To: The Chief Justice
Mr. Justice Black
Mr. Justice Clark
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Goldberg

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 515 AND 543.—OCTOBER TERM, 1964.

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Heart of Atlanta Motel, Inc., Appellant, v. United States et al.	On Appeal From the United States District Court for the Northern District of Georgia.
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Nicholas deB. Katzenbach, Acting Attorney General, et al., Appellants, v. Ollie McClung, Sr., and Ollie McClung, Jr.	On Appeal From the United States District Court for the Northern District of Alabama.
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[December —, 1964.]

MR. JUSTICE DOUGLAS, concurring.

I.

Though I join the Court's opinion, I am somewhat reluctant here, as I was in *Edwards* v. *California*, 314 U. S. 160, 177, to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right to persons to move freely from State to State" (*Edwards* v. *California*, *supra*, at 177), "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Ibid.* Moreover, when we come to the problem of abatement in *Hamm* v. *City of Rock Hill*, *post*, —, decided this day, the result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the indi-

vidual not with the impact on commerce of local activities or vice versa.

Hence I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.

My opinion last Term in *Bell* v. *Maryland*, 378 U. S. 226, 242, makes clear my position that the right to be free of discriminatory treatment (based on race) in places of public accommodation—whether intrastate or interstate—is a right guaranteed against state action by the Fourteenth Amendment and that state enforcement of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment.

II.

I think the Court is correct in concluding that the Act is not founded on the Commerce Clause to the exclusion of the Enforcement Clause of the Fourteenth Amendment.

In determining the reach of an exertion of legislative power, it is customary to read various granted powers together. See *Veazie Bank* v. *Fenno*, 75 U. S. 533, 548–549; *Edye* v. *Robertson*, 112 U. S. 580, 595–596; *United*

States v. *Gettysburg Electric R. Co.*, 160 U. S. 668, 683. As stated in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421:

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The "means" used in the present Act are in my view "appropriate" and "plainly adapted" to the end of enforcing Fourteenth Amendment rights [1] as well as protecting interstate commerce.

Section 201 (a) declares in Fourteenth Amendment language the right of equal access:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

The rights protected are clearly within the purview of our decisions under the Equal Protection Clause of the Fourteenth Amendment.[2]

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[1] For a synopsis of the legislative history see the Appendix to this opinion.

[2] See *Peterson* v. *City of Greenville*, 373 U. S. 244 (discrimination in restaurant); *Lombard* v. *Louisiana*, 373 U. S. 267 (discrimination

"State action"—the key to Fourteenth Amendment guarantees—is defined by § 201 (d) as follows:

> Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or *enforced by officials of the State* or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof. [Italics added.]

That definition is within our decision of *Shelley* v. *Kraemer,* 334 U. S. 1, for the "discrimination" in the present cases is "enforced by officials of the State," *i. e.,* by the state judiciary under the trespass laws.[3] As we wrote in *Shelley* v. *Kraemer, supra,* 19:

> We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
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> These are not cases, as has been suggested, in which the States have merely abstained from action,

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in restaurant); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (discrimination in restaurant); *Watson* v. *City of Memphis,* 373 U. S. 526 (discrimination in city park); *Brown* v. *Board of Education,* 347 U. S. 483 (discrimination in public school system); *Nixon* v. *Herndon,* 273 U. S. 536 (discrimination in voting).

[3] The Georgia trespass law is found in Ga. Code Ann., § 26–3005 (1963 Supp.), and that of Alabama in Ala. Code, 1959, Tit. 14, § 426.

> leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government 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. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

Section 202 declares the right of all persons to be free from certain kinds of state action at *any* public establishment—not just at the previously enumerated places of public accommodation:

> All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Thus the essence of many of the guarantees embodied in the Act are those contained in the Fourteenth Amendment.

The Commerce Clause, to be sure, enters into some of the definitions of "place of public accommodation" in §§ 201 (b) and (c). Thus a "restaurant" is included, § 201 (b)(2), "if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." § 201 (c)(2). But any "motel" is included "which provides lodging to tran-

sient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence." §§ 201 (b)(1) and (c)(1). Providing lodging "to transient guests" is not strictly Commerce Clause talk, for the phrase aptly describes any guest—local or interstate.

Thus some of the definitions of "place of public accommodation" in § 201 (b) are in Commerce Clause language and some are not. Indeed § 201 (b) is explicitly bifurcated. An establishment "which serves the public is a place of public accommodation," says § 201 (b), under either of two conditions: *first*, "if its operations affect commerce," or *second*, "if discrimination or segregation by it is supported by State action."

The House Report emphasizes these dual bases on which the Act rests. (H. R. Rep. No. 914, 88th Cong., 1st Sess., p. 20)—a situation which a minority recognized was being attempted and which it opposed. *Id.*, pp. 98–101.

The Senate Committee laid emphasis on the Commerce Clause. S. Rep. No. 872, 88th Cong., 2d Sess., pp. 12–13. The use of the Commerce Clause, to surmount what was thought to be the obstacle of the *Civil Rights Cases*, 109 U. S. 3, is mentioned. *Ibid.* And the economic aspects of the problems of discrimination are heavily accented. *Id.*, pp. 17 *et seq.* But it is clear that the objectives of the Fourteenth Amendment were by no means ignored. As stated in the Senate Report:

> Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. It reasoned that one who employed his private property

for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the intitution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.

> There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accommodations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.
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> Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices. [*Id.*, pp. 22–23.]

Thus while I agree with the Court that Congress in fashioning the present Act used the Commerce Clause to regulate racial segregation, it also used (and properly so) some of its power under § 5 of the Fourteenth Amendment.

I repeat what I said earlier, that our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.

APPENDIX.

(1) *The Administration Bill* (as introduced in the House by Congressman Celler, it was H. R. 7152).

Unlike the Act as it finally became law, this bill (a) contained findings (pp. 10–13) which described discrimination in places of public accommodation and in findings (h) and (i) connected this discrimination to state action and invoked Fourteenth Amendment powers to deal with the problem; and (b) the bill, in setting forth the public establishments which were covered, used only commerce-type language and did not contain anything like the present § 201 (d) and its link to § 201 (b)—the "or" clause in § 201 (b). Nor did the bill contain the present § 202.

In the hearings before the House Judiciary Subcommittee the Attorney General stated clearly and repeatedly that while the bill relied "primarily" on the Commerce Clause, it was also intended to rest on the Fourteenth Amendment. See Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., 1375–1376, 1388, 1396, 1410, 1417–1419.

(2) *The Subcommittee Bill* (as reported to the full House Judiciary Committee).

The Attorney General testified against portions of this bill. He reiterated that the administration bill rested on the Fourteenth Amendment as well as on the Commerce Clause: see Hearings, House Judiciary Committee on H. R. 7152, as amended, Subcommittee No. 5, 88th Cong., 1st Sess., 2693, 2700, 2764. But this bill added for the first time a provision similar to the present § 201 (d)—only much broader. See *id.*, at 2656, first full paragraph. (Apparently this addition was in response to the urgings of those who wanted to broaden the bill and who failed to comprehend that the administration

bill already rested, despite its commerce language, on the Fourteenth Amendment.) The Attorney General feared that the new provision went too far. Further, the new provision, unlike the present § 201 (d) but like the present § 202, did not limit coverage to those establishments specifically defined as places of public accommodation; rather it referred to all businesses operating under state "authorization, permission, or license." See *id.*, at 2656 top. The Attorney General objected to this: Congress ought not to invoke the Fourteenth Amendment generally but rather ought to specify the establishments that would be covered. See *id.*, at 2656, 2675–2676, 2726. This the administration bill had done by covering only those establishments which had certain commercial characteristics.

Subsequently the Attorney General indicated that he would accept a portion of the subcommittee additions that ultimately became §§ 201 (d) and 202; but he made it clear that he did not understand that these additions removed the Fourteenth Amendment foundation which the administration had placed under its bill. He did not understand that these additions confined the Fourteenth Amendment foundation of the bill to the additions alone; the commerce language sections were still supported in the alternative by the Fourteenth Amendment. See especially *id.*, at 2764; compare p. 2727 with p. 2698. The Subcommittee said that it made these additions in order to insure that the Fourteenth Amendment was relied on. See *id.*, at 2763; also Subcommittee Hearings, *supra*, 1413–1421. And the Attorney General repeated at p. 2764 that he would agree to whatever language was necessary to make it clear that the bill relied on the Fourteenth Amendment as well as the Commerce Clause.

Therefore it seems clear that a dual motive was behind the addition of what ultimately became §§ 201 (d) and 202: (1) to expand the coverage of the Act; (2) to make it

clear that Congress was invoking its powers under the Fourteenth Amendment.

(3) *The Committee Bill* (as reported to the House). This bill contains the present §§ 201 (d) and 202, except that "state action" is given an even broader definition in § 201 (d) as then written than it has in the present § 201 (d).

The House Report has the following statement: "*Section 201 (d)* delineates the circumstances under which discrimination or segregation by an establishment is supported by State action within the meaning of title II." H. R. Rep. No. 914, 88th Cong., 1st Sess., 21. On p. 117 of the Report Representative Cramer says: "The 14th amendment approach to public accommodations [in the committee bill as contrasted with the administration bill] is not limited to the narrower definition of 'establishment' under the interstate commerce approach and covers broad State 'custom or usage' or where discrimination is 'fostered or encouraged' by State action (sec. 201 (d))." By implication the committee has merely broadened the coverage of the administration's bill by adding the explicit state action language; it has not thereby removed the Fourteenth Amendment foundation from the commerce language coverage.

Congressman Celler introduced into the Congressional Record a series of memoranda on the constitutionality of the various titles of the bill; at pp. 1462–1463* the Fourteenth Amendment is discussed; at p. 1463 it is suggested that the Thirteenth Amendment is to be regarded as "additional authority" for the legislation.

At p. 1837 Congressman Willis introduces an amendment to strike out "transient guests" and to replace these words with "interstate travelers." As reported, says Con-

*All citations are to the daily Records for January 31 to February 5, 1964, not to the bound volumes, as they were unavailable when this Appendix was prepared.

gressman Willis, the bill boldly undertakes to regulate intrastate commerce, at least to this extent. *Ibid.* The purpose of the amendment is simply to relate "this bill to the powers of Congress." *Ibid.* Congressman Celler, the floor manager of the bill, will not accept the amendment, which introduces an element of uncertainty into the scope of the bill's coverage. At p. 1844 Congressman Lindsay makes remarks indicating that it is his understanding that the commerce language portions of § 201 rest only on the Commerce Clause, while the Fourteenth Amendment is invoked to support only § 201 (d).

But at p. 1846 Congressman MacGregor, a member of the Judiciary Subcommittee, states, in response to Congressman Willis's challenge to the constitutionality of the "transient guests" coverage, that: "When the gentleman from Louisiana seeks in subparagraph (1) on page 43 [§ 201 (b)(1)] to tightly circumscribe the number of inns, hotels and motels to be covered under this legislation he does violence to the 1883 Supreme Court decision where it defines the authority of the Congress under the 14th amendment. . . . Mr. Chairman, in light of the 1883 Supreme Court decision cited by the gentleman from Louisiana, and in light of a score of subsequent decisions, it is precisely the legislative authority granted in the 14th amendment that we seek here to exercise."

At pp. 1879–1884 there is the discussion surrounding the passage of the Goodell amendment striking the word "encouraged" from § 201 (d)(2) of the bill as reported. Likewise in these pages there is the discussion concerning the Willis amendment to the Goodell amendment: this amendment eliminated the word "fostered." After the adoption of these amendments the custom or usage had to be "required or enforced" by the State—not merely "fostered or encouraged" in order to constitute "state action" within the meaning of the Act.

At p. 1880 Congressman Smith of Virginia offered an amendment as a substitute to the Goodell amendment that would have eliminated the "custom or usage" language altogether. Congressman Celler said in defense of the bill as reported: "[C]ustom or usage is not constituted merely by a practice in a neighborhood or by popular attitude in a particular community. It consists of a practice which, though not embodied in law, receives notice and sanction to the extent that it is enforced by the officialdom of the State or locality" (p. 1881). The Smith Amendment was rejected by the House (p. 1883).

It would seem that the action on this Smith substitute and the statement by Congressman Celler mean that a state's enforcement of the custom of segregation in places of public accommodation by the use of its trespass laws is a violation of § 201 (d)(2).

(4) *The House Bill.*

The House bill was placed directly on the Senate calendar and did not go to committee. The Dirksen-Mansfield substitute adopted by the Senate made only one change in §§ 201 and 202: it changed "a" to "the" in § 201 (d)(3). Senator Dirksen nowhere made any explicit references to the constitutional bases of Title II. Thus it is fair to assume that the Senate's understanding on this question was no different from the House's view. The Senate substitute was adopted without change by the House on July 2, 1964, and signed by the President on the same day.