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## AN ARGUMENT IN FAVOR OF STRICT ADHERENCE TO THE "STATE ACTION" REQUIREMENT

SHEPARD W. MCKENNEY

The decisions of the past twenty years of the United States Supreme Court concerning the concept of state action as applied in the fourteenth and fifteenth amendments have employed exceptionally broad and sweeping reasoning to arrive at the results obtained.<sup>1</sup> Indeed, it has been recently suggested by one observer that we no longer need consider whether state action is present in any given case, because, "through developments concerning 'color of state law', state inaction, private groups and organizations becoming sufficiently oriented to public concern to justify public control, and judicial control of private agreements, state action is so permeating that it is present in virtually all cases."<sup>2</sup> Such an interpretation of the fourteenth amendment would seem to remove the single serious impediment to federal judicial control of traditionally local relationships. If this is the case, the much more basic question of the effect of such an interpretation on the functioning of the federal system is raised. Consider the argument of Alexander Hamilton, speaking in *The Federalist*, No. 17:

It may be said that if the then proposed constitution would tend to render the government of the Union too powerful, and enable it to absorb those residuary authorities, which it may be judged proper to leave with the states for local purposes . . .

<sup>1</sup> The significant portions of the fourteenth and fifteenth amendments for the purposes of this article are: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. amend XIV.

"The right of citizens of the United States 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." U. S. Const. amend. XV. Due to the fact that most of the cases referred to deal with the fourteenth amendment, in most instances this will be the sole points of reference in regard to "state action".

<sup>2</sup> Williams, *The Twilight of State Action*, 41 Texas L. Rev. 347, 389.

There is one transcendent advantage belonging to the province of the state governments, which suffices to place the matter in a clear and satisfactory light,—I mean the ordinary administration of criminal and civil justice. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is that which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, *regulating all those personal interests and familiar concerns* to which the sensibility of individuals is more than any other circumstance, to impressing upon the minds of the people, affection, esteem, and reverence towards the government. This great cement of society, which will diffuse itself almost wholly through the channels of the particular governments, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union. (Emphasis added.)<sup>3</sup>

When the *Civil Rights Cases*<sup>4</sup> were decided in 1883, Justice Bradley recognized the fact that the enactment of the fourteenth amendment did not render the argument of Hamilton inapplicable to the federal system as altered.<sup>5</sup> In the *Civil Rights Cases*, the question for decision was the constitutionality of an act of Congress which provided, in part, “that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . .”<sup>6</sup> Justice Bradley, speaking for the majority of the Court held that the act of Congress could not be sustained. He reasoned that the fourteenth amendment was prohibitive in character and thus “appropriate legislation” as used in the amendment meant only legislation to enforce the prohibition. And a grant of power to prohibit state action is not a grant of power to supplant all state authority in

<sup>3</sup> Hamilton, THE FEDERALIST, 97 (Lodge 1888).

<sup>4</sup> 109 U. S. 3 (1883).

<sup>5</sup> See generally Flack, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908).

<sup>6</sup> 18 Stat. 335.

that area. Justice Bradley contended that otherwise Congress would have the power to control individual action not only in the area of equal protection of the laws, but also as to "life, liberty, and property." If such power were vested in Congress, he said, "it is difficult to see where it is to stop."<sup>7</sup> It was the first and the last time to date that a majority opinion of the Court has given serious consideration to the problem of the erosion of the federal system through relaxation of the "state action" requirement.

Justice Harlan, in his dissent, replied to the majority arguments by contending that the right to use public accommodations was an attribute of United States citizenship and that since all persons born or naturalized in the United States were citizens by the first section of the fourteenth amendment, it followed that the act only codified a pre-existing right. Assuming the first premise could be satisfactorily established, it was a pretty strong argument. It was, however, his second argument which survives today as the most important part of the dissent.<sup>8</sup> That argument was that state regulation and licensing of inns, theatres, and railroads provided sufficient state nexus with these facilities so as to make their acts acts of the fourteenth amendment. Because they were regulated by the state, he reasoned in reverse, they were "corporations and individuals wielding public authority." He was then able to conclude that, "The supreme law of the land has decreed that *no authority* shall be exercised in this country on the basis of discrimination."<sup>9</sup> (Emphasis added.) It would appear that Justice Harlan failed to consider the distinction which Justice Bradley made the focal point of his opinion, i.e., the distinction between power to prohibit affirmative state government action and the power to prohibit action which *could* be state action if the state chose to exercise its regulatory power in that manner.

The failure to cope with this distinction leads inevitably to the conclusion that all acts are "state acts". The statement "no authority shall be exercised" practically admits this. To Justice Harlan, there is no distinction between a public inn and a public

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<sup>7</sup> Note 4 *supra* at 23.

<sup>8</sup> This argument was revived most strongly in *Garner v. Louisiana*, *infra* by Justice Douglas.

<sup>9</sup> Note 4 *supra* at 57.

highway. As long as the facility operates under the "license of the law" its acts are state acts. There is no distinction between a public utility, franchised by the state with a government granted monopoly, and the corner grocery store. The sole test is "license of the law". Unless we take this phrase to mean mere permission of the law, it must mean some form of formal license. After all, if it were mere permission, all legal acts would be state acts. Even Justice Harlan is more subtle than that. The application of the fourteenth amendment then depends on the state license of the activity. But if the state chooses not to require a license for an activity, is that activity then exempt from the fourteenth amendment? Should the application of the fundamental guarantees of the Constitution depend on the whim of the state to license?<sup>10</sup> Clearly not. Therefore, the fourteenth amendment must extend to all activities which the state could license. The power of the state to license is limited only by the terms of its constitution. Since a state may not hide behind its constitution to deny a federal right, all activities are licensable; all licensable activities fall within the "state action" requirement; and therefore the prohibitions of the fourteenth amendment reach all forms of activity.

This argument may sound far-fetched, but it is not, because any one point is an unreasonable extension of the former points. It is because the premise of the argument, i.e., the "license of the law" test, is so indefensibly broad. In attempting to explain the state action concept with such a test, the concept itself is destroyed.<sup>11</sup> The phrase, "license of the law", does not explain the words—rather, it erases them.

Following the decision in the *Civil Rights Cases*, there was a long period during which the question of "state action" did

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<sup>10</sup> Cf *Rice v. Elmore*, 165 F 2d 387 (C.C.A. 4th, 1947). In that case (shortly after the decision in *Smith v. Allwright* 321 U.S. 649 (1944) which held that due to the statutory control over primaries the persons running the primaries were subject to the provisions of the fifteenth amendment) South Carolina contended that because it had repealed all statutory and constitutional provisions relating to primary elections that federal rights were no longer applicable. It was held that the state could not divest itself of its responsibility simply by repealing the laws.

<sup>11</sup> One writer is happy to dance at the funeral. See St. Antoine, *Color Blindness But Not Myopia: A New Look at State Actions, Equal Protection, and "Private" Discrimination*, 59 Mich. L. Rev. 993.

not come before the Supreme Court. Then beginning in 1941, a steady stream of decisions were handed down defining and/or carving out exceptions to Justice Bradley's "state action of a particular character". These decisions have found "state action" where the state was not directly involved by finding that: (1) An organization was acting in a capacity so vested with governmental authority as to amount, to "state action"; (2) An individual was acting under color of state law; (3) The state was aiding private interests in engaging in prohibited practices; or (4) Local custom was so strong that it amounted to "state action".

### *Governmental Authority*

This concept was introduced in the so-called "white primary cases". The first and most famous of these is *United States v. Classic*.<sup>12</sup> In that case, the question for decision was "whether the right of qualified voters to vote in the Louisiana primary . . . is a right 'secured by the constitution' as used in the Federal Criminal Code."<sup>13</sup> The primary was strictly regulated by the state and only those persons who followed the statutory procedure for primary elections could even be placed on the official ballot at the general election. Also, this being the democratic primary, the winners of this primary election had a 100 per cent chance of success in the general election. Justice Stone, speaking for the majority, said:

The right to participate in the choice for representatives for Congress includes . . . the right to cast a ballot and have it counted at the general election, whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice, or where the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is included in the right protected by Article I, § 2 [of the Constitution]. 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 (state) action.<sup>14</sup>

<sup>12</sup> 313 U. S. 299 (1941).

<sup>13</sup> *Id.* at 307.

<sup>14</sup> *Id.* at 318.

While the statute applied in this case supplies "color of state law"<sup>15</sup> as the substantive test the significance of this case for the purposes of this inquiry is that it shows how clearly and uncontrovertibly a private organization can perform an act which is a state act. This case does not stand for the proposition that activity is state action if it *may* be performed by the state; nor does it stand for the idea that state regulation of an activity makes that activity state action. What this case does stand for is the proposition that a state may not avoid the mandates of the fourteenth or fifteenth amendments by adopting the acts of private organizations as a performance of its obligations in a given area. On this basis, it is difficult to argue with the decision.

A case which involves a superficially similar problem is *Marsh v. Alabama*.<sup>16</sup> That case involved the right of a Jehovah's Witness to distribute religious literature on the streets of a company-owned town. Justice Black said that:

In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the states 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 state statute.<sup>17</sup>

The sequence of ideas in that sentence indicates how Justice Black's reasoning goes. When he refers to the "deprivation of liberty . . . involved" he answers his inquiry before it starts. There is only a deprivation of liberty if the property involved has lost its private character. And how has the company's property lost its private character? By opening it to the public for certain purposes? By allowing people to live on it in return for

<sup>15</sup> The prosecution was under § 20 of the Civil Rights Act of 1866, 14 Stat. 27, which reads in part: ". . . any person who, under color of state law . . . shall subject, . . . any inhabitant of any state . . . to deprivation of any right secured by . . . the Constitution . . . shall be deemed guilty of a misdemeanor . . ."

<sup>16</sup> 326 U. S. 501 (1945).

<sup>17</sup> *Id.* at 509.

rent? If property is open to the public for certain purposes, is it public for all purposes?<sup>18</sup>

Justice Black contends that due to the lack of housing in the area of the company's operations the employees are practically forced to live there. Thus, he says, since the public must use it the state must see that it is fairly used. But the employees do not have any vested right to work for that company. If the employee has gripes against the housing policy of the company, that must be settled by employer-employee bargaining, not by state intervention. As Justice Reed points out in his dissent,

The restrictions imposed by the owners upon the occupants are sometimes galling to employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee . . .<sup>19</sup>

The freedoms of speech and religion may occupy a "preferred position", but that would hardly seem to mean that when these rights come in private property rights go out. Freedom of speech and religion occupy a "preferred position" *where they are applicable*.<sup>20</sup> Justice Black's reasoning, followed to its ultimate conclusion means that if you rent out an upstairs room you may have to put up with public speaking in the foyer—unwanted by you or your tenant.

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<sup>18</sup> Consider *Dorsey v. Stuyvesant Town Corp.* 299 N. Y. 512, 87 N. E. 2d 541 (1949). An action was brought to enjoin a private corporation from discriminating against Negroes as tenants in a housing development constructed by the corporation. The City of New York had condemned the land for the corporation and had granted it certain tax benefits in order to rehabilitate substandard housing. It was held that "helpful cooperation" by the state did not make the acts of the corporation state acts. The court said that the "state acts" concept was applicable to private organizations only where the state has consciously exerted its power or where the governmental capacity has been recognized by the state. *Certiorari* was denied by the U. S. Supreme Court, 339 U. S. 981. See Hale, *Force and the State: A Comparison of Political and Economic Compulsion*, 35 Col. L. Rev. 149 (1935).

<sup>19</sup> Note 16 *supra* at 513.

<sup>20</sup> All of the cases cited to support the "preferred position" theory refer to nature of speech protected rather than the circumstances under which the right exists. *Jones v. Opelika*, 316 U. S. 608; *Murdock v. Pennsylvania*, 319 U. S. 115.

*Color of State Law*

While the concept of "color of state law" was raised in *Ex Parte Virginia*<sup>21</sup> and the *Classic* case, the doctrine did not receive a thorough examination until the case of *Screws v. United States*.<sup>22</sup> In that case, the defendant, a Georgia sheriff, legally arrested a young Negro for stealing a tire and then with the assistance of other state officers brutally beat him to death. Defendant was prosecuted under the same statute as used in the *Classic* case. In holding that Screws was acting under "color of state law", Justice Douglas said:

They were officers of the law who made the arrest. By their own admissions, they assaulted Hall in order to protect themselves and to keep their prisoners from escaping. It was their duty under Georgia law to make the arrest effective. Hence their conduct comes within the statute.<sup>23</sup>

This piece of logic is a little confusing. Because the defendants assert privilege by virtue of state authority, it is found that they may be convicted of an act which is admittedly in violation of state law. If the defendants' assertion that they were forced to act as they did is correct, then they can be guilty of no crime, federal or otherwise. If their assertion is incorrect, then it cannot be relied on to prove "color of state law" since it has no validity in the first place.

It has been argued that a contrary result would allow a state to let its officers violate individual constitutional rights by the simple expedient of not prosecuting under state law. This is an excellent point. But the decision is not limited to cases in which the state does not prosecute. Consider this as an alternative to the reasoning used: An act directly in contravention of state law can never be an act done under "color of state law". But if a state refuses to prosecute its agent for such an act, the state law obviously does not exist, at least for some purposes. In fact, in such a case, it may be flatly said that there is no violation of state law, since the state is the final arbiter of the question of

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<sup>21</sup> 100 U. S. 339 (1880) A case which found a state judge to be guilty of the same statute as used in the *Classic* case for excluding Negro jurors from the panel.

<sup>22</sup> 325 U. S. 91 (1945).

<sup>23</sup> *Id.* at 107, 108.

when its laws are violated. Further, the state by its silence sanctions and ratifies the acts of its agents.<sup>24</sup>

This reasoning has two advantages over that used in the *Screws* decision. First, it avoids the dilemma of finding that an act was done under "color of state law" when it was obviously a violation of state law. Secondly, it limits the decision to those cases in which the state refuses to prosecute its agent. As the decision stands, there is nothing to prevent a federal prosecution for the "state act" after the state prosecution for that act.

A more recent case concerning the "color of state law" concept is *Monroe v. Pope*.<sup>25</sup> Here the action was brought under the civil counterpart of the statute in the *Screws* case. An action for damages was brought against Chicago police officers for illegal search and seizure. The majority of the Court found the *Classic* and *Screws* cases to be in point, thereby finding "color of state law". Justice Frankfurter in his dissent decided that the statute applied only to activities *sanctioned* by the state, after a "reconsideration" of his views as expressed in the *Screws* case. Justice Frankfurter, like Justice Bradley, was concerned with the erosion of our scheme of government,

. . . respect for principles which the court has long regarded as critical to the most effective functioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country.<sup>26</sup>

#### *State Aid of Private Interests*

Beyond a shadow of a doubt, the most controversial case of the "state action" cases is *Shelley v. Kramer*.<sup>27</sup> In this case, it

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<sup>24</sup> This does not mean that the state is responsible for seeing that all discrimination is punished. It is however responsible for the conduct of its agents.

<sup>25</sup> 365 U. S. 167 (1961).

<sup>26</sup> *Id.* at 241, 242.

<sup>27</sup> 334 U. S. 1 (1948).

was decided that restrictive covenants limiting the use of real property to persons of the Caucasian race were violative of the equal protection clause when enforced by state courts. Justice Vinson, speaking for the majority, said:

Nor is the fourteenth amendment ineffective simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement. State action, as that term is understood for the purposes of the fourteenth amendment, refers to the exertion of state power in all forms.<sup>28</sup>

That statement as used in this decision must mean at least this: Any time a state court lends its authority to support an individual's act, that act is a state act for the purposes of the fourteenth amendment.<sup>29</sup> Such a proposition, used without qualification, as it is in this decision, effectively erases the "state action" provisions of the fourteenth amendment. If any private discrimination may be successfully attacked in state court (otherwise the state would be denying equal protection) then that act is obviously unlawful. It has been suggested that the decision may be defended against such criticism by drawing a distinction between the words *compelling* and *allowing*. That is that the *Shelley* case stands for the proposition that a state may not *compel* a seller not to sell to a Negro in performance of a covenant. It does not mean that the state will not *allow* the seller not to sell to a Negro. According to this line of argument, what is prohibited is the state enforcing discrimination against unwilling parties even though the basis for the discrimination is a private agreement. In other words, contracts which force one party to discriminate are unenforceable as against the obligor so forced.<sup>30</sup>

<sup>28</sup> *Id.* at 20.

<sup>29</sup> See Henkin, *Shelley v. Kemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

<sup>30</sup> Cf. *Rice v. Sioux City Memorial Park Cemetery Ass'n*, 348 U. S. 880 (1954). In that case, a widow of an Indian man owned burial plot, bought on contract that only Caucasians be buried there. The state supreme court held the contract binding and the U. S. Supreme Court affirmed on an equally divided vote. Since one party wished voluntarily to discriminate, does that mean that at least part of the court is concerned with state compulsion of discrimination and not mere enforcement?

If this were what the decision said, it would certainly confine its implications considerably. It would mean that any individual at any given time would be free to decide whether or not he wished to discriminate or not, according to his personal desires. The decision, it would seem, however, means just the opposite.

The other major type of state aid to private interests is exemplified by *Burton v. Wilmington Pkg. Auth.*<sup>31</sup> In that case, a private restaurant located in a publicly owned and operated automobile parking building refused to serve plaintiff solely because he was a Negro. Justice Clark, speaking for a divided court, said:

As the Chancellor pointed out, in its lease with Eagle, the leasing restaurant, the Authority could have affirmatively required Eagle to discharge its responsibilities under the fourteenth amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive might be . . . By its inaction, the authority, and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property, and prestige behind the admitted discrimination.<sup>32</sup>

Why is it the responsibility of the state to see that no discrimination is practiced? Justice Clark supplies the following reasons: (1) The restaurant may get added business due to the nearby parking lot;<sup>33</sup> (2) Some of the fixtures attached by the restaurant have become chattels real and therefore enjoy the tax exemption of the state;<sup>34</sup> and (3) The profits from the restaurant "earned by discrimination" go to the state in the form of rent.<sup>35</sup> It should be noted that as to reason (1) that a restaurant located on one side of the street might derive benefit from a municipally owned parking lot on the other side of the street. It should seem to be stretching a point to say that private activity might be made state activity simply because it receives incidental benefit

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<sup>31</sup> 365 U. S. 715 (1961).

<sup>32</sup> *Id.* at 725.

<sup>33</sup> *Id.* at 724.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

from or is conducted in close proximity to a state government enterprise. As to the tax benefit to the lessee, this is not exactly a state gift. Very often lease agreements provide that the lessor shall pay certain taxes thereby relieving the lessee of certain tax burdens. Such factors are taken into consideration when the amount of rent is decided upon. In fact, as to both of the foregoing reasons mentioned by Justice Clark, there is nothing to indicate that the rent paid did not include any benefit which might accrue to the lessee as a result of the state government ownership of the building and the parking lot. When the authority decided to lease the building and the parking lot, the public was invited to bid and did so bid, the highest bidder for this particular space being the Eagle. The restaurant did not receive any special privileges. The sole object of the authority, as admitted by Justice Clark, was to obtain additional revenues. Any benefit the restaurant got, it paid for. As to the last point, it amounts to this: A state may not receive moneys from an enterprise which engages in practices which the state may not engage in. Since most states tax every business enterprise in one form or another, this statement, similar to others already noted, is completely open-ended.

All of these reasons, according to Justice Clark, add up to "that degree of state participation and involvement" which the fourteenth amendment condemns.

#### *State Custom*

While the state custom theory is expounded significantly only in the concurring opinion of Justice Douglas in *Gardner v. Louisiana*,<sup>36</sup> due to its impact in this field it is treated as a major area of thought. In the *Garner* case, Negro petitioners staged a sit-in demonstration in the white section of a restaurant lunch counter. The owner of the restaurant called the local police who arrested the petitioners for "disturbing the peace." The majority of the Court found that there was "no evidence of any crime".<sup>37</sup> Justice Douglas, concurring, found that the custom of the state was as effective as a statute of the state insofar as the state action mandate of the fourteenth amendment was concerned. Says Justice Douglas:

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<sup>36</sup> 368 U. S. 157 (1961).

<sup>37</sup> *Id.* at 174.

Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to local custom. Segregation is basic to Louisiana as a community; the custom it maintains is at least as powerful as any law. If these proprietors choose segregation, their preference does not make their action "private" rather than "state" action. If it did, a miniscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise.<sup>38</sup>

The reason that the segregation policy may be attributed to the state says Justice Douglas, is due to the many segregating statutes which Louisiana has in force. Consider this analysis of his reasoning: When Justice Douglas says that the proprietor is following Louisiana's custom in segregating, he can hardly be argued with.<sup>39</sup> But when he attempts to attribute the custom to the statutes of the state, he is putting the horse before the cart.<sup>40</sup> The statutes, just like the proprietor's choice to segregate, are a product of a custom that has been in existence since slavery began. As he points out, segregation is basic to the community. The moving force is the rank and file of the community—it is the *individual*. Viewed in this light, the statement that the preference of the proprietor does not convert "state" action into "private" action is nothing short of amazing. The state didn't have anything to do with it in the first place. If any factors are going to "convert" they must be factors to convert clearly private action into state action.

Note the emphasis that is put on force. Does state action include any custom with strong coercive force over the community?<sup>41</sup> Very often, and in fact in this case, that coercive force will be social custom. It is not that the proprietor does not think the Negroes will pay for the food they eat; or that they will tear up the furniture; or that they will make the restaurant

<sup>38</sup> *Id.* at 181.

<sup>39</sup> See generally Schwelb, *The Sit-In Demonstration: Criminal Trespass or Constitutional Right*, 36 N.Y.U.L. Rev. (1961).

<sup>40</sup> For a list of those statutes see 368 U. S. 180.

<sup>41</sup> Lewis, *The Meaning of State Action*, 60 Col. L. Rev. 1083, 1093.

unsightly—he admits that these are not his reasons when he admits them to a *separate* area of the lunch counter. The owner practices segregation because he knows that his white customers will find it socially disagreeable to eat with Negroes. The storeowner finds that following the social custom is economically advantageous. And the homeowner in sending out dinner invitations may find the social custom of segregation psychologically advantageous. Justice Douglas' opinion gives no hint that there is any reason to distinguish the restaurant owner from the homeowner. Once it is established that the state (or the people of the state) have a custom of segregation, then all discriminatory acts are state acts within the meaning of the fourteenth amendment.

### *General Analysis*

These, then, are the four major devices which have been used to find "state action" indirectly: (1) A private organization vested with governmental authority; (2) Color of state law; (3) State aid of private discrimination, and (4) State custom.

It is submitted that the first three of these either on their face or as applied deal more with "state inaction" than with "state action".<sup>42</sup> "State inaction" is synonymous with "state action" only when there is an *affirmative* duty on the part of the state to perform that act.

Thus, in the *Classic* case, the state was under an affirmative duty to provide a fair system of elections. Election procedures and responsibilities are clearly governmental functions. But in the *Marsh* case, the state is under no duty to regulate the ingress and egress of persons over private property no matter how public the owner may have made it for some purposes. Justice Black says the state "permits" the company to govern the town. By the

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<sup>42</sup> "State inaction" has been dealt with by the court directly. In *Smith v. Illinois Bell Tel. Co.*, 270 U. S. 587 (1926), the telephone company filed a proposed schedule to raise rates. Through various dilatory procedures the state public utilities commission sat around and managed to do nothing. After the telephone company had operated at a loss for two years, it brought an action in federal court to enjoin the enforcement of established rates on the theory that they were confiscatory. The Court said: "Property may be as effectively taken by a long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them." Thus, the state had effected a denial of due process without ever lifting a finger.

use of the word "permit", he admits that the state has not acted but rather that it could have acted. Since the stipulation of terms as between licensee and licensor are not a function reasonably falling on state governments, the fourteenth amendment would not be applicable.

Similarly, in the *Screws* case, the state is under a duty to see that its agents act reasonably and properly in the administration of official functions. When it condones improper acts it has failed to meet an affirmative duty. If, on the other hand, the state prosecutes for the wrongful act of its agents the act of the agent is then the antithesis of a "state act". The state has declared its hostility toward that act and performed its affirmative duty. As suggested earlier, this avoids finding a violation of state law to be "state action".

The *Shelley* decision is a clear-cut example of the "state inaction" analysis. Here the state did nothing but enforce the terms of a private agreement, but because the state at one point could have easily prevented discrimination, the court found that its failure to do so was a state act. Thus, according to the Court, "state exertions of authority in all forms" includes failure to exert state authority in any direction it could have been exerted. But the state is under no affirmative duty to dictate terms of private contracts. Thus, according to the suggested analysis, there would be no "state action".

The *Burton* case is similarly explainable. Because the state was the lessor of the restaurant, it had the *opportunity* to control discriminatory practices. However, the restaurant serves no governmental function. And the state is under no duty to regulate the clientele in restaurants. Thus, while the state did not act when it could have, there is no state action because there is no duty to act. There is no reason to treat restaurants differently simply because the property on which it is situated is rented from the state, rather than from an individual.

As for Justice Douglas's "local custom" argument, little can be added to what has already been said. Insofar as equal protection considerations are concerned, local custom is almost

inevitably the source of the discrimination involved. The argument does not carve out an exception to the "state action" rule. Rather, it precludes any meaningful discussion of that rule.

It is earnestly contended by this writer that the failure to distinguish between acts that a state *may* perform and acts which the state is under a duty to perform is the principle source of confusion in regard to the state action concept.<sup>43</sup> The following statement of Justice Douglas in the *Garner* case is an example:

But the necessity of a license shows that the public has rights in respect to those premises. The business is not a mere matter of private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of one race. For there is an overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group.<sup>44</sup>

Note, first of all, that the license referred to is not just for one race. The state license is for anyone the owner chooses to serve. Service for one race is the owner's idea, not the state's. The confusion which statements like this breed, however, is this: Because the public has some rights in respect to private premises for some purposes it has rights for all purposes.<sup>45</sup> This is not logically correct.<sup>46</sup> The state may say that if the patron wishes to buy and the owner wishes to sell a pork chop that chop must be cooked under sanitary conditions. The control of the state and the right of the public comes in only after the first two conditions are met, i. e., consent of the buyer and seller.

Such judicial statements as this one lead to monstrous propositions. The state may require a door to door salesman to buy a license. Does that mean that he must stop at every door? Does

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<sup>43</sup> As already suggested, the judicial stampede in every direction on this point had led some writers to feel that the concept of "state action" has become totally unwieldy. See Horowitz, *The Misleading Search for "State Action" Under The Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957).

<sup>44</sup> Note 36 *supra* at 185.

<sup>45</sup> For a die-hard attempt to make some sense out of "public right" concepts, see Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1962).

<sup>46</sup> 14 So. Cal. L. Rev. 762, 773.

that mean he may not skip over colored neighborhoods? If the requirement of a license gives the public a "right", does that "right" include being charged a fair price determined by the government? Does the requirement of a license make a business a public utility?

### *Conclusion*

This article is an attempt to point out the very real danger of unnecessarily broad reasoning being used to find "state action" in any given case. The broad precedents set by the Court in recent years all but sweep away the authority of local governments to make policies which protect essentially local interests. It is submitted (in accordance with Hamilton's views) that the local governments are the safest repository for the administration of criminal and civil justice and that such local administration is an essential element in the preservation of our federalism.<sup>47</sup>

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<sup>47</sup> See generally Fordham, *The States in the Federal System, Vital Role or Limbo*; For an exhaustive analysis of the circumstances surrounding the writing of the fourteenth amendment and its "state action" concept, see Frank and Munro, *The Original Understanding of "Equal Protection of the Laws"* 50 Col. L. Rev. 131 (1950).