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Discrimination in State University Housing Programs— Policy and Constitutional Consideration

WILLIAM W. VAN ALSTYNE*

In nearly all major state universities today, substantial numbers of students are obliged to live off-campus in private apartments or rooming houses.¹ Rather than cast these students into unfamiliar neighborhoods to find suitable accommodations by chance, most of these universities maintain some facility which refers students to landlords who have registered with the university. Typically, the privilege of registering is limited to those landlords who comply with university standards of health, safety, and supervision with respect to such things as visiting hours and alcohol control. Notwithstanding the availability of such services, however, racial and religious barriers cause certain groups of students to experience unusual difficulty in locating adequate housing.²

The existence of racial discrimination in registered, off-campus housing raises several issues of policy and law. With respect to policy, there is evidently some difference of opinion as to a university's responsibility to provide its student body with a non-segregated environment, particularly with respect to off-campus, privately owned housing. A representative survey of state universities outside the Deep South indicates that seventeen of forty-three universities have resolved that a willingness to accept all qualified students, regardless of race or color, is a reasonable condition to require of landlords registered with those universities.³ There may

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1. See Appendix at p. 78, *infra*, for a survey of state universities which maintain off-campus housing facilities. Southern universities were not canvassed because the great majority continue to be segregated, thus raising no problem in the off-campus housing of Negro students. Private universities were not surveyed since their housing practices do not raise the same constitutional issues, although some of these universities do enforce non-discrimination policies against registered landlords, e.g., Harvard, Yale, and Radcliffe. See N.Y. Times, Oct. 25, 1959, p. 83, col. 3; New York State Comm'n Against Discrimination memorandum of May 8, 1959, p. 1, *Cornell University Adopts Non-Discrimination Policy for Off-Campus Housing*.

2. For example, of 447 landlords registered with Ohio State University in November 1959, only 57 (or 13%) responded to a University questionnaire by indicating their willingness to accommodate students without regard to race or color. Ohio State Lantern, Feb. 24, 1960, p. 3. See Appendix at p. 78, *infra*.

3. See Appendix at p. 78, *infra*.

be some modest question whether enforcement of such a condition through a threat to delist discriminatory landlords unconstitutionally deprives them of property without due process, though the answer now appears to be quite clear. With respect to other universities which maintain substantial connections with discriminatory landlords and which do not enforce any policy against such discrimination, however, a more serious question exists as to whether these universities may unwittingly be violating the fourteenth amendment's guarantee of equal protection. The purpose of this article is to review briefly the choice of values implicit in the policies of each group of universities, and to discuss the constitutionality of those policies.⁴

*Policy Considerations*⁵

Whether the constitutional vehicle has been the due process clause,⁶ or the equal protection clause,⁷ objections by landlords to state action restricting their capacity to discriminate because of race are fundamentally bound up with an alleged "right" or "prerogative" of nonassociation.⁸ Out of context, the assertion of such a

4. For an earlier article, written before *Brown v. Board of Educ.*, 347 U.S. 483, 38 A.L.R. 2d 1180 (1954), briefly examining a related problem of discrimination by fraternities "recognized" by state universities, see Horowitz, *Discriminatory Fraternities at State Universities—A Violation of the Fourteenth Amendment*, 25 So. CAL. L. REV. 289 (1952).

5. This attempt to restate the normative principles involved in the "right" of non-association versus the "right" of equal access, is a self-conscious response to Samuel Johnson's reflections on the law: "SIR ALEXANDER: 'The bar is not so abusive as it was formerly. I fancy they had less law long ago, and were obliged to take to abuse to fill up the time. Now they have such a number of precedents, they have no occasion for abuse.' JOHNSON: 'Nay, Sir, they had more law long ago than they have now. As to precedents, to be sure they will increase in the course of time. But the more precedents there are, the less occasion is there for law; that is to say, the less occasion is there for investigating principles. Is it not so, Bozzy?' BOSWELL: 'Certainly, Sir.'" BOSWELL FOR THE DEFENSE 1769-1774, at 70 (Wamsatt & Pottle eds. 1959). (Emphasis added.)

6. See, e.g., *New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc.*, 10 Misc.2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958). Compare *Pyeatte v. Board of Regents*, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952).

7. See *New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc.*, 10 Misc.2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958). Compare *O'Meara v. Washington State Bd. Against Discrimination*, 4 RACE REL. L. REP. 664 (No. 535996) (Sup. Ct. Wash. July 13, 1959) (criticized in Forster & Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assigned Housing*, 6 N.Y.L.F. 38, 48-57 (1960)), and 28 OPS. ORE. ATT'Y GEN. 86 (1957), reprinted in 2 RACE REL. L. REP. 746 (1957), with *Levitt & Sons v. Division Against Discrimination*, 56 N.J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 80 Sup. Ct. 1257 (1960).

8. For an intemperate defense of this "prerogative," see Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13, 37 (1960): "All the fancy phrases of 'democratic living,' 'fair housing,' 'open occupancy,' and 'equality' cannot substitute for the denial of the right of freedom of association. Infringement of this right makes antidiscrimination legislation in housing violative of fundamental liberties."

The word "right" is placed in quotations in the text to indicate that we are here con-

prerogative is not without appeal. Essentially, the interest involved in such an assertion rests on a value judgment that a man's selection of associates, either as friends, business associates, or tenants, ought not be hedged about with state imposed notions of right and wrong which, in the last analysis, enjoy no divine guarantee of excellence or superiority. For a state institution to compel a landlord to lease part of what he owns to those whom he considers undesirable may be viewed as infringing on his freedom of choice and abridging the significance of ownership.

A property owner's interest in nonassociation does not exist in a vacuum, however; the uncontrolled exercise of such an interest may trample under foot competing interests of even higher value. Balanced against the pristine interest of property owners in declining to deal even on arbitrary bases and to make irrelevant differences of color the grounds for distinguishing among men, is the interest of the adversely affected class to pursue its opportunities in society free of artificial barriers not thrown up against others. In the case at hand, it is the interest of Negroes in equal access to facilities which are open to others. A juxtaposition of this claim of equal opportunity for housing with the claim of nonassociation indicates that both cannot be completely satisfied in all situations.

In the context of university housing programs, the better case clearly lies with those asserting an interest in equal access. It may be (though not persuasively, I think) argued that discrimination against Negroes with respect to casual interests, such as equal access to malt shops and country clubs, ought not be placed above the proprietors' or the club members' interest in nonassociation even though the exclusion arbitrarily stigmatizes those who are rejected.⁹

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cerned not with a legally enforceable claim, but rather with a philosophic claim or value judgment that there is some legitimacy in the interest of each person to determine his associations, regardless of his reasons.

9. Note, however, that the Supreme Court has held that segregation even in state operated facilities of recreation, amusement, and transportation is unconstitutional. *Compare* *Lucy v. Adams*, 350 U.S. 1 (1955); *Brown v. Board of Educ.*, 347 U.S. 483, 38 A.L.R.2d 1180 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (all dealing with "fundamental" interests in education), with *Department of Conservation & Dev. v. Tate*, 231 F.2d 615 (4th Cir. 1956), *Dawson v. Mayor & City Council*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955); *Browder v. Gayle*, 142 F. Supp. 707 (W.D. Ala.), *aff'd*, 352 U.S. 903 (1956) (overruling *sub silentio* *Plessy v. Ferguson*, 163 U.S. 537 (1896)), and *Sweeney v. City of Louisville*, 102 F. Supp. 525 (W.D. Ky. 1951), *aff'd sub nom. Muir v. Louisville Park Theatrical Ass'n*, 202 F.2d 275 (6th Cir. 1953), *vacated*, 347 U.S. 971, 38 A.L.R.2d 1190 (1954). See also *Flemming v. South Carolina Elec. & Gas Co.*, 128 F. Supp. 469 (E.D.S.C.), *rev'd*, 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956).

Since the *Brown* Court stressed the harmful effects of segregation only in education, *Brown v. Board of Educ.*, *supra* at 494, and since it expressly limited its holding to segre-

It can scarcely be doubted, however, that when discrimination is practiced in housing, and against students still in their formative years,¹⁰ the effect is more certainly an abridgment of a fundamental interest in democratic education, by forcing them into ghetto-like living which prejudices their whole existence—an interest clearly more critical than the landlord's desire for unrestricted use of the housing lists.¹¹

Also relevant as a matter of policy in balancing these competing interests is the amount of discrimination involved. It may be argued that if but a few landlords exclude Negroes, the latter's interest in equal access has been only slightly disturbed; presumably, they still enjoy access to many other nonsegregated houses of at least equal physical accommodation. But when the capacity to discriminate (euphemistically disguised as a "prerogative of non-association") is exercised so extensively that the minority's hope of securing desired goals is cut off, the principle of equal opportunity has in fact given way to a cruel and inexplicable tyranny of the many, clearly not justifiable under the rubric of "ownership" or any other such notion.¹² Parenthetically, it may be noted that

gation "in the field of public education . . ." *Id.* at 495, extension of *Brown* into related areas by per curiam opinions has properly been the subject of criticism. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22, 31-35 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 4-5 (1959); Note, *The Supreme Court—1956 Term*, 71 HARV. L. REV. 85, 150-51 (1957).

10. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494, 38 A.L.R.2d 1180 (1954), where the segregation of the young was said to generate "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

11. See, e.g., 1959 U.S. CIVIL RIGHTS COMM'N REPORT, 386-93. But see GLAZER & McENTIRE, *STUDIES IN HOUSING AND MINORITY GROUPS* 9 (1960).

12. Increasingly, it has been recognized that the enormous power traditionally associated with government has passed into private hands, see, e.g., BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954); BERLE, *ECONOMIC POWER AND THE FREE SOCIETY* (1957); Miller, *The Constitutional Law of the 'Security State'*, 10 STAN. L. REV. 620, 634-38 (1958), reviving the argument that the fourteenth amendment must be construed to prohibit substantial abuses of power whether exercised by the "state" politic or the "state" economic. See *Marsh v. Alabama*, 326 U.S. 501 (1946).

Still another approach towards eradicating racial discrimination in an area of fundamental concern where prejudice by a majority seriously affects basic interests, is suggested in BLAUSTEIN & FERGUSON, *DESEGREGATION AND THE LAW* 266 (1957).

"A change in the meaning of state action can also be accomplished by reintroducing into this area of constitutional thinking some basic common law principles. Some future Supreme Court might well hold that any activity which affects large numbers of the general public automatically becomes a matter of governmental concern, and thus falls within the state action concept. Under such an analysis the services of hotels, restaurants and theaters would have to be made available to the general public without regard to race. [Compare the dissent of Justice Harlan in *Civil Rights Cases*, 109 U.S. 3 (1883).] This was the old English common law rule governing inns and common carriers, since those facilities are inherently public in character. And while housing was not of public concern at common law, present-day, large-scale housing developments could be declared a matter of government interest within the context of the Fourteenth Amendment. This approach would

the "prerogative of nonassociation" as a personal interest often is not genuinely involved in university off-campus housing, since rental units may be owned by absentee landlords, rather than by families renting but a single room in their own homes. In reconciling these considerations of policy, and in relating them to the police power of the state, it would appear that the state could reasonably determine that the effect of discrimination *in this situation*¹³ is more harmful to some than the effect of nondiscrimination on others who oppose it. The philosophy of the fourteenth amendment¹⁴ suggests the persuasive policy argument to be made for a state institution's withholding support from discriminatory landlords. Indeed, since housing discrimination is unlikely to end through voluntary means,¹⁵ the argument in favor of positive state action becomes most compelling.

That State Universities May Enforce a Policy of Nondiscrimination in Registered Housing

While the Supreme Court has not passed directly upon the power of a state to compel nondiscrimination in "private" housing by penal sanctions, two states are sufficiently confident of the constitutionality of such legislation that they have placed it on their statute books.¹⁶ Additionally, the highest courts of two states have upheld the constitutionality of the application of antidiscrimination legislation to private housing where the financing was insured

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preclude racial discrimination in these private activities regardless of any specific action on the part of the state and regardless of whether the state had ever undertaken such activities in the past." *Id.* at 266-67.

See Frank and Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 COLUM. L. REV. 131, 167-68 (1950).

13. The need for exacting inquiry into the factual and policy consequences implicit in constitutional decisions which necessarily prefer one value over another in a given context is persuasively presented in Karst, *Legislative Facts in Constitutional Litigation*, 1 SUPREME COURT REVIEW (to be published).

14. In a case upholding the right of a state to withhold facilities from racially discriminatory labor unions, the Supreme Court approved the state's policy in the following terms: "[A] State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J. concurring). See *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 166 A.L.R. 342 (1946).

15. For a brief review of evasive schemes privately employed to preserve segregated housing, see Note, *Publicly-Owned Facilities, Housing, and Transportation: Federally Guaranteed Civil Rights*, 54 NW. U.L. REV. 377, 384-88 (1959).

16. See CONN. GEN. STAT. § 53-35 (1959); MICH. COMP. LAWS § 750.146.

by the federal government.¹⁷ In the more recent decision, the United States Supreme Court dismissed an appeal for want of a substantial federal question.¹⁸

Against this background, the case of a university housing officer's power merely to withhold special services from discriminatory landlords is indeed an easy one; by instituting such a policy, the university does not affirmatively require any landlord to surrender his prejudices or to abrogate his prerogatives. Rather, it limits the privilege of sharing a captive market of students and enjoying the free services of university advertising and referral personnel to those landlords who are willing to treat all qualified students with equal respect and accommodation. The right of the university to impose such a condition is probably greater than the power of the state-at-large, because of its pronounced responsibility for the welfare of its student body.¹⁹ A university's responsibility to provide a nonsegregated atmosphere for its students has been acknowledged by the Supreme Court to extend beyond the walls of the classroom.²⁰ Indeed, the right of a state university to ban fraternities affiliated with national organizations in an effort to stop racial discrimination, has been upheld in the federal courts.²¹ And, finally, it is not without significance that none of the state universities which presently maintain nondiscriminatory policies in off-campus housing have been challenged in court.²²

17. *New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc.*, 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958); *Levitt & Sons v. Division Against Discrimination*, 56 N.J. Super. 542, 153 A.2d 700 (App. Div. 1959), *aff'd*, 31 N.J. 514, 158 A.2d 177, *appeal dismissed*, 80 Sup. Ct. 1257 (1960). For recent discussions of such legislation, see GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 304-12 (1959); Forster & Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38 (1960). See also Note, *The New Jersey Housing Anti-Bias Law: Applicability to Non-State Aided Developments*, 12 RUTGERS L. REV. 557 (1958); 56 MICH. L. REV. 1223 (1958). Compare Witherswax, *Anti-Discrimination Legislation as It Affects Real Property Rights*, 23 ALBANY L. REV. 75 (1959).

18. *Levitt & Sons v. Division Against Discrimination*, 80 Sup. Ct. 1257 (1960).

19. See *Pyeatte v. Board of Regents*, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952). See also *Hamilton v. Board of Regents of University of California*, 293 U.S. 245 (1934); *Waugh v. Board of Trustees of University of Mississippi*, 237 U.S. 589, 596 (1915); *Webb v. State University*, 125 F. Supp. 910 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954); *Hughes v. Caddo Parish School Bd.*, 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1945).

20. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950). See *Sweatt v. Painter*, 339 U.S. 629 (1950).

21. *Webb v. State University of New York*, 125 F. Supp. 190 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954). The state's power was upheld even though the national organization had no discriminatory policies. Even where a landlord's ability to locate lessees has been virtually eliminated by a university regulation restricting students from living off campus, the courts have rejected the landlord's arguments based on the due process, equal protection, and contract clauses. *Pyeatte v. Board of Regents*, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952).

22. In anticipating how the Supreme Court might react to such a case, it should be

*That State Universities May Not Operate a Facility Which
Directs Students Into Segregated Housing*

Operation of state university housing offices must conform to the fourteenth amendment which provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²³ Implicit in any issue arising under the equal protection clause are two lines of inquiry, best examined separately: Is the state the author of the conduct with which we are concerned?²⁴ Is the conduct of a kind which involves a denial of equal protection?²⁵ The dichotomy is, of course, self-evident. It merits restatement here, only to emphasize that two separate classes of possible defendants are involved in university housing programs: the universities and the landlords. It will be found that the constitutional problems with respect to the former relate almost exclusively to the issue of the type of conduct involved, while the problems with respect to the latter relate almost exclusively to determining whether they are the state for purposes of the fourteenth amendment,²⁶ an issue not covered in this article. Our

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borne in mind that the Court has definitely moved toward an upgrading of the states' interests in a nonsegregated educational environment, at the same time it has tended to minimize the significance of private property rights. Thus, in *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954), the Court remarked: "Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it is a right which must be made available to all on equal terms." Compare these reflections from *Marsh v. Alabama*, 326 U.S. 501, 505-6 (1946), on the adequacy of property ownership as a justification for excluding offensive speech: "We do not agree that . . . property interests settle the question. . . . Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

23. U.S. CONSR. amend. XIV, § 1.

24. It is clear that in the absence of state action, the fourteenth amendment will not inhibit even the grossest kind of discrimination. See *Collins v. Hardyman*, 341 U.S. 651 (1951); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *United States v. Wheeler*, 254 U.S. 281 (1920); *Hodges v. United States*, 203 U.S. 1 (1906); *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank*, 92 U.S. 542 (1875). State inaction may violate the fourteenth amendment also. See *Lynch v. United States*, 189 F.2d 476 (5th Cir. 1951); *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947); *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943). See generally *Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958).

25. That this is a separate inquiry, too often confused as part of the "state action" inquiry, is made admirably clear in Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957).

26. The cases provoking the most discussion (excepting the *Brown* case) under the equal protection clause, have virtually all concerned action which, if practiced by state agencies, would clearly involve unconstitutional conduct. These cases have generally been brought against *nongovernmental* agencies, however, and thus while the Court had given a great deal of attention to the "state action" concept, it has done little to illuminate the penumbral areas of the "permissible conduct" concept. With respect to state action and the right to vote see, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Perry v. Cyphers*, 186 F.2d 608 (5th Cir. 1951); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *Chapman v. King*, 154 F.2d 460 (5th

immediate concern is with the officers of state universities who operate the housing offices, and possibly with university trustees or regents who promulgate rules governing operation of the housing offices. As to these, it is well settled that their actions are the actions of the state for purposes of the equal protection clause.²⁷

The significant question is whether the practice of university officers connected with an off-campus housing program embracing discriminatory housing is conduct of a kind which denies equal protection. The answer will depend upon the type of program involved. If the university denies minority students access to houses which it owns or leases, and the denial is identified with the students' race or color, the conduct is of a proscribed kind; exclusion

Cir. 1946), *cert. denied*, 327 U.S. 800 (1946); *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948); *United States v. Wilson*, 72 F. Supp. 812 (W.D. Mo. 1947). Regarding state action and the right of free speech see, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946); *Tucker v. Texas*, 326 U.S. 517 (1946). Regarding state action and employment see, e.g., *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *Tucker v. Texas*, *supra*; *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946). Regarding state action and education see, e.g., *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, *cert. denied sub nom. Pennsylvania v. Board of Directors of City Trusts*, 357 U.S. 570 (1958). Regarding state action and housing see, e.g., *Barrows v. Jackson*, 246 U.S. 249 (1953); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Shelley v. Kraemer*, 334 U.S. 1, 3 A.L.R.2d 441 (1948). Compare *Charlotte Park v. Barringer*, 242 N.C. 331, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) with *Smith v. Clark*, 2 RACE REL. L. REP. 200 (D.C. Colo. 1956), *aff'd sub nom. Capitol Federal Savings and Loan Ass'n*, 136 Colo. 265, 316 P.2d 252 (1957), and *Robinson v. Mansfield*, 2 RACE REL. L. REP. 445 (Super. Ct. Ariz. 1956); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948).

For current writings on the "state action" concept, see, e.g., GREENBERG, RACE RELATIONS AND AMERICAN LAW 46-61 (1959); MILLER, RACIAL DISCRIMINATION AND PRIVATE EDUCATION (1957); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375 (1958); Saks & Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488 (1960); *State Action, A Study of Requirements Under the Fourteenth Amendment*, 1 RACE REL. L. REP. 613 (1956).

One may surmise from the trend of the cases that if a suit were brought against discriminatory landlords who are "registered" with a state university, the Court might find sufficient "state action" to provide injunctive relief. See 32 OPS. CAL. ATT'Y GEN. 264 (1959), reprinted in 4 RACE REL. L. REP. 493 (1959). Compare *Ming v. Horgan*, 3 RACE REL. L. REP. 693 (Super. Ct. Calif. 1958), with *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) and *Johnson v. Levitt & Sons, Inc.*, 131 F. Supp. 114, 30 A.L.R.2d 602 (E.D. Pa. 1955). See also *Barnes v. City of Gadsden*, 268 F.2d 593 (5th Cir. 1959), *cert. denied*, 361 U.S. 915 (1960); *Cohen v. Public Housing Administration*, 257 F.2d 73 (5th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959).

27. The Supreme Court long ago declared that the fourteenth amendment covers not only state power embodied in the legislature, but that it extends to all agents of the State, regardless of the branch of government they represent. *Ex parte Virginia*, 100 U.S. 339 (1879). Included among responsible state agents are university trustees, curators, and regents. "The action of the curators, who are representatives of the State in the management of the state university must be regarded as state action." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). See *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

Even if subordinate state officials act in excess of their authority, or violate state laws or the state constitution by their acts, their conduct is still state action within the meaning of the fourteenth amendment. *Williams v. United States*, 341 U.S. 97 (1951); *Screws v. United States*, 325 U.S. 91, 162 A.L.R. 1330 (1945); *Iowa-Des Moines Nat'l Bank v.*

from or segregation within any state owned²⁸ or leased facility²⁹ for racial reasons has been held consistently to deny equal protection.

The more typical situation, however, relates to university referral policies with respect to registered houses which are *privately* owned. The university's procedure with respect to these houses is not conduct which excludes a person from a state facility, for the only state facility immediately involved is not the rooming house, but rather a university office. And the policy of the university is not to exclude from or segregate minority students in the use of this office, but only to follow a different procedure in referring them to off-campus houses than is followed for white students.

The question becomes, then, whether the difference in the referral procedure is of a prohibited kind. Taken in conjunction with other university rules, it may be prohibited because of the discriminatory effect the total university policy has upon minority students. Assume, for instance, that the university has a rule that all undergraduate students (or more typically, all undergraduate female students) must live on campus or in registered rooming houses. Assume also that the housing office has been advised by various landlords that they will not accept minority students, and in deference to these landlords the office does not include these houses on listings made available to minority students. The net effect of the whole operation is that the university has affirmatively compelled some students to live only in certain registered houses, a restriction based only on race. The practice is obviously conduct of a kind which denies equal protection.³⁰

Bennett, 284 U.S. 239 (1931); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913). See *Crews v. United States*, 160 F.2d 746 (5th Cir. 1947).

28. For cases involving government owned housing facilities, see *Heyward v. Public Housing Authority*, 238 F.2d 689 (5th Cir. 1956); *Detroit Housing Comm'n v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Askew v. Benton Harbor Housing Comm'n*, 2 RACE REL. L. REP. 611 (W.D. Mich. 1957); *Davis v. St. Louis Housing Authority*, 1 RACE REL. L. REP. 353 (E.D. Mo. 1955); *Jones v. City of Hamtramck*, 121 F. Supp. 123 (E.D. Mich. 1954); *Vann v. Toledo Metropolitan Housing Authority*, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954); *Taylor v. Leonard*, 30 N.J. Super. 116 (1954).

29. *Muir v. Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954), *vacating and remanding* 202 F.2d 275 (6th Cir. 1953); *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957); *Tate v. Department of Conservation & Dev.*, 133 F. Supp. 53 (E.D. Va. 1955), *aff'd*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956).

30. It is an "obvious" violation of the equal protection clause because it exceeds practices which have been held to be unconstitutional. Thus, where governmental bodies have not affirmatively *compelled* Negroes to live in certain, segregated houses, but have merely promulgated rules and ordinances restricting them from leasing or buying certain private homes, such legislative exclusion has been invalidated. *Harmon v. Tyler*, 278 U.S. 668 (1927); *Buchanan v. Warley*, 245 U.S. 60 (1917); *City of Richmond v. Deans*, 37 F.2d 712 (4th Cir. 1930), *aff'd*, 281 U.S. 704 (1930).

Curiously, the doctrine of "separate but equal" in *Plessy v. Ferguson*, 163 U.S. 537

Even if the university does not prevent its students from living in unregistered houses, a policy of refusing minority students access to complete housing lists, where certain houses are withheld only for racial reasons, is probably a denial of equal protection as well. Such a policy may operate much like a zoning ordinance restricting the leasing and purchase of some private property on grounds of race or color. Similarly, the university has withheld information necessary to locate certain housing accommodations, while the information is made available to others not of the same race.

The net effect is to cut off student access to certain houses—a state policy exercised only with respect to minority students. Ordinances of this type have been held unconstitutional since 1917,³¹ and it should make no difference whether the practice stems from legislative fiat by a municipal council, or executive fiat by a state university office.³²

It might be thought, however, that the *purpose* of a state university's reluctance to refer minority students to discriminatory landlords should be controlling, and since that purpose may not be to injure the minority students, any discriminatory effect is strictly incidental and not of a constitutional magnitude. The Court has indicated, however, that it is the fact of state participation in a discriminatory scheme which violates the equal protection clause, regardless of the purpose for which it is done.³³ Thus, it is no de-

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(1896), has apparently never applied in the housing field. See *Harmon v. Tyler*; *Buchanan v. Warley*; *City of Richmond v. Deans*, *supra*; *City of Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951); *Vann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953); *Bank v. Housing Authority*, 120 Cal. App.2d 1, 260 P.2d 688, *cert. denied*, 347 U.S. 974 (1953); *McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional*, 33 CALIF. L. REV. 5 (1945). But see *Favors v. Randall*, 40 F. Supp. 743 (D.C. Pa. 1941); *Housing Authority v. Higgenbottom*, 143 S.W.2d 95 (Tex. Civ. App. 1940).

31. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917). It should not matter that many or all of these landlords might personally reject Negro students when immediately confronted with an application to lease, for the denial of equal protection, as in the ordinance cases, is the denial of access to the landlords.

32. See note 27 *supra*.

33. Thus, it is of no consequence that the university may sanction segregation not from any racial animus of its own, but only to prevent ill-feeling and friction from arising in the community: "Desirable as this is, [i.e., promoting public peace by averting racial friction] and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81 (1917). See *Cooper v. Aaron*, 358 U.S. 1 (1958); *Dawson v. Mayor of Baltimore*, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955); *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945). With respect to the issue of "state action" in the *Kerr* case, compare *Eaton v. Board of Managers*, 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984 (1959). Similarly, a purpose to allay the fears of landlords that referrals to their neighborhood may depreciate property value is no defense. There are considerable data available, however, indicating that integration in housing does not depreciate property values. See, e.g., EMERSON & HABER,

fense for a state institution to claim that it must withhold certain listings from minority students to prevent discriminatory landlords from withdrawing from the university housing program. If a state facility cannot operate "successfully" without discriminating racially, then it is not constitutionally entitled to operate at all.³⁴

It might also be thought that use of a housing office is a matter of privilege, a special consideration that the university extends as a matter of grace, and that since students originally had no legal right to insist even upon the existence of such a facility, they can hardly complain of being denied any part of its services. But this objection is true even with respect to a university education itself—that the state is under no constitutional obligation to maintain a university. Nevertheless where the state has resolved to establish such facilities, it must make them available free of racial distinctions.³⁵ With respect to the operation of state housing facilities, the claim that segregation is permissible because use of the accommodations is a privilege and not a right has been unequivocally rejected.³⁶

POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 1205 (2d ed. 1958); Note, *The New Jersey Housing Anti-Bias Law: Applicability to Non-State Aided Developments*, 12 RUTGERS L. REV. 557, 562 n.31, 565 n.41 (1950).

Banks v. Housing Authority, 120 Cal. App.2d 1, 18, 260 P.2d 668, 678 (1953), cert. denied, 347 U.S. 974 (1954), raises and rejects the argument that since segregated housing may in fact make more housing available to Negroes than would otherwise be the case, the interest of the state in housing outweighs the interest of the Negroes in equal access to whatever nonsegregated facilities can be operated. The case repudiates *Favors v. Randall*, 40 F. Supp. 743 (E.D. Pa. 1941).

Analytically, it is improper to consider popular resistance, loss of property values, etc., as possible defenses to conduct already asserted to be a denial of equal protection, for this is to make the self-contradictory statement that one may properly act unconstitutionally under certain circumstances. Rather, the proffered defense is a part of the interest weighed initially in determining whether the conduct is constitutional.

34. "Successfully" is intended in the sense of effectuating its legitimate interest in housing. See *Cooper v. Aaron*, 358 U.S. 1, 13 (1958), where the Court acknowledged defendant school board's argument that integration had cast a "serious financial burden" on the school district and that "the education of the students had suffered and under existing conditions will continue to suffer," because of the resistance of the white community; the Court held that these considerations would not justify maintaining the schools on a segregated basis. The result was foreshadowed in the second *Brown* case, 349 U.S. 294, 300 (1955), where the Court stated: "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them," apparently including manifestations of disagreement such as a drop in total school attendance which might result from popular resistance to integration.

35. "The question here is not of a duty of the State to supply . . . training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938). "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Educ.*, 347 U.S. 483, 493, 38 A.L.R.2d 1180, 1186 (1954).

36. "Whether or not it be a property right which the housing authority 'creates and

The housing policy at many universities falls short of the types thus far discussed, however, and drops into the twilight zone of constitutionality. These universities may list all registered landlords and make the whole list available to all students regardless of race or color; the housing office may not even know which landlords discriminate, or if it does know, it does not use this knowledge to withhold any addresses from minority students.³⁷ The act of discrimination thus is exercised only by the *landlord* when the student applies to him personally.

If the mere maintenance of a referral office which services landlords, some of whom discriminate, is conduct of a kind which denies equal protection, it must be unconstitutional only because it fosters, facilitates, or "substantially" aids private discrimination, and not because discrimination is practiced by the state university itself. The Supreme Court has never decided whether such a practice does violate the equal protection clause, principally because cases of this nature almost uniformly have been brought against the real estate owner who has discriminated, rather than against the state agency directly or indirectly assisting the owner.³⁸ Discussion in these cases with respect to the state encouraging or aiding discrimination has not been directed to the issue of permissible conduct by the state, but to the issue of "state action" in the conduct of the real estate owner.³⁹ It is not at all clear from these cases that

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enforces, the state is engaged in furnishing suitable housing accommodations. . . . This, of course, it must do within the boundaries of the Fourteenth Amendment." *Banks v. Housing Authority*, 120 Cal. App.2d 1, 16-17, 260 P.2d 668, 677 (1953), *cert. denied*, 347 U.S. 974 (1954).

37. It is, perhaps, arguable that if the university housing office is aware of which landlords will not accept Negroes and yet refers a Negro student to such landlords, the office has damaged him "by subjecting him both to psychological injury and to an unnecessary consumption of time and energy." Letter From Sol Rabkin, June 23, 1960, in the author's files. Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38 (1960); Saks & Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488 (1960).

38. See discussion in note 27 *supra*, and see the dissenting opinion in *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 542, 87 N.E.2d 541, 555 (1949), *cert. denied*, 339 U.S. 981 (1950), which would have held unconstitutional the conduct of "private" tract developers who operated closely with and under the regulation of the government.

39. The one area where impermissible conduct is the result of inseparable private and state action grows out of the restrictive covenant cases, where the privately made decision to discriminate is rendered effective only through intervention and enforcement by a state court. *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948). Looking to the action of the state as represented by the state court, there is doubtless "state action" present "when[ever] state law is applied to determine legal relations between private persons." Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208, 209 (1957). The same modicum of state action is present, whether the case arises in an effort to enforce a covenant, *Shelley v. Kraemer*, *supra*, to collect damages for its breach, *Barrows v.*

connections between a state and a property owner sufficient to identify the owner as a state agent whose conduct is wrongful, carry over to render the conduct of the state wrongful.⁴⁰

The issue was raised fleetingly in *Mitchell v. Boys Club of Metropolitan Police*,⁴¹ where plaintiff sought to enjoin a public board of commissioners from contributing any property, facilities, personnel or services to a racially segregated private club. The court did not decide the question which concerns us, however, as it found that it lacked jurisdiction over the board. More recently a California Attorney General's Opinion⁴² did face the issue

Jackson, *supra*, or to clear title of the covenant or to enforce a reverter clause by way of defense. See *Robinson v. Mansfield*, 2 RACE REL. L. REP. 445 (Super. Ct. Ariz.), *aff'd sub nom.* Capitol Federal Savings & Loan Ass'n, 136 Colo. 265, 316 P.2d 252 (1957); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1948). It has been suggested that these cases necessarily mark an end to all private discrimination where judicial intervention is required to make it effective, as to enforce trespass laws against Negro sit-in demonstrations. This is not necessarily so, however, as it neglects a refinement of the other issue in the restrictive covenant cases, *viz.* what kind of state action was it? Specifically, the conduct in *Shelley* involved state enforcement of a decision by a former owner to bar Negroes, notwithstanding a present willingness of the immediate private owner and the Negro buyer to transact business. In balancing the constitutional rights of equal opportunity and nonassociation against each other, the latter right may decline in importance when an attempt is made to extend it indefinitely in time and to an undetermined number of other persons. Constitutionally, the decision in the Supreme Court meant only that the freedom of nonassociation is subordinate to the right of equal opportunity *when the right of nonassociation is not exercised or desired by any immediately participating party* who has an interest to be vindicated. See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 CALIF. L. REV. 5, 20-21 (1945). It is, therefore, conduct of a prohibited kind for a state court to enforce a privately made decision to discriminate when that decision is cast into a form to bind subsequent owners who may not wish to discriminate, and when weighed against the right of equal opportunity.

Under this analysis, the case of *Charlotte Park v. Barringer*, 242 N.C. 331, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), was wrongly decided. But *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880, *affirming* 245 Iowa 145, 60 N.W.2d 110 (1954), may be proper. *Rice* involved a refusal by private cemetery owners to bury non-Caucasians and may be vulnerable to attack on other grounds. See *Marsh v. Alabama*, 326 U.S. 501 (1946). The refusal of immediate property owners to repulse sit-in demonstrations may be vindicated through state courts. See *State v. Clyburn*, 101 S.E.2d 295 (N.C. 1958). See also *Williams v. Howard Johnson's Restaurant*, 268 F.2d 845 (4th Cir. 1959); *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124 (D. Md. 1960). It is submitted that the results in these cases are supportable, although the rationale of the court in *Slack* and in *Clyburn* that there was insufficient state action may be in error. *But see Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949); Pollit, *Dime Store Demonstrations: Events and Legal Problems of the First Sixty Days*, 1960 DUKE L.J. 315.

40. That the categories of "state action" and "permissible conduct" continue to be confused, see 32 OPS. CAL. ATT'Y GEN., 264, 274 (1959), reprinted in 4 RACE REL. L. REP. 493, 500 (1959), where the Attorney General suggests that the issue of the state university's permissible conduct (not the conduct of the fraternities themselves), is partly dependent upon the degree of "strict controls" it exercises over fraternities and the "substantial benefits and advantages" it confers. Whether or not the university strictly controls but does not thereby "aid" landlords in matters such as health and safety inspections, alcohol and moral conduct, these connections have no relevance to the permissibility of the university's referral policy; rather, these elements go only to identifying the fraternities as state agencies so that their conduct, which involves a total exclusion of Negroes and is thus clearly impermissible behavior, can be reached through the fourteenth amendment.

41. 157 F. Supp. 101 (D.D.C. 1957).

42. 34 OPS. CAL. ATT'Y GEN. 1 (1959), reprinted in 4 RACE REL. L. REP. 1089 (1959).

squarely in responding to a legislator's question whether the action of state redevelopment agencies in servicing listings of discriminatory landlords was conduct prohibited by the fourteenth amendment. The Attorney General found that the maintenance of such a service was a violation of equal protection because it was governmental action which had the practical effect of encouraging and fostering discrimination by private persons. In his view, the fourteenth amendment does not "countenance active sponsorship" by such an agency of racial discrimination by private landlords.⁴³ The Opinion is open to serious question, however, because the principal authorities upon which it relied were the restrictive covenant cases involving the question of the existence of state action.⁴⁴ Moreover, in neither of the cases cited was a state agency the defendant. The Attorney General anticipated the enormous implication of his opinion by observing that the principle that no state agency may conduct itself in such a manner as to assist private discrimination was subject to certain exceptions. Thus, he did not propose that police and fire protection must be withdrawn from property owners who discriminate,⁴⁵ stating that such assistance "only incidentally and passively" benefits private discrimination.⁴⁶ A federal court has since held that the furnishing of water and sewage services by state agencies to a tract developer who refused to sell to Negroes, is not conduct of a kind prohibited by the fourteenth amendment.⁴⁷ The case is particularly significant, because the state agency itself was joined as defendant.

That *special* assistance to property owners who discriminate is proscribed by the equal protection clause is, however, supported by dicta in *Ming v. Horgan*,⁴⁸ a case where a governmental agency

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43. *Id.* at 3, RACE REL. L. REP. at 1090-91. On the same page, the Opinion suggests that "state action, the practical effect of which is to encourage and foster discrimination by private parties, is unconstitutional."

44. The two principal cases were *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Barrows v. Jackson*, 346 U.S. 249 (1953), discussed in note 39 *supra*. A third case, *Banks v. Housing Authority*, 120 Cal. App.2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 975 (1954), was not in point, since the state agency *itself* was discriminating.

45. 34 OPS. CAL. ATT'Y GEN. 1, 2 (1959), reprinted in 4 RACE REL. L. REP. 1089, 1090 (1959).

46. *Ibid.* An interesting analogy to this distinction persists in the Supreme Court's treatment of permissible conduct by states in rendering "incidental" aid to religion, notwithstanding the "wall of separation" erected by the first and fourteenth amendments between church and state. Compare *Everson v. Board of Educ.*, 330 U.S. 1, 168 A.L.R. 1180 (1947), and *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 2 A.L.R.2d 1338 (1948).

47. *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851 (D. Md. 1960).

48. 3 RACE REL. L. REP. 693 (Super. Ct. Cal. 1958).

was not named as a defendant, but where the permissibility of the agency's conduct in extending FHA insurance to a discriminatory tract developer was mentioned by the court. In the *Ming* case, the defendant property owner argued that his use of federal insurance funds did not bind him to a policy of nondiscrimination because Congress had not laid down any such condition in establishing FHA. The court rejected the argument and noted the responsibility of the governmental agency itself:

If it be objected that Congress refused to . . . [require nondiscrimination by those benefiting from FHA], it must be replied that *Congress could not ordain otherwise*—the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under that law and seek and gain the advantage it confers *are as much bound thereby as the administrative agencies of government* which have functions to perform in connection therewith.⁴⁹

The clear suggestion is that it would be a denial of equal protection for the administering agency to assist discriminatory property owners with federal aid.⁵⁰

In one sense, the line separating permissible from impermissible state assistance to property owners who discriminate may appear to be illogical in terms of the difference between "necessary" and merely "helpful" aid. Thus, state provided services such as police and fire protection, or water and sewage supply, are practically indispensable to the property owner and constitute a *necessary condition*, of his continued discrimination. Yet, other services such as state referrals of tenants or state insurance may be only *helpful* to the property owner, and without them he might still operate successfully and discriminate at will. Why, then, should state agencies be prohibited from supplying the latter form of aid to discriminatory property owners, but not the former?⁵¹

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49. *Id.* at 699. [Emphasis added.]

50. Technically, the issue in *Ming* drew from the due process clause of the fifth amendment rather than the equal protection clause of the fourteenth amendment. The fifth amendment due process clause has, however, been interpreted as proscribing a denial of equal protection by the federal government. Compare *Brown v. Board of Educ.*, 347 U.S. 483, 38 A.L.R.2d 1180 (1954), *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), with *Hurd v. Hodge*, 334 U.S. 24 (1948). See also *Heyward v. Public Housing Administration*, 238 F.2d 689 (5th Cir. 1956).

51. One distinction, occasionally attempted, is to contrast permissible state aid which renders a service essential to the welfare of the *community*, with impermissible aid which confers more of a direct benefit to the immediate landowner, a benefit not essential to the community at large. The distinction may be helpful in explaining the use of state fire protection services even in behalf of discriminatory property holders, on the ground that fires would otherwise spread to others, but that is about as far as it goes. Municipal water,

Part of the answer may be simply that the wrongfulness of the state's conduct is not a matter of causation, but one of the state's participation in and intimate relationship to the *subject matter* of the discriminatory scheme itself; the business of supplying water or removing sewage is not the business of placing persons in houses and does not carry the same responsibility in securing equal treatment for those being placed. And part of the answer must necessarily be a question of policy as to how far the Supreme Court wishes to obliterate the distinction between private and state action under the fourteenth amendment. If state agencies can be enjoined from providing police protection to those who discriminate, or from providing utilities to landlords who discriminate, or from licensing businesses which discriminate, what remains of the state-private division in the fourteenth amendment will have vanished for all practical purposes. By limiting state responsibility to supplying special, or new kinds of services only to those who do not abuse those very services through racial discrimination, some temporary balance between the constitutional duty of states not to foster discrimination and the residual private "right" of nonassociation may be struck.

Whatever the situation may be with respect to independent state housing offices, it is more likely that the close tie of university approved housing to the educational process will mean that registration and servicing of landlords who discriminate will be held to foster discrimination in a manner constituting a denial of equal protection. It is safe to assume that many state universities do not merely list the landlords and make referrals to them from students who accidentally hear that such a list is available; rather, a certain amount of free advertising may be provided through campus publications and through the distribution of placards to registered landlords who display them in a window. And certainly where the university requires any segment of the student body to live in approved housing, whether or not the university itself racially screens the students, the supplying of such a captive market to the land-

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gas, and electrical utilities are of direct, personal benefit to a discriminatory landowner, yet withholding them would hardly threaten the nondiscriminatory neighborhood at large. Government postal deliveries are hardly critical to the community, and are of direct, personal benefit to the homeowner, yet it has not been suggested that the fifth amendment obliges the Government to withhold postal service from discriminatory homeowners! The test of "essential community welfare" would appear to be a phantom, providing no reliable standard to predict the type of state assistance the Supreme Court is likely to subject to fourteenth amendment equal protection conditions.

lords might well be viewed as very substantial assistance. Considering also that such programs emanate not from an isolated state office, the sole function of which is to provide housing referrals, but from institutions of higher learning where housing is intimately associated with an educational atmosphere seriously affecting young minds and ideas, it is entirely possible that the Supreme Court would hold these programs unconstitutional.⁵²

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52. As noted in text at note 22 *supra*, the Supreme Court has emphasized the obligation of state universities to provide a nonsegregated atmosphere for its students beyond the classroom itself. In a case involving, among other things, the seating of a Negro student at a separate university cafeteria table, the Court employed the following broad language in holding that such a practice violated the equal protection clause: "[T]he State, in administering the facilities it affords for professional and graduate study, sets [the Negro student] . . . apart from the other students. The result is that [he] . . . is handicapped in his pursuit of effective . . . instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950).

EXPLANATORY NOTES TO APPENDIX, PP. 78-79

- a)—approximately 60% of undergraduate women live in approved off-campus houses; approximately 75% of student men live in private houses.
- b)—complaints by offended students are referred to the state anti-discrimination commission. The housing policy of these schools is pursuant to state law and affects only houses with more than four lodgers where the premises are otherwise used as the lessor's home.
- c)—these universities are now considering the use of written agreements, committing signatory landlords to the university policy of nondiscrimination.
- d)—no conditions are imposed with respect to graduate housing.
- e)—letter attached to the questionnaire stated that no discrimination is allowed *within* the campus.
- f)—questionnaire was returned with statement that "Private landlords who have proven unsatisfactory for any reason are not listed."
- g)—questionnaire has not yet been returned, but correspondence received indicates that some policy against off-campus housing discrimination is enforced.

Note: Blank spaces are of undetermined significance, indicating in most instances only that no information of a specific kind was supplied by the questionnaires which were returned.

- 1—Statement of Policy is published in 4 RACE REL. L. REP. 803 (1959).
- 2—Statement of Policy is published in 5 RACE REL. L. REP. 281 (1960).
- 3—Statement of Policy is published in 4 RACE REL. L. REP. 810 (1959).

APPENDIX

CONTROLS EXERCISED BY SELECTED STATE UNIVERSITY HOUSING OFFICES

	No conditions imposed on approved landlords	Minimum safety, physical, or moral conditions required of landlords	Contract forms and terms required or supplied	Students locate off-campus housing by applying to a university office	Students locate addresses from an unlimited listing	Students locate addresses from a limited listing	Students are referred by university personnel directly to landlords	Number of students known to be living in off-campus rentals	Housing discrimination is known to exist	Estimated number of landlords who do discriminate	The university enforces a policy against discriminatory landlords	Unwanted students are not directed to discriminatory landlords	Voluntary nondiscrimination is sought through conferences, education, etc.	Violators of a nondiscriminatory policy are delisted	A prior agreement not to discriminate is required
California, Univ. of (Berkeley).....		X	X	X				1300			X ¹			X	X
California, Univ. of (Los Angeles).....		X	X	X				5100			X			X	X
Colorado, State Univ. of (Fort Collins)...		X	X	X		X		3500			X(b)			X	
Colorado, Univ. of (Boulder).....	X			X	X			5000			X ² (b)			X	
Cornell Univ.		X	X	X				4000						X	
Illinois, Univ. of (Urbana).....				X							X(g)				
Iowa State Univ. (Ames).....		X	X	X				2500			X			X	(c)
Iowa, State Univ. of (Iowa City).....		X	X	X				1800			X			X	(c)
Michigan State Univ. (East Lansing).....		X	X	X	X			2000			X			X	X
Minnesota, Univ. of (Minneapolis).....		X		X		X	X	5500			X		X	X	
New York, State Univ. of (Albany).....											X			X	X
Ohio State Univ. (Columbus).....		X	X	X		X		6000			X		X	X	
Sacramento State College.....		X	X	X	X	X	X	300			X			X	
San Jose State College.....		X	X	X			X	6700			X			X	
Washington, Univ. of (Seattle).....		X		X		X		2500			X ^a			X	
Wayne State Univ. (Detroit).....		X	X	X				1500			X			X	
Wisconsin, Univ. of (Madison).....		X		X		X		(a)			X			X	

Arizona, Univ. of (Tucson).....	X				X		X					
Arkansas, Univ. of (Fayetteville).....		X	X	X	X	1800	X		No	X		
Connecticut, Univ. of (Storrs).....		X		X								
Delaware, Univ. of (Newark).....		X		X		75	X	75%	No	X		
Hawaii, Univ. of (Honolulu).....	X			X								
Indiana, Univ. of (Bloomington).....		X		X	X	2500	X	major- ity	No		X	
Kansas, Univ. of (Lawrence).....		X		X	X	1000	X		No	X		
Maine, Univ. of (Orono).....	X			X					No			
Massachusetts, Univ. of (Amherst).....	X			X		400	X		No			
Michigan, Univ. of (Ann Arbor).....		X	X	X			X			X		
Missouri, Univ. of (Columbia).....		X	X	X	X	2450	X		No	X		
Montana State College (Bozeman).....		X		X		450						
Montana State Univ. (Missoula).....	X			X	X	1500	X		No			
Nebraska, Univ. of (Lincoln).....		X		X		1300	X		No	X		
North Dakota, Univ. of (Grand Forks)...		X		X		400			No			
Oklahoma, Univ. of (Norman)..... (d)		X		X	X	900			(e)			
Oregon, Univ. of (Eugene).....		X		X		1700	X		No	X		
Penn. State Univ. (Univ. Park).....	X			X		3100			No			
Pittsburgh, Univ. of (Pittsburgh).....		X			X	500						
South Dakota State College (Brookings)...		X		X		2000	X	5%	No			
South Dakota, Univ. of (Vermillion)....	X			X	X				No			
Tennessee, Univ. of (Knoxville).....		(f)		X		X	2000					
Utah, Univ. of (Salt Lake City).....		X		X			X		No	X		
Washington State Univ. (Pullman).....					X							
West Virginia Univ. (Morgantown).....	X				X				No			
Wyoming, Univ. of (Laramie).....				X	X	1500			No			