STATE ACTION AFTER THE CIVIL RIGHTS ERA

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The legal campaign against state-enforced racial segregation had far-reaching effects on the law. Not only equal protection and antidiscrimination law, but areas as disparate as federalism, labor law, criminal procedure, and freedom of expression were significantly affected by the civil rights revolution. Few legal principles, however, were more deeply affected than the state action doctrine.

The state action doctrine limits the reach of constitutional requirements. Except for the Thirteenth Amendment, and perhaps the right to travel, constitutional guarantees (it is conventionally said) apply only to actions of the state, not to actions of private parties. During the civil rights revolution, the state action doctrine became, in a word, the enemy. That happened because proponents of discrimination tried to portray discrimination, whenever they could, as the product of private, not state, action. In that way they could shelter discrimination from the substantive guarantees of the Constitution.

The great state action cases of the 1940s, 1950s, and 1960s took this form. In each case, someone explicitly discriminated on the basis of race. In fact, each of these cases involved not just an incidental act of discrimination but an integral aspect of a broad discriminatory and segregationist regime. That is why the cases were so notorious. In each case, the defense strategy was to claim that the discrimination that was occurring—the particular aspect of the Jim Crow regime that was under attack—was in fact the work of private actors, not of the state.

In *Shelley v. Kraemer*, the practice was racial discrimination in housing. In the white primary cases, *Smith v. Allwright* and *Terry v. Adams*, the practice was racial discrimination in voting rights; in the sit-in cases and *Burton v. Wilmington Parking Authority*, the practice was discrimination in public accommodations. Each of

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these mainstays of the regime of racial discrimination was defended in court on the ground that the discrimination was the work of private actors. In each case, federal law could be used against an aspect of the Jim Crow regime only if the Supreme Court satisfied itself that the state was sufficiently implicated in overt and widespread discriminatory practices.

In this context the state action doctrine came to be seen by many as an accomplice to racism. Charles Black's great article on the subject expressed this view:

> [The state action doctrine] 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 featly [sic] managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden. . . . 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.[1]

Much of this opprobrium continues to cling to the state action principle. The state action requirement is seen by many as a barrier to eliminating wrongs that are in fact of constitutional magnitude but that have been disingenuously portrayed as the actions of private parties in order to avoid the mandate of the Constitution. In this paper I want to suggest that this attitude toward the state action principle, absolutely appropriate when the issue was Jim Crow racial segregation, today tends to point us in almost exactly the wrong direction.

The legacy of the intertwining of the state action requirement and the civil rights movement is that the state action requirement is interpreted asymmetrically. When the actions of a unit of government are at issue, the state action requirement is interpreted formalistically: the actions of a government are *always*, ipso facto, "state action" for constitutional purposes. But when the actions of a private party are at issue, the state action requirement is interpreted antiformalistically. Private actions may or may not be "state action," depending on a variety of functional concerns. This made perfect sense in the era of the civil rights movement but, it seems to me, no longer makes sense today.

In this paper I am not concerned with the usual source of controversy about the state action doctrine—the question when private

1. Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69, 95, 70 (1967) (footnotes omitted) (quoting *Terry v. Adams*, 345 U.S. 461, 473 (1953)).

actions should be treated as "state action" and subjected to constitutional limits. Instead, I want to suggest that the automatic treatment of all actions of the government as "state action"—or at least as all *equally* state action—should be qualified in favor of a more thoroughgoing functionalism. The point is not that we should conclude that the actions of units of government are not "state action" at all and therefore are not subject to constitutional limits. Rather, many actions by units of government have some of the attributes of private action. Accordingly they should be judged by standards different from those which we apply to more purely governmental action.

Concretely, in the current state of doctrine, this means two things. First, it means an expanded role for something akin to the "unconstitutional conditions" doctrine. Second, it means that we should reconsider a suggestion once made by Justice Harlan but not accepted by the Supreme Court: that the actions of state and local governments should be subject to less stringent constitutional review than the actions of the federal government.[2]

I. STATE ACTION IN THE CIVIL RIGHTS ERA

From about 1890 to about 1970, a particular form of racial discrimination existed in the South. Obviously racial discrimination existed before then, after then, and elsewhere. But there was then a distinctive regime that no longer exists. To some degree courts and lawyers were (or seemed to be) the heroes in bringing down that regime. Because of that, and because now everyone agrees that that regime was wrong, we understandably generalize the lessons from the campaign against Jim Crow.

The Jim Crow system was, however, distinctive in many ways. One of the most important of its distinctive characteristics was a blurring of the line between the public and private realms. Southern society enforced the subordination of African-Americans by a range of practices only some of which formally involved the law. But whether they formally involved the law was basically incidental.

For example, states sometimes enacted laws requiring segregation or discrimination in employment or public accommodations. But sometimes social pressure alone was effective, without legal sanctions. Very often, violence and other wrongful conduct against African-Americans was formally illegal, but the laws were not en-

2. *Roth v. United States*, 354 U.S. 476, 503-06 (1957) (opinion concurring in part and dissenting in part).

forced—because the sheriffs were too intimidated, because they chose to look away, or because they too were riding with the Klan.

Certain conditions peculiar to the South at the time permitted this combination of social and governmental forces to be used. For the most part the Jim Crow South was rural. As in many rural settings, local areas were dominated by traditional elites that ruled essentially without challenge. The political, social, business, and government elites by and large were not distinct. Mobility was limited, and the elites faced little competition from outside forces. Until around the end of World War II at least, important national institutions—not just the federal government, but the national press, national firms, or national trade unions—had little presence throughout much of the South. The white population was insular and relatively homogeneous.

These conditions made it relatively easy to organize informal social sanctions. Whether the white majority worked its will through the government or through informal social mechanisms was nearly a matter of indifference. Often, of course, the Jim Crow regime was enforced not just by social sanctions but by extra-legal violence. But then all that was needed was for the law enforcement authorities to turn a blind eye. It is difficult to review government decisions not to enforce the law even in the best of circumstances. In an insular society dominated by traditional elites, reviewing a nonenforcement decision is even harder.

In these circumstances it does not make a lot of sense to distinguish between state action and private action. Racially restrictive covenants, white primaries, segregation in public accommodations, discrimination in employment—all of these were indeed forms of "community organization of racial discrimination."[3] Whether the community organization happened to use the mechanism of the government instead of one of the other available mechanisms was essentially a fortuity, and it makes little sense to have the outcome of a legal challenge turn on such a fortuity. Nor does it make sense to have the outcome turn on an inherently uncertain judicial review of alleged discriminatory underenforcement of the law by local police. It was clear enough that violence against African-Americans was socially approved and socially protected by the dominant powers of the community. It hardly mattered whether the local police sought to intervene but were intimidated, failed to intervene because they made a good faith resource allocation decision that it would be a waste of effort to challenge the overwhelming private force behind

3. Black, 81 Harv. L. Rev. at 96 (cited in note 1).

Jim Crow, or failed to intervene for discriminatory reasons. The problem was a system deeply woven into the fabric of the society.

These conditions made attitudes like Charles Black's perfectly appropriate. The state action requirement, applied to such a system, was a formalism that served only to generate arbitrary results and to allow some socially organized racial discrimination, of a kind that was clearly condemned by the Constitution, to survive.

In addition, expanding the category of "state action" is a way of putting the courts in charge of a problem. During the civil rights era, particularly before the federal civil rights legislation of the mid-1960s, the federal courts were already interpreting the Constitution to forbid racial discrimination. They were also much more likely than Congress to be vigorous about fighting discrimination. One of the standard explanations for *Brown* (and a factor that may have decided some of the Justices' votes in the case) was that Congress, stalemated by the filibuster, was institutionally unable to enact any serious civil rights legislation.

Expanding "state action" was a way of bypassing Congress; it was functionally equivalent to getting a range of civil rights legislation enacted before Congress was willing to do so. *Shelley v. Kraemer* anticipated the federal open housing laws by more than twenty years; the white primary cases adumbrated the Voting Rights Act by more than a decade; the sit-in cases were made moot by the public accommodations provisions of the Civil Rights Act of 1964.

This is not just a strategic or result-oriented reason for expanding the category of "state action." The *Carolene Products* justification for *Brown* and similar decisions was precisely that the courts were better suited to address issues of racial discrimination than the legislatures. Until at least the late 1960s, African-Americans were without question unfairly deprived of political power in the South and therefore in Congress as well. In that context, the *Carolene Products* argument for shifting issues from the legislatures to the courts was about as strong as it could be.

The *Carolene Products* approach is usually seen as a basis for expanding substantive constitutional guarantees. But there is no reason that it should not also have influenced the interpretation of the state action doctrine. The courts' superior capacity to deal with race discrimination issues, as well as the interpenetration of the public and private spheres that characterized Jim Crow, were both justifications (and sufficient justifications) for an expansive view of what constituted state action.

The result, quite appropriately, was the asymmetrical doctrine I mentioned earlier. When the government was actually caught

red-handed, discriminating against African-Americans, then of course there was state action. Formal arguments alone were sufficient to show state action there. But even when the government was nominally not involved, the functional equivalent of state action might still be present, because much private action was for all practical purposes indistinguishable from government action. In this context, an asymmetrical and partly formalistic state action doctrine was not unprincipled; it was a plausible adaptation of the doctrine to particular historical conditions.

II. STATE ACTION AFTER THE CIVIL RIGHTS ERA

To a substantial degree, the conditions that led to the view that the state action doctrine was "the enemy" no longer exist today. Many (not all) of the constitutional issues that confront the courts today are not characterized by the interpenetrated public-private pattern of oppression that was typical of the Jim Crow regime. Instead of a situation in which the moral imperative is clear, and the difficulty is in deciding how and how far to enforce it, we are more likely today to have morally equivocal situations. The legislative blockage that characterized the civil rights era does not exist in the same form, and to the extent that it does the courts are often not a remedy.

Consider a few constitutional issues that are on the frontier today:

- May a state university adopt rules against hate speech and harassment?
- May a municipality enact an ordinance restricting the sale of sexually explicit material on the ground that it subordinates women?
- May a municipality adopt an "integration maintenance" plan that limits minority enrollment in, for example, a publicly owned housing complex, in order to prevent the complex from "tipping" and becoming all-minority instead of integrated?
- May a municipality limit enrollment in a public high school to African-American males, in the hope of improving their education?
- May a city with a large minority population, surrounded by affluent suburbs, adopt extensive affirmative action measures in public contracting and employment?
- May one county in a state engage in aggressive environmental protection to a degree that arguably constitutes a taking of property without just compensation?

• May a state government adopt a system of public financing of elections and sharply limit contributions to political campaigns?

These issues have in common a number of features that contrast sharply with the *Brown*-era issues.[4]

1. *The lack of certainty.* Jim Crow racial segregation was an unambiguous moral wrong; when the government did it, it was an unambiguous constitutional wrong. Most people, I believe, would not say that the issues I just mentioned are comparably unambiguous.

2. *The need for experimentation.* Not only are these issues uncertain, but for many of them, the right answer ought to depend on facts that might be learned through deliberate experimentation. Will the hate speech rules chill genuine contributions to intellectual debate? Will integration maintenance plans and all-minority, single gender schools produce the desired effects, or will they become a cover for invidious discrimination? Will the affirmative action measures benefit the minority population as a whole or only certain already well-off segments of the minority population?[5] Will the environmental regulations create greater environmental burdens elsewhere? Is the campaign finance reform in fact just a means of incumbent protection?

In each of these cases, it would be useful to have answers to these questions before we assessed the constitutionality of the proposed government action. Consequently there is much to be said for allowing deliberate experimentation on questions of this kind. At least at first, the best state of affairs might *not* be one in which either every government or no government is allowed to adopt measures of these kinds. It might be better to allow some such measures to go forward while monitoring their effects, before we decide whether this kind of regulation is constitutional.

3. *A division of state and society.* In many (at least) of the instances I just described, the unity of state and society that characterized Jim Crow racial segregation will be absent. There will not necessarily be social forces directed toward accomplishing essentially the same things as the government action. Indeed, in each

4. Among other things, in each of these cases, many "liberals" or "progressives" will in general be much more favorable to allowing the government to act and to construing the constitutional provision narrowly. I return to this point and its significance below.

5. My own view is that affirmative action is in general unproblematic as a constitutional matter. The only concern that might raise a constitutional issue is whether it harms minority group members, for example by stigmatizing them. But for many the constitutionality of an affirmative action measure (and not just its wisdom as a matter of policy) might depend on a question of the kind mentioned in the text.

case powerful constituencies in the community will probably oppose the government action.

4. *Market pressures on the government.* In many of the cases I mentioned, the government will also be subject to market forces that limit its freedom of action. Public universities must compete in a market with private universities. The affirmative action measure will help the suburbs compete with the city for contractors and employees. The environmental regulation will enable other counties to profit from the taxes and economic opportunities made available by development.

One has to be careful not to overstate the contrast with racial segregation in the South. There were market forces that encouraged the South to abandon segregation. Nonetheless in the early period (until perhaps the mid or late 1950s) segregation seemed mostly impervious to these pressures. Even into the 1960s local elites were often well enough entrenched to resist economic pressure. In any event, many Southern communities that practiced official racial segregation were not part of a reasonably well-functioning and vigorous market like that involved in at least some of the modern examples I gave.

If I am right that the cases I mentioned differ from segregation in this respect, the asymmetrical character of state action doctrine—a powerful legacy of the civil rights era—is not justified today. The doctrine ought to be functional in both directions, so to speak. Under current doctrine, when nominally private action is functionally little different from government action, it is treated like government action. But to the extent that a government entity is subject to the market, its actions, while nominally governmental, have much in common with private action. Arguably, then, the restraints imposed on such government action should be correspondingly less stringent.

5. *Superior legislative competence.* The relationship of the courts and the legislature that characterized Jim Crow is inverted in these cases. The point is not the parochial one that "progressives" now think the courts are less sympathetic to their interests than the legislatures will be. Jim Crow laws presented, as I said, a case of the kind envisioned in the *Carolene Products* footnote—one in which the legislative process was blocked and the courts were the only effective recourse. But in the cases I listed above, there is no such blockage. To the extent that any of the issues I mentioned presents a threat to constitutional rights, it is not obvious that Congress is less able than the courts to deal with the threat.

In addition, these cases require responsiveness to empirical

findings and tolerance for experimentation. Courts are not accustomed to changing their positions in the short term in response to new facts about society, and judicial doctrines—except those that permit the government to act as it wishes—are seldom designed to accommodate experimentation. Legislatures and bureaucracies, for all their other limits, are better able to do both.

Even if experimentation is not called for—even if we are considering the category of clearly wrong government actions—Congress (or state legislatures) might do an adequate job of protecting constitutional liberties today. In many antidiscrimination areas—housing, voting, employment, education, race, gender, religion, disability, age—federal statutes have not only duplicated but exceeded constitutional requirements. Federal law has also provided some protection against state regulation of property, mostly by virtue of federal preemption of state law. So far there has been relatively little activity by the federal government to protect free speech rights, but there is no obvious reason why Congress could not act in that area as well.

In short, all of the reasons for the well-justified hostility to the state action doctrine, and for the asymmetry and formalism that characterized the state action doctrine of the civil rights era, are to some extent inapplicable to issues that are on the frontier of constitutional law today. But only to some extent. There may be present day counterparts to the widespread combined public and private discrimination of the Jim Crow regime, such as in the treatment of gays and lesbians and perhaps in gender discrimination. There are non-frontier issues that are not uncertain and do not call for experimentation: local officials who might use the machinery of government to silence critics; state universities that want to engage in unjustifiable discrimination against certain political points of view; municipalities that might permit pernicious racial, ethnic or religious discrimination; opportunistic and oppressively unfair regulation of property. Some of what I called frontier issues, of course, might seem to other people to fall in one of these categories. Sometimes the government will not be subject to countervailing political and social pressures from within or market forces from without. Even when it is subject to market forces, the market will almost never be perfect; it is costly to move to a different municipality or to have to attend a private university instead of a state university.

Finally, it seems mistaken to rely entirely on Congress for the protection of constitutional rights: many of those rights protect politically weak groups, and Congress will not stand up to national public opinion. Ironically, the congressional response to the civil

rights movement may suggest that the legislative process is better at protecting constitutional rights than it actually is. In the civil rights era, the threat was regional, and Congress may do better when it is acting against distinctively regional oppression. If there is a national tide of sentiment against a certain kind of speech, or unfamiliar religions, or the supposed enforcement of political correctness on campuses, or for that matter against banks or automobile insurance companies, Congress cannot be trusted to provide the needed protection of constitutional rights.

III. A REVISED DOCTRINE?

It seems, then, that an approach that seeks to expand the category of state action and that views all actions by governmental entities as equally threatening may no longer be appropriate. But the opposite approach, which would often regard governmental actions as functionally private and therefore exempt from constitutional guarantees, is also not appropriate. Today, there is sometimes (not always) a reason to treat government actions as more like (but not exactly like) private actions for constitutional purposes.

This suggests that the civil rights era approach to the state action doctrine should be not so much reversed as transcended. For many cases the question should not be whether the action is governmental, and therefore fully subject to constitutional limits, or private, and therefore not subject to constitutional limits. Rather the question should be how we can loosen the constitutional limits on certain kinds of government action without removing them entirely.

Suppose arguendo that the best state of affairs, for now, is that some but not all universities have hate speech codes, some but not all municipalities regulate pornography, and so on. If there were a national wave of opinion that threatened to impose homogeneity, the courts should intervene. Declaring these actions not to be state action, and therefore not subject to constitutional limits, would disable the courts from doing so. But if they are state action, and therefore subject to constitutional limits, it is difficult to see how the courts can allow experimentation in any principled way.

Two solutions seem plausible. One is to follow Justice Harlan's suggestion and to judge the actions of state and local governments less strictly than the actions of the federal government. In the Jim Crow era, that would have been a recipe for perpetuating a system of regional oppression that the federal government was responsible for ending. But today such an approach poses less risk of opening the door to regional oppression, and a better chance of allowing beneficial experimentation.

A related possibility is to try to reorient the inquiry from—in a word—rights to systemic concerns. Ordinarily when we interpret the First Amendment or the Just Compensation Clause or the Equal Protection Clause, we try to decide whether a person has a right to be free of a certain kind of regulation or discrimination. That question requires a nationwide yes or no answer that seems ill-adapted to at least some of the issues I discussed earlier. In dealing with those issues it seems better to focus not on rights but instead on whether the system as a whole has too much supposedly benign segregation, too much suppression of pornography or hate speech, or too much regulation of property or campaign contributions.

The constitutional question, therefore, should be not whether a measure violates the rights of the party complaining about it, but rather whether the overall system is healthy. Some experimentation along what I characterized as the frontier is consistent with a healthy system. Uniform regulation might not be.

There are at least two substantial objections to these possible approaches. The first objection is that they allow too many actions that ought not be allowed: even one instance of certain kinds of regulation and discrimination is too much. The answer—perhaps not an adequate answer—is one I sketched above: perhaps legislatures can be relied on to deal with those cases; and perhaps this is the price we should be prepared to pay for allowing heterogeneity on the issues where heterogeneity seems desirable. There may be instances in which we would not want to tolerate experimentation and heterogeneity; as I said earlier, there may be latter-day counterparts to racial segregation. But we should at least entertain the possibility that a uniform national standard is the exception that requires justification, rather than the rule.

The second objection is that an approach focusing on the overall health of the system is too difficult for anyone to manage, and hopeless for a court. But such systemic issues are increasingly the kind of questions that the courts have to answer anyway. It is, in particular, a component of the unconstitutional conditions or selective funding question that is increasingly salient in constitutional law.

Many of the issues I mentioned earlier can be recast in terms of selective funding or unconstitutional conditions. When a local government (a university or a municipality) prohibits an activity, it does not make it entirely impossible for people to engage in that activity. It increases the cost of doing so. If you want to engage in hate speech or pornography, or if you want to operate your firm free from the regulation in question, you have to move. It is materi-

ally different from Jim Crow because you will probably only have to move a few miles or transfer to a nearby school, instead of migrating to a different region of the country. In principle the effect is just as if the government denied you a tax exemption.

In the end, then, the problem with the civil rights era's version of the state action doctrine may be that, applied to today's issues, it masks the prevalence of one of the most difficult problems of constitutional law. We are accustomed to looking at allegations of local violations of constitutional rights and seeing an imitation of Southern racial segregation circa 1960—a more faint and less malign imitation, but structurally the same thing. Often, though, that is not what we have. We have something that is more like, but not entirely like, private action. It is less threatening to constitutional values but much more difficult to accommodate to constitutional doctrine or judicial enforcement. It is commonly said that constitutional law should try to move past *Brown*. Perhaps this is one of the directions in which it should move.