequence of any State or local law, . . . customs, or prejudice, any of the civil rights or immunities belonging to white persons, including the right . . . to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . ." *Cong. Globe.*, 39th Cong., 1st Sess., 318. A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a "civil" rather than a "social" right. It was repeatedly emphasized "that colored persons shall enjoy the same civil rights as white persons,"[9] that the colored man should have the right "to go where he pleases,"[10] that he should have "practical free-

tutionality. *United States* v. *Rhodes*, 27 Fed. Cas. 785 (No. 16,151); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247); *Smith* v. *Moody*, 26 Ind. 299; *Hart* v. *Hoss & Elder*, 26 La. Ann. 90. Contra, *People* v. *Brady*, 40 Cal. 198 (compare *People* v. *Washington*, 36 Cal. 658); *Bowlin* v. *Commonwealth*, 65 Ky. 5.

[8] As MR. JUSTICE BLACK pointed out in the Appendix to his dissent in *Adamson* v. *California*, 332 U. S. 46, 68, 107–108:

"Both proponents and opponents of § 1 of the [Fourteenth] amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. *Cong. Globe*, [39th Cong., 1st Sess.] 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961. Some thought that amendment was nothing but the Civil Rights [Bill] 'in another shape.' Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502."

[9] Cong. Globe, 39th Cong., 1st Sess., at 684 (Senator Sumner).

[10] *Id.*, at 322 (Senator Trumbull). The recurrent references to the right "to go and come at pleasure" as being "among the natural rights

dom,[11] and that he should share "the rights and guarantees of the good old common law." [12]

In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting "civil," as distinguished from "social," rights constantly recurred.[13] Although it was commonly recognized that in some areas the civil-social distinction was misty, the critical fact is that it was generally understood that "civil rights" certainly included the right of access to places of public accommodation for these were most clearly places and areas of life where the relations of men were traditionally

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of free men" reflect the common understanding that the concepts of liberty and citizenship embraced the right to freedom of movement, the effective right to travel freely. See *id.*, at 41–43, 111, 475. Blackstone had stated that the "personal liberty of individuals" embraced "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Blackstone, Commentaries (Lewis ed. 1902), 134. This heritage was correctly described in *Kent* v. *Dulles*, 357 U. S. 116, 125–127:

"The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth [and Fourteenth Amendments]. . . . In Anglo-Saxon law that right was emerging at least as early as the Magna Carta . . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Williams* v. *Fears*, 179 U. S. 270, 274; *Edwards* v. *California*, 314 U. S. 160." See also *Aptheker* v. *Secretary of State*, — U. S. —.

This right to move freely has always been thought to be and is now more than ever inextricably linked with the right of the citizen to be accepted and to be treated equally in places of public accommodation. See the opinion of MR. JUSTICE DOUGLAS, *post*, at 9.

[11] Cong. Globe, 39th Cong., 1st Sess., at 474 (Senator Trumbull).

[12] *Id.*, at 111 (Senator Wilson). See *infra*, at note 17.

[13] *E. g.*, *id.*, at 476, 599, 606, 1117–1118, 1151, 1157, 1159, 1264.

regulated by governments.[14] Indeed, the opponents both of the Freedmen's Bureau bill and of the Civil Rights Act of 1866 frequently complained, without refutation or contradiction, that these measures would grant Negroes the right to equal treatment in places of public accommodation. Thus, for example, Senator Davis of Kentucky, in opposing the Freedmen's Bureau bill, 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.[15]

An 1873 decision of the Supreme Court of Iowa clearly reflects the contemporary understanding of the meaning of the Civil Rights Act of 1866. In *Coger* v. *The North West. Union Packet Co.*, 37 Iowa 145, a colored woman sought damages for assault and battery occurring when the officers of a Mississippi River steamboat ordered that she be removed from a dining table in accordance with a practice of segregation in the main dining room on the boat. In giving judgment for the plaintiff, the Iowa Supreme Court quoted the Civil Rights Act of 1866 and concluded that:

> "Under this statute, equality in rights is secured to the negro. The language is comprehensive and includes the right to property and all rights growing out of contracts. It includes within its broad terms every right arising in the affairs of life. The right of the passenger under the contract of transporta-

[14] Frank and Munro, *supra*, note 4, at 148–149: "One central theme emerges from the talk of 'social equality': there are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights. There are statements by proponents of the Amendment from which a different definition could be taken, but this seems to be the usual one." See *infra*, at notes 16, 32.

[15] Cong. Globe, 39th Cong., 1st Sess., 936. (Emphasis added.) See also *id.*, at 541, 916, App. 70.

> tion with the carrier is included therein. The colored man is guaranteed equality and the equal protection of the laws with his white neighbor. These are the rights secured to him as a citizen of the United States, without regard to his color, and constitute his privileges, which are secured by [the Fourteenth Amendment]." *Id.*, at 156.

The Court then went on to reject the contention that the rights asserted were "social, and . . . not, therefore, secured by the constitution and statutes, either of the State or of the United States." *Id.*, at 157.[16]

Underlying the congressional discussions, and at the heart of the Fourteenth Amendment's guarantee of equal protection, was the assumption that the State by statutory or by "the good old common law" was obligated to guarantee all citizens access to places of public accom-

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[16] The court continued: "Without doubting that social rights and privileges are not within the protection of the laws and constitutional provisions in question, we are satisfied that the rights and privileges which were denied plaintiff are not within that class. She was refused accommodations equal to those enjoyed by white passengers. . . . She was unobjectionable in deportment and character. . . . She complains not because she was deprived of the society of white persons. Certainly no one will claim that the passengers in the cabin of a steamboat are there in the character of members of what is called society. Their companionship as travelers is not esteemed by any class of our people to create social relations. . . . The plaintiff . . . claimed no social privilege, but substantial privileges pertaining to her property and the protection of her person. It cannot be doubted that she was excluded from the table and cabin . . . because of prejudice entertained against her race . . . . The object of the amendments of the federal constitution and of the statutes above referred to is to relieve citizens of the black race from the effects of this prejudice, to protect them in person and property from its spirit. *The Slaughter House Cases* [16 Wall. 36]. We are disposed to construe these laws according to their very spirit and intent, so that equal rights and equal protection shall be secured to all regardless of color or nationality." *Id.*, at 157–158. See also *Ferguson* v. *Gies*, 82 Mich. 358.

modation. This obligation was firmly rooted in ancient Anglo-American tradition. In his work on bailments Judge Story spoke of this tradition:

> "An innkeeper is bound . . . to take in all travellers and wayfaring persons, and *to entertain them*, if he can accommodate them, for a reasonable compensation; and he must guard their goods with proper diligence. . . . If an innkeeper improperly refuses to receive or provide for a guest, he is liable to be indicted therefor. . . ." Story, Commentaries on the Law of Bailments (Schouler, 9th ed., 1878) § 476.[17]

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[17] The treatise defined an innkeeper as "the keeper of a common inn for the lodging and entertainment of travellers and passengers . . . ." Story, Commentaries on the Law of Bailments (Schouler, 9th ed. 1878), § 475. 3 Blackstone, *op. cit., supra*, note 10, at 166, stated a more general rule:

"[I]f an innkeeper, *or other victualler*, hangs out a sign and opens his house for travelers, 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 traveler." (Emphasis added.) In Tidswell, The Innkeeper's Legal Guide (1864), p. 22, a "victualling house" is defined as a place "where people are provided with food and liquors, but not with lodgings," and in 3 Stroud, *Judicial Dictionary* (1903), as "a house where persons are provided with victuals, but without lodging."

Regardless, however, of the precise content of state common-law rules and the legal status of restaurants at the time of the adoption of the Fourteenth Amendment, the spirit of the common law was both familiar and apparent. In 1701 in *Lane* v. *Cotton*, 12 Mod. 472, 484–485, Holt, C. J., had declared:

"[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against

"The first and most general obligation on [carriers of passengers] is to carry passengers whenever they offer themselves, and are ready to pay for their transportation. This results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment on hire. They are no more at liberty to refuse a passenger, if they have sufficient room and accommodations, than an innkeeper is to refuse suitable room and accomodations to a guest. . . ." *Id.*, at §§ 590, 591.

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him . . . . If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier . . . . If the inn be full, or the carrier's horses laden, the action would not lie for such a refusal, but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public." See *Munn* v. *Illinois*, 94 U. S. 113, 126–130 (referring to the duties traditionally imposed on one who pursues a public employment and exercises "a sort of public office").

Furthermore, it should be pointed out that the Framers of the Fourteenth Amendment, and the men who debated the Civil Rights Acts of 1866 and 1875, were not thinking only in terms of existing common-law duties but were thinking more generally of the customary expectations of white citizens with respect to places which were considered public and which were in various ways regulated by laws. See *infra*, at 14–20. Finally, as the Court acknowledged in *Strauder* v. *West Virginia*, 100 U. S. 303, 310, the "Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect," for those who adopted it were conscious that a constitutional "principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 217 U. S. 349, 373. See *infra*, at 30–32.

It was in this vein that the Supreme Court of Mississippi spoke when in 1873 it applied the equal accommodations provisions of the State's civil rights bill to a Negro refused admission to a theater:

> "Among those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain a *quasi* public relation to the community. The wayfarer and the traveler had a right to demand food and lodging from the inn-keeper; the common carrier was bound to accept all passengers and goods offered for transportation, according to his means. So, too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown. The statute deals with subjects which have always been under legal control." *Donnell* v. *State*, 48 Miss., 661, 680–681.

In a similar manner, Senator Sumner, discussing the Civil Rights Act of 1875, referred to and quoted from Holingshed, Story, Kent and Parsons on the common-law duties of innkeepers and common carriers to treat all alike. Cong. Globe, 42d Cong., 2d Sess. 382–383. With regard to "theaters and places of public amusement," the Senator observed that:

> "Theaters and other places of public amusement, licensed by law, are kindred to inns or public conveyances, though less noticed by jurisprudence. But, like their prototypes, they undertake to provide for the public under sanction of law. They are public institutions, regulated if not created by law, enjoying privileges, and in consideration thereof, assuming duties not unlike those of the inn and the public conveyance. From essential reason, the rule should

be the same with all. As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it 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." *Id.*, at 383.[18]

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[18] Similarly, in 1874, Senator Pratt said:

"No one reading the Constitution can deny that every colored man is a citizen, and as such, so far as legislation may go, entitled to equal rights and privileges with white people. Can it be doubted that for a denial of any of the privileges or accommodations enumerated in the [proposed supplement to the Civil Rights Act of 1866] bill he could maintain a suit at common law against the inn-keeper, the public carrier, or proprietor or lessee of the theater who withheld them? Suppose a colored man presents himself at a public inn, kept for the accommodation of the public, is decently clad and behaves himself well and is ready to pay the customary charges for rest and refreshment, and is either refused admittance or treated as an inferior guest—placed at the second table and consigned to the garret, or compelled to make his couch upon the floor—does any one doubt that upon an appeal to the courts, the law if justly administered would pronounce the inn-keeper responsible to him in damages for the unjust discrimination? I suppose not. Prejudice in the jury-box might deny him substantial damages; but about the law in the matter there can be no two opinions. The same is true of public carriers on land or water. Their engagement with the public is to carry all persons who seek conveyance on their cars or boats to the extent of their facilities for certain established fares, and all persons who behave themselves and are not afflicted with any contagious disease are entitled to equal accommodations where they pay equal fares.

"But it is asked, if the law be as you lay it down, where the necessity for this legislation, since the courts are open to all? My answer is, that the remedy is inadequate and too expensive, and involves too much loss of time and patience to pursue it. When a man is traveling, and far from home, it does not pay to sue every inn-keeper who, or railroad company which, insults him by unjust discrimination. Practically the remedy is worthless." 2 Cong. Rec. 4081–4082.

The first sentence of § 1 of the *Fourteenth* Amendment, the spirit of which pervades all the Civil War Amendments, was obviously designed to overrule *Dred Scott v. Sanford*, 19 How. 393, and to ensure that the constitutional concept of citizenship with all attendant rights and privileges would henceforth embrace Negroes. It follows that Negroes as citizens necessarily became entitled to share the right, customarily possessed by other citizens, of access to public accommodations. The history of the affirmative obligations existing at common law serves partly to explain the negative—"deny to any person"—language of the Fourteenth Amendment. For it was assumed that under state law, when the Negro's *disability* as a citizen was removed, he would be assured the same public civil rights that the law had guaranteed white persons. This view pervades the opinion of the Supreme Court of Michigan in *Ferguson* v. *Gies*, 82 Mich. 358, decided in 1890. That State had recently enacted a statute prohibiting the denial to any person, regardless of race, of "the *full and equal* accommodations . . . and privileges of . . . restaurants . . . and all other places of public accommodation and amusement . . . ."[19] A Negro plaintiff brought an action for damages arising from the refusal of a restaurant owner to serve him at a row of tables reserved for whites. In upholding the plaintiff's claim, the Michigan court observed:

> "The negro is now, by the Constitution of the United States, given full citizenship with the white man,

[19] The statute specifically referred to "the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, eating-houses, barber-shops, public conveyances on land and water, theaters, and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens." 82 Mich. 358, 364.

and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship." *Id.*, at 364.

The court then emphasized that in light of this constitutional principle the same result would follow whether the claim rested on a statute or on the common law:

"The common law as it existed in this State before the passage of this statute, and before the colored man became a citizen under our Constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the common law of this State, was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there; and that his right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred *in the courts* as that of any other citizen. This statute is only declaratory of the common law, as I understand it now to exist in this State." *Id.*, at 365.[20]

Evidence such as this demonstrates that Mr. Justice Harlan, dissenting in the *Civil Rights Cases*, 109 U. S. 1, 26, was surely correct when he observed:

"But what was secured to colored citizens of the United States—as between their respective States—by the national grant to them of State citizenship?

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[20] The court also emphasized that the right under consideration was clearly a "civil" as distinguished from a "social" right. See 82 Mich., at 363, 367–368; see also *supra*, at notes 13–14, 16 and *infra*, at note 32.

> With what rights, privileges or *immunities* did this grant invest them? There is one, if there be no other—exemption from race discrimination in respect of any civil rights belonging to the citizens of the white race in the same State. That surely is their constitutional privilege when within the jurisdiction of other States. And such must be their *constitutional* rights, in their own State, unless the recent amendments be splendid baubles, thrown out to delude those who deserved fair and generous treatment at the hands of the nation. Citizenship in this country necessarily imports at least equality of civil rights among citizens of every race in the same State. It is fundamental in American citizenship that, in respect of such rights, there shall be no discrimination by the State, or its officers, or by individuals or corporations exercising public functions or authority, against any citizen because of his race or previous condition of servitude." *Id.*, at 48.

The Framers of the Fourteenth Amendment, reacting against the Black Codes,[21] made certain that the States could not frustrate the guaranteed equality by enacting discriminatory legislation or by sanctioning discriminatory treatment. At no time in the consideration of the Amendment was it suggested that the States could achieve the same prohibited result by withdrawing the traditional

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[21] After the Civil War, Southern States enacted the so-called "Black Codes" imposing disabilities reducing the emancipated Negroes to the status of "slaves of society," even though they were no longer the chattels of individual masters. See Cong. Globe, 39th Cong., 1st Sess., 39, 516–517; opinion of MR. JUSTICE DOUGLAS, *post*, at 7, n. 3. For the substance of these codes, see 1 Fleming, Documentary History of Reconstruction (1906), 273–312; McPherson, The Political History of the United States During the Period of Reconstruction (1871), 29–44.

right of access to public places. In granting Negroes citizenship and the equal protection of the laws, it was never thought that the States could permit the proprietors of inns and public places to restrict their general invitation to the public and to citizens in order to exclude the Negro public and Negro citizens. The Fourteenth Amendment was therefore cast in terms under which judicial power would come into play where the State withdrew or otherwise denied the guaranteed protection "from legal discriminations, implying inferiority in civil society, lessening the security of [the Negroes'] enjoyment of the rights which others enjoy . . . ." *Strauder v. West Virginia*, 100 U. S., at 308.

Thus a fundamental assumption of the Fourteenth Amendment was that the States would continue, as they had for ages, to enforce the right of citizens freely to enter public places. This assumption concerning the affirmative duty attaching to places of public accommodation was so rooted in the experience of the white citizenry that law and custom blended together indistinguishably.[22]

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[22] See Lewis, *supra*, note 5, at 146: "It was assumed by more than a few members of Congress that theaters and places of amusement would be or could be opened to all as a result either of the Equal Protection Clause or the Privileges and Immunities Clause. Why would the framers believe this? Some mentioned the law's regulation of such enterprises, but this is not enough. Some other standard must delineate between the regulated who must offer equal treatment and those who need not. Whites did not have a legal right to demand admittance to [such] enterprises, but they were admitted. Perhaps this observed conduct was confused with required conduct, just as the observed status of the citizens of all free governments—the governments that Washington, J., could observe—was mistaken for inherent rights to the status. The important point is that the framers, or some of them, believed the Amendment would open places of public accommodation, and study of the debates reveals this belief

Thus it seemed natural for the Supreme Court of Mississippi, considering a public accommodations provision in a civil rights statute, to refer to "those customs which we call the common law, that have come down to us from the remote past," *Donnell* v. *State*, 48 Miss., at 680, and thus it seems significant that the various proposals for federal legislation often interchangeably referred to discriminatory acts done under "law" or under "custom." [23] In sum, then, it was understood that under the Fourteenth Amendment the duties of the proprietors of places of public accommodation would remain as they had long been and that the States would now be affirmatively obligated to insure that these rights ran to Negro as well as white citizens.

The Civil Rights Act of 1875, enacted seven years after the Fourteenth Amendment, specifically provided that all citizens must have "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . . ." 18 Stat. 335. The constitutionality of this federal legislation was reviewed by this Court in 1883 in the *Civil Rights Cases*, 109 U. S. 1. The dissent in the present case purports to follow the "state action" concept articulated in that early decision. There the Court had declared that under the Fourteenth Amendment:

> "It is State action of a particular character that is prohibited. Individual invasion of individual

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to be the observed expectations of the majority, tantamount in practice to legal rights. . . ."

[23] *E. g.*, The Supplementary Freedmen's Bureau Act, Cong. Globe, 39th Cong., 1st Sess., 318; The Civil Rights Act of 1866, 14 Stat. 27; The Enforcement Act of 1870, 16 Stat. 140; The Civil Rights Act of April 20, 1871, 17 Stat. 13; 42 U. S. C. § 1983. See also the language of the *Civil Rights Cases*, 109 U. S. 1, 17 (quoted *infra*, at note 25)

> rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, *and State action, of every kind,* which impairs the privileges and immunities of the citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." 109 U. S., at 11. (Emphasis added.)

Mr. Justice Bradley, writing for the Court over the strong dissent of Mr. Justice Harlan, held that a proprietor's racially motivated denial of equal access to a public accommodation did not, without more, involve state action. It is of central importance to the case at bar that the Court's decision was expressly predicated:

> "on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with." *Id.*, at 19.

The Court added that:

> "Innkeepers and public carriers, by the laws of all the States, so far as we are aware,[24] are bound, to the

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[24] Of the five cases involved in the *Civil Rights Cases*, two concerned threatres, two concerned inns or hotels and one concerned a common carrier. In *United States* v. *Nichols* (involving a Missouri inn or hotel) 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, October Term, 1882, p. 8. In *United States* v. *Ryan* (a California theatre) and in *United States* v. *Stanley* (a Kansas inn or hotel), it seems that common-law duties applied as well as state antidiscrimination laws. Calif. Laws 1897, p. 137; Kan. Laws 1874, p. 82. In *United States* v. *Singleton* (New York opera house) a state statute barred racial discrimination by "theaters or other places of amusement." N. Y. Laws 1873, p. 303; Laws 1881, p. 541. In *Robinson* v. *Memphis* (a Tennessee railroad

extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." *Id.*, at 25.[25]

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parlor car), the legal duties were less clear. The events occurred in 1879 and the trial was held in 1880. The common-law duty of carriers had existed in Tennessee and, from what appears in the record, was assumed by the trial judge, in charging the jury, to exist at the time of trial. However, in 1875 Tennessee had repealed the common-law rule, Laws 1875, p. 216, and in 1881 the State amended the law to require a carrier to furnish separate but equal first-class accommodations, Laws 1881, p. 211.

[25] Reasoning from this same basic assumption, the Court said that Congress lacked the power to enact such legislation: "[U]ntil 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." 109 U. S., at 13. And again: "[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by such authority, is simply a private wrong*, or a crime of that individual; an invasion of the rights of the injured party, it is true . . .; but if not sanctioned in some way by the State . . . his rights remain in full force, *and may presumably be vindicated by resort to the laws of the State for redress.*" *Id.*, at 17. (Emphasis added.)

The argument of the Attorney General of Mississippi in *Donnell* v. *State*, 48 Miss. 661, explicitly related the State's new public accommodations law to the Thirteenth and Fourteenth Amendments. He stated that the Amendments conferred a national "power to enforce 'by appropriate legislation,' these rights, privileges and immunities of citizenship upon the newly enfranchised class . . . ."; he then concluded that "the legislature of this state has sought, by this [anti-discrimination] act, to render interference by congress unnecessary." *Id.*, at 668. This view seems to accord with the assumption underlying the *Civil Rights Cases*.

This assumption, whatever its validity at the time of the 1883 decision, has proved to be unfounded. Although reconstruction ended in 1877, six years before the *Civil Rights Cases*, there was little immediate action in the South to establish segregation, in law or in fact, in places of public accommodation.[26] This benevolent, or perhaps passive, attitude endured about a decade and then in the late 1880's States began to enact laws mandating unequal treatment in public places.[27] Finally, three-quarters of a century later, after this Court declared such legislative action invalid, some States began to utilize and make available their common law to sanction similar discriminatory treatment.

A State applying its statutory or common law [28] to deny rather than protect the right of access to public accom-

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[26] Woodward, The Strange Career of Jim Crow (1955), 15–26, points out that segregation in its modern and pervasive form is a relatively recent phenomenon. Although the speed of the movement varied, it was not until 1904, for example, that Maryland, the respondent in this case, extended Jim Crow legislation to railroad coaches and other common carriers. Md. Laws 1904, c. 110, p. 188; Md. Laws 1908, c. 248, p. 88. In the 1870's Negroes in Baltimore, Maryland, successfully challenged attempts to segregate transit facilities. See *Fields* v. *Baltimore City Passenger R. Co.*, reported in Baltimore American, Nov. 14, 1871, p. 4, col. 3; Baltimore Sun, Nov. 13, 1871, p. 4, col. 2.

[27] Not until 1887 did Florida, the respondent in *Robinson* v. *Florida*, *post*, at —, enact a statute requiring separate railroad passenger facilities for the two races. Fla. Laws 1887, c. 3743, p. 116. The State, in following a pattern that was not unique, had not immediately repealed its reconstruction antidiscrimination statute. Fla. Digest 1881, c. 19, pp. 171–172; see Fla. Laws 1891, c. 4055, p. 92; Fla. Rev. Stat. 1892, p. viii.

[28] This Court has frequently held that rights and liberties protected by the Fourteenth Amendment prevail over state common law, as well as statutory, rules. "The fact that [a State's] policy is expressed by the judicial organ . . . rather than by the legislature we have repeatedly ruled to be immaterial. . . . '[R]ights under [the Fourteenth] amendment turn on the power of the State, no matter

modations has clearly made the assumption of the opinion in the *Civil Rights Cases* inapplicable and has, as the author of that opinion would himself have recognized, denied the constitutionally intended equal protection. Indeed, in light of the assumption so explicitly stated in the *Civil Rights Cases*, it is significant that Mr. Justice Bradley, who spoke for the Court, had earlier in correspondence with Circuit Judge Woods expressed the view that the Fourteenth 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." [29] In taking this position, which is consistent with his opinion and the assumption in the *Civil Rights Cases*,[30]

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by what organ it acts.' *Missouri* v. *Dockery*, 191 U. S. 165, 170–171." *Hughes* v. *Superior Court*, 339 U. S. 460, 466–467. See also *Ex parte Virginia*, 100 U. S. 339, 346–347; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 265.

[29] Letter from Justice Bradley to Circuit Judge (later Justice) William B. Woods (unpublished draft), Mar. 12, 1871, in the Bradley Papers on file, The New Jersey Historical Society, Newark, New Jersey; Supplemental Brief for the United States as Amicus Curiae, Nos. 6, 9, 10, 12 and 60, October Term, 1963, pp. 75–76. For a convenience source of excerpts, see Roche, Civil Liberty in the Age of Enterprise, 31 U. of Chi. L. Rev. 103, 108–110 (1963). See notes 30–31, *infra*.

[30] A comparison of the 1871 Bradley-Woods correspondence (and the opinion that Judge Woods later wrote, see note 31, *infra*) with Justice Bradley's 1883 opinion in the *Civil Rights Cases* indicates that in some respects the Justice modified his views. Attached to a draft of a letter to Judge Woods was a note, apparently written subsequently, by Justice Bradley stating that: "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 careful wording of this note, limiting itself to "the power of Congress to pass laws," supports the conclusion that Justice Bradley had only modified, not abandoned,

he concluded that: "Denying 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." [31] These views are fully

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his fundamental views and that the *Civil Rights Cases* should be read, as they were written, to rest on an explicit assumption as to the legal rights which the States were affirmatively protecting.

[31] The background of this correspondence and the subsequent opinion of Judge Woods in *United States* v. *Hall*, 26 Fed. Cas. 79 (Cas. No. 15,282), are significant. The correspondence on the subject apparently began in December 1870 when Judge Woods wrote Justice Bradley concerning the constitutional questions raised by an indictment filed by the United States under the Enforcement Act of 1870, 16 Stat. 140. The indictment charged that the defendants "did unlawfully and feloniously band and conspire together, with intent to injure, oppress, threaten and intimidate" certain citizens in their exercise of "right of freedom of speech" and in "their free exercise and enjoyment of the right and privilege to peaceably assemble." The prosecution was instituted in a federal court in Alabama against private individuals whose conduct had in no way involved or been sanctioned by state action.

In May of 1871, after corresponding with Justice Bradley, Judge Woods delivered an opinion upholding the federal statute and the indictment. The judge declared that the rights allegedly infringed were protected under the Privileges and Immunities Clause of the Fourteenth Amendment: "We think . . . that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution . . . ." 26 Fed. Cas., at 82. This position is similar to that of Justice Bradley two years later dissenting in the *Slaughter-House Cases*, 16 Wall. 36, 111, 118–119. More important for present purposes, however, is the fact that in analyzing the problem of "private" (nonstate) action, Judge Woods' reasoning and language follow that of Justice Bradley's letters. The judge concluded that under the Fourteenth Amendment Congress could adopt legislation: "to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth 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

consonant with this Court's recognition that state conduct which might be described as "inaction" can nevertheless constitute responsible "state action" within the meaning of the Fourteenth Amendment. See, *e. g.*, *Marsh* v. *Alabama*, 326 U. S. 501; *Shelley* v. *Kraemer*, 334 U. S. 1; *Terry* v. *Adams*, 345 U. S. 461; *Barrows* v. *Jackson*, 346 U. S. 249.

In the present case the responsibility of the judiciary in applying the principles of the Fourteenth Amendment is clear. The State of Maryland has failed to protect petitioners' constitutional right to public accommodations and is now prosecuting them for attempting to exercise that right. The *decision* of Maryland's highest court in sustaining these trespass convictions cannot be described as "neutral," for the decision is as affirmative in effect as if the State had enacted an unconstitutional law explicitly authorizing racial discrimination in places of public accommodation. A State, obligated under the Fourteenth Amendment to maintain a system of law in which Negroes are not denied protection in their *claim* to be treated as equal members of the community, may not use its criminal trespass laws to frustrate the constitutionally granted right. Nor, it should be added, may a State frustrate this right by legitimating a proprietor's attempt at self-help. To permit self-help would be to disregard the principle that "[t]oday, no less than 50 years ago, the solution to the problems growing out of race relations 'cannot be promoted by depriving citizens of their constitutional rights and privileges,' *Buchanan* v. *Warley* . . . 245 U. S., at 80–81." *Watson* v. *City of Memphis*, 373 U. S. 526, 539. As declared in *Cooper* v.

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the equal protection of the laws. Denying 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." *Id.*, at 81.

Aaron, 358 U. S. 1, 16, "law and order are not . . . to be preserved by depriving the Negro . . . of [his] constitutional rights."

In spite of this, the dissent intimates that its view best comports with the needs of law and order. Thus it is said: "It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace." *Post*, at 10. This statement, to which all will readily agree, slides over the critical question: Whose conduct is entitled to the "law's protection"? Of course every member of this Court agrees that law and order must prevail; the question is whether the weight and protective strength of law and order will be cast in favor of the claims of the proprietors or in favor of the claims of petitioners. In my view the Fourteenth Amendment resolved this issue in favor of the right of petitioners to public accommodations and it follows that in the exercise of that constitutionally granted right they are entitled to the "law's protection." Today, as long ago, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury* v. *Madison*, 1 Cranch 137, 163.

IV.

My Brother DOUGLAS convincingly demonstrates that the dissent has constructed a straw man by suggesting that this case involves "a property owner's right to choose his social or business associates." *Post*, at 25. The restaurant involved in this case is concedely open to a large segment of the public. Restaurants such as this daily open their doors to millions of Americans. These establishments provide a public service as necessary today as the inns and carriers of Blackstone's time. It should

be recognized that the claim asserted by the Negro petitioners concerns such public establishments and does not infringe upon the rights of property owners or personal associational interests.

Petitioners frankly state that the "extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity." Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. As noted before, the Congress that enacted the Fourteenth Amendment was particularly conscious that the "civil" rights of man should be distinguished from his "social" rights.[32] Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

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[32] The approach is reflected in the reasoning stated by the Supreme Court of Michigan in 1890:

"Socially people may do as they please within the law, and whites may associate together, as may blacks, and exclude whom they please from their dwellings and private grounds; but there can be no separation in public places between people on account of their color alone which the law will sanction.

. . . . . .

"The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or in other private places, but he connot [*sic*] in a public place carry the privacy of his home with him, or ask that people not as good or great as he is shall step aside when he appears." *Ferguson* v. *Gies*, 82 Mich., at 363, 367–368. See *supra*, at notes 13–14.

We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. A judicial ruling on this claim inevitably involves the liberties and freedoms both of the restaurant proprietor and of the Negro citizen. The dissent would hold in effect that the restaurant proprietor's interest in choosing customers on the basis of race is to be preferred to the Negro's right to equal treatment by a business serving the public. The history and purposes of the Fourteenth Amendment indicate, however, that the Amendment resolves this apparent conflict of liberties in favor of the Negro's right to equal public accommodations. As the Court said in *Marsh* v. *Alabama*, 326 U. S. 501, 506: "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." [33] The broad acceptance of the public in this and in other restaurants clearly demonstrates that the proprietor's interest in private or unrestricted association is slight.[34] The relationship between the modern innkeeper or restaurateur and the customer is relatively impersonal and evanescent. This is highlighted by cases such as *Barr* v. *City of Columbia*,

[33] Cf. *Munn* v. *Illinois*, 94 U. S. 113, 125–126: "Looking, then, to the common law, from whence came the [property] right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

[34] See Lewis, *supra*, note 5, at 148.

post, at —, *Bouie* v. *City of Columbia*, *post*, at —, and *Robinson* v. *Florida*, *post*, at —, in which Negroes are invited into all departments of the store but nonetheless ordered, in the name of private association or property rights, not to purchase and eat food, as other customers do, on the premises. As the history of the common law and, indeed, of our own times graphically illustrates, the interests of proprietors of places of public accommodation have always been adapted to the citizen's felt need for public accommodations, a need which is basic and deep rooted. This history and the purposes of the Fourteenth Amendment compel the conclusion that the right to be served in places of public accommodation regardless of color cannot constitutionally be subordinated to the proprietor's interest in discriminatorily refusing service.

Of course, although the present case involves the right to service in a restaurant, the fundamental principles of the Fourteenth Amendment apply with equal force to other places of public accommodation and amusement. Claims so important as those presented here cannot be dismissed by asserting that the Fourteenth Amendment, while clearly addressed to inns and public conveyances, did not contemplate lunch counters and soda fountains. Institutions such as these serve essentially the same needs in modern life as did the innkeeper and the carrier at common law.[35] It was to guard against narrow conceptions that Chief Justice Marshall admonished the Court never to forget "that it is *a constitution* we are expounding . . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415. Today, as throughout the history of the Court, we should remember that "in determining whether a provision of the Constitution applies to a new

[35] See *supra*, at note 17.

subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." *United States* v. *Classic*, 313 U. S. 299, 316.

V.

In my view the historical evidence demonstrates that the traditional rights of access to places of public accommodation were quite familiar to Congressmen and to the general public who naturally assumed that the Fourteenth Amendment extended these traditional rights to Negroes. But even if the historical evidence were not as convincing as I believe it to be, the logic of *Brown* v. *Board of Education*, 347 U. S. 483, based as it was on the fundamental principle of constitutional interpretation proclaimed by Chief Justice Marshall,[36] requires that petitioners' claim be sustained.

In *Brown*, after stating that the available history was "inconclusive" on the specific issue of segregated public schools, the Court went on to say:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U. S., at 492–493.

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[36] See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955).

The dissent makes no effort to assess the status of places of public accommodation "in the light of" their "*full* development and . . . present place" in the life of American citizens. In failing to adhere to that approach the dissent ignores a pervasive principle of constitutional adjudication and departs from the ultimate logic of *Brown*. As Mr. Justice Holmes so aptly said:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we *must realize* that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to *hope* that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433.

CONCLUSION.

The constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations is a civil *right granted* by the people in the Constitution—a right which "is too important in our free society to be stripped of judicial protection." Cf. *Wesberry* v. *Sanders*, 376 U. S. 1, 7; *Baker* v. *Carr*, 369 U. S. 186. *This* is not to suggest that Congress lacks authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, § 8, to implement the rights protected by § 1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between *genuinely*

public and private accommodations. In contrast, we can pass only on justiciable issues coming here on a case-to-case basis.

It is, and should be, more true today than it was over a century ago that "the great advantage of the Americans is that . . . they [are] born equal" and that in the eyes of the law they "are all of the same estate." [37] The first Chief Justice of the United States, John Jay, spoke of the "free air" of American life. The great purpose of the Fourteenth Amendment is to keep it free and equal. Under the Constitution no American can, or should, be denied rights fundamental to freedom and citizenship. I therefore join in reversing these trespass convictions.