Constitutionally Guaranteed Civil Rights as a Limitation on Private Action

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Contents

*I. Introduction**)*

On the morning of April 20, 1958, Mr. Williams, a Negro, entered a Howard Johnson's restaurant in Alexandria, Virginia, to obtain breakfast

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**) The inundation of periodical literature touching upon the issues raised in this paper is only partly attested to by the following noteworthy articles and comments: Berle, Constitutional Limitations on Corporate Activity-Protection of Personal Rights from Invasion through Economic Power, 100 U. Pa. L. Rev. 933 (1952); Clark, Charitable Trusts, The 14th Amendment and the Will of Stephen Girard, 66 Yale L. J. 979 (1957); Coleman, Civil Rights Act of 1964: A Synopsis, 28 Ky.

and was refused service. He brought suit in federal court against the nationally operated restaurant, seeking a declaratory judgment as to his rights and an injunction against further racial discrimination by the restaurant[1]).

In Santa Anita, California, a Negro tenant received an eviction notice from his landlord but refused to move. In a suit by the landlord for unlawful detainer, the tenant claimed that the only reason he was served notice was because of his race and that for the court to enforce such an eviction would be discriminatory state action in violation of his constitutional rights[2]).

During February of 1954, two Negro orphans applied for admission to Girard College in Philadelphia, a private school established by the will of Stephen Girard for "poor male white orphan children" and administered by a city appointed board of directors. The board refused the boys' applications for admission. Lawyers for the boys thereupon filed suit to compel the board to admit them on the basis that they met all of the requirements for admission except for race, and race could not be used as a basis for barring them from this private school since it was publicly administered[3]).

S.B.J. 10 (1964); Frank and Munro, The Original Understanding of "Equal Protection", 50 Colum. L. Rev. 131 (1950); Frantz, Congressional Power to Enforce the Fourteenth Amendment Against Private Acts, 73 Yale L. J. 1353 (1963/64); Haber, Notes on the Limits of Shelley v. Kraemer, 18 Rutgers L. Rev. 881 (1964); Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962); Horowitz, Fourteenth Amendment Aspects of Racial Discrimination in "Private Housing", 52 Calif. L. Rev. 1 (1964); Horowitz, The Misleading Search for "State Action" under the 14th Amendment, 30 So. Calif. L. Rev. 208 (1957); Huber, Revolution in Private Law, 6 So. Calif. L. Q. 8 (1953); Karst and Van Alstyne, State Action, 14 Stan. L. Rev. 3 (1961); Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083 (1960); Losos, Impact of the 14th Amendment upon Private Law, 6 St. Louis U.L.J. 368 (1961); Pollock, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Sanders, Civil Rights Act of 1964, 27 Texas B.J. 931 (1964); St. Antoine, Color Blindness but not Myopia: A New Look at State Action, Equal Protection and "Private" Racial Discrimination, 59 Mich. L. Rev. 993 (1961); Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Wellington, The Constitution, Labor Unions and Government Action, 70 Yale L.J. 345 (1961); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Symposium on Civil Rights, 24 Fed. B.J. 1 (1964); Comment, Police Enforcement of Private Discrimination and the State Action Concepts, 52 Northwestern L. Rev. 774 (1958); Comment, An Innkeeper's Right to Discriminate, 15 U. Fla. L. Rev. 109 (1962); Comment, Application of the 14th Amendment to Builders of Private Housing, 12 Kan. L. Rev. 426 (1964); Comment, State Action under the Equal Protection Clause of the Fourteenth Amendment and the remaining Scope of Private Choice, 50 Cornell L. Q. 473 (1965); Comment, Civil Rights Act of 1964, 78 Harv. L. Rev. 684 (1965).

[1]) *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4 C.C.A., 1959).

[2]) *Abstract Investment Co.* v. *Hutchinson*, 204 C.A. 2d 242, 22 Cal. Rptr. 309 (1962).

[3]) *In re Girard's Estate*, 386 Pa. 548, 127 A. 2d 287 (1956).

In March of 1955, three Negro physicians applied for "courtesy staff privileges" of practicing medicine at the James Walker Memorial Hospital in Wilmington, North Carolina. They were denied such privileges solely on the basis of their race. Suit was subsequently brought to gain admission to hospital practice on the basis that although the hospital was built with private funds, it was a publicly administered institution subject to the equal protection restraints of the Federal Constitution[4]).

These cases indicate something of the breadth and complexity of one of the most serious social problems existing in America today as well as one of the more serious legal problems which has arisen from it. The social problem is, of course, racial discrimination and the Negro struggle for equality. The legal problem is the development of a theoretical basis for determining when and to what extent constitutionally guaranteed civil rights are to be applied in the adjudication of private law controversies. In all of the above cases, Negroes sought judicial vindication of their civil rights allegedly infringed by the actions of private individuals or institutions rather than by the direct acts of government.

Unfortunately, the term "civil rights" is one which defies precise definition. In its general sense, it is most often meant to embrace all "rights appertaining to a person in virtue of his citizenship in a state or community"[5]). In recent years, the term has come to apply more narrowly to rights secured to all citizens by the United States Constitution and particularly to those rights recognized by the Thirteenth, Fourteenth and Fifteenth Amendments. And of course, the context in which such rights have been very frequently and prominently adjudicated has been the context of alleged denial of these rights because of race.

The United States Constitution, however, in terms of the rights guaranteed by it to all citizens, was and is directed primarily against acts of encroachment by the national government. It is not a document designed to guarantee a citizen's rights from encroachment by his fellow citizens, except for a few specific provisions. "Constitutional Law", states Professor Corwin, "signifies a body of rules resulting from the interpretation of a high court of a written constitutional instrument in the course of disposing of cases in which the validity, in relation to the constitutional instrument of some act of governmental power, State or national, has been challenged"[6]).

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[4]) *Eaton* v. *Bd. of Mgrs. of James Walker Memorial Hospital*, 261 F. 2d 521 (4 C. C. A., 1958).

[5]) Black's Law Dictionary, 4th ed.

[6]) Corwin in the Constitution of the United States, Norman Small, ed. (1964),

Further, the Bill of Rights or first ten amendments to the Constitution, were originally not only inapplicable to private individuals but were also not applicable to the States[7]). Only upon the adoption of the Fourteenth Amendment were some of the fundamental rights enumerated in the Bill of Rights extended to apply also to the governments of the States[8]).

Yet today, constitutional rights are being applied and enforced regularly in legal controversies between private individuals and institutions, particularly in matters of race discrimination. On what basis and to what extent have the constitutional guarantees against governmental encroachment upon basic civil rights been extended to apply against private encroachment upon such rights? It will be our purpose here to explore this question in relation to two of the most important constitutionally guaranteed rights – freedom of speech and equal protection of the law – and to consider how recent national legislation has even further extended the second of these rights into what were formerly private legal disputes.

II. The First Amendment Guarantee of Freedom of Speech

The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech". As previously noted, the Supreme Court has ruled that this First Amendment protection has become applicable to the States as well by virtue of the Fourteenth Amendment[9]).

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p. 1. This is essentially the same approach as taken by the West German *Grundgesetz* in which the basic rights enumerated in the first nineteen articles are stated in Article 1 (3) to be directly enforceable law upon the legislature, executive and judiciary. Both the Constitution and the *Grundgesetz* do, of course, contain some provisions applicable to private actions, *e.g.* the Thirteenth Amendment and Article I, sec. 4, U.S. Const. See also *Bailey* v. *Alabama*, 219 U.S. 219 (1911) and *U.S.* v. *Classic*, 313 U.S. 299 (1941).

[7]) *Barron* v. *Baltimore*, 7 Pet. 243 (1833).

[8]) Among other things, the Fourteenth Amendment states: "... nor shall any State deprive any person of life, liberty, or property, without due process of law ...". The fundamental concept of "liberty" as that word is used in the Fourteenth Amendment embraces many of those liberties guaranteed in the First, Fourth, Fifth, Sixth and Eighth Amendments. Among those liberties are: all of those listed in the First Amendment, *Everson* v. *Bd. of Education*, 330 U.S. 1 (1947) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1942); right of privacy (no unreasonable search or seizure), *Mapp* v. *Ohio*, 367 U.S. 643 (1961); privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1 (1964); right to just compensation for private property taken for public use, *C.B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1896); right to counsel in criminal cases, *Betts* v. *Brady*, 316 U.S. 455 (1941) and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); right of the criminally accused to be informed of the charge against him, *Snyder* v. *Massachusetts*, 291 U.S. 97 (1933); and, the guarantee against "cruel and unusual punishment," *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1946) and *Robinson* v. *California*, 370 U.S. 660 (1962).

[9]) *Ibid.*

One of the earliest and at least partially successful attempts to inject the First Amendment protection of free speech into private law controversies was in the labor movement[10]). The question arose in the 1930's of the right of laborers to picket their employers and the correlative right of the employer to be free of such interference with his private property by use of a court injunction. In 1940 the United States Supreme Court ruled in *Thornhill* v. *Alabama*[11]), that it was a violation of freedom of speech for a state to prohibit without exception all types of labor picketing by statute. Because the statute in question made no distinction between violent and peaceful picketing, the Court broadly assimilated peaceful picketing into the legal concept of freedom of speech, and, as such, held it to be protected against abridgement by the First and Fourteenth Amendments.

In 1941, this same principle was applied in *A.F.L.* v. *Swing*[12]) where a state court had issued an injunction against peaceful picketing based on the common law policy against picketing when there was no immediate dispute between employer and employee. The Court shortly thereafter began retreating from its original position and found that even peaceful picketing involved more than just communication of ideas and could not be made immune from all state regulation. The cases which followed, including the latest, *A.F.L.* v. *Vogt, Inc.*[13]), adopted the "ends-means" test whereby a peaceful picket could be enjoined or legislatively regulated where the objective of the picketing was illegal or against public policy. As Professor Russel Smith observes:

> "The communication aspect of picketing appears to have been so subordinated that the civil rights and 'substantive due process' constitutional tests have become fairly indistinguishable, and thus negligible, in their impact. As in the case of the problem of emergency disputes, the influence of this current attitude of the Court is to force attention upon the totality of policy considerations which should, in balance, determine the extent and nature of the legal privilege to picket"[14]).

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[10]) It should be noted that in the late 30's and early 40's, the Supreme Court began to consider labor unions as something other than purely private organizations. In *Steele* v. *Louisville & N. Ry*, 323 U.S. 192 (1944), the Court likened the power of the labor union to represent and make rules for its members with "power not unlike that of a legislature". *Id.* at 198. See also *American Communications Ass'n.* v. *Douds*, 339 U.S. 382 (1950). When a union becomes recognized and empowered by law to act as bargaining agent for employees, it becomes subject to applicable constitutional limitations.

[11]) 310 U.S. 88 (1940).

[12]) 312 U.S. 321 (1941).

[13]) 354 U.S. 284 (1957).

[14]) Russel A. Smith, The Supreme Court and Labor, 8 SW. L. J. 1 at p. 9 (1954).

The picketing of privately owned business because of alleged policies of race discrimination would also appear to be protected by the First and Fourteenth Amendment guarantees[15]). However, such right is subject to many limitations, just as is labor picketing. Groups may not picket to pressure private businesses to hire specified percentages of Negroes as employees, since that system would amount to discriminatory hiring on the basis of race[16]). In general, such picketing can be prohibited when the end sought to be gained is illegal, against public policy or when the right is outweighed by problems of serious public disorder, violence or excessive economic harm[17]). But "only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms"[18]).

The question arose in *N.A.A.C.P.* v. *Overstreet*[19]) as to whether a store owner may collect money damages in a tort action against persons picketing his store due to an alleged racial controversy. The plaintiff, Overstreet, had a 14 year old Negro boy in his employ and on May 30, 1962 discharged him because the boy allegedly had stolen some grocery items from the store. The boy went to the police, accusing plaintiff of having beaten him and the boy's aunt swore out a warrant against him for assault and battery. Shortly thereafter, agents of defendant organization organized a campaign to picket Overstreet's store and try to persuade customers not to buy at the store. Defendants were temporarily enjoined from continued picketing and a jury trial was instituted to obtain damages and to make the injunction permanent.

Defendants argued that they had the right, protected by the Constitution, to engage in peaceful picketing and other related activities to attempt to persuade the public not to support commercial establishments which practice race discrimination. Both the lower court and the state supreme court found, however, that the picketing was not the result of race discrimination by Overstreet, since he employed Negroes and more than two-

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[15]) See *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938) holding that picketing by Negro group to protest refusal of grocery to employ Negroes was a labor dispute within the meaning of the Norris-La Guardia Act which forbids issuance of state court injunctions against peaceful picketing in labor disputes. See also *Anora Amusement Corp.* v. *Doe*, 12 N.Y.S. 2d 400, 171 Misc. 279 (1939) and *Sumter* v. *Lewis*, 241 S.C. 364, 128 S.E 2d 684 (1962).

[16]) *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950).

[17]) *Clemmons* v. *Congress of Racial Equality*, 201 F. Supp. 737 (D.C. La., 1962); *Hughes* v. *Superior Court, supra*, note 16.

[18]) *N.A.A.C.P.* v. *Button*, 371 U.S. 415 (1963).

[19]) 221 Ga. 16, 142 S.E. 2d 816 (1965), cert. denied, 16 L. Ed. 692 (1966).

thirds of his customers were Negroes. Rather, the court felt that the evidence indicated an intention to punish Overstreet by injuring his business through a disorderly type picketing. Thus, ruled the court, the picketing is unlawful and not protected under the free speech provisions of the Constitution. The court also inferred that had the picketing been entirely peaceful and engaged in as a protest against actual race discrimination, an action in tort for damages to Overstreet's business could not have been maintained.

In the cases mentioned above in which the picketing was found to be lawful, the constitutional guarantees against restraints upon free speech were applied to the state rather than to the employer or shop owner who in most instances sought to prevent the picketing. In *A.F.L.* v. *Swing*, it was the state court's action of enforcing a common law policy forbidding peaceful picketing where no immediate employer-employee dispute existed which constituted the wrongful restraint upon free speech. "The scope of the Fourteenth Amendment", said the Court, "is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state"[20]). Thus, a court, as an agent of the state, may not enforce a law or public policy in a private law dispute which would result in a wrongful restraint upon the constitutionally guaranteed right of the defendant.

Perhaps the most significant as well as one of the most recent cases applying the constitutional right of free speech in a private law controversy is *New York Times Co.*, v. *Sullivan*[21]). The case was a civil suit for libel and slander brought by the supervisor of the Montgomery, Alabama police department against the *New York Times* newspaper and others. In his libel suit originally brought before the Circuit Court of Montgomery County, Sullivan alleged that he had been libeled by statements in a 1960 New York Times advertisement placed by a committee representing 64 publicly known persons who had signed the statement contained in the advertisement. It stated that police armed with shotguns and tear gas had ringed the Alabama State College campus following a student demonstration over civil rights, that "they" (referring presumably to Montgomery County and city officials) had assaulted Martin Luther King and had arrested him seven times, most recently charging him with perjury in a tax case. Generally, the statement was an appeal for funds

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[20]) *A.F.L.* v. *Swing*, 312 U.S. 321 at 325–326 (1941).
[21]) 376 U.S. 254 (1964).

for The Committee to Defend Martin Luther King and The Struggle For Freedom in The South. Some of the factual statements contained in the advertisement were not accurate. The jury, at the trial, found the defendants guilty of libel and slander and awarded Sullivan punitive damages of $ 500 000. The Alabama Supreme Court affirmed, holding that the trial judge had properly instructed the jury that the newspaper statements were libelous *per se*, that falsity and malice are therefore presumed, and that the only defense against such libel would be proof of the truth of the statements published. The court further ruled that "The First Amendment of the U.S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action"[22]).

The Supreme Court of the United States reversed the judgment and held that the suit could not be entertained in the Alabama courts on the basis of the proofs which had been offered at the trial.

In its simplest form, American common law provides that publication of derogatory statements adversely affecting the plaintiff in his business, trade, profession or office are libelous and actionable without proof of damages. The publisher may be required in a civil suit to pay money damages unless he successfully asserts a legal defense such as the truth of the statements made or that the statements were fair comment and criticism on matters of public interest or concern[23]). It would not be valid to defend on the basis that imposition of liability would violate the publisher's freedom of speech under the First and Fourteenth Amendments[24]).

In this case, however, the Court held that since the advertisement was "an expression of grievance and protest on one of the major public issues of our time", and since it was directed, if at all, against the respondent in his capacity as a public official, the publication was constitutionally protected against state action designed to prevent or punish such statements. And the fact that the statement is false or defamatory does not result in the withdrawal of the constitutional protecion. Only if the statement was made with actual malice, *i. e.*, with knowledge that it was false or with reckless disregard of whether it was false, is the protection of the First Amendment forfeited.

The ruling of the Court is summed up in the following:

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[22]) 273 Ala. 656 at 676, 144 So. 2d 25 at 40 (1962).

[23]) See American Law Institute, Restatement of Torts, sec. 568 ff.; Prosser on Torts, Ch. 21 (1964).

[24]) *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 49 (1961); *Times Film Corp.* v. *City of Chicago*, 365 U.S. 43, 48 (1961).

> "We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. (376 U.S. at 283). Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedom of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. (376 U.S. at 265)".

Thus, the constitutional guarantee of free speech may be asserted as a legal defense in a private suit for non-malicious libel and slander of a public officer as to his official conduct. Any enforcement of common law or statutory libel and slander rules in this type of case constitutes an infringement by the state upon the defendant's constitutional right to speak freely.

Unfortunately, the Court does not make precisely clear what state act it is which is constitutionally proscribed. Is it the legislative or judicial act of creating the statutory or common law libel rule? Is it the application and enforcement of the rule by a court? Is the act of the public officer in instigating a civil suit for libel to obtain money damages an act of the state? Or is it a combination of these? One thing is clear. If it is the action of the court which is the prohibited state action, then the state action with which the Fourteenth Amendment is concerned will exist in all private law litigation.

One could argue that since the courts are entrusted with the interpretation of all law and are empowered to nullify legislative and executive actions, they determine in fact what is and what is not law. If a court determines that a particular rule is law, which a higher court finds to be violative of constitutional rights, it is the lower court determination which constitutes the actual state infringement. This question arises repeatedly in the cases, some of which are discussed below.

III. The Fourteenth Amendment Guarantee of Equal Protection of the Laws

The first section of the Fourteenth Amendment states in part the following: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws". As early as 1875, the Supreme Court held in *United States* v. *Cruikshank*[25]) that this constitutional prohibition

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[25]) 92 U.S. 542 (1875).

applied to the individual states and not to private citizens. "The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not ... add anything to the rights which one citizen has under the Constitution against another" [26]). This precedent was affirmed in *Virginia* v. *Reeves* [27]), ("The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals") [28]), and reaffirmed in the famous *Civil Rights Cases* [29]) ("Individual invasion of individual rights is not the subject matter of the amendment") [30]).

The purpose of the Fourteenth Amendment was stated quite clearly by the Court in *Strauder* v. *W. Virginia:*

> "It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States ... It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction, the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,–the right to exemption from unfriendly legislation against them distinctively as colored,–exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race" [31]).

Thereafter, in consideration of a Fourteenth Amendment case, the Supreme Court always started from the premise that only the actions of the state were to be reviewed for purposes of applying the Amendment mandates. Nevertheless, the requirement that the act complained against must be attributable to the state has become a matter of degree. Furthermore, there remains some doubt as to the validity of earlier interpretations

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[26]) *Id.* at 554–555.
[27]) 100 U.S. 313 (1879).
[28]) *Id.* at 318.
[29]) 109 U.S. 3 (1883).
[30]) *Id.* at 11.
[31]) 100 U.S. 303 at 306–308.

requiring direct and obvious state action. Justice Harlan's dissent in the *Civil Rights Cases*[32]) is today quoted perhaps more often than the majority opinion. To him, the concept of "state" implied more than just governmental agencies. "In every material sense applicable to the practical enforcement of the Fourteenth Amendment, railroad corporations, keepers of inns, and managers of places of public amusement are agents or instrumentalities of the State, because they are charged with duties to the public, and are amenable, in respect of their duties and functions, to governmental regulation"[33]).

In the Senate debate prior to Congressional approval of the Amendment, Senator Sumner of Massachusetts supported an even broader view than Harlan of what was properly included within the meaning of the term "state". "Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color"[34]). To the same effect were the observations of Representative Laurence of Ohio during the House debate on the Amendment:

> "The object of this provision is to make all men equal before the law. If a State permits inequality in rights to be created or meted out by citizens or corporations enjoying its protection it denies the equal protection of the Laws. What the State permits by its sanctions, having the power to prohibit, it does in effect itself ..."[35]).

Until recently, these broad views as to the extent of responsibility of a state under the Fourteenth Amendment for the acts of non-governmental groups and institutions were repeatedly repudiated in American constitutional law. In the last decade, however, it would appear no longer so clear as to when private actions may be sufficiently tinged with elements of state action so as to bring them within the purview of the Amendment.

The causes for the recent preoccupation with state action as a necessary element in the assertion of Fourteenth Amendment rights are suggested by Van Alstyne and Karst:

> "What has particularly distinguished the racial equality cases from other civil liberties cases arising under the fourteenth amendment is their preoccupation with the state action limitation; indeed, most of the shifts in state action theory first made their appearance in the race cases. Historical explanations

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[32]) 109 U.S. 3 (1883).
[33]) *Id.* at 58–59.
[34]) Cong. Globe, 42d Cong. 2d Sess. 242 (1871).
[35]) 2 Cong. Rec. 412 (1874); see also Frank and Munro, *op. cit. supra* note **, 131.

for this novel preoccupation are likely to be little more than guesses, but two may be suggested. (1) Other interests of a constitutional dimension have continually required protection from action which is easily identified as governmental ... Since racial discrimination as a straightforward state policy has been denied by the Constitution, there has followed a subtle but deliberate delegation of the enforcement of the policy to private hands ... (2) Other constitutionally protected interests have found early and active support from within state governments, while the interest in racial equality has been virtually ignored by the states most seriously affected by racial problems"[36]).

A. Private actions not subject to constitutional restraints because of insufficient state involvement

As late as 1953, prior to the demise of the "separate but equal" doctrine, federal as well as state courts were still reluctant to give other than a very narrow interpretation to the state involvement requirement of the Fourteenth Amendment[37]). In *Sweeney* v. *City of Louisville*[38]), Negro plaintiffs brought suit to obtain a declaration of their rights to use an amphitheater owned by the defendant city and located in a city park. It was leased each year to the Louisville Park Theatrical Association, Inc., a private group, for the summer months. The Association staged opera performances in the amphitheater and refused to admit Negroes to the performances. The federal district court, without intensively examining the issue, ruled that the Association and not the City was responsible for the policy of refusing to admit Negroes, and that as long as the City was willing, when so requested, to provide amphitheater facilities in Negro city parks, it could not be viewed as denying the plaintiffs the equal protection of the law. The case was affirmed on appeal[39]). In view of the cases following the school desegregation case of 1954 overruling the "separate but equal" doctrine[40]), it is most probable that the Louisville case is no longer a valid precedent on the question of the degree of state involvement necessary to subject private action to the restraints of the Fourteenth Amendment.

In contrast, the Supreme Court eighty-three years ago ruled that privately owned and operated public accommodations were not subject to the Equal Protection Clause and that, furthermore, Congress could not make private operators of public accommodations subject to the Clause by enactment of legislation based upon the implementation clause of the Fourteenth

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[36]) Karst and Van Alstyne, *op cit. supra* note **, 3.
[37]) No attempt is made here to review the many pre-1953 cases.
[38]) 102 F. Supp. 525 (D.C. Ky. 1951).
[39]) 202 F. 2d 275 (6 C.C.A. 1953).
[40]) *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

Amendment[41]). That decision remained legally effective, even after the *Brown* case of 1954. In 1959, for example, the fourth U.S. Circuit Court of Appeals ruled that a Negro who was refused service at a Howard Johnson's restaurant could not maintain an action for a declaratory judgment that the restaurant had violated his rights under the Fourteenth Amendment[42]). The plaintiff attempted to argue that the state was involved in the discriminatory action of the restaurant because of a custom prevalent in the state to refuse to serve Negroes in "white" restaurants. Plaintiff also argued that the restaurant was engaged in interstate commerce and therefore subject to the regulation of Congress and the Federal policy of nondiscrimination. The court, however, rejected these arguments, finding that customs of the people of a state do not constitute "state action" and that legally speaking the restaurant did not engage in interstate commerce. "As an instrument of local commerce, the restaurant is not subject to the constitutional and statutory provisions discussed above and, thus, is at liberty to deal with such persons as it may select"[43]).

To the same effect is the case of *Slack* v. *Atlantic White Tower System*[44]), decided in 1960. There, the same court held that a private restaurant located along a federal highway was at liberty to discriminate on a racial basis and was not subject to the restraints of the Fourteenth Amendment or the Commerce Clause.

Very recently, the question arose as to whether an unincorporated state dental association is required by the Fourteenth Amendment to admit qualified dentists to membership in the society on a nondiscriminatory basis. In *Hawkins* v. *North Carolina Dental Society*[45]), the plaintiff, a Negro dentist, argued that the State of North Carolina was sufficiently involved in the conduct and activities of the Society so as to make the Fourteenth Amendment applicable. Plaintiff pointed out that the state law required

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[41]) *Civil Rights Cases*, 109 U.S. 3 (1883). These consolidated cases involved the question whether the Congress had the authority, under the power granted it by the Fourteenth Amendment to implement the provisions of the Amendment, to pass legislation prohibiting persons who owned and operated public accommodations from offering their accommodations to the public on a racially discriminatory basis. The Court held, of course, that the Congress was limited to passage of legislation which sought to regulate state actions in violation of the Amendment. It was this precedent which led the Congress in 1964 to pass civil rights legislation dealing with public accommodations, declaring that the legislation was based upon the Congress' power to regulate interstate commerce under Article I, Section 8 of the Constitution.

[42]) *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (4 C.C.A. 1959).

[43]) *Id.* at p. 848.

[44]) 284 F. 2d 746 (4 C.C.A. 1960).

[45]) 230 F. Supp. 805 (1964).

the Governor to request recommendations from the President of the Society as to who should be appointed as the dental members of the State Medical Care Commission and the State Mental Health Council, but the Governor is not obligated to accept such recommendations nor is he limited to obtaining them solely from the Society. Plaintiff also pointed out that the Society serves in an advisory capacity to a number of state councils and committees, although again there is no legal obligation to advise or to accept the advice. Thus, the court found that whatever relationship might exist between the State of North Carolina and the dental society, that relationship was not one imposed or governed by any law and was of such an informal and non-binding nature that the State could not be said to be legally involved in the discriminatory activities of the Society[46]).

Perhaps the most questionable of the recent cases of this category is *Eaton* v. *Board of Managers of James Walker Memorial Hospital*[47]), also decided by the Fourth U.S. Circuit Court of Appeals. The controversy involved three Negro physicians who had requested and were denied courtesy staff privileges at the defendant hospital. The plaintiffs sought to establish that the hospital was an instrumentality of the state and therefore prohibited from excluding qualified Negro doctors from practice in the hospital. The state was alleged to be involved because the hospital had been established by municipal authority in 1881 and was supported and operated by the City of Wilmington, North Carolina until 1901. In 1901, the city and county conveyed the land on which the hospital stood to the Board of Trustees of a new corporation created by an act of the state legislature. The act gave the board full powers of management and self-perpetuation. A new hospital building was erected on the site from funds donated by a private benefactor. The board thereafter operated the hospital independently and received financial aid from the city and county until 1951. Thereafter, no further governmental aid was given, but the local governments entered into contracts with the hospital whereby it was paid on a *per diem* basis from public funds for any patients treated who were sent by the city or county.

There could be no question that the state was involved, at least to the extent that it had donated the site on which the hospital building was erected, and that it had by statute created the corporation which governed the operations of the hospital. The court found, however, that this degree

[46]) For a case reaching the opposite result, see *Bell* v. *Georgia Dental Association*, 231 F. Supp. 299 (N.D. Ga. 1964) which is factually distinguishable in that the Governor of Georgia was required by law to appoint only from lists prepared by the dental association and the appointments were to be confirmed by the state senate.

[47]) 261 F. 2d 521 (4 C.C.A. 1958).

of state involvement was inadequate to bring the activities of the hospital within the confines of the Fourteenth Amendment. The court pointed out that the grant of public land does not make the governing board a public corporation. The fact that the state no longer exercised any control over the operations of the hospital and provided no financial assistance to it was decisive of the question in favor of the defendant hospital.

Whether the outcome would have been the same had this case been decided in another federal circuit court is subject to speculation. Thus, by emphasizing certain facts, sufficient state involvement might have been found. The land conveyed by the local governments was granted under the express stipulation that the site was to be used as a hospital for the benefit of the city and county, which is to say that the hospital was to be operated for the benefit of the public. This alone raises the question whether a state agency may donate for public use land which is to be put to a use inconsistent with the mandates of the Constitution. Furthermore, between 1901 and 1951, the hospital received public funds for operations. Such a long period of public contributions to the hospital would further constitute it a public rather than a private operation. Finally, and not of least importance, the governing board of the hospital corporation owed its very creation and existence to a special act of the state legislature, and its power to act independently of the city or county derives solely from the state statute[48]).

B. Private actions subject to constitutional restraint because of sufficient state involvement in the activity

One of the earlier significant cases of this century dealing with the effect of state participation in private action was *Nixon* v. *Condon*[49]), which held that the state could not confer powers of a public or governmental nature

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[48]) It is interesting to note that in 1963, this same court (4th circuit) cast doubt upon the validity of its decision in the *Eaton* case. In *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4 C.C.A. 1963) the question was presented whether federal aid to a hospital was sufficient governmental involvement to require the hospital to conform to constitutional requirements. At p. 968, the court notes that "In light of Burton doubt is cast upon Eaton's continued value as a precedent". (The *Burton* case is reviewed elsewhere in this paper). The *Eaton* case is also criticized in *Hampton* v. *City of Jacksonville*, 304 F. 2d 320 (5 C.C.A. 1962) where the court notes the similarity between property leased by a state agency to a private organization, thus creating sufficient state involvement as was found in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) and land granted by a state agency to a hospital, as was the case in *Eaton*, where the grant contained a reverter clause to the effect that the land would revert back to the city in the event that the hospital discontinued to use the land for hospital purposes or abandoned it.

[49]) 296 U.S. 73 (1932).

upon a private association without requiring the private group to comply with the mandates of the Constitution. Prior to this case, the State of Texas had passed an act to prohibit Negroes from voting in state primary elections and the act had been struck down by the Supreme Court in an earlier decision[50]). Texas thereafter passed a new statute empowering the executive committees of state political parties to determine for themselves who was qualified to vote in party primaries. The parties were treated as private associations with full power to admit or exclude as they saw fit. In Texas at the time, there was only one party of any significance, the Democratic Party, which had a policy of excluding Negroes. Upon the refusal of the Democratic Party to permit Nixon to vote in a primary, Nixon brought suit against the election judges for damages. On appeal, the Supreme Court overruled the trial court's dismissal of the case.

Although the grounds for the Supreme Court's decision were narrow[51]), the Court indicated that the state will be held constitutionally accountable for power it confers upon a private association to act in the area of public affairs.

But it was not until *Brown* v. *Bd. of Education, supra,* that the whole issue of state involvement in private discriminatory actions became the subject of frequent and thorough litigation. In 1957, the Supreme Court decided *Pennsylvania* v. *Bd. of City of Philadelphia*[52]). It declared that the city board of trustees named by a private will to administer a trust establishing a "white only" private school was an agency of the state, and even though it might be acting as a trustee under the provisions of a private will, if it acted in a racially discriminatory manner, such action constituted unlawful discrimination prohibited by the Fourteenth Amendment. Following this decision, the lower court administering the will removed the city trustees and substituted private persons in their place in order to carry out the testator's intent that the school be open only to poor white orphans. This

[50]) *Nixon* v. *Herndon,* 273 U.S. 536 (1926).

[51]) The court held that the executive committees of state political parties had no inherent powers to determine the qualifications of voters in primaries and that ordinarily such powers resided in the state conventions. Thus, when the state legislature passed a statute constituting the party executive committee as judge of qualifications for voting in primaries, it gave power to a body which it would not otherwise possess and in so doing made that body an organ of the state to the extent it was enabled by law to exercise such powers. This left open the question whether the political party, through its state convention had the inherent power, unrestrained by the Constitution, to determine its own membership. It was not until 1944 that this question was finally settled in *Smith* v. *Allwright,* 321 U.S. 649 (1944). The Court ruled that political parties were agencies of the state insofar as they determine who is to vote in primaries, since the primaries are part of the machinery for choosing public officials.

[52]) 350 U.S. 230 (1957).

was upheld by the Supreme Court of Pennsylvania[53]) and application for review was denied by the U.S. Supreme Court[54]).

In 1961, the Supreme Court ruled that premises leased by a governmental authority to a private person could not be used in violation of the mandates of the Fourteenth Amendment. In *Burton* v. *Wilmington Parking Authority*[55]), the defendant Parking Authority was a state agency which had built a building primarily for offstreet parking of automobiles. The Authority had leased space in the building to a private restaurant and the restaurant had refused to serve the appellant, a Negro. The constitutional question raised was whether the State was sufficiently involved to make the conduct itself "state action" prohibited by the Fourteenth Amendment. Sufficient involvement was found because of the following factors: the building and the land were publicly owned; the building was devoted primarily to a public use, that of off-street parking; the upkeep and maintenance of the building were provided from public funds; and the restaurant enjoyed the "fringe benefits" of being part of a public activity in that there were no taxes assessed on the building and there was adequate parking available for guests at the site.

There is also language in the opinion to the effect that the failure of the Parking Authority to require the restaurant, as a condition of the lease, to make its services available to the public on a nondiscriminatory basis constituted a form of state action. For example, the Court points out that the lease itself

> "... contains no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities except any as would impair the security of its bondholders" [56]).

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[53]) 391 Pa. 434, 138 A. 2d 844 (1958).

[54]) 357 U.S. 570 (1958). It is interesting to compare the result in *Pennsylvania* v. *Bd. of City of Philadelphia* with the very recent case of *Evans* v. *Newton*, 86 S. CT. 486 (1966) in which a testator had devised a tract of land for park use to the city of Macon, Georgia with the stipulation that the park and the board of city managers named to control it were to be white. As time passed, the city permitted Negroes to use the park and individual members of the Board of Managers filed suit in the state court asking that the city be removed as trustee of the land and that title be placed in new, private trustees. The city trustees thereupon resigned and the court appointed new trustees. In a brief opinion, the Court held that the park had for so long been a part of the city's activities that it's character as a public park was not dissipated by the transfer of the land from city trustees to private trustees. The public character of this park required that it be treated as a public institution, according to the Court, regardless of who at the moment might have title to the land.

[55]) 365 U.S. 715 (1961).

[56]) *Id.* at 720.

The Court notes, significantly, its own inability to precisely define the tests or standards by which sufficient state involvement can be ascertained.

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted'. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance" [57]).

Two years after *Burton*, the requirements of state involvement were considerably liberalized by *Smith* v. *Holiday Inns of America, Inc.*, in which constitutional prohibitions were applied to private persons rather than government agents or agencies[58]). The federal district court which heard the case ruled that owners of land purchased from a government agency in an urban renewal project are bound, as is a lessee from the government, in the use of that land by the requirements of the Fourteenth Amendment. The defendant in this case had erected a new motel on a site in an urban renewal area in Nashville, Tennessee, and had refused to offer motel accommodations to Negroes. The court found that the participation by government agencies in the renewal project and the continuing governmental controls imposed on the future use of the land were sufficiently pervasive to make the discriminatory acts of the private motel owner "state action".

On appeal, the district court decision was affirmed and further supported by the recital of the nature and extent of governmental controls which remained with the land even after its sale to the private purchaser.

> "We do n o t hold that the mere fact that a state agency once held title to a piece of property affects private title forever after with some public quality. The public design, and the continuing public controls which we have recited, are major factors in the decision made herein. So, likewise, is the fact that part of the preconceived public design was to create a facility (a motel) which has service to the general public as its basic purpose.
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> It seems to this court clearly to be the sort of injustice which the Fourteenth Amendment prohibits, for the State of Tennessee to conceive and (in concert with the United States agency involved) carry out a plan to effect great improvement in the aesthetic qualities and public convenience of the

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[57]) *Id.* at 722.
[58]) 220 F. Supp. 1 (D.C. Tenn. 1963).

area immediately surrounding its Capitol building and to do so by using the power of eminent domain to acquire the property of and evict many of its Negro citizens, and then to require and provide for a public accommodation (a motel) so that its citizens can conveniently visit the Capitol and then to allow the operators of that motel to ban some of Tennessee's own citizens from use of these accommodations thus provided, solely on grounds of race.

We believe that the right not to have state finances, state agencies and state laws employed to such a purpose and such a result is a right encompassed in the Equal Protection Clause of the Fourteenth Amendment" [59]).

Another case involving the effect of the receipt of public funds by private persons upon the question of the applicability of the Fourteenth Amendment is *Simkins* v. *Cone Memorial Hospital* [60]). The facts were somewhat similar to the *Eaton* case, *supra,* insofar as the plaintiffs were Negroes who had been denied hospital facilities because of their race. Six of the plaintiffs were physicians, three were dentists and two were persons in need of medical treatment. Under provisions of federal statute [61]), the hospital (actually, two hospitals were involved) received considerable public funds for hospital construction amounting to 17.2 % of total construction expenses in the case of the Cone Hospital and 49.6 % for Long Hospital. The program of aid was voluntary and, as the court noted, participation "subjects hospitals to an elaborate and intricate pattern of governmental regulations, both state and federal . . ." [62]). The issue which these facts raised, according to the court, was

". . . whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense" [63]).

Sufficient involvement was found by the court to bring the Fourteenth and Fifth Amendments to bear upon the racially discriminatory policies of the hospitals.

In sum, the cases noted here have held private actions to be subject to constitutional requirements when the private acts can be identified with governmental action, as when the private persons or organizations are empowered by law to act, when public officials participate in private

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[59]) *Smith* v. *Holiday Inns of America, Inc.,* 336 F. 2d 630 at 635 (6 C.C.A. 1964).

[60]) 323 F. 2d 959 (4 C.C.A. 1963).

[61]) Hospital Survey & Construction Act, 60 Stat. 1041 (1946) as amended 42 U.S.C.A. Sec. 291 e(f).

[62]) 336 F. 2d at 964.

[63]) *Id.* at 966.

acts, when the private acts relate to property held under lease from a public authority or purchased subject to continuing control of public authorities, or when private activities are extensively assisted financially by public funds.

It is interesting to note that in neither the *Smith* nor *Simkins* cases is a governmental agent or agency named as a party to the suit. All of the parties in both cases were private parties rather than governmental officials or organizations. Thus, although both decisions found that the government was involved in the constitutionally prohibited activity, the Constitution in both cases was applied to private persons and not to the "state" as the Fourteenth Amendment specifies. What these cases would appear to indicate is that the defendants, by virtue of their particular relationship to the "state" as grantees from the government under pervasive public programs, had lost their purely "private" status and their actions had fallen within the meaning of "state action" as used in the Constitution. It is one matter for a court to find that a public officer or agency has become sufficiently involved in a private act so as to make that public officer or agency constitutionally accountable for the private act. It is quite another to hold that because a public officer or agency is involved in a private act, the private actor is himself constitutionally accountable.

C. Private action subject to constitutional restraints when enforcement powers of the judiciary are invoked

The first major and now classic case raising the question of the role of a court in enforcing private actions which would be unconstitutional if the state were involved is *Shelley* v. *Kraemer*[64]). The specific question it raised was whether private property owners could legally enforce covenants providing that their properties could not be sold to racial minorities. Shelley was a Negro who had purchased and acquired title to a parcel of land in a St. Louis subdivision. Kraemer, and twenty-nine other owners of parcels in the area, had signed a covenant which restricted sale of

[64]) 334 U.S. 1 (1948). The use of racially restrictive covenants following the Second World War was to a large extent the result of a very great demand for housing coupled with the practice of "block-busting". When a Negro family managed to purchase a home in an all white neighborhood, real estate dealers would frighten white home owners into selling their homes at low prices by making predictions that there would now be a great influx of Negroes into the neighborhood and a depreciation of property values. Homes purchased at low prices through these tactics would then be resold to Negroes at high prices. To prevent this, neighborhoods of whites often organized associations, drew up racially restrictive covenants and circulated them in the neighborhood for signatures.

the parcels to the white race only and Shelley's parcel was also subject to the covenant. Kraemer and others sued to restrain Shelley from taking possession and to reacquire title. The Missouri Supreme Court upheld the covenant and ruled that the trial court should grant relief as asked.

The constitutional issue presented was whether judicial enforcement of a private racially discriminatory agreement as to disposition of private land would violate the Fourteenth Amendment equal protection clause. The court found first that "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are rights to acquire, enjoy, own and dispose of property" [65]). Secondly, if such racial restrictions upon land use and disposition were created by statute or ordinance, they would clearly violate the Fourteenth Amendment. And third, if racial restrictions on land use are by private agreement voluntarily adhered to, there is no constitutional violation. In other words, the agreement itself is not unconstitutional. But when those who have made the private agreement seek the intervention of the state judiciary to enforce it, and "it is clear that but for the active intervention of the state courts ... petitioners would have been free to occupy the properties in question without restraint" [66]), then the court is inhibited from taking action by the equal protection clause.

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands" [67]).

Narrowly stated, *Shelley* holds that a private agreement to discriminate racially may not receive judicial enforcement when enforcement would result in judicial denial of a civil right on racial grounds.

A companion case, *Barrows* v. *Jackson* [68]), came before the Court four years later, presenting the question of whether the same type of racially restrictive covenant could be enforced against a co-covenantor in a suit for money damages. In 1944, Barrows and Jackson as well as others had entered into a covenant not to sell their properties to non-Caucasians, the covenant to run with the land, *i. e.*, to be a permanent restriction upon the use of the land, binding upon subsequent title holders. In 1950, defendant Jackson conveyed title to her property to Smallys,

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[65]) *Id.* at 10.
[66]) *Id.* at 19.
[67]) *Id.* at 20.
[68]) 346 U.S. 249 (1953).

non-Caucasians, in violation of the covenant. Barrows thereafter sought to obtain money damages in the California courts for breach of covenant. The trial court refused to entertain the suit on the ground that the Fourteenth Amendment forbad either equitable or legal court enforcement of such a covenant. The California District Court of Appeals affirmed the lower court decisions[69]).

The U.S. Supreme Court held that the state courts could not enforce such a private agreement either directly by injunction or other equitable means or indirectly by permitting a suit at law for breach of covenant. The reasoning was similar to that of *Shelley,* that "to compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property ... The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley, supra*"[70]).

The unique feature of the *Barrows* case is that respondent Jackson was not invoking her Fourteenth Amendment right to the equal protection of the laws as a defense against the suit. Rather, she was in effect invoking the Fourteenth Amendment right of non-Caucasians as a class. Since no non-Caucasian was a party to the suit, the issue presented itself whether under traditional concepts of "standing", she could invoke the rights of third persons not party to the suit as her defense. "Ordinarily", the Court observed, "one may not claim standing in this Court to vindicate the constitutional rights of some third party"[71]). But this case was sufficiently unique to justify relaxation of the rule.

> "We are faced with a unique situation in which it is the action of the state c o u r t which might result in the denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court (346 U.S. at 257). The law will not permit respondent to resist any effort to compel her to observe such a covenant, so widely condemned by the courts, since she is the one in whose charge and keeping reposes the power to continue to use her property to discriminate or to discontinue such use. The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand" (346 U.S. at 259).

[69]) 112 Cal. App. 2d 534, 247 P. 2d 99 (1952).
[70]) 346 U.S. 249 at 254.
[71]) *Id.* at 255.

Question might be raised as to whether the *Barrows* case rests upon as sound a footing as does *Shelley*. The persuasiveness of the logic of *Shelley* is in the fact that the plaintiff-respondent was requesting a court of law to enforce an agreement against a third person not party to the agreement, the defendant-appellant, where such enforcement would have the direct effect of denying to the defendant, strictly because of his race, an important civil right guaranteed by the Constitution. *Barrows*, on the other hand, presented a quite different situation, in which the defendant-respondent had voluntarily made a contractual promise not to sell her property to members of certain minorities. Later, however, she broke that promise, and plaintiff Barrows sought by court action n o t to deny any third person on racial grounds the right to the possession and use of the land purchased from Jackson, but only to obtain money damages for Jackson's breach of a contractual promise not to sell to such person. A court award of money damages would not have had the effect of denying any civil right to Jackson's purchaser nor would it discourage any other persons of those races included in the covenant from purchasing when a willing seller could be found. The chief effect of court action in the Barrows case would have been to discourage people like Jackson from initially and voluntarily entering into racially restrictive covenants which they might not wish to honor at a later date.

The expansion of the concept of "state action" to include court action where the court is involved only to the extent of acting as arbiter to settle private legal differences has been variously criticized[72]). The vulnerability of such an expansion is aptly pointed out by T. J. S t. A n t o i n e :

> "Logically extended, the *Shelley-Barrows* rule simply will not go down. For by now it is plain that in e v e r y case before the courts–in the probate of a will, in the enforcement of an arbitration award regarding an employee discharge, in a criminal prosecution for trespass on a private lawn–there is state action in a true sense. And if the courts in adjudicating rights and relationships between private persons must hold every private person to the identical constitutional standards binding on the state, then effectively over eighty-five years of unbroken constitutional rulings go by the board, and individual action for all practical purposes becomes subject to the fourteenth amendment"[73]).

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[72]) See, for example, S t. A n t o i n e , *op cit. supra* note **; H o r o w i t z , The Misleading Search ..., *op. cit. supra* note **; K a r s t and V a n A l s t y n e , *op. cit. supra* note **; W i l l i a m s , *op cit. supra* note **.

[73]) S t. A n t o i n e , *id.* at 1008.

This observation doubtlessly overstates the danger of the *Shelley-Barrows* rule and the rule as recently articulated in the *New York Times* case, *supra*. For the fact remains that the rule can be used only negatively, permitting the Fourteenth Amendment, when relevant, to be asserted as a d e f e n s e in a private law controversy. The private person is not, as a result of the rule, held to the "identical constitutional standards binding on the state". Whereas private individuals may discriminate on the basis of race with constitutional impunity, the state may not. It is one matter to maintain that private individuals may not secure court assistance in their attempts to enforce private racially discriminatory agreements. It is quite another to maintain that they may make no such agreements or that their legal actions may not be racially discriminatory. The Fourteenth Amendment generally r e q u i r e s that the state be racially indiscriminate in its actions. The *Shelley-Barrows* rule does not require anything of individuals in their private legal relations. The rule does not suggest, for example, that a person of a racial minority could sue a seller unwilling to sell to a person of that race and thereby require the seller to be racially indiscriminate[74]).

The case of *Abstract Investment Co.* v. *Hutchinson*[75]) presents an interestig application of the *Shelley-Barrows – New York Times* rule. In this case, plaintiff instituted an unlawful detainer suit against defendant, a Negro tenant, in order to obtain possession of premises leased to Hutchinson on a month-to-month basis. The municipal court which heard the case refused to accept defendant's affirmative defense, that the only reason plaintiff sought to evict him was because of his race. On appeal to the California district court of appeals, the court framed the question to be decided as follows: "Does judicial enforcement of the eviction of a tenant because of race violate the tenant's rights guaranteed by the Fourteenth Amendment of the Constitution of the United States ..."? The decision answered the question affirmatively, using the reasoning of *Shelley* and *Barrows*, that a court may not enforce a private law right when the right is exercised on a racially discriminatory basis, for such enforcement would amount to the proscribed Fourteenth Amendment state action.

At the outset, there would appear to be a factual problem involved which makes analysis of the case difficult. If it is the landlord's race prejudice which leads him to seek the ouster of the tenant, the question arises as

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[74]) It should be kept in mind that we are discussing here only cases in which a constitutional right is asserted. It is another question whether a person might sue on the basis of a statutory right not to be discriminated against in the sale of real estate.

[75]) 204 C. A. 2d 242, 22 Cal. Rptr. 309 (1962).

to why the landlord permitted a Negro to become his tenant initially, unless it was a case of the landlord's agent having rented the premises to the defendant without the landlord's knowledge that the tenant was a Negro. Assuming the matter of proof is not problematic, the question then is the nature of the right which is being asserted as a defense against the action. Is it the right to have the legal relationship of landlord-tenant continued even though it has expired by its own terms and the landlord is unwilling to renew the relationship? Or is it the right to continue in possession even though the legal relationship has come to an end? Under ordinary private common law rules, an estate or tenancy at will, or a periodic estate, is terminable by either party without the terminating party being required to have a reason. Two questions then present themselves. Has either party terminated the tenancy? The landlord indicates by his court action that he has. If so, the second question is whether the tenant may lawfully remain in possession even though the tenancy has been terminated. The court in this case holds that he may, or at least that he may if it is found that the reason for the landlord's termination was racial discrimination. The effect of such a ruling is to alter private law rules relative to landlord-tenant relationships, whereby a tenancy at will may no longer be terminated by either party at will. This case would suggest that the decision to terminate must have a rational basis, *i. e.*, cannot be based on the race of the non-terminating party.

As Professor Paul Kauper has suggested, classification by race for legislative purpose (and perhaps also for enforcement purposes) would appear to be irrational *per se* and forbidden to governmental authorities.

> "Even though the [Supreme] Court has repeatedly said that classification is a matter for legislative discretion and that the rationality of classification will be presumed, the Court has made clear that classification by race or color is inherently irrational and will not be sanctioned" [76]).

In private legal matters, however, private law has and still does recognize that people may enter into and terminate legal relationships as it suits their purposes so long as such relationships are not forbidden by law. If the law recognizes that private persons may voluntarily agree to enter into a legal relationship which is terminable at will, *i. e.*, on an irrational or rational basis, does the Equal Protection Clause of the Constitution prevent courts from enforcing such an agreement? The question would seem to suggest its own answer.

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[76]) Kauper, The Supreme Court and the Rule of Law, 59 Mich. L. Rev. 531 at 539 (1961).

The contrasts between *Shelley* and *Barrows* on the one hand and *Abstract Investment* on the other are stark. In the former, the very purpose of the legal relationship as expressed by the restrictive covenants was to promote race discrimination. The subject of the disputes were legal documents executed by whites for the sole purpose of excluding non-whites as a class from among those who might acquire rights to ownership of the properties involved. Court action (at least in *Shelley*) would have resulted in denying ownership rights to non-whites as a class and in compelling action of a racially discriminatory nature. The effect of such agreements was quite similar to zoning ordinances based on race.

In the *Abstract Investment* case, however, there is no racial basis for the legal relationship. It does not exist for racial reasons nor does it have racial discrimination as its purpose. But by the terms of the agreement itself, it is terminable for any reason, be it racial, rational or for no reason at all. Thus, although the terms of the agreement provide that the reasons for its termination shall be legally irrelevant, the court rules that the Fourteenth Amendment, solely because of judicial intervention, operates to make the reason for termination relevant. It is, of course, highly questionable whether the courts are constitutionally forbidden to give effect to private decisions of legal consequence, decisions which would be void under the Equal Protection Clause if made by a government authority [77]).

D. Drawing a distinction between permitted private and constitutionally forbidden public acts

The *Shelley*, *Barrows* and *Abstract Investment* cases clearly demonstrate the difficulty of the "state action" doctrine as a theoretical basis for consistent decisions in private law cases involving widely varying factual situations. Although it is the policy of the national and most state governments to discourage and eliminate race discrimination, the wisdom of making the Fourteenth Amendment applicable to all private law controversies merely because the judiciary is present as arbiter is quite doubtful. For at the private law level, rights of equal value and legal standing often come into conflict, rights such as those involved in the *Abstract Investment* case–the property owner's right to a publicly inoffensive degree of choice in the control and use of his property and the right of the racial minority to possess and use private property on the same basis as all other

[77]) For other interesting cases dealing with the question, see *Gandolfo* v. *Hartman*, 49 Fed. 181 (Cir. Ct. Cal. 1892); *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *People* v. *Utica Daw's Drug Co.*, 225 N.Y.S. 2d 128 (1962).

members of society. If the Fourteenth Amendment public right to be free of discrimination is to be made a private right as well, then all other private rights which are of equal constitutional standing must give way whenever in conflict. Then, logically, racial minorities are made immune, for example, from trespass laws where the home owner seeks to eject the uninvited trespasser of another race for racial reasons. And if public authority may not enforce the private right to prevent intruders upon one's private land, self-help and public disorder are thereby encouraged[78]).

Likewise demonstrating the difficulty of the "state action" requirement as it is currently interpreted are cases dealing with the question whether the state is sufficiently involved in private action so as to bring the Constitution to bear. The emphasis in these cases has been first and foremost on inquiry as to the nature and extent of governmental participation in the private action. Thus, the hypothesis is that "state action" in such cases means a certain undefined quantum of governmental participation coincidental with the private acts. The weakness of such a hypothesis lies in the political and social fact that government has generally become more and more involved in private activity. As rapidly expanding technology makes more private relationships of an increasingly complex nature possible, the natural tendency has been for government to extend its powers to encompass and regulate what formerly were considered to be strictly private matters. Indeed, the regulatory power of government has gone so far as to attempt to invade the sanctity of the marital bedroom[79]). It follows that if state action means state involvement in private activity, then that sphere of private activity which will become subject to constitutional regulation will enlarge almost to the same extent as government expands its involvement in otherwise strictly private matters.

In the absence of legislative intervention, which is discussed *infra*, such an undesirable development of constitutional law might still be checked. To do so, courts would need to shift the focus of inquiry away from the element of state participation to an inquiry into the nature of the "private" acts themselves. It is often the case that private actions are labeled as "private" only because they have not heretofore aroused or touched upon the public interest and have not as a result been subjected to public reg-

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[78]) For a case in which a private trespass law was judicially enforced against a Negro without mention of the court involvement, see *Tyson* v. *Cazes*, 238 F. Supp. 937 (D. C. La., 1965).

[79]) See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

ulation. At one time, the right of a private land owner to use his property as he saw fit was almost absolute. But as it became more apparent that private property could be put to uses offensive to the rights of significant sectors of the public, private property rights have been subjected to a great deal of restriction and control. State action as a constitutional matter might therefore be more effectively viewed as including acts of individuals and groups not formally connected with government which are of such scope as to affect the public interest just as the acts of governmental authority may affect the public interest and welfare. With respect to the Equal Protection Clause, for example, one might start from the premise that the Clause does not require the state to protect all aggrieved parties against all forms of discrimination–an impossibility in any event. The logical point at which the Constitution would require such protection would be the point at which private practices of a discriminatory nature affect the public interest or where the right to equal protection is considered of greater social value than the private right with which it is in conflict.

The private right of a landlord to terminate a tenancy at will, it could be argued, is at least as important, as a policy matter, if not more so, than the right of the tenant to be free from racial discrimination in the landlord's decision whether to continue the tenancy. The underlying assumption in this value judgment is that discrimination tends to become threatening to racial minorities when it is practiced systematically in private legal relations so as to constitute a threat to a significant part of the minority. At this point, private action becomes a matter of public concern which would justify the application of constitutional restraints.

The frequent practice of placing legal restrictions of a racially discriminatory character upon private property, as was the case in *Shelley* and *Barrows*, served to bar any and all non-Caucasians who might be financially able and desirous of obtaining title to such properties. The practice, particularly if given legal effect, would result in denying non-Caucasians an important right which Caucasians enjoy–the right to acquire, use and dispose of private real estate. What this suggests is that when one racial group starts "ganging up" on another, the public interest is affected, the private acts become public in nature (and thus can be considered as state action) and the constitutional protections of the Fourteenth Amendment can be legitimately applied. On the other hand, when an individual landlord decides to terminate a tenancy at will with his red-haired tenant because he no longer wishes to rent to red-haired people, the interest of the tenant in being free of legal acts of a discriminatory, irrational nature,

and the interests of the class to which he belongs, *i. e.*, all red-heads, are not sufficient to justify the application of constitutional guarantees[80]).

In actual practice, the approach here suggested, that individuals and groups whose private actions when considered in terms of collective or cumulative effect do involve the public interest sufficiently to bring them within the limits of the Constitution, has been judicially recognized. The Fifth Amendment Due Process Clause, for example, has been held to be applicable to labor unions either on the ground that the union is often clothed by federal statute with powers similar to those of a legislature[81]) or on the ground that the government, whenever it confers special powers upon a union, is responsible for the proper exercise of those powers[82]). Federal labor statutes often confer power upon unions selected by election of employees to act as the sole bargaining agent for the employees in their disputes with the employer and in making contractual agreements with the employer relative to employee rights, duties and benefits. In a sense, then, the union, by government permission, exercises significant control over its own members and it is but one step further to reason that the legal consequences of the exercise of such power and control is to place the union in the same constitutional position as an agency or arm of the state.

Corporations have likewise, to a limited extent, been held to be subject to the restraints of the Constitution, at least to the extent that they exercise powers in areas normally considered as governmental activity. Thus,

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[80]) This is not to suggest that measures of a legislative or executive nature are uncalled for to regulate private discrimination of the more individual type. All that is implied in this discussion is that the problem cannot be solved by the judiciary alone and by means of elevating all legal disputes involving race to a constitutional level.

[81]) In *Steele* v. *Louisville and Nashville R. R. Co.*, 323 U.S. 192 (1944) question arose as to whether the union could discriminate under the Railway Labor Act (48 Stat. 1185, 45 U.S.C.A. § 151 et seq.) against Negro workers in its negotiation as representative of railroad employees of agreements with employer railroads. The Court held: "We think that the Railway Labor Act imposes upon the statutory representative [*i.e.*, the union] of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representatives with powers comparable to those possessed by a legislative body ..., but it has also imposed on the representative a corresponding duty". 323 U.S. at 202. By implication, the Court is suggesting that if the Railway Labor Act had not required that unions exercise their powers in conformity with the Constitution, the Act itself would have been invalid.

[82]) For example, in *Todd* v. *Joint Apprenticeship Comm.*, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F. 2d 243 (7 C.C.A., 1964), a federal district court found that the U.S. Department of Labor had violated the due process requirements of the Constitution by failure to end union race discrimination in a government certified apprentice program on a government project.

in *Marsh* v. *Alabama*[83]), the Gulf Shipbuilding Corporation owned an entire town which contained the normal residences, business district, streets and town police who were appointed and paid by the corporation. A Jehovah's Witness sought to distribute religious literature on the public sidewalks of the town and was arrested after she declined, upon police request, to leave. The Court struck down her conviction for trespass on the ground that her right to freedom of speech and religion under the First Amendment to the Constitution could not be abridged as it would be if the town police were empowered to prevent her from standing on public sidewalks to distribute religious literature. The general principle applied by the Court in arriving at its decision was that although the land and buildings making up the town were all privately owned by a corporation, "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". Here, it was found that the State had p e r m i t t e d a private corporation to perform a public function by organizing and operating an entire town. By so doing, any acts performed by the corporation in its regulation of the town which conflicted with the Constitution could be considered as state action and an unconstitutional exercise of power.

Professor Adolph B e r l e has done much to shed light on determining what factors are crucial to bring otherwise strictly private activities within the confines of the Constitution[84]). His reading of the cases dealing with corporations indicates that corporations have been held to the requirements of the Constitution when the corporation has been granted a specific right or privilege from the state. Further, this would suggest, according to Berle, that "corporations enjoying privileges of any kind under statutory arrangements, and acquiring power of discrimination, may be held to like [constitutional] tests"[85]).

The key to the above quotation is the term "power of discrimination". If private persons or organizations regulated to any degree by the state have the resources or power to make their acts effective and felt by those against whom directed, such persons or organizations, in Berle's view, would meet the "state action" requirements of the Fourteenth Amendment. To emphasize the point, he notes that

> "If there are fifty stores in the vicinity from which an individual can satisfy his needs, discriminatory practice by any one of them has little or no effect on

[83]) 326 U.S. 501 (1946).
[84]) B e r l e, *op cit. supra* note **.
[85]) *Id.* at 951.

> the individual. If there is a single chain of stores, the effect may be to drive him out of the neighborhood ... The whim of a single houseowner directed towards his tenants' religious practices might be private. The prejudice of the owner of ninety per cent of the available housing would be a public matter" [86]).

The above analysis might have been utilized in those cases previously discussed in which governmental involvement was negligible or present only in the form of court intervention, for these cases clearly demonstrate that judicial exercise is often unconvincing in its attempts to find sufficient state involvement in private action sought to be brought within the scope of the Constitution. Furthermore, the attempt to delineate a constitutionally sufficient amount of state involvement from a legally insufficient amount is becoming more and more an exercise in academic hair-splitting.

What is needed for the future is a clear statement from the highest court indicating the standards or tests by which it is to be determined whether and which private actions are subject to constitutional restraints. Such a clarification, if based upon the foregoing, would find private actions subject to constitutional restraint when

1) the act violated a constitutionally protected civil right;

2) minimum (rather than "sufficient") state involvement in the act was found, which might take the form of state regulation of the subject, the grant of a license, right or privilege to act, or court involvement; and,

3) the consequences of the act are sufficient to affect the public welfare or arouse public concern.

IV. The Civil Rights Act of 1964

A. Introduction

The foregoing discussion has been concerned solely with judicial applications of the Constitution in private law controversies for purposes of protecting guaranteed civil rights. In recent years, however, a number of states as well as the federal government have enacted statutes designed to protect and secure the constitutional rights of individuals in their private relations. By 1964, a total of 34 states had some form of civil rights legislation on their books [87]). These statutory provisions have been variously designed to deal with such matters as equal employment opportunities, non-discriminatory rental and sale of housing, public accommodations, private

[86]) *Id.* at 952–953.

[87]) For a list of states and type of legislation each has, see Appendix V, *Bell* v. *Maryland*, 378 U.S. 226 at p. 284.

schools and private hospitals. Of these 34 states, 31 have antidiscrimination laws dealing with privately owned public accommodations, 25 have fair employment laws and only 11 have laws dealing with discrimination in the sale and rental of housing[88]). Of course, there remain 16 states, most of them southern, which have no legislation of this nature at all.

On July 2, 1964, the President signed into law a statute known as the "Civil Rights Act of 1964"[89]) which amended and added to existing federal civil rights legislation and provided for the first time since the *Civil Rights Cases* of 1883 a section requiring nondiscrimination in public accommodations doing business in interstate commerce[90]). Because the *Civil Rights Cases* had never been overruled[91]), the Congress chose to base the public accommodations portion of the act on its power to regulate interstate commerce rather than on its power to implement the Fourteenth Amendment as granted in Section 5 of the Amendment. The necessity of the Supreme Court reconsidering the present day validity of the *Civil Rights Cases* was thereby avoided. Whether the Court would have overruled the *Cases* in light of recent constitutional developments in the area of civil rights remains a matter of speculation. One writer has persuasively argued that even if federal civil rights legislation dealing with private discrimination was enacted based upon the Fourteenth Amendment powers of Congress, it would not be necessary to overrule the *Civil Rights Cases* in order to uphold such legislation[92]).

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[88]) *Ibid.*

[89]) Public Law 88–352, 78 Stat. 241 (1964).

[90]) *Id.*, Title II.

[91]) See discussion *supra* under Part III of this paper.

[92]) Frantz, *op. cit. supra* note **. The author argues that the correct interpretation of the *Civil Rights Cases* is as follows: "1. The fourteenth amendment places the primary responsibility for enforcing equality of civil rights on the states, but lodges in Congress adequate power to insure that the state's failure to discharge this responsibility shall not result in leaving these rights unprotected. 2. Where a racial group is discriminated against through a cultural pattern in which private acts play a part, the constitutional wrong, under the fourteenth amendment, is not the act of the individual, but the failure of the state to take adequate steps to prevent it, or to afford redress. 3. Congress, however, is not limited to striking directly at the constitutional wrong. It may also offset it by providing the protection which the state has failed to provide. But this power exists only when the state fails to do its duty. 4. Congress may provide in advance for a possible violation. But if it does so, such legislation must be made conditional on the state's failure to act. 5. Congressional legislation which impinges directly on the conduct of private individuals and which operates uniformly regardless of the role played by the state is unconstitutional. But this is not because 'private acts' are beyond the limits of congressional power. Rather, it is because: (a) Congress may not presume that states will fail to discharge their constitutional duties; (b) Congress may not deprive the states, in advance of any default on their part, of the very function the amendment commands them to perform". *Id.* at p. 1359.

B. Major provisions

Generally speaking, the act prohibits discrimination in a number of activities, including voting in federal elections (Title I), places of public accommodations (Title II), public facilities (Title III), public schools (Title IV), federally assisted programs (Title VI) and employers employing twenty-five or more employees (Title VII). Titles I, III and IV are directed against state action where the state is clearly involved. Titles II, VI and VII deal with the actions of private persons of a discriminatory nature.

The first section of Title VI (§ 601) broadly provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance". This provision would appear to relieve the federal courts of the problems of determining in specific cases whether the institution or group receiving federal financial aid thereby has the sufficient nexus with the state to bring its actions within the requirements of the Fourteenth Amendment. Title VI, rather than providing for judicial enforcement of its provisions, grants broad authority to the federal agencies administering the assistance programs to terminate or withhold aid where discrimination is being practiced. The title also provides for judicial review of a federal agency's determination to withhold aid where discrimination is being practiced (§ 603).

Title VII makes it unlawful, *inter alia*, for an employer engaged in an industry affecting commerce who employs a certain minimum number of employees to discriminate in the hiring or firing of employees on the basis of race, color, religion, sex or national origin. Also prohibited is employment discrimination by labor unions and employment agencies. Exempted from the title are religious organizations where the work performed is related to religious activities, and educational institutions where the work is related to educational activities (§ 702). This title is, of course, based upon the constitutional power of Congress to regulate interstate commerce. There are many limitations upon the application of the title, among them the provision (§ 703 (e)) exempting from the act employment discrimination based on religion, sex or national origin where the religion, sex or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise".

The title of most significance, at least in terms of the notoriety surrounding its passage, is Title II covering discrimination in public accommodations operating in interstate commerce. Prohibited is discrimination based on race, color, religion or national origin. The title covers four types

of public accommodations: 1) establishments which provide lodging to transient guests, *e. g.*, hotels, motels and inns; 2) establishments engaged in selling food for consumption on the premises; 3) places of public entertainment, *e. g.*, theaters, movies, concert halls, sports arenas, etc.; and 4) any establishment in or on the premises of an establishment described in 1–3 which serves patrons of those listed places. Discrimination is prohibited to such establishments in either of two cases: 1) when the operations of the establishment affect commerce (which may mean, for example, that interstate travelers eat there, or that films are shown which "move in commerce"); or 2) when the discrimination is supported by state action. For purposes of the act, state action is defined as discrimination carried on under color of law, under a law requiring such action, or under a custom enforced by public authority. Exempted from the prohibitions of the title are establishments which are not in fact open to the public and are not made available to the customers of establishments which do fall within the title.

Title II provides only two specific judicial remedies for its violation. A person aggrieved may bring a civil suit for injunctive relief, or, in cases where there appears to be a pattern or practice of resistance to the requirements of the title, the Attorney General of the United States may bring a civil suit requesting preventive relief. The aggrieved party always has the option, of course, of bringing suit instead under any other federal or state law which would serve to vindicate any rights asserted under this title.

The chief effect of Title II on the development of constitutional law is to relieve the federal courts of the necessity of deciding cases such as *Burton* v. *Wilmington Parking Authority* and *Smith* v. *Holiday Inns of American, Inc., supra,* at least so far as establishments operating in interstate commerce are involved. Thus, in the absence of contrary state law, operators of public accommodations functioning only in intrastate commerce with no effect on interstate commerce remain free to discriminate except when state action is involved in some manner in the private discriminatory act.

C. Constitutionality

Thus far, only the constitutionality of Title II of the Civil Rights Act has been passed upon by the Supreme Court in the cases of *Heart of Atlanta Motel* v. *United States*[93]) and *Katzenbach* v. *McClung*[94]). In both cases,

[93]) 379 U.S. 241 (1964).
[94]) 379 U.S. 294 (1964).

the question was raised whether the exercise of legislative control over private racial discrimination was a constitutionally valid exercise of Congress' commerce powers. In both cases, the Court held that such was a valid exercise of the commerce power. The Court, in the *Atlanta Motel* case, noted first that the 1964 act contrasted with the federal act declared unconstitutional in the *Civil Rights Cases* in that the latter act broadly prohibited racial discrimination in places of public accommodation whereas the former act prohibits such discrimination only to enterprises having a direct and substantial relation to the interstate flow of goods and people or to acts of discrimination in which state authority is involved. Secondly, the Court points out that ample evidence was introduced in the Congressional hearings concerning the Act to show that racial discrimination does in fact place burdens upon interstate commerce. After a long discussion of the nature and limits of the constitutional power of Congress to regulate interstate commerce, the Court concludes:

> "Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce ... The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no 'right' to select its guests as it sees fit, free from governmental regulation"[95]).

Both questions as formulated by the Court were answered in the affirmative. Still untouched, however, was the question whether the Congress today might have enacted such legislation under its power to implement the Fourteenth Amendment. The question would now appear to be academic, since this federal legislation plus the many state statutes on the same subject will no doubt protect the rights of minorities to a degree sufficient to prevent consideration of federal regulation of intrastate public accommodations.

Now that the constitutionality of Title II has been upheld, the only significant question which remains and which has generated a large volume of litigation in the lower federal courts is the question whether any given establishment falls within the act, *i. e.*, is engaged in interstate commerce or affects it[96]).

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[95]) 379 U.S. 241 at 258–259.

[96]) See, for example, *Willis* v. *Picknick Restaurant*, 231 F. Supp. 396 (D.C. Ga. 1964);

V. CONCLUSIONS

As this paper has attempted to point out, the fundamental written law of the United States, the Constitution, was conceived of and written as a blueprint for the limiting and regulating of governmental power to assure that individual freedom would be adequately protected and nurtured. With very few exceptions, the rights enumerated in the Constitution were rights guaranteed as against encroachments by government. It was not until the early decades of this century that the Supreme Court began to recognize that power not formally related to governmental functions might be utilized by groups of individuals in such a manner as to effectively deny those very civil rights which the Constitution had been designed to secure. Such power was recognized by the Court as it manifested itself in the great upheavel of the 1930's between employers and labor unions and resulted in the judicial application of the First Amendment guarantees of free speech to employer-employee relationships.

When in 1954 the Court determined that the proper interpretation of the Constitution forbad the use of public facilities on a racially segregated basis, constitutional law entered upon uncharted seas, for it was now viewed as an umpire between warring social groups. Again, it was apparent that large sectors of the population, by sheer weight of numbers, were exercising power in such a manner as to deny rights to minority groups; rights which were thought to be constitutionally guaranteed. The considerable pressure for social change brought to bear upon the judiciary as well as upon other public institutions led the courts to sometimes sacrifice legal tidyness for the larger objective of preventing subtle relationships between public and private power from denying the constitutional rights presumed to be fundamental in a democratic society. The public agitation for social change together with the lack of sufficient legislative protections for basic rights thus led the Supreme Court to apply the Constitution increasingly to legal disputes previously viewed as private law disputes.

Although the objective of the Court was laudable, the necessity of broadening the constitutional doctrine of state action to enable the Constitution to reach "private" disputes, created many new and troublesome problems as to the exact relationship between public authority and private power. Had the Congress and state legislatures not stepped in with meaningful legislation which offered real protection for fundamental rights in private relationships, it appears likely that the doctrine of state action would

Pinkney v. *Meloy,* 241 F. Supp. 943 (D.C. Fla. 1965); *Rogers* v. *Provident Hospital,* 241 F. Supp. 633 (D.C. Ill. 1965).

eventually have become little more than an unconvincing exercise in legal rhetoric.

The direction in which constitutional law had been proceeding demonstrated rather clearly that in a democratic society it is, perhaps, not so wise to rely exclusively upon a constitutional court to implement the provisions of a fundamental law written in broad and general terms. Such a task requires heavy reliance upon legislative detail and guidance. Without such legislative participation, the court must shape and fit the general terms of the constitution to the specific social, economic and political needs of the present. And although those needs may later change, the court remains haunted by its interpretive and implementing decisions.