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EXPANSION OF THE STATE ACTION CONCEPT UNDER THE FOURTEENTH AMENDMENT

Glenn Abernathy†

Aside from two specific instances, the United States Constitution does not, through its own force, set limitations upon private action. With the exception of the thirteenth and twenty-first amendments, it deals wholly with the structure and organization of the national government, limitations upon the state and national governments, and the distribution of powers—first, among the three branches of the national government and, second, between the national government and the states and the people. With the notable exception of the two amendments mentioned above, only positive governmental action by the executive or legislative departments, supported if necessary by judicial decision, can set limitations upon private action.

If there is any doubt as to other sections of the Constitution, there should be none about the general applicability of the fourteenth amendment to states rather than to private persons. The second sentence contains the phrases "No State shall make or enforce any law . . ." and "nor shall any State deprive any person . . .; nor deny to any person . . ." As the court is wont to say, "If language is to carry any meaning at all it must be clear" that this amendment was designed to impose limitations upon actions of the states and not upon those of private persons. That there is some evidence leading to a contrary conclusion as to the intention of Congress appears both in Congressional speeches at the time of passage and in later studies on the subject.¹ The practical answer to the intended application of the fourteenth amendment, however, was given by the Court in Brown v. Board of Education: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted . . . ."² The decision rendered in the Civil Rights Cases³ was unequivocally that the amendment covers state action and not individual action. Justice Bradley, speaking for the majority in those cases, stated:

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the

† See Contributors' Section, Masthead, p. 449, for biographical data.
¹ See Cohen, "The Screws Case: Federal Protection of Negro Rights," 46 Colum. L. Rev. 105 n. 61 (1946) for Congressional statements. See also Flack, Adoption of the Fourteenth Amendment 252-63 (1908); Barnett, "What is 'State' Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?" 24 Ore. L. Rev. 227, 228, 232 (1945); Frank and Munro, "The Original Understanding of 'Equal Protection of the Laws';" 50 Colum. L. Rev. 131, 163-64 (1950).
³ 109 U.S. 3 (1883).
several States, is prohibitory in its character, and prohibitory upon the States . . . .

It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.\(^4\)

These statements made by Justice Bradley in 1883 are concrete and specific, and indicate clearly that it is certain types of positive action by state officers or agencies which the amendment prohibits. But later in the opinion, he made remarks which leave the way open for considerable question as to the application of the amendment to state inaction when private persons deny rights of other private persons:

\[\text{[I]t is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress . . . .}^5\] (Emphasis added.)

The rule stated in the first selection from Justice Bradley's opinion has remained the law down to the present. A general principle, however, is capable of a great deal of molding, shaping and expansion as it passes via the decisional process through successive generations of judges. The majority opinion in the Civil Rights Cases raised at least as many questions as it answered, and later decisions have been rendered which point the way, partially at least, to answers to the secondary questions.

The dissent by Justice Harlan in the Civil Rights Cases represents a monumental intellectual and legal effort to justify the constitutionality of congressional legislation imposing civil liability for racial discrimination effected not by the normal officers of the state, e.g., by hotels, inns, railroads and places of amusement. (Since this study is directed to the definition of state action, Justice Harlan's arguments as to the validity of the legislation under the thirteenth amendment are omitted.) Particularly ingenious is the manner in which the Justice perceived state action in the rules and practices of hotels, inns, taverns, railroads and places of amusement. Citing numerous authorities, he concluded that innkeepers were exercising a quasi-public employment. "The law gives him special privileges and he is charged with certain duties and responsibilities to the public." He felt that the public nature of the innkeeper's

\(^4\) Id. at 10-11.

\(^5\) Id. at 17.
employment forbade him from discriminating against any person seeking admission on account of that person's race or color.

As to public conveyances, the Justice read the law of common carriers to require the performance of public duties, and that no matter who is the agent or what is the agency, the function performed "is that of the State." In addition, the investiture of the railroad with the state's right of eminent domain and the right of municipalities to spend tax money to aid in the construction of railroads made these corporations' functions public functions.

Implicit in both the majority opinion by Justice Bradley and in Justice Harlan's dissent are a number of legal paths which might be taken in the expansion of the concept of state action. Justice Bradley said that not only the legislature's acts were included, but "the action of state officers executive or judicial." He further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the state, or not done under state authority." This latter comment is the embryonic statement of the theory that state inaction to remedy private wrongs constitutes state action under the fourteenth amendment. Justice Harlan added other theoretical bases for expansion, albeit a more restricted development strangely enough, of the concept of state action. In effect he argued: (1) if a person or corporation is granted the tool of eminent domain, that person or corporation may be considered an agent of the state, and its acts considered the acts of the state; (2) if the operation being considered is subject to special regulation or supervision by the state and is granted special privileges by the state, then it may be concluded that its acts constitute state action; and (3) if the purpose served by a particular person or corporation is properly classified as a "public purpose," the operators may be described as agents of the state.

There are presented, then, in these opinions, several legal theories which the judiciary of later days could use as rationale for justifying an expanded interpretation of the acts included in the concept of state action. The peculiar feature of the expansion which has taken place since those cases, however, is that the judicial pegs on which this growth has been hung are those of the majority opinion rather than those of the dissenter. If the majority opinion be considered as restrictive in its delineation of state action, it would appear that development of a broader scope of coverage would almost of necessity move in the direction indicated by the dissenting Justice Harlan. Not only is this not the case, but the majority opinion contains implicitly a theory which would extend the concept of state action far beyond the reach of any of the three suggested tests of Justice Harlan—this is the theory that state inaction
may be state action violative of the fourteenth amendment. The answer seems to be that while the decision of the majority was more restrictive, the theory stated by that majority admits of very broad applications.

Prior to discussing the state inaction theory, an examination will be made of the various developments in the concept of what constitutes state action.6

The Court rather early began the extension of the term state action to cover not only legislative action (indicated by the use of "law" in the privileges and immunities clause) but action of the judicial and executive branches as well. And there was a vertical extension to include all governmental units subordinate to the state. The Court has found violations of the amendment by the state courts,7 legislatures,8 executives,9 tax boards,10 boards of education,11 counties,12 and cities,13 among others. In cases where there is a clear official mandate to persons performing state functions in any of these categories, and the execution of such mandate results in a violation of rights protected either by the due process clause or the equal protection clause, then the fourteenth amendment is violated. Assuming the official position and the legal mandate to act, there is no further problem of determining state action. The only problem remaining is to determine whether a fourteenth amendment right has been violated, and this discussion does not contemplate the problem of the rights protected.

More complex questions concerning state action have arisen with respect to either operations not strictly classified as government operations, or acts of state agents which are not a part of their statutory duties. These will be taken up under various categories.

**Official Acts Unauthorized or Prohibited by State Law**

A question was raised very soon after the adoption of the fourteenth amendment, and even before the decision in the Civil Rights Cases, concerning the applicability of the amendment to the act of a state judge in discriminating racially in the process of selecting jurors. Such discrimi-

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6 For discussion of the subject see, Hale, Freedom Through Law cc. VIII-XI (1952); Barnett, supra note 1; Frank and Munro, supra note 1, at 162-64; Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C.L.Q. 1, 23-31 (1954); Hale, "Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals," 6 Law. Guild Rev. 627 (1946); Watt and Orlikoff, "The Coming Vindication of Mr. Justice Harlan," 44 Ill. L. Rev. 13 (1949); Notes, 47 Colum. L. Rev. 76 (1947); 35 Cornell L.Q. 399 (1950); 96 U. Pa. L. Rev. 402 (1948).
7 Ex parte Virginia, 100 U.S. 339 (1880).
8 Strader v. West Virginia, 100 U.S. 303 (1879).
12 Ward v. Love County, 253 U.S. 17 (1920).
13 Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913).
nation was not authorized nor required by state law, but Judge Cole, of Virginia, on his own initiative excluded Negroes from jury service. The judge was indicted under section 4 of the Act of Congress of March 1, 1875, for the intentional discrimination. While in custody, he petitioned the United States Supreme Court for habeas corpus, alleging that the Act could not constitutionally be applied to him. The question raised, then, was whether the federal criminal law passed under authority of the equal protection clause of the fourteenth amendment could constitutionally be applied to official acts of a state judge who acted in his own discretion and not under statutory direction. In Ex parte Virginia\textsuperscript{14} the Supreme Court held that such acts were within the purview of the prohibitions of the fourteenth amendment and the enforcement acts passed under it. Justice Strong, speaking for the majority, stated:

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.\textsuperscript{15}

While the action of Judge Cole of Virginia was not authorized by state law, neither was it expressly prohibited nor made punishable under Virginia law. The question logically arises whether an act specifically prohibited by state law can be brought within the purview of the fourteenth amendment when performed by a state official while supposedly acting in his official capacity. To phrase the question differently, can illegal acts of a state official be classified as "state action" when the defendant is purportedly acting in an official capacity? In early cases dealing with attempts to obtain civil remedies against this type of official action the Supreme Court vacillated, first saying "no," and then saying "sometimes.\textsuperscript{16}

The attempt to apply federal criminal penalties under the civil rights acts further complicated the answer in that the criminal provision punishes acts done "under color of law." It was not until 1945 that the United States Supreme Court squarely faced and answered the question with respect to federal criminal penalties. The case was Screws v. United States,\textsuperscript{17} a classic example of police brutality.

\textsuperscript{14} 100 U.S. 339 (1880).
\textsuperscript{15} Id. at 347.
\textsuperscript{16} The first case was Barney v. City of New York, 193 U.S. 430 (1904). In Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907), the Court held the unequal assessment basis of a state board violative of the fourteenth amendment even though such action of the board violated the state constitution. In Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913), the Court held that the fact that a city ordinance might violate the state constitution did not foreclose a finding of "state action."
\textsuperscript{17} 325 U.S. 91 (1945). In United States v. Classic, 313 U.S. 299 (1941), the primary
Screws, sheriff of Baker County, Georgia, aided by a local police officer and a deputy sheriff, arrested Hall, a Negro citizen of the United States, on a warrant charging theft of a tire. Hall was handcuffed and driven to the court house. There he was dragged from the car and, while still handcuffed, beaten by all three men with their fists and with a two-pound solid-bar blackjack. The beating continued for fifteen to thirty minutes. Hall was then dragged feet first through the courthouse yard into the jail and thrown upon the floor, dying. An ambulance was called, but Hall died shortly afterward without regaining consciousness.

An indictment was returned against the three men charging, on one count, violation of the Criminal Code, 18 U.S.C. section 242. This section provides:

Whoever, under color of any law, . . . willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The key phrase which concerns us here is “under color of any law.” It is, of course, a statutory provision passed under the authority of the fourteenth amendment, and does not necessarily indicate the full reach of the amendment. But, certainly, if the phrase be interpreted as contemplating illegal acts of state officials in their official capacity, then the amendment must justify such inclusion for it to be constitutional.

The members of the Court divided on the interpretation of this phrase, with six members holding that the statute covered such illegal acts of state officials and three contending vigorously that such an interpretation was never intended by the Congress.

Justice Douglas announced the judgment of the Court and delivered an opinion in which the Chief Justice and Justices Black and Reed concurred. Justice Douglas' opinion is not notable for clarity of reasoning. The Justice knew where he wanted to go but seemed uncertain how to get there. He stated that the “color of law” phrase was before the Court in United States v. Classic, 18 and that the decision there was a rule of law controlling the Screws case. As to where the line is drawn between acts

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18 313 U.S. 299 (1941).
performed under color of law and those not so included, Justice Douglas stated:

It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express that idea... 10

Mr. Justice Rutledge was in full accord with the view that the statute extended to acts of state officials in their official capacity even though such acts were made criminal under state law, and Justice Murphy held that "section 20 unmistakably outlaws such actions by state officers."

Justice Roberts dissented, and was joined by two of his brethren—Justices Frankfurter and Jackson. To these men the question was purely one of congressional intent, and they concluded that Congress did not intend to make criminal the act of a state officer who flouts state law and is subject to punishment by the state for his disobedience. As to whether the fourteenth amendment authorized such a coverage as the majority attributed to section 20, Justice Roberts did not categorically answer. The indications are, however, that he might have gone along with the majority on the point of constitutional power, even though he differed on the congressional intent. 20

It is clear, then, that the rule of construction laid down in the Screws case by a majority of at least six, and possibly seven, extends the coverage of the fourteenth amendment to acts of state officers performed in their official capacity, even though state laws prohibit such acts. 21

OFFICIAL OR PRIVATE ACTION

The next question to be answered is when does a state official act in his official capacity? Justice Douglas, in his opinion in the Screws case, stated that acts of officers "in the ambit of their personal pursuits are plainly excluded" from the coverage of the statute or, presumably, the amendment. While such a statement does not necessarily preclude a broader interpretation of the full reach of the fourteenth amendment, it would seem to be an eminently reasonable delineation of the extent of coverage.

10 325 U.S. at 111.
20 Id. at 148.
21 The conviction of Screws was reversed, however, by the vote of the Justices that the trial judge's charge to the jury was defective in that he did not require the jury to find that the defendant was not merely guilty of the act of taking a life without justification, but intended to deprive the prisoner of a constitutional right, i.e., the right to be tried by a court rather than by ordeal. At the second trial Screws was acquitted. A similar case of police brutality reached the United States Supreme Court in 1951—Williams v. United States, 341 U.S. 97 (1951). Williams' conviction under § 20 was upheld.
To hold differently and consider every act of a state officer or employee to be "state action" subject to the fourteenth amendment would appear to place an intolerable burden upon both the individual employee and the state.

Few cases are available to illustrate the judicial view of what constitutes "private" as opposed to "official" acts of state officials. The extremes of the two categories are, of course, apparent. But when a quarrelsome police officer off duty gets into a brawl with a private citizen who knows the occupation of his opponent, and who might fear the consequences of a victory over a policeman, is the officer's action "state action"? Liability of this officer under federal civil provisions of the fourteenth amendment enforcement acts would be a somewhat more difficult question to answer.

Where an officer's acts are performed while on duty or in response to a citizen's request for some official performance of duty, it would appear that the officer's acts certainly constitute "state action." In Catlette v. United States22 this situation was presented in a peculiarly distasteful fashion. Two Jehovah's Witnesses went to Richwood, West Virginia, to distribute religious literature, seek converts and get a petition signed. After having been warned by Deputy Sheriff Catlette and others to get out of town, the two men and two companions went to the city hall to request the mayor to furnish them police protection while carrying on their religious activities in the city. The mayor was absent, and their request was made to Chief of Police Stewart. Thereupon Catlette and Stewart took the men into the mayor's office. Catlette then said that what "is done from here on will not be done in the name of the law," and removed his badge. They forced three of the men to drink eight ounces of castor oil each, and the fourth, because of his protests, was forced to drink sixteen ounces. These and other members of the sect were then tied in file, marched to their cars, and given their personal property, which had been covered with castor oil and uncomplimentary inscriptions, and advised never to return.

Catlette was prosecuted under section 20 of the United States Criminal Code for deprivations of constitutional rights (including one's right not to have his stomach purged while engaged in purging souls) while acting under color of law. He defended on the ground that in view of his statement and the removal of his badge, the acts were committed in his private and not his official capacity, and that therefore such acts were not "under color of any law." The trial court was not impressed with this

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22 132 F.2d 902 (4th Cir. 1943).
argument, and he was convicted. On appeal Judge Dobie, speaking for the court of appeals, stated on this point:

We must condemn this insidious suggestion that an officer may thus lightly shuffle off his official role. To accept such a legalistic dualism would gut the constitutional safeguards and render law enforcement a shameful mockery... \(^{23}\)

In a later case involving essentially the same question, the court of appeals of another circuit held in similar fashion. In this case, *Crews v. United States*,\(^{24}\) the Government obtained the conviction of Tom Crews, a Florida county constable, on the charge of violating section 20. Crews "arrested" a Negro farmhand on the grounds of drunkenness, proceeded to beat him with a bull whip, and ultimately forced him to jump into the Suwanee River where he was drowned. Crews appealed his conviction, claiming that his act was purely one of personal vengeance and was devoid of official character and authority, in that he was off duty and out of uniform. The three judges of the court of appeals unanimously rejected this argument, stating, through Judge Waller:

An officer of the law should not be permitted to divest himself of his official authority in actions taken by him wherein he acts, or purports, or pretends, to act pursuant to his authority, and where one, known by another to be an officer, takes the other into custody in a manner which appears on its face to be in the exercise of authority of law, without making to the other any disclosure to the contrary, such officer thereby justifies the conclusion that he was acting under color of law in making such an arrest.\(^{25}\)

Thus, as Professor Robert Carr so ably states the rule, "When an officer uses his official position as a means of gaining physical control over his victim, further evidence that his actions were in good part unofficial cannot interfere with the conclusion that he acted under color of law."\(^{26}\)

Suppose, however, that an officer takes an off duty job as watchman or guard over private property. Would his acts in such related police capacity constitute "state action"? The answer is less easily determined than in the *Screws* and *Crews* cases, and seems to hinge on the specific facts in each case. The most notable case in this area which reached the United States Supreme Court is *Williams v. United States*, decided in 1951.\(^{27}\)

Williams, the head of a private detective agency, was employed by a

\(^{23}\) Id. at 906.

\(^{24}\) 160 F.2d 746 (5th Cir. 1947).

\(^{25}\) Id. at 750.

\(^{26}\) Carr, Federal Protection of Civil Rights 175 (1947).

\(^{27}\) 341 U.S. 97 (1951).
Florida corporation to investigate thefts of its property. He held a special police officer’s card issued by the City of Miami. Along with two employees of the company and a Miami police officer, he took several suspects one by one into a shack on the corporation’s property and there subjected them to brutal third-degree methods. The Miami policeman was sent along by his superiors to lend authority to the proceedings. And Williams, who committed the assaults, went about flashing his badge.

The indictment under section 242 (formerly section 20) charged that Williams, acting under color of law, obtained confessions by force and that the victims were denied the right to be tried by due process of law. Justice Douglas spoke for the majority in holding that such action was “state action” or action under color of law:

... [the] petitioner was no mere interloper but had a semblance of policeman’s power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person. ... 28

Various other cases presenting the question of when an officer acts in his private capacity have been decided in the lower federal courts. One of these is Flemming v. South Carolina Electric and Gas Company.29 The case was an action brought by a Negro woman under the federal civil rights acts for damages suffered as a result of a bus driver’s requiring her to move to the rear of the bus, such move required by the segregation law of the state. Under South Carolina law the bus driver is made a police officer of the state for the purpose of enforcement of laws dealing with bus operation. Thus his act was claimed to have been under color of law and an act depriving the plaintiff of a constitutional right. The district court dismissed, but the court of appeals reversed. On the question of state action the court said, in a per curiam opinion:

It is argued that, since the driver is made a police officer of the state by ... the South Carolina Code, his action is not attributable to the defendant; but we think it clear that he was acting for the defendant in enforcing a statute which defendant itself was required by law to enforce. ... He was thus not only acting for defendant, but also acting under color of state law.... 30

In any given controversy the question of whether state officers were acting in their official or in a private capacity must hinge on the individual facts surrounding the incident.31 Such circumstances may be considered

28 Id. at 100.
29 224 F.2d 752 (4th Cir. 1955), appeal dismissed, 351 U.S. 901 (1956).
30 Id. at 753.
as whether the officer (if a peace officer) was wearing a uniform or badge, whether he was known to the injured party as an official of the state, whether he acted "under pretense" of his official position, whether he would have acted in the same manner if he had not held a state office, and any other circumstances relevant to determining the fact question. Certainly it can be concluded that the courts generally will look to the substance of his action and not merely the form. Momentary abdications of official title, even if accompanied by sonorous warnings to such effect, will not suffice to reduce conduct from the level of official acts to private acts if the initial focus of conflict occurred during the exercise of official authority.

An unusual aspect of the problem of differentiating between official and private action under the fourteenth amendment appears in the case *In re Estate of Stephen Girard.* In 1831 Stephen Girard created a testamentary trust for the education of "poor white male orphans." By the terms of the trust, it is administered by the City of Philadelphia. This is accomplished through the Board of Directors of City Trusts of the City of Philadelphia. The board consists of the mayor and the president of the city council, both ex-officio, and twelve other members appointed by the judges of the courts of common pleas for the county. The members of the board serve, without compensation, for life or during good behavior. The board's operations are conducted completely independently of control or connection with any city or state agency other than the Philadelphia Orphans Court. These operations are financed solely from the proceeds of trust property.

Having been denied admission to the school operated under Girard's trust, two otherwise qualified Negro children petitioned the Philadelphia Orphans Court to direct the board to show cause why they should not be admitted to the school. They contended that the board's action was state action because the board's authority was derived from a statute, which provided that most of the board's membership was to be selected by elected public officials, while two of the board's members and its treasurer serve as such by virtue of their status as city officials. The court held that the action of the board of directors in administering Girard's racially discriminatory private testamentary trust was not state action under the terms of the fourteenth amendment, since the interest of the board was limited to that of a bare legal title holder and administrative agent. In a re-examination of the question *en banc* the Orphans Court affirmed the first decision, pointing out that the position of the

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City of Philadelphia was functional—to act for the decedent and carry out his intent.\textsuperscript{33}

The court added that even if the board were constitutionally barred from racial discrimination in administration of a private trust, the court would have to appoint a private trustee to carry out the terms of the will to restrict the school to "poor white male orphans."

Here there is no question as to the public positions occupied by the members of the board. The question, as the court saw it, was whether the officers were acting as state agents or as private agents in administering the trust, and the decision was that they were performing in essentially a private capacity.

In an opinion more noteworthy for the prolixity of its author than for clarity, the Pennsylvania Supreme Court upheld the decision, one justice dissenting.\textsuperscript{34} The United States Supreme Court reversed this decision on the authority of \textit{Brown v. Board of Education} and with no reference to the distinction between governmental and fiduciary functions.\textsuperscript{35} Thus it may be assumed that when state agents act and act by virtue of their public position, then the requirement of state action is met even though the function performed is that of administering a private testamentary trust, or other normally private functions. The obvious next question is whether it would be unconstitutional for the Orphans Court to appoint, as it suggested, a private trustee for the estate and demand of that trustee that the terms of the will be met. There would appear to be no important constitutional distinction between enforcement of the terms by a city board and similar enforcement by a court.

\section*{Private Operations Assisted by Government Appropriations}

Another facet of the problem of delineating state action appears in the classification of the privately owned and managed operation which receives direct financial aid from the state. Is the act of such an agency an act of the state or is it a private act for purposes of the fourteenth amendment? Obviously, a categorical yes or no answer to the question is impossible. It would seem patently ridiculous to characterize as state agents all persons or institutions which receive direct financial aid from the state. Persons on relief, unemployed persons benefiting under state compensation plans, persons on state retirement pensions, veterans organizations in some states, or even persons who financially benefit through ordinary contracts with the state could then be classified as state agents and their acts as state acts. Thus would the public purpose doctrine con-

\textsuperscript{33} 24 U.S.L. Week 2311 (Phila. County, Pa., Orphans Ct., Jan. 6, 1956).
\textsuperscript{34} In re Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956).
cerning the validity of state expenditures under the due process clause be equated with state action: any operation or purpose of value to the public may be encouraged by the appropriation of public money and the resulting publicly supported operation is a state operation for purposes of the fourteenth amendment. Justice Harlan virtually stated such a rule in his dissent in the *Civil Rights Cases*. Such a rule would seem to go to an extreme, and, in addition, would open up another well of uncertainty—that of discovering how direct the state assistance must be in order to characterize the recipient's acts as state acts. It would seem that a more useful approach would be that of determining the degree of control which follows the dollar, or of determining whether the purpose behind the state appropriation represents a systematic and intentional exclusion of persons, to borrow a phrase from the jury panel cases, from benefits or services to which they would normally be entitled if the purposes effectuated were accomplished directly by the state. There seems to be no formula which would provide the correct division of cases of this type into neat categories of state action and private action, but the absence of precise formulae for judicial decision is old hat in the field of constitutional law. Some clues, however, to the considerations which might impel the court in one direction or the other may be obtained from an examination of the cases in this area. These are lower court decisions, since the United States Supreme Court has not as yet decided a case squarely presenting the issue of whether receipt of state financial aid alone makes the recipient an agent of the state.

In 1945 a question was raised concerning the status of the Enoch Pratt Free Library of Baltimore. Kerr, a Negro, sued for damages and an injunction on complaint that she was refused admission to a library training class conducted by the library to prepare persons for staff positions in the central library and its branches. She charged that the library was performing a governmental function and that she was rejected solely because of race, and that such rejection constituted state action prohibited by the fourteenth amendment. Her father joined in the suit as a taxpayer and asked that if the library were found to be a private body not barred from discriminating, the City of Baltimore be enjoined from making further contributions on the ground that it would then be exacting taxes from him in violation of the due process clause. The library defended on the ground that it was a private corporation.

The library was established by Pratt in 1882. He erected a building and established a fund and gave them to the city on condition that the city would create a perpetual annuity of $50,000 to be paid to the board of trustees for the maintenance of the library and the erection of four
branches. In giving legal effect to the terms of the gift, the Maryland legislature passed a statute and the city passed three ordinances. The state law named the persons who were to constitute the board of trustees. The real and personal property vested in the city by virtue of the act, as well as later acquisitions, were exempted from state and city taxes. In addition to the $50,000 annually appropriated, much greater sums were required to meet demands for increased services. In 1943 the total amounted to $511,575 and in 1944 to $650,086. In addition the city paid large sums for bond interest, bond retirement, and the retirement funds for the library's employees. Salary checks were issued by the city's payroll officer and charged against the library's appropriation. The library budget was included in the regular city budget, and library employees were included within the municipal employees' retirement system.

The Court of Appeals for the Fourth Circuit held that the library's action was state action within the meaning of the fourteenth amendment. The two criteria stressed by the court of appeals in holding the library's action to be state action were control by the state over the library's activities and, apparently, the volume of importance of financial assistance afforded by the state. The opinion indicated no line of demarcation to aid in determining how far along the spectrum from zero to complete control or complete financial support the state must go before the activity becomes that of the state. Nor is it easy to see where such a line can be drawn. It would seem that the only solution is the case-to-case approach, examining each question on its own peculiar set of public-private relationships. Certainly, however, the two criteria stated would necessarily be a part of the consideration of the question. The major problem is to determine whether other criteria should be added to these two.

In a subsequent Maryland case, Norris v. Mayor and City Council of Baltimore, decided three years later, a very similar question to that decided in the Kerr case was presented. Maryland Institute was incorporated in 1826 as a private corporation for the purpose of teaching art courses. Norris, a Negro, applied for admission in 1946 and was refused on the ground that no Negro students were admitted. He sued for a declaratory judgment that he was entitled to enter and for an injunction barring further exclusion on ground of color.

The city made one appropriation of $20,000 and the state made an annual grant of $3,000 to the president of the institute. In 1907 the city leased a building constructed with public funds to the institute for $500

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annual rent. The estimated commercial rental value of the institute's lease was $12,000 annually.

After 1881 the city maintained a contract relationship with the institute for the education of pupils in the schools of the institute. Pupils under such contracts secured appointments from members of the city council. City payments to the institute under these contracts amounted to about $25,000 annually. The state made annual contributions to the institute varying in amount—in 1948 about $16,500. For this contribution each of the twenty-nine members of the Maryland Senate had the right to appoint one student free of tuition charge. No control over the management of the affairs of the institute was exercised by either the city or the state except that courses were examined from time to time to guarantee that contract requirements were being fulfilled.

The question presented in the federal district court was whether the institute's activities became acts of the state in view of the financial support rendered by city and state and the contract relationships between those governments and the institute. The court held that there was no such control exercised by the state as to require a holding that the institute was an instrumentality of the state.

This lack of direct control was the essential point of differentiation between the Norris and the Kerr cases, according to Judge Chesnut, who compared the fact situations in the two cases at great length, even presenting a tabular statistical summary of financial aid in each case. He pointed out that the state made no designation of the particular individuals as managers, reserved no special visitorial powers with respect to management of the institute, and also noted the institute owned its property in its own right. In further support of the holding he cited earlier decisions of Maryland's courts holding the institute and other schools to be private corporations.

In spite of the absence of direct control, the court still had to answer the charge that the substantial financial support rendered by city and state converted the operation into a state institution. In answer the court stated:

[Counsel for the plaintiff contends] . . . that whenever the State or Baltimore City as a municipal agency of the State, advances moneys to a private corporation of an educational nature in an appreciably substantial amount which thereby becomes mingled with other general funds of the institution, that action of the institution or City thereby becomes State action within the scope of the 14th Amendment. No authority is cited for this proposition and I know of none. In my opinion it is untenable. . . .

[38 Id. at 460.]
The court stated further that at each session of the Maryland Legislature there was passed an omnibus appropriations bill giving state aid to many private institutions for educational and charitable purposes, and even though many of the institutions practiced racial discrimination, the Maryland courts expressly approved the policy and action.

It may very well be true that state financial aid alone does not render the institution receiving such aid a state agency. The principle would certainly seem to be a sound one to follow. But financial aid plus some additional factor might lead to a different conclusion. Of course, a mere finding of state control is not determinative, since the state has a considerable measure of control under its police power over all types of business operations. However, a finding of state financial support plus an unusual degree of control over management and policies might properly lead to characterization of a business or agency as a state operation. The problem, of course, is to determine just how much control constitutes an “unusual degree of control.” There appears to be no facile answer to the problem, although it seems that one practical approach might be to compare the degree of control over the operation in question with the control exercised over other similar types of businesses or agencies.

There are other factors also which when added to the factor of state financial aid might result in a finding of state action. It seems a fair guess that the United States Supreme Court would examine closely a state expenditure or appropriation to private institutions where there is any suggestion that such appropriation is in reality for the purpose of accomplishing an end which would be held unconstitutional if attempted directly. To put the case squarely, if a state favoring racial segregation should withdraw from the field of active education of its citizens and substitute therefor a contract device for furnishing tuition and fees to any private schools selected by the citizens, it is inconceivable that the Court would ignore the possibility that the whole purpose of the device might be to defeat the decision barring state enforced racial segregation in public schools. Thus financial aid plus motive to accomplish an unconstitutional purpose would present a second type of fact situation which might result in a conclusion of unconstitutional state action. However, there is a very important difference between this situation and the first one. In the first situation the Court can quite properly categorize the acts of the “private” institution as state acts. In the second this conclusion would not follow at all. The state appropriation to effect an unconstitutional purpose is simply unconstitutional under the due process clause. It represents a taking of property for an unconstitutional purpose and therefore for a purpose not “public” within the requirement of
the due process clause. The institution would remain private unless unusual control by the state be a condition of the receipt of state money.

Another factor which might be considered is whether the operation is an important public function. Would the combination of state aid and the furnishing of an important public service result in a conclusion that the operation should be classified as a state agency? If so, it would seem that logically the conclusion would have to rest on the theory that the performance of a public function is a state act. If a given function is of such public importance and so closely related to state governmental functions as to be classified as a governmental agency, then the presence or absence of state financial aid should be irrelevant in making a finding of state action. If the function does not fall within such a description, then the mere addition of state money should not influence the conclusion.

Thus the conclusion here is that the fact that a state appropriates money to a private person or institution has nothing to do with the determination of whether the acts of the person or institution constitute state action. While to recount a list of various appropriated sums of money may sound impressive, the fallacy of this consideration is exposed when one looks at the various persons or operations which receive government money. To take the extreme case, assume that a given operation is completely dependent upon the money it receives from the state, as for example a private garbage collection agency. The mere fact that the city provides the agency with its entire means of existence does not change the denomination of that agency as a private one. Nor does a person entirely dependent upon state welfare relief become thereby a state agent. Neither the total amount of the appropriation nor the ratio of state aid to total cost of maintenance of the private operation would seem to have any bearing on a determination of the presence or absence of state action on the part of the recipient. The determining factor must be something other than mere financial aid furnished by the state.

PRIVATE OPERATIONS ASSISTED BY GOVERNMENTAL ACTS OTHER THAN APPROPRIATION OF MONEY

The state may aid a private operation in various ways other than by direct financial assistance. It may give the organization the power of eminent domain, it may grant tax exemptions, or it may give it a monopolistic status for certain purposes. Does the receipt of such assistance convert the organization into a state agency? According to Justice Harlan, in the Civil Rights Cases, it would, especially if the state acquired special control powers in return.

The most thoroughly argued case on the point is the case of Dorsey v.
Stuyvesant Town Corporation, decided in the New York Court of Appeals in 1949. Stuyvesant Town was built as an apartment housing development pursuant to a contract between the City of New York, Metropolitan Insurance Company and its wholly owned subsidiary Stuyvesant. Stuyvesant was organized under the state's Redevelopment Companies Law of 1942, as amended. The purpose of the law was to encourage private companies to enter the housing field. Under that law, the City of New York, by eminent domain, brought under one good title an area of eighteen blocks in the city, the area having been declared one of substandard housing. Stuyvesant acquired the property, including certain streets which the city had agreed to close, by paying to the city the cost of acquiring land and buildings. The agreement provided that Stuyvesant would demolish the old buildings and construct new ones without expense to the city, and the city granted the corporation a twenty-five year tax exemption to the extent of the enhanced value to be created by the project. (Certain writers estimate the total tax exemption to reach approximately $50,000,000.)

The project represented an investment of about $90,000,000 of private funds by Metropolitan Insurance Company. No state law barred the owner or operator of this project from discriminating, racially or otherwise, in his choice of tenants. While repeated attempts had been made in the state legislature to amend the redevelopment law to bar racial discrimination, all had failed. Although the question was discussed in the city council, the agreement reached contained no bar to practice of racial discrimination by the landlord. When finally completed, the project housed approximately twenty-five thousand persons. The contract gave the city the right to regulate rents, and certain auditing privileges, and prohibited the mortgage or sale of the property.

Dorsey, a Negro, was refused tenancy because of race and sued to enjoin Stuyvesant from denying accommodations because of race, on the grounds of alleged violation of the fourteenth amendment. The issue presented, of course, was whether the city's assistance in the form of eminent domain and tax exemptions and the reserved control over the housing operation made the housing project a state instrumentality within the meaning of the fourteenth amendment. The lower court held that Stuyvesant town was not a state instrumentality. Justice Benvenega, in the New York Supreme Court, stated:

The fundamental fallacy in plaintiff's argument is that it confuses "public use" and "public purpose" with "public project," and assumes that, because the work of redevelopment and rehabilitation is a public purpose, the project involved is necessarily a public project. But the public use and purpose involved terminates when the work of redevelopment is completed. . . . In a word, though the purpose involved is a public purpose, the project itself is not now and never was a public project. . . .

By the narrow margin of four to three the New York Court of Appeals affirmed the decision in favor of Stuyvesant, and the United States Supreme Court denied certiorari. Judge Bromley, speaking for the majority in the Court of Appeals, stated:

To say that the aid accorded respondents is nevertheless subject to . . . [the fourteenth amendment requirements], on the ground that helpful cooperation between the State and the respondents transforms the activities of the latter into State action, comes perilously close to asserting that any State assistance to an organization which discriminates necessarily violates the Fourteenth Amendment. Tax exemption and power of eminent domain are freely given to many organizations which necessarily limit their benefit to a restricted group. It has not yet been held that the recipients are subject to the restraints of the Fourteenth Amendment.

Judge Fuld spoke for the three dissenters in a vigorous rebuttal to the majority view. He stated that the housing operation was assuredly not a purely private agency because governmental assistance at a number of points was vital to the establishment of the project. Since it was not a private operation, it must be a state agency. The majority certainly did not overlook the presence of governmental assistance. The difference lay in the treatment accorded the project as a result of this aid. The majority seemingly considered the solution to the question of state action to rest in a process of determining how far along a continuous spectrum from purely private to purely governmental a specific problem situation might be located—at least in a case not involving "matters of high public interest" or performance of functions of a governmental character. Presumably, then, the majority would consider an act private if it were mostly private and governmental if it were mostly governmental. The dissenters, on the other hand, seemed to take the position that a particular operation is either purely private or else it is governmental.

Whether or not the principle of deciding questions of state action laid down by the dissenters will ultimately be the ruling law, it is certain that the United States Supreme Court has not yet expanded the state action concept this far. As the New York Supreme Court indicated, the

42 See note 39 supra.
43 299 N.Y. at 535, 87 N.E.2d at 551.
minority view does in fact equate public purpose and state action, at least in cases where private persons receive state aid. As stated earlier, such a view would lead to ridiculous conclusions if pursued to its logical end.

The public purpose argument or doctrine must be left where it rightfully belongs—as a limitation of the power of the government to spend money or to exercise eminent domain—and not dragged into the proper delineation of state action and private action. If the citizen is denied the equal benefits of a service performed by private persons with governmental financial aid or the “loan” of eminent domain, then he should litigate his rights in the matter under the public purpose doctrine of the due process clause. Then if the services afforded by the private persons are unduly restricted, or if the classification of customers and non-customers is unreasonable, the courts can stay further expenditure of public money. This would accomplish the end of discouraging public expenditures to accomplish unreasonable discriminations without the encumbering legal snarls coincident with a finding of governmental instrumentality.

PRIVATE ACTIVITIES CONDUCTED ON GOVERNMENT PROPERTY

In a number of cases a question has been raised concerning the status of an operation conducted by private persons under lease or permit on government property. The variety of fact situations which might be visualized in this connection is, of course, infinite. For purposes of attacking the problem of the application of the fourteenth amendment, therefore, the possible variations are grouped into four general types of situations for analysis: (1) private operation of a facility open to the public where the operator leases land from a governmental unit but where the governmental unit in fact directs and controls the management and the policies under which the facility is operated; (2) private operation of a facility open to the public where the operator leases land from a governmental unit and where there is a bona fide arm’s length lease with no improper collusion or control over operating policy exercised by the governmental unit; (3) the same situation described in (2) except that the private operator makes capital improvements on the government land, but not open to the public, and (4) a private operation conducted under lease on government land.

45 For example, in Connecticut College for Women v. Calvert, 87 Conn. 421, 88 Atl. 633 (1913), the Connecticut Supreme Court of Errors held invalid a state law granting to the college the right of eminent domain. The court held that the granting of this right could only be made where there was a common and equal right of the public to the benefit of the service rendered, free from unreasonable discrimination, and there was no guarantee of equal right of the public to use the college.
There has been no general division of cases by the courts into any such categories as those suggested here, but it seems that much of the confusion engendered by the opinions could be avoided by such a differentiation. It is necessary here also to add to the analysis a discussion of the rights protected by the fourteenth amendment, in a limited fashion, as well as the concept of state action.

It is clear that if state property is opened up to the use of the public, then restrictions upon that use imposed directly by the state must meet the test of the fourteenth amendment. The state cannot, for example, discriminate on the basis of religion, \textsuperscript{46} or political belief, \textsuperscript{47} or race \textsuperscript{48} in the grant to the public of the use of its facilities. The state may withdraw public property from general public use or it can make such property available to the use of the public under various restrictions, but such restrictions must fall within statutory authorization and must not violate state or federal constitutional guarantees. To this extent, certainly, governmental power to determine conditions attaching to the use of public property is less than that of private persons over private property. The right of access to government property under reasonable restrictions appears to be a right clearly possessed by the citizen. However, the question arises as to the source of the right and the proper remedies for its abridgment.

The fourteenth amendment establishes the right as against unreasonable interference \textit{by the state}. The fourteenth amendment establishes no such federal rights as against interference by private persons. Since the decision in the \textit{Slaughter-House Cases} in 1873,\textsuperscript{49} more recently reiterated in \textit{Collins v. Hardyman},\textsuperscript{50} a distinction has been made, albeit not a crystal clear one, between federal rights and state rights, and only the former are covered by the fourteenth amendment. The right to gain access to state property, under reasonable restrictions, free from private interference is a state right not now protected by the Federal Constitution. Thus in the latter situation remedies against private interference must be sought in ordinary actions brought in state courts. Only where the state unreasonably interferes with the exercise of the right does the fourteenth amendment come into play. With this distinction as to the nature of the rights involved, it is less difficult to approach the cases concerning private activities on government land.

(1) \textit{Private operation of a facility open to the public where the oper-}

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\textsuperscript{46} Niemotko v. Maryland, 340 U.S. 268 (1951).
\textsuperscript{47} Hague v. C.I.O., 307 U.S. 496 (1939).
\textsuperscript{49} 83 U.S. (16 Wall.) 36 (1873).
\textsuperscript{50} 341 U.S. 651 (1951) dealing with private interference with the assembling of citizens to discuss federal governmental policy.
ator leases land from a governmental unit but where the governmental unit in fact directs and controls the management and the policies under which the facility is operated. In cases falling in this category, there should be no question but that state action is present in the operation of the facility and in the execution of policies affecting access of the public to the facility. An illustration of this sort of lease is found in the case of Lawrence v. Hancock. The City of Montgomery, West Virginia, built a municipal swimming pool. Vacillation on the question of admission of Negroes to the pool delayed the opening of the pool when completed in 1945, and in 1946 the city council leased the property for one dollar to the Montgomery Park Association, a private corporation formed for the purpose of operating the pool. All revenue, according to the lease, was to be used for redevelopment and improvement of the property. The association opened the pool to the public, but denied its use to Negroes. Lawrence brought suit for a declaratory judgment and an injunction to restrain defendants, members of the city council, from discriminating against plaintiff because of race. (The action was dismissed as to defendant Montgomery Park Association.)

In finding a denial by the state of access to the pool, District Judge Moore stated:

Justice would be blind indeed if she failed to detect the real purpose in this effort of the City of Montgomery to clothe a public function with the mantle of private responsibility. "The voice is Jacob's voice," even though "the hands are the hands of Esau." It is clearly but another in the long series of stratagems which governing bodies of many white communities have employed in attempting to deprive the Negro of his constitutional birthright; the equal protection of the laws.

Thus even though improper interference be accomplished by indirectness, if the state is found to be an active party to the interference, the denial constitutes state action.

Of course a broad statement based upon equal protection would go too far if it covered all leases of public land to private individuals. While all persons must have opportunity to bid on a lease, it would seem perfectly proper to lease public land to private oil companies for extraction of oil without at the same time guaranteeing to all citizens equal shares of the oil extracted, or equal access to the property for the purpose of sinking wells once the lessee has been selected. The better rule would appear to be that the citizen has a right of access to state property without unreasonable discrimination if that property is to be opened up to any substantial part of the public.

52 Id. at 1008.
(2) Private operation of a facility open to the public, where the operator leases land from a governmental unit and where there is a bona fide arm's length lease with no improper collusion or control over operating policy exercised by the governmental unit. The case which best illustrates this category is Kern v. City Commissioners of Newton.\textsuperscript{53}

The question presented was the right of Negroes to admission, on the same basis as others, to a municipally owned swimming pool which was operated by a private person under a lease with the city. The pool had been constructed by the City of Newton, Kansas, with funds procured from the sale of municipal bonds. Hunt, the private lessee, operated the pool for his profit and denied access to all members of the Negro race. Kern, a Negro, sued for mandamus, directed to both the city commissioners and the lessee, and requiring them to admit him to the pool.

Since mandamus generally lies only against public officials, or if against private persons only where there is express statutory duty imposed,\textsuperscript{54} it would seem that the better approach would have been to seek a declaratory judgment and injunction. This would have put the issue squarely as to the right of access, without the overtones of state action surrounding the collateral attack by defendant on the propriety of a suit for mandamus.

Whatever the actual circumstances might have been, the record shows a lease entered into in good faith at arm’s length with no subterfuge attempted by the city. Upon this record the denial of access was not accomplished by the city, and the remedy afforded should have been a private one. The Kansas Supreme Court held mandamus to lie, however, and had a difficult time in doing so. Since the action was brought in a state court, it is clear that a remedy could and should have been offered. The objection is that the wrong one was sought and considerable confusion attended the court's justification for giving it. The court held that the lessee Hunt was an official of the city to the extent that mandamus properly lay against him. It held that Hunt was not an official of the state to the extent that his operation was clothed with governmental immunity from wrongful death claims arising out of the furnishing of this municipal function. The opinion stated that Hunt merely managed the pool for the city. This simply was not true in view of the fact that the profits redounded not to the city but to Hunt.

Either Hunt’s position as manager of the swimming pool leased from the city made him an agent of the government or it did not. If his acts in such capacity constituted state action, then he was clothed with


both the responsibilities and the immunities of such status. If not, then
actions brought against him ought to have followed the normal remedies
available against other private persons. Assuredly it is not reasonable
or proper to classify all private operators of concession stands on gov-
ernment property as governmental agents. Here again, a firm distinc-
tion must be made between federal rights and state rights—between
state deprivation of liberties included in the coverage of the fourteenth
amendment and private deprivation of liberties included in the fourteenth
amendment. There are ample remedies either at law or in equity to
cover the situation of private abridgment of rights without resorting to
awkward and unsound applications of the fourteenth amendment.

Other cases of a similar nature have appeared in the courts more
recently, but the only one which presents a sufficiently different facet
of the problem to merit examination here is *Sweeney v. City of Louis-
ville*.

In one of its parks the City of Louisville constructed an amphitheatre
at its expense, except that the Louisville Park Theatrical Association
contributed $5,000. The association is a private non-profit organization
incorporated under the laws of Kentucky, and which at its own expense
and under its sole direction and supervision, during some of the summer,
presented operas, for which an admission fee was charged. The ar-
rangement with the city for these performances was pursuant to a writ-
ten contract whereby the city maintained the amphitheatre and the
association would pay into the city any profit realized from the per-
formances, less $5,000 to make up for the original contribution to the
city. Any organizations desiring to use the amphitheatre during the
months for which the lease ran were to be required to apply for a sub-
lease from the association. No Negro group applied to the association
for a sub-lease during the summer. Sweeney and other Negroes, how-
ever, did apply for admission to performances and were refused on
account of their race. Both the city and the association were made
defendants in an action in a federal district court for a declaratory
judgment as to the right of access of Negroes to the performances in the
amphitheatre. The district court held that the City of Louisville had
made a proper lease which did not by its terms prohibit other organiza-
tions from using it, nor was there any proof that other organizations
had not used it. In view of this and the fact that the city exercised no

access to privately operated restaurant on federal property; Easterly v. Dempster, 112 F.
Supp. 214 (E.D. Tenn. 1953), concerning access to a privately operated golf course owned
by a city.
special control over the operations of the association and, further, the indication that the association actually occupied the amphitheatre for only thirty days, the court held that the complaint against the city was without merit. In dismissing the complaint against the association, the court implicitly held that its acts were not state acts.

In a brief per curiam opinion the Sixth Circuit Court of Appeals affirmed this decision. It held that where the City of Louisville did not participate either directly or indirectly in the operation of the private enterprise, the theatrical association was guilty of no unlawful discrimination in violation of the fourteenth amendment in refusing admission to colored persons. Contemporaneous with the decision in the school segregation cases the United States Supreme Court granted certiorari. In a per curiam opinion the judgment was vacated and the case remanded "for consideration in the light of the Segregation Cases" and "conditions that now prevail." In view of the findings of fact in the trial court, supported on appeal, that the city was not a party to the discrimination, the instructions of the Supreme Court are not particularly edifying. The school segregation cases are authority for a holding that the City of Louisville can no longer directly or indirectly discriminate on the basis of race in granting access to its parks. The fourteenth amendment right, then, is to be free from racial discrimination imposed by the state with respect to state property opened to the public use. The right to be free from racial discriminations imposed by private persons with respect to state property opened to the public use is a state right and presents no federal question. Negroes have a federal right not to be denied admission by the state to the operas on account of race. Negroes have a state right not to be denied admission by private persons to the operas because of race.

Obviously, the next question is what happens if the state courts refuse to hold that the Negro has a right of access to state property opened to the public? Is there no federal question to enable one to obtain review in the United States Supreme Court? The answer must be that there is a federal question presented under the equal protection clause if the state court holds that the white person has a right of access and the Negro does not. This is an affirmative declaration of state policy by an organ of the state with respect to land owned by the state, and thus comes within the purview of the fourteenth amendment. The important point in making this differentiation is that the issue is clarified and the proper defendants and remedies can be chosen without unnecessarily

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57 Sub nom. Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953).
dragging into the picture questions of tax immunity or tort liability of governmental agents.

To complete the picture, it is necessary to take up the special situation of a governmental facility normally open to the public but leased to private persons for short intervals and for purely private purposes. As an illustration the example of the municipal auditorium may be used. This is similar in principle to the amphitheatre case, but the auditorium admits of a much greater variety of activities and is not so subject to seasonal temperature or weather variations. Such auditoriums are almost invariably leased out to various private organizations for one or two-day activities. Some of these activities are open to the public, either free or for an admission charge, while others are not. Assuming the very short term leasing arrangement, the differentiation as to right of access to the activity must rationally turn on whether the private lessee opens the facility to the public or restricts it to some specific private group. First, of course, the municipality must allow free competition in determining which groups shall be given a right to contract for the auditorium. Improper discrimination in leasing the facility would clearly violate the fourteenth amendment. But assuming this phase of the procedure to be fair, then it would appear that there is no violation of either federal or state right for the lessee to limit access to some specific group so long as the public generally is not invited or encouraged to attend. For example, if the lessee is offering a concert performance in a municipal auditorium and urging the public to buy tickets and attend, then right of access cannot be denied on the basis of religion, color, size, or other improper classification. The denial of access on such bases by the lessee would be a denial of a state right. But assume that the city leases the auditorium to the governing body of the southeastern region of the Methodist Church, for the purpose of holding an annual convention of delegates and ministers of that faith to determine church policy. While permission to use such a facility might, broadly construed, be interpreted as an aid to religion in general or an aid to the Methodists in particular, this type of aid certainly ought not to come within the proscribed behavior of *McCollum v. Board of Education*, in which a released time program for religious instruction in school buildings during school hours was held unconstitutional. So long as the city does not discriminate improperly in offering its park facilities for speeches and assemblages, it is perfectly permissible for the city to grant a specific religious organization a permit for a religious meeting on a given day.  

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60 See Milwaukee County v. Carter, 258 Wis. 139, 45 N.W.2d 90 (1950).
A *fortiori*, the city can do the same with an auditorium it owns. And if the lessee chooses not to open the meeting to the public generally, then there is no right, state or federal, of access in the public to the meeting. The lessee can then discriminate on the basis of religion or non-membership in the specific organization, whatever it may be.

(3) **Private operation of a facility open to the public where the operator leases land from a governmental unit and where there is a bona fide, arm's length lease and no improper collusion or control over operation policy exercised by the governmental unit, but where the physical facilities forming the basis of the service to the public are constructed by the lessee out of private capital and owned by the lessee.** In this third situation, as in the category just discussed, it should be clear that the acts of the lessee are not state acts and thus do not come under the fourteenth amendment. The earliest case located which is directly in point is *Swan v. Riverside Bathing Beach Co.*,\(^61\) which dealt with the question of the extension of governmental immunity from suit to a lessee of governmental property under the circumstances set out above.

A private person leased certain property from a city in Kansas for a period of fifteen years, under the terms of the contract. The city agreed to excavate for the pool, provide storm and sanitary sewer lines and lay out certain roads around the pool. The lessee agreed to build and maintain a concrete swimming pool, pay a designated rate to the city for the water used, construct and maintain dressing rooms, and provide proper guards and police facilities. At the end of the fifteen-year lease period, all properties and buildings were to revert to the city.

Kansas law granted, at this time, to municipalities immunity from suit for damages to one injured in a municipal swimming pool through the negligence of its officers or agents. Swan sued the lessee Riverside Bathing Beach Company for damages for its alleged negligence leading to the death of a child. The lessee claimed governmental immunity from liability, and the question presented was whether, under the contract arrangement between lessee and city, the lessee was in fact an agent or employee of the city. The Kansas Supreme Court held that the lessee was not in such category and was not therefore immune from suit in the case. The opinion of the court is noteworthy in that a differentiation is made between a purely private lessee and a "state agent" lessee on the basis of the net effect of the contractual agreement itself.\(^62\)

It is interesting to note that in comparing decisions of courts dealing with a lessee's denial of access on the basis of race with decisions deal-
ing with a lessee's attempt to attain governmental immunity from suit, the cases present judicial pressure operating in exactly opposite directions. In the former the scope of state action is being broadened, while in the latter the scope of state action is being narrowed. Clarification of the status of such lessees by proper categorization should simplify decision making in both types of cases.

The most recent statement concerning this category of privately leased government land is found in Holley v. City of Portsmouth,\(^6\) decided in April, 1957. Judge Hoffman dealt with the question of the right of Negroes to the use of a municipal golf course. In the course of the opinion the following statement was made as dictum:

> It is not suggested that, where a lessee pays ground rent on a reasonable basis and private capital is used for the construction and operation of the golf course with no expense to the taxpayers, the Tate case should be controlling as such a situation would not be a governmental facility or operation.\(^6\)

It would seem reasonable to conclude, with Judge Hoffman, that where the private lessee himself makes the capital improvements which form the basis for the service offered, he can make such discrimination as any other private operator on purely private property is free to make, and his acts are not state acts. Thus a particular religious group might lease land from the state and construct thereon an orphans' home and restrict admission, constitutionally and legally, to those persons of the lessee's faith. However, the facts in each case must be examined carefully to support a finding that the private improvements are the essential element of the service rendered to the customers and not a mere subterfuge under which immunity from a duty not to discriminate is claimed. Assuredly, there are difficult questions to decide in considering such factors as reverter clauses and options to renew leases.

(4) *Private operation conducted under lease on government land but not open to the public.* This fourth category would seem to present no problems concerning state action, so long as the governmental unit leases in good faith by giving due notice of intention in such a manner that interested parties may avail themselves of equal opportunity to submit bids with respect to the property, and have such bids considered fairly. The grazing of cattle on land privately leased from state governments does not by itself make the lessee's activity a governmental act. The private lessee under these circumstances is obviously not an agent of the governmental unit, and the public has no right of access to the property once the effective date of the lease begins. The only situation

\(^6\) 150 F. Supp. 6 (E.D. Va. 1957).
\(^6\) Id. at 9 n.1.
which poses somewhat of a problem is that discussed earlier, under the
second category, concerning the use of a municipal auditorium for activ-
ities sometimes public and sometimes private. However, as was in-
dicated in that discussion, the determining factor is the question of
whether the facility is to be opened to the public. If so, then the case
falls in the second category, above, and the public has a right of access,
even though state action may not be present. If not, then the case
properly falls into the present area of discussion and there is neither
state action violative of the Constitution nor a right of access in the
public.

To summarize, it is felt, first, that the fact situations which arise
under the general heading of private activities conducted on government
property may reasonably and profitably be broken down into four cate-
gories, and that such categorization will clarify the legal issues presented
in such cases. Secondly, it is suggested that a clear differentiation be-
tween the federal and the state rights possessed in the various categories
of cases above has not been made in most of the cited cases, and has
therefore led to some confusion in the rationale for disposition of these
cases.

PRIVATE ACTIVITIES CLASSIFIED AS GOVERNMENTAL BECAUSE OF THEIR
PUBLIC NATURE

In the Dorsey case, discussed previously, and in several others there
is reference to institutions engaged in "matters of high public interest"
or agencies performing a "public function," which again harks back to
the arguments of Justice Harlan in the Civil Rights Cases. The theory
sometimes stated in the cases is that such institutions or agencies are,
by virtue solely of the function performed, governmental agencies. The
best illustration of the point is found in the cases concerning political
parties.

The series of cases dealing with the question of Negro voting in the
south culminated in a holding that, in the south, at least, even though
the activity of a state or local Democratic Party be completely under
private control and outside the regulatory pattern of the state, the party
is still an instrumentality of the state because of its nature. In Nixon v.
States Supreme Court found state action in the acts of the Texas Demo-
cratic Party by virtue of close statutory control, statutory grants of
power, and judicial processes in aid of the party’s actions and decisions.

66 286 U.S. 73 (1932).
But in *Rice v. Elmore* the question was presented of whether the actions of the South Carolina Democratic Party constituted state action despite the legislature's repeal of all statutes relating to the primaries. The trial court held the party to be a state instrumentality, and this view was affirmed in the court of appeals. Judge Parker, speaking for the latter court, stated:

The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and that the primary is a mere piece of party machinery. . . . [W]ith the passage of the years, political parties have become in effect state institutions . . . through which sovereign power is exercised by the people. . . .

In *Terry v. Adams*, the most recent of the white primary cases, the Supreme Court found state action in the nominations of a county organization in Texas called the Jaybird Democratic Association, which consisted of all qualified white voters in the county. In this case the Court went even further than in *Rice v. Elmore*, since the Jaybird primary was in reality a preliminary primary, and only custom dictated that the winners would run unopposed in the regular primary.

The Court's statements in *Terry v. Adams*, taken with that of Justice Cardozo who, in *Nixon v. Condon*, used the phrase "matters of high public interest" in connection with participation in the Texas Democratic Party primary, have led to conjecture concerning the possibility of bringing all of the important functions of society under the same broad rule. While such an extension presents interesting possibilities, it seems that voting for public officials and participation in political party activities are unique phases of life in a democratic society. Consequently, extreme care should be used in transferring some of the broad generalizations found in those opinions into other areas of activity.

An uncautious extension of these generalizations is noted in the theory espoused by some writers to the effect that activities which are "fundamental" or "indispensable" in our society are, by definition, too important not to be considered as governmental functions, even though completely controlled and operated by private persons. The only problems to be solved under this approach are, first, the delineation of the political theory which demands that government undertake positively to...

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68 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948).
69 Id. at 389.
70 H. B. Mayo speaks of the "procedural liberties sufficient to ensure that a continuing and shifting majority may be arrived at freely." Mayo, "Majority Rule and the Constitution in Canada and the United States," 10 Western Pol. Q. 49, 51 (1957).
71 See Note, 32 Texas L. Rev. 223 (1953), and the discussion in Nicholson, "The Legal Standing of the South's School Resistance Proposals," 7 S.C.L.Q. 1, 40-45 (1954).
provide all persons with all fundamentals of life, and, second, the determination of which aspects of life are "fundamental."

While the political theory of Karl Marx embraces the idea that government, at least in the transitional stage of its existence, should furnish the fundamentals of life, the anti-democratic aspects of his theory make it a poor format for illustration. The host of more recent socialist writers include many, such as the Fabian Socialists, whose theories may be more acceptable to those in this country who argue for such a goal for the state. T. H. Green does not explicitly argue for such a function, but his theory is at least congenial to the view that the state has the affirmative duty of seeing that all essentials of life are available to all persons. Green holds that the state's task is to make possible the achievement of the good life both by removing obstacles in the path of such achievement and in assisting the individual in realizing his ideal of self-perfection. Somewhat similar is the statement in the Report of the President's Committee on Civil Rights:

It is not enough that full and equal membership in society entitles the individual to an equal voice in the control of his government; it must also give him the right to enjoy the benefits of society and to contribute to its progress. The opportunity of each individual to obtain useful employment, and to have access to services in the fields of education, housing, health, recreation and transportation, whether available free or at a price, must be provided with complete disregard for race, color, creed, and national origin.

This latter statement stops short of demanding that government furnish such necessaries—it merely says that they shall not be denied because of race, color, creed or national origin. With the exception, perhaps, of education and recreation, there is a substantial difference of opinion in the United States as to the degree of direct participation of government in even the admittedly vital areas mentioned in the above quotation. And assuming that general agreement could be obtained to the effect that indispensable functions are governmental functions, or that they relate in some manner to the state even without specific statutory control, then the problem remains of defining the line between the "fundamentals" and the "non-fundamentals" of life.

The analogy of the doctrine of "businesses affected with a public interest" immediately comes to mind in this connection, as does the memory of the tortuous meanderings of the Court in trying to give effect to that doctrine from *Munn v. Illinois* to *Nebbia v. New York*. The

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72 For a general treatment see Coker, Recent Political Thought cc. IV, V (1934).
74 To Secure These Rights 9 (1947).
75 94 U.S. 113 (1876).
76 291 U.S. 502 (1934).
difficulty was well stated by Justice Holmes in a dissenting opinion in the case of *Tyson & Brother v. Banton*, dealing with the constitutionality of a New York statute which limited the fees charged by theatre ticket brokers:

But if we are to yield to fashionable conventions, it seems to me that theatres are as much devoted to public use as anything well can be. . . . To many people the superfluous is the necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them. . . .77

Fear of a repetition of the experience during the rise and fall of the affectation doctrine might be sufficient for many to eschew acceptance of the doctrine that the fundamental is governmental. Even for the less timorous, there is considerable doubt as to the desirability of adopting a policy which would classify thousands of formerly private persons as governmental agents, subject to the law of such agents.

That such a theory presents a useful wedge for further expansion of the coverage of the fourteenth amendment through the concept of state action is clear. But the burdensome ramifications of its use must be recognized also, and weighed against the benefits derived.

A related, although more restrictive, theory may be derived by a re-statement of the premise. The premise might be put that if a function is governmental in its nature, then the activity is a state instrumentality whether conducted privately or publicly. Thus, electing public officials and participating in political party activities are so vital to the organization and policies adopted by government as to make those agencies carrying out such functions governmental instrumentalities. The danger in such a theory is that there may crop up the old distinction between "governmental" and "proprietary" functions which has plagued the courts in determining the law relative to intergovernmental tax immunities and tort liability of municipalities. The latter two situations present the reverse approach, of course, to determining where the line should be drawn. Instead of the question raised by the latter of "what governmental activities are private?", we have under this state action theory the question of "what private activities are governmental?"

The confusion engendered in attempting to delineate those functions which are "governmental by their very nature" is well illustrated in some of the cases dealing with immunity of various state activities from national taxation, as, for example, liquor dispensaries,78 university athletic contests,79 elevated railroads80 and water works.81 To avoid this pitfall

78 South Carolina v. United States, 199 U.S. 437 (1905).
and still bring the voting cases within a workable definition of "state action," it is suggested here that the only purely privately operated functions which properly should be considered as governmental are those which are indispensable to the maintenance of democratic government. It should be noted that such a definition does not go so far as to cover operations which are merely useful or desirable as aids to a more efficient or intelligently controlled government. If these are to be included, then we are no better off than if we equate governmental action with operations affected with a public interest. Education is desirable and useful in a democratic system, but it is not indispensable to the maintenance of democratic government in the sense that access to the ballot and the processes of selecting public officials is. Philosophically, perhaps, the man who is properly fed, clad, and housed is in a position to decide public questions in a more rational manner than one who is not. This, however, should not in itself make the functions of furnishing food, clothing and housing governmental functions brought within the coverage of "state action." The criterion must not be merely the finding that a given operation exerts an influence on public policy for the operation to be classified as "governmental" or else—if reports concerning such figures as Napoleon and Mark Antony be given credence—even one's activities relative to procreation would be so categorized.

A different situation is presented when the private organization is exercising authority granted to it by government and is empowered by such grant to create or destroy rights of private persons. The best available illustration is that of the labor union certified by a government agency as exclusive bargaining agent for a specified group of employees. The leading case on this question is Steele v. L. & N. Railroad,\(^2\) decided in 1944. The Negro petitioner, a fireman on the L. & N., sued the railroad and the Brotherhood of Locomotive Firemen and Enginemen to have a contract between the two set aside. The Brotherhood was the exclusive bargaining agent for all firemen and enginemen but, at the same time, excluded Negroes from its membership. Following an announcement of their intention, the Brotherhood entered into an agreement with the railroad so as to exclude ultimately all Negro firemen from the service. The state courts of Alabama held that the Railway Labor Act imposed on petitioner and other Negro members the legal duty to comply with the contract terms since the Brotherhood was their legal representative.

The United States Supreme Court reversed the state court, and Chief Justice Stone, speaking for the Court, stated:

\(^2\) 323 U.S. 192 (1944).
If, as the state court has held, the Act confers this power on the bargain-
ing representative of a craft or class of employees without any commen-
surate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legisla-
ture which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.\textsuperscript{83}

The Chief Justice, however, chose to avoid the constitutional questions presented by the simple remedy of holding that the act imposed upon the representative of a craft the duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such. Justice Murphy put the case more succinctly when he said that since the union received its authority solely from Congress, it could take no action in the exercise of its delegated powers "which would in effect violate the constitutional rights of individuals."\textsuperscript{84}

STATE JUDICIAL INTERVENTION TO AID PRIVATE DISCRIMINATION

In 1948 the United States Supreme Court decided the case of Shelley \textit{v. Kraemer},\textsuperscript{85} in which was presented the question of whether the state courts could constitutionally enforce private racially restrictive cove-
nants. The Court held that such action was state action, and that the state court's enforcement of such agreements was a denial of equal protection of the laws. The acts of state judges in their official capacity have long been held to be encompassed within the meaning of state acts under the fourteenth and fifteenth amendments, as was discussed earlier in this study. And the opinion for the Court in the Shelley case contains a lengthy collection of cases so holding.\textsuperscript{86} While this study is primarily concerned with the distinction between state and private action, rather than the rights involved under the amendments, the whole problem pre-

tented by the decision in the Shelley case turns on the rights protected against state judicial interference. Without careful examination of this problem, the case may very well be construed as extending to altogether unreasonable lengths.

The question arises whether the holding in the Shelley case bars state

\textsuperscript{83} Id. at 198.


\textsuperscript{85} 334 U.S. 1 (1948). This case was followed by another, Barrows \textit{v. Jackson}, 346 U.S. 249 (1953), in which the Court held unconstitutional the state court's award of damages in an action for breach of a racially restrictive covenant on authority of the Shelley case. Since the Barrows holding appears to be a perfectly rational consequence of the former case, discussion in this section centers about the Shelley case with no further comment on Barrows.

\textsuperscript{86} 334 U.S. at 14 ff.
organs from aiding private persons to effect *any and all* discrimination based on race, religion, creed or other classification which would be considered unconstitutional if made directly by a state organ. To be specific, would the private householder be barred by the Shelley rule from obtaining state assistance in his attempt to stop Jehovah's Witnesses (but no other sect) from entering his property? In all reasonableness the private householder should certainly be allowed his eccentricities, if such they be, in determining what private persons shall be permitted the use of his home or property. And his determinations in this respect should be given the bulwark of judicial remedies if necessary to enforce his decision. This circumstance, then, should be outside the application of the Shelley rule. The problem which must be solved is the construction of a proper rule which will adequately describe the situations covered by the decision in the Shelley case without depriving the private individual of the power to make discriminations or classifications which make life more bearable for him but which would be unconstitutional if made by the government directly. In other words, it is contended here that not every governmental act which would be unconstitutional if adopted as general policy is unconstitutional when it is merely in support of private discrimination.

In *Martin v. City of Struthers*, the Court held unconstitutional, as applied to the distribution of literature by Jehovah's Witnesses, an ordinance barring the knocking on doors or ringing of doorbells of residences in order to deliver handbills. Certainly, then, these prohibitions could not constitutionally have been propounded as public policy by the state courts either. But assuredly the courts can constitutionally come to the rescue of harassed householders and, through application of the law of trespass or by injunction, afford relief. In fact, such was the suggestion of the majority in the *Struthers* case. To hold otherwise leads us to the ridiculous conclusion that when one wants to peddle his product, be it a religion or a magazine, to a private person, all judicial assistance is denied the householder, for it would be state action in denial of a first amendment right, or else a denial of equal protection.

What, then, is the proper rule? In the Shelley case the property owner and the would-be purchaser were denied the right to contract for sale of the property solely because the purchaser was a Negro. The important fact in the case was the willingness of both parties to enter into the contractual agreement. It may be said that there inheres in the individ-

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87 319 U.S. 141 (1943).
88 Justice Black, speaking for the Court, stated: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. . . . A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." 319 U.S. at 147-48.
ual a right of contract when bilateral agreement is present. However, a contract contemplates two or more willing parties, and there is no right of contract enforceable unilaterally over the objections of the reluctant party.

Freedom of contract is, of course, no more absolute than any other right, but despite this fact, the state violates the due process clause if it unreasonably restricts this useful mechanism. And state restrictions on the enjoyment of contractual benefits are unconstitutional if based on race or religion. The *Shelley* rule thus bars the state from interposing its authority in order to halt consummation of a contract between agreeable parties when the basis for the interference is the race or religion of one of the parties. Such interference would be state action depriving an individual of a right protected by the fourteenth amendment because of his race or religion. But since there is no unilateral right of contract, the rule does not bar the state from intervening on behalf of a private person who seeks to prevent another person, because of the latter's race or religion, from further efforts to conclude a contract agreement. State action is present, but no right protected by the fourteenth amendment is violated. The same principle would apply to entry on privately owned land for the practice of religion. Once permission of the owner is obtained, the outsider may be said to have acquired a right of religious teaching, within the reasonable restrictions imposed by the state. Until such permission is obtained, no right accrues to practice religious exercises on another's private property, and state punishment for trespass on complaint of the owner does not violate the fourteenth amendment.

The equal protection clause is essentially an explanatory adjunct to the due process clause and for all practical purposes cannot stand alone. The facility with which an equal protection guarantee was written into the fifth amendment is illustrative of this fact. The equal protection clause only becomes operative when there is a denial of some aspect of the right to life, liberty or property. Some rights by their nature are capable of exercise unilaterally, such as speech, but are constitutionally protected within certain limits only if the exerciser has a right to be in the place of exercise. Speeches in the public streets and parks have broad constitutional protection against state interference, since the speakers have a general right to use the public streets and parks for this purpose. The same speeches are broadly protected against state interference when made on private property with the owner's permission, since the speaker has then acquired at least a temporary right to use the property for that purpose. The same speeches on another's private
property have no constitutional protection against state interference requested by the owner, because there is then no right to the use of the property for making speeches. Thus even the fact that the owner denies the use of his property because of religious bias does not make the assistance offered by the state a denial of the equal protection clause of the fourteenth amendment.

This is the only rational basis on which the decision in *Marsh v. Alabama*\(^9\) can be squared with the proper application of the fourteenth amendment. In that case the State of Alabama convicted Jehovah's Witnesses of trespass for continuing, despite warnings, to distribute literature on the streets of a privately owned company town. In setting aside the conviction, the opinions of the majority of the United States Supreme Court said essentially that "this company town looks like a governmental town and therefore it is subject to the constitutional restrictions on the latter in the field of religious exercise." Justice Black even went to the subject of interstate commerce to find a horrible example of what private discretion of the town manager might lead to in the matter of discriminatory street regulation. He stated:

... And, though the issue is not directly analogous to the one before us, we do want to point out by way of illustration that such regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates against interstate commerce. ...\(^9\)

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\(^9\) Id. at 506. This is the sort of hazardous reasoning against which the opening sentences of the present study are directed. As stated there, the Constitution does not restrict private action through its own force except in the thirteenth and twenty-first amendments. Therefore private persons cannot "unconstitutionally interfere with and discriminate against interstate commerce." With the exception of the two amendments mentioned, private persons may act illegally, but they do not act unconstitutionally; only governments and government agents act unconstitutionally. The determination of what sort of acts unreasonably interfere with interstate commerce is a matter for legislative decision where such acts are performed by private persons. It is for Congress to regulate the commerce among the several states when it deems regulation necessary, and the courts are neither delegated that power nor is the court equipped to make a proper analysis of the myriad political factors which must be considered in determining the desirability of a particular type of restriction. The function of the courts in this matter of the commerce clause is to protect the plenary power of Congress over the subject from improper inroads on the part of the States and their subordinate units. It is the judicial task to reconcile the practical demands of a federal system of government with the specific delegation of the commerce power to Congress. It is assuredly not the judicial task to lay down the general policy of what sort of private acts unduly burden or interfere with interstate commerce.

The Fourth Circuit Court of Appeals went astray in just this fashion in deciding the case of Chance v. Lambeth, 186 F.2d 879 (4th Cir.), cert. denied, 341 U.S. 941 (1951). Chance, a Negro, brought suit for damages against Lambeth and the A.C.L. Railroad because of plaintiff's alleged wrongful ejection from a railroad coach because of race. The railroad had adopted a regulation requiring segregation in the South, and upon Chance's refusal to move to a colored car he was ejected. The court held that the regulation was an unconstitutional burden on interstate commerce. It did not base the holding in any way upon a violation of any act of Congress regulating carriers. Judge Soper, speaking for a unanimous court, said:

... It is true that the regulation of the carrier was not enacted by state authority, although the power of the state is customarily invoked to enforce it; but we know of
The company town is certainly not a governmental unit. It may restrict tenancy of its houses in ways which would be clearly unconstitutional if attempted by the ordinary municipality. Its managers need not be elected, and constitutional debt limits applicable to cities have no relevance in the case of the company town. It is the first rule of judicial restraint to avoid unnecessary generalizations which may place the Court in completely untenable positions later. The question can more properly be brought within the application of the rules of the fourteenth amendment by holding first that the Witnesses had a state right to use the streets for distributing religious literature, since they had been opened up to the public for the ordinary uses to which streets are put (including, since *Hague v. C.I.O.*, 9 communication of ideas) and, second, when the state prosecuted the Witnesses for trespass, it established the element of state action necessary for a finding of unconstitutionality under the fourteenth amendment. If the creation of a congeries of people is sufficient in itself to activate the fourteenth amendment prohibitions against persons exercising any managerial authority over such people, then owners of substantial apartment house projects should take careful note. All things considered, it would seem to be a very dubious proposition to follow.

The conclusion here is that if the rule of *Shelley v. Kraemer* is to be applied reasonably, the Constitution must allow the private individual some measure of intolerance. In all the pressure toward conformity in this society92 it may well be that for solution to public problems we must look to the rebellious and those with low irritability coefficients. Constitutionally the distinction between state acts in furtherance of private discrimination which are valid and those which are not permissible must rest on whether the victim of the discrimination was exercising a state or federal right—not merely whether the discrimination was based on a classification which would be improper if made directly by the state.

**STATE INACTION: FAILURE TO PREVENT OR AFFORD REMEDIES FOR A DEPRIVATION OF STATE OR FEDERAL RIGHTS**

It is time now to return to Justice Bradley's remarks in his opinion for the majority in the *Civil Rights Cases*. He said that the wrongful act of an individual, unsupported by state authority, is simply a private

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91 307 U.S. 496 (1939).
92 Whyte, The Organization Man (1956) is in point.
wrong "if not sanctioned in some way by the state, or not done under state authority." Implicit in this statement is a broader coverage for the fourteenth amendment than can possibly be read into Justice Harlan's dissent. If the quoted statement be rephrased, it might be put in rather forceful language: If a state agent willfully fails to fulfill a legal duty to any person and, as a result of such failure, the person is denied or deprived of any right, then the state in effect becomes a party to the wrong and the fourteenth amendment is violated.93 Such a rule would be, it seems, a proper paraphrase of Justice Bradley's statement, "if not sanctioned in some way by the state." Thus if a religious speaker fears private interference with his speech, and his requests to local police to furnish protection are willfully and unjustifiably refused, the police are violating the fourteenth amendment. A few cases have appeared in which this question was considered, although none has yet been decided by the United States Supreme Court on this specific point.

The best illustration is Catlette v. United States, discussed earlier. A group of Jehovah's Witnesses asked the mayor and the police chief for police protection while distributing religious literature. Not only did the police fail to furnish such protection, but they subjected the Witnesses to various indignities and ejected them from the town. Among other bases for holding that the federal civil rights acts applied to such acts the Court of Appeals for the Fourth Circuit said:

...And since the failure of Catlette to protect the victims from group violence or to arrest the members of the mob who assaulted the victims constituted a violation of his common law duty, his dereliction in this respect comes squarely within the provisions of 18 U.S.C.A. § 52.

It is true that a denial of equal protection has hitherto been largely confined to affirmative acts of discrimination. The Supreme Court, however, has already taken the position that culpable official State inaction may also constitute a denial of equal protection. . . .94

In Picking v. Pennsylvania Railroad95 a damage suit was initiated against the railroad, the Governor of Pennsylvania, and various other persons as a result of the apprehension and transportation of a fugitive to the State of New York from the State of Pennsylvania. During the proceedings, Picking applied to a justice of the peace in Pennsylvania for a hearing on the legality of the apprehension and proposed removal. The justice allegedly refused the hearing. In discussing the question of whether a cause of action lay against the justice under the federal civil rights acts, Chief Judge Biggs stated for the court:

93 For an excellent discussion of the possible application of the criminal provisions of the federal civil rights acts to state inaction, see Carr, Federal Protection of Civil Rights 155-71 (1947). See also, Coleman, "Freedom from Fear on the Home Front," 29 Iowa L. Rev. 415 (1944).
94 132 F.2d 902, 907 (4th Cir. 1943).
95 151 F.2d 240 (3d Cir. 1945).
If these allegations be proved it may be concluded that the refusal of Keiffer to act as required by law may have deprived the plaintiffs of their liberty without due process of law in violation of the Fourteenth Amendment. The refusal of a state officer to perform a duty imposed on him by the law of his state because he has conspired with others in a conscious design to deprive a person of civil rights in legal effect may be the equivalent of action taken "under the color" of the law of the state.96

Of course the problem in these cases, once the law is accepted, is to determine whether any specific failure to furnish requested police protection or judicial remedies was in fact a culpable defection of duty. But this is a problem for the jury in each instance to determine.

It is the extension of the state inaction theory to areas of purely private controversy which has led to some strangely circuitous reasoning. Suppose an intrastate employer fires an employee because of the latter's religion, or lack of it. Then assume that the ex-employee goes to a state court for a court order directing the employer to reinstate the employee because the employee has a right to his own choice of religion. If the court refuses to issue such an order, does such refusal constitute willful state inaction which directly permits the abridgment of religious belief in violation of the fourteenth amendment? Some speculation exists that such will be the holding in the near future. Rationally, however, it should not fall within the coverage of the fourteenth amendment unless there are added certain important facts—as, for example, a state law barring employers from making religion a test of employment. The reason for excluding this case from fourteenth amendment protection is that no right is violated. In this respect the discussion parallels some of that in connection with the Shelley rule. There is no federal or state right (in the absence of statute) to employment irrespective of religion in intrastate business generally. Thus when the state court fails to act in the hypothetical case, it does not fail in any legal duty imposed upon it, and no fourteenth amendment violation takes place.

That there is need to consider this type of fact situation carefully is indicated by an examination of Justice Douglas' dissenting opinion for himself, Chief Justice Warren and Justice Black in the case of Black v. Cutter Laboratories.97 A pharmaceutical company in California discharged an employee on the grounds that she was an active member of the Communist Party and had falsified her application for employment. Her union sought her reinstatement before an arbitration board pursuant to a valid collective-bargaining agreement which authorized discharge for "just cause" only. The board ordered her reinstatement after find-

96 Id. at 250.
ing that although she was an active member of the Communist Party and had falsified her application for employment, she actually was discharged for union activities. The lower California courts affirmed this order, but the Supreme Court of California reversed. The United States Supreme Court granted certiorari on a petition contending that the decision and opinion violated the equal protection and due process clauses of the fourteenth amendment. Upon examination of the record the Court, with three dissenting votes, held that the writ should be dismissed in view of the California court's construction that "just cause" included membership in the Communist Party and that the decision involved only California's construction of a local contract under local law. If we stipulate the terms of the contract and narrow the issue down to the question of whether a contract permitting discharge of an employee because of Communist membership can constitutionally be upheld by the state courts, then we have the question essentially as the dissenters viewed it. It is the opinion of Justice Douglas which presents the controversial viewpoint for the purposes of this discussion. He stated that it was plain that the judgment of the Supreme Court of California sustained a discharge of this worker because she was a communist, and that such action violated the first amendment rights of the employee. In explaining his position he stated:

I can better illustrate my difficulty by a hypothetical case. A union enters into a collective-bargaining agreement with an employer that allows any employee who is a Republican to be discharged for "just cause." Employers can, of course, hire whom they choose, arranging for an all-Democratic labor force if they desire. But the courts may not be implicated in such a discriminatory scheme. Once the courts put their imprimatur on such a contract, government, speaking through the judicial branch, acts. *Shelley v. Kraemer* . . . ; *Barrows v. Jackson* . . . And it is governmental action that the Constitution controls. Certainly neither a State nor the Federal Government could adopt a political test for workers in defense plants or other factories. It is elementary that freedom of political thought is protected by the Fourteenth Amendment against interference by the States. . . .

. . . And if the courts lend their support to any such discriminatory program, *Shelley v. Kraemer*, supra, teaches that the Government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology. . . .

With all due respect to the dissenting Justices, *Shelley v. Kraemer* teaches no such thing. The *Shelley* rule bars the state judiciary from interfering with the enjoyment of a state or federal right where the basis of the interference rests on an unreasonable classification. Where an

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98 43 Cal. 2d 788, 278 P.2d 905 (1955).
99 351 U.S. at 302-03 (footnotes omitted).
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individual has no right to take a particular course of action, the state court's assistance in barring the individual from beginning or continuing such action does not violate the fourteenth amendment even though the basis for the private denial of permission be religion, political ideology or other classification which would be improper if used by the state in establishing various rights or in abridging those already existing. The crucial fact in either case is the existence of a state or federal right, and, in the absence of statute, there is no right of private employment irrespective of political affiliation.

The best guess concerning a rule which the dissenters in the Cutter Laboratories case would follow is this: Where there exists a right protected by the fourteenth amendment against improper state abridgment, and where the state could, within the due process clause, constitutionally create a similar right running against private abridgment, the state court acts in violation of the fourteenth amendment if it fails to offer a remedy, upon request, against such private abridgment. Under such a rule the state remains free to enforce its ordinary trespass laws at the instance of the harassed household, because the state could not constitutionally take away the household's freedom to discriminate in his choice of guests. Under the rule the state is not free to aid the employer in his attempt to fire an employee who happens to be a member of the Republican Party since the state can constitutionally bar the employer from discharging an employee solely because of political affiliation. Further, in the latter case the state must, upon request, furnish the aggrieved employee a remedy against such attempted discharge. In short, what the state can do it must do to protect the individual against constitutionally unreasonable discriminations on the part of other private persons.

This theory not only includes in entirety the "state inaction" theory expressed in the cited cases, but it goes one step further. Not only must state agents perform all acts demanded of them by common law or by their constitution and statutes, they must, in addition, perform all acts in furtherance of non-discrimination which the fourteenth amendment due process clause would permit them to perform. While such a theory presents a salutary solution to the plaguing problem of energizing a legislative body into action to protect persons from unreasonable private discriminations, there is absolutely no justification for restricting its application to equal protection cases while at the same time excluding due process questions. If the rule is good for one, it is equally applicable to the other clause of the fourteenth amendment. To take a sample question, suppose a group of citizens resident in Smoky City decide that a smoke abatement program should be established in that city. The freeing
of air from an overabundance of impurities certainly represents an enhancement of the citizens' liberty to live in healthful surroundings, as well as an improvement of their real property values. The right to enjoyment of one's property can constitutionally be protected by the state against private abridgment. Therefore, under the theory stated, the state must, upon request of the citizens, embark upon a smoke abatement program. Presumably, if the citizens appeal to the courts for a remedy against air pollution, then such remedy would have to be given or the fourteenth amendment would be violated. This goes further than mere judicial proceedings to abate a nuisance, and would require a full-scale program of smoke abatement to be established by the judicial branch. Otherwise the state becomes a party to the abridgment of a property right. The vision of a trial judge substituting his procedures for legislative research, investigation and hearings in the preparation of a fair and comprehensive smoke abatement program presents an absurd picture. And this is a relatively simple problem. Considering the various possibilities inherent in the state police power for improving the health, safety, morals and convenience of the citizens, there is an infinite variety of legislative-type duties which would be laid upon the judges by such a reading of the fourteenth amendment. Judges can and do perform occasionally in a legislative capacity, and this "judicial legislation" is certainly a necessary part of their function. But such functions can be performed only in a limited fashion by judges. Their training, their staff, and their procedures are simply not geared to the practical demands of the legislative process generally. The Supreme Court can readily hold unconstitutional a permit ordinance for street meetings in the City of New York, but, as Justice Jackson suggested, if the Court is not in a position to draw a proper ordinance, it should be cautious in ruling out those drawn by the city. If the Court is unwilling to lay down the specific policy in a first amendment question, then even greater restraint is called for in the other areas of governmental regulations.

It seems that from a practical standpoint the theory implicit in Justice Douglas' statements above is simply not tenable. Restricting the coverage of his theory somewhat, a rule which would properly reckon with the problem of state inaction might be stated thus: Where there exists a state or federal right running against private abridgments, the state acts in violation of the fourteenth amendment if, upon request, it fails to protect this right against private abridgment. Such a theory represents an extension of the Shelley case to some degree, since it requires affirmative action on the part of the state, yet it is a workable and logical extension.

It does not require the judicial branch to undertake purely political functions of regulating the "various and interfering interests" of society.

CONCLUSION

This analysis attempted, first, to indicate the lines along which the concept of state action has developed; second, to point up the practical and theoretical dangers involved in some of the more recently suggested theories on the reach of the state action concept; and, third, to present a logically consistent delineation between state action and private action which will afford broad protections to personal liberties without embroiling the courts either in improper legislative functions or in irrational and burdensome applications of the law of public officers to private persons.

Throughout the whole problem runs the difficult task of expanding personal liberty in certain directions without undermining the responsibility and incentive of local officials under a federal system for expansion of liberty in other directions. Many aspects of economic liberty and enjoyment of property are so inextricably involved in purely local problems as to be irresoluble at the national level on any proper basis. And one need not be dubbed a professional states-righter merely for his recognition of the usefulness of the federal system of government.

Changes in application of the state action concept have enormous ramifications concerning the operation of the federal system and the status of individual rights. Whatever direction expansion of the concept takes—and expansion is a certainty—much careful thought must be given to the consequences of such a move if the results are to prove more beneficial than harmful.