

Comment: Sit-Ins and State Action— Mr. Justice Douglas, Concurring

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Last December the Supreme Court decided three "sit-in" cases. In *Garner v. Louisiana*,¹ the Court struck down disturbing-the-peace convictions of sixteen young Negroes whose only allegedly criminal activity was to sit at "white" lunch counters in a department store, a drug store, and a bus terminal, all in Baton Rouge. The opinion of the Chief Justice for the majority was a disappointment for those who had hoped for a sweeping expansion of the doctrine of state action under the fourteenth amendment. It rested on grounds which were as drab as they are now familiar:

In the view we take of the cases we find it unnecessary to reach the broader constitutional questions presented, and in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment.²

With a citation to *Thompson v. City of Louisville*,³ the Court's constitutional analysis was over; it remained to examine the Louisiana statute to determine the elements of the crime, and to demonstrate by references to the several records that the convictions did not "rest

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1. 368 U.S. 157 (1961). The *Garner* case was argued and decided along with *Briscoe v. Louisiana* and *Hoston v. Louisiana*. In *Garner*, two Negro students from Southern University "sat in" a drugstore at its lunch counter, after one of them had just bought an umbrella elsewhere in the store. The store served both Negroes and whites, but segregated the races in its seating arrangements. In *Briscoe*, seven Negro students "sat in" the restaurant in the local Greyhound Bus Terminal, which also maintained segregated seating. In *Hoston*, seven Negro students "sat in" a Kress department store at the "white" lunch counter, and did not change seats when they were told that they could be served at the counter across the aisle. Each of the students was arrested, see text accompanying note 28 *infra*, tried, and convicted for disturbance of the peace; each defendant was "sentenced to imprisonment for four months, three months of which would be suspended upon the payment of a fine of \$100." 368 U.S. at 161.

2. *Id.* at 163.

3. 362 U.S. 199 (1960).

upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace."⁴

But there was something for everyone in the *Garner* case. Those who wanted an opinion on the broader constitutional questions got one from Mr. Justice Douglas. Because his reading of the Louisiana Supreme Court opinions interpreting the statute required the conclusion that the accused Negroes had committed a violation, he reached the question of state action. While prediction is risky, it seems likely that if the *Garner* case is remembered at all, it will be remembered for Mr. Justice Douglas's concurring opinion.

The traditional nature of the opinion's opening gambit does not permit adequate psychological defense against the dazzling moves which are to come:

It is, of course, state action that is prohibited by the Fourteenth Amendment, not the actions of individuals.⁵

Of course. The reader may settle back, awaiting an extension on the mechanics of *Shelley v. Kraemer*;⁶ the arrests were made by policemen, and the convictions were adjudged by state courts. But Mr. Justice Douglas, having lost the last time he tried such a mechanical extension,⁷ does not even cite the *Shelley* case. Instead, the state action requirement is to be killed with a new kind of kiss. Three seemingly independent grounds are asserted for holding that the private discrimination on which these convictions are based has satisfied the requirement of state action: (a) The customs of Louisiana, reinforced by the state's general legal patterns, maintain racial discrimination; (b) the restaurant business is "affected with a public interest," and thus subject to the regulatory power of the state; and in fact (c) the state, through its municipalities, had licensed these restaurants.

The opinion thus discards the substance of the state action limitation while maintaining it as a verbal façade. There is, of course, room for argument that the principle of state action has outlived any usefulness it ever had; such arguments have been made, off and on, ever since the adoption of the fourteenth and fifteenth amendments. Occasionally it is said that there is no justification for a traditional state action limitation when certain interests are at stake,

4. 368 U.S. at 163-64.

5. *Id.* at 177.

6. 334 U.S. 1 (1948).

7. *Black v. Cutter Labs.*, 351 U.S. 292, 302-03 (1956) (dissenting opinion).

as in the voting⁸ or lynching⁹ cases. Others have urged a more thoroughgoing rejection of the requirement of state action,¹⁰ and perhaps the Court is listening. *Griffin v. Illinois*,¹¹ while obviously distinguishable, certainly looks in the direction of an affirmative state duty to guarantee equality.

If the state action requirement is not discarded, however, it seems unfortunate to assume that it can be satisfied by the skillful use of slogans. If the state action requirement is kept, no doubt the reason will be that it serves—or should serve—real values of constitutional proportion. Even in a unitary government, *some* principle of “governmental action” would be desirable as a protection of individual freedom of choice; the national interest in racial equality, for example, should not prevent an individual attorney from using racial criteria—or any other arbitrary criteria—in the selection of a partner.¹² When an individual’s actions strongly affect the interests of many people, we may apply constitutional limits to his freedom of action, on the ground that the impact of his conduct in effect resembles that of governmental conduct. Something like this consideration probably stands behind Mr. Justice Douglas’s first ground, based on community customs. But when government acts, we do not worry about subordinating *its* freedom of action; government must justify its conduct, and cannot act arbitrarily. The federal system adds another consideration which supports a

8. See *United States v. Given*, 25 Fed. Cas. 1324 (No. 15210) (D. Del. 1873); Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 19–23 (1959). The case of *Terry v. Adams*, 345 U.S. 461 (1953), may—but need not—be explained on this broad ground.

9. See *Ex parte Riggins*, 134 Fed. 404, 409 (N.D. Ala. 1904); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 638 (1946). For similar tendencies in other contexts, express or implied, see *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th Cir. 1956), 70 HARV. L. REV. 1299 (1957) (education); Frank & Munro, *The Original Understanding of “Equal Protection of the Law”*, 50 COLUM. L. REV. 131 (1950) (land ownership or use; access to public accommodations).

10. For a recent example, Mr. Justice Harlan’s dissent in the Civil Rights Cases, 109 U.S. 3, 26–62 (1883), is echoed in HARRIS, *THE QUEST FOR EQUALITY* 42 (1960): “The clause does more, therefore, than condemn unequal state laws or the unequal enforcement of equal laws; it requires the states to provide or afford equal protection of the laws. Neither a strenuous exercise in philology nor an examination of usage in 1866 is required to define the word ‘deny.’ It meant then within the context of the amendment what it meant long before and continues to mean, to refuse to grant, to withhold, to forbid access to, to refrain from giving some claim, right, or favor. Accordingly, the prohibition against the denial of equal protection of the laws is the same thing as a positive requirement which could read, ‘Every state shall afford, or furnish, every person within its jurisdiction the equal protection of the laws.’”

11. 351 U.S. 12 (1956).

12. We assume the absence of state fair employment legislation. Even in the absence of such legislation, the state action balance may not fall the same way in the case of a sixty-man law firm which rejects Negro attorneys on racial grounds.

requirement of state action before constitutional limits are to be applied. Such a doctrine decentralizes both the administration of nationally adopted standards and the effective decision whether to promote or retard various competing policies.¹³

The most unsettling aspect of Mr. Justice Douglas's concurring opinion in the *Garner* case is that it ignores these interests, and lends support to treatment of the state action requirement as a gimmick. State action is once again viewed as a kind of conceptual hook; once the hook is found or invented, the racially discriminatory conduct is invalid, without further analysis.

I. THE CUSTOM OF THE COMMUNITY

The *Civil Rights Cases*¹⁴ of 1883 are the bedrock for the stringent state action limitations on the fourteenth and fifteenth amendments—limitations with which the Court has been wrestling ever since. The cases invalidated the application of an early federal Civil Rights Act to the exclusion of Negroes from places of public accommodation, holding that Congress lacked authority to legislate against "private" discrimination. Yet in the *Garner* case Mr. Justice Douglas employed an unguarded dictum of Mr. Justice Bradley in the *Civil Rights Cases* to reach a very different result; the implication drawn from the dictum is that "state authority in the shape of laws, customs, or judicial or executive proceedings" provides the necessary modicum of state action so as to involve the equal protection clause.¹⁵ He went on to demonstrate that at least from the time of *Plessy v. Ferguson*,¹⁶ Louisiana has contributed to a custom of segregation by adopting it as a legislative policy with respect to a vast number of activities. On the strength of these premises, he concluded that a Louisiana lunch counter proprietor in 1961 is constitutionally inhibited from segregating his customers because of race. No particular statute or ordinance compelled segregation in the business establishments involved in *Garner*, but Mr. Justice Douglas felt that the custom, observed by parallel private decisions and uncoerced by state police or state laws, was sufficient nevertheless:

13. We have more fully stated our views on the values represented by the state action limitation in Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961). For application of these views in the sit-in context see *id.* at 52-57.

14. 109 U.S. 3 (1883).

15. *Id.* at 17, quoted in 368 U.S. at 178. The emphasis was added by Mr. Justice Douglas.

16. 163 U.S. 537 (1896).

If these proprietors also *choose* segregation, *their* preference does not make the action "private," rather than "state," action.¹⁷

If he is correct, and if he ultimately persuades the Court to adopt this view, then there is no area of social intercourse in the South which is free from the constitutional protections against state action, since the custom is generally one of segregation. Moreover, since virtually every federal civil rights statute enacted since 1866 speaks of "custom" as sufficient to bring a defendant within its provisions,¹⁸ acceptance of Mr. Justice Douglas's interpretation plus immediate enforcement of the federal laws would result in wholesale prosecutions and civil suits under existing statutes.

We have commonly understood, however, that a free, individual decision is the very freedom of choice which the fourteenth amendment is not designed to foreclose. Will a common practice by white persons in a given community hereafter be sufficient to convert the choice of a local service or social club not to accept Negroes into state action which offends the equal protection clause? If convincing survey evidence should reveal that white families in Jackson, Mississippi, customarily refuse to rent rooms in their homes, or to offer dinner at their family tables, to Negroes while occasionally providing such accommodations for whites, can damages be obtained in a federal court under 42 U.S.C. § 1983 and an offending family imprisoned under 18 U.S.C. § 242?¹⁹ And if it makes no difference that the club members or the family were expressing *their* own preferences and *their* own choice in the matter, have we finally resolved that the fourteenth amendment no longer requires state action in the South because of the prevailing custom, but that it continues to require some state action in the North absent a similar custom? Mr. Justice Douglas's opinion suggests an affirmative answer to all of these questions. In doing so, it unnecessarily confounds existing confusion about the fourteenth amendment.

A more careful examination of the interests involved in *Garner* and of the manner in which they compete for constitutional pro-

17. 368 U.S. at 181. (Emphasis added.)

18. See, e.g., 18 U.S.C. § 242 (1958) (carrying the word "custom" through three revisions since its original appearance, Act of May 31, 1870, ch. 114, § 17, 16 Stat. 144); REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958).

19. Section 1983 provides an action for damages against any person "who, under color of any . . . custom" deprives another person of any right secured by the Constitution. Section 242 makes it a federal misdemeanor for any person "under color of any . . . custom" to deprive another of any rights secured or protected by the Constitution.

tection would have been helpful. As we have suggested elsewhere,²⁰ the interest of the defendant Negroes involved in *Garner*-type situations is essentially in obtaining light food and refreshment, and perhaps to enjoy the atmosphere and social contact offered in the restaurants.²¹ Qualitatively, this interest is not so substantial as interests in shelter, employment, education, or voting, especially where the policy of the management is not to exclude, *i.e.*, to deny access to the light food and refreshment, but only to segregate. One might therefore expect that in view of the less substantial character of the interests which compete for constitutional protection there would be less judicial inclination to extend "state action" than in the voting,²² education,²³ or housing²⁴ cases.

Quantitatively, however, custom is significant: it may demonstrate the extent to which the interest of the minority class is affected. If all but one of a dozen lunch counters are available to all persons on an unsegregated basis, the urgency of judicial action to change the policy of the single lunch counter owner to vindicate the minority interest is substantially less. But if all lunch counters are closed to Negroes, the harm to their legitimate desires is conspicuously greater. Thus the element of community custom is certainly relevant, although it surely ought not be conclusive as suggested by Mr. Justice Douglas's opinion.

Competing with these interests in access is the interest of the lunch counter owner in his freedom of choice—choice as to the use of his property, the economic risks he will incur, and the personal associations he will encounter in his trade. In determining whether the fourteenth amendment should be construed so as to deprive him of these freedoms, surely some inquiry as to their particular involvement is demanded. If his establishment is provided by public sub-

20. Van Alstyne & Karst, *supra* note 13, at 54.

21. Additionally, Mr. Justice Harlan properly acknowledged the legitimate interest of the Negroes to demonstrate for the purpose of influencing public opinion with respect to a lawful objective. See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Marsh v. Alabama*, 326 U.S. 501 (1946). There may be some doubt, however, whether the acknowledgment of such an interest takes sufficient account of the "reasonable time, place, and manner" doctrine of *Kovacs v. Cooper*, 336 U.S. 77 (1949), in view of the feasible alternatives available to the Negroes to promote this interest in freedom of speech outside the premises. Unassisted by the vagueness of the local ordinances, the equivocal role of the managers in the *Garner* and *Hoston* cases, and the aggressiveness of the local police, perhaps the invasion of the interest in freedom of expression under the circumstances would not have been unconstitutional. This is not to suggest that a consideration of the free speech issue is irrelevant in determining what interests were in the balance, but only to say that its involvement here was comparatively slight.

22. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

23. *Brewer v. Hoxic School Dist.*, 238 F.2d 91 (8th Cir. 1956).

24. *Ming v. Horgan*, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958).

sidy, if it is clear that he would sustain no loss of trade by pursuing a nondiscriminatory policy, and if he has no personal contact with his customers, the case stands on an entirely different footing, and correspondingly there is less reason to exempt him from the full measure of equal protection required by the fourteenth amendment. These are matters which Mr. Justice Clark doubtless held in mind in the *Burton* case,²⁵ and they are equally relevant here. Mr. Justice Douglas apparently would make no such distinctions, but would treat these "opposite" cases identically.

Additionally, a substantial difference might be made by a more particular inquiry into the effect of the local custom in depriving the lunch counter owner of his own freedom of choice. If the decisions to have the students arrested and removed from the stores were not made by the owners or managers of the stores, but were, rather, made by the police because it was *their* judgment that the students' presence by itself constituted a breach of peace, then—parallel with the "willing buyer-willing seller" aspect of *Shelley v. Kraemer*²⁶—there is not necessarily any conflict between the interests of the owners and that of the students; freedom of choice for both private parties has been foreclosed by the intervention of the police in response to third party pressure. Since third party interests in having the establishment segregated are clearly less substantial than the interests of the Negroes and those of the owner, it would be perfectly proper to apply the fourteenth amendment, as Judge Bazelon suggested in his opinion in the *Hot Shoppes* case.²⁷ The situation would then be quite close to *Shelley v. Kraemer*. However, the *Garner* cases themselves are not wholly of this character, for the decision to segregate the lunch counters, and even the decision to call the police in at least one case, was made by the manager;²⁸ thus the interests of the proprietors and of the Negroes were not all on one side, but in competition.

It might still be suggested that the custom of the community effectively deprived the manager of his own freedom of choice in a more subtle fashion, justifying application of the fourteenth amendment. Thus, if the manager concludes from the custom of the white community that, should he follow a personal preference

25. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

26. 334 U.S. 1 (1948).

27. *Williams v. Hot Shoppes, Inc.*, 293 F.2d 835, 844-47 (D.C. Cir. 1961) (dissenting opinion).

28. 368 U.S. at 160, 198-99.

for desegregation, he will lose a disproportionate amount of business to his segregationist competitors, that he will lose his affiliation with various social organizations and otherwise be stigmatized and ostracized, and that his children may be harassed, the choice to maintain segregation is—by definition—not one he had any practical freedom to avoid. Should the indirect coercion of the community, as manifested by its custom, be used to transform his decision to discriminate from a private one to a community-state one?

Again, the answer is that this consideration is relevant in determining the arrangement of interests which would be affected by application of the fourteenth amendment, but these subtle forces ought not, of themselves, tyrannize over all other considerations. Moreover, in deciding what is a private decision and what is a community-imposed decision, there is some risk in separating an individual's personal decision to segregate from the impersonal motives for making the decision. Carried to the limit, such a distinction would suggest that unless an entrepreneur's decision to segregate were solely the product of personal animus toward Negroes on account of race, it was somehow not really *his* decision. Although no personal animus may be involved, when the lunch counter owner assesses the risks to his business in terms of loss of other customers and loss of personal status among his community peers, it is at least his own assessment, however, rather than that of the police or other persons, which leads him to the choice of segregation. Indeed, if we carry a theory of community determinism to its ultimate extreme, it is quite possible to conclude that a decision to discriminate based even on a self-conscious animus toward Negroes is still community-imposed; in the sense that the decision maker was reared in a segregated environment, was spoon-fed his social values, and was subject to the steady conditioning of the community, he never had a "free" choice to become anything other than a segregationist. Thus the fact that custom may tend to dictate a decision to a businessman, pre-empting his own freedom of choice under some circumstances, must fairly be viewed as one element among many under the fourteenth amendment rather than as *the* critical link between the individual's racial discrimination and the state.

The use of "custom" in deciding whether the critical quantum of state action is involved to invoke the fourteenth amendment might also properly vary according to whether the case involves

the self-executing effect of the amendment against a single establishment in a limited case, or whether it involves the general applicability of a federal statute. Where the issue is raised as it was in *Garner*, the net effect of the result under Mr. Justice Douglas's treatment is only to halt segregation in the very establishments involved in the case; the decision obviously has no direct effect on other businesses in the community. And although *stare decisis* makes clear that discrimination by other businesses would be violative of the fourteenth amendment, the amendment itself does not impose any type of penalty likely to deter a continuation of their segregationist policy. Such a situation may put the economic onus of desegregation on the first business required to desegregate by court order, since its customers may take their trade to those stores which continue to segregate.

The *ad hoc* nature of judicial desegregation thus tends to make the first target of a sit-in demonstration the economic fall guy for the community. But where Congress has acted to forbid all businesses of a certain kind to distinguish among customers because of their race, the situation is improved in two ways. First, the legal duty to conform to a uniform policy applies to all alike; assuming the civil or criminal sanctions of the statute are fairly stringent, fewer enterprises will dare to hold out against the policy and risk a lawsuit. If the deterrent effect of the statute can effect a uniform change of policy with respect to all businesses similarly situated, the apprehension of any one owner that he will lose business by desegregating will be significantly reduced.

Second, as has been said previously, for Congress to make the decision may justify greater deference to an interpretation of constitutional power than the Court might justify without the backing of Congress. "Federal intervention as against the states is . . . primarily . . . for congressional determination in our system as it stands,"²⁹ since "the representative nature of Congress and its sensitivity to local interests—guaranteed by the manner in which it is selected"³⁰ provide certain political safeguards against arbitrary federal power which are not present in the selection or operation of the Court.

Finally, the consideration of custom also is relevant in evalu-

29. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954).

30. Van Alstyne & Karst, *supra* note 13, at 11 n.19.

ating the exercise of local responsibility as that exercise bears upon the issue of state action. Where the community stands ready to vindicate the vital interests of its members by responsible local means, something of the value of federalism and its emphasis upon decentralized authority is sacrificed by gratuitously supplanting local remedies with protection by the national authority. Indeed, the willingness of the Court or the Congress to extend national protection may tend to sap the state's incentive to discharge its responsibilities toward its citizens, whether the context be race relations, aid to education, welfare assistance, or something else.

Statement of the value of local decision making merely poses the issue and does not dispose of it in a given case. The desirability of responsible local government cannot be used forever to insulate local irresponsibility behind the orator's demand for deference to the abstraction of "states' rights." To the extent that the long-standing custom of the community and the continued indifference of its legislature make clear that protection of minority interests in the South cannot be achieved without national intervention, custom may properly be reviewed by the Supreme Court in determining the present necessity for construing the fourteenth amendment so as to offer those legitimate interests some shelter. In this connection, the announced policy of Louisiana to encourage segregation, its repeal of the common-law rules affecting innkeepers, and the discriminatory custom of local businesses in keeping with white supremacy all indirectly contribute to the predictable expansion of the concept of state action under the fourteenth amendment.³¹

II. STATE POWER TO REGULATE AND LICENSE

In the latter portion of Mr. Justice Douglas's opinion, the chief reliance is on the line of cases which stretches from *Munn v. Illinois*³² to *Nebbia v. New York*³³ and beyond. Thus there is proposed a test for state action which is coextensive with the vast domain of what is traditionally called the police power. Of that power, Mr. Justice Douglas has said:

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition.

31. See *id.* at 14-22.

32. 94 U.S. 113 (1877).

33. 291 U.S. 502 (1934).

Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.*³⁴

After all, that was the point in *Nebbia*. The legislature had spoken. The Court abandoned earlier police power formulas in favor of genuine deference to the legislative judgment. The plain and repeated references in the *Nebbia* opinion to the presumption of constitutionality have found reflection in a virtually unbroken series of modern cases in which the Court has consistently rejected due process attacks on legislative regulation of business so long as the legislation has a "rational basis."³⁵

Now that the Court has properly resigned its former function as arbiter of the reasonableness of economic regulation, Mr. Justice Douglas proposes to make that very resignation the basis for the most sweeping application of national judicial standards of reasonableness in race relations. The conclusion does not follow, no matter how often one quotes Lord Hale's maxim about businesses "affected with a public interest."³⁶ The issue is not whether that phrase can be made to serve in a manner remote from its author's context, but whether it is useful to make it do such service.

It is clear, for example, on traditional police power analysis, that there is no due process objection to a statute which forbids motorists to drive on sidewalks or forbids restaurants to serve from unwashed dishes. So also, after *Nebbia* and its progeny, motorists might be required, as a condition of being allowed to drive, to pick up hitchhikers at designated stands during a period of transportation shortage; restaurants might also be limited in the prices they charge or the wages they pay. All these activities are "affected with a public interest" in the sense of the *Nebbia* decision. That phrase

is the equivalent of "subject to the exercise of the police power"; and it is plain that nothing more was intended by the expression [in *Munn v. Illinois*]. . . .

. . . .

So far as the requirement of due process is concerned, and in the

34. *Berman v. Parker*, 348 U.S. 26, 32 (1954). (Emphasis added.)

35. *E.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). *Morey v. Doud*, 354 U.S. 457 (1957), decided on equal protection grounds, can be regarded only as an aberration, as the dissenting opinions of Justices Black and Frankfurter make clear. *Id.* at 470, 472.

36. The phrase comes to us through the opinion of Mr. Chief Justice Waite in *Munn v. Illinois*. See Fairman, *The So-called Granger Cases, Lord Hale, and Justice Bradley*, 5 STAN. L. REV. 587 (1953).

absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.³⁷

Mr. Justice Douglas takes us one step—one leap—further. *Because the Supreme Court will not exercise its veto* to prevent the state legislature from keeping motorists off sidewalks, or requiring them to pick up riders, then the fourteenth amendment—absent implementing legislation—will not permit motorists to pick up only white hitchhikers, refusing rides to Negroes. *Because the Supreme Court will not exercise its veto* to prevent the state legislature from requiring restaurants to be sanitary or to pay a living wage, then the fourteenth amendment—absent implementing legislation—requires the restaurant to open its facilities to all customers, without discrimination based on race. Thus is the fourteenth amendment converted into a self-executing omnibus fair employment and civil rights act, covering all forms of racial discrimination which *could be* reached by state legislative power. Since there is now no effective due process limit in the Supreme Court on state economic regulation under the fourteenth amendment, every business is “affected with a public interest,” every business is subject to some regulation by the state, and—Mr. Justice Douglas adds—every business must refrain from conduct which, if performed by the state itself, would be objectionable as a denial of equal protection or due process. “It is, of course, state action that is prohibited by the Fourteenth Amendment, not the action of individuals,” but since practically all individual action is subject to some form of state regulation, practically all individual action *is* state action; so the reasoning goes.³⁸

We are on no firmer ground when we turn to the municipal

37. *Nebbia v. New York*, 291 U.S. 502, 533, 537 (1934).

38. The decision to make the boundaries of the fourteenth amendment and the state's regulatory power coterminous can also be used inversely, to cut back the state's power so that its civil rights legislation is justified only to the extent that it reaches governmental action. A Washington court has in fact reached this bizarre conclusion. *O'Meara v. Washington State Bd. Against Discrimination*, 4 RACE REL. L. REP. 664, 682 (Wash. Super. Ct. 1959). The Washington Supreme Court, in affirming on the ground that the statute violated both the equal protection clause of the fourteenth amendment and the privileges and immunities clause of the Washington constitution, found it unnecessary to pass on the issue of state action thus posed. 365 P.2d 1 (Wash. 1961), *cert. denied*, 369 U.S. 839 (1962); see Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Laws*, 8 How. L.J. (Issue 2, forthcoming in 1962).

license aspects of the *Garner* case. Mr. Justice Douglas correctly assumes that a state cannot license a business "to serve only whites or only blacks or only yellows or only browns."³⁹ But the fact that a state cannot *require* its licensee to segregate does not dispose of the problem of this case. The state action issue should not be determined by reference to the state's power to condition its permission to operate a restaurant on the periodic examination of the restaurant's cleanliness, the adequacy of its refrigeration and food preparation equipment, and the like. The interests at stake are totally different, and this opinion is objectionable precisely because it does not talk about particular interests, but about the public interest in general:

[O]ne who operates an enterprise under a license from the government enjoys a privilege that derives from the people. . . . [T]he necessity of a license shows that the public has rights in respect of those premises. The business is not a matter of mere private concern.⁴⁰

The opinion thus equates state regulation with state assistance, perhaps on the assumption that any state connection suffices to satisfy the state action requirement. Such a confusion is common, but totally unjustified. If the state gives its assistance to a private enterprise, either by a direct grant of public funds or by more indirect means, then the personal, private interests in the enterprise are to that extent diminished. A man's lunch counter is less *his* castle when it is in a city-owned building, as *Burton v. Wilmington Parking Authority*⁴¹ suggests. The proprietor who operates on state capital, or with the benefit of state assistance, does not have the same quality of private proprietary interest as his unassisted competitor. If the state's license were, as Mr. Justice Douglas says, properly considered as a kind of capital gift from the public, then the reduction of the personal interests of the licensee should importantly influence the resolution of the state action question.

The license requirement in the *Garner* case, however, is only a form of regulation. It is forbidden to operate a restaurant except with a license. In order to get a license, one must apply, perhaps pay a fee or a tax, and submit to certain limitations on the conduct of his business. If he fails to comply with the law's requirements, his license can be revoked. Thus when we say that the operator of

39. 368 U.S. at 184.

40. *Id.* at 184-85.

41. 365 U.S. 715 (1961).

a restaurant must be licensed, the important consequence is that he cannot operate in certain ways: He cannot serve from unwashed plates; he must maintain adequate refrigeration for his food; if he fails to meet these requirements, he will be put out of business. Correspondingly, anyone willing to comply with the requirements will be licensed. There is no magic to a license from the government; it has none of the significance of governmental assistance, but it does perform the state action trick for Mr. Justice Douglas.

The opinion's principal citation in support of the license argument is to *Boman v. Birmingham Transit Co.*,⁴² in which the Fifth Circuit properly held that a bus line franchised by a city could not, by its own choice, segregate the seating of its passengers by race. In *Boman*, the state had not required segregation; the company chose it. But the transit company, unlike the restaurants in the *Garner* case, had an exclusive franchise. It was, in other words, a public utility. One may grant that the phrase "public utility" does not solve problems any better than its counterpart, "affected with a public interest." But when the government prevents other would-be bus lines from operating in competition with the transit company, three important consequences follow, none of which is present in the facts of the *Garner* case. First, the government's exclusive license magnifies the impact of the company's decisions on the disadvantaged class—the Negro riders. There is no such similar result when a single lunch counter proprietor decides to segregate his customers, even though he may be licensed by the city. Second, the exclusive franchise gives the transit company an important economic advantage, which it would not have in the absence of the license requirement and the policy of noncompetition; one who operates under an exclusive license plainly *does* enjoy "a privilege that derives from the people." Finally, the economic interest of the monopoly transit company is much less harmed by a judicial ruling forbidding it to discriminate by segregation than is the interest of an individual lunch counter proprietor. A monopoly bus line need not fear any substantial loss of business because of such a judicial decision, because there will be no segregated bus line to which white riders may divert their patronage. Thus the *Boman* case is distinguishable on both sides of the constitutional balance, in the increased impact of the "private" segregation on racial equality and

42. 280 F.2d 531 (5th Cir. 1960).

in the reduced impact of the judicial decision on the interests of the person forbidden to segregate.

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We want to make clear that we do not assert that the facts of the *Garner* case cannot support a conclusion that the state action requirement has been met. Much less do we contend that the *Garner* case itself is wrongly decided. Nevertheless, the choice to rest decision on principles so broad and so different from what has gone before carries with it an obligation to base the new principles on analysis of the relevant interests, even though another technique may be easier or may provide more quotable judicial epigrams.

One who is strongly devoted to the advancement of a uniform national standard of racial equality may be excused for impatience with what may appear to be a technicality. But the state action requirement is not a technicality; it serves legitimate and important constitutional purposes. If the requirement seems to some to be a quibble, a merely technical roadblock in the path of social advance, perhaps a measure of the fault lies with opinions like this one.