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THE POSSIBILITY OF A FRONTAL ASSAULT ON THE STATE ACTION CONCEPT, WITH SPECIAL REFERENCE TO THE RIGHT TO PURCHASE REAL PROPERTY GUARANTEED IN 42 U.S.C. §1982

Joseph B. Robison*

In the sphere of race relations and the legal struggle for equality there are two basic approaches to the fourteenth amendment. One is to treat it as a grant of authority to Congress to adopt legislation, primarily under section 5, the enabling clause. The other is to rely on the amendment to operate per se to bar discriminatory action, primarily by virtue of the equal protection clause of section 1. Under either approach, one critical issue is whether and to what extent application of the amendment depends on a showing of "state action," i.e., participation by state governmental agencies in the challenged inequality.

There is reason to believe that we are at a point in time when a critical shift in approach will, or at least can, take place. It is the purpose of this article to consider that possibility, with particular reference to discrimination in housing. Although the proposals ultimately made require abandonment of much of what has been accepted law until now, it is necessary to review that law and its history.

Up to 1883, when the Supreme Court decided the Civil Rights Cases, the legislative approach was used as actively as the direct constitutional approach. Concomitantly with its approval of the three Reconstruction Amendments, Congress enacted a number of laws designed to prohibit racial discrimination and other abuses. To the extent that they are applicable here, the history of these will be reviewed briefly.

The thirteenth amendment, which became law on December 18, 1865, prohibited slavery and empowered Congress to enforce its provisions. On April 9, 1866, Congress passed (over President Andrew Johnson's veto) the first of the post-Civil War civil rights laws. Section 1 of that law provided, in part:

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1 The relevant portions of the fourteenth amendment are:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2 109 U.S. 3 (1883).
3 U.S. Const. amends. XIII, XIV, XV.
4 For the text of these laws see Carr, Federal Protection of Civil Rights 211-51 (1947).
5 Civil Rights Act of 1866, ch. 31, §1, 14 Stat. 27 (1866).
That all . . . citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States . . . to inherit, purchase, lease, sell, hold, and convey real and personal property. . . .

The fourteenth amendment was declared to have been ratified on July 28, 1868. On May 31, 1870, President Grant signed the second Civil Rights Act, which attempted to deal comprehensively with the matter of equality for the freed slaves. Section 18 of that act specifically reenacted the 1866 statute. The last of the post-Civil Rights Acts was that of March 1, 1875. This act, among other things, prohibited discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement."  

I. The Civil Rights Cases

The history of judicial nullification and legislative repeal of most of these laws has often been told. The key decision was in the Civil Rights Cases. The Court there considered five proceedings: the prosecutions of the owners of two inns and of two theaters and a civil action against a railroad for violations of the 1875 statute. With the first Justice Harlan the only dissenter, the Court held the statute unconstitutional.

Justice Bradley, speaking for the majority, said:

It is State action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not the subject-matter of the amendment.

The Court found that section 5 of the amendment, which gives Congress power to enforce its other terms, permits adoption only of laws "correcting the effects" of state actions violating the restrictions of the amendment. The Civil Rights Act of 1875 was held unconstitutional because its operation did not depend on "any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. . . ." The Court referred to the 1866 act, as reenacted in 1870, as "clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings . . . ." The Court clearly regarded section 5 of the amendment as empowering Congress only to provide remedies for violations of sections 1 to 4, not as permitting it to create new rights.
Justice Harlan characterized the majority opinion as "entirely too narrow and artificial." He expressed the view that the 1875 act was a proper exercise of the power of Congress under both the thirteenth and fourteenth amendments and concluded:

If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. 1

II. Advances Under Section 1

It is not surprising that the years following the Court's sweeping decision in the Civil Rights Cases saw virtual abandonment of all efforts to advance equality through congressional action based on section 5 of the fourteenth amendment. Rather, the amendment was used in its self-acting capacity, without reference to section 5 or to Congress. Case after case was brought in which various forms of discrimination were challenged as violating the commands of section 1, most often of the equal protection clause. A great deal was accomplished in this fashion. 2

Specifically with respect to housing, the courts were persuaded to hold: (1) that discrimination and segregation were prohibited in housing operated by public agencies, 3 (2) that local governmental agencies could not adopt racial zoning laws, 4 and (3) that state courts could not enforce restrictive covenants. 5 There was at least a start in curbing discrimination in privately-owned housing built with government assistance. 6

The state action limitation imposed by the Supreme Court in 1883 is still an accepted test of both the self-acting aspect of section 1 of the fourteenth

17 Id. at 26.
18 Id. at 62.
19 The gains included, of course, the line of cases leading up to and following the public school desegregation decisions, Brown v. Board of Educ., 347 U.S. 483 (1954), rehearing on question of relief, 349 U.S. 294 (1955). A high water mark of the self-acting approach may have been the holding in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), that the equal protection clause, of its own force, prohibits exclusion of Negroes from a restaurant operated on premises leased in a publicly owned off-street parking building.
20 One week after it decided the school desegregation cases, the Supreme Court refused to review the decision of a California state court barring segregation in public housing. Banks v. Housing Authority, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), cert. denied, 347 U.S. 974 (1954). This action was generally taken as an indication that it viewed segregation in public housing as unconstitutional, and that is the position uniformly taken by the lower courts since that time. See e.g., Detroit Housing Comm'n v. Lewis, 226 F.2d 180, 183 (6th Cir. 1955); Eleby v. Louisville Municipal Housing Comm'n, Civil No. 3240, W.D. Ky., May 24, 1957, in 2 race rel. L. Rep. 815 (1957).
amendment and the congressional power under section 5. However, it has been extended so far that some commentators have suggested it has changed form completely.\textsuperscript{24} Some members of the Supreme Court, notably Justice Douglas, have recently shown some restiveness under the restraints of the state action limitations.

III. Recent Supreme Court Decisions

In \textit{Garner v. Louisiana},\textsuperscript{25} a 1961 sit-in case, Justice Douglas, while accepting the state action limitation, argued that a state may not enforce segregationist policies of restaurant facilities because "a license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public."\textsuperscript{26} In a later case\textsuperscript{27} involving trespass convictions of Negroes who had attempted to obtain service in a privately-owned restaurant, Justice Douglas argued in his concurring opinion that a restaurant has no constitutionally protected privacy and that access by the public is the reason for its existence.\textsuperscript{28} He referred to the common law rule requiring innkeepers and common carriers to accept all travelers\textsuperscript{29} and urged that the constitutional guarantee of equal protection dictated that a "business serving the public cannot seek the aid of the state police or the state courts or the state legislatures to foist racial discrimination in public places under its ownership and control."\textsuperscript{30} He pointed out that the use of the state courts to convict for trespass constituted state action, and expressed the view, outlined in his \textit{Garner} concurrence, that the fourteenth amendment prohibited discrimination by places operated under licenses from the state, such as restaurants. He concluded:

There is no constitutional way, as I see it, in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of \textit{apartheid}, which is foreign to our Constitution.\textsuperscript{31}

Justice Douglas repeated these views in his separate opinion in \textit{Bell v. Maryland}\textsuperscript{32} with somewhat less emphasis on the state enforcement aspect. In effect, he called for making the common law innkeeper rule "the common law of the Thirteenth and Fourteenth Amendments."\textsuperscript{33} Justice Goldberg concurred with Justice Douglas's opinion in that case and also submitted a separate opinion in which the Chief Justice, as well as Justice Douglas concurred.\textsuperscript{34} He reviewed the

\textsuperscript{25} 368 U.S. 157, 176 (1961).
\textsuperscript{26} \textit{Id.} at 184.
\textsuperscript{27} Lombard v. Louisiana, 373 U.S. 267 (1963).
\textsuperscript{28} \textit{Id.} at 274-75.
\textsuperscript{29} \textit{Id.} at 275-76.
\textsuperscript{30} \textit{Id.} at 277-78.
\textsuperscript{31} \textit{Id.} at 283.
\textsuperscript{32} 378 U.S. 226, 242 (1964).
\textsuperscript{33} \textit{Id.} at 255.
\textsuperscript{34} \textit{Id.} at 266.
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history of the fourteenth amendment and concluded that it was intended from
the first to prohibit discrimination in public places. He said, “it follows that
Negroes as citizens necessarily become entitled to share the right, customarily
possessed by other citizens, of access to public accommodations.” It should be
noted, however, that Justice Goldberg tied the result thus reached quite closely
to the “traditional right of access to public places.” He said that “a funda-
mental assumption of the Fourteenth Amendment was that the States would
continue, as they had for ages, to enforce the right of citizens freely to enter
public places.” Justice Goldberg also argued that the Civil Rights Cases had
assumed that the states did or would prohibit discrimination in public places
and that the assumption, “whatever its validity at the time of the 1883 decision,
has proved to be unfounded.” He said, therefore, that all states are “obligated
under the Fourteenth Amendment to maintain a system of law in which Negroes
are not denied protection in their claim to be treated as equal members of the
community.” He concluded that the right to equal access to places of public
accommodation “is a civil right granted by the people in the Constitution.”
Referring to section 5 of the fourteenth amendment, he said that “in the give-
and-take of the legislative process, Congress can fashion a law drawing the
guidelines necessary and appropriate to facilitate practical administration and
to distinguish between genuinely public and private accommodations.”

The issue was presented in a different form in the recent Supreme Court
decisions142 upholding Title II of the Civil Rights Act of 1964143 which prohibits
discrimination in certain places of public accommodation. Congress had itself
enacted legislation, invoking its powers under section 5 as well as the commerce
clause. However, in its briefs and argument before the Supreme Court, the
government refused to rely on section 5. The majority of the Court, in upholding
the statute, followed the government’s lead and relied only on the commerce
clause.

Justice Douglas submitted a concurring opinion resting his decision primarily
on section 5. He explained that his concurring opinion in the Bell case meant that
the right to be free of discriminatory treatment (based on race) in places
of public accommodation—whether intrastate or interstate—is a right guar-
anteed against state action by the Fourteenth Amendment and that state

35 Id. at 301.
36 Id. at 303.
37 Id. at 304.
38 Id. at 307.
39 Id. at 311. Of course, this is very broad language which could mean that the amend-
ment requires the states to bar all forms of inequality. However, Justice Goldberg had just
referred to “petitioners’ constitutional rights to public accommodations” and it is likely that
he was referring only to that limited right.
40 Id. at 317.
41 Ibid.
42 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v.
44 The title prohibits discrimination in certain types of places if their operations affect
interstate or foreign commerce or if the discrimination in question is supported by state action.
enforcement of the kind of trespass laws which Maryland had in that case was state action. . . . 47

Justice Goldberg, in a brief concurring opinion, referred to language in his opinion in Bell which declared that "Congress [has] authority under §5 of the Fourteenth Amendment . . . to implement the rights protected by §1." 48 It is noteworthy that Justice Goldberg, unlike Justice Douglas, left no need to rely on the trespass prosecution to find the requisite state action.

IV. The Original Intent of the Fourteenth Amendment

These judicial opinions suggest that the time may have come for a frontal assault on the state action concept, at least as to section 5 of the fourteenth amendment. It is well known that the historical basis of the Supreme Court's decision in the Civil Rights Cases is open to challenge. 49 A close analysis was made only twenty-five years after the decision was announced by H. E. Flack, a person entirely sympathetic to the result it reached. 50 Flack examined the legislative history of the amendment in detail, including the debates in Congress and newspaper reports concerning the debates in the ratifying states. He also examined the debates on the civil rights laws adopted during the Reconstruction Period.

Flack said of the 1866 act:

There also seems to have been a general impression among the press that [N]egroes would, by the provisions of the bill, be admitted, on the same

47 Id. at 280.
48 Id. at 293.
In a very recent case the Supreme Court held that a park donated to the city of Macon, Georgia, for the exclusive use of whites was not removed from the public to the private sphere by a Georgia court decision removing the city as trustee and appointing "private" trustees to administer the park. Evans v. Newton, 86 S. Ct. 486 (1966). Justice Douglas, writing for the majority, took note of the fact that for years the park had been an integral part of the city's activities and that it had been cared for and continued to be cared for by the city even after the "private" trustees were appointed.

The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment. . . . We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

86 S. Ct. at 489-90. In Evans the Court clearly declined to take a further step away from the state action limitation. It could have said, but did not, that mass recreation facilities are public accommodations and that such accommodations must be open to all, regardless of their management.

49 See, e.g., Bell v. Maryland, 378 U.S. 226, 286 (1964) (concurring opinion, Goldberg, J.). One of the most detailed studies of the subject concludes that the framers of the amendment believed (1) that it prohibited discrimination by public businesses subject to the common law duty to deal with all customers; (2) that it did not affect discrimination by private persons as to which the law did not otherwise impose a legal duty; and (3) that it did reach the discriminatory failure of a state to protect Negroes from violence by private parties. Frank & Munro, The Original Understanding of "Equal Protection of the Laws" 50 COLUM. L. REV. 131, 162-66 (1950).

He commented that this impression was “clearly warranted, both by the context of the bill and by the declarations of some of its supporters.”

Describing the history of the fourteenth amendment, he stated that one of its most active proponents told the House that Congress should have the power to declare what rights should be secured to all citizens. It was immediately after his speech that the House approved the amendment.

It also seems proper to say that Congress would be authorized to pass any law which it might declare “appropriate and necessary” to secure to citizens their privileges and immunities, together with the power to declare what were those privileges and immunities.

Flack also theorized that the framers of the amendment intended to make a great change in the federal government and that “their failure to do this is due to the strained construction put upon their work by the Supreme Court.”

A bill prohibiting discrimination in places of public accommodation was introduced in Congress in 1873. One of its supporters, Congressman Lawrence, who was a member of Congress when the fourteenth amendment was approved, expressed his view as to the first section of the amendment:

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 the laws. . . . What the State permits by its sanction, having the power to prohibit, it does in effect itself.

Flack concluded his book as follows:

However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. [The evidence shows that] according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by the States.

The Civil Rights Cases and Plessy v. Ferguson have long been regarded as the principal decisions in the series of cases by which the Supreme Court largely frustrated the equalitarian aspects of the fourteenth amendment. Sub-

51 Id. at 45.
52 Ibid.
53 Id. at 80-81.
54 Id. at 82.
55 Id. at 69.
56 Id. at 260-61.
57 Id. at 262.
58 Id. at 277.
59 163 U.S. 537 (1896).
sequently, the *Plessy* decision underwent a long process of narrowing, followed by a frontal attack which resulted in its total reversal within a few years. The state action limitation imposed by the *Civil Rights Cases* has similarly undergone a long process of confinement. Perhaps this confinement will give birth to an equally welcome offspring.

V. A World Without State Action

Let us assume that total abandonment of the state action limitation is possible. How would this work in practice?

Certainly there would be serious problems with respect to the self-acting aspect of the fourteenth amendment. If the courts were to hold that section 1, by itself, prohibits racial discrimination, they would either have to apply that holding to all forms of discrimination or devise some limitation on its scope. The courts are not likely to embrace the first alternative, even assuming that it would be desirable. The second is not impossible. The line could be drawn at action having a "public effect" (perhaps with some lingering reverberations of the state action concept). It could be drawn by balancing the benefits of equality against the benefits of privacy and freedom from governmental control or in various other ways.

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61 A further complication is that the fourteenth amendment applies to many forms of state action having nothing to do with race. Thus, it is well settled that the guarantees of freedom of speech, press, religion and association contained in the first amendment apply to the states by virtue of the due process clause of the fourteenth amendment. See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

Conceivably of course, the courts might make their modification or elimination of the state action limitation apply only to the equal protection clause, rather than to the amendment as a whole, on the ground that the only historical evidence of a broader intent is confined to that aspect of the amendment. Even so, there would be problems of overbreadth. Application of the equal protection clause has not been confined to race but has extended generally to unreasonable classification by state action. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Connally v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902); *Gulf, Colo. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897).

Hence, the process of removing the state action curb from the equal protection clause would have to take into account its application to classification generally. While the courts may be prepared to hold that the amendment bars individual acts of discrimination on the basis of race, religion, or national origin, they would presumably want to avoid curbing those other forms of arbitrariness that are permitted to individuals, but not to governments. Thus, the classification condemned by the Supreme Court in *Skinner* distinguished between those who steal by robbery or burglary and those who steal by fraud or embezzlement. While the Court quite reasonably held that a state may not make such arbitrary distinctions, it is not likely to hold that individuals may not do so.

62 Professor St. Antoine suggests the following test:

Has the state permitted, even by inaction, a private party to exercise such power over matters of a high public interest that to render meaningful the type of rights protected by the fourteenth amendment, the action of the private person or organization must be deemed, for constitutional purposes, to be the action of the state?

St. Antoine, *supra* note 24, at 1011.

63 In his concurring opinion in *Lombard v. Louisiana*, Justice Douglas distinguished the restaurant proprietor from the home owner by saying that "the Bill of Rights ... casts its weight on the side of the privacy of homes." 373 U.S. 267, 274 (1963). Similarly, Professor Williams suggests that the courts must consider the "freedom of the individual to engage in discrimination on a purely private basis without intrusion." Williams, *supra* note 24, at 368.
While courts are capable of this kind of agility, they are not as suited to it as legislatures. A legislature can distinguish between restaurants and amusement parks or between employers of 100 or more employees and those with 99 or less in a manner bordering on the arbitrary. There is much to be said for leaving the task of drawing such lines to the legislative process. A legislature may appropriately consider where the evil is most pressing, what kinds of enterprises are susceptible of regulation and similar purely practical factors. As Professor Wechsler has said in a closely related context, "... I do not hesitate to say that I prefer to see the issues faced through legislation, where there is room for drawing lines that courts are not equipped to draw."

The task could be left to the legislature by retaining the state action curb as to section 1 of the amendment and abandoning it only as to section 5. This approach, for which there is historical support, would have the effect of placing with Congress the responsibility of deciding just how far outside the traditional area of state action the ban on bias should be extended.

VI. Possibilities of Section 1982

It is not necessary, however, to look solely to future legislation. Particularly with respect to housing, one might invoke the terms of the statute derived from the Civil Rights Act of 1866:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

As reenacted in 1870, this statute is an exercise of the power of Congress under section 5 of the fourteenth amendment as well as of the corresponding section of the thirteenth amendment.

Section 1982 has led a relatively quiet existence and, as applied to real estate, has shown few, if any, signs of life. It has been mentioned in three...
Supreme Court decisions but has been given significant weight in only one. Its desuetude is no doubt due to the Supreme Court's holding that it goes no farther than the fourteenth amendment itself. So construed, it cannot have independent effect.

If the wraps were taken off section 5, the courts could take a fresh look at section 1982. Without the state action limitation on Congress' power and hence on the statute's interpretation, it could be reevaluated as a broad declaration of the right of citizens to obtain and hold property without discrimination based on race. What would such a reinterpretation cover? Let us take a simple case where a Negro offers to buy a house known to be on the market and the owner refuses to sell on the express grounds that he will sell only to whites. This might take place in a state having no law against discrimination in housing or in a state with a fair housing law not applicable to owner-occupied one-family homes. It should be noted that the sale need not even involve a house, since the statute applies to "real and personal property."

Even assuming that Congress has the power to adopt a law applying to such a refusal to sell, it is problematic whether it did so in the 1866 act as re-enacted in 1870. The language of the statute is not particularly helpful: "All citizens . . . shall have the same right . . . as is enjoyed by white citizens . . . to . . . purchase . . . property." In the instance given, does a white citizen have the "right" to purchase the property? In the sense that the owner can turn him down as he did the Negro, he does not; in the sense that the owner had put the property on the market for whites who thereby had rights that Negroes did not,

71 Hurd v. Hodge, 334 U.S. 24 (1948); Oyama v. California, 332 U.S. 633 (1948); Buchanan v. Warley, 245 U.S. 60 (1917). The Hurd case was decided on the same day as Shelley v. Kraemer, 334 U.S. 1 (1948), in which the Court held that the fourteenth amendment prohibited enforcement by state courts of racial restrictive covenants. However, in Hurd, the Court held that it was unnecessary to decide whether the fifth amendment required the same result as to federal courts. It held instead that §1982 had the same general thrust as the fourteenth amendment and that it therefore applied to the federal courts in the same way as that amendment applied to the courts of the states. It also held, independently of the statute, that enforcement of the covenants would be against the public policy of the United States and that the Court must therefore bar such enforcement under its general supervisory powers.

72 See Hurd v. Hodge, 334 U.S. 24, 31 (1948), where the Court said specifically that the statute is directed at "governmental action."

73 The texts of the twelve state laws prohibiting discrimination in privately-owned housing, adopted through 1964, as well as those of the District of Columbia, Puerto Rico, and the Virgin Islands, together with a description of their terms, can be found in U.S. HOUSING AND HOME FINANCE AGENCY, FAIR HOUSING LAWS (Sept. 1964). The California law was nullified, insofar as it applies to the sale and rental of housing, by an amendment to the state constitution approved by the voters in November 1964. CAL. CONST. art. 1, §26. During 1965 new fair housing laws were enacted in Indiana, Maine, Ohio and Rhode Island. IND. ANN. STAT. §10–901 (Supp. 1965); ME. REV. STAT. ANN. tit. 17, §1301 (Supp. 1965); OHIO REV. CODE ANN. §§4112.01–07 (Page Supp. 1965); R. I. GEN. LAWS ANN. §§34–37–1 to –11 (Supp. 1965). The laws of Colorado, Connecticut and New York were amended. COLO. REV. STAT. ANN. §§69–7–1 to –7 (1963), as amended, Colo. Laws 1965, ch. 107, §§5, 6, ch. 185, §§ 1–8. CONN. GEN. STAT. ANN. §§35–35 (Supp. 1965); N.Y. EXECUTIVE LAW §§290–301.

74 Of the eighteen state and territorial fair housing laws now in existence, only those of Alaska, Michigan, Puerto Rico and the Virgin Islands apply to all housing. ALASKA STAT. §§18.80.200–300 (Supp. 1965); MICH. STAT. ANN. §28.343 (1962); P.R. LAWS ANN. tit. 1, §13 (1965); VIRGIN ISLANDS CODE ANN. tit. 10, §3 (Supp. 1965). The sale and rental of owner-occupied one-family homes is covered only by those laws and those of Connecticut, New York, and Rhode Island.

74 See text accompanying note 69 supra.
he does. This is at least an arguable interpretation of the statute. Certainly the right to buy property is of limited value if it can be withheld by those who have property to sell.

Almost a century of domination by the state action concept could easily blind us to the intent of the Reconstruction Amendments and statutes. Once we reopen the “strained construction put upon [the amendment] by the Supreme Court” in the Civil Rights Cases\(^7\) and go back to the period from 1866 to 1875, we have no basis for assuming that those who strove to undo the results of slavery were concerned only with official disabilities. They were well aware that the indicia of slavery could be maintained by individual action as well as by state action. They viewed the fourteenth amendment, therefore, as imposing on the states the obligation to prevent inequality. As Congressman Lawrence said, only seven years after the fourteenth amendment was debated in a Congress in which he sat, the equal protection clause was violated if a state allowed “inequality . . . to be . . . meted out by citizens or corporations.”\(^7\)

In sum, it is inappropriate to apply to language formulated in 1866, the concept of state action which came into the law seventeen years later and which in all probability was a limitation never contemplated by the legislators of the 1860’s. It is not unreasonable to conclude that the Congress that approved the fourteenth amendment intended, in the first Civil Rights Act, to reach individual conduct as well as state action that effectively impaired the right to purchase property. Plainly, citizens or corporations mete out inequality when they exclude citizens from housing on the basis of race, religion or national origin. It can also be argued that if the amendment was intended to protect the right of access to restaurants it must have included the more basic right to housing, which has been described by Justice Holmes as “a necessary of life.”\(^7\) On the other hand, as we have seen,\(^8\) there is evidence that the amendment was originally intended only to cover enterprises where discrimination was already prohibited under the innkeeper rule.

It hardly needs to be said that, if the courts were persuaded to accept a broad interpretation of section 1982, the effect would be tremendous. A strong factor working against such an interpretation is that it would do too much. It would instantly create a fair housing law for all the states and territories, without any of the exemptions that are usually taken for granted.\(^7\) Moreover, since the act is not limited to real property, the provisions dealing with personal property might constitute a nationwide law against discrimination in all retail stores. This is probably not as serious an obstacle as one might suppose since discrimination with respect to personal property does not seem to be a significant problem today.

One further complication is that a conspiracy to deprive any citizen of a right secured by the “Constitution or laws of the United States” is a federal

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75 Flack, op. cit. supra note 50, at 69.
76 See text accompanying note 57 supra.
78 See note 49 supra.
79 Even the broad fair housing laws of Connecticut, New York, and Rhode Island, exempt the rental of one apartment in an owner-occupied two-family dwelling. See note 73 supra.
This statute was originally part of the Civil Rights Act of 1870. By its terms, it plainly applies to the rights created by section 1982. An interpreting court would doubtless give weight to the fact that persons conspiring to violate that section, such as the partners in a real estate firm, might find themselves charged with a federal crime.

VII. The Thirteenth Amendment Approach

There is another possible approach to section 1982 that might help solve some of these problems. The state action limitation does not apply, of course, to Congressional action under the thirteenth amendment. It could be argued that Congress could and did make section 1982 applicable to individual action in the exercise of its power under that amendment to remove the indicia of slavery. This result was reached by a federal district court in 1903. In that case, the defendants had been indicted for conspiracy to intimidate certain citizens in the enjoyment of their rights because they were Negroes. The indictment specified the right to lease lands and cultivate them, as guaranteed by the thirteenth amendment and the act of 1866. In sustaining the indictment, the court assumed that the act could not be invoked in this case as an exercise of congressional power under the fourteenth amendment. It sustained the act and its application to individuals under the thirteenth amendment. It held that that amendment guaranteed to Negroes the "fundamental or natural rights" of freemen and that the right to lease land was one of those rights, and concluded:

... Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color....

If this approach to section 1982 were adopted, the problems created by its sweeping language could be met by limiting it to what could properly be described as the "natural rights" of "freemen." This could be held to include the right to buy or lease a home but not necessarily the right to deal in a particular store.

VIII. Other Approaches

It is by no means clear that no further large-scale advance can be made in the law of civil rights without jettisoning the state action limitation on the fourteenth amendment. If the courts adopted Justice Douglas' suggestion that

81 Ch. 114, §6, 16 Stat. 140 (1870).
82 The amendment reads as follows:
   Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
   Section 2. Congress shall have power to enforce this article by appropriate legislation.
84 Id. at 325-26.
85 Id. at 330.
government licensing is state action, a large number of enterprises would come under the equal protection clause, including many not covered by Title II of the 1964 Civil Rights Act. This would include, for example, all restaurants, hotels, barber shops, grocery stores, doctors, lawyers and even hunting and fishing guides. In the housing field it would cover all real estate agents. Presumably, it would cover most if not all builders, who must obtain many kinds of permits before they can lift a hammer. It might also apply to the owners of all apartment houses and other buildings who must obtain what is known, in New York City at least, as a Certificate of Occupancy. Here again, the very comprehensiveness of the effect of the interpretation might inhibit its adoption.

A word should be said about another approach which proposes to include "inaction" within the state action concept. According to this theory, a state's failure to prohibit a particular form of discrimination constitutes a positive approval of discrimination which in turn must be viewed as state action within the reach of the amendment. It seems that this approach is equivalent to

86 See text accompanying note 27 supra. This suggestion finds support in the historical research of Frank and Munro even though they do not tend to support the view that the framers of the fourteenth amendment entirely ignored the difference between state and individual action. They do, however, encourage a broad view of what constitutes state action. Thus, they cite Senator Sumner, one of the inner circle of radical Republicans as saying, "Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color." Frank & Munro, supra note 49, at 153, n.113.

87 NEW YORK CITY ADMIN. CODE §C26-181.0.

88 The general theory that the activities of all licensees of the state constitute state action has never been attractive to this author, despite its obvious advantages and impressive authority. Licensing of those who would operate restaurants, barber shops, or groceries is permitted, not because carrying on those occupations is a "privilege," but because the state has the power to prevent abuses in those occupations and the establishment of licensing machinery is a reasonable way of exercising that power. See Biddies, Inc. v. Elright, 239 N.Y. 354, 363, 146 N.E. 625, 629 (1925). Exercise of that power in that particular way does not, in my view, transform the pursuit of those occupations into a privilege. The doctrine that it does do so has undesirable implications, not the least of which is that it encourages the imposition of political restraints on licensees which could not be imposed on private citizens. Professor Gellhorn has assembled a number of bizarre loyalty oath requirements for state licensees, including not only pharmacists, professional boxers and wrestlers but also veterinarians. In the state of Washington the latter "may not minister to an ailing cow or cat unless they have first signed a non-Communist oath, thus assuring that they will not indoctrinate their four-legged patients." GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 129-30 (1956).

However, it would not be necessary to apply this sweeping view of the effects of licensing to the fourteenth amendment as a whole or to state action generally. The statement of Senator Sumner, see note 86 supra, supports an interpretation of the equal protection clause specifically applying it to licensed establishments.

89 The theory finds some support in the statement of a Reconstruction Period Congressman: "What the State permits by its sanction, having the power to prohibit, it does in effect itself." FLAGG, op. cit. supra note 50, at 262.

The theory also finds support in the concurring and dissenting opinions in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), where the Court held that the Constitution barred discrimination in a restaurant in a public parking building. Justice Stewart, concurring in the result, relied on the ground that the Delaware Supreme Court had held that the proprietor's conduct was sanctioned by a state statute providing that no restaurant was obliged to serve persons whose reception "would be offensive" to most of its customers. Justice Stewart said: "The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment." 365 U.S. at 726-27. Justices Frankfurter and Harlan agreed with Justice Stewart that a state statute having that effect would be unconstitutional. They dissented from the judgment of the Court only because they believed that it was not clear that the Delaware Court had so construed the
abandoning the state action limitation. The problem we are dealing with here is how to use the prohibition of discrimination contained in the equal protection clause against conduct permitted by a state. (If it is prohibited by the state, there is no problem.) If the prohibition applies to all individual conduct permitted by the state, it applies to all individual conduct. The state action limitation is then a dead letter. It would be better to kill it officially than to engage in the legal fiction that inaction is action.90

Another approach that has found some support may be called the “trespass” theory. It has been used primarily in cases involving sit-ins in places of public accommodation. The theory is that the needed element of state action is supplied by a state prosecution for trespass against a person who has been legally denied service because of his race and has refused to leave when requested to do so by the proprietor.91 Applied to housing, this means that, even though

statute; they would therefore have remanded the case for clarification of that point. 365 U.S. at 728-30.

The theory of these opinions seems to be that if a state enacts a statute saying that a restaurateur (or a housing developer) may discriminate on the basis of color, such discrimination then becomes unconstitutional. But how does this differ constitutionally from the situation in which a state’s statute books are silent on the point but discrimination is permitted by its common law?

90 With particular reference to housing Professor Horowitz appears to suggest that failure of the state to prohibit discrimination is relevant to the application of the equal protection clause provided there is some degree of “governmental assistance” to the discriminator. Horowitz, Fourteenth Amendment Aspects of Racial Discrimination in “Private” Housing, 52 CALIF. L. REV. 1, 19-20 (1964). But civil rights lawyers have consistently urged that any degree of governmental assistance makes the clause applicable. If they are correct, the “state inaction” concept adds nothing.

It should be noted that the courts have moved quite steadily toward acceptance of the governmental assistance test. See, for example, Burton v. Wilmington Parking Authority, where the Supreme Court said that the test of the applicability of the equal protection clause to individual conduct was whether “to some significant extent the State in any of its manifestations has been found to have become involved in it.” 365 U.S. 715, 722 (1961). Professor Horowitz’s theory would reverse that trend. He would weigh “the interest of the discriminatee in having equality of access to the benefits of governmental assistance” against “the interest of the discriminator in being permitted to discriminate.” Horowitz, supra at 5.

That he would allow the latter to prevail in some instances is shown by his statement that state action allowing a school receiving governmental aid to discriminate might not violate the Constitution if the aid “is only a relatively small contribution to the institution’s operating budget.” Horowitz, supra at 11. But any holding that there may be discrimination in the distribution of governmental benefits would mean the loss of ground won and now held under the state action concept. It would also be contrary to the trend exemplified by Title VI of the Civil Rights Act of 1964 which bars discrimination in all programs receiving any federal aid. 78 Stat. 252 (1964), 42 U.S.C. §§2000d to d-4 (1964).

Some support for Professor Horowitz’s theory can be found in the following language in Justice Douglas’s opinion in the Evans case:

There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality. . .

86 S. Ct. at 488. It should be noted, however, that none of the balance of Justice Douglas’ opinion indicates any actual weighing of competing values.

Professor St. Antoine’s test, “high public interest,” see note 63 supra, aside from its extreme vagueness, is subject to the same objection: that the amendment might be held inapplicable in some situations where its application is now accepted. Could the right of the plaintiff in the Burton case to service in a lunchroom in a public parking building be held to be a matter of “high public interest”? The same doubt would exist as to the right of a Negro to play golf on a course operated by private enterprise on land obtained from the state. See Simkins v. Greenboro, 149 F. Supp. 562 (M.D.N.C.), aff’d, 246 F.2d 425 (4th Cir. 1957).

91 The espousal of this point of view by Justice Douglas is described in the text accompanying notes 29-32, 45-46 supra.
constitutionally a state may allow discrimination in housing sales and rentals, it may not take any steps against the family that moves into an apartment or house after having been turned down because of their race. This approach is a similar attempt to do away with the state action limitation by resort to fiction.

Other less sweeping enlargements of the state action theory would also result in substantial gains. Thus, the general concept of the use of public powers, as evolved by the Supreme Court in *Marsh v. Alabama*[^92^] and the white primary cases[^93^] could be invoked against large-scale developers. The owner of a 15,000-home tract makes many decisions that are governmental in effect if not in authority.[^94^]

**IX. Conclusion**

Efforts to expand the scope of the fourteenth amendment prohibition of racial discrimination while retaining the state action limitation on both sections 1 and 5 are either too limited or too unnatural. On the other hand, proposals to eliminate the state action limitation altogether, as we have seen, require making a choice between covering more than is feasible and drawing new limits. Moreover, the historical evidence on which one must rely for such an interpretation—that is, the evidence that the drafters of the amendment believed that it applied by its own force to the conduct of private individuals—is almost entirely confined to discrimination in places of public accommodation. There is little or no evidence that the congressmen of the 1860's thought that their work applied to the sale or rental of real property.

There is much to be said, however, for seeking a court ruling that the state action concept does not apply to congressional action under section 5 of the fourteenth amendment and that Congress has the power, under that section and perhaps also under the thirteenth amendment, to adopt laws prohibiting discrimination by private individuals and otherwise protecting the "natural rights" of "freemen." This would be consistent with the shift, already under way, of the focus of the legal aspects of the civil rights struggle from the courts to the legislatures.

Ten years ago, civil rights leaders had no reason to believe that they could receive effective redress at the hands of Congress. Today, with the major civil rights legislation enacted in the last eight years, with substantial gains in voting by Negroes in the South already recorded and more in sight, and with profound changes in the makeup of the House of Representatives as a result of the Supreme Court decision on congressional apportionment[^95^], such hopes are entirely realistic.

[^94^]: An analogy may be drawn to *Terry v. Adams*, where the Court prohibited exclusion of Negroes from a privately conducted white primary. The Court said: "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment." *Terry v. Adams*, supra note 93, at 469. It could be argued that the state may not permit a private developer in effect to create racial zoning which is prohibited to the states by the fourteenth amendment. *Buchanan v. Warley*, 245 U.S. 60 (1917).
The courts may indeed be prepared to hold that they have gone as far as they need to under the self-acting provisions of the Constitution but that Congress has ample power to go further.

A straightforward way to raise the issue with respect to housing would be to initiate a test case challenging discrimination in the sale or rental of homes in a large housing project. The plaintiffs would, of course, make the broad challenge of the state action limitation by claiming that the discrimination was barred by direct action of the thirteenth and fourteenth amendments. However, they would also make the narrower challenge by claiming that Congress has power to prohibit housing discrimination and that it exercised that power by enacting section 1982. The courts could then hold: (1) that the discrimination was illegal under the thirteenth or fourteenth amendments; (2) that Congress had power under section 5 or under the thirteenth amendment to prohibit such discrimination and had done so in section 1982; (3) that Congress has such power but had not done so in section 1982; or (4) adhering to past law, that such discrimination could not be reached by federal action, judicial or legislative.

If the courts embraced the third of these possibilities, it would be up to those who support equality in housing to seek relief from Congress. That body, unlike the courts applying constitutional principles, can give relief in a step-by-step process, enacting a prohibition of discrimination in housing by stages that reflect the balance of political forces in the country. That would be entirely appropriate in a democracy.