AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Foundations/Scope/State Action

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Bell v. Maryland, 378 U.S. 226 (1964)

Robert Mack Bell (who later became the chief justice of the Maryland Court of Appeals) was one of fifteen to twenty African-American students who staged a sit-in protest at Hooper's Restaurant in Baltimore because the proprietor would not serve persons of color. When he refused to leave, Bell and eleven of his peers were arrested for trespass. At trial, they were convicted and each fined ten dollars. Their conviction was sustained by the Maryland Court of Appeals and the protestors appealed to the Supreme Court of the United States. Bell claimed a constitutional right not to be discriminated against on the ground of race in a place of public accommodation and that his arrest and conviction satisfied the state action requirement. Maryland claimed that the police were merely enforcing the trespass laws. The United States sided with Bell, filing a brief that urged the justices to reverse the convictions in that case and four others before the Supreme Court. After asserting that the statutes in all these cases were unconstitutionally vague, Solicitor General Archibald Cox concluded,

> *Discrimination is alien to our law and its practice forbidden to both State and Nation. An affront to the dignity of the victim, it is, by the same token, demeaning to him who engages in the practice and destructive of the fiber of a democratic society. If it be true that this Court cannot right every moral failing, it is also true, we believe, that it must hold every exercise of governmental power to the strictest standards of legal accountability when the failure to do so may encourage or abet a fundamental human wrong.*

The Supreme Court by a 6-3 reversed Bell's conviction. Justice Brennan's majority opinion ducking the constitutional issues by insisting that Maryland courts should consider whether a recent change in Maryland law applied to Bell's case. Bell *was one of more than twenty cases decided between 1960 and 1965 in which the Supreme Court considered whether a civil rights protester had been constitutionally convicted of trespass or disturbing the peace. In all cases, the convictions were reversed.* Bell *was the closest the justices came to sustaining a state court conviction. The original judicial vote was 5–4 in favor of affirming the state court. Justice Brennan, fearful that an unfavorable judicial decision might adversely influence the pending Civil Rights Act of 1964, managed first to delay announcing the decisions and then persuaded Justices Stewart and Clark to reverse on a dubious technicality.*[1]

Justices Black and Douglas, who often allied in free speech and incorporation cases, reached sharply different conclusions in Bell. *You might consider reading their different opinions in* Bell *in light of their other agreements. To what extent to the differences between Black and Douglas in Bell reflect policy preferences, different attitudes toward protest, or different theories of constitutional adjudication. Would Douglas (and Goldberg) completely abandon state action and is such abandonment constitutionally justified? Does Black correctly recognize the rights of the private entrepreneur or does he fail to recognize the complex interactions between public and private discrimination?*

JUSTICE BRENNAN delivered the opinion of the Court.

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[1] For the internal court debates, see Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000), 227–29.

We do not reach the questions that have been argued under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. It appears that a significant change has taken place in the applicable law of Maryland since these convictions were affirmed by the Court of Appeals. Under this Court's settled practice in such circumstances, the judgments must consequently be vacated and reversed and the case remanded so that the state court may consider the effect of the supervening change in state law.

. . .

JUSTICE DOUGLAS, with whom JUSTICE GOLDBERG concurs in part

The clash between Negro customers and white restaurant owners is clear; each group claims protection by the Constitution and tenders the Fourteenth Amendment as justification for its action. Yet we leave resolution of the conflict to others, when, if our voice were heard, the issues for the Congress and for the public would become clear and precise. The Court was created to sit in troubled times as well as in peaceful days.

. . .

We have in this case a question that is basic to our way of life and fundamental in our constitutional scheme. No question preoccupies the country more than this one; it is plainly justiciable; it presses for a decision one way or another; we should resolve it. The people should know that when filibusters occupy other forums, when oppressions are great, when the clash of authority between the individual and the State is severe, they can still get justice in the courts. When we default, as we do today, the prestige of law in the life of the Nation is weakened.

For these reasons I reach the merits; and I vote to reverse the judgments of conviction outright.

The issue in this case, according to those who would affirm, is whether a person's "personal prejudices" may dictate the way in which he uses his property and whether he can enlist the aid of the State to enforce those "personal prejudices." With all respect, that is not the real issue. The corporation that owns this restaurant did not refuse service to these Negroes because "it" did not like Negroes. The reason "it" refused service was because "it" thought "it" could make more money by running a segregated restaurant.

. . .

I now assume that the issue is the one stated by those who would affirm. The case in that posture deals with a relic of slavery—an institution that has cast a long shadow across the land, resulting today in a second-class citizenship in this area of public accommodations

. . .

Prior to [the post–Civil War] Amendments, Negroes were segregated and disallowed the use of public accommodations except and unless the owners chose to serve them. To affirm these judgments would remit those Negroes to their old status and allow the States to keep them there by the force of their police and their judiciary.

. . .

The Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in these sit-in cases is a relic of slavery.

. . .

There has been a judicial reluctance to expand the content of national citizenship beyond racial discrimination, voting rights, the right to travel, safe custody in the hands of a federal marshal, diplomatic protection abroad, and the like. . . . The reluctance has been due to a fear of creating constitutional refuges for a host of rights historically subject to regulation. . . . But those fears have no relevance here, where we deal with Amendments whose dominant purpose was to guarantee the freedom of the slave race and establish a regime where national citizenship has only one class.

. . . [T]he right to be served in places of public accommodations is an incident of national citizenship and of the right to travel. . . .

. . .

When one citizen because of his race, creed, or color is denied the privilege of being treated as any other citizen in places of public accommodation, we have classes of citizenship, one being more degrading than the other. That is at war with the one class of citizenship created by the Thirteenth, Fourteenth, and Fifteenth Amendments.

. . .

The problem in this case, and in the other sit-in cases before us, is presented as though it involved the situation of "a private operator conducting his own business on his own premises and exercising his own judgment" as to whom he will admit to the premises.

The property involved is not, however, a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public. As my Brother GOLDBERG says, it is a "civil" right, not a "social" right, with which we deal. Here it is a restaurant refusing service to a Negro. But so far as principle and law are concerned it might just as well be a hospital refusing admission to a sick or injured Negro. . . , or a drugstore refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home.

The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy.

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Apartheid . . . is barred by the common law as respects innkeepers and common carriers. There were, to be sure, criminal statutes that regulated the common callings. But the civil remedies were made by judges who had no written constitution. We, on the other hand, live under a constitution that proclaims equal protection under the law. Why then, even in the absence of a statute, should apartheid be given constitutional sanction in the restaurant field? . . .

. . .

The right of any person to travel interstate irrespective of race, creed, or color is protected by the Constitution. *Edwards v. California* (1941) . . . . Certainly his right to travel intrastate is as basic. Certainly his right to eat at public restaurants is as important in the modern setting as the right of mobility. In these times that right is, indeed, practically indispensable to travel either interstate or intrastate.

The requirement of equal protection, like the guarantee of privileges and immunities of citizenship, is a constitutional command directed to each State.

State judicial action is as clearly "state" action as state administrative action. Indeed, we held in *Shelley v. Kraemer* . . . that "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

. . .

Maryland's action against these Negroes was as authoritative as any case where the State in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts.

. . .

The preferences involved in Shelley v. Kraemer and its companion cases were far more personal than the motivations of the corporate managers in the present case when they declined service to Negroes. Why should we refuse to let state courts enforce apartheid in residential areas of our cities but let state courts enforce apartheid in restaurants? If a court decree is state action in one case, it is in the other. Property rights, so heavily underscored, are equally involved in each case.

. . .

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the "State" violates the Fourteenth Amendment.

I would reverse these judgments of conviction outright, as these Negroes in asking for service in Hooper's restaurant were only demanding what was their constitutional right.

JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE DOUGLAS joins in part

. . .

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." . . .

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." . . . The cases following the 1896 decision in *Plessy v. Ferguson*, . . . too often tended to negate this great purpose. In 1954 in *Brown v. Board of Education*, . . . 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.

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 institutions are founded upon the doctrine of equality." . . . 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 insures an equality of public benefits. . . .

. . .

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. 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. . . .

. . .

. . . A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the [Civil Rights Act of 1866 and the Freedmen's Bureau Bill] 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," that the colored man should have the right "to go where he pleases," that he should have "practical" freedom, and that he should share "the rights and guarantees of the good old common law."

In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting "civil," as distinguished from "social," rights constantly recurred. 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 regulated by governments. . . .

. . .

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. Sandford* (1856), . . . 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 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, theaters, and other places of public amusement . . ." The constitutionality of this federal legislation was reviewed by this Court in 1883 in the *Civil Rights Cases*. . . . The dissent in the present case purports to follow the "state action" concept articulated in that early decision. . . .

The Court [in the *Civil Rights Cases* declared]:

> "Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." . . .

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. 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. 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 to deny rather than protect the right of access to public accommodations 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. . . .

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. . . .

. . .

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." The restaurant involved in this case is concededly 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.

. . . 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.

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. . . .

. . .

. . . [E]ven if the historical evidence were not as convincing as I believe it to be, the logic of *Brown v. Board of Education* . . . 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." . . .

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. . . .

. . .

It is, and should be, more true today than it was over a century ago that "[t]he 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." 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.

JUSTICE BLACK, with whom JUSTICE HARLAN and JUSTICE WHITE join, dissenting.

. . .

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. We know that many similar cases are now on the way and that many others are bound to follow. We 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. . . .

. . .

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, 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* (1948). . . .

. . . 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. 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. . . .

. . .

. . . [T]he 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." 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. . . . 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 must 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."

. . .

. . . 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. Neither the State, the city, nor any of their agencies has leased publicly owned property to Hooper. 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.

. . . Yet despite a complete absence of any sort of proof or even respectable 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—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 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.

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 from discriminating on account of color or race. . . .

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. . . .

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 establishments otherwise open to the general public. For example, in the House debates on the Civil Rights bill of 1866 cited, not one of the speakers mentioned privately owned accommodations. Neither the text of the bill, nor, for example, the enumeration by a leading supporter of the bill of what "civil rights" the bill would protect, even mentioned inns or other such facilities. . . .

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

. . . 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," 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.

. . . 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. . . .

. . .