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## Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination

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## COLOR BLINDNESS BUT NOT MYOPIA: A NEW LOOK AT STATE ACTION, EQUAL PROTECTION, AND "PRIVATE" RACIAL DISCRIMINATION†

*Theodore J. St. Antoine\**

MR. Justice Frankfurter has remarked: "In law also the right answer usually depends on putting the right question."<sup>1</sup> For nearly one hundred years now the courts have been putting certain key questions whenever confronted by the claim that a person was being deprived of the equal protection of the laws guaranteed by the fourteenth amendment of the federal constitution. From the time the "separate-but-equal" doctrine was enunciated in *Plessy v. Ferguson*<sup>2</sup> until it was repudiated in the *School Segregation Cases*,<sup>3</sup> two principal questions were likely to be asked about any classification based on racial grounds: (1) Did the classification result, not merely in the creation of separate facilities for the different races, but in the creation of unequal facilities? (2) Did the classification result from "state action," *i.e.*, from the exercise of the state's legislative, executive, or judicial powers? Only if both questions were answered in the affirmative was there an unconstitutional deprivation of equal protection.

In the *School Segregation Cases* of 1954 the Supreme Court held that in the field of public education, separate facilities were

† This paper was awarded the first prize in the 1960 Broomfield Essay Competition at The University of Michigan. — Ed.

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<sup>1</sup> See, *e.g.*, *Estate of Rogers v. Commissioner*, 320 U.S. 410, 413 (1943).

<sup>2</sup> 163 U.S. 537 (1896) (upholding validity of state statutes requiring separate accommodations for whites and Negroes on intrastate railroads). The Supreme Court never applied the separate-but-equal doctrine to uphold laws limiting the right to own real estate, apparently because of the unique status of realty and the special protection afforded property under the Constitution. See *Buchanan v. Warley*, 245 U.S. 60, 78-81 (1917); *Richmond v. Deans*, 281 U.S. 704 (1930).

<sup>3</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

"inherently unequal."<sup>4</sup> This of course did not expressly dispose of the separate-but-equal doctrine in other areas such as public transportation and recreational facilities.<sup>5</sup> But in a subsequent series of brusque, sometimes cryptic per curiam decisions and orders, the Court left no doubt that the death knell had sounded for separate-but-equal.<sup>6</sup> Classification on the basis of race was no longer open to a state.

With the separate-but-equal factor effectively eliminated, the courts in racial discrimination or classification cases have now concentrated their attention on what apparently seems to them the remaining key question: Does the classification involve "state action"? Close examination of recent Supreme Court and lower federal court decisions, especially those of the past half dozen years, provides strong evidence that the courts have not been, in the words of Mr. Justice Frankfurter, "putting the right question." The inevitable result of this failure will be an increasing tendency to come up with the wrong answer. Perhaps the courts' sounder instincts will somehow save them from this tendency.<sup>7</sup> But surely it would be better if the Supreme Court could arrive at a more precise formulation of the crucial question in these cases — if only for the greater guidance of literal-minded lower court judges and the greater edification of theoretically-minded academicians.

Specifically, nicer precision is called for in the formulation of the issue when the courts must look at racial discrimination prac-

<sup>4</sup> *Id.* at 495. Previously, the application of the "separate-but-equal" doctrine to public educational facilities may have been assumed by the Supreme Court, but it had never been precisely decided. *Id.* at 491 n.8; see *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927). In the decade and a half preceding *Brown v. Board of Educ.*, the Supreme Court in a series of cases involving education on the graduate school level held that separate white and Negro facilities were not in fact equal, in view of the superior benefits enjoyed by the white students. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents of the Univ. of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

<sup>5</sup> See Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137 (1954).

<sup>6</sup> *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), *vacating and remanding per curiam* "for consideration in the light of the Segregation Cases . . . and conditions that now prevail," 202 F.2d 725 (6th Cir. 1953) (public amphitheater leased for the holding of opera performances for the public); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955), *affirming per curiam* 220 F.2d 386 (4th Cir. 1955) (public beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955), *vacating per curiam* 223 F.2d 93 (5th Cir. 1955) (public golf courses and parks); *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming per curiam* 142 F. Supp. 707 (M.D. Ala. 1956) (state-regulated public transportation); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959), *affirming per curiam* 168 F. Supp. 149 (E.D. La. 1958) (state-regulated athletic contests).

<sup>7</sup> See discussion of *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), and related cases, *infra*, part II.

ticed or initiated by persons or groups traditionally regarded as "private." What question or questions should be posed by a court in this type of case to determine whether there has been a deprivation of a constitutional right, particularly the right to equal protection of the laws under the fourteenth amendment? To put the problem in perspective, and, hopefully, to point the way toward its solution, it is first necessary to review the development of Supreme Court doctrine regarding constitutional limitations on "state" and "private" action, and to analyze some of the possible implications of these doctrines.

# I. IN SEARCH OF EQUALITY: THE COURSE OF CONSTITUTIONAL DOCTRINE ON "PRIVATE" DISCRIMINATION

The fourteenth amendment, ratified in 1868, provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And with similar emphasis upon the "State" as the target of the prohibition, the fifteenth amendment, ratified in 1870, declares that the right of United States citizens to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

There is both contemporaneous evidence and subsequent scholarly judgment that these prohibitions were intended to operate against "individual" or "private" action as well as against "state" action.<sup>8</sup> Resort was even had at an early date to the rather sophisticated argument that individual or private action is necessarily covered because *all* action is either forbidden, required, or permitted by the state.<sup>9</sup>

<sup>8</sup> See FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 262-63 (1908).

<sup>9</sup> Representative Lawrence of Ohio, discussing pending civil rights legislation in 1874, said of the equal protection clause of the fourteenth amendment:

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

"When it is said 'no State shall deny to any person the equal protection' of these laws, the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws. The word 'deny' must include an omission by any State to enforce or secure the equal rights designed to be protected. There are sins of omission as well as commission. A State which omits to secure rights denies them." 2 CONG. REC. 412 (1874).

For recent discussions of the proposition that all action in a sense involves state action, see Barnett, *What Is State Action?* 24 ORE. L. REV. 227, 228 (1945); Shanks, "State Action" and the *Girard Estate Case*, 105 U. PA. L. REV. 213, 218 (1956); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208, 208-09 (1957).

The issue was seemingly put to rest by the Supreme Court in the *Civil Rights Cases*<sup>10</sup> of 1883. In the Civil Rights Act of 1875,<sup>11</sup> Congress had provided both criminal and civil sanctions against "any person" denying equal accommodations in inns, public conveyances, theaters, and other places of public amusement because of race, color, or previous condition of servitude. Speaking through Mr. Justice Bradley, the Court struck down the enactment as beyond the constitutional power of Congress. Of the fourteenth amendment<sup>12</sup> it was said: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."<sup>13</sup> Then, in a sentence strangely marked by overtones of potential enlargement as well as by the obvious note of restriction, Mr. Justice Bradley commented:

"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."<sup>14</sup>

Mr. Justice Harlan dissented vigorously. In flat contradiction to the majority, he asserted that the fourteenth amendment created federal rights, enforceable directly by Congress, against all racial discrimination except that of a purely social nature. But he was willing also to meet the majority on its own ground. Even conceding that adverse state action was an essential element of an abridgment of rights under the amendment, said he, the Act of 1875 could be upheld. For railroads, innkeepers, and places of public amusement are "agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation."<sup>15</sup>

<sup>10</sup> 109 U.S. 3 (1883). See also *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Harris*, 106 U.S. 629 (1883).

<sup>11</sup> Sections 1, 2, 18 Stat. 335-36 (1875).

<sup>12</sup> The consideration in the *Civil Rights Cases* of the effect of the thirteenth amendment, which concededly operates against private persons in forbidding slavery or involuntary servitude, is not pertinent to the present inquiry into the constitutional limitations on other forms of racial discrimination.

<sup>13</sup> 109 U.S. at 11.

<sup>14</sup> *Id.* at 17. (Emphasis added.)

<sup>15</sup> *Id.* at 58-59.

Despite certain contrary historical testimony, and despite the high authority of Mr. Justice Harlan, whose lone, stirring dissent in *Plessy* was later to be so fully vindicated, it is safe to say that no member of the present Supreme Court has seriously questioned the abstract soundness of the fundamental principle affirmed by the majority in the *Civil Right Cases*. The pertinent provisions of the fourteenth amendment operate only against "such action as may fairly be said to be that of the States."<sup>16</sup>

How, then, does a state act? Very early the Supreme Court declared that a state may act through its legislative, executive, or judicial authorities, adding broadly that whoever acts "by virtue of public position under a state government . . . acts in the name and for the State, and is clothed with the State's power," so that "his act is that of the State."<sup>17</sup> A state judge may thus be subject to federal criminal penalties for excluding Negroes from jury service, and thereby depriving colored defendants of equal protection, even though he acts on his own initiative and without the authorization or compulsion of state law.<sup>18</sup> And a municipal ordinance is state action for purposes of the fourteenth amendment, even though the provisions of the particular ordinance may be in conflict with the state constitution.<sup>19</sup>

What if the actions of individual public officials not only are unauthorized by state law, but also are in direct violation of it? May their conduct still fairly be said to be that of the state? For some time the Supreme Court vacillated on this issue, but the question was finally resolved in *Screws v. United States*.<sup>20</sup> A Georgia sheriff and two assistants brutally beat to death a young Negro they had arrested on a warrant charging him with the theft of a tire. There was evidence that the sheriff had a personal grudge against the Negro. The sheriff and his assistants were convicted of willfully denying rights under the fourteenth amendment while acting under color of state law. Although the Su-

<sup>16</sup> Vinson, C.J., speaking for a unanimous Court in *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

<sup>17</sup> *Ex parte Virginia*, 100 U.S. 339, 347 (1880). See also *Strauder v. West Virginia*, 100 U.S. 303 (1880) (state statute excluding Negroes from jury service); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discriminatory administration of county licensing law by board of supervisors so as to exclude Chinese laundries).

<sup>18</sup> *Ex parte Virginia*, 100 U.S. 339 (1880).

<sup>19</sup> *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913).

<sup>20</sup> 325 U.S. 91 (1945); see also *United States v. Classic*, 313 U.S. 299, 326 (1941) ("misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law"); *Williams v. United States*, 341 U.S. 97 (1951); *Monroe v. Pape*, 365 U.S. 167 (1961). *But cf.* *Barney v. City of New York*, 193 U.S. 430 (1904).

preme Court technically reversed, six Justices<sup>21</sup> were in agreement on one basic proposition. Acts of an individual state official in the discharge of his official duties are state action, even though the particular acts may violate state law. Effectively, then, the fourteenth amendment reaches all the formally designated agents of the state whenever they are performing official functions.

So there is left that vast area of so-called "private" action. The individual householder invites to his cocktail parties only persons with a pigmentation akin to his own. All the individual householders in a community sign agreements they will not sell their homes to Negroes. The great insurance company runs a picture-book residential community and sees that it stays antiseptically Caucasian. The department store chain employs colored janitors but not colored accountants. The philanthropist dies and leaves his millions to build a school for white orphans. Under what circumstances, if any, are such activities subject, either directly or indirectly, to the fourteenth amendment's prohibition against the denial of "equal protection"?

The courts of course have had no trouble finding state action when a state statute or city ordinance affirmatively requires a private person to act in a discriminatory manner. A statute requiring an employer to dismiss all alien employees in excess of 20 percent of his working force was thus invalid as a deprivation of equal protection.<sup>22</sup> But an injunction preventing state officials from enforcing such discriminatory legislation may not be the only direct remedy available. Where state law required a bus company to maintain racial segregation, the company has been held liable in damages for enforcing the unconstitutional statute, on the ground that it was acting "under color of state law."<sup>23</sup> The Supreme Court itself has pointed the way toward what might become an even broader approach for holding "private" action subject to constitutional limitations. It has said that a state statute was invalid which affirmatively *permitted*, though it did not require, a railroad to provide unequal transportation facilities for whites and Negroes.<sup>24</sup>

<sup>21</sup> Stone, C.J., and Black, Douglas, Reed, Rutledge, and Murphy, JJ. Dissenting were Roberts, Frankfurter, and Jackson, JJ.

<sup>22</sup> *Truax v. Raich*, 239 U.S. 33 (1915). See also *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>23</sup> *Flemming v. South Carolina Electric & Gas Co.*, 224 F.2d 752 (4th Cir. 1955).

<sup>24</sup> *McCabe v. Atchison, T. & S.F. Ry. Co.*, 235 U.S. 151 (1914). See also *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). That state action may be found in official inaction or failure to protect private rights is indicated by *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943); *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir. 1945); *Lynch v. United States*, 189 F.2d 476 (5th Cir. 1951). See also *Truax v. Corrigan*, 257 U.S. 312 (1921).

And the Court has seemed to indicate in such instances that the federal courts could entertain a suit directly against the railroads for an injunction restraining them from taking advantage of the state legislation permitting them to discriminate.

The sharpest acceleration in the forward thrust of "state action" into areas formerly deemed private has come in the past fifteen years or so. In several significant cases the Supreme Court has held or has suggested that certain actions of "private" groups or organizations are subject to constitutional limitations. In each of these situations there seems to have been present one or more of the following three crucial elements: (1) the private body was exercising a basic state function, typically with the affirmative cooperation of the state;<sup>25</sup> (2) the private body was invoking affirmative state action by seeking judicial enforcement of a private contract;<sup>26</sup> or (3) the private body had derived its power to act in a particular capacity or engage in a specific activity, usually monopolistic or exclusive, by virtue of a statute, and was regulated in the exercise of this power by governmental authority.<sup>27</sup> Cases in the first two categories bear especially close examination.<sup>28</sup>

*Terry v. Adams*<sup>29</sup> was the culmination of a series of efforts by certain white citizens of Texas to thwart the right of Negroes to vote. Previously, in *Smith v. Allwright*,<sup>30</sup> the Supreme Court had held that where primary elections in a state are an integral part of the election process and are conducted by a political party under

<sup>25</sup> *Smith v. Allwright*, 321 U.S. 649 (1944); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Terry v. Adams*, 345 U.S. 461 (1953). Attempts to eliminate alleged racial discrimination within labor unions by holding them to constitutional standards on a somewhat similar theory were rejected in *Williams v. Yellow Cab Co.*, 200 F.2d 302, 307 (3d Cir. 1952) (union not exercising "a basic state function"), *cert. denied*, 346 U.S. 840 (1953), *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957), and *Oliphant v. Brotherhood of Locomotive Firemen*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959), but were viewed favorably in *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

<sup>26</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

<sup>27</sup> *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944) (exclusive collective bargaining representative required by Congress to represent all members of a craft without discrimination); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952) (public transport utility specifically permitted by governmental commission to operate radio programs); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (exclusive collective bargaining representative expressly authorized by Congress to enter into union shop agreements otherwise invalid under state law). See also *Machinists v. Street*, 215 Ga. 27, 108 S.E.2d 796 (1959), *prob. juris. noted*, 361 U.S. 807 (1959).

<sup>28</sup> Cases in the third category involve federally-regulated bodies, and so the governmental action at issue was that of Congress rather than that of a state. And the primary attention of the Court was on the action of Congress or of a governmental regulatory agency, not on the action of the private body itself.

<sup>29</sup> 345 U.S. 461 (1953).

<sup>30</sup> 321 U.S. 649 (1944), *overruling* *Grovey v. Townsend*, 295 U.S. 45 (1935). See also *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).



state statutory authority, the action of the party in excluding Negroes from voting is the action of the state. Consequently the fifteenth amendment, which is identical to the fourteenth in applying only to state action, forbade such exclusion. The last resort of the whites in a particular Texas county was the Jaybird Party. The Jaybirds also excluded Negroes from voting in their primary. Victors in the Jaybird primary almost invariably had no opposition in the Democratic primaries and general elections that followed. But the Jaybirds contended that they were merely a self-governing voluntary club, not a state-regulated political party, and that the fifteenth amendment did not prohibit their racial exclusions.

In *Terry* eight Justices, on somewhat diverse grounds, found that the fifteenth amendment reached the Jaybirds. Justices Black, Douglas, and Burton declared that the Jaybird primary had become an integral, indeed the effective, part of the elective process, observing: "For a state to *permit* such a duplication of its election processes is to permit a flagrant abuse of those processes. . . ." <sup>31</sup> Justice Frankfurter emphasized the full participation of the county's elected officials, and concluded that this fastened responsibility on "the State, through the action and *abdication* of those whom it has clothed with authority. . . ." <sup>32</sup> Mr. Chief Justice Vinson and Justices Clark, Reed, and Jackson deemed the Jaybirds to be part and parcel of the Democratic Party, so that *Allwright* governed. Yet they went on to say that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that *organization itself*, in whatever disguise, *takes on those attributes of government* which draw the Constitution's safeguards into play." <sup>33</sup>

So there is substantial sentiment on the Court that when a state permits private organizations to take over the electoral processes — "matters of high public interest" in Mr. Justice Cardozo's phrase — they become "to that extent the organs of the State itself." <sup>34</sup>

An extension of this sentiment may be reflected in *Marsh v. Alabama*. <sup>35</sup> Chickasaw, Alabama, was wholly owned by the Gulf Shipbuilding Corporation, but otherwise had "all the characteristics of any other American town." Posted company rules prohibited solicitation without permission. A Jehovah's Witness distrib-

<sup>31</sup> 345 U.S. at 469. (Emphasis added.)

<sup>32</sup> *Id.* at 477. (Emphasis added.)

<sup>33</sup> *Id.* at 484. (Emphasis added.)

<sup>34</sup> Cardozo, J., speaking for the Court in *Nixon v. Condon*, 286 U.S. 73, 88 (1932).

<sup>35</sup> 326 U.S. 501 (1946).

uting religious literature on a sidewalk accessible to the public was told to leave. When she declined she was arrested by a county deputy sheriff, who was paid by the company to be the town's policeman. The Witness was convicted in state court for remaining on another's premises after being told to depart. The Supreme Court reversed on the basis of the first and fourteenth amendments.

Mr. Justice Black for the Court spoke of the operation of the town as being a "public function," and concluded that property rights in the premises were not sufficient to justify "the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute."<sup>36</sup> Mr. Justice Frankfurter, concurring, was less cautious than he afterward proved in *Terry* about the necessity of pinning down formal state action. In *Marsh* it was enough for him that "a company-owned town is a town. In its community aspects it does not differ from other towns."<sup>37</sup>

Subsequent references to *Marsh* make it difficult to say whether the decision turned chiefly on the state's criminal enforcement of the company's exclusion, or on the special status of the town itself as a source of state action.<sup>38</sup> But plainly it would have been a different question had an individual householder invoked police assistance against the Witness.<sup>39</sup>

Judicial enforcement of private contracts as state action was the central issue in *Shelley v. Kraemer*.<sup>40</sup> Negroes purchased land in a district which had been made subject to covenants restricting the use or occupancy of the realty to Caucasians. Relying on the covenants, other property owners obtained a state court injunction to restrain the Negroes from occupying the land they had purchased. The Supreme Court unanimously held that the Negroes had been deprived of the equal protection of the laws guaranteed by the fourteenth amendment.

It was not the restrictive covenants "standing alone," nor "voluntary adherence to their terms," that violated the fourteenth amendment, said the Court, since that amendment "erects no shield

<sup>36</sup> *Id.* at 507, 509.

<sup>37</sup> *Id.* at 510.

<sup>38</sup> Compare *Breard v. Alexandria*, 341 U.S. 622, 643 (1951), with Frankfurter, J., concurring in *Niemotko v. Maryland*, 340 U.S. 268, 277 (1951).

<sup>39</sup> See *Martin v. Struthers*, 319 U.S. 141, 143-44 (1943).

<sup>40</sup> 334 U.S. 1 (1948). See also *Hurd v. Hodge*, 334 U.S. 24 (1948) (similar result under the due process clause of the fifth amendment in the District of Columbia).

against merely private conduct.”<sup>41</sup> But the active intervention of the state courts, bringing to bear the coercive power of government, was state action “in the full and complete sense of the phrase.”<sup>42</sup> The restrictions sought to be created by the private agreement could not have been imposed by state statute or local ordinance.<sup>43</sup> So neither could they be enforced by a state court.

Mr. Chief Justice Vinson, writing for the Court, scornfully brushed aside the argument that the state courts were not depriving Negroes of equal protection so long as they stood ready to enforce restrictive covenants against white persons as well. “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.”<sup>44</sup>

Five years later, in *Barrows v. Jackson*,<sup>45</sup> the Court settled a question left unanswered by *Shelley*. A racial restrictive covenant, as well as being unenforceable in equity by injunction, was held to be unenforceable at law for damages against a co-covenantor who sold to a Negro. On the award of damages as an exercise of state action, the Court was brief: “The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would put its sanction behind the covenants.”<sup>46</sup>

With its emphasis upon state “sanctions” as the state action calling into play fourteenth amendment safeguards, the Court was harking back to the words of Mr. Justice Bradley in the *Civil Rights Cases*. And yet, seventy years later, the Court still seemed no closer to asking itself: “Does it make any difference what type of private conduct is sanctioned?” *Shelley* and *Barrows* had left the Court with a constitutional doctrine of sweeping scope, uncritically adopted, its implications unplumbed. Much can be admired in the effort to add force to Mr. Justice Harlan’s noble dictum, “Our Constitution is color-blind.”<sup>47</sup> But with a short-sighted approach, unforeseen pitfalls could well be expected. They were not long in showing up.

<sup>41</sup> 334 U.S. at 13. Cf. *Corrigan v. Buckley*, 271 U.S. 323 (1926) (recognizing validity of restrictive covenants as such, in the District of Columbia).

<sup>42</sup> 334 U.S. at 19.

<sup>43</sup> *Buchanan v. Warley*, 245 U.S. 60 (1917); *Richmond v. Deans*, 281 U.S. 704 (1930).

<sup>44</sup> 334 U.S. at 22.

<sup>45</sup> 346 U.S. 249 (1953).

<sup>46</sup> *Id.* at 254.

<sup>47</sup> Dissenting in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

## II. THE WRONG ROAD TAKEN: A CONSTITUTIONAL DOCTRINE HEADS TOWARD A DEAD END

Sergeant Rice was a Korean War casualty, and a Winnebago Indian. His body was returned to Sioux City, Iowa, for burial. After services were conducted at the grave site in a private cemetery, the cemetery management, having discovered the deceased's non-Caucasian antecedents, refused to permit interment. Sergeant Rice's wife sued the cemetery for damages for mental suffering. The cemetery defended on the basis of a covenant in the contract of sale of the burial lot limiting burial privileges to Caucasians. The Iowa courts ruled that the clause was unenforceable, but that it was not void and could be relied upon by the cemetery as a defense to the damage action.<sup>48</sup> The Supreme Court affirmed by an equally divided Court.<sup>49</sup> In the meantime the Iowa legislature had taken steps to prevent a recurrence of such a case — though it provided no relief for Mrs. Rice. The Supreme Court granted a rehearing, vacated its prior judgment of affirmance, and dismissed the writ of certiorari as improvidently granted.<sup>50</sup> Mr. Chief Justice Warren and Justices Black and Douglas dissented. On the issue of "state action," Mr. Justice Frankfurter, for the Court, did no more than deliver himself of the view that it was a "complicated problem."<sup>51</sup>

Cutter Laboratories fired Doris Walker, supposedly on the ground she was a Communist. But an arbitrator found there was no "just cause" for the dismissal, ruling the company had waived party membership as a basis. California refused to enforce the arbitration award. Five members of the United States Supreme Court, in an opinion by Mr. Justice Clark, dismissed a writ of certiorari.<sup>52</sup> To the Court, all that was involved was a state construction of "just cause" in a local contract as being equivalent to Communist Party membership, with no federal question being presented. *Shelley* and *Barrows* were not even cited.

Mr. Justice Douglas, with whom Mr. Chief Justice Warren and Mr. Justice Black concurred, dissented strongly. Mr. Justice

<sup>48</sup> *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 245 Iowa 147, 60 N.W.2d 110 (1953). For a refusal to allow a residential racial restrictive covenant to be used as a defense in a damage action, see *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1949).

<sup>49</sup> *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 348 U.S. 880 (1954).

<sup>50</sup> *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

<sup>51</sup> *Id.* at 72.

<sup>52</sup> *Black v. Cutter Laboratories*, 351 U.S. 292 (1956).

Douglas conceded that a private employer could arrange for an all-Democratic labor force. But government could not. "And," he continued with rigorous logic, "if the courts lend their support to any such discriminatory program, *Shelley v. Kraemer* . . . teaches that the government has thrown its weight behind an unconstitutional scheme to discriminate against citizens by reason of their political ideology."<sup>53</sup>

Would Mr. Justice Douglas deny a private householder police assistance in barring Jehovah's Witnesses from his front porch, while admitting Methodist ministers? Probably not. Here the householder would be able to assert due process rights of his own against governmental regulation. But at least Mr. Justice Douglas seems to mean that whenever a private party cannot interpose countervailing constitutional rights (and fair employment practices legislation does not deprive an employer of due process<sup>54</sup>), then the state may not assist him in practicing discrimination forbidden to the state.<sup>55</sup> And there is much in *Shelley* and *Barrows*, taken at face value, to support the logic of such a conclusion. At least the majority in *Cutter Laboratories* supplied no sound distinction.

The relationship of private action to state action again arose to plague the Court in the *Girard College* case.<sup>56</sup> Stephen Girard died in 1831, leaving a fund in trust to run a school for "poor white male orphans." The will named the City of Philadelphia as trustee, and eventually the trust came to be administered by a city board set up under a state statute. The board refused to admit two applicants to the school solely because they were Negroes. The Supreme Court in a per curiam decision held that the board, as a state agency, could not practice racial discrimination. Even though the board was acting as a trustee, its action was state action. Perhaps *Sioux City Cemetery* and *Cutter Laboratories* had given the Court pause; its only reliance was on the *School Segregation Cases*, and *Shelley* was ignored.

The next move in *Girard* was obvious. The Pennsylvania courts removed the state-created board as trustee, and appointed

<sup>53</sup> *Id.* at 302-03.

<sup>54</sup> See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945); Annot., 44 A.L.R.2d 1138 (1955).

<sup>55</sup> For such an interpretation of the *Cutter Laboratories* dissent, see Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 415-16 (1958).

<sup>56</sup> *Pennsylvania v. Board of Directors*, 353 U.S. 230 (1957).

a wholly private trustee.<sup>57</sup> But the Supreme Court declined the gambit, denying certiorari.<sup>58</sup> In view of *Shelley*, was there no longer state action merely because the state courts were enforcing the racially-discriminatory will through a private rather than a public trustee?<sup>59</sup>

Then came *Boynton v. Virginia*.<sup>60</sup> A Negro law student, traveling by bus from Washington, D. C., to Montgomery, Alabama, entered the white section of a restaurant in a bus terminal during a short stopover and demanded service. When he refused to leave on being ordered, he was arrested and convicted of criminal trespass. His petition for certiorari presented only constitutional questions under the commerce clause and the fourteenth amendment. But the Court, speaking through Mr. Justice Black, went far out of its way to dodge the constitutional issue. It ruled in the Negro passenger's favor on a much more narrow statutory ground, by stretching the Motor Carrier Act's anti-discrimination ban to cover even a restaurant operated by a private lessee of an independent terminal company in a terminal at which interstate buses make regular stopovers. Are even the dissenters in *Cutter Laboratories* becoming dubious about the reach of their doctrine? At least there is no indication they are winning new adherents for it.

This impression is reinforced by the latest word from the Supreme Court. In *Burton v. Wilmington Parking Authority*<sup>61</sup> the Court held that a Negro had been denied equal protection when refused service in a restaurant occupying leased space in a public parking building. But at least as significant as the holding was the tone of Mr. Justice Clark's majority opinion. It was a model

<sup>57</sup> See *Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. denied, 357 U.S. 570 (1958).

<sup>58</sup> *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 357 U.S. 570 (1958).

<sup>59</sup> See generally Shanks, "State Action" and the *Girard Estate Case*, 105 U. PA. L. REV. 213 (1956); Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

<sup>60</sup> 364 U.S. 454 (1960). The Court must next come to grips with state convictions of Negro "sit-in" demonstrators in *Garner v. Louisiana*, and related cases. (Nos. 617-619, Oct. Term 1960). Certiorari was granted in these cases on March 20, 1961. 365 U.S. 840 (1961). The strategists for the Negro litigation managed to present the first Supreme Court test of the "sit-in" issue in an unusually favorable posture. Unlike the typical situation in which colored demonstrators have been convicted of criminal trespass upon the complaint of a private store owner, *Garner* and its companion cases involve Negro students who were prosecuted for a breach of the peace after being arrested by police officers apparently acting on their own initiative. See N.Y. Times, March 21, 1961, p. 18, col. 3.

<sup>61</sup> 365 U.S. 715 (1961), reversing 157 A.2d 894 (Del. 1960), 59 MICH. L. REV. 450 (1961).

of circumspection, if not irresolution. The Court's decision was expressly limited to its facts, and then every fact was culled out that might possibly serve to link the restaurant with the public authorities. The parking facility was built, owned, and operated by a state agency. The leased premises were not surplus public property, but were originally intended for commercial tenants as an essential part of the plan for financing the project. The conjunction of restaurant and parking area made each more attractive to patrons. Both facilities by their very nature were designed for serving the public. And the state, in its lease, could have required the restaurant to operate nondiscriminatorily. Mr. Justice Clark even took note of the state flag flying atop the building.

Mr. Justice Stewart concurred on a more narrow ground. He pointed out that in upholding the restaurant's right to discriminate, the state court had relied on a statute permitting a restaurant proprietor to refuse service to persons "offensive to the major part of his customers." For Mr. Justice Stewart, the fourteenth amendment was thus violated by a legislative authorization for a discriminatory classification based exclusively on color. Justices Frankfurter, Harlan, and Whittaker dissented. They contended the case should have been remanded to the state court for a clarification of the precise basis for its refusal to grant the Negro declaratory and injunctive relief.

Nothing was heard from the three *Cutter Laboratories* dissenters, all of whom were apparently willing to go quietly along with Mr. Justice Clark's reasoning. Not one raised an obvious point: What had happened to the *Shelley-Barrows* doctrine of judicial action as state action? Could it not be argued that the proscribed state action was to be found right in the state court order denying the Negro a remedy, thereby lending the state's assistance to the private discrimination? Or may *Shelley* be invoked only against a party who, in furtherance of a discriminatory purpose, is affirmatively seeking judicial aid to alter the status quo? Fortunately for the Court, the facts of *Burton* justified an entirely different approach, and once again the hard questions implicit in *Shelley* and *Barrows* could be avoided.

Lacking such Supreme Court escape hatches as denials or dismissals of certiorari, the lower federal courts and the state courts have meanwhile had to flounder as best they could amidst a whole wave of cases on the possible constitutional implications of "private" action.

As if anticipating *Burton*, the courts readily have found the requisite state action to invoke constitutional protections when a state leases its facilities to a private person or group for carrying on activities or offering services open to the public. So racial discrimination may not be practiced by the lessees of public parks or golf courses,<sup>62</sup> or of a cafeteria in a county courthouse.<sup>63</sup> But it is undoubtedly significant that in these situations the lessees' activities by their very nature are accessible to the public generally. Surely a state should not be foreclosed from leasing a public auditorium for a convocation of the Ancient Order of Hibernians.

The mere receipt by an organization of state funds, financial support, or other assistance has not been deemed enough to constitute the recipient a state instrumentality,<sup>64</sup> unless the effective power of management and control is also lodged in the state.<sup>65</sup> Obviously the introduction of state assistance invites the closest scrutiny of particular facts. Tax exemptions for charitable institutions might be one thing, and substantial support of the only hospital in a county quite another.

Persistent efforts to find state action in the private operation of housing projects, public transportation, and places of public amusement echo curiously the three types of facilities which Mr. Justice Harlan in the *Civil Rights Cases* regarded as state instrumentalities because of their public function. Housing developments, no matter how large, have generally continued to avoid being tagged with governmental attributes.<sup>66</sup> In transportation<sup>67</sup>

<sup>62</sup> *Department of Conservation v. Tate*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956); *Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957). See also *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), *vacating* 202 F.2d 275 (6th Cir. 1953). *But cf.* *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) (private grant of land for public parks, with reverter if used by non-whites).

<sup>63</sup> *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957). For a discussion of the status of lessees of public property under numerous other federal and state court rulings, see 59 MICH. L. REV. 450 (1961).

<sup>64</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949) (four-to-three decision), *cert. denied*, 339 U.S. 981 (1950) (Black and Douglas, JJ., dissenting); *Eaton v. James Walker Memorial Hospital*, 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959); (Warren, C.J., and Douglas and Brennan, JJ., dissenting). *Cf.* *Vincennes University v. Indiana*, 14 How. (55 U.S.) 268 (1852) (grant of public land to university trustees did not make trustees a public corporation).

<sup>65</sup> *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), *cert. denied*, 326 U.S. 721 (1945).

<sup>66</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950); *Johnson v. Levitt & Sons*, 131 F. Supp. 114 (E.D. Pa. 1955). *But cf.* *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>67</sup> *Flemming v. South Carolina Electric & Gas Co.*, 224 F.2d 752 (4th Cir. 1955); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). See also *Chance v. Lambeth*, 186 F.2d 879 (4th Cir. 1951), *cert. denied*, 341 U.S. 941 (1951).



and amusement<sup>68</sup> cases the courts have seemed to plant one foot on a Harlan-type doctrine and one on a *Shelley*-type; they discourse at length on the "public" nature of these facilities, even when privately operated, but then hunt for legislation requiring or permitting racial discrimination, or for enforcement of the discrimination by the state police and courts, as the crucial element of state action.

Does this mean that the *Shelley* doctrine will be applied to the point of forbidding all private discrimination based on a classification the state itself could not properly make, so long as there is state enforcement in the picture? Quite clearly not. A man, for example, can still bequeath property with a gift over if the legatee marries a person of a prohibited faith.<sup>69</sup> And setting aside the easiest case of the householder discriminating against guests on racial grounds, the owner of an ice cream parlor can so far still constitutionally secure police assistance against persons whose patronage is unwanted because of their race.<sup>70</sup>

Logically extended, the *Shelley-Barrows* rule simply will not go down. For by now it is plain that in *every* case before the courts — in the probate of a will, in the enforcement of an arbitration award regarding an employee discharge, in a criminal prosecution for trespass on a private lawn — there is state action in a true sense.<sup>71</sup> And if the courts in adjudicating rights and relationships between private persons must hold every private person to the identical constitutional standards binding on a state, then effectively over eighty-five years of unbroken constitutional rulings go by the board, and individual action for all practical purposes becomes subject to the fourteenth amendment. This no one now seriously proposes. A search for a new test is in order.

### III. THE HARD QUESTION MAY BE RIGHT: WHEN IS PRIVATE ACTION STATE ACTION?

Put to one side cases involving the acts of formally designated state agents, or the acts of private persons or groups done pursuant

<sup>68</sup> *Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949); *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950); *Griffin v. Collins*, 187 F. Supp. 149 (D. Md. 1960).

<sup>69</sup> *United States Bank of Portland v. Snodgrass*, 202 Ore. 530, 275 P.2d 860 (1954); *Gordon v. Gordon*, 332 Mass. 197, 124 N.E.2d 228 (1955), *cert. denied*, 349 U.S. 947 (1955). See also *Charlotte Park & Recreation Comm'n v. Barringer*, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956). *But cf.* *Claremont Improvement Club v. Buckingham*, 89 Cal. App. 2d 32, 200 P.2d 47 (1948) (court refused declaratory judgment that restrictive covenant, standing alone, was valid, since such declaration would be state action enforcing the covenant).

<sup>70</sup> *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958). *Cf.* *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959).

<sup>71</sup> See note 9 *supra*.

to the formal mandate of a state. Concentrate upon the case which involves only the acts of private persons having no formal connection to the state. At this point, surely, if the distinction between state action and private action is to have any genuine meaning, the applicability of constitutional limitations must hinge on the nature of the private activity itself — and not on the bare presence of state enforcement or adjudication.

Assume that the Supreme Court's instincts, if not its rationalizations, have been sound, and that its actual holdings in both *Shelley* and *Cutter Laboratories* are correct. Is there an essential difference between a racial restrictive covenant and an employment contract, or in the legal status of the parties relying on them, so that in the one case but not in the other a federal constitutional question is raised when enforcement is sought in the state courts?

A trenchant analysis of this problem has been made by Professor Glenn Abernathy of the University of South Carolina.<sup>72</sup> For him the key to the solution lies in the distinction, elaborated in such Supreme Court decisions as *Collins v. Hardyman*,<sup>73</sup> between a person's federal rights and his state rights. Professor Abernathy proceeds as follows. Only federal rights, and not state rights, are secured or protected by the federal constitution. Two willing persons may have a state right, though not a federal right, to enter into a contractual relationship. But they do have a federal right under the fourteenth amendment that the state shall not assert its authority, on the basis of race or color, to interfere with their contract. Similarly, a Negro has a state right, not a federal right, to be free from private interference with his access to state property opened to the public use. But he does have a federal right that a state court shall not declare it to be state policy in such a situation that whites have a right of access and Negroes do not.

On the other hand, continues Abernathy, a Negro has no right, either federal or state, to be hired by an unwilling employer (in the absence of special legislation), or to be admitted to an unwilling householder's premises. So no constitutional question is presented when a state acts in furtherance of such private racial discrimination. Abernathy rounds out his analysis by allowing one type of privately operated activity to be classified as governmental, and thus subject to constitutional limitations. This category embraces the functions "which are indispensable to the maintenance of

<sup>72</sup> Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958).

<sup>73</sup> 341 U.S. 651 (1951). See also *United States v. Cruikshank*, 92 U.S. 542 (1876); *Civil Rights Cases*, 109 U.S. 3 (1883).

democratic government,"<sup>74</sup> such as the electoral processes at issue in *Terry v. Adams*.

This critique is conceptually precise. It clears away much of the fog generated by the Supreme Court, and in its emphasis on specific rights can be a most useful analytical guide. But it too suffers from defects. First of all, it may give a false illusion of comprehensiveness by failing to take account of the equivocal nature of the term "right." For example, a daughter would seem to have neither a federal nor state right to be her father's legatee, if he is unwilling. Yet she would seem to have a right to contract an interracial marriage with a willing Negro, which the state could not constitutionally prohibit solely on the basis of race.<sup>75</sup> Would the state be forbidden, by analogy to *Barrows*, to enforce her father's will insofar as it provided for forfeiture of her legacy if she went through with the prospective interracial marriage?<sup>76</sup> Does it make a difference that the exercise of contractual rights on the part of two willing parties is being penalized on racial grounds at the behest of a single hostile testator, rather than at the behest of a united group of hostile landholders in a community?

This leads to the deeper objection to an Abernathy-type analysis. The development of constitutional theory must not be frozen in the established molds of property and contract law. Concepts must not be exalted at the expense of hard facts. It is settled that a willing seller and a willing buyer cannot be stopped from concluding a realty transaction through judicial enforcement of a racial restrictive covenant previously entered into by the now-unwilling seller and ten other residents in a community. Will the state be allowed to stand idly by while ten thousand residents in a community form a single realty corporation, sell all their land to it while retaining ground-rental rights, and then through resolutions of the corporation's board of directors make the corporation a "single" unwilling seller or lessor of land to non-Caucasians?

Perhaps the right answer, or less ambitiously the right question, lies not in *Shelley* and *Barrows* at all, but in *Terry v. Adams*<sup>77</sup> and *Marsh v. Alabama*.<sup>78</sup> In these latter cases the Supreme Court grappled with situations in which the state had "permitted" pri-

<sup>74</sup> Abernathy, *supra* note 72, at 407.

<sup>75</sup> *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17 (1948). *But cf.* *Naim v. Naim*, 197 Va. 80, 87 S.E.2d 749 (1955), *judgment vacated*, 350 U.S. 891 (1955).

<sup>76</sup> See note 69 *supra*, and related text.

<sup>77</sup> 345 U.S. 461 (1953).

<sup>78</sup> 326 U.S. 501 (1946). See also notes 29 through 38 *supra*, and related text.

vate organizations to act in "matters of high public interest," such as the electoral process, and situations in which the state had "permitted" or acquiesced in their "performance of a public function," such as the operation of a town.<sup>79</sup> And in these situations constitutional protections applied.

Here the real issues are framed. And the right question in the long search after state action becomes: "Has the state permitted, even by inaction, a private party to exercise such power over matters of a high public interest that to render meaningful the type of rights protected by the fourteenth amendment, the action of the private person or organization must be deemed, for constitutional purposes, to be the action of the state?"

Obviously this is no open-sesame to the riddle of individual cases. But it directs the inquiry to the proper considerations. And above all it takes account of the realities of modern life.

The notion that certain private action should be treated as state action is not new. English liberals such as John Stuart Mill and T. H. Green came to realize that restricting the state alone was not enough to ensure individual freedom. In some situations government must inhibit private action in the interest of greater freedom. Green in particular substantially identified state inaction with intervention in situations where state passivity left powerful private forces free to stifle individual liberties as effectively as could a government.<sup>80</sup>

In our own day there has been similar sentiment. Professor Mark DeWolfe Howe suggests that when groups "exercise power in matters which directly concern the state they lose their privacy and, claiming the prerogatives of sovereignty, may not object if their action is treated as that of the state itself."<sup>81</sup> Professor W. G. Friedmann discusses how the state "surrenders its power to the new massive social groups of the industrial age," and pointedly observes: "The corporate organizations of business and labor have long ceased to be private phenomena."<sup>82</sup> And A. A. Berle states flatly that "a corporation, especially in some national industrial planning complex, is subject to the same constitutional limitations

<sup>79</sup> *Terry v. Adams*, 345 U.S. 461, 469 (1953); *Marsh v. Alabama*, 326 U.S. 501, 507 (1946); see also *Nixon v. Condon*, 286 U.S. 73, 88 (1932).

<sup>80</sup> GREEN, *PRINCIPLES OF POLITICAL OBLIGATION* 206-10 (1895); see discussion in GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 48-49 (1959).

<sup>81</sup> Howe, *Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 95 (1953).

<sup>82</sup> Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155, 165, 176 (1957).

as those applicable to a branch of the federal government or of the state government."<sup>83</sup>

The Supreme Court itself, even in applying the traditional rule that state action alone can deprive a person of rights under the fourteenth amendment, has added a cautionary word: "We do not say that no conspiracy by private individuals could be of such magnitude and effect as to work a deprivation of equal protection of the laws, or of equal privileges and immunities under laws."<sup>84</sup> This is a frank though guarded recognition that there may be instances where the effective application of great private power shall have to be adjudged the equivalent of state action. Cautious jurisprudents will understandably still yearn for at least a formalistic nexus between such private action and the officially designated agencies of the state before calling into play constitutional protections and accompanying federal remedies. They may find some comfort in the respectable amount of judicial authority for the propositions that state inaction or official nonfeasance can be regarded as state action,<sup>85</sup> that affirmative state permission for private action can likewise be regarded as state action,<sup>86</sup> and that in the latter instance an injured individual can obtain a remedy directly against the private party acting pursuant to the state's permission.<sup>87</sup> It would not seem a hazardous additional leap to bridge the first two of these propositions by equating state inaction in not stopping certain private action with state permission for such action.<sup>88</sup>

Whatever the merit of all this theory, some will object, it would be rash in the extreme to try it out in practice. Would it not mean

<sup>83</sup> Berle, *The Changing Role of the Corporation and Its Counsel*, 10 THE RECORD 266, 274, 275 (1955) (arguing that a great oil company could not adopt the policy of refusing to sell gasoline to Negroes). See also HALE, *FREEDOM THROUGH LAW* 374, 379 (1952) (suggesting that if employers and a union tried to keep Negroes wholly out of a trade, they would be unconstitutionally acting on matters of "high public interest" with the aid of the state); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953). *But cf.* GRAY, *THE NATURE AND SOURCES OF THE LAW* 156 (2d ed. 1921) (arguing that the by-laws of a corporation are not law).

<sup>84</sup> *Collins v. Hardyman*, 341 U.S. 651, 662 (1951) (holding mob attack on a meeting did not deprive victims of the equal protection of the laws).

<sup>85</sup> *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943); *Picking v. Pennsylvania R. Co.*, 151 F.2d 240 (3d Cir. 1945); *Lynch v. United States*, 189 F.2d 476 (5th Cir. 1951).

<sup>86</sup> *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

<sup>87</sup> *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). See also *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914); *Flemming v. South Carolina Electric and Gas Co.*, 224 F.2d 752 (4th Cir. 1955).

<sup>88</sup> As to the handling of elections, is this not substantially what the Supreme Court did in *Terry v. Adams*, 345 U.S. 461 (1953)?

bringing under the multitude of special laws covering governmental agents all the purely private persons who perform functions supposedly of a "high public interest" or "fundamental" to our society? And how are the courts going to be able to distinguish, anyway, between what is "fundamental" and what is not?<sup>89</sup> To the first query it is enough to reply, with Mr. Justice Cardozo, that the "test is not whether" such private persons "are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."<sup>90</sup> That is the sort of problem to which judicial inventiveness is peculiarly adapted, and it need detain us no further.

One cannot blink the force of the second objection. But it is rather a proper assessment of the scope of the challenge than a genuine discrediting of the worth of the undertaking. No doubt there would be moments of anguish when the courts tried to draw the line in particular cases. Yet it is axiomatic that "the great body of the law consists in drawing such lines."<sup>91</sup> And the Supreme Court has itself noted that the grave question of the applicability of constitutional protections might have to turn on the drawing of a proper line between an unruly mob and a full-scale conspiracy,<sup>92</sup> or between a political club and a political party performing a state function.<sup>93</sup> If, as mounting testimony indicates,<sup>94</sup> the kind of rights intended to be safeguarded by the fourteenth amendment can be rendered truly meaningful in the modern context only by ascribing to certain so-called private actions the attributes of state action, then the courts must risk the dangers and set about the task.<sup>95</sup>

How would this approach work in various specific circumstances? Racial restrictive covenants would fall, not because their enforcement is discriminatory state action, but because in them-

<sup>89</sup> For a voicing of these two objections, see Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 404-06 (1958).

<sup>90</sup> *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

<sup>91</sup> Holmes, J., dissenting in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926).

<sup>92</sup> See *Collins v. Hardyman*, 341 U.S. 651, 662 (1951).

<sup>93</sup> See *Terry v. Adams*, 345 U.S. 461, 482 (1953).

<sup>94</sup> See notes 80 through 83 *supra* and accompanying text.

<sup>95</sup> See generally Pollock, *Judicial Caution and Valour*, in *JURISPRUDENCE IN ACTION* 367 (1953); Holmes, J., speaking for the Court in *Blinn v. Nelson*, 222 U.S. 1, 7 (1911) ("constitutional law, like other mortal contrivances, has to take some chances"). On the specific issues involved here, see Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1119-23 (1960).

selves they represent an exercise, on the prohibited basis of race, of the essentially public function of "zoning" real property.<sup>96</sup> On the other hand, the owner of the small corner ice cream parlor would hardly be held to be engaged upon matters of high public interest when, acting wholly independently, he draws the color line among his employees and patrons.<sup>97</sup> But a far more searching scrutiny would await any analogous policies on the part of the great nation-wide public utility. Discrimination here might be substantially like the denial of a license to practice a craft, or like the denial of ready access to an essential product or service. And hard questions indeed would have to be asked about the effect of racial discrimination in extensive suburban housing developments, regardless of how unified the developments' ownership.

In short, the inquiry in each instance would primarily be addressed to the extent of the discriminator's power adversely to affect constitutional-type rights on racial grounds — and not so much to the relationships, in terms of traditional property or contract law, among the various parties. For convenience, however, certain lines would likely be drawn rather mechanically. All restrictive covenants could be barred on the basis that any combination of persons for the purpose of zoning realty would be deemed state action, even though a handful of such persons might actually have less effective power than a relatively small, individually-owned housing development, which would not be held to governmental standards.

On the authority of *Terry v. Adams*,<sup>98</sup> claims of a deprivation of constitutional rights through the discriminatory exercise by a private person or group of a public function could be litigated in a suit brought in federal district court directly against the alleged

<sup>96</sup> This would call for the effective, if not technical, overruling of *Corrigan v. Buckley*, 271 U.S. 323 (1926) (recognizing validity of restrictive covenants as such, in the District of Columbia), which would hardly be a much-lamented loss.

<sup>97</sup> A different case might well be presented, however, if a Negro were convicted and subjected to a heavy penalty under special "emergency" legislation aimed at "sit-in" demonstrators. See Va. Acts, chs. 96-98 (1960); N.Y. Times, Feb. 23, 1960, p. 38, col. 1, Feb. 25, 1960, p. 1, col. 3. Discriminatory application of a statute fair on its face is invalid. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But cf. *Randolph v. Virginia*, 29 U.S. Law Week 2523 (Va. Sup. Ct. App., April 24, 1961).

<sup>98</sup> 345 U.S. 461 (1953). See also *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

<sup>99</sup> *Abernathy*, on the contrary, would first demand formal state action, through an adjudication by the state courts of the victim's rights, or at least through a failure by state authorities, upon his request, to protect his federal or state rights. *Abernathy*, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 399, 410, 417 (1958).

offender.<sup>99</sup> It would make no difference that the offender may have been acting in violation of state law also.<sup>100</sup>

No intention exists that the analytical tool here fashioned should be used as a blunt instrument for hammering out racial equality under the guise of enforcing constitutional rights. Indeed, despite the greater protection it would afford against racial discrimination on the part of massive corporate and other social structures, this whole analysis may be less helpful than a logical extension of the *Shelley* doctrine would be to the victims of discrimination resulting from contractual or testamentary arrangements of a plainly private character. No matter. The purpose has been to develop a theory which will make meaningful in our time the rights sought to be protected by the fourteenth amendment against invasion by the action of the *state*. At this late date any effort to twist the federal system to do more might well merit something akin to Judge Learned Hand's poignantly skeptical remonstrance in a different but analogous context: "[A] society so riven that the spirit of moderation is gone, no court *can* save; . . . a society where that spirit flourishes, no court *need* save; . . . in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."<sup>101</sup>

#### CONCLUSION

The aim has not been to supply a multitude of possible answers, but to frame the one right question. The proposed test accepts the premise, apparently now unopposed, that fourteenth amendment protections operate only against state action. It rejects the mechanical application of any formula which would find the requisite state action whenever state authorities adjudicate private disputes or enforce private rights, thereby holding the action of pri-

<sup>99</sup> *Screws v. United States*, 325 U.S. 91 (1945); *Monroe v. Pape*, 365 U.S. 167 (1961); see also *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913).

<sup>101</sup> Hand, *The Contribution of an Independent Judiciary to Civilization*, *THE SPIRIT OF LIBERTY* 164 (3d ed. 1960). (Emphasis in the original.) To say the judiciary may have to limit its role in furthering racial equality is but to emphasize that the legislative and executive branches must enlarge their own. So far, for example, Congress has done little to assert the power of the purse. However, one promising recent step was Executive Order No. 10925, March 6, 1961, 26 Fed. Reg. 1977 (establishing the President's Committee on Equal Employment Opportunity). And it may still be not too wild a dream that private groups and individuals will increasingly take up the task. Only the most sanguine could have predicted that Negro "sit-ins" in Atlanta, Georgia, would produce a peaceful settlement formula whereby the demonstrations were to end in return for businessmen's promises to desegregate lunch counters coincidentally with the forthcoming integration of local schools. *N.Y. Times*, March 8, 1961, p. 1, col. 2.



vate persons subject in effect to constitutional limitations in these situations. Such a formula proves too much, leads to logical absurdities, and most importantly fails to focus attention on the truly significant factors.

The inquiry suggested here would concentrate on the nature of the privately-operated activity itself. The existence of state action for constitutional purposes would hinge on whether a private activity was so invested with the public interest, and so subject to the control of powerful private forces, that effective impairment of fourteenth amendment rights could result from the action of these so-called private persons or groups. To the millions fighting the battle for racial equality in our day, this would be no ultimate weapon. But it should clear the way toward a realistic, meaningful protection of their constitutional rights against invasion by combinations of private citizens or by the great social structures which, in our complex modern society, increasingly come to perform functions formerly reserved to the state. And that would be no small gain.