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SIT-INS: PROCEED WITH CAUTION

CHARLES E. RICE*

In the current racial contentions, the sit-in demonstration has proved to be an effective and disturbing weapon against segregation by privately-owned business establishments. It is effective because the imposition of economic loss, through monopolizing the seats in a restaurant to the exclusion of potential customers, can break down a proprietor's pattern of segregation more relentlessly than persuasion. It is disturbing because the sit-in poses a direct challenge to accustomed understanding of private property rights.

On May 20, 1963, the Supreme Court of the United States decided five important sit-in cases. In *Peterson v. Greenville*,¹ the Court reversed trespass convictions of sit-in demonstrators in a store in Greenville, South Carolina, which city had an ordinance requiring hotels, boarding houses, restaurants and the like to furnish "separate facilities" for "white persons and colored persons." The majority of the Court, speaking through the Chief Justice, held that the manager of the store was "left with no choice of his own" because of the existence of the ordinance. The restaurant discrimination, therefore, was in fact imposed by the ordinance and this constituted sufficient participation by the state to bring into operation the equal protection guarantee of the Fourteenth Amendment. Mr. Justice Harlan wrote a concurring opinion in which he chided the majority for leaving no room for a showing that the discrimination was indeed the private choice of the store manager uninfluenced by the ordinance. In the particular case, however, Mr. Justice Harlan found that the manager was in fact influenced by the ordinance, and so he concurred in the reversal of the conviction.

In *Gober v. Birmingham*,² the Court reversed, per curiam, criminal trespass convictions of department store sit-ins in Birmingham, which also had an ordinance requiring segregation. Mr. Justice Harlan dissented in part because he doubted whether, under Alabama procedure, the issue

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1. 373 U.S. 244 (1963).
2. 373 U.S. 374 (1963).

of the ordinance was properly raised. In *Shuttlesworth v. Birmingham*,³ the Court reversed the convictions of two Negro ministers for inciting the sit-in demonstrations which had been held in the *Gober* case to be unpunishable. Chief Justice Warren, for the majority, observed that "there can be no conviction for aiding and abetting someone to do an innocent act."⁴ Mr. Justice Harlan dissented because the influence of the Birmingham segregation ordinance on the case was unclear and because "I do not think it can be said that the record lacks evidence of incitement of 'sit-ins' other than those involved in *Gober*."⁵

In *Avent v. North Carolina*,⁶ the Court vacated the trespass convictions of restaurant sit-ins in Durham, North Carolina, where there also was a segregation ordinance, and remanded the case to the state court for consideration in light of *Peterson v. Greenville*. Mr. Justice Harlan dissented in part, because of his disagreement with the premises of *Peterson*.

The fifth case, *Lombard v. Louisiana*,⁷ involved sit-ins at a lunch counter in the McCrory store in New Orleans, but it was unlike the other four in that neither New Orleans nor Louisiana had any ordinance or statute requiring segregated eating facilities. Rather, the Court, speaking again through the Chief Justice, found sufficient state action in public announcements by the Mayor and the Superintendent of Police of New Orleans which directed the demonstrations to be halted and which went beyond the nondiscriminatory exhortations to preserve the peace which would have been permissible. Thus, said the Court, "the store officials' actions were coerced by the city."⁸ Mr. Justice Douglas concurred, asserting his belief that any "place of public accommodation under license from the State"⁹ is an instrumentality of the state and bound as fully as the state by the restrictions of the Fourteenth Amendment. Mr. Justice Harlan dissented, finding instead that the statements by the Mayor and the Superintendent of Police did not mandate a continuation of segregation but "are more properly read as an effort by these two officials to preserve the peace in what they might reasonably have regarded as a highly charged atmosphere."¹⁰

3. 373 U.S. 262 (1963).

4. *Id.* at 265.

5. 373 U.S. at 259.

6. 373 U.S. 375 (1963).

7. 373 U.S. 267 (1963).

8. *Id.* at 273.

9. *Id.* at 281.

10. 373 U.S. at 254.

The Court in these five sit-in cases decided in effect that in no city where segregation is a matter of ordinance, statute or public policy can Negroes be prosecuted for trying to get service at stores or restaurants. There remains undecided the issue whether a privately-owned restaurant or other place of public accommodation, in a city where there is no ordinance, statute or public policy of segregation, can choose its customers on the basis of race. In the October, 1963, Term of the Supreme Court, cases involving this question were scheduled to be heard.¹¹

If the Court is to invalidate discriminatory practices in privately-owned public accommodations, it will probably do so in reliance upon the Fourteenth Amendment, adopted in 1868.¹²

11. See *Bell v. Maryland*, 227 Md. 302, 176 A.2d 771 (1962), *cert. granted*, 374 U.S. 805 (1963); *Griffin v. Maryland*, 225 Md. 422, 171 A.2d 717 (1961), *cert. granted*, 370 U.S. 935 (1962), *restored to calendar for reargument*, 373 U.S. 920 (1963); *Drews v. Maryland*, 224 Md. 186, 167 A.2d 341 (1961), *appeal pending*, 368 U.S. 894 (1961); *Bouie v. Columbia*, 239 S.C. 570, 124 S.E.2d 332 (1962), *cert. granted*, 374 U.S. 805 (1963); *Barr v. Columbia*, 239 S.C. 395, 123 S.E.2d 521 (1961), *cert. granted*, 374 U.S. 804 (1963).

12. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

That amendment, however, was construed in 1883 to prohibit only state action and not action by individuals.¹³ The Civil Rights Act of 1875 provided in its first section:

. . . That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.¹⁴

The second section of the law made it a penal offense for any person to deny to any citizen any of the accommodations or privileges mentioned in the first section, "except for reasons by law applicable to citizens of every race and color." The Supreme Court in the *Civil Rights Cases*¹⁵ held the act unconstitutional because it sought to prevent discriminatory acts by private individuals whereas the Fourteenth Amendment, for the enforcement of which the act was passed, prohibited only state action and not the actions of individuals. Section 5 of the amendment, therefore, which granted Congress power to enforce the amendment by appropriate legislation,

does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.¹⁶

Mr. Justice Bradley, for the majority of the Court, observed:

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?¹⁷

Nor, held the Court, did the Thirteenth Amendment,¹⁸ which abolished slavery, confer such power upon Congress. The denial by a proprietor of

13. *Civil Rights Cases*, 109 U.S. 3 (1883).

14. 18 Stat. 335 (1875).

15. *Supra* note 13.

16. *Supra* note 13, at 11.

17. *Supra* note 13, at 14.

18. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

a privately-owned inn, public conveyance or theatre of service to a customer on racial grounds is not such a badge of servitude as to be encompassed within the prohibition of the Thirteenth Amendment, even though that amendment interdicted the actions of individuals as well as states.¹⁹

Mr. Justice Harlan dissented in the *Civil Rights Cases*, and criticized the majority for sacrificing "the substance and spirit" of the Fourteenth Amendment "by a subtle and ingenious verbal criticism."²⁰ The Thirteenth Amendment, he also said, gave Congress the power to eradicate all "burdens and disabilities which constitute badges of slavery and servitude,"²¹ and discriminatory exclusion from inns, public conveyances, and places of public amusement may be thus forbidden. Moreover, he asserted, the Fourteenth Amendment, in making the Negroes citizens of the United States and of their respective states, brought them "within the direct operation of that provision of the Constitution which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Art 4, § 2."²² That citizenship granted by the Fourteenth Amendment may be protected, reasoned Mr. Justice Harlan, "by Congressional legislation of a primary character"²³ and not merely by legislation directed only to the rectification of state action. He found an exemption from racial discrimination in public accommodations to be an immunity of that citizenship which may be so protected by Congressional legislation directly operative against individuals.²⁴ Nor would the sustaining of Congressional power to prohibit racial discrimination in public accommodations necessarily imply a power in Congress to enact a municipal code "covering every matter affecting the life, liberty, and prop-

19. *Supra* note 13, at 20-23. The Civil Rights Act of 1866, enacted pursuant to the thirteenth amendment over President Johnson's veto, guaranteed to all persons, regardless of race, color or previous condition of servitude, the same right "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." 14 Stat. 27 (1866); see BIDDLE, *CIVIL RIGHTS AND THE FEDERAL LAW IN SAFEGUARDING CIVIL LIBERTY TODAY* 120 (1945).

20. *Supra* note 13, at 26.

21. *Id.* at 35.

22. *Id.* at 46.

23. *Ibid.*

24. See *Neil v. Delaware*, 104 U.S. 370 (1881); *Ex parte Virginia*, 100 U.S. 339 (1880); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Whitefield v. Ohio*, 297 U.S. 431 (1936); see also *McKane v. Durston*, 153 U.S. 684, 687 (1894); *Detroit v. Osborne*, 135 U.S. 492 (1890); *Chambers v. B. & O. R. Co.*, 207 U.S. 142 (1907); *Slaughter-House Cases*, 83 U.S. 36 (1873). The apparently settled interpretation of article 4, section 2, however, is that it merely forbids a state to discriminate against citizens of other states in favor of its own.

erty of the citizens of the several States,"²⁵ since the right to be free from such racial discrimination is a right *created* by the Fourteenth Amendment and therefore within the ambit of Congressional power to enforce, whereas the states retain exclusive power to protect the general run of civil rights which are not derived from the Thirteenth, Fourteenth or Fifteenth Amendments.²⁶

The Harlan dissent foreshadowed the later views of Mr. Justice Douglas²⁷ in declaring that:

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation. . . .

. . . What I affirm is that no State, nor the officers of any State, nor any corporation or individual wielding power under State authority for the public benefit or the public convenience, can, consistently either with the freedom established by the fundamental law, or with that equality of civil rights which now belongs to every citizen, discriminate against freemen or citizens, in those rights, because of their race, or because they once labored under the disabilities of slavery, imposed upon them as a race.²⁸

Again the Harlan dissent presaged a modern-day approach in suggesting that the commerce clause empowers Congress to enforce non-discriminatory access to some public accommodations:

I suggest, that it may become a pertinent inquiry whether Congress may, in the exertion of its power to regulate commerce among the States, enforce among passengers on public conveyances, equality of right, without regard to race, color or previous condition of servitude, if it be true—which I do not admit—that such legislation would be an interference by government with the social rights of the people.²⁹

The *Civil Rights Cases* are definitive in their limitation of the strictures of the Fourteenth Amendment to state activity. But they are significant also in their involvement of other sections of the Fourteenth Amend-

25. *Supra* note 13, at 55.

26. *Id.* at 55-56.

27. See *Lombard v. Louisiana*, *supra* note 7 at 274.

28. *Civil Rights Cases*, *supra* note 13, at 58-59.

29. *Id.* at 61. It is well settled that Congress, pursuant to the commerce power, can prohibit racial discrimination in interstate transportation. See *Boynton v. Virginia*, 364 U.S. 454 (1960); *Mitchell v. United States*, 313 U.S. 80 (1941).

ment and of the Thirteenth Amendment as well.³⁰ The various aspects of the case should be kept in mind as we discuss the later applications of the principles involved.³¹

The primary impact of the *Civil Rights Cases* arises from the holding that the Fourteenth Amendment does not limit individual or private action, but instead limits only the actions of a state. In fact, however, the decision on that point was not a pioneering one, in that it expressly rested upon several prior cases which first enunciated the limited applicability of the amendment.³² In *Virginia v. Rives*, for example, the Court declared in a dictum to which Mr. Justice Harlan then made no objection:

The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals. It is the State which is prohibited from denying to any person within its jurisdiction the equal protection of the laws, and consequently the statutes partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights.³³

Nevertheless, it is still disputed as to whether this restrictive interpretation comports with the intention of the framers. On the one hand, the withdrawal from the amendment's purview of discrimination by private persons has been strongly criticized as "totally foreign to the conceptions of those who passed the Amendment."³⁴ And some support for that reproach can be found in the Congressional debates on the amendment and the enforcement acts. Senator Charles Sumner of Massachusetts, for example, asserted in 1871:

Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color. (Emphasis added)³⁵

The Ku Klux Act of 1871, enacted at President Grant's insistence to

30. See, for example, the limited application of the "privileges or immunities" clause of section 1 of the fourteenth amendment in *Slaughter-House Cases*, *supra* note 24; see also *United States v. Cruikshank*, 92 U.S. 542 (1875).

31. See Watt and Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949).

32. *United States v. Harris*, 106 U.S. 629, 640 (1883); *Ex parte Virginia*, *supra* note 24; *Virginia v. Rives*, 100 U.S. 313 (1880); *United States v. Cruikshank*, *supra* note 30.

33. *Virginia v. Rives*, *supra* note 32, at 318.

34. Frank and Munro, *The Original Understanding of "Equal Protection of the Law"*, 50 COLUM. L. REV. 131, 162-163 (1950).

35. Cong. Globe, 42d Cong., 2d Sess. 242 (1871).

curb the violent excesses of the Klan, provided that failure of a state to enforce the laws in the teeth of Klan lawlessness "shall be deemed a denial by such State of the equal protection of the laws."³⁶ The act went on to provide for federal criminal punishment of any persons engaged in a conspiracy "for the purpose of preventing or hindering the constituted authorities of any state from giving or securing to all persons within such state the equal protections of the laws. . . ."³⁷ This would appear to be an expression of Congressional understanding that some individual discriminatory action can be reached by federal legislation based upon the Fourteenth Amendment, at least where the state concerned has been remiss in enforcing its laws against the individual disturbers of the peace. Some caution is in order, however. Manifestly, the Ku Klux Act was primarily directed against violent or other outrageous conduct of a magnitude sufficient to challenge the very order of the state and implicate in such conduct the state authorities who tolerate it,³⁸ and it is not tenable to claim that it necessarily stands as a Congressional determination that all discrimination practiced peacefully by a private owner of a public accommodation may be prohibited pursuant to the Fourteenth Amendment. Moreover, the Ku Klux Act has been severely castigated by the Supreme Court for its radical potential:

The Act, popularly known as the Ku Klux Act, was passed by a partisan vote in a highly inflamed atmosphere. It was preceded by spirited debate which pointed out its grave character and susceptibility to abuse, and its defects were soon realized when its execution brought about a severe reaction.³⁹

Against these indications of Congressional intent to reach individual action by Congressional legislation under the Fourteenth Amendment, must be considered the plain meaning of the words of its first section, "*No State shall make or enforce any law . . . ; nor shall any State deprive . . .*" (Emphasis added). Considerable support for the literal interpretation of those words so as to require some sort of state action can be mustered in the Congressional debates leading to the adoption of the amendment. For example, Senator Jacob Howard of Michigan, in introducing the amend-

36. 17 Stat. 13 (1871).

37. *Ibid.*

38. See Frank and Munro, *supra* note 34, at 164.

39. *Collins v. Hardyman*, 341 U.S. 651, 657 (1951); see also *Sharp v. Lucky*, 252 F.2d 910, 920 (5th Cir. 1958); BOWERS, *THE TRAGIC ERA* 340-348 (1929). The Ku Klux Act was repealed in 1894. 28 Stat. 37 (1894).

ment on behalf of the Reconstruction Committee, referred to the provisions of the Constitution, especially the Fifth Amendment:

They do not operate in the slightest degree as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation, but applies only to the legislation of Congress. There is no power given in the Constitution to enforce and to carry out any of these guarantees They stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions which may be altered from year to year. The great object of the first section of this Amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. . . . Section one is a restriction upon the States, and does not, of itself, confer any power upon Congress I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to the citizens of the United States, and to all persons who may happen to be within their jurisdiction.⁴⁰

In the House of Representatives, Thaddeus Stevens, in presenting the amendment, stated:

But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.⁴¹

It is not the purpose here to plumb the subjective intention of the framers.⁴² It does seem, however, that the emphatic, near-contemporary judicial agreement on the point, and the plain meaning of the words of the amendment, render more probable the conclusion that it is properly construed to interdict state actions and not the actions of individuals in which the state is not implicated. Later in this article we shall discuss the treatment of peripheral state activities as state action, and of individuals

40. Cong. Globe, 39th Cong., 1st sess. part 3, pp. 2764-66.

41. *Id.* at 2459.

42. See generally FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT, *passim* (1908); Guthrie, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT 22-27, 42 (1898).

as agents of the state for purposes of the Fourteenth Amendment. Also we shall examine the possible treatment of state inaction as sufficient state action to bring the strictures of the amendment into operation. But let it merely be asserted at this point that some sort of state action does seem properly required to activate the provisions of the Fourteenth Amendment.⁴³ It has been persuasively asserted that the state action concept is unworkable and ought to be shelved in favor of a balancing of competing interests, for example, a balancing of "the personal right to discriminate as against the public's concern for the elimination of discrimination."⁴⁴ It is said that in every conceivable case of racial discrimination there is some state action or inaction, as when the private homeowner employs his state-established title to his land to employ racial discrimination in his selection of social guests.⁴⁵ Therefore, an application of the state action standard would inevitably result in an application of the Fourteenth Amendment to all forms of private as well as public discrimination—an obviously dangerous result.⁴⁶

An abandonment of the state action standard, however, would be undesirable on at least two counts. For one thing, it would involve a repudiation of a construction of the amendment which is at least arguable and which has the sanction of a long and general acceptance. Also, the conjured difficulty in construing state action to avoid a relentlessly all-embracing application of the amendment to private discrimination betokens an unwarranted reluctance to exercise, in construing state action, the same balancing technique which it is now proposed to employ in a more nebulous evaluation of a variety of competing interests.⁴⁷ There appears to be no compelling necessity for applying an absolutist, unyielding construction to the state action standard. Rather, it should be recognized that state action, as that term is used in relation to the amendment, does not embrace everything which can, even by the most tenuously abstract logic, be found to have some connection with the state. Some types of state action should be construed to bring into effect the prohibition of the Fourteenth Amendment, and some should not. This ought not to be an impos-

43. State action of some kind also appears to be needed for enforcement of the fifteenth amendment's guarantee of the right to vote; see *James v. Bowman*, 190 U.S. 127, 136 (1903); but see Frank and Munro, *supra* note 34 at 163.

44. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 380 (1963).

45. *Id.* at 367.

46. *Ibid.*

47. *Ibid.*

sible distinction to make, given a reasonable deference to the historical development of the subject, and a generous employment of common sense.

It is one thing, though, to affirm that some element of state action is requisite to an application of the Fourteenth Amendment and that the state action norm therefore ought not to be discarded, but it is another and more difficult task to define the limits of the norm.⁴⁸ The early applications of the concept were restrictive, in requiring a fairly measurable engagement of state or local government officials before the state would be considered in action.⁴⁹ Routinely, the Supreme Court reiterated the inapplicability of the amendment to merely private action.⁵⁰ Gradually, though, the concept of state action was expanded by the Court in two directions. On the one hand, more peripheral types of state activity were brought within the definition. On the other, more types of persons became susceptible, owing to their status or activity, to treatment as agents of the state.

*Shelley v. Kraemer*⁵¹ was the celebrated case which widened the circle of state action to include the enforcement by a state court of a restrictive covenant barring the sale of real property to Negroes. The Court had long held that state or city enactments directly prohibiting interracial sales of land were violative of either the due process or equal protection clauses of the Fourteenth Amendment.⁵² But in *Shelley* the Court was faced, not with a clearly invalid official edict of segregation, but with a mutual covenant among the owners of thirty parcels of realty, that none of such property would be occupied "by people of the Negro or Mongolian Race"⁵³ for fifty years. When one owner sold his property to Negroes, owners of other parcels covered by the agreement sued in the state courts of Missouri to restrain the Negroes from taking title. The Supreme Court of Missouri granted the injunction against the sale, but the Supreme Court of the United States, reversed, holding that the state court's participation was suf-

48. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), where the Court said that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' *Kotch v. Board of River Port Pilot Comm'rs.*, 330 U.S. 552, 556. . . ."

49. *Ex parte Young*, 209 U.S. 123 (1907) (state executive officers); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (legislative action in enactment of statute barring Negroes from jury duty); *Ex parte Virginia*, 100 U.S. 339 (1880) (state court judge excluded a Negro from jury duty, contrary to Act of Congress).

50. See, for example, *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926); *Hodges v. United States*, 203 U.S. 1, 14 (1906).

51. 334 U.S. 1 (1948).

52. *Richmond v. Deans*, 281 U.S. 704 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917).

53. *Supra* note 51, at 5.

ficient state action to make operative the guarantees of the Fourteenth Amendment. Restrictive covenants as such are not unconstitutional, since they are merely private matters, but, under the *Shelley* rule, they cannot be enforced in the courts.⁵⁴ In *Barrows v. Jackson*,⁵⁵ similar restrictive covenants were involved and some property owners had violated them by selling to Negroes. The Court held that state courts could not entertain damage suits against these sellers by owners of other property subject to the covenant. Where *Shelley* found sufficient state action in the granting of an injunction, *Barrows* found it in the granting of damages.⁵⁶

Chief Justice Vinson, who wrote the Court's opinion in *Shelley*, dissented in *Barrows* and drew a distinction between the two:

But even if the merits are to be reached. . . . I think that the absence of any direct injury to any identifiable non-Caucasian is decisive. The *Shelley* case, resting on the express determination that restrictive covenants are valid between the parties, dealt only with a state court's attempt to enforce them directly against innocent third parties whose right to enjoy their property would suffer immediate harm.

In this case, the plaintiffs have not sought such relief. . . .

The majority speaks of this as an attempt to "coerce" respondent to continue to abide by her agreement. Yet the contract has already been breached. The non-Caucasians are in undisturbed occupancy. Furthermore, the respondent consented to the "coercion"—if "coercion" there be—by entering into the covenant. Plaintiffs ask only that respondent now pay what she legally obligated herself to pay for an injury which she recognized would occur if she did what she did.

Of course, there may be other elements of coercion. Coercion might result on the minds of some Caucasian property owners who have signed a covenant such as this, for they may now feel an economic compulsion to abide by their agreements. But visiting coercion upon the minds of some unidentified Caucasian property owners is not at all the state action which was condemned in the *Shelley* case. In that case, the state court had directed "the full coercive power of government" against the Negro petitioners—forcefully removing them from their property because they fell in

54. See *Hurd v. Hodge*, 334 U.S. 24 (1948), decided on the same day as *Shelley*, and holding that similar restrictive covenants are unenforceable in the District of Columbia, pursuant to the fifth amendment which binds the federal government.

55. 346 U.S. 249 (1953).

56. See, generally, Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

a class discriminatorily defined. But in this case, where no identifiable third person can be directly injured if respondent is made to disgorge enough to indemnify petitioners, the Court should not undertake to hold that the Fourteenth Amendment stands as a bar to the state court's enforcement of its contract law.⁵⁷

Whether or not the *Barrows* ruling was required by the rationale of *Shelley*, both are particularly relevant to the question whether a state court's enforcement of a neutral trespass or breach of the peace statute against a person ordered to leave a privately-owned public accommodation by its owner, acting from racial prejudice, is sufficient state action to bring the Fourteenth Amendment into play. There are obvious distinctions, however, between the racial covenant and simple trespass or breach of the peace cases. In *Shelley*, the state court acted to deprive a Negro of the contractual rights he had gained under a contract freely entered into by him and his willing vendor, whereas the very purpose of a sit-in is to compel an unwilling proprietor to contract with the person sitting-in. An enforcement of the neutral trespass or breach of the peace statute would not deprive defendant of any contractual rights, unless there is a right to compel a contract in that situation. In *Barrows*, while Chief Justice Vinson was correct in saying that no direct deprivation of contractual rights was worked against the Negro himself, nevertheless the obnoxious racial discrimination pervaded the entire covenant and the state was enforcing a contract which, in 1963, is repugnant in its very terms to considered public policy, and the enforcement of which would inhibit prospective vendors from selling their property in violation of such covenants. The trespass and breach of the peace statutes, however, are neutral and untainted by discrimination in their terms. The discrimination involved is a matter of the motive for employing the statute. To deny the enforcement of a valid trespass or breach of the peace statute in a case where it has been formally and materially violated, merely because of an unhealthy motive of the complainant, could lead to unpredictability in the law.⁵⁸ Furthermore, if we assume that the proprietor is acting from uncoerced free will, he does not wish to contract with the rejected customer. A refusal to enforce the trespass statute would come perilously close to a holding that there is a right to compel an unwilling party to enter a contract, a rule which would be quite unexampled apart from those public-

57. *Supra* note 55, at 267-268.

58. Of course, a particular statute may be impermissibly vague and therefore unenforceable. That is a possibility which must be considered in any specific case, but a discussion of it is beyond the purview of this treatment.

service callings which impose, by common law or statute, an obligation to serve. Moreover, if the state action in the sit-in case is found only in the state court's enforcement of the trespass or breach of the peace statute, the result could indicate, as did *Shelley* and *Barrows*, that there may be a right to refuse service on racial grounds but that it simply is unenforceable in the courts. This could lead to an assertion that the proprietor who has the right to refuse service has an incidental right to remove the would-be customer from the premises so long as unreasonable force is not used.⁵⁹ And if the aid of the police and courts is not available, there may be an unwholesome encouragement of self-help. In short, if state action is to be found in the sit-in situation, it would seem preferable to avoid finding it in the enforcement of a trespass or breach of the peace statute, and to seek it instead in independent actions of state officials or in an enlarged semi-public status of the proprietor himself.

It is fair to say that *Shelley* and *Barrows* betokened an elastic trend in the treatment of state action which may be difficult to control. The most recent example is *Lombard v. Louisiana*,⁶⁰ where the Court found that, even without a statute or ordinance commanding segregation in New Orleans restaurants, sufficient state involvement in the proprietor's discrimination was found in the statements of the Mayor and the Superintendent of Police discouraging sit-in demonstrations—statements, incidentally, that were at least nominally directed toward the preservation of public peace and order and not toward the maintenance of segregation as such.

The related movement to bring more classes of persons within the ambit of state action has taken varied form. In effect it involves a treatment of the individual as an agent of the state for this limited purpose. The notion, however, is not a novel one. It is found, for example, in the dissenting opinion of Mr. Justice Harlan in the *Civil Rights Cases*:

In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation.⁶¹

The nexus between the state and its supposed agent can be found in several ways. It can be financial, through public subsidy of the erstwhile

59. See *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913).

60. 373 U.S. 267 (1963).

61. *Civil Rights Cases*, 109 U.S. 3, 58-59 (1883).

private person or body.⁶² Or the state can devolve public functions upon the formerly private entity, as in the election cases where political parties were held to perform a public function in the selection of candidates in primary elections, who were recognized by the state through their inclusion on the general election ballot.⁶³ Or a state formulation of a discriminatory policy, which is imposed upon or accepted by a private party, may cause the action of that private person to be considered the action of the state.⁶⁴ Whatever the rationale in any particular case, there is an apparent trend to treat ever broader categories of persons as agents of a state with which they may in fact have less than a substantial connection. Obviously, this tendency can be carried to extremes. It is difficult to conceive of any human activity that is not in some way supported, regulated, or at least legitimized by the state. The private homeowner, even if he has no government-insured mortgage, is a "homeowner" by virtue of state laws recognizing that status. When he decides to invite social guests to his home, and does so on a discriminatory basis, there is, through state sanction of his title, a tenuous and theoretical state participation in his discrimination. Certainly, subjection of such a homeowner to the Fourteenth Amendment rules applicable to the state, would obliterate any meaningful distinction between the public and the private spheres. Even Mr. Justice Douglas, who believes that any "place of public accommodation under license from the State"⁶⁵ is thereby an instrumentality of the State, draws the line at the door of the private home:

62. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (lessee of state-owned property held bound by the fourteenth amendment in conduct of restaurant on that property).

63. *Rice v. Elmore*, 333 U.S. 875 (1948); and see *Terry v. Adams*, 345 U.S. 461 (1953) (The "private" Jaybird Democratic Association of Fort Bend County, Texas, regarded all white voters in the county as members and excluded Negroes from its "primary" election, which it held prior to the official primary to select candidates it would endorse in that official primary and in the general election. The Supreme Court struck down this device as a subterfuge, with Mr. Justice Minton dissenting.); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932).

64. See discussion in *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956); *Dorsey v. Stuyvesant Town Corporation*, 299 N.Y. 512, 87 N.E.2d 541, 554 (1949); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960). See also *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962), *cert. denied*, 371 U.S. 911 (1962), holding that where a city sold its golf courses to private purchasers with a reversionary clause providing that the land be used only as golf courses or revert to the city, the new owners were enjoined from restricting the use of the courses to white patrons. The reversionary clause made the purchasers state agents since it reposed sufficient "present control and interest" in the city. The case is well noted in 9 WAYNE L. REV. 373 (1963).

65. *Lombard v. Louisiana*, 373 U.S. 267, 281 (1963) (concurring opinion).

If this were an intrusion of a man's home or yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder. For the Bill of Rights, as applied to the State through the Due Process Clause of the Fourteenth Amendment, casts its weight on the side of the privacy of homes.⁶⁶

The proper inquiry in the sit-in cases, then, must be to determine the point at which participation by the state is sufficient to translate the proprietor's moral duty to serve without discrimination into a legal imperative mandated by the Fourteenth Amendment. Also to be considered here is the federal structure of the American system of government, for an application of the Fourteenth Amendment involve to a considerable extent a supersession of individual, state and local responsibility in favor of an overarching federal power. If the state action concept were pushed to "a drily logical extreme," all of us would be agents of the state for at least some purposes, and subject to federal control under the Fourteenth Amendment, for few areas of human endeavor are uncolored by state support, license or sufferance.

In deciding what sort of state participation is sufficient to subject the otherwise private discrimination, for example, of a restaurateur, to Fourteenth Amendment regulation, due consideration must be given to the right to own and use private property and to the property owner's liberty to direct that use as he sees fit. The Fourteenth Amendment, in section one, provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The right of property has long been regarded as a fundamental and natural right, inherent in the person and not dependent upon a constitutional or legislative grant for its validity.⁶⁷ Of course, the problems posed by the sit-ins cannot be resolved by ritualistic incantations concerning liberty or the general rights of property. There is a specific issue here, and it is the extent of the right of an owner or proprietor of a public accommodation, whether we call it a property right or an attribute of his personal liberty, to arbitrarily refuse his services to some or all persons. Fortunately, the courts have addressed themselves to this general point. In *Terminal Taxicab Co. v. District of Columbia*, Mr. Justice Holmes delivered this dictum:

It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare

66. *Id.* at 274.

67. See *Wilkinson v. Leland*, 27 U.S. 627 (1829); and see cases collected in 11 AM. JUR. CONSTITUTIONAL LAW § 335.

of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that an invitation to the public to buy does not necessarily entail an obligation to sell. It is assumed that an ordinary shop keeper may refuse his wares arbitrarily to a customer whom he dislikes, and although that consideration is not conclusive . . . , it is assumed that such a calling is not public as the word is used.⁶⁸

There are, of course, some recognized exceptions to the right of a proprietor of a public accommodation to discriminate against prospective patrons. Generally, in a business "clothed with a public interest" the proprietor may be required by statute to forego his right to select his customers arbitrarily. In 1923, the Supreme Court held unconstitutional a Kansas statute declaring the meat packing business to be affected with a public interest and subjecting such a business to wage and other labor regulations.⁶⁹ But the Court then defined the categories of businesses affected with a public interest:

Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such as railroads, other common carriers and public utilities.

(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. . . .

(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly. . . .

It is manifest from an examination of the cases cited under the third head that the mere declaration by a legislature that a

68. 241 U.S. 252, 256 (1916).

69. *Wolff v. Court of Industrial Relations*, 262 U.S. 522 (1923).

business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry.

. . . It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances.

An ordinary producer, manufacturer or shopkeeper may sell or not sell as he likes . . . , and while this feature does not necessarily exclude businesses from the class clothed with a public interest . . . it usually distinguishes private from quasi-public occupations.

In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

. . . If, as in effect contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. This will be running the public interest argument into the ground, to use a phrase of Mr. Justice Bradley when characterizing a similarly extreme contention. *Civil Rights Cases*, 109 U.S. 3, 24. . . . It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment.⁷⁰

An ordinary shopkeeper, not an innkeeper, therefore, is not normally considered to be engaged in such a business affected with a public interest that the legislature can impose upon it the extensive sort of regulations to which an innkeeper may be subjected.⁷¹ At least it can be said that the

70. *Id.* at 535-540.

71. In fact, in *German Alliance Ins. Co. v. Kansas*, 233 U.S. 389 (1914), "the Court said that a business might be affected with a public interest so as to permit

ordinary shopkeeper is under no obligation to serve without discrimination, in the absence of a statute to the contrary. But it is settled that a statute, enacted pursuant to the police power of the state, can impose upon "any places of public accommodations, resort or amusement" an obligation to serve potential customers without regard to "race, creed, color or national origin."⁷² Twenty-nine states and the District of Columbia now forbid racial discrimination in public accommodations of one sort or another.⁷³ It should be noted, though, that the police power of a state does not depend, for the validity of its exercise, upon any showing that the individual activity regulated is state action, while, under the existing precedents, individuals can be regulated by Congress or the federal courts pursuant to the Fourteenth Amendment only if state action is present.⁷⁴ Therefore, the proper conclusion that a state possesses power to bar discrimination in public accommodations does not mandate a conclusion that such discrimination of itself is violative of the Fourteenth Amendment.

price regulation although no public trust was impressed upon the property and although the public might not have a legal right to demand and receive service. . . ." *Tyson and Brother v. Banton*, 273 U.S. 418, 434 (1927). This approach would indicate that the restriction upon an unfettered choice of customers is, in a sense, a greater restriction even than a price regulation.

72. NEW YORK CIVIL RIGHTS LAW § 40. This section is constitutional. *People v. King*, 110 N.Y. 418 18 N.E. 245 (1888). Accord, as to a similar California statute, *Western Turf Assn. v. Greenberg*, 204 U.S. 359 (1907). In *Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945), the Supreme Court upheld Section 43 of the NEW YORK CIVIL RIGHTS LAW, which prohibits racial and religious discrimination by labor unions.

73. CAL. CIVIL CODE §§ 51-52 (Supp. 1961); COLO. REV. STAT. ANN. § 25-1-1 et seq. (1953); CONN. GEN. STAT. REV. § 53-35 (Supp. 1961); D. C. CODE § 47-2901 et seq. (Supp. 1960); IDAHO CODE ANN. § 18-7301 (1961); ILL. ANN. STAT. ch. 38, §§ 125-128 (Smith-Hurd 1961); IND. ANN. STAT. §§ 10-901, 10-902 (Supp. 1962); IOWA CODE ANN. § 735.1 (1950); KAN. GEN. STAT. ANN. § 21-2424 (1949); ME. REV. STAT. ANN. ch. 137, § 50 (Supp. 1959); MD. ANN. CODE art. 49B, §§ 11-15 (Acts 1963, c. 227, c. 228); MASS. GEN. LAWS ch. 272, §§ 92A, 98 (1956); MICH. STAT. ANN. § 28.343 (Supp. 1959); MINN. STAT. ANN. § 327.09 (1947); MONT. REV. CODES ANN. § 64-211 (Supp. 1961); NEB. REV. STAT. § 20-101.102 (1943); N. H. REV. STAT. ANN. § 354.1 (Supp. 1961); N. J. STAT. ANN. §§ 10:1-2 to 10:1-7 (1960); N. M. STAT. ANN. §§ 49-8-1 to 49-8-6 (Supp. 1961); N. Y. CIV. RIGHTS LAW § 40 (1948); N. Y. EXECUTIVE LAW §§ 292 (9), 296 (2) (Supp. 1962); N. D. REV. CODE § 12-22-30 (Supp. 1961); OHIO REV. CODE § 4112.02 (G) (Anderson Supp. 1961); ORE. REV. STAT. §§ 30.670-680, as amended by L. 1961 c. 247; PA. STAT. ANN. tit. 18, § 4654, as amended by Act No. 19 (1961); R. I. GEN. LAWS ANN. §§ 11-24-1 to 11-24-6 (1956); S. D. ACTS 1963, Senate Bill No. 1, Jan. 30, 1963; VT. STAT. ANN. tit. 13, §§ 1451, 1452 (1958); WASH. REV. CODE §§ 49.60.040, 49.60.215 (1962); WIS. STAT. ANN. § 924.04 (1958), as amended (Supp. 1962); WYO. STAT. ANN. §§ 6-83.2 (Supp. 1961).

74. See *Civil Rights Cases*, 109 U.S. 3 (1883); for a discussion of the residual character of the state police power, see *Western Turf Assn. v. Greenberg*, *supra* note 72, at 363; *Munn v. Illinois*, 99 U.S. 113 (1876).

Rather the discrimination, to be proscribed by that amendment, must pass the prior test of state action.⁷⁵

Federal legislation or direct judicial action, of course, could invalidate all racial discrimination in public accommodations through an outright rejection of the state action requirement. This, as we have discussed already, is hardly a desirable technique. It is far more likely that the invalidation, if done under the Fourteenth Amendment,⁷⁶ will be effected through a broadening of the state action classification which, while retained, would be stretched to include the privately-owned public accommodation not "clothed with a public interest," even in a community without a statute, ordinance or public policy favoring segregation.⁷⁷ In determining whether, as a matter of constitutional policy, the state action test should be extended so far, the proprietor's liberty and right of property have a direct bearing.

Restaurants and other public accommodations are usually licensed by the state or local government concerned, and regulations can accompany the licensing requirement. The license, however, is regularly held not to convert the otherwise private business into a public one.⁷⁸ Such license requirements are generally designed to protect the health and safety of the community and do not authorize local officials "to control the management of the business of a restaurant or to dictate what persons will be served."⁷⁹ Of course, if the licensed business is an inn, there will be an independent obligation to serve without discrimination, but this arises from

75. Civil Rights Cases, *supra* note 74. See Karst and Van Alstyne, *Comment: Sit-Ins and State Action*, 14 STAN. L. REV. 762, 773 (1962), arguing against the conversion of the fourteenth amendment "into a self-executing omnibus fair employment and civil rights act, covering all forms of racial discrimination which could be reached by state legislative power." (Emphasis in original.) The authors warn that such a construction "can also be used inversely, to cut back the state's power so that its civil rights legislation is justified only to the extent that it reaches governmental action." See *O'Meara v. Washington State Bd. Against Discrimination*, 4 RACE REL. L. REP. 664, 682 (WASH. Super. Ct. 1959); the case was affirmed without passing on this point, 365 P.2d 1 (Wash. 1961), *cert. denied*, 369 U.S. 839 (1962).

76. See main text, *infra*, for a discussion of the possible application of the commerce clause as a justification for such anti-discrimination legislation.

77. The application of the thirteenth amendment here, as suggested by Mr. Justice Harlan in his dissent in the Civil Rights Cases, *supra* note 74, is far less tenable or likely. See *Hodges v. United States*, 203 U.S. 1 (1906).

78. *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E.2d 697 (1947).

79. *Slack v. Atlantic White Tower System, Inc.*, 181 F.Supp. 124, (D. C. Md. 1960), *aff'd. per curiam*, 284 F.2d 746 (4th Cir., 1960); *Eaton v. Grubbs*, 216 F.Supp. 465 (E.D. N.C. 1963).

the common law obligation of an innkeeper,⁸⁰ and does not support an inference that the operation of the inn is thereby state action.⁸¹

Although the general public have an implied license to enter any public accommodation such as a restaurant or retail store, that license has regularly been held at common law to be revocable at the will of the proprietor.⁸² The right of a proprietor of a licensed private business, not "clothed with a public interest" as that term is commonly understood, to select his customers on the basis of race or any other arbitrary criterion, where no statute, ordinance or public policy dictates otherwise, is so far settled.⁸³ But the fact that this common law right has been heretofore conceded does not insulate it from attack. If experience and reason now demonstrate clearly that the untrammelled recognition of this right no longer comports with overriding considerations of constitutional policy, the Supreme Court has power, under existing precedents, to alter the rule. In a matter of sufficiently serious import, accepted canons of stare decisis will not prevent a reversal of the existent rule.⁸⁴ A vindication of the proprietor's rights in the sit-in cases cannot be had, then, by a simple marshalling of precedent, although precedents are surely not lightly to be discarded. Unless some unacceptable disadvantage can be shown to be likely to result from a disregard of the proprietor's alleged rights, then we can expect that those rights will give way to the asserted and appealing right to racial equality in all public accommodations.

The chief argument for the existing recognition of the proprietor's rights may be the one raised by Mr. Justice Bradley for the Court in the *Civil Rights Cases*: "If this legislation is appropriate for enforcing the pro-

80. See *Madden v. Queens County Jockey Club*, *supra* note 78.

81. See *Bowlin v. Lyon*, 67 Iowa 536, 25 N.W. 766, 56 Am. Rep. 355 (1885), where the court indicated that a place of public amusement, if licensed by the state, would thereby become subject to all the obligations attendant upon an innkeeper, including that of refraining from an arbitrary denial of service.

82. *Brookside-Pratt Mining Co. v. Booth*, 211 Ala. 268, 100 So. 240 (1924); *Crouch v. Ringer*, 110 Wash. 612, 188 Pac. 782 (1920); see *Annots.*, 33 A.L.R. 421 (1924), 9 A.L.R. 379 (1920), and cases there compiled.

83. See, for example, *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Madden v. Queens County Jockey Club*, *supra* note 78; *Nance v. Mayflower Tavern*, 106 Utah 517, 150 P.2d 773, 776 (1944).

84. See the discussion by Mr. Justice Brandeis, dissenting, in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-411 (1932), arguing that reversal is more readily justified "where the question presented is one of applying as distinguished from what may accurately be called interpreting, the Constitution." (285 U.S. at 410); for a contrasting opinion, see Long, *The Doctrine of Stare Decisis: Misapplied to Constitutional Law*, 45 A.B.A.J. 921 (1959), arguing that the flexibility inherent in the common law rule of stare decisis is inappropriate to constitutional law.

hibitions of the Amendment, it is difficult to see where it is to stop."⁸⁵ If an individual customer can compel an unwilling proprietor of a public accommodation to contract with him simply because the business is licensed or serves the public, where the business is not clothed with a common law public interest and where no statute or ordinance requires equality of service, it is difficult to see where the line can be finally drawn. Many types of business, other than food preparation and sale, are regulated or required by law to be licensed in order to serve the public. For example, attorneys,⁸⁶ barbers,⁸⁷ beauty parlors,⁸⁸ blood banks,⁸⁹ boarding houses,⁹⁰ chiropractors,⁹¹ private clubs selling alcoholic beverages,⁹² dentists,⁹³ electricians,⁹⁴ embalmers and undertakers,⁹⁵ employment agencies,⁹⁶ firearms dealers,⁹⁷ hairdressers and cosmetologists,⁹⁸ insurance agents,⁹⁹ insurance brokers,¹⁰⁰ certain clergymen, such as a minister of a Spiritualist church,¹⁰¹ optometrists,¹⁰² osteopaths,¹⁰³ pawnbrokers,¹⁰⁴ peddlers and hawkers,¹⁰⁵ personal loan companies,¹⁰⁶ pharmacists,¹⁰⁷ physicians and surgeons,¹⁰⁸ physiotherapists,¹⁰⁹ plumbers,¹¹⁰ podiatrists,¹¹¹ pool and billiard rooms,¹¹² practical nurses,¹¹³ private detectives and investigators,¹¹⁴ private insane

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85. Civil Rights Cases, *supra* note 74.
 86. NEW YORK JUDICIARY LAW § 460.
 87. NEW YORK GENERAL BUSINESS LAW §§ 432, 439.
 88. *Id.* § 446.
 89. NEW YORK PUBLIC HEALTH LAW §§ 3120-22.
 90. NEW YORK PUBLIC HEALTH SANITARY CODE, Ch. 7A.
 91. NEW YORK EDUCATION LAW § 6553.
 92. NEW YORK ALCOHOLIC BEVERAGE CONTROL LAW § 66.
 93. NEW YORK EDUCATION LAW §§ 6605, 6608-10, 6612-14.
 94. NEW YORK GENERAL CITY LAW § 20.
 95. NEW YORK PUBLIC HEALTH LAW § 3421.
 96. NEW YORK GENERAL BUSINESS LAW § 174.
 97. NEW YORK PENAL LAW § 1914.
 98. NEW YORK EDUCATION LAW § 404.
 99. NEW YORK INSURANCE LAW §§ 113, 114.
 100. *Id.* §§ 118, 119, 124.
 101. NEW YORK RELIGIOUS CORPORATIONS LAW §§ 210, 211.
 102. NEW YORK EDUCATION LAW §§ 211, 7103, 7105-08, 7111.
 103. See NEW YORK EDUCATION LAW § 6512.
 104. See NEW YORK PENAL LAW § 1590.
 105. NEW YORK GENERAL BUSINESS LAW §§ 30, 31.
 106. NEW YORK BANKING LAW § 362.
 107. NEW YORK EDUCATION LAW §§ 211, 6803, 6804.
 108. *Id.* §§ 6502, 6506-6511, 6513, 6514.
 109. *Id.* §§ 6502, 6512, 6514.
 110. *Supra* note 94, § 56.
 111. NEW YORK EDUCATION LAW §§ 7003, 7006.
 112. NEW YORK PENAL LAW § 345.
 113. NEW YORK EDUCATION LAW § 6906.
 114. NEW YORK GENERAL BUSINESS LAW § 70.

asylums,¹¹⁵ private institutions for the treatment of mental disorders or epileptics,¹¹⁶ registered nurses,¹¹⁷ surveyors,¹¹⁸ and veterinarians¹¹⁹ are among the businesses and professions specifically licensed or regulated by law in New York. Other states have similar patterns.¹²⁰ If licensing and the offering of service to the public make a restaurant a public instrumentality so as to convert its action into state action, it is difficult to see why the same could not be true in every licensed or regulated business or profession dealing in some way with the public. While racial discrimination is as invidious in the callings enumerated here as it is in a hot dog stand, and while the states, employing police power, probably could prohibit racial discrimination in most or all of them,¹²¹ it could be a dubious technique to bring the strictures of the Fourteenth Amendment directly to bear upon them. In the attempt to resolve the problem of racial discrimination, there ought to be a proper deference to the concept of federalism. If the factors that make a hot dog stand an instrumentality of the state are service to the public and the license or regulation requirement, then all licensed or regulated businesses or professions that serve the public are equally arms of the state. Such a construction would stretch the state action standard beyond recognition while ostensibly retaining it. And if the controlling factor in the finding of state action is the issuance of a license, we are led to ponder the status of the licensed individual driver of a motor vehicle.

But if the *reductio ad absurdum* is inappropriate, and even if the occupations mentioned above would not be swept into the Fourteenth Amendment vortex by the extension of that amendment to the restaurant, there is cause for concern about that first step alone. Suppose an injunction to serve Negro patrons is issued against a restaurant and the proprietor thereby loses the trade of a dozen white customers. This could happen, especially in a community where the injunction against the one proprietor broke an existing uniform pattern of segregation. The prospect of losing such trade could well have influenced the proprietor not to integrate. Also, it could be unfair to subject him alone among the restaurant proprietors

115. NEW YORK PENAL LAW § 1122.

116. NEW YORK MENTAL HYGIENE LAW § 202.

117. NEW YORK EDUCATION LAW § 6907.

118. *Id.* §§ 7202, 7205-7207, 7210, 7211.

119. *Id.* §§ 6702, 6704, 6706-6709, 6711, 6712.

120. See, for example, CALIFORNIA BUSINESS AND PROFESSIONS CODE, *passim*.

121. See *Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945).

in a town to economic loss as the price of his integration.¹²² It seems plain that the dozen white customers are lending significant, if not essential, support to the maintenance of segregation in that public accommodation. In order, then, to achieve integration equitably in the enjoined restaurant, it could be practically necessary to enjoin the customers from taking their business elsewhere, or at least from doing so in concert. This may well be an undesirable infringement upon the freedom of choice of those customers, regardless of the moral delinquency of their refusal to patronize the integrated facility, especially in that violations of the injunction could be triable without a jury as contempts. If the alternative is said to be a prompt extension of the injunction to all restaurants in the community, the problem is not entirely avoided, but is merely met on a broader scale, since it is not difficult to conceive of a total diminution of restaurant patronage in a community with newly-integrated restaurants. It may be said that this speculation is too conjectural, that similar conjectures could be made concerning most penal statutes, and that the elimination of segregation in public accommodations ought not to be stayed merely because of some chimerical prospect that such a newly-conceded judicial or legislative power will be pushed to an extremity of doubtful worth. However, in evaluating a proposed course of decision, it is quite relevant to foresee its natural and proximate extensions. The extension of the judicial mandate to customers could well be necessary or warranted at or near the outset of a judicial program desegregating public accommodations in general. Moreover, if the courts can impose what amounts in effect to a duty to sell upon the proprietor, it is not captious or unreasonable to conclude that they may, with almost equal facility, impose upon a boycotting customer a duty to buy. If it is said that this has presented no significant problem in the enforcement of existing state equal accommodations statutes, it ought to be recalled that those statutes were not enacted in the teeth of popular resistance such as, lamentably but undeniably, exists in some states today.

If a store owner decided to go out of business, admitting that this decision was prompted largely by personal animadversion toward serving Negroes, could he be enjoined under the proposed new standards from doing so, especially if his were the only store of its kind in the com-

122. "The *ad hoc* nature of judicial desegregation thus tends to make the first target of a sit-in demonstration the economic fall guy for the community." Karst and Van Alstyne, *supra* note 75 at 770.

munity? It is worthwhile to recall here that the National Labor Relations Board recently restrained a manufacturing corporation from closing its plant and going out of business where the corporation's decision was motivated in part by aversion to the employees' union activities.¹²³ A strained construction of the Fourteenth Amendment, extending the immediate reach of federal power to public accommodations in general, might well be productive of greater mischief than relief. Moreover, a stultification of the federal government through an ineffective enforcement could be worse than no federal participation at all. If the Fourteenth Amendment is to be employed, it will have to be used in a thorough and perhaps relentless manner. In the conduct of such a quest for equality, the competing value of liberty could suffer seriously, and this not alone in the infringement upon asserted property rights of proprietors, but in a general undue encroachment upon that voluntarism which, while not immune to some restriction and qualification, is still the hallmark of a free society.

The difficulties attendant upon an extension of the Fourteenth Amendment to the ordinary public accommodation would not be avoided by a reliance upon some element other than the licensing of the accommodation or the active participation of state officials as the touchstone for a finding of state action. For example, under some circumstances, state action may properly be found in state inaction, in that a state's failure to take affirmative steps to eliminate segregation in some situations may in itself constitute a denial of equal protection.¹²⁴ On the other hand, it cannot be said that a state is under a positive duty to eliminate all forms of unofficial segregation in a community.¹²⁵ But whether or not the state is held to an affirmative duty to end segregation in public accommodations, and thereby its failure to do so is considered action, the same problems of limitations are met. If the potentiality of over-extension of the desegregation mandate, so as to impinge unduly upon other rights and interests, is present when the state action is found through a licensing

123. *Darlington Mfg. Co.*, 139 NLRB No. 23 (1962).

124. The three Enforcement Acts of 1870 and 1871 seem to have rested upon this theory; Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 163 et seq. (1950). See also *Baker v. Carr*, 369 U.S. 186 (1962); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961); *Lynch v. United States*, 189 F.2d 476, 479 (5th Cir. 1951); *Catlette v. United States*, 132 F.2d 902, 907 (4th Cir. 1943).

125. See, for example, *Bell v. School City of Gary, Indiana*, 213 F.Supp. 819 (N.D. Ind. 1963), holding that a Board of Education is not under an affirmative duty to eliminate racial imbalances incidentally occurring in the operation of a neighborhood school system.

of the accommodation, it is present as well when the state action is found in state inaction. The resort, therefore, to the formula of state inaction will not eliminate the problem of drawing the line. Indeed, the state inaction formula would seem to be as vulnerable on that score as the licensing criterion.¹²⁶

Furthermore, the difficulties of limitation are analytically present when the prohibition of segregation is attempted by federal legislation based upon the Fourteenth Amendment as well as when the prohibition is applied by direct judicial interpretation of the amendment without federal enforcing legislation. For example, the proposed Interstate Public Accommodations Act of 1963¹²⁷ provides for injunctive relief, at the suit of "the person aggrieved," or of the Attorney General upon complaint by a person aggrieved,¹²⁸ against any person who, "whether acting under color of law or otherwise"¹²⁹ shall:

(a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 3, or (b) interfere or attempt to interfere with any right or privilege secured by section 3, or (c) intimidate, threaten, or coerce any person with a purpose of interfering with any right or privilege secured by section 3, or (d) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 3, or (e) incite or aid or abet any person to do any of the foregoing.¹³⁰

Such a provision could warrant, in an appropriate situation, an injunction against customers, and perhaps others, who induce a proprietor to maintain segregation by their announced intention not to patronize the accommodation in the event it is integrated. Nor is the problem of possible over-extension of injunctive compulsion avoided by basing a

126. Significantly, the proposed Interstate Public Accommodations Act of 1963 (S. 1732, 88th Cong., 1st Sess.) resorts in part to the state inaction theory in section 2(h): "The discriminatory practices described above are in all cases encouraged, fostered or tolerated in some degree by the governmental authorities of the States in which they occur, which license or protect the businesses involved by means of laws and ordinances and the activities of their executive and judicial officers. Such discriminatory practices, particularly when their cumulative effect throughout the Nation is considered, take on the character of action by the States and therefore fall within the ambit of the equal protection clause of the fourteenth amendment to the Constitution of the United States." (Emphasis added). The same provision is found in Title II of the omnibus Civil Rights Bill of 1963. (S. 1731, 88th Cong., 1st Sess.).

127. S. 1732, 88th Cong., 1st Sess.

128. *Id.* § 5(a).

129. *Id.* § 4.

130. *Ibid.*

public accommodations statute upon the commerce clause.¹³¹ Indeed, it may be accentuated thereby. If the proprietor of a restaurant which serves food transported in interstate commerce imposes, by refusing service to a Negro, a burden upon that commerce significant enough to warrant congressional prohibition, can it be said that the refusal of a dozen of his customers to continue their patronage of the integrated facility imposes no significant burden upon that commerce?¹³²

Federal legislation to bar segregation in public accommodations, however, whether enacted pursuant to the Fourteenth Amendment or the commerce clause, does offer the advantage that it would lessen the likelihood that one proprietor would become the "fall guy" in the community. Judicial desegregation decrees are necessarily *ad hoc*, while a statute which has strong civil or criminal sanctions could effect wide-spread desegregation more promptly through its actual enforcement or the deterrent effect of its potential sanctions.¹³³ But even where the desegregation mandate is statutory, the problem of popular rejection may be met on a broader scale. If the Congressional power to legislate in the area be conceded, it could require for its implementation an imposition of civil or criminal sanctions against an unofficial popular boycott of newly-integrated accommodations. The problem, then, of ancillary enforcement directed against individual customers is troublesome whether the desegregation is by judicial decree or legislation, and whether the recalcitrant customers are few or many. Surely, the line ought to be drawn short of telling individual citizens where they must eat, but locating it with precision and fairness before that point may be a task incapable of practical achievement.

It would be erroneous, though, to infer that the problem of ancillary enforcement is the central objection to extending the reach of federal

131. The proposed Civil Rights Act of 1963, *supra* note 126, and the proposed Interstate Public Accommodations Act of 1963, *supra* note 126, are based partly upon the equal protection clause of the fourteenth amendment and partly upon the commerce clause of the United States Constitution (Art. I, Sec. 8, cl. 3).

132. The rule of *de minimis non curat lex* has been held not to limit constitutionally the reach of other federal statutes regulatory of commerce, such as the Fair Labor Standards Act. See *Mabee v. White Plains Publishing Co.* 327 U.S. 178 (1946); but see *McLeod v. Threlkeld*, 319 U.S. 491 (1943), holding that an employee engaged in serving meals to maintenance-of-way employees of an interstate railroad pursuant to a contract between his employer and the railroad is not "engaged in commerce."

133. See the discussion in Karst and Van Alstyne, *Comment: Sit-Ins and State Action*, 14 STAN. L. REV. 762, 770 (1962).

power, under the Fourteenth Amendment or the commerce clause,¹³⁴ to public accommodations in general. That problem is merely used herein to illustrate the general diminution of voluntarism which is likely to attend the general incursion of federal enforcement. Nor does opposition to the extension spring from a solicitude for the racially-biased discriminators. It is, of course, difficult to work up any sympathy for either the proprietor or the customer who would withdraw an otherwise public invitation to buy because of the color of a person, otherwise included, who seeks to accept that invitation. But the questions posed by the suggested expansion of federal power cut more deeply than that. For one thing, there is the extra-constitutional consideration that racial discrimination is a problem of diverse elements, including moral, economic, social and political ones. And while the full force of law, in its proper channels, ought to be applied to the eradication of such discrimination as is amenable to a coercive remedy, nevertheless the engines of legal compulsion do have their limitations. While the issue is debatable, it would seem fair to conclude that a direction of federal compulsive power into the general public accommodations field, where it would be difficult to channel toward finite and practical objectives, entails an unacceptable risk of ironically impeding the establishment of that voluntary cooperation without which any short range achievements would be pyrrhic. The attack upon discrimination in public accommodations must be maintained, but it ought not to be allowed to become a total, and perhaps destructive, assault upon a mere symptom.

The suggestions that a general federal legislative or judicial employment of compulsion against discrimination in public accommodations might be misdirected in terms of the long range objective to be pursued, is not one that can be supported by legal authority, for this is an area of policy and value judgment which cannot readily be reduced to the rubrics of precedent. The same can be said of the related notion that such federal activity would unduly impinge upon that freedom of association and choice which a free society ought generally to encourage. We are dealing here mainly with matters of degree and the issues are difficult to frame with precision. In deciding at what point the asserted right to equal treatment in public accommodations ought not to be enforced by federal power and ought to become a matter for private or local solution, the pivotal factor

134. For purposes of discussion here, it is conceded that Congress has constitutional power to enact a public accommodations statute under the present judicial conceptions of the commerce clause. See *Boynton v. Virginia*, 364 U.S. 454 (1960); *Mitchell v. U.S.*, 313 U.S. 80 (1941).

may well be the likelihood of federal intrusion upon concededly private and social relations. The major policy objection to a federal entry into the general public accommodations field, therefore, may best be phrased in terms, not of a theoretical invasion of a categorically defined right of property or choice, but rather of a tangible prospect that federal enforcement, once introduced, might not be contained short of an Orwellian intrusion into private and social affairs.¹³⁵

These reservations are not beyond dispute, and it would be less than useful to criticize the proposed extension of federal power without suggesting an alternative approach that can implement fairly the just aspirations for equality without injuring the federate and limited structure of government which is, in the long run, a prerequisite to the fullest realization of those aspirations. Here the approach taken by the Supreme Court in *Lombard v. Louisiana*¹³⁶ may point the way. Although there was no statute or ordinance mandating segregation, the Court nevertheless found state action in public statements of the Mayor and the Superintendent of Police which, while they were ostensibly directed toward the maintenance of peace, the Court found to have directed the continuance of segregated service as such. The *Lombard* decision carried to its outermost limits to date the apparent trend to find "state action" in less direct and even incidental involvements of state or local governmental officials. In principle, the approach appears to be correct. A state can act in ways more subtle than the enactment of a statute or an ordinance. When a state official throws the prestige of his office onto the scales in an endorsement of otherwise private segregation, the consequence usually will be a predictable reinforcement of the private party's determination to segregate. At the point where that public official's encouragement becomes a substantial factor in the proprietor's decision to conduct his restaurant on a segregated basis, the Fourteenth Amendment should be interposed to bar the discrimination. In *Lombard* itself, it appears that the Court applied this legitimate principle erroneously to the facts. In the trial court, evidence was excluded as to the extent to which the proprietor was coerced or influenced by the statements of the Mayor and the Superintendent of Police. As Mr. Justice Harlan observed in his dissent, the utterances of those officials were, in his opinion, "more properly read as an effort by these two officials to

135. See Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955), in which the author, who is unswerving in his opposition to public segregation, affirms in another context the distinction between official and unofficial segregation.

136. 373 U.S. 267 (1963).

preserve the peace in what they might reasonably have regarded as a highly charged atmosphere"¹³⁷ rather than as evasive attempts to encourage segregation as such. The case should have been returned to the trial court for a resolution of this key factual issue.

The principle of *Lombard* is not really novel. It is clear that a state cannot escape its burden under the Fourteenth Amendment by cloaking its action in a fictitious private character. Just as it is violative of the amendment for a state to abolish its primary election laws, but then encourage white "private" primaries by according to the victor a place on the general election ballot, so it should be equally wrong for a state or city, having abolished all statutes and ordinances promoting segregation, to encourage segregation by public pronouncements of government officials.¹³⁸ Nor does the relative informality of a state's promotion of segregation insulate that promotion from Fourteenth Amendment attack.¹³⁹ The *Lombard* approach, however, requires careful limitation. It should not be carried so far as to bar genuinely private discrimination in areas where the state has no legitimate interest, such as social discrimination in a home or private club, merely because that discrimination has been encouraged by public statements of public officials. The crucial factor in finding a sufficient state interest ought to be the holding out of the premises as open to the public.¹⁴⁰ If there are public statements by government officials encouraging segregation in such a facility, and if they constitute a substantial factor in the proprietor's decision to segregate, "state action" ought to be considered present. But even in establishments holding themselves open to the public, a truly private decision to segregate, not substantially influenced by official action, ought to be beyond the federal power.¹⁴¹

137. 373 U.S. at 254.

138. See *Terry v. Adams*, 345 U.S. 461 (1953); *Rice v. Elmore* 333 U.S. 875 (1948).

139. See *Bantam Books v. Sullivan* 372 U.S. 58 (1963), holding that a system of informal censorship of obscene literature, carried on by the Rhode Island Commission to Encourage Morality in Youth, violated the freedom of the press protected by the fourteenth amendment.

140. See *Marsh v. Alabama*, 326 U.S. 501 (1946), treating a company owned town as a municipality because of its open character, despite its private ownership.

141. For the reasons indicated *supra*, mere official enforcement of a neutral trespass or breach of the peace statute ought not of itself to be sufficient official action to activate the *Lombard* rule, even if the presence of such a statute, and the prospect of its enforcement, is a source of encouragement to racially-biased proprietors. The inquiry should rather be directed toward official encouragements of segregation as such. Of course, it is conceivable that official pronouncements reminding the populace of the presence of trespass or breach of the peace statutes may in fact be covert devices to encourage segregation as such. State action would

Even where such a decision is in keeping with a genuinely private local custom favoring segregation in such establishments, there ought not to be a finding of state action as long as the custom is not substantially influenced by any formal or informal sanction on the part of public officials.¹⁴²

In summary, then, the opposition to the extension of federal supervision into the general public accommodations field, is more effectively rested upon prudential than theoretical grounds. Apart from the question of bare constitutionality, wisdom would counsel against the adoption of a rather extreme course where a more moderate one would seem to promise an equivalent remedy. The limited approach suggested in principle by *Lombard* could be employed to direct the anti-discrimination effort into a productive channel. The federal attack should be upon governmental promotion of racial discrimination, rather than directly upon the misguided discriminators. In fact, we can confidently expect that discrimination in public accommodations will disappear in an acceptably short time when it is no longer nourished by governmental patronage and encouragement. If, however, the federal offensive is launched directly upon the private citizens concerned, it could well do violence to settled constitutional interpretations, and would entail an encroachment upon the heretofore conceded state and private spheres which ought not to be countenanced in the absence of a demonstrated necessity therefor. Moreover, an uncritical resort to compulsion could retard the growing development of a free popular consensus favoring equality of opportunity.

It is, of course, true that the *Lombard* approach involves an extension of federal power beyond its prior bounds. It also carries in its train, in principle, the same general problems of limitation as are found in the more extreme suggested approaches. But there is a real difference of degree. Under the *Lombard* approach, the general encroachment upon voluntarism, and such incidental problems as that of ancillary enforcement, will be met in far fewer cases, that is, only where the *Lombard* test of state action is

seem to be present in such a case, not because of the existence or enforcement of the statute, but rather on account of the official, though devious, promotion of segregation as such.

142. Mr. Justice Bradley, speaking for the Court in the Civil Rights Cases, apparently had reference to officially sanctioned customs when he observed that "civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, *customs*, or judicial or executive proceedings." (Emphasis added) Civil Rights Cases, 109 U.S. 3, 19 (1883); see also, *Baldwin v. Morgan*, 287 F.2d 750, 756 (5th Cir. 1961).

satisfied. It is true that the *Lombard* method will take more time than more extreme solutions. But if it offers a real prospect of success within a reasonable time, and if it entails fewer undesirable side effects, it ought to receive favorable consideration. In short, the occasion would seem to require that zeal for reform be tempered with prudence.