# SUPREME COURT OF THE UNITED STATES

No. 12.—October Term, 1963.

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| 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 Black, with whom Mr. Justice Harlan and Mr. Justice White join, dissenting.

The case does not involve the constitutionality of any existing or proposed state or federal legislation requiring restaurant owners to serve people without regard to color. The crucial issue which the case does present but which the Court does not decide is whether the Fourteenth Amendment, of itself, forbids a State to enforce its trespass laws to convict a person who comes into a privately owned restaurant, is told that because of his color he will not be served, and over the owner's protest refuses to leave. We dissent from the Court's refusal to decide that question. For reasons stated, we think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a State's trespass laws.

The petitioners were convicted in a Maryland state court on a charge that they "unlawfully did enter upon and cross over the land, premises and private property" of the Hooper Food Co., Inc., "after having been duly notified by Alfred Warfel, who was then and there the servant and agent for Hooper Food Co.," not to do so, in violation of Maryland's criminal trespass statute.[1] The

[1] "Any person or persons who shall enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor . . . ." Md. Code, Art. 27, § 577.

*conviction* was based on a record showing in summary that:

> A group of fifteen to twenty Negro students, including petitioners, went to Hooper's Restaurant to engage in what their counsel describes as a "sit-in protest" because the restaurant would not serve Negroes. The hostess, on orders of Mr. Hooper, the president of the corporation owning the restaurant,[2] told them, "solely on the basis of their color," that she would not serve them. Petitioners refused to leave when requested by the hostess and the manager; instead they went to tables, took seats, and refused to leave, insisting that they be served. On orders of the owner the police were called, but they advised the manager that a warrant would be necessary before they could arrest petitioners. The manager then went to the police station and swore out the warrants. Petitioners had remained in the restaurant in all an hour and a half, testifying at their trial that they had stayed knowing they would be arrested—that being arrested was part of their "technique" in these demonstrations.

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[2] Mr. Hooper testified this as to his reasons for adopting his policy:

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

The Maryland Court of Appeals affirmed the convictions, rejecting petitioners' contentions urged in both courts that Maryland had (1) denied them equal protection and due process under the Fourteenth Amendment by applying its trespass statute to enforce the restaurant owner's policy and practice of racial discrimination, and (2) denied them freedom of expression guaranteed by the Constitution by punishing them for remaining at the restaurant, which they were doing as a protest against the owner's practice of refusing service to Negroes.[3] This case, *Barr* v. *City of Columbia*, *ante*, p. —, and *Bouie* v. *City of Columbia*, *post*, p. —, all raised these same two constitutional questions, which we granted certiorari to decide.[4] The Solicitor General has filed *amicus* briefs and participated in oral argument in these cases; while he joins in asking reversal of all the convictions, his arguments vary in significant respects from those of the petitioners. We would reject the contentions of the petitioners and of the Solicitor General in this case and affirm the judgment of the Maryland court.

I.

On the same day that petitioners filed the petition for certiorari in this case, Baltimore enacted an ordinance forbidding privately owned restaurants to refuse to serve Negroes because of their color.[5] Nearly a year later Maryland, without repealing the state trespass law petitioners violated, passed a law applicable to Baltimore and some other localities making such discrimination by res-

[3] 227 Md. 302, 176 A. 2d 771 (1962).

[4] 374 U. S. 804, 805 (1963). Probable jurisdiction was noted in *Robinson* v. *Florida*, 374 U. S. 803 (1963), rev'd, *ante*, p. —. Certiorari had already been granted in *Griffin* v. *Maryland*, 370 U. S. 935 (1962), rev'd, *ante*, p. —.

[5] Ordinance No. 1249, June 8, 1962, adding § 10A to Art. 14A, Baltimore City Code (1950 ed.).

taurant owners unlawful.[3] We agree that the general judicial rule or practice in Maryland and elsewhere, as pointed out in the Court's opinion, is that a new statute repealing an old criminal law will, in the absence of a general or special saving clause, be interpreted as barring pending prosecutions under the old law. Although Maryland long has had a general saving clause clearly declaring that prosecutions brought under a subsequently repealed statute shall not be barred, the Court advances many arguments why the Maryland Court of Appeals could and perhaps would, so the Court says, hold that the new ordinance and statute nevertheless bar these prosecutions. On the premise that the Maryland court might hold this way and because we could thereby avoid passing upon the constitutionality of the State's trespass laws, the Court, without deciding the crucial constitutional questions which brought this case here, instead sends the case back to the state court to consider the effect of the new ordinance and statute.

We agree that this Court has power, with or without deciding the constitutional questions, to remand the case for the Maryland Court of Appeals to decide the state question as to whether the convictions should be set aside and the prosecutions abated because of the new laws. But as the cases cited by the Court recognize, our question is not one of power to take this action but of whether we should. And the Maryland court would be equally free to give petitioners the benefit of any rights they have growing out of the new law whether we upheld the trespass statute and affirmed, or refused to pass upon its validity at this time. For of course our affirmance of the state court's holding that the Maryland trespass

[3] Md. Acts 1963, c. 227, 49B Md. Code § 11 (enacted March 29, 1963, effective June 1, 1963). A later accommodations law, of statewide coverage, was enacted, Md. Acts 1964, c. —, but will not take effect unless approved by referendum.

statute is constitutional as applied would in no way hamper or bar decision of further state questions which the Maryland court might deem relevant to protect the rights of the petitioners in accord with Maryland law. Recognition of this power of state courts after we affirm their holdings on federal questions is a commonplace occurrence. See, *e. g., Piza Hermanos* v. *Caldentey,* 231 U. S. 690, 692 (1914); *Fidelity Ins. Trust & Safe Deposit Co.* v. *McClain,* 178 U. S. 113, 114 (1900).

Nor do we agree that because of the new state question we should vacate the judgment in order to avoid deciding the constitutionality of the trespass statute as applied. We fully recognize the salutary general judicial practice of not unnecessarily reaching out to decide constitutional questions. But this is neither a constitutional nor a statutory requirement. Nor does the principle properly understood and applied impose a rigid, arbitrary, and inexorable command that courts should never decide a constitutional question in any single case if subtle ingenuity can think up any conceivable technique that might, if utilized, offer a distant possibility of avoiding decision. Here we believe the constitutionality of this trespass statute should be decided.

This case is but one of five involving the same kind of sit-in trespass problems we selected out of a large and growing group of pending cases to decide this very question. We have today granted certiorari in two more of this group of cases.[1] We know that many similar cases are now on the way and that many others are bound to follow. We

[1] *Hamm* v. *City of Rock Hill, post,* p. —; *Lupper* v. *Arkansas, post,* p. —. The same question was presented but is not decided in seven other cases which the Court today disposes of in various ways. See *Drews* v. *Maryland, post,* p. —; *Williams* v. *North Carolina, post,* p. —; *Fox* v. *North Carolina, post,* p. —; *Mitchell* v. *City of Charleston, post,* p. —; *Ford* v. *Tennessee, post,* p. —; *Green* v. *Virginia, post,* p. —; *Harris* v. *Virginia, post,* p. —.

know, as do all others, that the conditions and feelings that brought on these demonstrations still exist and that rights of private property owners on the one hand and demonstrators on the other largely depend at this time on whether state trespass laws can constitutionally be applied under these circumstances. Since this question is, as we have pointed out, squarely presented in this very case and is involved in other cases pending here and others bound to come, we think it is wholly unfair to demonstrators and property owners alike as well as against the public interest not to decide it now. Since *Marbury* v. *Madison*, 1 Cranch 137 (1803), it has been this Court's recognized responsibility and duty to decide constitutional questions properly and necessarily before it. That case and others have stressed the duty of judges to act with the greatest caution before frustrating legislation by striking it down as unconstitutional. We should feel constrained to decide this question even if we thought the state law invalid. In this case, however, we believe that the state law is a valid exercise of state legislative power, that the question is properly before us, and that the national interest imperatively calls for an authoritative decision of the question by this Court. Under these circumstances we think that it would be an unjustified abdication of our duty to leave the question undiscussed. This we are not willing to do. So we proceed to state our views on the merits of the constitutional challenges to the Maryland law.

II.

Although the question was neither raised nor decided in the courts below, petitioners contend that the Maryland statute is void for vagueness under the Due Process Clause of the Fourteenth Amendment because its language gave no fair warning that "sit-ins" staged over a restaurant owner's protest were prohibited by the statute.

The challenged statutory language makes it an offense for any person to "enter upon or cross over the land, premises or private property of any person or persons in this State after having been duly notified by the owner or his agent *not to do so* . . . ." Petitioners say that this language plainly means that an entry upon another's property is an offense only if the owner's notice has been given before the intruder is physically on the property; that the notice to petitioners that they were not wanted was given only after they had stepped from the street into the restaurant; and that the statute as applied to them was void either because (1) there was no evidence to support the charge of entry *after* notice not to do so, or because (2) the statute failed to warn that it could be violated by remaining on property after having been told to leave. As to (1), in view of the evidence and petitioners' statements at the trial it is hard to take seriously a contention that petitioners were not fully aware, before they ever entered the restaurant, that it was the restaurant owner's firmly established policy and practice not to serve Negroes. The whole purpose of the "sit-in" was to protest that policy. (2) Be that as it may, the Court of Appeals of Maryland held that "the statutory references to 'entry upon or crossing over,' cover the case of remaining upon land after notice to leave," and the trial court found, with very strong evidentiary support, that after unequivocal notice to petitioners that they would not be seated or served they "persisted in their demands and, brushing by the hostess, took seats at various tables on the main floor and at the counter in the basement." We are unable to say that holding this conduct barred by the Maryland statute was an unreasonable interpretation of the statute or one which could have deceived or even surprised petitioners or others who

wanted to understand and obey it. It would certainly be stretching the rule against ambiguous statutes very far indeed to hold that the statutory language misled these petitioners as to the Act's meaning, in the face of evidence showing a prior series of demonstrations by Negroes, including some of petitioners, and in view of the fact that the group which included petitioners came prepared to picket Hooper and actually courted arrest, the better to protest his refusal to serve colored people.

We reject the contention that the statute as construed is void for vagueness. In doing so, we do not overlook or disregard the view expressed in other cases that statutes which, in regulating conduct, may indirectly touch the areas of freedom of expression should be construed narrowly where necessary to protect that freedom.[8] And we do not doubt that one purpose of these "sit-ins" was to express a vigorous protest against Hooper's policy of not serving Negroes.[9] But it is wholly clear that the Maryland statute here is directed not against what petitioners said but against what they did—remaining on the premises of another after having been warned to leave, conduct which States have traditionally prohibited in this country.[10] And none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property. Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949). We believe that the statute as construed and applied is not void for vagueness.

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[8] *Winters* v. *New York*, 333 U. S. 507, 512 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296, 307–308 (1940).

[9] See *Garner* v. *Louisiana*, 368 U. S. 157, 185 (1961) (HARLAN, J., concurring).

[10] See *Martin* v. *City of Struthers*, 319 U. S. 141, 147 and n. 10 (1943).

## III.

Section 1 of the Fourteenth Amendment provides in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This section of the Amendment, unlike other sections,[11] is a prohibition against certain conduct only when done by a State—"state action" as it has come to be known—and "erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948).[12] This well-established interpretation of section 1 of the Amendment—which all the parties here, including the petitioners and the Solicitor General, accept—means that this section of the Amendment does not of itself, standing alone, in the absence of some cooperative state action or compulsion,[13] forbid property holders, including restaurant owners, to ban people from entering or remaining upon their premises, even if the owners act out of racial prejudice. But "the prohibitions of the amendment extend to all action of the State denying equal protection of the laws" whether "by its legislative, its executive, or its judicial authorities." *Virginia* v. *Rives*, 100 U. S. 313, 318 (1880). The Amendment thus forbids all kinds of state action, by all state agencies and officers, that dis-

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[11] *E. g.*, § 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[12] Citing *Civil Rights Cases*, 109 U. S. 3 (1883); *United States* v. *Harris*, 106 U. S. 629 (1883); *United States* v. *Cruikshank*, 92 U. S. 542 (1876).

[13] See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

criminate against persons on account of their race.[14] It was this kind of state action that was held invalid in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963), *Lombard* v. *Louisiana*, 373 U. S. 267 (1963), and *Griffin* v. *County School Board*, 377 U. S. — (1964), and that this Court today holds invalid in *Robinson* v. *Florida*, *ante*, p. —.

Petitioners, but not the Solicitor General, contend that their conviction for trespass under the state statute was by itself the kind of discriminatory state action forbidden by the Fourteenth Amendment. This contention, on its face, has plausibility when considered along with general statements to the effect that under the Amendment forbidden "state action" may be that of the Judicial as well as of the Legislative or Executive Branches of Government. But a mechanical application of the Fourteenth Amendment to this case cannot survive analysis. The Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the State that prosecutes. Such a doctrine would not only be based on a fiction; it would also severely handicap a State's efforts to maintain a peaceful and orderly society. Our society has put its trust in a system of criminal laws to punish lawless conduct. To avert personal feuds and violent brawls it has led its people to believe and expect that wrongs against them will be vindicated in the courts. Instead of attempting to take the law into their own hands, people have been taught to call for police protection to protect their rights wherever possible.[15] It would

[14] See *Shelley* v. *Kraemer*, *supra*, 334 U. S., at 14–15 (1948), particularly notes 13 and 14.

[15] The use in this country of trespass laws, both civil and criminal, to allow people to substitute the processes of the law for force and violence has an ancient origin in England. Land law was once

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. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his Nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights.

In contending that the State's prosecution of petitioners for trespass is state action forbidden by the Fourteenth Amendment, petitioners rely chiefly on *Shelley* v. *Kraemer, supra.* That reliance is misplaced. *Shelley* held that the Fourteenth Amendment was violated by a State's enforcement of restrictive covenants providing that certain pieces of real estate should not be used or occupied by Negroes, orientals, or any other noncaucasians, either as owners or tenants, and that in case of use or occupancy by such proscribed classes, the title of any person so using or occupying it should be divested. Many briefs were filed in that case by the parties and by *amici curiae.* To support the holding that state enforcement of the agreements constituted prohibited

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bound up with the notion of "seisin," a term connoting "peace and quiet." 2 Pollock and Maitland, The History of English Law Before the Time of Edward I (2d ed. 1909), 29, 30. As Coke put it, "he who is in possession may sit down in rest and quiet . . . ." 6 Co. Rep. 57b. To vindicate this right to undisturbed use and enjoyment of one's property, the law of trespass came into being. The leading historians of the early English law have observed the constant interplay between "our law of possession and trespass" and have concluded that since "to allow men to make forcible entries on land . . . is to invite violence," the trespass laws' protection of possession "is a prohibition of self-help in the interests of public order." 2 Pollock and Maitland, *supra*, at 31, 41.

state action even though the agreements were made by private persons to whom, if they act alone, the Amendment does not apply, two chief grounds were urged: (1) This type of agreement constituted a restraint on alienation of property, sometimes in perpetuity, which, if valid, was in reality the equivalent of and had the effect of state and municipal zoning laws, accomplishing the same kind of racial discrimination as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State. See *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Terry* v. *Adams*, 345 U. S. 461 (1953); cf. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362 (1940).[16] (2) Nearly all the briefs in *Shelley* which asked invalidation of the restrictive covenants iterated and reiterated that judicial enforcement of this system of covenants was forbidden state action because the right of a citizen to own, use, enjoy, occupy, and dispose of property is a federal right protected by the Civil Rights Acts of 1866 and 1870, validly passed pursuant to congressional power authorized by section 5 of the Fourteenth Amendment.[17] This

[16] On this subject the Solicitor General in his brief says: "The series of covenants becomes in effect a local zoning ordinance binding those in the area subject to the restrictions without their consent. Cf. *Buchanan* v. *Warley*, 245 U. S. 60. Where the State has delegated to private persons a power so similar to law-making authority, its exercise may fairly be held subject to constitutional restrictions."

[17] 42 U. S. C. § 1982, deriving from 14 Stat. 27, § 1 (1866), provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U. S. C. § 1981, deriving from 16 Stat. 144, § 16 (1870), provides: "All persons within the jurisdiction of the United States shall have the same right . . . to make contracts . . . as is enjoyed by white citizens . . . ." The constitutionality of these statutes was recognized in *Virginia* v. *Rives*, 100 U. S. 313, 317–318 (1880), and in *Buchanan* v. *Warley*, 245 U. S. 60, 79–80 (1917).

argument was buttressed by citation of many cases, some of which are referred to in this Court's opinion in *Buchanan* v. *Warley*, 245 U. S. 60 (1917). In that case this Court, acting under the Fourteenth Amendment and the Civil Rights Acts of 1866 and 1870, struck down a city ordinance which zoned property on the basis of race, stating, 245 U. S., at 81, "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan* v. *Warley* was heavily relied on by this Court in *Shelley* v. *Kraemer*, *supra*, where this statement from *Buchanan* was quoted: "The Fourteenth Amendment and these statutes [of 1866 and 1870] enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." 334 U. S., at 11–12. And the Court in *Shelley* went on to cite with approval two later decisions of this Court which, relying on *Buchanan* v. *Warley*, had invalidated other city ordinances.[18]

It seems pretty clear that the reason judicial enforcement of the restrictive covenants in *Shelley* was deemed state action was, not merely the fact that a state court had acted, but rather that it had acted "to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell." 334 U. S., at 19. In other words, this Court held that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy, and use their property without regard to race or color. Thus, the line of cases from *Buchanan* through *Shelley* establishes these

[18] *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930).

propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, lease, sell, hold, and convey" property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. *Shelley v. Kraemer, supra*, 334 U. S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." *Buchanan v. Warley, supra*, 245 U. S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as *both* parties are willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in *Buchanan*, he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use. But petitioners here would have us hold that, despite the absence of any valid statute restricting the use of his property, the owner of Hooper's restaurant in Baltimore must not be accorded the same federally guaranteed right to occupy, enjoy, and use property given to the parties in *Buchanan* and *Shelley;* instead, petitioners would have us say that Hooper's federal right must be cut down and he be compelled—though no statute said he must—to allow people to force their way into his restaurant and remain there over his protest. We cannot subscribe to

such a mutilating, one-sided interpretation of federal guarantees the very heart of which is equal treatment under law to all. We must never forget that the Fourteenth Amendment protects "life, liberty, or property" of all people generally, not just some people's "life," some people's "liberty," and some kinds of "property."

In concluding that mere judicial enforcement of the trespass law is not sufficient to impute to Maryland Hooper's refusal to serve Negroes, we are in accord with the Solicitor General's views as we understand them. He takes it for granted

> "that the mere fact of State intervention through the courts or other public authority in order to provide sanctions for a private decision is not enough to implicate the State for the purposes of the Fourteenth Amendment. . . . Where the only State involvement is color-blind support for every property-owner's exercise of the normal right to choose his business visitors or social guests, proof that the particular property-owner was motivated by racial or religious prejudices is not enough to convict the State of denying equal protection of the laws."

The Solicitor General also says:

> "The preservation of a free and pluralistic society would seem to require substantial freedom for private choice in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts."

We, like the Solicitor General, reject the argument that the State's protection of Hooper's desire to choose customers on the basis of race by prosecuting trespassers is enough, standing alone, to deprive Hooper of his right to operate the property in his own way. But we disagree with the contention that there are other circumstances which, added to the State's prosecution for trespass, justify a finding of state action. There is no Maryland law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encouragement to, Hooper to bar Negroes from his restaurant.[19] Neither the State, the city, nor any of their agencies has leased publicly owned property to Hooper.[20] It is true that the State and city regulate the restaurants—but not by compelling restaurants to deny service to customers because of their race. License fees are collected, but this licensing has no relationship to race. Under such circumstances, to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take. Businesses owned by private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.

Neither the parties nor the Solicitor General, at least with respect to Maryland, has been able to find the present existence of any state law or local ordinance, any state court or administrative ruling, or any other official state conduct which could possibly have had any coercive influence on Hooper's racial practices. Yet despite a complete absence of any sort of proof or even respectable

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[19] Compare *Robinson* v. *Florida*, *ante*, p. —; *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963).

[20] Compare *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

speculation that Maryland in any way instigated or encouraged Hooper's refusal to serve Negroes, it is argued at length that Hooper's practice should be classified as "state action." This contention rests on a long narrative of historical events, both before and since the Civil War, to show that in Maryland, and indeed in the whole South, state laws and state actions have been a part of a pattern of racial segregation in the conduct of business, social, religious, and other activities. This pattern of segregation hardly needs historical references to prove it. The argument is made that the trespass conviction should be labeled "state action" because the "momentum" of Maryland's "past legislation" is still substantial in the realm of public accommodations. To that extent, the Solicitor General argues, "a State which has drawn a color line may not suddenly assert that it is color blind." We cannot accept such an *ex post facto* argument to hold the application here of Maryland's trespass law unconstitutional. Nor can we appreciate the fairness or justice of holding the present generation of Marylanders responsible for what their ancestors did in other days [21]—even if we had the right to substitute our own ideas of what the Fourteenth Amendment ought to be for what it was written and adopted to achieve.

There is another objection to accepting this argument. If it were accepted, we would have one Fourteenth Amendment for the South and quite a different and more lenient one for the other parts of the country. Present "state action" in this area of constitutional rights would

[21] In fact, as pointed out in Part I of this opinion, Maryland has recently passed a law prohibiting racial discrimination in restaurants in Baltimore and some other parts of the State, and Baltimore has enacted a similar ordinance. Still another Maryland antidiscrimination law, of statewide application, has been enacted but is subject to referendum. See note 6, *supra*.

be governed by past history in the South—by present conduct in the North and West. Our Constitution was not written to be read that way, and we will not do it.

IV.

Our Brother GOLDBERG in his opinion argues that the Fourteenth Amendment, of its own force and without the need of congressional legislation, prohibits privately owned restaurants to discriminate on account of color or race. His argument runs something like this: (1) Congress understood the "Anglo-American" common law, as it then existed in the several States, to prohibit owners of inns and other establishments open to the public from discriminating on account of race; (2) in passing the Civil Rights Act of 1866 and other civil rights legislation, Congress meant access to such establishments to be among the "civil rights" protected; (3) finally, those who framed and passed the Fourteenth Amendment intended it, of its own force, to assure persons of all races equal access to privately owned inns and other accommodations. In making this argument, the opinion refers us to three state supreme court cases and to congressional debates on various post-Civil War civil rights bills. However, not only does the very material cited furnish scant, and often contradictory, support for the first two propositions (about the common law and the Reconstruction era statutes), but, even more important, the material furnishes absolutely none for the third proposition, which is the issue in this case.

In the first place, there was considerable doubt and argument concerning what the common law in the 1860's required even of carriers and innkeepers and still more concerning what it required of owners of other establishments. For example, in Senate debates in 1864 on a proposal to amend the charter of the street railway company in the District of Columbia to prohibit it from excluding

any person from its cars on account of color—a debate cited in MR. JUSTICE GOLDBERG'S opinion—one Senator thought that the common law would give a remedy to any Negro excluded from a street car,[22] while another argued that "it was universally conceded that railroad companies, steamboat proprietors, coach lines, had the right to make this regulation" requiring Negroes to ride in separate cars.[23] Senator Sumner of Massachusetts, one of the chief proponents of legislation of this type, admitted that there was "doubt" both as to what the street railroad's existing charter required and as to what the common law required; therefore he proposed that, since the common law had "fallen into disuse" or "become disputable," Congress should act: "Let the rights of colored persons be placed under the protection of positive statute . . . ." [24]

Second, it is not at all clear that in the statutes relied on—the Civil Rights Act of 1866 and the Supplementary Freedmen's Bureau Act—Congress meant for those statutes to guarantee Negroes access to estab-

[22] Cong. Globe, 38th Cong., 1st Sess., 1159 (1864) (Senator Morrill).

[23] *Id.*, at 1157–1158 (Senator Saulsbury).

[24] *Id.*, at 1158. In response to a question put by Senator Carlile of Virginia, Sumner stated that it had taken a statute to assure Negroes equal treatment in Massachusetts:

"That whole question, after much discussion in Massachusetts, has been settled by *legislation*, and the rights of every colored person are placed on the same equality with those of white persons. They have the same right with white persons to ride in every public conveyance in the Commonwealth. *It was done by positive legislation* twenty-one years ago." *Ibid.* (Emphasis supplied.)

A few minutes later, Senator Davis of Kentucky asked Sumner directly if it was not true that what treatment was extended to colored people by "public hotels" incorporated by the Commonwealth of Massachusetts was left to "the judgment and discretion of the proprietors and managers of the hotels." Sumner, who had answered immediately preceding statements by Davis, left this one unchallenged. *Id.*, at 1161.

lishments otherwise open to the general public.[25] For example, in the House debates on the Civil Rights bill of 1866 cited, not one of the speakers mentioned privately owned accommodations.[26] Neither the text of the bill,[27]

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[25] A number of the remarks quoted as having been made in relation to Negroes' access to privately owned accommodations in fact dealt with other questions altogether. For example, Senator Trumbull of Illinois is quoted, *ante*, p. —, as having said that the Negro should have the right "to go where he pleases." It is implied that such remarks cast light on the question of access to privately owned accommodations. In fact, the statement, made in the course of a debate on a bill (S. 60) to enlarge the powers of the Freedmen's Bureau, related solely to Black Laws that had been enacted in some of the Southern States. Trumbull attacked the "slave codes" which "prevented the colored man going from home," and he urged that Congress nullify all laws which would not permit the colored man "to go where he pleases." Cong. Globe, 39th Cong., 1st Sess., 322 (1866). Similarly, in another debate, on a bill (S. 9) for the protection of freedmen, Senator Wilson of Massachusetts had just told the Senate about such laws as that of Mississippi which provided that any freedman who quit his job "without good cause" during the term of his employment should, upon affidavit of the employer, be arrested and carried back to the employer. Speaking of such relics of slavery, Wilson said that freedmen were "as free as I am, to work when they please, to play when they please, to go where they please . . . ." *Id.*, at 41. Senator Trumbull then joined the debate, wondering if S. 9 went far enough and saying that to prevent States "from enslaving, under any pretense," the freedmen, he might introduce his own bill to ensure the right of freedmen to "go and come when they please." *Id.*, at 43. It was to the Black Laws—and not anything remotely to do with accommodations—that Wilson, Trumbull, and others addressed their statements. Moreover, in the debate on S. 9, Senator Trumbull expressly referred to the Thirteenth Amendment as the constitutional basis both for the pending bill and for his own bill, *ibid.*, showing that the Senate's concern was with state laws restricting the movement of, and in effect re-enslaving, colored people.

[26] Cong. Globe, 39th Cong., 1st Sess., 474–476 (1866) (Trumbull of Illinois), 599 (Trumbull), 606 (Trumbull), 1117 (Wilson of Iowa), 1151 (Thayer of Pennsylvania), 1154 (Thayer), 1157 (Thornton of Minnesota), 1159 (Windom of Minnesota).

[27] See *id.*, at 211–212.

nor, for example, the enumeration by a leading supporter of the bill of what "civil rights" the bill would protect,[28] even mentioned inns or other such facilities. Hence we are pointed to nothing in the legislative history which gives rise to an inference that the proponents of the Civil Rights Act of 1866 meant to include as a "civil right" a right to demand service at a privately owned restaurant or other privately owned establishment. And, if the 1866 Act did impose a statutory duty on innkeepers and others, then it is strange indeed that Senator Sumner in 1872 thought that an Act of Congress was necessary to require hotels, carriers, theatres, and other places to receive all races,[29] and even more strange that Congress felt obliged in 1875 to pass the Civil Rights Act of that year explicitly prohibiting discrimination by inns, conveyances, theatres, and other places of public amusement.[30]

Finally, and controlling here, there is nothing whatever in the material cited to support the proposition that the Fourteenth Amendment, without congressional legislation, prohibits owners of restaurants and other places to refuse service to Negroes. We are cited, only in passing, to general statements made in the House of Representatives to the effect that the Fourteenth Amendment was meant to incorporate the "principles" of the Civil Rights Act of 1866.[31] Whether "principles" are the same thing as "provisions," we are not told. But we have noted the serious doubt that the Civil Rights Act of 1866 even dealt with access to privately owned facilities. And it is revealing that in not one of the passages cited from the debates on the Fourteenth Amendment did any speaker suggest that the Amendment was designed,

[28] *Id.*, at 1151 (Thayer).
[29] Cong. Globe, 42d Cong., 2d Sess., 381–383 (1872).
[30] 18 Stat. 335.
[31] Cong. Globe, 38th Cong., 1st Sess., 2459, 2462, 2465, 2467, 2538 (1866).

of itself, to assure all races equal treatment at inns and other privately owned establishments.

Apart from the one passing reference just mentioned above to the debates on the Fourteenth Amendment, a reference which we have shown had no relevance whatever to whom restaurants should serve, every one of the passages cited deals entirely with proposed *legislation*—not with the Amendment.[32] It should be obvious that what may have been proposed in connection with passage of one statute or another is altogether irrelevant to the question of what the Fourteenth Amendment does in the absence of legislation. It is interesting to note that in 1872, some years after the passage of the Fourteenth Amendment, Senator Sumner, always an indefatigable proponent of statutes of this kind, proposed in a debate to which we are cited a bill to give all citizens, regardless of color, equal enjoyment of carriers, hotels, theatres, and certain other places. He submitted that, as to hotels and carriers (but not as to theatres and places of amusement), the bill "simply reenforce[d]" the common law;[33] it is

[32] Cong. Globe, 38th Cong., 1st Sess., 839 (1864) (debate on bill to repeal law prohibiting colored persons from carrying the mail); Cong. Globe, 38th Cong., 1st Sess., 1156–1157 (1864) (debate on amending the charter of the Metropolitan Railroad Co.); Cong. Globe, 39th Cong., 1st Sess., 322, 541, 916, 936 (1866) (debate on bill to amend the Freedmen's Bureau Act, S. 60); Cong. Globe, 39th Cong., 1st Sess., 474–476, 599, 606, 1117–1118, 1151, 1154, 1157, 1159, 1263 (1866) (debate on the Civil Rights Act of 1866, S. 61); Cong. Globe, 39th Cong., 1st Sess., 41, 111 (1866) (debate on bill for the protection of freedmen from Black Codes, S. 9); Cong. Globe, 42d Cong., 2d Sess., 381–383 (1872) (debate on Sumner's amendment to bill removing political and civil disabilities on ex-Confederates, H. R. 380); 2 Cong. Rec. 4081–4082 (1874) (debate on bill to give all citizens equal enjoyment of inns, etc., S. 1). One cited passage, Cong. Rec., 39th Cong., 1st Sess., 684 (1866), consists of remarks made in debate on a proposed constitutional amendment having to do with apportionment of representation, H. R. 51.

[33] Cong. Globe, 42d Cong., 2d Sess., 383 (1872).

significant that he did not argue that the bill would enforce a right already protected by the Fourteenth Amendment itself—the stronger argument, had it been available to him. Similarly, in an 1874 debate on a bill to give all citizens, regardless of color, equal enjoyment of inns, public conveyances, theatres, places of public amusement, common schools, and cemeteries (a debate also cited), Senator Pratt argued that the bill gave the same rights as the common law but would be a more effective remedy.[34] Again, it is significant that, like Sumner in the 1872 debates, Pratt suggested as precedent for the bill only his belief that the common law required equal treatment; he never intimated that the Fourteenth Amendment laid down such a requirement.

We have confined ourselves entirely to those debates cited in Brother GOLDBERG's opinion the better to show how, even on its own evidence, the opinion's argument that the Fourteenth Amendment without more prohibits discrimination by restaurants and other such places rests on a wholly inadequate historical foundation. When read and analyzed, the argument is shown to rest entirely on what speakers are said to have believed bills and statutes of the time were meant to do. Such proof fails entirely when the question is, not what statutes did, but rather what the Constitution does. Nor are the three state cases[35] relied on any better evidence, for all three

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[34] 2 Cong. Rec. 4081 (1874).

[35] *Donnell* v. *State*, 48 Miss. 661 (1873); *Coger* v. *North West Packet Co.*, 37 Iowa 145 (1874); *Ferguson* v. *Gies*, 82 Mich. 358 (1890). The Mississippi case does contain this observation pertinent to a court's duty to confine itself to deciding cases and interpreting constitutions and statutes and to leave the legislating to legislatures:

"Events of such vast magnitude and influence now and hereafter, have gone into history within the last ten years, that the public mind is not yet quite prepared to consider them calmly and dispassionately. To the judiciary, which ought at all times to be calm, deliberate

dealt with state antidiscrimination statutes; not one purported to interpret the Fourteenth Amendment.[36] And, if we are to speak of cases decided at that time, we should recall that this Court, composed of Justices appointed by Presidents Lincoln, Grant, Hayes, and Arthur, held in a series of constitutional interpretations beginning with the *Slaughter-House Cases*, 16 Wall. 36 (1873), that the Amendment of itself was directed at state action only and that it did not displace the power of the state and federal legislative bodies to regulate the affairs of privately owned businesses.[37]

We are admonished that in deciding this case we should remember that "it is *a constitution* we are ex-

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and firm, especially so when the public thought and sentiment are at all excited beyond the normal tone, is committed the high trust of declaring what are the rules of conduct and propriety prescribed by the supreme authority, and what are the rights of individuals under them. As to the policy of legislation, the judiciary have nothing to do. That is wisely left with the law-making department of the government." 48 Miss., at 675.

[36] The Attorney General of Mississippi is quoted as having argued in *Donnell* v. *State*, 48 Miss. 661 (1873), that the Mississippi Legislature had "sought by this [antidiscrimination] act, to render interference by Congress unnecessary." *Ante*, p. ——. This very statement shows that the Mississippi Attorney General thought in 1873, as we believe today, that the Fourteenth Amendment did not of itself guarantee access to privately owned facilities and that it took legislation, such as that of Mississippi, to guarantee such access.

[37] Brother GOLDBERG's opinion in this case relies on *Munn* v. *Illinois*, 94 U. S. 113 (1877), which discussed the common-law rule that "when private property is devoted to a public use, it is subject to public regulation." *Id.*, at 130. This statement in *Munn* related, of course, to the extent which a legislature constitutionally can regulate private property. *Munn* therefore is not remotely relevant here, for in this case the problem is, not what legislatures can do, but rather what the Constitution itself does. And in fact this Court some years ago rejected the notion that a State must depend upon some rationalization such as "affected with a public interest" in order for legislatures to regulate private businesses. See *Nebbia* v. *New York*, 291 U. S. 502 (1934).

pounding." [38] We conclude as we do because we remember that it *is* a Constitution and that it is our duty "to bow with respectful submission to its provisions." [39] And in recalling that it is a Constitution "intended to endure for ages to come," [40] we also remember that the Founders wisely provided the means for that endurance: changes in the Constitution, when thought necessary, are to be proposed by Congress or conventions and ratified by the States. The Founders gave no such amending power to this Court. Cf. *Ex parte Virginia*, 100 U. S. 339, 345–346 (1880). Our duty is simply to interpret the Constitution, and in doing so the test of constitutionality is not whether a law is offensive to our conscience or to the "good old common law," [41] but whether it is offensive to the Constitution. Confining ourselves to our constitutional duty to construe, not to rewrite or amend, the Constitution, we believe that section 1 of the Fourteenth Amendment does not bar Maryland from enforcing its trespass laws so long as it does so with impartiality.

This Court has done much in carrying out its solemn duty to protect people from unlawful discrimination. And it will, of course, continue to carry out this duty in the future as it has in the past.[42] But the Fourteenth

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[38] *McCulloch* v. *Maryland*, 4 Wheat. 316, 407 (1819). (Emphasis in original.)

[39] *Cohens* v. *Virginia*, 6 Wheat. 264, 377 (1821). (Emphasis supplied.)

[40] *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819).

[41] That the English common law was not thought altogether "good" in this country is suggested by the complaints of the Declaration of Independence, by the Virginia and Kentucky Resolutions, and by observations of Thomas Jefferson. The Jeffersonian Cyclopedia 163 (Foley ed. 1900).

[42] It is said that our holding "does not do justice" to a Constitution which is color blind and to this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). *Ante*, p. —. We agree, of course, that the Fourteenth Amendment is "color blind," in the sense that it outlaws all state laws which discriminate merely on

Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will. We do not believe that section 1 of the Fourteenth Amendment was written or designed to interfere with a storekeeper's right to choose his customers or with a property owner's right to choose his social or business associates, so long as he does not run counter to valid state [43] or federal regulation. The case before us does not involve the power of the Congress to pass a law compelling privately owned businesses to refrain from discrimination on the basis of race and to trade with all if they trade with any. We express no views as to the power of Congress, acting under one or another provision of the Constitution, to prevent racial discrimination in the operation of privately owned businesses, nor upon any particular form of legislation to that end. Our sole conclusion is that section 1 of the Fourteenth Amendment, standing alone, does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise.[44]

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account of color. This was the basis upon which the Court struck down state laws requiring school segregation in *Brown* v. *Board of Education, supra*. But there was no possible intimation in *Brown* or in any other of our past decisions that this Court would construe the Fourteenth Amendment as requiring restaurant owners to serve all races. Nor has there been any intimation that the Court should or would expand the Fourteenth Amendment because of a belief that it does not in our judgment go far enough.

[43] Cf. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963).

[44] The opinion of our Brother GOLDBERG characterizes our argument as being that the Constitution "permits" Negroes to be denied access to restaurants on account of their color. We fear that this statement

V.

Petitioners, but not the Solicitor General, contend that their convictions for trespass deny them the right of freedom of expression guaranteed by the Constitution. They argue that their

> "expression (asking for service) was entirely appropriate to the time and place at which it occurred. They did not shout or obstruct the conduct of business. There were no speeches, picket signs, handbills or other forms of expression in the store possibly inappropriate to the time and place. Rather they offered to purchase food in a place and at a time set aside for such transactions. Their protest demonstration was a part of the 'free trade in ideas' (*Abrams* v. *United States*, 250 U. S. 616, 630, Holmes, *J.*, dissenting) . . . ."

Their argument comes down to this: that since petitioners did not shout, obstruct Hooper's business (which the record refutes), make speeches, or display picket signs, handbills, or other means of communication, they had a perfect constitutional right to assemble and remain in the restaurant, over the owner's continuing objections, for the purpose of expressing themselves by language and "demonstrations" bespeaking their hostility to Hooper's refusal to serve Negroes. This Court's prior cases do not support such a privilege growing out of the constitutional rights of speech and assembly. Unquestionably peti-

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might mislead some readers. Precisely put, our position is that the Constitution of itself does not prohibit discrimination by those who sell goods and services. There is of course a crucial difference between the argument—which we do make—that the Constitution itself does not prohibit private sellers of goods or services to choose their own customers, and the argument—which we do not make—that the Constitution affirmatively creates a right to discriminate which neither state nor federal legislation could impair.

tioners had a constitutional right to express these views wherever they had an unquestioned legal right to be. Cf. *Marsh* v. *Alabama, supra.* But there is the rub in this case. The contention that petitioners had a constitutional right to enter or to stay on Hooper's premises against his will because, if there, they would have had a constitutional right to express their desire to have restaurant service over Hooper's protest, is a boot-strap argument. The right to freedom of expression is a right to express views—not a right to force other people to supply a platform or a pulpit. It is argued that this supposed constitutional right to invade other people's property would not mean that a man's home, his private club, or his church could be forcibly entered or used against his will—only his store or place of business which he has himself "opened to the public" by selling goods or services for money. In the first place, that argument assumes that Hooper's restaurant *had* been opened to the public. But the whole quarrel of petitioners with Hooper was that instead of being open to all, the restaurant refused service to Negroes. Furthermore, legislative bodies with power to act could of course draw lines like this, but if the Constitution itself fixes its own lines, as is argued, legislative bodies are powerless to change them, and homeowners, churches, private clubs, and other property owners would have to await case-by-case determination by this Court before they knew who had a constitutional right to trespass on their property. And even if the supposed constitutional right is confined to places where goods and services are offered for sale, it must be realized that such a constitutional rule would apply to all businesses and professions alike. A statute can be drafted to create such exceptions as legislators think wise, but a constitutional rule could as well be applied to the smallest business as to the largest, to the most personal professional relationship as to the most impersonal business,

to a family business conducted on a man's farm or in his home as to businesses carried on elsewhere.

A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably, without resort to intimidation, force, or violence. The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the States or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to "establish Justice, insure domestic Tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity." At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both "Liberty" and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland's trespass law does not depart from it. Nor shall we.

We would affirm.