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"State action" again? Yes, because the "state action" problem is the most important problem in American law. This follows inexorably from two things.

First, the most important single task to which American law must address itself is the task of eradicating racism. How we would like to forget this, and turn to problems amenable to a more cheerful engineering, problems of venial failure rather than of sweating national shame! One Sunday last April, I happened to look at two articles of quite different sorts. One, in The New York Times Magazine, was by James Baldwin. He tells of reading, in Moss Hart's autobiography, how Hart early one morning saw a boy doing "some morning errand before school," and how thrilled Hart was to think that, in America, such a boy might rise to any eminence, attain any ambition — forgetting, of course, to add that all this could be said only because the boy was white. The other article, by a famous economist, discussed what must have seemed to him all the saliently relevant considerations bearing on the propriety of turning federal money over to the states without important limitations on its use; but he omitted to deal with the objection that such a step would mean giving much of this money to states whose racist policies, and defiance of national law in the furtherance of these, are unhidden. These two examples, so different, converge on a single point — menschlich allzu menschlich, we yearn for the rite that will exorcise this most stubborn of our attendant demons, our old capricious cruelty now in its third century, the crime that bloodies our sacred arrows and puts around us that odor the Cheyenne smelt around the man who defiled the ultimate covenant by killing a tribal brother, as our racism defiles our covenant with each other and with the world. We want to think that all this will disappear, that it is really some other problem ("immigration," "poverty"), by that recharacterization merged in the manageable. But it does not disappear, it will not merge, and if justice is the business of law, then, easily and by far, the first item on our law's agenda is and always ought to have been the use of every resource and technique of the

1 Baldwin, Negroes Are Anti-Semitic Because They're Anti-White, N.Y. Times, Apr. 9, 1967, § 6 (Magazine), at 26, 136.
law to deal with racism. Strong words? I wish they were stronger.

Secondly, the strategy of this war now plainly must address itself in chief to the barrier of the so-called state action "doctrine"—and to the standardized errors of attitude which go with that "doctrine." State-originated or state-supported discriminations against Negroes have always been held banned. So long as the Court declined to perceive segregation as a stigma, "an assertion of their inferiority," this major premise was lamed for work. The Court did finally bring itself to take note of the plain public meaning of the segregation charade, and by necessity the battleground shifted. The only strategic hope left for the maintenance of de facto racism, in whatever part of public life, now lies in the "no state action" contention. The amenability of racial injustice to national legal correction is inversely proportional to the durability and scope of the state action "doctrine," and of the ways of thinking to which it is linked. It is not too much to have said that the state action problem is the most important problem in American law. We cannot think about it too much; we ought to talk about it until we settle on a view both conceptually and functionally right.

Reitman v. Mulkey, decided last Term, touched this problem. I shall first state a rationale which I hope can at least contribute to discourse. I shall then make some general remarks on the "doctrine," suggesting that what may impend, and what ought to occur, is a major shift in point of view.

"Separate but equal" and "no state action"—these fraternal twins have been the Medusan caryatids upholding racial injustice. "Separate but equal" adroitly invited its opponents to show themselves logical dunces; how could "separate but equal," being by definition "equal," be "unequal"? The answer, like many answers long travailed for, turned out to be simple indeed. Separate cannot be equal, in the society we are talking about; the phrase describing the doctrine designates a non-mammalian whale; Plessy v. Ferguson was the merest shoddy. We are now travailing after an answer to the problem posed by the "state action" doctrine. Just look: "No State shall . . . nor shall any State . . ." I enlist myself with those who see the way to get this goose out of the bottle as, again, one of great simplicity: "Yes, of course, but in all the cases you put, in all the cases that come to court, some state does."

I mean to treat of the "state action" doctrine and its arrested metamorphoses only as touching the field of racial discrimination. I regard this as at least prima facie a rational limitation, on the ground, broadly, that the post-Civil War amendments ought to be taken as applying with a highly special force to the racial field. I take the fourteenth

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4 Strauder v. West Virginia, 100 U.S. 303, 308 (1880).
7 387 U.S. 369 (1967).
8 163 U.S. 537 (1896).
9 U.S. Const., amend. XIV, § 1.
10 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71-72 (1872). As to the
amendment's "equal protection" clause to mean that members of a race are to be shielded in the most ample way from any incidence of governmental power that works their disadvantaging by virtue of their race, with all the distinguishing implications in this ampleness and in this application to race as a subject of special solicitude.

I. The California Anti-Fair Housing Amendment

On July 7, 1879, presiding in the United States Circuit Court for the District of California, Mr. Justice Field had to rule on a justificatory plea in the case of Ho Ah Kow v. Nunan. The action was for "maltreatment"—to wit, that the defendant, the sheriff of San Francisco, had cut off the plaintiff's queue, while the plaintiff was in jail. The defendant pleaded a local ordinance, directing that the hair of every male prisoner be "cut or clipped to an uniform length of one inch from the scalp," immediately on his arrival at jail. Sustaining the demurrer to the defendant's plea, Mr. Justice Field said:

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled . . . . The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."

Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the reach of these protections to other racial groups than the Negro, see Frank & Munro, The Original Understanding of "Equal Protection of the Laws," 50 COLUM. L. REV. 131, 143 (1950). On the unique importance of the "state action" problem in the race field, see Van Alstyne & Karst, supra note 6. In Loving v. Virginia, 388 U.S. 1 (1967), the Court strongly sums up the cases establishing a highly special sensitivity in regard to racial classification.

11 2 F. Cas. at 255 (No. 6546) (C.C.D. Cal. 1879).
12 2 F. Cas. at 255 (emphasis supplied).
legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should in some quarter of the city overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork would be seen by every one to be leveled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.

On November 3, 1964, the people of California adopted Proposition 14, which thus became article 1, section 26 of their constitution. Several "fair housing" laws had recently been enacted in the legislature. Proposition 14 went to work as follows: 14

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14 ½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

A number of suits, all involving the federal constitutionality of


article i, section 26, were brought by Negro plaintiffs in the state courts. The California Supreme Court held the provision invalid on the ground that it violated the fourteenth amendment. The Supreme Court of the United States, on certiorari, affirmed by a 5-4 vote. Mr. Justice White wrote for the Court, Mr. Justice Douglas concurred in the opinion of the Court but wrote a separate opinion, and Mr. Justice Harlan wrote in dissent, joined by Justices Black, Stewart, and Clark.

The decision in *Reitman v. Mulkey* is apt to be widely misunderstood, because both those who like it, and those who do not, are powerfully impelled to see it as holding more than it did — the former because a broad reading could open the way to attack on many more difficult situations in the field of housing and elsewhere, and the latter because a broad holding is easier, in the present state of professional thought, to assail and discredit. The broader holding would have rested on the ground that the repeal of the fair housing law was itself a state action which denied equal protection. Further, since the distinction between states which up to now have, and those which up to now have not, enacted fair housing laws would seem to be unacceptable as a criterion of state obligation, it ought to follow that all states have a duty to enact fair housing laws, and that if they do not the discrimination thus made possible is to be seen as sanctioned by their omission, and hence as infected with a forbidden state complicity that calls down the ban of the fourteenth amendment. State "neutrality," the holders of this view would insist, is not possible — or, if possible, is not a sufficient fulfillment of the "equal protection" obligation.

I would be less than candid if I did not say at once that I think the position described to be the right one, and that I believe we will at last come to it. "Thou shalt not kill, but needst not strive/Officiously to keep alive" may be good enough when it comes to "deprivation of life, liberty or property," but it seems to me not nearly good enough when it comes to denial of "equal protection of the laws." Inaction, rather obviously, is the classic and often the most efficient way of "denying protection;" the "denial of justice," in international law, includes the failure to act. When a racial minority is struggling to escape drowning in the isolation and squalor of slum-ghetto residence, everywhere across the country, I do not see why the refusal to throw a life-preserver does not amount to a denial of protection.

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17 387 U.S. at 381.
18 387 U.S. at 387.
19 I would state this opinion with more confidence if it were not that Robert L. Hale, the subtlest and most thorough modern explorer of these questions, seems in his discussion of *Truax v. Corrigan*, 257 U.S. 312 (1921), to be saying there might be another side to this. R. Hale, *Freedom Through Law* 327-35 (1952). See also Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473, 489 n.29 (1962). But I remain unconvinced; at this point I would begin to find food for thought in the cautions in Part III of Mr. Justice Harlan's Reitman dissent, 387 U.S. at 395. See note 38 infra.
But I mean at this point only to name a position, and not to defend it or even to state it with a defensive exactness. Evaluation of the very judgment in *Reitman v. Mulkey* does not depend on acceptance or rejection of this advanced view. Neither the California court nor the Supreme Court made it the ground of decision.\(^2\) It is interesting to ask, then, whether the very thing done by Proposition 14 was a forbidden state action in aid of racial discrimination, or hostile to minority races, even on the assumption that the mere repeal of the fair housing law or the failure to enact a fair housing law would constitute a state "neutrality" not contravening the fourteenth amendment.

Mr. Justice Harlan's dissent makes a good starting place: \(^22\)

In short, all that has happened is that California has effected a *pro tanto* repeal of its prior statutes forbidding private discrimination. This runs no more afool of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance. The fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done. The Fourteenth Amendment does not reach such state constitutional action any more than it does a simple legislative repeal of legislation forbidding private discrimination.

Now, with deference, this is a puzzling way to put the thing. In the first quoted sentence "all that has happened" is "*pro tanto* repeal." Two sentences later something else has happened as well, or, at least, something "also accompanied" the "all" that happened—"a constitutional prohibition against future enactment of such laws by the California Legislature." On absolute assertion, unembarrassed by elaboration of reasons, this accompaniment is pronounced to make no difference. That is the last we hear of it.

Yet the majority saw the matter otherwise, and even read the section differently, in a respect which it seems hard to dismiss as insignificant. Said Mr. Justice White: \(^23\)

Unruh and Rumford were thereby *pro tanto* repealed. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, *immune from legislative, executive, or judicial regulation at any level of the state government*. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, *free from censure or interference of any kind from official sources*.

The thing we must do is to look back at the text of article 1, section 26; \(^24\)

\(^{21}\) 64 Cal. 2d at 537, 413 P.2d at 830, 50 Cal. Rptr. at 886; 387 U.S. at 374-76.

\(^{22}\) 387 U.S. at 389.

\(^{23}\) 387 U.S. at 377 (emphasis supplied).

\(^{24}\) CA. CONST. art. 1, § 26 (emphasis supplied).
Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

There is no question that Mr. Justice White has correctly paraphrased what this text says, and that Mr. Justice Harlan has rendered it too narrowly. This point is vital, for the Reitman decision, to be understood, must be looked at as a holding on the very thing done by article i, section 26. That section in its own chosen terms neither declares a right, nor repeals a statute, nor states a position of constitutional neutrality, though it may be thought to do some or all of these things, in some fashion, by implication. What it does, without implication, is to lay a sweeping prohibition on all agencies and subdivisions of government within the state, and not merely on the state legislature, saying that none of them may do anything to place any limitation on the absolute discretion of owners to decline to deal with chosen objects of discrimination among would-be buyers and tenants of residential property.

That is, quite surely, no return to the situation as it stood before the Rumford Act; one has to fight down the feeling that insistence upon its being merely that takes origin from a difficulty felt about dealing with what the section really did. The "mere repeal" view would in any case be a rather wayward and problematic one, since the Rumford Act might have been repealed by a referendum procedure substantially easier than the one that had to be used to pass Proposition 14. A recent writer, in a review of the history of the Proposition, says, "The CREA [California Real Estate Association] presumably wanted more than a simple repeal in order to prevent the legislature from passing any other fair-housing legislation." Some such explanation must exist, though its terms, to cover the whole case, must include all agencies and subdivisions of government. But as a matter of plain law, regardless of explanation, the proposition brought into being a substantially different situation from that which mere legislative silence, original or resumed, would have produced.

If the Rumford Act had been repealed, then: (1) The legislature by simple majorities might pass a new act, now or ten years from now. (2) By a petition having signatures of five percent of the voters at the last gubernatorial election, and by success at the polls, proponents of fair housing might bring about the enactment of a new statute, now or (as seems more realistic) much later. (3) Local governments, as well as nonlegislative agencies of the state, might have been persuaded to take remedial action favorable to the claim to fair housing.

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26 Cal. Const. art. 4, § 15.
27 Cal. Const. art. 4, § 1. Five percent can force consideration of a law by the legislature. If the legislature fails to enact it, then it goes before the people at the next general election.
28 California counties, cities, towns, and townships have extensive general police powers. See Cal. Const. art. xi, § xi.
After the passage of the section, two possibilities and two only were left to the proponents of fair housing. They might collect signatures from eight percent of the voters in the last gubernatorial election, or they might get two-thirds of each legislative house to go with them, and so, in either event, get a new and favorable constitutional amendment before the electorate. Then they would have to get a statewide majority. Unless one of these hard roads was travelled to the end, racial discrimination in housing would be lawful forever, everywhere in California, and every state agency and local government would stand under a prohibition against touching its immunity.

First, as to the legislature, and the chances of its passing a new Rumford Act. If we may for the moment deal with "significance" in practice, and not with "significance" as a newly emergent term of art, we need not stop at pointing to the difference between half-plus-one and two-thirds, though that, in itself, is a difference whose significant magnitude is recognized in classic places. We can take into account too, the well-known political fact that minority groups quite largely protect themselves, and move toward equality by law, through the use of their marginal voting power, and through coalition. A legislator from a district with say, fifteen percent Negroes, is going to be strongly motivated to give them something, though not everything, that they want, even when they could not get any of what they want by referendum. The advantage to the minority group of having some leverage of this kind is incalculable. Conversely, the best way to make the minority impotent is to take it or its claims out of ordinary politics. In the Old South the white primary took the Negro, with all his claims, altogether out of politics. But article 1, section 26 takes out of ordinary politics, out of the day-to-day process of legislative struggle and compromise, the striving of Negroes and other racial minorities for the law's aid in clearing access to decent housing, the thing they need most.

If the proponents of fair housing look to the initiative and referendum procedures, they find that section 26 has made their chances very substantially worse than these would have been made by repeal of the Rumford Act, for they must now collect not five percent but eight percent of the voters' signatures in order to get any fair housing proposal before the people. The difference between five and eight is only three; perhaps that doesn't sound like much. The difference between 300,984 and 481,574 is of an impressiveness assessable only by doorbell-ringers.

So far as statewide legislation and policy is concerned, then, article 1, section 26, in contrast to "mere" repeal of the Rumford Act, makes

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20 CAL. CONST. art. 4, § 1. Eight percent is the designated figure for the direct proposal of a "law or amendment to the Constitution." The five percent procedure, going through the legislature, is for "a law" only.

25 CAL. CONST. art. 18, § 1.

31 CAL. CONST. art. 4, § 1, art. 18, § 1.


33 E.g., U.S. CONST. art. I, §§ 3, 5, 7, art. II, § 2, art. V.

34 There were 6,019,670 votes cast in the 1966 gubernatorial election. Cf. N.Y. Times, Nov. 10, 1966, at 34, col. 1.
far more difficult, though not quite impossible, a return to fair housing as a legal right. On the levels of local government, the edict is even sterner. The sweep of the section’s prohibition would make it radically impossible for any unit of local government to take any steps whatever to favor fair housing. Five years from now, seventy-five percent of the people in San Francisco might think a fair housing ordinance wise and just, imperatively called for in the interest of public health and safety. Yet, under article i, section 26, such an ordinance would not only have been held unconstitutional if passed, but might even have been ruled off a referendum ballot.

Such a statewide rule laid upon local governing bodies is significant in the factual sense. A fair housing ordinance in Berkeley was defeated on referendum, in 1963, by a small margin; a few years, and a little more spade-work, might have brought victory. Los Angeles at one time seems to have had a limited fair housing ordinance — not a very strong one, but too strong for article i, section 26. Throughout the country, local fair housing ordinances are being pushed, sometimes with success. One of the best hopes of racial minorities may lie in the local diminution of prejudice, where the larger political subdivision remains intractable. Article i, section 26 said that this hope was to be extinguished — not just diminished, but simply extinguished — throughout California. Mr. Justice Harlan’s dissent, as we have seen, fails to refer even briefly, even in passing, even for the purpose of asserting its irrelevance, to this extinguishment; can it be that the matter needs no more attention than that? 38

It is not really doubtful, then, that article i, section 26 did more — and in the realm of fact did “significantly” more — than merely to repeal the fair housing law, or to declare a total state “neutrality” on the question of discrimination in housing; that of course has to be why this amendment was pushed and the repeal of the Rumford Act neglected. Does such action by the state, as a matter of law, constitute a forbidden disfavoring of those racial groups who would benefit from fair housing laws or local ordinances — a disfavoring critically different in contemplation of law from the mere repeal of a statewide fair housing statute, or from the mere failure to pass one? We have not so far had very full judicial discussion of the question. Mr. Justice White, writing for the Court, having described the difference briefly but with accurate comprehensiveness, appears to look on it as evidently significant. This view may seem understandable; it is not hard to imagine a world in which it would be thought obvious that a state, by recording such a

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35 22,750 to 20,456. T. Casstevens, Politics, Housing and Race Relations: The Defeat of Berkeley’s Fair Housing Ordinance (1965).

36 It seems to have prohibited discrimination only in “publicly aided housing.” 1 Trends in Housing, Aug., 1956 (No. 2), at 7. But this would be too much for section 26: “irrespective of how obtained or financed.”

37 This omission deepens the irony enveloping Part III of Mr. Justice Harlan’s dissent. He there protests that the Court’s Reitman holding “may hamper, if not preclude, attempts to deal with . . . race relations through the legislative process.” 387 U.S. at 395. It would seem that section 26 is the thing that did that. Clearly, in addition to its vastly increasing the difficulty of statewide experiment, it would have cut off all possibility of experiment at the vital local level.

38 387 U.S. at 377.
resolution not to intervene, by putting itself in a position where it would be hard to intervene, and by commanding all its parts and semi-autonomous subdivisions not to intervene, was itself significantly disfavoring the interest seeking intervention.

But this is not that kind of a world, and the question remains. I would like to divide it into two. Let us suppose, first, that article I, section 26 had read as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to any Negro, if it be the will and desire of such seller, lessor, or landlord not to sell, lease or rent such property to Negroes.

Now on a certain hard-shelled view—even, so far as his own words advise us, on the view expressed in Mr. Justice Harlan's dissent—this would be "perfectly legal." This imagined section is not one "requiring unjustified discriminatory treatment ...." 40 It calls for "no affirmative enforcement of any sort." 41 If the criterion of "encouragement" be "slippery and unfortunate," 42 may we not say that "Here ... we have only the straight-forward adoption of a neutral provision restoring to the sphere of free choice, left untouched by the Fourteenth Amendment, private behavior within a limited area of the racial problem"? 43 If not, why not? The state passing this imaginary section is not saying anyone either must or should discriminate against Negroes with respect to housing, if it is not saying something parallel to that in the real article I, section 26. The fourteenth amendment, we are assuming, does not make such private conduct unlawful, or forbid its being left in the sphere of "free choice," which is just where the imaginary section leaves it.

Most of us would be troubled, I think, even though sticking firmly to the assumption that, in this sphere, the state owes the Negro no more than neutrality. Let us consider the situation of the Negro who wants to take his children out of the ghetto-slum. Just two paths are open to him. He may try private appeal, or he may try politics. If he is very lucky, private appeal may avail him. In the normal case, it will not. Secondly, he can band with others to advocate the passage of open housing laws and ordinances. Without this section his way to such laws and ordinances is uphill, but there is, in many places and at many times, considerable hope. With this section, the gradient leading to a state law is tilted dizzyly up, and the bridges on the road to a local ordinance have been dynamited.

The harm to the Negro is plain. The state has not said he may not have a good apartment. But the state has said that his political road, toward a law that might get him a good apartment, is to be made especially difficult, as difficult as it can be made without making this

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40 387 U.S. at 392 (emphasis supplied).
41 Id.
42 387 U.S. at 393.
43 387 U.S. at 394.
constitutional provision unamendable altogether, far more difficult than is the political road to a law regulating barbers, or changing the Rule in Shelley's Case, or making drinks available to minors. The state has not commanded discrimination against Negroes, but it has assured the discriminator, exactly with respect to the discrimination, of a special immunity — as complete an immunity as the state can within its constitutional forms grant — from any political assault on his practice of discrimination.

The law of the new case is never open-and-shut. Yet I confess I find it hard to see why the Negro in this example (whose refreshing candor of phrase is latterly to be found only in the world of the imagination) is not being placed at a forbidden disadvantage in his duel with the discriminator. A state, to be sure, may set up a hierarchy of interests, placing some at an advantage and others at a disadvantage. "Constitutionalizing" an interest has just these effects, on the interest itself and on its contradictories respectively. But these platitudes do not answer the question whether the fourteenth amendment permits the treatment of this interest in such a discountenancing way. The issue really is whether a Negro's interest in using the political process to get a good house can permissibly be classified with the least favored interests, while a "preferred position" is given discrimination. Does "equal protection" for this interest (and hence, pro tanto, for the Negro) mean "equal to the least favored," or "equal to the general run"? "Equal to those interests and claims which the state allows to make their way, when they can, in the ordinary political processes, state and local," or "equal to those interests which the state allows to make their way not at all locally, and statewide only by the specially difficult process of constitutional amendment"?

The real article i, section 26, however, entirely generalizes the landlord's discretion to decline. Does this make a difference? Reduced to these terms, the question is seen to be the same old question: Has the state, by generality of language, succeeded in validly doing to Negroes what it could not do to Negroes eo nomine? Has, at last, the hand been quicker than the judicial eye? For, if the imaginary section is not "neutral" as between Negroes and those who would discriminate against them, the real section 26 is not "neutral" as between arbitrary discriminators and their chosen discriminees, including Negroes. Section 26 must have found validity, if at all, only in its generalizing of the protection afforded to discriminators.

The area of enlargement effected is narrow. Nothing like absolute freedom of the owner is vouchsafed; he is protected only against the thing the racial discriminator needs to be protected against — regulations limiting his freedom to decline to sell or lease. For all section 26 provides, state and local laws may still directly or indirectly limit his affirmative freedom to sell or lease to any willing buyer or tenant;

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44 Cf. U.S. Const. art. V., concerning equal representation in the Senate, and the slave trade until 1808. One wonders whether such a provision, as to the subject-matter of section 26, would strike anybody as "neutral."

this may be accidental, but I suspect it is not, for one of its effects is to keep quite safe the zoning laws, which, though "indirectly," do stringently limit the classes of buyers and tenants to whom a sale or lease may practically be made; "property" no longer gives off the odor of sanctity when the maintenance of "values" swims into the ken. A very large class of private persons and corporations, designated as "agent[s] of the State" for this purpose, may force the owner to sell for any one of a long list of "public uses" (wharfage, mining facilities, telephone lines, oil pipelines, cemeteries, airports, etc.) under the "eminent domain" reservation in section 26. The section, though it starts off with "real property," defines itself so as to affect only residential property. What is carved out, then, constitutionalized, and so put beyond ordinary political attack, is a small area, absolutely vital so far as racial discrimination is concerned but of rather uncertain importance otherwise.

So far as I can read them, the cases are devoid of any suggestion that a provision which hurts Negroes as such, and places them at a disadvantage, is impregnable if it states itself without using the term "Negro," and so pays the price of putting some others as well into an exposed situation. In Burton v. Wilmington Parking Authority, the discrimination was held forbidden, though the city leased out a restaurant for miscellaneous reasons, with no proved or probable interest on its part in the racial policies of the owner. The actual discrimination was shown to be racial, and the owner was able to practice it because of certain actions taken by the city, not in themselves racially discriminatory; that was enough—even though, by the state's action, the restaurateur also got the power to discriminate against teen-agers, or people without ties, or people leading dogs.

If one accepts that my imagined section disadvantages the Negro in a forbidden way, then the plea of "generality" has to be a plea merely in confession and avoidance, a plea that says, "Yes, California is doing exactly the thing it would be doing in your fancied example, it is doing something which, in respect to proved and identified cases of racial discrimination, will be felt just exactly as if that discrimination were singled out and named in the section; you won't even know the difference. But California has a right to do this, because it is doing the same thing to all other seekers after houses and apartments." This plea, it seems to me, rests on too carefully chosen a view of what it is that hurts the Negro in the imaginary example. The racial discrimination of which he primarily complains, the racial discrimination that immediately hurts him, is that of the owner or landlord. That act of discrimination, without which no case arises, is just as explicitly racial

46 CAL. CIV. CODE § 1001 (West 1954).
47 CAL. CIV. PRO. CODE § 1238 (West 1955).
48 By "as such," I here mean, "in respect to a situation in which the Negro is shown to be suffering discrimination explicitly based upon his race."
50 Cf. Shelley v. Kraemer, 334 U.S. 1 (1948). The state's rule, as a formal matter, was that an indefinite class of restrictive covenants were valid; the racial application arose from the "private" acts of people whom this "general" rule empowered to use the state's recordation and judicial machinery to produce anti-Negro zoning. See Mr. Justice Douglas's concurrence in Reitman, 387 U.S. at 381.
under a general section like the real section 26 as it would be under a general section like the real section 26 as it would be under a section naming the Negro, or naming racial discrimination as the sole subject of constitutional solicitude. Of either section it could equally be said that under it acts of racial discrimination, announced by their perpetrators or clearly found to be such, are given an immunity from suppression by statute, or local ordinance, that is greater than that given to constitutionally regulatable conduct in general, and that those who suffer from acts of racial discrimination are placed under a corresponding political disadvantage, vis-à-vis other Californians who want other forms of state regulatory intervention as to matters which happen to interest them. The hurtful unneutrality of the section in either form consists in its withdrawing the claim of the Negro from the arena of ordinary politics, where claims in general meet and fight it out; this picture changes only minimally when the housing claims of pet-owners, and others not enjoying any special federal constitutional protection, are similarly withdrawn. It would still be as true as it ever was that the overwhelming majority of ends that people in California seek to attain by politics can be freely fought for by one set of rules, while the Negroes' end of fair housing must be fought for under a different and far more handicapping set of rules.

To conclude that generality saves section 26 would involve the law in triviality, for it would amount to saying that of two sections, one immunizing racial discrimination by name, and one immunizing all the other forms, the first would be invalid and the second valid, while a mere codifier’s neatness, consolidating them into their logical sum, might save the bad with the good. What is being tendered to the Negro, in this “generality,” is a hollow and formal equality not unkin to the “equality” of “separate-but-equal.” He is being told that he must suffer having to wage the political part of his fight for housing — a bitter, desperate fight for him as all know — under drastically handicapping conditions, and that that is all right, because other people will have to seek to clear their way to housing, through use of political processes, under conditions formally the same, however it may happen that these conditions handicap or, perchance, do not handicap them. In “separate-but-equal,” the plea in confession and avoidance was in part analogous, in that it pointed to the imposition, on whites, of formally similar rules.

The discussion of the effect of article I, section 26’s generality has so far proceeded on lines which may seem rather strainedly theoretical. How many wisps of real hay has the state thrown around the gleaming needle of racism in article I, section 26? In real life context, on quantitative rather than purely qualitative analysis, how strongly does the section bear on racial discrimination? How much, in effect, is it really like the example I have imagined? It is heartening to note that we have come past the time when such a question would be shied away from, as threatening the law’s elegantia, and that we do not have to leave the courtroom to get an answer that seems to satisfy everybody. The entire Court in Reitman explicitly recognized the thrust and trend of section 26. Mr. Justice Harlan, for himself and the other dissenters, tells its familiar history in terms of its relation to laws prohibiting
racial discrimination,\textsuperscript{51} and sees it, summarily, as freeing "private behavior within a limited area of the racial problem."\textsuperscript{52} It cannot fairly be doubted that he is right (though the setting of the italicized word would have been more accurate if he had said "binding official behavior within a limited area of the racial problem")). One need not go out of law to come to this conclusion. Section 26, on its plain text, operates immediately on laws and official actions that limit the power of owners to discriminate. It is common knowledge that virtually all such official actions taken or being pressed for, in California and throughout the country, have to do in principal part with racial discrimination. As to the factual status of the Negro as the main victim of housing discrimination today, I really think citation would be stultifying. When we consider whether the smirking facial generality of section 26 can crucially distinguish it from the explicitly racist imaginary example, we have to ask whether that can be the case with a provision which, in background and in easily foreseeable effect, acts in preponderant part in the racial sphere, and chiefly against Negroes.

The rule which I would propose, then, as a basis for the \textit{Reitman} decision, is that where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.

I limit this generalization to the racial question on the assumption, already stated,\textsuperscript{53} that the fourteenth amendment marks racial groups — Negroes primarily but other racial groups within the clear "equity of the statute" — as groups against whose interest in immunity from discrimination no state measures of any kind may be justified on a balance of convenience, or on local assessment of the worthiness of competing interests. The Federal Constitution may mark off other such groups; if it does, then I see no reason why the \textit{Reitman} type of state action hostile to their interests may validly be taken. But I shall not try to name them. On the other hand, a constitutional provision forbidding the legislature and subdivisions of California from interfering with discrimination in housing, so long as that discrimination were based on sex or age, would not fall within the principle put forward. Such a provision might be "arbitrary," and so fall under either a due process or generalized equal protection ban. But neither women nor people of a certain age enjoy any general federal constitutional immunity against all state measures placing them at any disadvantage.

I have discussed the situation where, at some point, the discrimina-

\textsuperscript{51} 387 U.S. at 387-88.
\textsuperscript{52} 387 U.S. at 394 (emphasis supplied).
\textsuperscript{53} See pp. 70-71 & note 10 supra.
tion, protected by a shielding device such as section 26, is openly racial either in the provision itself, or in the factual situation extraordinarily protected by it from regulation by law. I do not, however, mean to imply that the equal protection clause might not also be invoked when the rather different Gomillion v. Lightfoot 54 situation (where Negroes are discriminated against or their interest in some way unmistakably attacked without their ever being named) is approximated. It is just that that is not the Reitman case, and the special problems of fact-finding, judicial notice, etc., need not here be faced. In Reitman, as the case stood, the question was one of the significance of a state's action taken with respect to overtly racial discrimination, practiced in the very cases, and practiced, as everyone knows, on a wide scale.

II. The Place of Reitman

Even on the assumption, then, that California "need not strive" to rescue the Negroes from that housing misery and de facto racial zoning which is now the thing chiefly blocking them from equality in the enjoyment of citizenship, even if "neutrality" will do, the Reitman decision, for the reasons I have given, seems to me correct. California has not "merely" failed to throw the life-preserver out of convenient reach, so as not to be tempted to throw it, and has passed the word down the line to those she commands, that the life-preserver is not to be thrown. 55 To revive an ancient saying, there is no question whom such actions are neutral against.

How does Reitman fit into the line of development of the "state action" doctrine?

55 I have confined myself to what seems to me the most interesting rationale for Reitman. I would not reject any of the three others that have been put forward.
1 The "encouragement" rationale, (in part, it seems, that of the Court) is right in its major premise; if a state does encourage racial discrimination, how is it possible to say the state is not involved? It does not seem very unlikely that the decision to seek the incorporation of this "freedom to discriminate" amendment in the bill of rights was one taken partly for its encouragement effect. In Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955), Mr. Justice Frankfurter defends dismissal of the case without decision partly on the ground that, if the refusal of burial were held not unconstitutional, that might, by condoning, encourage the racist practice. Is there any reason to think anything different about the constitutionalizing of the discriminator's practices to the far greater extent done by section 26? Henkin, supra note 19, at 485, takes the "encouragement" idea very seriously, even in the case of a statute authorizing discrimination—as, presumably, did Mr. Justice Stewart when he concurred in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), on the ground that the statute authorized discrimination. Whether a provision, in the context of other state law, does "encourage," is a question either close to, or among, questions of state law interpretation; the Court's deference to the California court's views on this question seems therefore not so inexplicable as has been made to appear. (2) Mr. Justice Douglas's special ground—the functional equivalence of practices followed in the real estate industry with racial zoning—is, again, not demurrable; one would want to know more about the business facts. (3) The argument, in the amicus brief for the United States, that section 26 indubitably prohibits fair housing laws as to some property covered by the fourteenth amendment by reason of special governmental connections, and that attempted severance (besides being a state-law question) is not meet in this sensitive constitutional context, seems to me clearly right. Brief for the United States as Amicus Curiae at 32-47.
One may well start by observing that the *Civil Rights Cases* opinion,\(^6\) the *fons et origo*, speaks not at all to the *Reitman* problem. "Legislation," which section 26 surely is, is the one form of "state action" which satisfies the *Civil Rights Cases's* requirement, if no other does; it is, therefore, especially clear in *Reitman* that the weight of inquiry shifts to the *substance* of the legislation — the question is not whether state action is present, but what the thrust and effect of the state action is. This is perceived by the whole Court.\(^5\) This has really been true, I think, of most recent state action cases, but the fact seems to be recognized with a new clarity in *Reitman*.

The Court, not for the first time, uses the word "significant" as the key term of art.\(^5\) There is no point in doing the usual dance about that word; obviously, there occur stages in the development of legal doctrines where the almost total lack of resolving power involved in such a concept has to be tolerated, and may even be welcomed. But such a terminology marks the abandonment of the attempt to draw nice conceptual lines — the judgment, it may be, that such lines are not appropriate to the subject-matter or that they are not warranted by law.

This is where we stand, eighty-five years after the decision in the *Civil Rights Cases*. It is not wonderful that so much recent commentary on the "state action" doctrine is radically revisionist. The latter half of this paper will look about the "state action" terrain. One way of putting my impression of this landscape's character would be to say that the interesting question in *Reitman* is why a climate of attitude still persists in which it is possible for anyone to think that a state measure so evidently hostile to Negroes has any chance of getting by.

### A. State Action in the Cases

On October 8, 1903, the federal grand jury for the Eastern District of Arkansas returned an indictment in the United States District Court, there charging certain defendants with having conspired to oppress, threaten and intimidate eight Negroes in the free exercise of rights secured to them by the Constitution and laws of the United States. The charge was that the defendants, motivated by racial prejudice, intimidated the Negroes, to get them to quit their jobs at a mill. The defendants were convicted. On writ of error in *Hodges v. United States*\(^6\) the Supreme Court reversed.

The case was argued on a thirteenth amendment theory. The Attorney General disclaimed reliance on the fourteenth.\(^6\) But the Court did say in proceeding toward discussion of the issue that had actually been raised: "[T]hat the Fourteenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of."\(^6\)

The interest of this dreary decision, to me, lies in its being the last

\(^{58}\) 109 U.S. 3 (1883).
\(^{59}\) See Mr. Justice Harlan, dissenting, 387 U.S. at 390-91.
\(^{54}\) 387 U.S. at 380-81.
\(^{59}\) 203 U.S. 1 (1906) (Harlan, J., joined by Day, J., dissented).
\(^{60}\) 203 U.S. at 10.
\(^{61}\) 203 U.S. at 14.
case, still of so much as formal authority, in which (even in the attenuated form of such a "holding" as this, perhaps logically necessary but far from the center of attention) the Supreme Court has held that a claim under the equal protection clause, against racial discrimination, must fail because "state action" is absent, or present in insufficient kind or amount to implicate the equal protection clause of the fourteenth amendment.

I have limited this statement to the field of racial claims to equal protection, on an assumption already stated; one should emphasize here that the equal protection clause, even in its wording, may furnish a basis for especially ample latitude with respect to the finding of significant "state action" or "inaction." But for the purposes of an overview the picture does not change very much if one considers the "state action" doctrine as a whole, in its application to other constitutional guarantees. In the sixty-one years since Hodges v. United States, astoundingly few Supreme Court holdings have been based, affirmatively, on the state action doctrine, and fewer have escaped explicit or clearly implied overruling.

When one goes back beyond Hodges v. United States to the "state action" cases intervening between it and the Civil Rights Cases, one is struck by the total dissimilarity to modern problems, and by the lack

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62 See pp. 70-71 & note to supra.
64 For nine years, the flagrant fraud on the Constitution perpetrated by the "white primary" seemed to the Court impenetrable. Grove v. Townsend, 295 U.S. 45 (1935), overruled in Smith v. Allwright, 321 U.S. 649 (1944). In all practical effect, it would seem that Corrigan v. Buckley, 271 U.S. 323 (1926) was overruled by Shelley v. Kraemer, 334 U.S. 1 (1948) and Barrows v. Jackson, 346 U.S. 249 (1953). Black v. Cutter Laboratories, 351 U.S. 292 (1956) (not a racial case) still stands, but the ruling (a dismissal for want of a substantial federal question) is put on grounds that have not proven comprehensible to later commentators. See P. KAUPER, supra note 63, at 149-51. There have been denials of certiorari in "no state action" cases. Pennsylvania v. Board of Directors of City Trust, 337 U.S. 570 (1949); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955). How little these mean for future developments seems to be suggested by the certiorari denial in Dorsey v. Stuyvesant Town, 339 U.S. 981 (1950). The facts of that celebrated case are accessible in the state report, 299 N.Y. 512, 87 N.E.2d 541 (1949). It seems unthinkable that any member of the Court would now find "no significant state action" on such facts. The least one could say about it is that the question remains entirely open. See Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1107 (1960). The same author says that governmental assistance was certainly less evident in Burton than in Stuyvesant Town—a decidedly restrained characterization. P. KAUPER, supra note 63, at 157, calls the Stuyvesant Town result "surprising indeed." Hale, supra note 19, at 374-379, fully states and discusses the case, stressing that the certiorari denial imports no holding on the merits. One has to take the oft-repeated word of the Court that a denial of certiorari imports no judgment on the merits, both as to Stuyvesant Town and so as to the others.

On the whole, the fragments of holdings still possibly in formal good standing, and the denials of certiorari, add nothing except a bit of confusion.

Silard, in a recent provocative article whose conclusions in part overlap mine, A Constitutional Forecast: Demise of The "State Action" Limit on the Equal Protection Guarantee, 66 Colum. L. Rev. 855 (1966), seems to give more weight than I would to the Court's concessive "acceptances" of the state action limitation in such cases as Shelley v. Kraemer, and United States v. Guest, 383 U.S. 745 (1966). Such concessions to a never-applied doctrine are not unknown: Congress, for example, is quite limited in delegating its powers, except in real cases. Also, the requirement that a "state" be shown to "deny" equal protection need never be abandoned. See note 116 infra.
of awareness of questions now seen by all as crucial. The cases are mostly criminal prosecutions; questions of statutory construction are therefore often interwoven. The state-private dichotomy is simply assumed, without any attention to problems of admixture of power, state fostering and support, functional equivalence to state function, and the like.65

On the other hand, since 1944 at least, the Stone, Vinson, and Warren Courts have been recognizing, one after another, new and different forms of state involvement. The functional equivalence of the white primary to an exclusion of Negroes by law from the franchise is firmly established.66 An admirably intricate ritual dance, including enabling statute, devise, petition, resignation, and judicial acceptance could not keep Negroes out of the largest public park in Macon, long run by the city.67 The use of the judicial power to enforce negative easements against Negro occupancy is forbidden.68 A company town is a town for constitutional purposes.69 A state's lessee, in cases not very clearly defined, may not exclude Negroes from his restaurant.70 If a private amusement park uses a badged policeman to enforce its no-Negro policy, state and private power are so mixed as to bring constitutional guarantees into play.71 A monopolistic bus company, regulated by the state, must respond to the Constitution.72

65 See, e.g., James v. Bowman, 190 U.S. 127 (1903). An indictment charged bribery of Negroes with respect to a federal election. The Court conceded the offense was punishable by Congress, but held the statute cast too wide a net since it included private interference with fifteenth amendment rights in state elections.

An interesting question to the generations around 1910 was whether and to what extent the "state" could be said to be acting when the official acted without warrant of state law. The development is reviewed in Barnett, What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?, 24 ORE. L. REV. 227 (1945); also helpful and clear is Williams, The Twilight of State Action, 41 TEXAS L. REV. 346, 352-55 (1963). In the modern cases, the constitutional issue is inextricably intertwined with a statutory construction question concerning the "under color of law" qualification; see Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). The racial cases seem to hew to the line of Yick Wo v. Hopkins, 118 U.S. 356 (1886), which held discriminatory administration to fall under the amendment's ban. See also Ex parte Virginia, 100 U.S. 339 (1886), discussed by Williams, supra at 352-55. "It has never been satisfactorily explained," said Justices Roberts, Frankfurter, and Jackson, dissenting in Screws, "how a State can be said to deprive a person of liberty or property without due process of law when the foundation of the claim is that a minor official has disobeyed the authentic command of his State." 325 U.S. at 147-48. The answer has to be that the state has put the official where he can do what he does, and that his action must be held that of the state, "or the constitutional prohibition has no meaning." Ex parte Virginia, 100 U.S. at 347. But this makes it plain that the old cases are in some sense in a continuum with the modern state action cases; the conferral of the right of eminent domain, for example, may give the conferee a power as great as that bestowed on a minor official.

69 Marsh v. Alabama, 326 U.S. 501 (1946). This was not a racial case, but the same reasons which lead me to treat the racial field separately (see note 69 supra) would seem to suggest that non-racial "state action" cases would apply a fortiori to racial discrimination.

72 Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (not a racial case, but see note 69 supra).
The characteristics of a doctrine thus lopsidedly pegged out may be seen from many perspectives. The most poignantly discouraging view must be from one of the two perspectives of advocacy. Imagine yourself in the position of the pleader who must contend to the Court, in a modern racial case of some complexity, that the presented set of circumstances does not contain elements of state action sufficient to bring it under the equal protection clause. You really have only one precedent to cite on your side—the Civil Rights Cases. Your opponent, on the other hand, has a whole quiverful of modern cases, out of which he can develop more or less appealing analogies. You must try to distinguish these. They can always be distinguished descriptively. But some of them are pretty sure to be connected, in far from trivial respects, to the case at bar. And you have no fixed point of reference of your own; the Civil Rights Cases opinion, as your opponents keep reminding you decade after decade, speaks delphically to all modern problems—first, because the requirement there laid down is only for state action in some form; secondly, because the opinion can be read as resting on the assumption that state law will protect the asserted right, an assumption false to either law or fact, or both, in most arising cases.

The Court, then, is today not in the position of drawing or even of gradually redrawing lines within limits more or less well marked by prior precedents on both sides—as in, say, the field of "corporate presence," or in regard to the question of how long an import stays an import. It is marking out the inclusions of an open-textured concept already illustrated authoritatively over a long range—from judicial award of damages for the breach of a racial restrictive covenant, to the "encouragement" of segregation by the state's (unenforceably) providing that a restaurant owner, who wants to exclude Negroes anyway, would have to install separate toilets if he should suddenly decide that all men are brothers—a concept, on the other hand, the openness of whose texture is nowhere sealed by authority.

Some ten cases are cited, for example, in Mr. Justice Harlan's dissent in Reitman. In every one of them, except the Civil Rights Cases, the decision or the unchallenged assumption was that the state, in one way or another, had involved itself in the forbidden discrimination. All could in some fashion be distinguished—as every question sometime must, the Reitman question arose for the first time in Reitman. But no case could have been or was cited in which, on facts affording any basis even

73 109 U.S. 3 (1883).
75 109 U.S. at 17. See R. Hale, supra note 19, at 327. Haber, Notes on the Limits of Shelley v. Kraemer, 18 Rutgers L. Rev. 811, 818 n.26 (1964), acutely remarks, "This type of comment [suggesting that the Civil Rights Cases holding may rest on the assumption stated in the text] has been puzzling, because little or nothing in the opinion seems to suggest anything else." See also Silard, supra note 64, at 857.
78 387 U.S. at 387.
for remote analogy with those in Reitman, the Court had held that the state had not involved itself in a forbidden manner. It is an uncomfortable position.

In his Reitman dissent, Mr. Justice Harlan distinguishes Evans v. Newton, citing that case with a neutrality of tone which might lead to the inference that it is pretty thoroughly domesticated in the law. In Evans, however, Mr. Justice Harlan also dissented. Fewer cases are there cited for the purpose of distinguishing them. Marsh v. Alabama is attacked frontally, on the grounds: (1) that it commanded a majority of only five out of eight judges; and (2) that certiorari had later been denied in two cases where application of the Marsh doctrine might have caused reversal. Again, no precedent could be cited for anything like the proposition that "no state action" of a critical significance is discernible when government does what government did in Evans.

Yet Mr. Justice Harlan's Evans opinion contains a passage which well exemplifies a certain tonal quality in the discourse now sounding around the state action "test." Of a "public function" theory of state action (which need not for present purposes be defined, any more than its name defines it) Mr. Justice Harlan says: It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past decisions in this realm." Now, with the greatest respect, there were and are no clear and concrete tests of state action; the concept is notoriously, scandalously lacking in these; it is itself nothing but a catch-phrase. There are no such past decisions binding on the Court; if there were, Mr. Justice Harlan, or somebody, would cite them. The Civil Rights Cases, quite aside from the delphic qualities referred to above, do not by any tiptoeing fancy reach to the issues in Evans v. Newton. The only precedent whose descriptive similarity Mr. Justice Harlan seems to concede — Marsh v. Alabama — appears to be looked on by him, for the rather unorthodox reasons just given, as not of full force. Insofar as it is of force, it is strongly if not decisively against him.

I have singled out this passage to illustrate what seems to me a paradoxical thing about the state action field. Though, in all the modern range of problems, the Court is writing on a clean tablet, overruling no precedents, disturbing no settled doctrine, declaring for the first time

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80 382 U.S. at 315.
82 382 U.S. at 320-21. One of these was Stuyvesant Town, see note 64 supra.
83 382 U.S. at 322 (emphasis added).
84 These "decisions," like the shades met by Ulysses, cling tenaciously to their phantasmal life. Professor Monrad Paulsen says, of Mr. Justice Black's dissent in Bell v. Maryland, 378 U.S. 226 (1964), that it "most easily satisfies ... the demands of the prior case law." Paulsen, The Sit-in Cases of 1964: "But Answer Came There None," 1964 SUP. CT. Rev. 137, 168 (emphasis supplied). "Demands" is a strong word; before evaluating its use here, we would want to know, what "prior case law"? I do not find in the Black dissent itself any "prior case law" that could possibly be said to "demand" the "no-state-action" holding favored in that opinion. I can't find any of it in Paulsen's article, either. "Heard melodies are sweet, but those unheard / Are sweeter . . . . "
the applicability of the fourteenth amendment to novel patterns of racist action, somehow a feeling persists, and is passionately expressed, that massive Doric columns are falling. Connected with this is another feeling, also illustrated in the quoted passage, that the certain is being abandoned for the uncertain, the clear for the unclear — where the truth is that eight decades of metaphysical writhing around the "state action" doctrine have made it the paragon of unclarity. The only thing settled and clear is that "state action" or relevant "state inaction" is necessary, in some quantity or kind, to the invocation of the equal protection clause. As Mr. Justice Frankfurter so well put it, in Terry v. Adams, 85 "The vital requirement is State responsibility — that somewhere, somehow, to some extent, there be an infusion of conduct by officials panoplied with State power ... ."

Every member of the Court has now recognized, it would seem, that the "state action" doctrine is not unitary, and that judgments of degree have to be made in many if not all its branches. Yet even this is far short of the truth. The full truth, as we have seen, is that the last racial case now of authority, in which the doctrine was applied in favor of the racist, is sixty-one years old, that neither that case nor most of its predecessors had any particular connection with or relevance to most if any of the controversial modern problems, that the last case at all resembling any of the modern cases is the Civil Rights decision itself, and that that decision speaks with an inherent, ineradicable ambiguity. There has been a good deal of "deeming," 86 outside the courthouse, but when the Court faces a problem like the one it faced in Reitman v. Mulkey, it has to decide for the very first time, at the focus of unappealable judgment, the question never tendered there before — the question whether the "deeming" (which has usually "deemed" nothing very exact about the case at bar) gives the right weight to social and political reality, to the gearing of law with society — or whether, perchance, it is not a "deeming" which is integrally a part of the same old chronic national acquiescence in racism, and in all the fictions that have protected racism. The year 1883 was a banner year for that kind of deeming; any year now might be a good year for seeing forever the last of it.

The true condition of the "state action" doctrine, be it diffidently said, imposes specific obligations on the Court. Those Justices who discern "significant state action" ought to be more thorough than perhaps has sometimes been their practice in describing and explaining the exhibited incidences of state power, as each new specimen swims into the net — while at the same time making it even clearer that "state action" is not a term of authoritatively and arbitrarily limited meaning, that the task is not that of testing a set of facts against a well-defined (or even ill-defined) "concept," but rather that of noting and clarifying yet another of the wonderfully variegated ways in which the Briarean state can put its hundred hands on life.

There seems to me a perhaps heavier obligation weighing on those,

85 345 U.S. at 473 (1953) (separate opinion) (emphasis added).
86 See P. KAUPER, supra note 63, at 166 (quoted pp. 91-92 infra). Let me emphasize that the "deeming" is not Professor Kauper's, but is only recorded by him.
so far in dissent, who rest their judgments on the conclusion that "state action" in the presented case is not to be found in the requisite form or amount. After all, they are explaining to the Negro community why it is their judgment that reasoned law requires that public racial discrimination be endured. To see the relief asked for by the Negroes in some pending cause as required, say, by Marsh v. Alabama, or Shelley v. Kraemer, may be right, or it may be over-enthusiasm, a blurring. That is always true when precedent is applied to the new problem, resembling in some ways but differing in others from prior cases. But to rest judgment against such relief in any of the modern "state action" cases on settled precedent or clearly established rule is to be flatly, visibly wrong. It should be acknowledged that such a judgment is made upon, and only upon, such considerations as can support the decision that is radically new and that goes, to say the least, against the whole drift of the cases.

As I have remarked, the Court now fully recognizes the vagueness and plasticity of the "state action" doctrine. In Burton v. Wilmington Parking Authority, for example, it was said: 87

Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, 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. Pilot Comm'rs, 330 U.S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

and again, in Reitman v. Mulkey: 88 "This Court has never attempted the 'impossible task' of formulating an infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations."

This state of doctrine will always seem deplorable to some lawyers. But it is a state of doctrine imposed and not chosen. The "state action" concept in the field to which I have limited myself has just one practical function; if and where it works, it immunizes racist practices from constitutional control. Those who desire to practice racism are therefore motivated, even driven, to test it through total possibility; the metaphor of Proteus is exact. And its potential variety is simply the variety of all possible action by that complex entity that is called the state. The commitment of the Court to a single and exclusive theory of state action, or to just five such theories, with nicely marked limits for each, would be altogether unprincipled, in terms of the most vital principle of all—the reality principle. It would fail to correspond to the endless variations not only of reality as presently given, but of reality as it may be manipulated and formed in the hands of people ruled by what seems to be one of the most tenacious motives in American

88 387 U.S. at 378.
life. Such an arbitrary commitment would serve only to instruct racism in the essentials of evasory tactics; it would make the law, classically, "Their perch and not their terror." If it were impelled by anything in authority, or in the nature of the issues arising in life, that were perhaps another matter, but the very contradictory is true on both scores. Such a formula, whatever its foresightedness in statement, would decide in advance hundreds of classes of cases, without focal consideration of the issues they will raise. As long as the "state action" concept is looked to, even pro forma, for significant limitations, it will either remain vague and ambiguous or become arbitrary, losing correspondence to the varieties in life. At this stage of the game, as racism runs about searching for a sheltered place, solution is to be sought not in the clarification of "lines" now vague, but in a radical shift in approach, attitude, and expectation—a shift which one may hope will move the entire profession.

B. Samplings in the "State Action" Literature

On the cases and on the opinions, "state action" is a doctrine in trouble. It is just possible (though it would be an anomaly in our case-oriented legal culture) that rescue might be found in the scholarly commentary. But day breaketh not in that quarter of the sky. The modern literature of state action, insofar as I have gotten around in it, chimes faithful answer to the cases. I do feel diffidence about uttering summary characterizations on work which I respect, and which has aided me. Surely I shall make mistakes; I hope they are not such as mortally to flaw my inferences, and that some readers will correct them by checking after me in the helpful works I shall mention. My aim is not to summarize (much less to discuss and evaluate) all the points and suggestions made in this literature. I am interested only in the symptomatic indications it contains; what future does it seem to promise for the state action doctrine?

The literature of "state action" is the literature of a non-concept. There is a large amount of it, and a surprising number of articles seem to come to much the same conclusions. I shall notice Kauper, Lewis, Horowitz, Van Alstyne and Karst, Williams, and Henkin.

Professor Kauper's carefully conducted tour is probably the most helpful thing in print for one approaching "state action" for the first time. The picture he draws is precisely the one expectable, in view of what I have said about the case law. What is settled is only the highest level generality—the amendment deals with "state" and not "private" action.

Before the Equal Protection and Due Process clauses can be invoked, it must be demonstrated that the state has in some way made itself a party to the denial of a constitutional liberty. But this distinction between public and private action is not as substantial as might at first appear. Indeed, only a thin wall separates them in some situations.

80 Shakespeare, Measure for Measure Act II, Scene I, l. 4 (G. Kittredge ed. 1936).
81 P. Kauper, supra note 63, at 127-66, 166; see note 86 supra.
We have in recent years witnessed a development whereby—through the branding of lawless acts by state officers as state action, the expansion of the instrumentality idea, the application of constitutional limitations to private persons exercising power in areas of state responsibility, and the recognition that judicial enforcement of private contract and property rights brings constitutional restrictions into play—progressively greater areas of conduct, at one time deemed private, have been brought under constitutional scrutiny. A notable functional feature of this broadened concept of state action is that it has served an important purpose as part of the total movement for securing equal rights for Negroes. The basic theory of the Civil Rights Cases continues unchanged, but the interpretation of this theory in recent decades reveals again that in the field of constitutional law, as in all areas of law, significant developments and changes are obscured by formal adherence to old formulas.

"Deemed"? Well, who can answer for deeming in pais? But "held"? The careful work of Thomas P. Lewis does not summarize easily. But it would be instructive to quote in full a paragraph near the end of his chief article: 91

The concept of state action, a helpful concept in the division of responsibility between the federal and state governments, need not be a rigid one. It does seem true, however, that it can exist as a meaningful concept only by adherence to some principles that mark its limits. The so-called "expansion" of the concept has been very slight. Only those "private" interests that have been involved in a governmental function or have exercised extraordinary powers under law have been identified with the state. Unless the Court overrules the Civil Rights Cases the next question seems to be whether the Court can and will find a general principle to support expansions of the concept into some areas of ordinary nongovernmental effort.

This is now about the best that can be said, by a thoughtful writer, about the "state action" doctrine. It is not much to say. Adherence to "some general principles" is recommended, but what are these, and how are they to be warranted? "Very slight" seems a remarkable understatement for Terry v. Adams, 92 Shelley v. Kraemer, 93 and Marsh v. Alabama, 94 unless Professor Lewis means (as I fear he does not, though I would agree with him if he did) that no posted "limits" preexisted those cases, for the purpose of being expanded. Nothing in the article which this summation concludes has at all shown why or how, or to whom, the concept has been in any degree "helpful"; it has been presented, true to life, as a string of conundrums, not of solutions.

So much of the commentary of this type, though thoughtful in its way, seems to me thoughtful about the wrong questions, because of insufficient probing of the assumption which makes necessary or relevant the questions being asked. I can select, as an example of this, Lewis's long comment on Burton v. Wilmington Parking Authority. 95 He takes

91 Lewis, supra note 74, at 1121.
92 345 U.S. 46x (1953).
93 334 U.S. x (1948).
94 326 U.S. 50x (1946).
the Court to task for not having furnished "guidance" to "the bar and the public" with respect to the extent to which government lessees must abstain from racial discrimination — which circumstances, in addition to the leasing itself, bring their practices under the fourteenth amendment. But the striking thing is his acceptance, without fully critical examination, of the assumption that such a "limit" must exist somewhere around this point — that facts and circumstances in addition to leasing must be necessary. If a governmental unit leases its property to a private individual, it puts that individual, by its own affirmative act, in a position of being able to discriminate racially with respect to that property. It is surely to be charged with notice, in our semi-racist society, that such discrimination is a live possibility. It has ready in its hands the most obvious means of preventing this result — a covenant in the lease. How, in a principled manner, is it possible to hold that "no significant state action" has facilitated the resultant discrimination, unless "significance" is a mere conclusory term, labeling a result reached on grounds other than a finding of "significance" in any colloquial sense? What relevance to the causal tie, between "state action" and the resultant discrimination, is to be found in such matters as the "purpose of providing a particular facility"? Do such suggested criteria really derive from the fourteenth amendment's language? From past cases of authority? If not, where do they come from? They do not arise ex necessitate; it is quite thinkable that no state lessee be allowed to discriminate; indeed, if this result were to be attained by laws, ordinances, and covenants, I suppose we should all applaud it. Do they originate in sound policy? If so, how would you state the policy, and how establish that it outweighs the rather obvious countervailing policy? If you say that the simple general rule would make leasing more difficult for the state, are you not saying that the state proposes to profit from racial discrimination? Are these lines to be spun out only that there may be lines?

For a first sample of a more radical type, we may turn to Harold Horowitz's admirably clear short article, now ten years old, with the significant title, The Misleading Search for "State Action." Horowitz says, in effect, that state action always enfolds private action, because the state always attributes some legal significance to private action. He then suggests that, in every case, analysis should concern itself not with the presence or absence of "state action," but with the constitutionality of that "state action" which is always present. A number of cases

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90 Lewis, Burton v. Wilmington Parking Authority — A Case Without Precedent, 61 COLUM. L. REV. 1458, 1463 (1961). I pretermit the question of what segments of the bar and public are waiting to be told what you have to do to lease state property and still keep Negroes out.


98 Horowitz, The Misleading Search for "State Action" Under the Fourteenth Amendment, 50 S. CAL. L. REV. 208 (1957). These titles themselves tell a story. As early as 1948, a note could be entitled, The Disintegration of a Concept — State Action Under the 14th and 15th Amendments, 55 U. PA. L. REV. 402 (1948). Says the author, the "extension of the concept . . . has rendered impossible the . . . use of the concept as a guide . . . ." Id. at 412. See also Williams, supra note 65; Silard, supra note 64.
are then analyzed in terms of the practical effect of the state's immunization of conduct. For example, the state's granting to the landlord the right to discriminate is "state action." If he is a small landlord "this is probably constitutional state action . . . ." 99

But at some point the action of the state in making racial discrimination privileged by a "private" owner of a number of apartment houses may perhaps become a "denial" of the equal protection of the laws, if housing is in short enough supply and the apartment houses are large enough, so that the effect on the Negroes' opportunity to secure housing without discrimination because of their race approach the degree of effect which the company town's regulation in *Marsh v. Alabama* had on the liberty of press and religion of the Jehovah's Witness.

Horowitz does not fully argue his position, but his paper is noteworthy, because it first disposes of state action as a concept incapable of drawing any lines, then proceeds to substitute for it, in the line-drawing function, a new concept of a practical cast. This is the paradigm of much modern thought on "state action."

A 1961 article by Van Alstyne and Karst 100 is far more complicated. Yet it seems fair to say that it, too, would jettison the "state action" test in all but name. As I read it, after pronouncing the "traditional state action doctrine . . . unsatisfactory as a guide," 101 it proposes attention instead to interests actually at stake. Many hypothetical examples are explored. The point of the discussion of all of these seems to be that the application of formal "state action" tests are irrelevant to sound decision.

Professor Jerre Williams in an article with another highly significant title, 102 helpfully reviews recent developments and finds it clear that "the sun is setting on the concept of state action . . . there is no formula . . . . The issue must become one of the merits of accommodating the interests, not one in the nature of a formula which is irrelevant to the interests involved." 103

Professor Henkin, in his much-cited article on *Shelley v. Kraemer*, 104 narrows his focus to cases wherein the sole ground asserted for a finding of "state action" is that the state is enforcing the "private" discrimination. He then takes *Shelley* quite literally, and proposes that every such case — every case in which state power is used to enforce any racial discrimination — shall be held subject to the *Shelley* rule. This would take the "state action" concept a very long way; it would be clear, for example, that "state action" was present when sit-inners were convicted of trespass, after refusing to obey an order to leave given by a store-owner on racially discriminating grounds.

"State action" would seem, equally clearly, to be present in the conviction of a trespasser ordered to leave by a racist home-owner — the horrible case so often conjured up by critics of *Shelley*. But there is, says Henkin, a "small area" of privacy protected by other constitutional

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100 Van Alstyne & Karst, *supra* note 6.
101 *Id.* at 7.
102 Williams, *The Twilight of State Action*, *supra* note 65.
103 *Id.* at 389-90.
104 Henkin, *supra* note 19.
provisions; these latter are of sufficient weight to overbalance the "equal protection" claim. This "small area" would generally be the area in which the state could not constitutionally prohibit discrimination; where it may not prohibit, it may enforce it by the legal process.

It is evident that this treatment of Shelley v. Kraemer, freeing it to grow, would radically alter the "state action" field. It is hard to think, in the end, very much would be left of the "state action" doctrine as one actually drawing a line, for it seems inconceivable that society could live with an asymmetry which forbade enforcement (say) of racial restrictive covenants but allowed neighbors to abate Negroes as nuisances, or which reversed Negroes' convictions as sit-inners, while allowing proprietors to throw them out, or even, in a proper case, to shoot them. I do not understand Professor Henkin to advocate such a solution. What one can say for sure about the article (and herein lies its great importance and merit) is that it follows the Shelley doctrine, at least, all the great way that doctrine leads, and then puts reliance for sensible limitation on other methods than the dimming of sight as to obvious "state action."

The commentary I have thus briefly sampled distils much reflection and thought, and its authors are not chargeable with what they neither made nor can help. Taking it as a whole, what we see exhibited is a "doctrine" without shape or line. The doctrine-in-chief is a slogan from 1883. The sub-doctrines are nothing but discordant suggestions. The whole thing has the flavor of a torchless search for a way out of a damp echoing cave. And some writers—Henkin, Horowitz, and others—seem to be saying that the way out, that the thing we have to do, is to register and acknowledge "state action" when it really appears, which is usually if not always, and then to rely for limitation on other doctrines and techniques. The commentary confirms the inferences we would draw from the decisions. The field is a conceptual disaster area; most constructive suggestions come down, one way or another, to the suggestion that attention shift from the inquiry after "state action" to some other inquiry altogether.

III. The Future of State Action

Here, then, we have to do with a "doctrine" which is little more than a name for a contention that has failed to make any lasting place for itself as a decisional ground, and that has failed of intellectual clarification. Almost everybody who writes about it insists on its multiple vaguenesses and ambiguities; it is a map whose every country is marked incognita. It now exists principally as a hope in the minds of racists (whether for love or profit) that "somewhere, somehow, to some extent," community organization of racial discrimination can be so feitly managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden.

It is nevertheless a forecast of high probability, and great importance, that the Court will continue for a while to use "state action" to analyze

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105 Id. at 498–500.
cases of racial discrimination in which the very decision to discriminate cannot be shown to be that of a state agency or official. This could be harmless or harmful, depending upon the set of mind with which each new case is approached. If the canon is that state involvement factually “significant” is enough, and that such involvement may be as various in kind as are the different ways in which the vast organization that is the state, reaching everywhere, can sanction, foster, support, and immunize racial discrimination, no great harm need ensue. If, on the other hand, a Court majority should even once come to be captivated by the fascination of spinning out intricately conceptualized subtests, a *Carter Coal* case\(^\text{107}\) might come down, and have to be struggled against until at last overruled.

A flexible and realistic view may be recommended and anticipated, on three grounds. First is the present state and recent history of the doctrine in the Court. The decisions have been strongly marked by receptivity to new insights into the practical relations of state power to life. Secondly, a look into the middle-distance future ought to encourage the hope that views on the content of “equal protection” will one day undergo a qualitative change, carrying the line of possible doubt far beyond cases now looming; this forecast in turn might be partially self-fulfilling, for it might legitimately diminish, right away, the feeling that a limit is being strained when a case like *Reitman v. Mulkey* goes as it did. Thirdly, a poster on the wall in every seminar room (dare one add, “conference room”?) where “state action” is under discussion, should bear the words: “Fear not, but be of good cheer. Even if the state action doctrine should prove unuseable for drawing any sound line, it is warranted and feasible to limit the incidence of the fourteenth amendment on the private life, by interpretative doctrines actually fitted for this work.” I have said enough about the first of these; I will say a little, here and in the next section respectively, about the other two.

No scholarly or judicial contentment has been attained with respect to the drive and goal of “equal protection of the laws”—or, therefore, with respect to the ambient of broad social assumptions surrounding each particular case or field in which the “state action” problem is presented. Instead, a dangerous bivalence appears. Cases and problems are often reasoned about, in some of the scholarly commentary and in some dissent, as though the broad postulate were that governmental involvement should be acknowledged most sparingly, and only in cases too like cases already decided for the authority of these to be avoided—as though the extension of the “equal protection” concept were an evil, or at least a thing fraught with great perils, and so to be shunned when technically possible. This is the only attitude which could produce contentment with the mere distinguishing of prior cases as an affirmative ground for decision. Meanwhile, the decisional line marches in just the opposite direction, and one may at least hope that a component

\(^{107}\) *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There, with baleful consequences, the Court drew the distinction between the “direct” and the “indirect” connection of economic activity (factually of high national importance) with interstate commerce.
in public and professional feeling is uneasy about "equal protection" if, as a net matter, a polity does actually run, for example, a slum-ghetto regime.

The first of these attitudes (though I dare say not consciously in most cases) is nothing but the last unexpunged clause of our long settled gentlemen's agreement about racism. The Civil Rights Cases are cut off the same bolt of historical cloth as Plessy v. Ferguson. All must assent to the syntactical truism of the Civil Rights Cases. But there is no other warrant than will for turning that truism into a productive assertion about new problems, into a powerful presumption that the requirement the truism states is not met, as new patterns of state action are spread out. It is time for a fresh beginning.

What, then, is the anticipable reach of the "denial" of "equal protection of the laws," to one race as such? I believe that, in the end, there will be found no principled stopping-place short of this: If one race is, identifiably as such, substantially worse off than others with respect to anything with which law commonly deals, then "equal protection of the laws," is not being extended to that race unless and until every prudent affirmative use of law is being made toward remedying the inequality. When we try to define the reach of Congress's power under the commerce clause, we find that sheer growing insight into economic causation makes it impossible to draw a principled line short of Wickard v. Filburn; we cheerfully own that the framers would have been astonished, but their general words and the form of relations within the polity to which they gave its original mold are held to control their particular expectations as these cloudily appear or may be guessed at.

As we reflect more exactly and deeply in every decade on the involvements of governmental power with racial discrimination,

108 109 U.S. 3 (1883).
110 317 U.S. 111 (1942), holding that Congress may regulate the growing of wheat even for one's own consumption, since such activity bears an economic relation to the price of wheat and to its movement in commerce.
111 Lacking professional qualifications, I have not attempted in this discussion to broach the many and probably at last not precisely soluble historical problems of "original intent." I would rest on the point on which I take it the doctors do not disagree—the point that, wherever may have been the focus and center of 1868 expectations, the obstetric history of the equal protection clause was not such as to inhibit growth. As Alexander Bickel implies, a canon of limitation to the narrow "intent" of 1868 would make erroneous the very first decisions—those on jury service—applying the amendment to Negro rights; such a method would prove what at this late date we are bound to think too much. Of the segregation decisions, Bickel concludes that "the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the Union in 1954, not 1866." A. BICKEL, POLITICS AND THE WARREN COURT 211, 261 (1965). As Herbert Wechsler says of the clause, "the words are general and leave room for expanding content as time passes and conditions change." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 32 (1959). Such change, I should think, may be just as legitimate with respect to the affirmative implications of an obligation not to "deny" equal protection as it thus confessedly is with respect to the substantive interests protected. Mr. Justice Clark's opinion for the Court, in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), implies as much. The developments march parallel; indeed, one may often be described in terms of the other. In this sense, as in so many others, a breakthrough to general acceptance of an expansive concept of state action would but complete the work half-done when the "separate-but-equal" fraud was repudiated.
we find, and we are going to find even more, that no line can warrantably be drawn at any point short of the discernment that racist regimes, and widespread racial discrimination, live within law, that they do not exist unless tolerated and sanctioned by law, and that equal protection of the laws against racism is always "denied" if law — including even the law of revenue and appropriation — is not being used to eradicate racial inequality.

Law is a resource to be husbanded, and no state can at any one time act in every imaginable way to extend equal protection. The discernment of a constitutional obligation resting on the states to quest after practical racial equality, would not necessarily imply a full set of corollaries concrete enough for judicial action. In some of its reaches the obligation might have to remain only a great moral duty created by the Constitution, as the extradition clause created a smaller one. But such a strategic view, if accepted, would at least furnish a new frame for tactics and a fresh perspective in which to perceive those cases that can be dealt with by judicial remedies. State involvements such as those in Reitman and in Evans v. Newton could be seen — as I think, on the long view, they ought to be seen — as state action falling so very far from fulfillment of the "equal protection" obligation as to stand unquestionably under the constitutional ban, rather than as close cases on the issue of "significant" state involvement.

When we think of the next hundred years, we have to ask ourselves the question that rises to the solemnity of that lapse of time. Law will envelop and support and shape our society during that century. If at the end of that century, it is still a thing to be told in every traveler's tale that American Negroes are in poverty and misery, if they are still in fact discernibly disadvantaged because of their race, and if during that century the states have maintained legal regimes which did not put forth all reasonably possible affirmative effort to relieve this suffering and practical subordination, are our descendants going to be able to say that the century has been marked by "equal protection of the laws" for Negroes? A hollow and formal "equality," perhaps, if carefully enough defined in categories thereunto devised by the discriminators. But "equal protection"? Will they be able to tell themselves that the state has had no "significant" part in inequalities which have thriven under the regime it maintains and guards, and which have enjoyed the immunities mathematically reciprocal to its abstentions? Grounds so "narrow and artificial" may do for the first century of "equal protection." Will they do for the second? Mr. Justice Holmes said of Mr. Justice Harlan the elder, the author of the Civil Rights Cases dissent, that he had a mind like a powerful vise, the

112 In re Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861). See also Mr. Justice Strong's remarks on section 1 of the fourteenth amendment, in Ex parte Virginia, 100 U.S. 339, 347 (1880). Even though there is no longer any "room for argument that the first section is only declaratory of the moral duty of the State," (emphasis added), there is still room for the argument that the section imposes moral duties beyond any possibility of judicial enforcement; the discernment of these might make the judiciary less uneasy in enforcing what it can enforce.

113 382 U.S. 296 (1965).

114 Mr. Justice Harlan dissenting in the Civil Rights Cases, 109 U.S. 3, 26 (1883).
jaws of which could not be brought closer together than two inches.116 But must we not more fearfully beware, in the centuries-long building work of constitutional law, of choosing a vise whose jaws are exceeding fine, but cannot be gotten far enough apart to hold the big beams?

One sometimes senses in the air an inarticulate major premise that the “equal protection” obligation defines a kind of game, in which the object is for the state to see what it can get away with. If all a state has to do to avoid being tagged with a “denial of equal protection” is just barely to be absolutely “neutral” as between Negroes on the one hand and on the other those who want to isolate them, then the rule of the game is that we must search the record each time to find some way in which more — “significantly” more — has been done. If that is the game, then Reitman illustrates a state’s failure to win, I think, but not, concededly, by a mile. A little more “neutrality” next time, a little less obvious favoring of the discriminator, and who knows? As long as that is the game, what we can look forward to is a succession of cliffhangers.

But whoever said that was the game? And why should it be the game? If, on the other hand, the obligation not to “deny equal protection of the laws” ought to be looked on as an obligation even to make the most obviously cried-for use of law to remedy the most crushing practical inequalities, and even if judicial enforcement of this affirmative obligation be conceded arguendo to be infeasible, then the rules of the game in a case like Reitman altogether change. The state in Reitman, on even this modest view of what it means to “deny equal protection,” is far from any borderline.

I earnestly believe that some such spacious view as the one I have outlined of “state action” or, better, of “denying equal protection” is the only one that will in the end be found adequate to the realities of law’s involvement with life and to the claim on liberal interpretation which should be conceded to the equal protection clause. There is, however, an alternative view, in the nature of a lesser included case. That is the view that where overt and affirmative racial discrimination appears, or where a discrimination appears which is practically racial in its main incidence, and where a state’s legal regime makes this discrimination lawful, with all the aids incident to lawfulness, the state has “denied” equal protection of the laws to the victim race. I will not support this view at length. I will only say that we come here to a point where the state’s option is forced; it must support either the discriminator or the victim. Its legal system must and does make this election, and the submission is that the choice for the discriminator ought to be looked on as a prohibited failure to protect the victim.

There is still a third possibility — again a lesser included case — and it seems to me the absolute minimum. This formula would concede (though I think unsoundly, and in the end meaninglessly) that state “neutrality” is barely possible and that neutrality, where attained, isolates the racial discrimination from state power. But it would qualify

this neutrality obligation as one uberrimae fidei, one calling for the most scrupulous abstention by the state from any special contact or connection with the discriminatory practice, other than the merest failure to make it unlawful. The state action cases in the Court may be moving toward such a rule as a minimum. I cannot think why the litmus paper that tests for the corrosive acid of state supported racism should be any less sensitive than this.

Acceptance of any one of these general postulates would freshen the air and make possible a consistent approach to “state action,” unhaunted by the restless ghosts of assumptions now untenable in robust life. The acceptance of any one of the three would make obvious the right decision in every state action case that has reached the Court in modern times.

It is desirable to add two qualifications, one a matter of doctrinal housekeeping, the other a reservation so important that I keep it for a separate heading.

As to the housekeeping, no one, so far as I know, is proposing that the “state action” requirement be dropped. I, surely, am not. The point is not that the equal protection clause does not forbid states, and only states, from “denying equal protection.” The point is, rather, that time and thought will make it even clearer that this requirement is always satisfied in the case where substantial racial discrimination is tolerated. To state a criterion is not to ensure that it will draw a useful line, that real cases of weight will fall in some numbers on either side of it.¹¹⁶ This is especially true when the criterion is not stated as such, but is taken by implication from one term in a complex phrase whose emphasis lies elsewhere.

A. “State Action” and the Private Life

I have already made the point in another connection, but it must be said over and over again, until it comes to be thoroughly understood everywhere, that expansion of the “state action” concept to include every form of state fostering, enforcement, and even toleration does not have to mean that the fourteenth amendment is to regulate the genuinely private concerns of man.

I think this is what people are really afraid of. The answer is obvious, for it arises out of the very nature of the problem once the trouble is accurately located. If what is feared is the intrusion of the fourteenth amendment into the private life—the really private life, not the “private” life of lunch-counters, housing developments, community swimming pools—then the thing needed, if by any fair means we can have it, is not a doctrine of “state action” unresponsive entirely in terms and only crudely and fitfully responsive in application to the

¹¹⁶ Consider the situation that grew up after Betts v. Brady, 316 U.S. 455 (1942), holding that the states must furnish counsel to the accused only where special circumstances make lack of counsel unfair. It appeared, soon enough, that to be poor, and charged with serious crime, were circumstances which always made the lack of professional help unfair. The Court finally so held, Gideon v. Wainwright, 372 U.S. 335 (1963). See Mermin, Computers, Law, and Justice: An Introductory Lecture, 1967 Wis. L. Rev. 43, 83–85.
required distinction, but rather a substantive rule of reason operating in the interpretation of the equal protection clause, a canon which fences off this authentically private life from the clause's application. If we could envisage the possibility, even, of committing ourselves to that, and of its being worked out rationally, then we would know ourselves to be ready, if need should come, to begin on the work of clarifying the thing that really needs to be clarified; in the meanwhile, in the cases which in fact involve no such values, we would not have to proceed so fearfully.

Much of the modern scholarly exploration of the "state action" field converges on this point. Henkin, for example, as we have seen, proposes that we accept *Shelley v. Kraemer* at its face value as a seminal case, but that we delimit its application by shielding therefrom certain areas whose unamenability to the equal protection clause seems implied by other parts of the Constitution.117 I would agree as far as the thesis goes — and, if *Shelley* be first correctly stated and then read as a broad leading case, it goes a long way. But it would seem that both components of the thesis could be generalized. The Court ought not to feel hesitation about registering the significance of all governmental actions, including inactions, in sanctioning racism, whether or not these happen to fall into sound analogy with *Shelley v. Kraemer*. Once the unjustified attitude of sparingness is given up and the matter looked at freshly, it will, I think, be hard to conclude that the state is not significantly involved in all widespread racial discrimination. But at the same time if any litigation threatens authentic privacy the Court ought firmly to say that the clause is to be read as not applying at all to the functionally private life, the private life which people really do, in general, expect to live privately — whether or not a strictly constitutional immunity covers the part of that life concerned.118

The "if" is a big one. No Negro, as far as I am aware, has ever tried to use constitutional law to get into any living room or private club or pool. No suit is of record in which the prayer was for a mandatory injunction that a dinner invitation issue. The leading cases in the Court, and the mill-run of cases around the country, have been and will certainly continue to be cases where the problem is in the public life of the community — in the prevailing policies of restaurants, in the structuring of neighborhoods, in the calling for books at the loan-desk, in the casual swimming of strangers past one another in some large pool, in the shouting of "fore!" down the fairway that used to be "municipal."

Henkin's suggestion — the limitation of the fourteenth amendment when it collides with another constitutional guarantee — seems to me a good one. I think much might also be made of the idea that "equal protection of the laws" means "protection toward the end of equality,


with respect to those matters with which law commonly deals." Law deals abundantly with the character of neighborhoods, with the obligations of restaurants to serve, with the management of public parks, with the conduct of common carriers, with picketing and parades, with schools. Law does not, in our legal culture, commonly deal with dinner invitations and the choice of children's back-yard playmates.

It would be absurd to think that all applicable or helpful doctrines could now be sketched in detail, that all reservations could be neatly limned, that an answer could be firm to every question. Like "due process," like so very many other legal concepts, the concept of authentic privacy would have to find its solutions, clarify its rules, as it went along. The only thing important at the present stage is the perception that some such doctrine, substantively limiting the scope of the amendment so as to shield the private life that is really private, is warranted, and generally feasible of development. Underlying all other considerations that justify this perception, is the one that provisions such as the equal protection clause must be and ought properly to be read within the assumptions of a whole civilization. It is not a warranted assumption of our civilization that a lunch-counter proprietor will practice a general choosiness about his customers, or that the law is expected to leave him alone in this regard. If the equal protection clause limits his "freedom of choice," it limits something which people in his position do not ordinarily think about until the Negro comes in and something which has frequently been limited by other kinds of law. If the equal protection clause were held to apply to his dinner-list at home, it would be breaking in upon a process of discriminating selectiveness which has the flesh-tones of real life; it would be doing so in a manner quite unknown to prior law and astounding to his expectations as to the ambit of law, constitutional and otherwise, in our society. It seems to me that considerations such as these would fully warrant the development, if cases ever arise, of the suggested "rule of reason." The social

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119 Representative Lawrence of Ohio, in 1874, expressed this point in discussing the equal protection clause:

The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of laws. What the State permits by its sanction, having the power to prohibit, it does in effect itself.

When it is said 'no State shall deny to any person the equal protection' of these laws, the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws. The word 'deny' must include an omission by any State to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A state which omits to secure rights denies them.

2 Cong. Rec. 472 (1874) (emphasis added).

120 For the best discussion of this, see Lewis, The Sit-in Cases: Great Expectations, 1963 Sup. Ct. Rev. 101, 144-45.

121 It remains a wonder that so much emotion about the sacred right to choose one's customers could be generated and maintained in communities where segregation laws and ordinances, drastically limiting freedom to choose customers as well as other associates, were so long a matter of course. A good night's sleep after the Brown case, and one woke to find that a restaurant was just like a home.
reality of the general distinction projected also vouches for the feasibility of its being drawn.

Of the very considerable uncertainty which would attend the delineation of the shielded area, one ought not to have to say anything. But in this field, every "it" must be crossed, and I will say three things. First, I hope I have adequately reminded the reader that, on this score, there is no question of substituting the nebulous for the precise. The "state action" concept has no clarity of line; no fresh start could do worse on the score of precision. Secondly, no statement of concepts separating the public from the private life will ever eliminate the penumbra wherein decision will have to feel its way; does anyone think sound law can get rid of such areas? Thirdly, when we assess the undesirability of an interim of uncertainty, or of tolerating a permanent penumbra, we ought to reflect that the only conduct which might thereby be made of doubtful legality would be racial discrimination in some sphere at least arguably within the public life. There would never be any doubt about the many unequivocally private situations which march in the parade of horribles that is led out whenever one proposes a liberal view toward acknowledging state involvement in racism.

B. Certain Institutional Considerations

Still, in the foreseeable short future, the main work of the Court is apparently going to be that of pronouncing seriatim on the "significance" of various state actions supporting racism. I have recommended, I suppose, something like judicial activism in the performance of this task. It might not be amiss, therefore, to say a word about the application, to this field of judging, of the standard general objections to judicial activism in the enforcement of constitutional guarantees.

One general point, frequently—I had almost said chronically—made, asserts the incapacity of judges to bring the requisite expertness to bear on the sorts of judgments necessary in constitutional adjudication. As to concrete cases and fields, this point more often than not seems to me ill taken; constitutional adjudication, as it requires bringing into range facts and concepts from many different fields, calls for the skill of the generalist, the specialist in communicating with and understanding the work of substantive specialists. The lawyer, I should think it plain, is the nearest thing to the trained generalist that our culture produces. But, however this may be, it can hardly be gainsaid that the skilled lawyer is the best man around for exploring and keeping straight the relations of governmental action to formally private action. The analysis of these relations, in all the modern state action cases, is predominantly and centrally lawyers' work.

Nor would there seem to be, in the run of state action cases as they come through the mill, any occasion for "deference" to a prior judgment by some other authority. The prior judgments in these cases are at two levels. Immediately incident upon the disadvantaged Negro

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is the judgment that he shall be discriminated against; in this "judgment" the state as a formal matter is claimed by itself and by the discriminator to have no part and no interest; indeed, the whole scheme falls without more unless that is assumed to be true, or, more accurately, to be a thing which the discriminator, or the state, may not profit from denying. The second "judgment" is that state power is not so related to the private discrimination as to wire in the fourteenth amendment. There is commonly no reason to assume that the political organs have made any judgment on this. For example, the trespass laws in the sit-in cases are presented as being of total generality, only accidentally applying to sit-ins. The question of the constitutionality of their application under the equal protection clause is supposed never to have come into focus. Insofar as this is true, no prior judgment on the "state action" issue exists to be deferred to. Insofar as it is not true, the racial application of the purportedly "general" statute is purposive, and a judgment that such application is immunized from the Constitution is correspondingly suspect — and, indeed, substantively weakened. The judgment of the legislature on the immunity of nominally "private" actions, performed under mere general immunities created by itself, is moreover unrelated to any judgment of expediency on which deference to the legislature is maximally appropriate.

Nor is it always the legislature whose judgment is at stake. Often the "general" rule invoked to uphold "private" discrimination is one of common law, and the only judgment on the federal constitutionality of its application to the racial problem will have been that of lower court judges, fully reviewable without embarrassment of any kind. The situation is really much the same when the questions have been questions of the construction and application of old statutory material of a general cast, for in such a case it is usually certain that the legislature enacting the law never had any reason to face the state action question.

Moreover, it will not do to forget that in the very large majority of cases the general confrontation is between action by one of the states on the one hand and, on the other, the Federal Constitution. Justice Gibson and James Bradley Thayer, the nineteenth century voces clamentium in deserto to make straight the way of judicial passivism, were each respectively crystal clear on the inapplicability of his cautions about judicial review when it came to that kind of confrontation.\(^{123}\) I am sorry to say that, even when speaking of these men with a reverence precisely engendered by the doubts each cast on the propriety of judicial activism, their modern admirers seldom allude to these immensely significant reservations of theirs, and sometimes, it seems to me, do not themselves sufficiently attend to the evidently sensible distinction made.\(^{124}\)

I have dealt with this question abstractly. Few of us, I should

\(^{124}\) The late Judge Learned Hand, in THE BILL OF RIGHTS (1958), discusses the legitimacy of judicial review, and the limits upon it which he would derive.
think, doubt that, when the historians work the period over, they will not be puzzled, for example, by the South Carolina legislature’s reasons for passing a stiffer “general” trespass-after-warning law just in 1960. Nor can it really be doubted that no state legislature possesses, institutionally, any capacity for shaping sound judgments on the subtleties of “state action.”

A vague intuition of the suitability of “judicial deference” to political judgments may be an explanation (alternative to the projection of nonexistent clearly defined concepts and binding precedents that give warranted concrete shape to the “state action” requirement) of the puzzling feel, which we have seen to surround this subject and to find passionate expression in some dissents, of limits being overrun, of viae antiquae abandoned to grass. But this alternative explanation will not parse either, and attitudes based on it are as inappropriate to reality as are attitudes based on the imagining of clearly blueprinted “state action” concepts ancestrally given. Institutionally, as doctrinally, the Court is here in an area of maximal freedom, an area in which it may and ought to decide forthrightly on the basis of its own discernments of the endless varieties of “state action” and “state inaction” in their profound (if at times artfully buried) connections with racism.

At a deeper level, “judicial deference” to other authorities in matters of racism seems to me to rest on a tragically mistaken evaluation. We ought not to be deciding which branch or organ of government is most nicely suited to dealing with this problem; we ought to be using every governmental power to its fullest extent, straining every resource we have to deal with it.

I have thus far emphasized the role of the Court in the process of developing receptivity to the varieties of “state action,” and even of working out a new frame in which particular questions can be placed. But, of course, a liberating perception of the “equal protection” obligation would leave much work, as well, to other institutions of government. It would suggest a free creativeness to the state legislatures, and a spacious view of congressional power under section 5 of the fourteenth amendment.

from the mode of legitimation he thinks necessary, in Marbury v. Madison terms; then he proceeds to pick examples quite at random as between cases of the Marbury type and cases involving the federal constitutionality of state acts. Even my colleague Alexander Bickel seems to me to dispose far too easily of this distinction; he, too, discusses the legitimacy of review in a Marbury v. Madison frame, and then disposes very briefly of the state problem—though the fields he later travels over preponderantly concern review of state acts. A. BICKEL, THE LEAST DANGEROUS BRANCH 33 (1962). The difference deserves more attention than that, most obviously because, if what you are worrying about is the “democratic character” of judicial review, you have to meet the point that Congress, since 1789, has shown nothing more clearly than its adherence to the policy (implemented in jurisdictional statutes) of federal judicial review of state acts for their federal constitutionality. Nothing about the American government has better national democratic credentials. Knowing the risks of expressio unius, I hasten to add that I think review of federal legislation also has credentials importing both de jure and “democratic” legitimacy—but that is another, and a wearingly reiterated story. See the excellent brief discussion of the “democratic character” problem by Martin Shapiro, in his LAW AND POLITICS IN THE SUPREME COURT 45-46 (1964).

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On the latter point: The judiciary can and should deal with discrimination accompanied by state neglect of the protection obligation, and, strongly a fortiori, with cases such as *Evans v. Newton*126 and *Reitman v. Mulkey*,127 where highly significant affirmative involvements of the state in the discriminatory course of conduct are visible. A point will be reached where the weight of the problem shifts to the question whether a prudent use is being made of the resources of law to afford "protection." With issues in this area, Congress is especially well equipped to deal. If Congress, judging on the larger situation, concludes that state "protection" of an interest going to the life of "equality" is inadequate, is unreasonably short of prudently assessed possibility, "appropriate Legislation," under section 5, might be the furnishing of a supplementary or substitute set of remedies.128 There is no warrant for erecting a set of artificial limitations on this legislative power. It should be measured with the same measure as other congressional powers, express or implied.129

"The possibility of national legislation to enforce lunch-counter integration is so remote that a discussion of it is largely academic."130 These words were published some thirty-eight months, more than a thousand but not as many as fifteen hundred days, before President Johnson signed the Civil Rights Act of 1964, having staked his political head on putting it through. The possibility of national legislation to enforce the guarantee of equal protection, under that name, by supplying efficacious protection, is now so remote that a discussion of it is largely academic. So be it; it is the best work of the legal academy to discuss ideas a thousand days, or even longer, before their time has come.131

I suppose, under the rubric of "institutionalism," one ought to say a word about the suggestion, which flits through the commentary,132 that respect for the values of "federalism," or "localism," is not properly shown when the Court uses a sensitive galvanometer to detect the currents of state action.

The issue suggested, I take it, is one of policy, and the empirical

131 See P. KAIPEL, supra note 63, at 131. See also Professor Cox's excellent treatment The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91 (1966); and (on this point and generally) Peters's thoughtful work, supra note 20.
132 Carl, supra note 117, at 455.
133 I here venture the unkind conjecture that reluctance in some quarters about the pushing of section 5 legislation squarely based on a very broad view of the "state action" requirement derives not from a fear that such legislation would be held unconstitutional, but rather from a fear (very well grounded indeed, I should think) that it would be ringingly, even gratefully, upheld, with all that that would imply as to future national obligation.
134 E.g., Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L.Q. 373, 438 (1958). See also Lewis, supra note 74, at 172, where he sees the state action concept as "helpful" in dividing responsibility between state and nation; Henkin, supra note 19, at 475, paraphrasing (but not, it seems, making his own) some of this thought.
basis therefore cannot be irrelevant. When and where has respect for “localism” or “federalism” (which is too often, in this context, but old states' rights writ large) done any good in the racial sphere — any good, that is to say, worthy of being mentioned alongside the massive, grinding racial oppression which has stayed unwhipped of justice precisely because of that “respect”?

Moreover, alert judicial tracing out of the thousand varieties of state action has in its nature no tendency to inhibit state experiments in aid of racial equality. The cases come to court, absolutely always, after racial discrimination has occurred or is concretely threatened and the state has not dealt with it but has instead in some way sanctioned it. I find the boat here has a suspiciously high center of gravity. I suppose we can save the state or local judgment from being one in aid of discrimination, one uttered in approval of discrimination, if we make it a very abstract judgment in favor of “freedom of choice,” rendered without care for the facts, without care for the sorts of choices likely to be made, or actually made. But why should anybody defer to such a judgment, or regard it as a respectable attempt to solve a problem? Is it not lacking in just that instructed regard for local conditions which is supposed to make respect for local judgments expedient? And who really thinks that is the kind of judgment ordinarily made? How, finally, in a society permeated with racism, can a state that decides to leave racial discrimination to “freedom of choice” be thought, realistically, not to be deciding that there shall exist some substantial racial discrimination? 133

Racism, including that formally “private” racism that blots so much of public life, is not only a national problem but the national problem. The racism problem, in law, is now principally the “state action” problem; to be slow to recognize state action, to complicate the concept with unwarranted limiting technicalities, is to confirm racism pro tanto. “State action” questions, however stated, are therefore national questions, questions for the Court and Congress, both of them acting in keen consciousness of their being engaged in a work of exploratory interpretation that goes to the life of that one of our constitutional guarantees most evidently rooted in justice. If the states want to help, they can find plenty to do; their function might helpfully be to make very sure at the threshold that “no state action,” in the most ample sense, has supported racism. But there are no national policy grounds for leaving in the slightest measure to them, under the name of any presumption or of any deference, the question whether their own power has gotten itself involved in racial discrimination, or for giving them, under the guise of a limiting “state action” doctrine, option to solve or not to solve a problem that concerns us all.

133 Similarly, tort law comment is beginning to elaborate the concept of “decision for accidents.” See Calabresi, The Decision for Accidents: An Approach to Nonfault Allocation of Costs, 78 Harv. L. Rev. 713 (1965). The “decision for accidents” may have to be made, for life to go on; not so the “decision for discrimination.” Yet a polity makes that decision every time it permits discrimination, for where discrimination is permitted, some will surely and foreseeably take place in our society as it stands.
IV. A Summing Up

After the death of El Cid, his followers showed a true Iberian ingenuity. They knew that the Moorish host was so afraid of him that his mere presence at the head of his troops insured easy victory, and they did not want these adversaries to know or to suspect that he was dead. They solved this problem by propping up his corpse, sitting it on his reliable steed Bavieca, and issuing forth with this grisly montage in full sight. The Moors were deceived and adequately terrified; they thought El Cid was after them again. It is not known, such is the state of the thirteenth century MSS, how many times the trick worked.

The "state action" criterion shows few signs of life. It produces no decisions in the Supreme Court. It responds feebly if at all to the resuscitative apparatus of commentary. Yet it still seems to strike terror into the hearts of some of us Moors. We have yet to lose a decisive engagement to its proppers-up, but we quake, we decline battle, they come out far better than they have any business doing in skirmishes in the state and lower federal courts.

Decent burial is not quite the metaphor. There must be a "state," committing or omitting. Perhaps one should speak of an honorary perpetual commandership, coupled with retirement, and the entrusting of effective command into other hands.

There were two thoroughly logical and principled positions about "state action" in the race field that could have been taken as bases for judicial enforcement of the equal protection clause; between them principle is fated to find no ground on which to stand. The first would have said that "no State" denied equal protection of the laws to Negroes unless its laws commanded or rewarded discrimination against Negroes. If they did not, then the "state," as an entity, did not commit the discrimination, and hence did not "deny" protection. This theory in its pure logical form was rejected by Mr. Justice Strong for the Court in *Ex parte Virginia.* It has been steadily losing ever since. It has been losing for one reason above all others. The results it would produce would be scandalous, and would make a mockery of the very text being construed. Those reasons are sufficient for rejecting any doctrine; such considerations are the best aids to every act of interpretation.

The other thoroughly principled position would say that equal protection of the laws is denied by the state whenever the legal regime of the state, which numbers amongst its ordinary police powers the power to protect the Negro against discrimination based on his race, elects not to do so—choosing instead to envelop and surround the discriminators with the protection and aids of law and with the assistance of communal life. The doctrine has not been accepted yet, because it has been feared that its acceptance would lead to the application of the constitutional norm to authentic human privacies. This fear is groundless; entirely legitimate techniques of substantive interpretation can avoid this result, which is not wanted by anyone.

Apart from this fear, there is no reason for our not looking forward

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134 100 U.S. 339, 347 (1880).
to the ultimate acceptance of this principle, and even beyond it to the acceptance of equal protection as an obligation, at once constitutional and moral, of affirmative succor where distress is distinctively racial in its incidence.

Discourse on state action now contains too much matter on such problems as the precise circumstances which ought to subject the conduct of the lessee of state property to the equal protection clause, or (as in *Reitman*) the precise juristic nature and intra-legal relations of an act by which the state publishes and declares its fixed and all but inalterable purpose of abandoning the Negro to the slum-ghetto that "private enterprise" has made ready for him. We ought to take time out from such questions and talk instead about whether they are the questions we should be considering, whether they prick out the line along which doubt should be located. Why should *Reitman*, *Evans*, and *Burton* be looked on as "close cases"? It is not that they overturn or come near overturning anything settled. It is not that there is doubt, in any of them, that state action made racial discrimination possible. None of them presents a picture of "mere" abstention; in each the state action goes further and deeper. There must then be some broad philosophic reason. What is it?

We have to keep before our minds the problems of a general view toward the equal protection obligation. I have spread to the gaze my own view. It is a view formed by passion as well as (I hope) by my own and others' thought; I should be ashamed if passion played any but a large role in choice of stance toward this last huge pseudo-doctrinal bar to the elimination of racism from American law. Passion has its dangers; so has lack of passion, and so has the insidious desire to be thought unimpassioned.

I deeply believe in what I have written, but I believe with an even more assured conviction that these are the things we should now be talking about when "state action" comes into focus. If the "doctrine" is to continue its life as a threat to racial minorities and as an encouragement to racist patterns in public life, instead of going into honored retirement as an innocuous truism, the professional community ought to have acquiesced in that result only on the basis of a more fundamental and more acceptable reason than is found in the custom-thought of the same generations that hailed in *Plessy v. Ferguson* a Solomonic judgment.