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THE BURGER COURT, "STATE ACTION," AND CONGRESSIONAL ENFORCEMENT OF THE CIVIL WAR AMENDMENTS

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All that is gold does not glitter, Not all those who wander are lost.
—Bilbo Baggins[1]

There is an uncertainty abroad in the land. At its root, to speak boldly, lies the fear that the fate of individual liberty in this Nation is in the hands of a Supreme Court whose newest members, cast in the intellectual likeness of a disgraced Executive, lack sufficient sensitivity to libertarian ideals to preserve the American democracy as we know it. Particularly for those who found in the Warren Court the moral leadership necessary to move the country toward a just resolution of the perplexing social problems that plague us all, the skies seem dark. Our constitutional system has always recognized that majorities can be expected to show little respect for individual liberty and that, accordingly, the power of legislatures and executive officers must be held in check by adherence to enduring principles of law that fix the boundaries of governmental action. This is the place of the Bill of Rights and its analogue, the fourteenth amendment. And it is, of course, the Supreme Court's role to enforce those limitations in order to protect the individ-

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1. J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING 325 (Bal. ed. 1965).

ual rights and liberties so critical in a free society. Against this background, intransigence in the judicial department is sobering. The doubt runs deep; it will not easily be dispelled. Nevertheless, we do well to examine the Burger Court on its record, for it is only on the reported decisions that the Court's performance, indeed its character, can fairly be judged. This article will evaluate the Burger Court's "state action" decisions—those in which the Court has defined the reach of the Federal Constitution for the protection of individual liberty. At the outset, it will be necessary to review some fundamentals and to trace the development of the state action concept from the earliest cases following the Civil War through the Warren Court years. Then, the Burger Court's decisions will be treated, with a view toward identifying the extent to which the present Court has rejected the expansive notion of state action forged by its predecessor and adopted in its place a much more restrained approach.

This article will contend that the Burger Court has retreated from the Warren Court's view of state action for two essential reasons. First, the Court perceives for itself a sharply limited role in this legal system and recoils from any approach to constitutional adjudication that suggests activism—the unnecessary or premature exercise of federal judicial power. Second, the Burger Court understands the state action limitation in the fourteenth amendment as a key constitutional recognition of a fundamental tenet of the American scheme—federalism. To the extent the definition of state action is broadened, thereby making more activities subject to constitutional attack, the Court is increasingly called upon to intervene in local affairs. Through this process social problems are constitutionalized, taken away from other agencies of government—particularly state legislatures. In the view of the Burger Court, the state action concept is thus crucial to the balance between state responsibility and federal judicial power.

This article will argue that in cases involving not state action within the meaning of the fourteenth amendment, but "government action" sufficient to bring into play the specific provisions of the Bill of Rights, the Court's failure to invoke constitutional safeguards cannot justifiably rest on the values of federalism. Only the Court's sense of appropriate judicial restraint impedes a decision that significant governmental involvement in challenged action is sufficient to invoke the Constitution. In some cases the Court will determine that the Bill of Rights is applicable and will turn to the substantive question whether the conduct under attack is valid. But in other cases, those in which the Congress has

become involved in ostensibly private conduct in order to further the same interests protected by the Constitution, the Court's tendency to avoid confrontation with a coordinate branch of government will counsel restraint. In a final section this article will defend the thesis that the Burger Court will generally uphold congressional action designed to protect individual liberty. The Court will approve not only congressional enactments that give effect to the Bill of Rights but also legislation based on the enforcement provisions of the three Civil War amendments. In the latter cases the Court will uphold federal statutes that govern the very matters the Court itself refuses to reach by deferring, through the state action device, to state legislatures. This is true because in construing enforcement legislation the Court's concern is not the precipitous intervention of federal *judicial* power, grounded in the Constitution of its own force, but instead the application of federal *legislative* power. In the Burger Court's view, the exercise of legislative power, while certainly posing questions of federalism, is still less intrusive than Court decisions. In addition, the Court's predisposition to defer to reasonable attempts by the Congress to deal with social problems leads inexorably to decisions upholding enforcement legislation.

If this proposition is correct, and it is the design of this article to show that it is, then the Burger Court may be a good deal more supportive of individual liberty than is popularly assumed. If liberty in the 1970's can be as effectively safeguarded by the enlightened construction of legislative enactments as by interpretation of the Constitution itself, there is no obvious reason to object to the route the newly constituted Court has chosen. It will be urged here that in a real sense the future of individual liberty now depends upon the Burger Court's continued willingness to give a liberal reading to the civil rights legislation enacted in the last two decades, its concurrent willingness to broadly construe similar legislation enacted during the Reconstruction period, and, perhaps most important, the Congress' willingness to enact new and far-ranging legislation to protect individual liberty against encroachment by ostensibly private action. This last bears close attention. For in the modern industrial state, even as the public sector necessarily increases in size and importance, the enormous economic and political power wielded by corporate enterprise poses the most serious threat to individual liberty. As the Nation moves into its third century, the extent to which the Congress is prepared to deal with private intrusions upon liberty is the great question in constitutional law.

I. THE CONCEPT OF STATE ACTION

> It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject of the amendment.
>
> —Mr. Justice Bradley[2]

A. The Early Decisions

It is a commonplace that the key constitutional provision regarding individual rights and liberties, the fourteenth amendment, applies only to the actions of state government.[3] Thus, the Constitution of its own force offers protection from the acts of private persons only insofar as they can be linked with the state,[4] leaving purely private disputes and misdeeds for regulation under the police power.[5] As a prerequisite to federal intervention, a *state* must be shown to have deprived an individual of life, liberty, or property or to have denied him or her the equal protection of the laws. Buried as it is in the inscrutable records of the period, the intent of the framers of the fourteenth amendment—and its sister Civil War amendment, the fifteenth[6]—remains a matter of dis-

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2. Civil Rights Cases, 109 U.S. 3, 11 (1883) (opinion of the Court).

3. The fourteenth amendment provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5 (emphasis supplied).

4. The language used in the text is left vague here with the expectation that later sections of this article will to some extent define what state actions may be subject to constitutional limitation under the fourteenth amendment.

5. P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 137 (1962).

6. The fifteenth amendment, which like the fourteenth contains a "state action" limitation, provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any *State* on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend XV (emphasis supplied); *see* James v. Bowman, 190 U.S. 127 (1903) (state action required under fifteenth). The fifteenth amendment was adopted in 1870, two years after

pute.[7] At all events, the fourteenth amendment was the child of abolitionists, specifically the Radicals in the Republican Party. Men like Sumner, Wilson, Bingham, Howard, and Stevens saw in the amendment a necessary and final blow against the remnants of slavery, itself put to rest by the thirteenth amendment.[8] Thus it is clear that the fourteenth amendment was intended to invalidate the Black Codes that had sprung up in the South to perpetuate a caste system and, to the extent possible, to ensure that the southern states were unable in the future to deny civil rights to former slaves.[9] More than this it is difficult to say. Whether

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the Nation had approved the fourteenth. *See generally* Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965). It has been suggested that the Radicals' motives were practical as well as principled. Indeed, blacks may well have been enfranchised primarily to strengthen the Republican Party in the South. Oregon v. Mitchell, 400 U.S. 112, 254-56 (1970) (Brennan, J., concurring & dissenting); *see* Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13, 16 (1949).

7. The literature on the subject is voluminous and contradictory. The following list is merely representative. *E.g.*, 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1083-1118 (1953); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); W. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1898); J. TEN BROEK, EQUAL UNDER LAW (1965) (originally published as THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950); Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (pts. 1-2), 47 YALE L.J. 371, 48 YALE L.J. 171 (1938). On the question whether the framers intended to prohibit segregation, as distinguished from slavery, see J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 201 (1956); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

8. The thirteenth amendment was adopted in 1865. It provides as follows:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

Significantly, the thirteenth amendment on its face is not subject to a "state action" limitation. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-39 (1968). Taken together, the three Civil War amendments have been termed a second American Constitution, fixing the temper of political life in the years since. Frank & Munro, *supra* note 7, at 166.

9. *See* G. STROUD, A SKETCH OF THE LAWS RELATING TO SLAVERY (1968); T. WILSON, THE BLACK CODES OF THE SOUTH (1965). While there was considerable disagreement among the ranks of Republicans, the majority intended to ensure equality of "civil rights" and at the same time to put "social rights" outside the reach of the Constitution.

> Thus the original distinction appears to have been that the law should know no distinctions of color, but that personal taste should be left to govern itself. In this the practical difference between the abolistionist [*sic*] and the middle position was that the abolitionists as a moral matter encouraged complete intermingling even though this entered the zone of taste, while the middle group lacked any such fervor.

Frank & Munro, *supra* note 7, at 149; *see* Bell v. Maryland, 378 U.S. 226, 293 (1964) (Goldberg, J., concurring).

the Radicals themselves, not to say a majority in the Congress and state legislatures, intended the amendment to create new rights protected by federal power, to protect existing or new rights against both state action and private conduct apart from the state, or to enable the Congress to enact supplemental legislation to do any of these things is at most debatable and at least unknowable from the materials available.[10] From the outset, then, the interpretation of the amendment fell to the Court, which in its earliest decisions gave the new amendment a narrow reading.

The most influential of the Court's early opinions came in the *Civil Rights Cases*, decided in 1883.[11] Justice Bradley's majority opinion directly addressed the question whether the 1875 Civil Rights Act[12] was authorized by the thirteenth or fourteenth amendments. But the opinion additionally set forth in some detail the reach of the fourteenth amendment of its own force. Viewing the language of the amendment on its face, the Court said:

> [C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.[13]

No matter what the precise holding of the *Civil Rights Cases* may have been—and that is a matter this article will consider—it is this language that has ruled interpretation of the fourteenth amendment to the present day. The fundamental proposition is that the state action limitation draws a line, however difficult to discern in the particular case, between

10. As the Court stated in the *Segregation Cases*, the sources are "inconclusive." Brown v. Board of Educ., 347 U.S. 483, 489 (1954); Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 110 (1966).

11. 109 U.S. 3 (1883).

12. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (codified in scattered sections of 10, 42 U.S.C.). Congressional power to enforce the Civil War amendments through legislation will be examined *infra*.

13. 109 U.S. at 17.

legal arrangements wholly within the sphere of the state police power and others subject to federal intervention. If it were otherwise, the division of authority between the states and the national government—federalism—would be threatened.[14]

Other cases decided in the same period consistently adhered to this theme. In *United States v. Cruikshank*,[15] in the midst of a bitter dispute over the outcome of the 1872 election, a number of blacks had assisted a sheriff in taking control of a local courthouse. A mob of whites set fire to the building and shot at the blacks as they emerged. Several blacks were killed, and the Department of Justice sought an indictment charging the whites with conspiracy to deprive their victims of rights secured by the Federal Constitution.[16] In the course of its opinion quashing the indictment on various grounds, the Supreme Court intimated the result later reached in the *Civil Rights Cases*—that federal power cannot intrude into the province of state law to punish private conduct unless the state itself is linked with the private action.[17] Similarly, in *Ex parte Virginia*[18] the Court sustained the indictment of a state judge for

14. That federalism was at the forefront of the Nation's thinking when the *Civil Rights Cases* were decided is well documented. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957). Justice Harlan was the lone dissenter in the case. After stating his general position verbally on the day the Court's decision was announced, he worked for weeks to set his thoughts down in writing. At one point his thinking stalled, and he was put back on track only when Mrs. Harlan produced the very inkstand Chief Justice Taney had used to write his opinion in the *Dred Scott* case. The sight of the inkstand reportedly inspired Harlan to complete a dissent that would finally put to rest the notion that the Constitution permits the denial of civil rights to black people. The dissent took four paths to its result. First, Harlan argued that one of the cases, which involved discrimination by a railroad operating in interstate commerce, might be controlled by commerce clause precedents. Second, even granting Justice Bradley's contention that Congress could act to protect individuals from state action only, Harlan argued that innkeepers and common carriers are agents of the state, charged with the responsibility to serve all comers on an equal basis. Third, Harlan took the position that the 1875 Act was a valid exercise of the Congress' power to enforce the thirteenth amendment by prohibiting the remaining incidents of slavery. And, finally, Harlan maintained that in order to enforce the fourteenth amendment Congress has power to reach purely private action. *See generally* Watt & Orlikoff, *supra* note 6, at 31-32; Westin, *supra* at 674-85.

15. 92 U.S. 542 (1876).

16. *See* Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1365 (1964).

17. Specifically, the Court said:

> The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the States . . . .

92 U.S. at 554.

18. 100 U.S. 339 (1879).

excluding blacks from the jury list only because the judge was an agent of the State of Virginia.[19] And in *United States v. Harris*[20] the Court held a key section of the Ku Klux Klan Act of 1871 unconstitutional on the ground that it impermissibly reached private action, in that case the lynching of four blacks by a band of whites.[21]

In succeeding years, however, the Court's opinions extended the scope of the fourteenth amendment through an analytical process that gradually undermined the wooden notion of state action set forth in the early cases. Instead of tying the definition of state action to the text of the amendment itself, the Court expanded the concept on several fronts to subsume quasi-official action in various forms. The Court first disposed of the argument that a state officer who exceeds his authority under state law or custom, who indeed violates state law, cannot be held to have acted for the state for purposes of the fourteenth amendment.[22] That proposition has some appeal on first blush. On an analogy to general tort principles it seems plausible to conclude that the state is not involved in the ultra vires actions of its employees.[23] Yet on closer examination the argument is untenable; it would limit the application of the fourteenth amendment to an extremely narrow class of

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19. In the *Civil Rights Cases* Justice Bradley pointed particularly to *Ex parte Virginia* to illustrate his view of the limits on federal power. 109 U.S. at 15. The pertinent language from *Ex parte Virginia* is:

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.

100 U.S. at 346-47; *see* Virginia v. Rives, 100 U.S. 313, 318 (1879).

20. 106 U.S. 629 (1882).

21. In strong language *Harris* made it clear that, for that time at least, the scope of the fourteenth amendment was restricted to official action:

> When the State has been guilty of no violation of [the amendment's] provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.

106 U.S. at 639.

22. The argument was made and rejected without elaboration in *Ex parte Virginia*, 100 U.S. 339 (1879); *see* Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 352-53 (1963).

23. Indeed, several eminent names have been associated with this position. *E.g.*, Screws v. United States, 325 U.S. 91, 147-48 (1945) (Roberts, J., dissenting); Snowden v. Hughes, 321 U.S. 1, 17 (1944) (Frankfurter, J., concurring); Raymond v. Chicago Union Traction Co., 207 U.S. 20, 41 (1907) (Holmes, J., dissenting). *But see* Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 244-45 (1931) (Brandeis, J., opinion of the Court).

cases—those in which positive state law or custom itself is invalid. Under this approach the great majority of cases in which state authorities mistreat individuals, albeit also in violation of state law, would not be cognizable under the Federal Constitution.[24] To avoid such a result, the Court recognized that a state agent possesses power by virtue of his or her position, and it is that power that links all official actions to the state.[25] Thus, a police officer who brutalizes a suspect on the way to the stationhouse is in a position to do so only because he is clothed with official authority, and it is clear that his action must be ascribed to the state.[26] By contrast, if the same officer strikes his neighbor in a dispute over a boundary line between their properties, he acts in a private capacity, and it is just as clear that the fourteenth amendment is not implicated.[27]

In the white primary cases the Court enlarged the concept of state action to encompass the conduct of private persons exercising power delegated by the state.[28] In the first case to reach the Court Justice Holmes struck down a Texas statute that prohibited blacks from participating in a political party primary.[29] The state action presented—a positive enactment of the state legislature—was clear, and the Court found ample support in the precedents for its result. In a like manner the Court had no difficulty striking down a subsequent statute, obviously drafted to circumvent the Court's first ruling, that authorized the party executive committee to determine the qualifications of voters in the primary. When blacks were once again excluded, the Court held that Texas had still not avoided the reach of the fourteenth amendment.[30] By placing

24. Williams, *supra* note 22, at 352; Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1087 (1960).

25. Williams v. United States, 341 U.S. 97, 99-100 (1951).

26. Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941); *see* Monroe v. Pape, 365 U.S. 167 (1961); Williams v. United States, 341 U.S. 97 (1951).

27. Screws v. United States, 325 U.S. 91, 109-10 (1945). There are, of course, close cases. *E.g.*, Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975) (off-duty police officer who used chemical mace and service revolver in barroom brawl acted under color of state law). For examples of the early treatment of the question whether the fourteenth amendment comes into play when the action complained of violates state law, see Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907); Barney v. City of New York, 193 U.S. 430 (1904). *See also* Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 378-81 (1958).

28. Both the fourteenth and the fifteenth amendment, which prohibits race discrimination in voting, were involved in these cases. Both, of course, contain "state action" limitations. *See* notes 3 & 6 *supra*.

29. Nixon v. Herndon, 273 U.S. 536 (1927).

30. Nixon v. Condon, 286 U.S. 73 (1932).

authority to determine voter qualifications in a particular committee rather than in the party as a whole or its state convention, the state had intervened in the affairs of the party to empower a few of its members to make decisions binding on all. "Power so intrenched," said the Court, "is statutory, not inherent."[31] When, however, the state party convention itself decided that blacks would be excluded from the primary, the Court at first let the discrimination stand. Reasoning that the extensive state regulation of the primary was neutral, the Court deferred to the determination of the private political group.[32] Yet that decision was soon expressly overruled when the Court held that a political party is essentially performing a state function in conducting a primary that the legislature has established as an integral part of the election scheme.[33] To round out the picture, the Court ruled 9 years later that primaries conducted by the Jaybird Association, which operated with minimal state contacts in a single Texas county, must be open to blacks.[34] The generalization to be drawn from the white primary cases is that, at least in the crucial area of the selection of public officials, the state cannot avoid its constitutional obligations by delegating key functions to private organizations.[35]

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31. *Id.* at 85.

32. Grovey v. Townsend, 295 U.S. 45 (1935).

33. Smith v. Allwright, 321 U.S. 649 (1944). The Court placed heavy reliance upon its then recent opinion in United States v. Classic, 313 U.S. 299 (1941), which held that the right to vote for federal officers, guaranteed by article I, § 2 of the Constitution, extends to a party primary that influences the ultimate selection of public officials. *Smith's* use of *Classic* has since been questioned. *E.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 28-29 (1959). However, at the time the Court was persuaded that *Classic* had a bearing on *Grovey v. Townsend*:

> The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that *state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State.*

321 U.S. at 660 (emphasis supplied).

34. Terry v. Adams, 345 U.S. 461 (1953).

35. In *Smith*, for example, the Court said:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organiza-

The decade of the 1940's closed with two decisions that promised to expand the scope of state action even further—perhaps to obliterate the notion altogether as a significant restraint on the intervention of federal judicial power. In *Marsh v. Alabama*[36] a member of a religious sect had been convicted of criminal trespass for distributing literature in the company town of Chickasaw, Alabama.[37] The state contended that since Chickasaw was wholly owned by a private corporation, the ordinary protections of the first amendment, applicable against the states through the due process clause of the fourteenth, were inapplicable.[38] Put simply, a private concern rather than the state had denied the petitioner the freedom of speech.[39] In an opinion by Justice Black, the Court cut through the superficial argument that the decision should turn on property law principles and held instead that "[t]he 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."[40] Since Chickasaw was in all respects indistinguishable from "any other American town,"[41] it must be treated similarly for constitutional purposes. *Marsh* thus underscored the premise of the white primary cases—that the state cannot turn over

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tion to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

321 U.S. at 664.

36. 326 U.S. 501 (1946).

37. The Court explained that Chickasaw was a suburb of Mobile. The Gulf Shipbuilding Corporation owned the principal property, consisting of residential buildings, streets, a sewer system, and a block of business establishments used freely by the inhabitants. The deputy sheriff who arrested the petitioner was responsible to the sheriff of Mobile County, but his salary was paid by the company. *Id.* at 502.

38. Existing precedents made it clear that, if the case had arisen in an ordinary municipality, the conviction for distributing literature could not have withstood constitutional challenge. *E.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943) (municipal ordinance forbidding door-to-door distribution of literature cannot constitutionally be applied to Jehovah's Witness distributing religious literature); Lovell v. City of Griffin, 303 U.S. 444 (1938) (right to distribute literature cannot constitutionally be conditioned on obtaining a permit from public officials operating without objective standards).

39. As the Court put it:

> [I]t is the State's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these [first amendment] freedoms.
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> . . . The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. . . .

326 U.S. at 505-06.

40. *Id.* at 506.

41. *Id.* at 502.

essentially public functions to private hands and in that way circumvent constitutional limitations. Moreover, it was now clear that the expansive definition of state action taking shape in the Court's decisions would not be limited to the protection of blacks through the equal protection clause, but would also be brought to bear in other constitutional contexts.[42] In the aftermath of *Marsh*, the argument was advanced that *any* entity that exercises sufficient power over individuals to limit liberty in the manner of government must be subject to the same constitutional restraints as would apply to the state.[43]

The second decision of far-reaching import came in *Shelley v. Kraemer*,[44] perhaps the most criticized case of its time. Property owners in St. Louis had voluntarily entered into an agreement to restrict the sale of parcels of land to members of the white race. The covenant expressly stated that its purpose was to exclude blacks and orientals. Some 30 years later, a black couple purchased one of the lots without knowledge of the restrictive covenant. A group of adjoining property owners then obtained an order from the state courts restraining the couple from taking possession, divesting them of title, and revesting title

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42. In *Marsh* itself the Court applied the fourteenth amendment due process clause to a private company performing the public function of operating a town.

43. St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 1016 (1961). It is plausible to argue that the framers of the fourteenth amendment were not so much interested in placing limitations on state power as in protecting individual liberty. At the time the principal threat to that liberty came from government and not private organizations and, so goes the argument, the framers reasonably couched the new amendment in terms to meet only the present evil. Today, when great private corporations and associations exercise enormous power over individuals, it is consistent with the purpose of the framers to apply the fourteenth amendment to their actions as well as to those of government. In the case of corporations chartered by the state, the argument is even stronger. *See, e.g.*, Berle, *Constitutional Limitations on Corporate Activity– Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957); Miller, *The Constitutional Law of the "Security State,"* 10 STAN. L. REV. 620, 661-66 (1958). Similarly, labor unions are subject to extensive governmental regulations and they, too, have been offered as quasi-public entities to which constitutional limitations should apply. *See, e.g.*, Rauh, *Civil Rights and Liberties and Labor Unions*, 8 LABOR L.J. 874 (1957). On the other hand, there is perhaps more support for legislative protection. *E.g.*, Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 611 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345, 348-49 (1961). Of course, the Court has not applied constitutional restraints directly to unions. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950); Local 1498 v. American Fed'n of Gov't Employees, 522 F.2d 486 (3d Cir. 1975). *But see* Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944) (relying ultimately on a statutory ground).

44. 334 U.S. 1 (1948).

in the grantor.[45] In the Supreme Court Chief Justice Vinson's majority opinion held that the state court enforcement of the restrictive covenant constituted invalid state action within the meaning of the fourteenth amendment. While the Court allowed that the covenant standing alone was not unconstitutional—since it was created by private as opposed to state action—the court order giving legal effect to the covenant sufficiently involved the state in the private discrimination to invoke the constitutional guarantee of equal protection of the laws.[46]

The logical possibilities of the *Shelley* analysis prompted exhaustive attention in the law reviews. "What," asked Professor Wechsler, "is the principle involved?"[47] If *Shelley* meant that private racial discrimination in the abstract may be immoral but not unconstitutional, but that the Constitution forbids the states from recognizing the private person's discrimination, what case was as a practical matter left outside the reach of the fourteenth amendment? A parade of horribles came easily to mind. Can a state probate a will that "draws a racial line" among its devisees?[48] Can the state arrest and prosecute a black defendant for trespass when the complaint was filed by a racist property owner who regularly permits whites to cut across his lawn?[49] Pushing the argument to extremes, can the state prosecute a trespasser who wears black shoes when the complaint was filed by an exceedingly narrow-minded property owner who regularly permits white shoe wearers to use his property?[50] Taken to its logical conclusion, the analysis in *Shelley* would

45. *Id.* at 6.

46. *Id.* at 19.

47. Wechsler, *supra* note 33, at 29.

48. *Id.* The application of *Shelley* to wills, charitable trusts, and similar devices raised complex questions in an area that previously had not been thought to have a constitutional dimension. After holding in Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957), that public officials cannot act as trustees of a private will that requires racial discrimination, the Court held in Evans v. Newton, 382 U.S. 296 (1966), that even the transfer of title to private hands is insufficient to save a discriminatory trust, if the property is to be continued as a public park from which black people are excluded under terms fixed by the testator. On the other hand, in Evans v. Abney, 396 U.S. 435 (1970), the Court approved the state court's action on remand—dissolving the discriminatory trust so that title might revert to the heirs. In the latter case there were vigorous dissents from Justices Brennan and Douglas, who argued that the city continued to be linked to the management of the property so long as it remained a park. On the general question, see Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957); Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272 (1967); Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956); Note, *Mandatory Cy Pres and the Racially Restrictive Charitable Trust*, 69 COLUM. L. REV. 1478 (1969).

49. Wechsler, *supra* note 33, at 29-30.

50. *Cf.* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473,

erase the previously unclear line between public and private responsibility for racial discrimination and would usher the exercise of federal constitutional power into virtually every case in which black people suffer from unequal treatment.

Although some found this prospect desirable, indeed long overdue,[51] others found in *Shelley* "a skeleton key to constitutional law's *Finnegan's Wake*,"[52] and many set out to find justifications for limiting the opinion's logic. It was argued, for example, that *Shelley* was merely another illustration of the principle that the state cannot avoid constitutional limitations by delegating public functions to private parties who discriminate.[53] To the extent the restrictive covenant might be considered essentially a zoning regulation designed to govern the use of property in the area, it was contended that the real evil in the case lay in the state's delegation of zoning authority to a private group, which in turn performed that public function in a discriminatory fashion.[54] A more persuasive view was that *Shelley* condemned not judicial recognition of private discrimination, but merely enforcement of private agreements against the will of participants. In fact, the seller in *Shelley* wished to

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477 (1962). Professor Henkin pointed out that the equal protection clause bars the state from discriminating on *any* arbitrary basis. *Shelley* might then mean that "the enforcement of trespass would not be possible, even where the exclusion had nothing to do with racial discrimination but was based upon some other caprice." *Id.*

51. *See, e.g.*, Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949). For pre-*Shelley* urgings that the fourteenth amendment be invoked to prohibit restrictive covenants, see Lowe, *Racial Restrictive Covenants*, 1 ALA. L. REV. 15 (1948); McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5 (1945); Note, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948).

52. Kurland, *The Supreme Court, 1963 Term, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government."* 78 HARV. L. REV. 143, 148 (1964).

53. *See* Marsh v. Alabama, 326 U.S. 501 (1946). Parenthetically, it should be noted that some have suggested the reverse is true—that *Marsh* was actually an early application of the *Shelley* principle that a state cannot use its judicial machinery to enforce private action that would be barred to the state itself. The argument holds that the invalid state action in *Marsh* was not the company's suppression of the petitioner's speech but the state's criminal prosecution for trespass. *See* Berle, *supra* note 43, at 950. The obvious difficulty with this view is that it would seem to follow that the company might have used self-help to remove the Jehovah's Witness from Chickasaw. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1, 24 (1948); Lewis, *supra* note 24, at 1097 n.52.

54. *See* Reitman v. Mulkey, 387 U.S. 369, 383 (1967) (Douglas, J., concurring); Bell v. Maryland, 378 U.S. 226, 326-35 (1964) (Black, J., dissenting); Buchanan v. Warley, 245 U.S. 60 (1917) (city ordinance that zones real property on the basis of race is unconstitutional); Lewis, *supra* note 24, at 1115.

ignore the covenant and sell to blacks in direct violation of it. The discrimination occurred only because the state courts required the seller to conform to the agreement, thus helping the adjoining property owners to coerce the recalcitrant seller into racial discrimination.[55] It was argued that when a private person relies upon a similar covenant in seeking to enforce what he desires voluntarily to do with his property, *Shelley* is inapposite.[56]

Proposals for limiting *Shelley* aside, the enormous potential of the decision's logic gave rise to revisionist thinking on the subject generally. It appeared after *Shelley* that perhaps even a state's *inaction*—in the face of private discrimination—might constitute a violation of the equal protection clause.[57] If state courts cannot give legal effect to private conduct that would be barred to the state itself, it seemed to follow that,

55. Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 569 (1951); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959).

56. In a case decided after *Shelley* a majority of the Court neither embraced the "coercion" theory of *Shelley* nor explicitly rejected it. In Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *vacated and petition for cert. dismissed*, 349 U.S. 70 (1955), the Court apparently could not agree on the question whether *Shelley* made void an action for damages for breach of a contract to sell a burial plot—when the refusal to perform was based on the race of the purchaser. The writ was finally dismissed as improvidently granted when a new state statute banning similar contract provisions was enacted. Then, in Black v. Cutter Laboratories, 351 U.S. 292 (1956), a majority avoided the constitutional question whether California courts could uphold an arbitration award of reinstatement in a case in which the discharge of an employee was based upon Communist Party membership. The state courts had declined to enforce the award on the ground that the underlying collective bargaining agreement permitted the employer to dismiss an employee for "just cause." Although the majority found only a state contract law issue and no substantial federal question in the case, Mr. Justice Douglas' dissent maintained that *Shelley* barred the state courts from sustaining the discharge of an employee on the basis of her associations. 351 U.S. at 302-03 (Douglas, J., dissenting). Since *Black* seemingly involved no coercion by the state courts of a private individual who did not want to discriminate, the Douglas position, concurred in by the Chief Justice and Justice Black, apparently was that *Shelley* was not limited as Professor Pollak suggested. *See* Lombard v. Louisiana, 373 U.S. 267, 280-81 (1963) (Douglas, J., concurring); *The Supreme Court, 1955 Term*, 70 HARV. L. REV. 123, 124-25 (1956). On the other hand, Justice Douglas' opinion in *Black* did not speak for the majority, and in subsequent cases the Court has studiously avoided applying *Shelley* across the board to the many cases its logic might conceivably reach. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964). Moreover, in a number of cases individual justices have taken the position, contra Douglas, that *Shelley* is indeed limited to cases involving coercion. *E.g.*, *id.* at 331 (Black, J., dissenting with Harlan & White, JJ.); *cf.* Evans v. Abney, 396 U.S. 435, 456 (1970) (Brennan, J., dissenting); Barrows v. Jackson, 346 U.S. 249, 261 (1953) (Vinson, C.J., dissenting). For recent unsuccessful attempts to expand *Shelley* to its logical limit, see Girard v. 94th Street & Fifth Ave. Corp., 396 F. Supp. 450 (S.D.N.Y. 1975); Fallis v. Dunbar, 386 F. Supp. 1117 (N.D. Ohio 1974).

57. *See* Abernathy, *supra* note 27; Lewis, *supra* note 24.

at least through a process of case-by-case adjudication, the state could be compelled to do everything within its power to *prohibit* discrimination by private individuals.[58] If in any case to come before state courts a judgment that furthers discrimination is barred, the law tends over time to protect the interests of black people by thwarting the discriminatory purpose of other litigants. Put simply, state courts can no longer prefer private rights founded on state law over the constitutional right of black people to be free of state-sponsored discrimination. This is only to recognize that "state action" is present in every case in which the state gives legal consequences to transactions between private persons.[59] If a white property owner has a right to refuse to sell his property to a black buyer, it is because state law gives him that right. And if the right to discriminate among buyers is recognized as a defense to an action for breach of contract, it is once again only because state law declares it to be so. In *Shelley* itself the invalid state action may have vested, not in the use of state judicial machinery to enforce the restrictive covenant, but in the underlying common law that recognized the validity of such covenants.[60] Thus, the state law that defines and gives meaning

58. In light of *Shelley*, Professor Lewis found inescapable the conclusion that the white primary cases involved a "court-declared state duty to prevent systematic discrimination against Negro voters by private interests." Lewis, *supra* note 24, at 1093. Although those cases were supported by the fifteenth amendment, which may alone be a basis for limiting the principle, Lewis also suggested that *Marsh* might best be explained as recognizing that a state's responsibility under the fourteenth amendment "may rest not on its positive acts but on its omission to act . . . ." *Id.* at 1097. *See also* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

59. As Professor Horowitz put it:

> [W]henever, and however, a state gives legal consequences to transactions between private persons there is "state action"—*i.e.*, . . . the definition by a state of legal relations between private persons is, for the purposes of the Fourteenth Amendment, a matter of "state action."

Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957). *See also* Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CAL. L. REV. 1 (1964) [hereinafter cited as *Racial Discrimination in "Private" Housing*]. It is perhaps noteworthy that Horowitz carefully avoided taking the position that private persons may somehow be subject to the limitations of the fourteenth amendment. Instead, he made clear his view that in some cases the ever-present state law underlying the relationship between private persons is so intertwined with private discrimination that the fourteenth amendment is invoked. There is a difference. *Id.* at 21-22; *cf.* note 175 *infra*.

60. Although the Court's statement that the covenant standing alone was valid would seem to preclude this view, Professor Lewis pointed out that Chief Justice Vinson, who wrote for the Court in *Shelley*, dissented in Barrows v. Jackson, 346 U.S. 249 (1953), which extended *Shelley* to preclude a suit for damages for breach of a restrictive covenant. In *Barrows* the Chief Justice found no invalid state action because the black buyer would remain in possession, and the state

to legal arrangements among individuals is always at work, and the significant question for analysis is not whether state action exists but, on the contrary, whether the state action that concededly is present is constitutional.[61] Though the contours of their analyses did not precisely coincide, the writers who explored the cases generally came to the same conclusion—that at least after *Shelley* the search for state action in the wooden sense of some identifiable link to government is misleading. Rather, the validity of even superficially private arrangements should be judged according to a delicate balance of interests.[62] Thus, Professor Henkin put the paradigm case—the conviction of a trespasser ordered to leave the premises by a racist homeowner solely on the ground that he is black—as, in truth, the question whether the black's right to be free of racial discrimination is sufficient to outweigh the home-

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court judgment would affect only the seller who had failed to comply with a covenant which was itself valid. Since the *Barrows* Court did not distinguish *Shelley* on Vinson's ground, it can be argued that a majority had never been convinced that the state court's enforcement order in that case was the controlling factor, Vinson's opinion notwithstanding. "But if *Shelley* stands for the principle that the power to enter into a covenant restricting land use and occupancy on the basis of race is lacking because that part of the common law that provides the particular property rights necessary for such an arrangement is invalid, then the majority's decision that a court cannot award damages for breach of restrictive covenant is easier to understand." Lewis, *supra* note 24, at 1114.

61. Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

62. A few quotations from the literature will suffice here:

> The sun is setting on the concept of state action . . . .
>
> . . . .
>
> . . . There is no formula.
>
> . . . The issue must become one of the merits of accommodating the interests, not one in the nature of a formula which is irrelevant to the interests involved.

Williams, *supra* note 22, at 389-90.

> Any proper discussion of the cases . . . must . . . begin with recognition that the *state action* requirement is no more unitary than the requirement that *equal protection* has been denied. These verbal formulations are simply an awkward shorthand to describe a multiplicity of interests which compete for respect in each case. Among these interests are several which are functionally related to the presence or absence of participation by a government in the alleged constitutional invasion. Thus while the search for a merely formal connection—for 'state action'—is misleading, the search for the values which stand behind the state action limitation is indispensable.

Van Alstyne & Karst, *supra* note 61, at 7 (emphasis in original).

> The determination of the existence of state action is a preliminary problem only, and must be followed by a determination as to which of several conflicting rights is to be protected. . . .
>
> . . . [T]he ultimate decision of the constitutional issue will hinge upon a balance struck between several interests, public and private.

Note, *The Disintegration of a Concept—State Action Under the 14th and 15th Amendments*, 96 U. PA. L. REV. 402, 413-14 (1948); *see* Note, *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 COLUM. L. REV. 1241, 1245 (1948).

owner's due process right to choose the persons he will invite into his home.[63] No serious writer suggested that the right of privacy might not prevail.[64] On the other hand, most agreed that as the interest of the person seeking to discriminate takes on a public character the interest of blacks in freedom from discrimination becomes paramount.[65] As the activism of the Warren Court years gathered momentum, the consensus was that even more significant doctrinal developments lay just ahead—perhaps even demise of the state action concept as a limitation on the exercise of federal judicial power.

B. The Warren Court Years—The Demise of State Action?

The Court launched the decade of the sixties with *Burton v. Wilmington Parking Authority*,[66] which was viewed variously as opening the door to "the abandonment of the state action concept as a means of deciding the constitutional issue on discrimination"[67] and as "singularly uninstructive"[68] as a guide to future developments. In *Burton* a black man had been denied service at the Eagle Coffee Shoppe, located in a publicly owned and operated parking garage in Wilmington, Delaware. Although the petitioner made the straightforward argument that Eagle's lease from the Parking Authority was alone sufficient to bring the case within the fourteenth amendment, the majority opinion by Justice Clark avoided such a broad holding. Instead, the Court lamented that it was unable to perform the "impossible task"[69] of fashioning a precise formula for determining the application of the equal protection clause in a wide variety of cases: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[70] The Court then turned to a detailed examination of the contacts between the state of Delaware and the coffee shop. And only after laboriously detailing that the land had originally been condemned for public use, that the lease to

63. Henkin, *supra* note 50, at 498.

64. *See* Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964).

65. Henkin, *supra* note 50, at 498-99; Van Alstyne & Karst, *supra* note 61, at 46.

66. 365 U.S. 715 (1961).

67. Williams, *supra* note 22, at 382.

68. Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458, 1459 (1961).

69. 365 U.S. at 722, *quoting* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

70. 365 U.S. at 722.

Eagle constituted an essential portion of the state's income from the entire facility, that the building was kept in repair at public expense, and that the restaurant enjoyed tax exemptions for its improvements, did Justice Clark conclude that the state was sufficiently involved in Eagle's discriminatory policy to implicate the Constitution.[71]

The *Burton* holding was a classic illustration of an ad hoc balancing approach to constitutional adjudication—law that is good for this day and this case only. Nevertheless, language in the opinion lent support to the view that the state action concept was indeed on the wane. For example, at one point the Court noted that the Parking Authority might have required Eagle to serve blacks by merely inserting a prohibition on discrimination in the lease contract. The failure to do so gave rise to the charge that the state had impermissibly abdicated its constitutional responsibilities "by either ignoring them or by merely failing to discharge them whatever the motive may be."[72] The notion that the state's *inaction* in failing to bar race discrimination at the restaurant was the crux of the case in *Burton* understandably fed the growing suspicion that, while the Court might continue to *say* that state action must be shown—citing the *Civil Rights Cases* in a perfunctory manner at the

71. The Court was careful to tie its holding closely to the facts of the case at hand, apparently in order to avoid the state's contention that a judgment for the plaintiff would mean "nigh universal application of a constitutional precept . . . ." *Id.* at 726. In a concurring opinion Justice Stewart suggested that the Court might have avoided saying even as much as it did by resting its finding of state action on an existing statute in Delaware that expressly permitted the operators of restaurants to discriminate among clientele. Justice Stewart was prepared to rule flatly that if the statute authorized racial discrimination in public accommodations it was unconstitutional. *Id.* at 726-27 (Stewart, J., concurring). Justices Harlan and Frankfurter agreed with Stewart that Delaware might not by statute authorize racial discrimination; but because they were not sure that the Supreme Court of Delaware had actually construed the statute in that way, they urged a remand for clarification. *Id.* at 727-28 (Frankfurter, J., dissenting); *id.* at 728-30 (Harlan, J., dissenting). Remarkably, all three Justices, and presumably Justice Whittaker who joined Justice Harlan's opinion, viewed possible reliance on the statute as an "easy route to decision" that would reach the same result but would avoid the "circuitous route" followed by Justice Clark. *Id.* at 728 (Frankfurter, J., dissenting). Of course, if the statute had been construed to *require* racial discrimination, a wealth of precedent would have supported a finding of unconstitutional state legislative action. But on its face this statute *required* nothing; at most it *authorized*. Did the Justices writing separately mean to say that a state legislature cannot be neutral, that it must speak against discrimination if it speaks at all? No prior case had gone so far. At all events, such a conclusion would hardly have been a narrower ground of decision in *Burton*. It is true that Justice Harlan distinguished the possible common-law right of a restaurant operator to serve whom he pleases, suggesting a vaguely defined difference between a statute expressly authorizing discrimination and mere common-law understanding, but that distinction only further confused the view he took of state action in the case.

72. 365 U.S. at 725.

outset of every opinion—in reality the Court would in the future tend always to find sufficient contacts with the state to justify the exercise of federal power.[73] The *Burton* nonanalysis was seen as little more than a rough balancing process with a decided preference for equality.

Then came the first round of *Sit-In Cases* in 1963. Ostensibly, *Peterson v. City of Greenville*,[74] *Lombard v. Louisiana*,[75] and the two per curiam decisions[76] handed down with them presented the precise issue that had long awaited decision—whether the fourteenth amendment of its own force prohibits the states from enforcing racial discrimination in public accommodations.[77] But the decision did not come. Only two of the cases were given full treatment. In *Peterson* the Court failed to reach the question because the City of Greenville had an ordinance that expressly prohibited serving white and black people in the same room. There was evidence in the record tending to show that when the manager of a Kress store refused service to black children, he did so in order to comply with the ordinance. The Court held that the ordinance removed the decision whether to serve black people from the sphere of private choice and, accordingly, the state had so involved itself in the resultant racial discrimination that the fourteenth amendment was brought into play.[78] Similarly, in *Lombard* the Court rested its finding

73. Williams, *supra* note 22, at 382-84.

74. 373 U.S. 244 (1963).

75. 373 U.S. 267 (1963).

76. Avent v. North Carolina, 373 U.S. 375 (1963); Gober v. City of Birmingham, 373 U.S. 374 (1963).

77. *See* Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUP. CT. REV. 101. Actually, one factually similar case had come before the Court 3 years earlier. In Garner v. Louisiana, 368 U.S. 157 (1961), the Court overturned the convictions of several black students for disturbing the peace. The majority avoided the merits of the state action issue by holding that the convictions were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Id.* at 163; *see* Thompson v. City of Louisville, 362 U.S. 199 (1960). Justice Douglas, on the other hand, reached the more significant question in a concurring opinion. He contended that the state action requirement was met by the custom of racial discrimination in Louisiana, the public interest affected by the operation of restaurants, and the licensing regulation of restaurants by the state. The Douglas opinion is criticized in Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962).

78. Indeed, the Court held that even if the manager had acted independently the result would have been the same, because the convictions had the unquestioned effect of enforcing the ordinance. "When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." 373 U.S. at 248. It is tenable, then, to argue that the Court *did* find the criminal prosecutions and not merely the existence of the ordinance crucial to the result—perhaps relying on *Shelley* without citation.

of invalid state action on the public statements of the mayor and police superintendent, who had earlier threatened prosecution of blacks for sit-ins at local restaurants. It was apparent, to use the Court's words, that "the State cannot achieve the same result [discrimination] by an official command which has at least as much coercive effect as an ordinance."[79]

In the next Term the second round of *Sit-In Cases* yielded more analysis but still no resolution of the crucial state action issue. Of the five cases decided in 1964, only *Bell v. Maryland*[80] was treated in depth.[81] The Court once again evaded the state action question by remanding the criminal trespass convictions involved in the case to the state courts, which, the majority apparently hoped, might dismiss them in light of an interim change in state law.[82] But three other opinions, written by

79. 373 U.S. at 273. In a concurring opinion, Justice Douglas would have applied *Shelley* and held that the criminal penalty imposed upon the demonstrators by the state courts constituted state action within the meaning of the fourteenth amendment. Citing Professor Henkin, note 50 *supra*, Douglas let it be known that he would permit the *Shelley* analysis to reach a great many cases involving businesses subject to state regulatory control of some sort.

> [S]urely *Shelley v. Kraemer* . . . and *Barrows v. Jackson* . . . show that the day has passed when an innkeeper, carrier, housing developer, or retailer can draw a racial line, refuse service to some on account of color, and obtain the aid of a State in enforcing his personal bias by sending outlawed customers to prison or exacting fines from them.
>
> Business, such as this restaurant, is still private property. Yet there is hardly any private enterprise that does not feel the pinch of some public regulation—from price control, to health and fire inspection, to zoning, to safety measures, to minimum wages and working conditions, to unemployment insurance. When the doors of a business are open to the public, they must be open to all regardless of race if *apartheid* is not to become engrained in our public places. It cannot by reason of the Equal Protection Clause become so engrained with the aid of state courts, state legislatures, or state police.

373 U.S. at 280-81 (Douglas, J., concurring); *see* Black v. Cutter Laboratories, 351 U.S. 292, 302-03 (1956) (Douglas, J., dissenting).

80. 378 U.S. 226 (1964).

81. In Robinson v. Florida, 378 U.S. 153 (1964), the Court held that trespass convictions of demonstrators in a department store lunch counter must be reversed because two Florida agencies had issued regulations requiring separate toilet facilities for black patrons, thus imposing an impermissible burden upon restaurants serving both white and black clientele. In Griffin v. Maryland, 378 U.S. 130 (1964), the Court reversed the convictions of blacks who had entered a privately operated amusement park. The park detective who ordered the demonstrators to leave was paid by the private owner to enforce a policy of segregation but acted as a deputy of the local sheriff in arresting the protesters for failing to obey his orders. In Bouie v. City of Columbia, 378 U.S. 347 (1964), the Court reversed more trespass convictions on the ground that the statute involved had been rendered impermissibly vague by retrospective construction by the South Carolina Supreme Court. Finally, in Barr v. City of Columbia, 378 U.S. 146 (1964), the Court once again relied on Thompson v. City of Louisville, 362 U.S. 199 (1960), to hold that the convictions of civil rights workers were not supported by sufficient evidence. In the case the Court could find no basis for a finding that a nonviolent sit-in at a lunch counter constituted a breach of the peace. *See* Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137.

82. After the Maryland Supreme Court had affirmed the trespass convictions in *Bell*, the

Justices Douglas, Goldberg, and Black, finally faced squarely the question whether state enforcement of discrimination in public accommodations is unconstitutional. Justice Douglas had little difficulty finding a violation of both the equal protection clause and the privileges and immunities clause of the fourteenth amendment.[83] Justice Goldberg's similar position rested on his conclusion that the framers' intent was to guarantee to blacks the right to be served at all places of public accommodation.[84] But the dissent could not follow. Picking apart the very historical materials used by Justice Goldberg to make his case, Justice Black concluded that the evidence of original intent was inadequate to the task Justice Goldberg would have it perform.[85] Accordingly, Black concluded that while the Court should and would continue to protect individuals against discrimination in all ways within its power, "the Fourteenth Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will."[86] With the Court thus split on the fundamental question presented, the final decision in the *Sit-In Cases*, already delayed to the final day of the term, was in. Ten days later President Johnson

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city of Baltimore and the state legislature enacted public accommodations legislation. The state enactment went into effect only days after the petition for certiorari had been granted. The crux of Justice Brennan's opinion for the Court was that the question of the applicability of the state savings clause should be left to the state courts. While it seems clear that Justice Brennan "pushed the legal materials to their limit," it has been suggested that restraint was appropriate in the circumstances. Paulsen, *supra* note 81, at 144.

83. Reliance upon the "privileges" clause as a vehicle for the protection of individual liberty, while not surprising in a Douglas opinion, has never been accepted by a majority of the Court. *Compare, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974) (Douglas, J., concurring), *with* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). Accordingly, Justice Douglas fortified his result by once again contending that *Shelley* prohibits state judicial enforcement of private discrimination—at least in cases in which corporations rather than individuals open the doors of their establishments to the public for the purpose of making profits. 378 U.S. at 252-60 (Douglas, J., concurring).

84. The Goldberg opinion has been criticized in C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 105-12 (1969). While Professor Miller finds Justice Goldberg's treatment of the historical materials inadequate—principally because of their inherent inscrutability—he gives the Justice high marks for avoiding the theory put forward by the Solicitor General, albeit under pressure, that state action might be found in the officially recognized tradition of segregation which historically characterized the Southern States. *Id.* at 102-03.

85. At one point Justice Black wrote:

> We have confined ourselves entirely to those debates cited in Brother GOLDBERG'S opinion the better to show how, even on its own evidence, the opinion's argument that the Fourteenth Amendment without more prohibits discrimination by restaurants and other such places rests on a wholly inadequate historical foundation.

378 U.S. at 340 (Black, J., dissenting).

86. *Id.* at 342-43 (Black, J., dissenting).

signed into law the 1964 Civil Rights Act,[87] which provided federal protection for the very conduct for which the petitioners in all nine cases had been prosecuted.

The Warren Court soon made it clear that, having survived the emotional outpouring and intellectual maneuvering of the *Sit-In Cases*, the Court would not again take up the question whether *Shelley* extends to all cases in which a state court gives effect to private discrimination. In so doing, on the other hand, the Court seemingly opened the way for even further erosion of the state action concept. In the fall of 1964 an initiated measure was submitted to the people of California in a statewide ballot.[88] Proposition 14 was intended to effectively repeal existing open housing legislation by amending the state constitution to bar state interference with the exercise of unrestricted personal choice in real estate transactions.[89] After the proposition had been adopted by an

87. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C.). As Professor Miller described the circumstances of the Court's consideration of *Bell*, "the Supreme Court . . . strove mightily to lose the race with Congress in elucidating the Constitution with respect to sit-ins." C. MILLER, *supra* note 84, at 103.

> The course that *Bell* and its companion cases took in the Supreme Court is intertwined with the consideration by Congress, during the same months, of the Civil Rights Act of 1964. In the light of the split on the Court, the justices would certainly have been grateful for congressional legislation to refer to in reaching a decision. Many members of Congress, on the other hand, would have welcomed a clearcut constitutional decision to refer to in their own debate—although, whichever way the decision went, it would have entangled even more the legislative maneuvering. Caught in the middle was the Department of Justice
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> . . . .

Id. at 100 (footnote omitted). Caught in the middle, indeed. The executive branch was at the time working diligently in the Congress for civil rights legislation it contended was desperately needed. That position seemed inconsistent with an argument before the Court that the fourteenth amendment of its own force barred racial discrimination in public accommodations. Accordingly, at first the Solicitor General maintained that the cases could be decided on narrow grounds—avoiding the crucial state action question. Only when the Court prodded did the government file a supplemental brief which argued not only that judicial enforcement of discrimination was unconstitutional but that state action might be found in the Jim Crow tradition of the Southern States. *Id.* at 100-03; *see* Bell v. Maryland, 375 U.S. 918 (1963) (mem.).

88. California has long maintained a well-developed process by which citizens may place questions that concern them on the ballot for decision by the electorate. *See generally* CAL. ELECTIONS CODE §§ 3500-08 (West Supp. 1975); Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922 (1975).

89. The language, neutral on its face, was deemed by the California Supreme Court to have been intended to "overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right." Mulkey v. Reitman, 64 Cal. 2d 529, ____, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 885 (1966). The significant text was as follows:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent

overwhelming majority, two cases arose to challenge the validity of the new constitutional provision. In *Mulkey v. Reitman*[90] a black couple sued in state court for an injunction and damages, alleging that an apartment manager had violated state open housing statutes by refusing to rent them an apartment solely because of race. The trial court granted the defendant's motion to dismiss on the theory that the adoption of Proposition 14 had made preexisting open housing legislation null and void. In *Prendergast v. Snyder*[91] a black couple sued under the California open housing statutes, alleging that they had been evicted from their apartment on racial grounds. Unlike the trial court in *Reitman*, however, the court in *Prendergast* did not reach the question of the validity of Proposition 14. Relying on *Shelley*, the court held that, the state constitution aside, judicial enforcement of an eviction based on race would violate the equal protection clause.[92] The two cases were considered together by the California Supreme Court, which held the new state constitutional provision void.[93] In its opinion in *Reitman* the court referred to but did not place great weight upon *Shelley*;[94] in *Prendergast* the court indicated misgivings about the trial court's analysis but nevertheless concluded that the judgment for the tenants must be affirmed both because Proposition 14 itself was void *and* because judicial enforcement of the eviction might run afoul of *Shelley*.[95]

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any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

CALIF. CONST. art. I, § 26.

90. 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

91. 64 Cal. 2d 877, 413 P.2d 847, 50 Cal. Rptr. 903 (1966).

92. *Id.* The trial court also placed reliance upon an earlier California case that had held that, in light of *Shelley*, it was prejudicial error to deny a black tenant in an eviction case the opportunity to show that the landlord acted on the basis of race. Proof of race discrimination would bar the state court from holding for the landlord. Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962).

93. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

94. *Id.* at ____, 413 P.2d at 831, 50 Cal. Rptr. at 887. A vigorous dissent in the case would have distinguished *Shelley* on the coercion theory. *See* notes 55 & 56 *supra* and accompanying text.

95. The court's brief opinion contained the following key passages:

> The trial court . . . held that the Fourteenth Amendment . . . proscribed discrimination based on race where directly practiced by a state and also if practiced by private persons where . . . "a state court enforces the racial discriminatory act of a private individual . . . . (Shelley v. Kraemer . . .)"
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> . . . .
>
> . . . We have held today that [Proposition 14] . . . is, in its entirety, an unconstitutional infringement of the Fourteenth Amendment. (Mulkey v. Reitman . . .) For that reason, *as well as those relied upon by the trial court*, defendant's cross-complaint is not meritorious, and judgment for plaintiffs is affirmed.

In the Supreme Court Justice White's majority opinion in *Reitman v. Mulkey*[96] mentioned the reliance upon *Shelley* in *Prendergast*, but then left the question and never returned to it. Focusing only upon the validity of Proposition 14, the Court could find "no sound reason for rejecting" the state court's reasoning.[97] The meaning of the decision was not immediately clear. The majority apparently viewed Proposition 14 as invalid state encouragement of private racial discrimination,[98] but Justice Douglas added the argument that, like *Shelley*, *Reitman* involved the delegation of zoning authority to private persons who discriminate.[99] In dissent, Justice Harlan complained that the state constitutional amendment had been nothing more than a repeal of open housing legislation. "This runs no more afoul of the Fourteenth Amendment than would have California's failure to pass any such antidiscrimination statutes in the first instance."[100] Yet the Court's opinion clearly disclaimed reliance on any theory that the mere repeal of open housing legislation might violate the Constitution. California had not merely repealed statutory provisions forbidding discrimination, but had given state constitutional authority to discriminatory action by private persons.[101] Moreover, California had placed a new barrier in the way of those who would have the state prohibit race discrimination. In general,

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Prendergast v. Snyder, 64 Cal. 2d 529, ___, 413 P.2d 847, 848-49, 50 Cal. Rptr. 903, 904-05 (1966) (emphasis supplied).

96. 387 U.S. 369 (1967).

97. *Id.* at 376.

98. *Id.* at 381. The California Supreme Court had called up the suggestion in Justice Stewart's concurring opinion in *Burton* that a state statute that *authorizes* private racial discrimination would be invalid, see note 71 *supra*, and Justice White followed suit—to the obvious discontent of Justices Stewart and Harlan, who dissented without mentioning their *Burton* opinions. In this vein, *Reitman* has been the principal cited authority for the argument that state statutes that authorize self-help repossession and mortgage foreclosure procedures without prior notice and a hearing impermissibly "encourage" private creditors to do what the state itself may not do. The argument has roundly failed. *See, e.g.*, Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974) (mortgage foreclosure); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Adams v. Southern California First Nat'l Bank, 492 F.2d 324 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974) (self-help repossession under § 9-503 of the *Uniform Commercial Code*). *See generally* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1 (1973). The "encouragement" theory, though strong in the immediate wake of *Reitman*, has since been eroded by more recent Burger Court decisions, discussed *infra*. *See* Bond v. Dentzer, 362 F. Supp. 1373 (N.D.N.Y. 1973), *rev'd*, 494 F.2d 302 (2d Cir.), *cert. denied*, 419 U.S. 837 (1974).

99. 387 U.S. at 381 (Douglas, J., concurring).

100. *Id.* at 389 (Harlan, J., dissenting).

101. As Justice White put it, the California court had dealt with the case as though the new constitutional provision "expressly authorized and *constitutionalized* the private right to discriminate." *Id.* at 376 (emphasis supplied).

citizens who desire legislative change need only persuade a majority in the legislature to enact it; after the adoption of Proposition 14 in California, persons seeking legislative protection from discrimination in the housing market—protection that is clearly within the power of the legislature to give—were immediately faced with the task of amending the state constitution.[102]

The possible significance of the state constitutional dimension of the case aside, the decision in *Reitman*, if read broadly, pointed far down the road to the final—and long-awaited—emasculation of the state action limitation in the fourteenth amendment. Justice Harlan properly pointed out that if the state cannot be neutral, if it cannot repeal statutes that prohibit racial discrimination, it follows that the state must have a federal constitutional obligation to *enact* open housing legislation.[103] The state's failure to affirmatively prohibit racial discrimination then involves the state in the private discrimination *permitted* by the state's inaction. If, indeed, *Reitman's* logic led inexorably to such a result, the expansive theories developed in the wake of *Shelley* seemed now to be the law of the land.[104] As Justice Harlan put it, "Every act of private discrimination is either forbidden by state law or permitted by it."[105] If *Reitman* held that a state cannot validly permit discrimination, then it must prohibit it. In subsequent cases, the lower courts took the decision at face value and looked closely at any state attempt at "neutrality."[106]

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102. *See* Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

> The rule I would propose, then, as a basis for the *Reitman* decision, is that where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.

Id. at 82. *Compare* James v. Valtierra, 402 U.S. 137 (1971) (similar requirement for public housing projects upheld), *with* Hunter v. Erickson, 393 U.S. 385 (1969) (requirement that open housing legislation secure approval by referendum held invalid).

103. 387 U.S. at 394-95; *see* Black, *supra* note 102, at 73 (contending that this position is correct even if *Reitman* cannot be read to support it). *See generally* A. COX, THE WARREN COURT 43-50 (1968).

104. *See* notes 57-65 *supra* and accompanying text.

105. 387 U.S. at 394.

106. *E.g.*, Keyes v. School Dist. No. 1, 313 F. Supp. 61 (D. Colo. 1970), *aff'd* (on this point), 445 F.2d 990 (10th Cir. 1971), *cert. denied*, 413 U.S. 921 (1973) (school board's revocation of resolutions designed to aid desegregation held invalid); Otey v. Common Council, 281 F. Supp.

II. Enter the Burger Court

> [A]ll that is good is not commanded by the Constitution and all that is bad is not forbidden by it.
>
> —Mr. Chief Justice Burger[107]

A. The Revitalization of State Action

On June 23, 1969, the last day of the October 1968 Term, Earl Warren retired after 16 years on the Court, and Warren Earl Burger was sworn in as Chief Justice of the United States. In 1970 Justice Blackmun came to the Court, followed by Justices Rehnquist and Powell in January 1972.[108] In retrospect it may safely be said that the Court's view of the concept of state action changed dramatically with the change in membership. As late as May 1968, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[109] the Court had extended *Marsh v. Alabama*[110] to protect labor picketing at a shopping center, even though the land used by the pickets was privately owned. Justice Marshall wrote for the Court; Justice Black, increasingly unreceptive to expansive state action arguments since the *Sit-In Cases*,[111] dissented.[112] Then, in January 1970, after Chief Justice Burger had joined the Court

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264 (E.D. Wis. 1968) (city resolution that ordinances restricting the right to deal with real property would not be passed held not to be neutral); *cf.* Hunter v. Erickson, 393 U.S. 385 (1969), *discussed in* note 102 *supra*.

107. Palmer v. Thompson, 403 U.S. 217, 228 (1971) (concurring opinion).

108. Justice Blackmun was appointed to fill the vacancy left by the resignation of Justice Fortas. Justices Rehnquist and Powell succeeded Justice Black, who died on September 25, 1971, and Justice Harlan, who had retired with poor health 2 days earlier and later died on December 29, 1971.

109. 391 U.S. 308 (1968).

110. 326 U.S. 501 (1946); *see* notes 36-43 *supra* and accompanying text.

111. *See* notes 85 & 86 *supra* and accompanying text.

112. 391 U.S. at 327. Justice Black, of course, had been the author of the Court's opinion in *Marsh*. In *Logan Valley*, however, he found no similarity between the company town in *Marsh* and a shopping center.

> The question is, Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives is when that property has taken *all* the attributes of a town, *i.e.*, "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated." . . . I can find nothing in *Marsh* which indicates that if one of these features is present, *e.g.*, a business district, this is sufficient for the Court to confiscate a part of an owner's private property and give its use to people who want to picket on it.

Id. at 332.

and just before Justice Blackmun was sworn in, Justice Black was able to gain the upper hand in *Evans v. Abney*.[113] Now, with Justice Marshall not participating, Black held a majority.[114] By the next summer Justice Blackmun had joined Justice Black and the Chief Justice in what seemed a conscious effort to dampen the Court's enthusiasm for exercising federal judicial power in aid of the civil rights movement.[115] When Justices Rehnquist and Powell came to the Court, judicial restraint increased even more, and in the major state action cases of the last three Terms the revival of the concept as a limitation on the application of the fourteenth amendment is self-evident.

Nevertheless, while it is easy enough to explain the Court's decisions in many fields by referring to the personalities of its members, and perhaps even easier to fault the Court's results as opposed to its analysis, the temptation to despair must be resisted. The truth of the matter is that, so long as the newly constituted Court can justify its decisions in principle and precedent rather than personal predilection, the Court has every right to steer a course different from that of its predecessor.[116] On another level, it is hardly fruitful to leap to the conclusion that the Warren Court jurisprudence is now to be rooted up and rejected—and individual liberty lost in the process. Intellectual responsibility requires a closer look. It is the thesis of this article that, if indeed a closer look is given, the Burger Court's state action decisions, seen in the light of contemporaneous opinions in related fields, suggest a basis for cautious

113. 396 U.S. 435 (1970); *see* note 48 *supra*.

114. It would, of course, be simplistic to imply that the results in these cases can be explained by reference to the personalities of the Justices participating alone. Indeed, Justice Stewart, who had been with Justice Marshall in *Logan Valley*, voted with Justice Black in *Evans v. Abney*. On the other hand, Justices White and Harlan had dissented with Black in *Logan Valley*. They, together with Stewart and the new Chief Justice, formed Justice Black's majority in *Evans* when Justice Marshall failed to participate and Justices Douglas and Brennan dissented. *Cf.* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), *discussed in* the text accompanying notes 134-46 *infra*.

115. *See* Palmer v. Thompson, 403 U.S. 217 (1971). In *Palmer* the Court upheld the closing of a swimming pool in Jackson, Mississippi in the face of a desegregation order. The presence of state action in the case was undisputed, and Justice Black's majority opinion dealt principally with the substantive question whether the city's action denied black people the equal protection of the laws. Yet the petitioners placed some reliance on *Reitman*, and the case thus emerged as an indicator of the Court's developing mood on state action matters. The Chief Justice and Justice Blackmun filed separate concurring opinions. After the decision in *Palmer*, Professor Kurland pointed out that although *Evans v. Abney* was recent and very similar, the majority thought it prudent to ignore rather than cite it. Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 276.

116. *See* Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 329.

optimism. A survey of the cases will indicate a clear purpose to back away from federal *judicial* intrusion into local affairs affecting individual liberty, but a simultaneous willingness to approve the exercise of federal *legislative* power to accomplish the same result by a different means. We begin with a review of the state action cases.

On the first Sunday after Christmas in 1968 a member of Moose Lodge No. 107 in Harrisburg, Pennsylvania invited his friend, LeRoy Irvis, to the dining room for drinks and dinner. The Lodge employees denied service to Mr. Irvis on the sole ground that he was black and the local policy—consistent with the policy of the national organization—barred blacks from the dining room.[117] Reviewing the incident 4 years later in *Moose Lodge No. 107 v. Irvis*,[118] the Supreme Court found in the case a vehicle for reaffirming the proposition in the *Civil Rights Cases*[119] that the fourteenth amendment protects the individual only from actions of the state.[120] Without expressly overruling Warren Court precedents that seemed to look the other way,[121] the majority opinion by Justice Rehnquist held that the licensing scheme by which the state of Pennsylvania regulated the sale of liquor did not sufficiently implicate the state in the discriminatory guest policies of Moose Lodge No. 107.[122] The Court began with the *Burton* litany that state action can be ascertained "[o]nly by sifting facts and weighing circumstances."[123] *Burton*

117. Under the local charter issued by The Supreme Lodge of the World, Loyal Order of Moose, a nonprofit corporation organized under the laws of Indiana, Lodge No. 107 was committed to recognize the constitution and bylaws of the national organization. The constitution of the Supreme Lodge expressly limited membership to "male persons of the Caucasian or White race above the age of twenty-one years, and not married to someone of other than the Caucasian or White race . . . ." Irvis v. Scott, 318 F. Supp. 1246, 1247 (M.D. Pa. 1970). Although there was some doubt whether the Supreme Lodge merely barred blacks from membership or from all participation in Lodge affairs, while the case was pending in the courts the bylaws of the Supreme Lodge were amended to expressly bar even the guests of members if the guests were not eligible for membership. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178 (1972).

118. 407 U.S. 163 (1972).

119. *See* text accompanying note 13 *supra*.

120. The Court's narrowly drawn opinion held first that the district court's order had improperly reached the Lodge membership policy. Since Mr. Irvis had never applied for membership, he had no standing to raise the question whether the discriminatory admissions policy was invalid. On the other hand, because he had been denied service in the dining room, he did have standing to challenge the practices of the Lodge concerning the serving of food and drink to guests. 407 U.S. at 171.

121. Indeed, the Court's opinion cited and apparently relied upon *Shelley*, *Burton*, and *Reitman*. Significantly, however, there was no attempt to draw the precedents together in order to identify the developing doctrine.

122. 407 U.S. at 177.

123. 407 U.S. at 172, *quoting* Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

itself was distinguished as involving a "symbiotic relationship"[121] between the Eagle Coffee Shoppe and the state. It was the race discrimination practiced by Eagle that enabled it to make sufficient profits to pay its rent and ultimately to keep the publicly owned parking facility afloat. Just as Eagle benefited from various contacts with the state, the state benefited from the very practice of which the petitioners complained—racial discrimination. The *Sit-In Cases* were distinguished as involving affirmative state enactments requiring racial discrimination.[125] In *Moose Lodge*, on the other hand, with one exception[126] the Court found nothing in Pennsylvania law that compelled discrimination and, perhaps as importantly, found no benefit derived by the state from the discrimination practiced by Moose Lodge. The case was thus reduced to the bare question whether *any* benefit conferred upon private activity by the state sufficiently involves the state in the private activity to implicate the equal protection clause. The Court had no difficulty rejecting that proposition out of hand. "Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct . . . ."[127] *Moose Lodge*, then, effectively braked the growing line of cases holding that state action might be found in state aid to private action.[128] Disregarding the

124. 407 U.S. at 175.

125. *Id.* at 173. The opinion dealt with only one case — Peterson v. City of Greenville, 373 U.S. 244 (1963) (trespass conviction invalid when based upon ordinance requiring racial discrimination).

126. The Court did find one provision of the Pennsylvania Liquor Control Board's regulations questionable. The rule expressly required private clubs with liquor licenses to adhere to the provisions of their own constitutions and bylaws. All parties agreed that the regulation was intended to reach a case in which a place of public accommodation seeks to evade other applicable state regulations by presenting itself as a "private club." *Cf.* Daniel v. Paul, 395 U.S. 298 (1969) (evasion of 1964 Civil Rights Act held invalid). Yet the Court agreed that if the rule were applied to require the local organization to follow the national prohibition on serving blacks, the fourteenth amendment would come into play. Accordingly, the Court held that Mr. Irvis was entitled to a decree enjoining the enforcement of the rule insofar as it required race discrimination. 407 U.S. at 179.

127. 407 U.S. at 173.

128. *Compare* cases cited in note 106 *supra*, *with* Howe v. United Parcel Serv., Inc., 379 F. Supp. 667 (S.D. Iowa 1974). The tax exemption and financial aid cases also provide an illustration of the impact of *Moose Lodge*. *Compare* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (governmental action found in private hospital's receipt of federal funding under the Hill-Burton Act), *with* Ascherman v. Presbyterian Hosp., 507 F.2d 1103 (9th Cir. 1974) (Hill-Burton funding even coupled with tax exemption insufficient to invoke the Constitution); *see* Marker v. Schultz, 485 F.2d 1003 (D.C. Cir. 1973) (tax exemption insufficient to bring a labor union within constitutional restrictions). *But see* Jackson v. Statler Foundation, 496 F.2d 623 (2d

pervasive regulatory scheme under which the Pennsylvania Liquor Control Board monitored the sale of alcoholic beverages, Justice Rehnquist's opinion was at pains to make clear that, so long as the state does not become a joint venturer in discrimination as in *Burton*, the public-private dichotomy established by the fourteenth amendment would continue to restrict the exercise of federal judicial power in essentially private affairs.[129]

If the opinion in *Moose Lodge* had surface plausibility, the decision loomed as a significant departure from recent state action precedents. Analysis aside, the result in *Moose Lodge* was startling. For the first time in years the Court had failed to find sufficient state involvement in private discrimination to justify the application of constitutional safeguards.[130] Prior to 1970 the development of the state action doctrine had moved inexorably toward a broader definition of the circumstances that justify the exercise of federal judicial power in the civil rights field. But now the mood had clearly changed. In *Moose Lodge* the change seemed rooted in a revitalized appreciation for the ideal of federalism. The Rehnquist opinion reaffirmed "the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield.' "[131] Echoing the *Civil Rights Cases*,[132] the Court was saying that there are some problems that must, in this constitutional framework, be left to the states to resolve for themselves without interference from the national government. In Justice Rehnquist's view, the dissenting holdover Justices from the Warren Court, in urging a broad view of state action that would invoke the Federal Constitution in a variety of cases, failed to fully comprehend the consequences of their position for federalism.[133] The

Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (tax exempt status together with a detailed regulatory scheme with connotations of governmental approval may justify a finding of state action in the conduct of charitable foundations). On the question of state licensing and state action, see Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir.), *cert. denied*, 414 U.S. 1011 (1973).

129. 407 U.S. at 172-73. On the continuing viability of *Burton*, see note 157 *infra*.

130. As Professor Black said in 1967: "In the sixty-one years since *Hodges v. United States* [203 U.S. 1 (1906)], astoundingly few Supreme Court holdings have been based, affirmatively, on the state action doctrine, and fewer have escaped explicit or clearly implied overruling." Black, *supra* note 102, at 85.

131. 407 U.S. at 172, *quoting* Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

132. 109 U.S. 3 (1883). *See* text accompanying note 13 *supra*.

133. Justices Douglas, Marshall, and Brennan dissented in opinions arguing that the Pennsylvania regulatory scheme sufficiently involved the state in the actions of Moose Lodge to invoke the equal protection clause. 407 U.S. at 179-90 (dissenting opinions).

deplorable actions taken by Moose Lodge might well be made unlawful by local legislation, but the newly constituted Court was not prepared to force that resolution upon the State of Pennsylvania.

Ten days later, in *Lloyd Corp. v. Tanner*,[134] the Court again fixed limits on the reach of recent cases. Lloyd Corporation owned and operated a large shopping center occupying 50 acres of land in Portland, Oregon. The Lloyd Center was the site of more than 60 commercial businesses and professional offices, opening on one side to public sidewalks and streets and on the other to an interior mall. The mall covered approximately 26 acres of land, described by the district court as "a multi-level complex of buildings, parking facilities, sub-malls, sidewalks, stairways, elevators, escalators, bridges, and gardens . . . ."[135] It also included a skating rink, an auditorium, and other facilities for the use of the Center's customers. All told, the Center was in many respects indistinguishable physically from the shopping center in the *Logan Valley* case,[136] decided 4 years earlier. But while *Logan Valley* had held that a labor union could not be enjoined from picketing a grocery store at a shopping center in Pennsylvania, the Court in *Tanner* concluded that the distribution of leaflets concerning the draft and the Vietnam War could be prohibited in the Lloyd Center mall in Portland. In an opinion by Justice Powell the majority concluded that both *Marsh v. Alabama*[137] and *Logan Valley* were distinguishable. *Marsh* had involved a company town, in Justice Powell's telling an "anachron-

134. 407 U.S. 551 (1972).

135. Tanner v. Lloyd Corp., 308 F. Supp. 128, 129 (D. Ore. 1970).

136. Indeed, in dissent Mr. Justice Marshall wrote:

> The Lloyd Center is similar to Logan Valley Plaza in several respects: both are bordered by public roads, and the entrances of both lead directly into the public roads; both contain large parking areas and privately owned walkways leading from store to store; and the general public has unrestricted access to both. The principal differences between the two centers are that the Lloyd Center is larger than Logan Valley, that Lloyd Center contains more commercial facilities, that Lloyd Center contains a range of professional and nonprofessional services that were not found in Logan Valley, and that Lloyd Center is much more intertwined with public streets than Logan Valley.

407 U.S. at 575 (Marshall, J., dissenting). Justice Marshall also noted but apparently did not rely on the lower court's finding that Lloyd employed twelve security guards who were given full police power by the city of Portland. *Id.* It was these security guards who first warned the respondents that they were not free to distribute leaflets in the mall and that if they persisted they would be arrested and charged with trespassing. After the warning, the respondents left the mall and without further incident commenced passing out leaflets on the public sidewalks outside the Center. *Id.* at 556 (opinion of the Court).

137. 326 U.S. 501 (1946); *see* text accompanying notes 36-43 *supra*.

ism,"[138] an "economic anomaly of the past."[139] In that case the Court had properly held that when a corporation takes over *all* the functions of a municipality, the balance between an individual's right of expression and the private property interest must be struck in favor of free speech.[140] If anything, *Logan Valley* had improperly extended *Marsh* to reach a modern shopping center that only vaguely resembled the business district in Chickasaw, Alabama.[141] Nevertheless, it was unnecessary in *Tanner* to overrule *Logan Valley*. That case had expressly left open the question whether expression unrelated to the use to which private property is put might be enjoined.[142] *Logan Valley* involved picketing regarding the employment practices of one of the stores in the shopping center. Thus, it was essential to the pickets to be able to reach the persons doing business with that store. Since the only entirely public area in the vicinity was some distance from the store, pickets established there would have been ineffective. The leaflets distributed at Lloyd Center, on the other hand, concerned general political issues not directly related to the stores at the center or, more precisely, to the use to which the Center grounds were being put. It was, then, not essential that the leaflets reach these particular people at this particular location; the same expression might be just as effective elsewhere. Indeed, in *Tanner* the respondents had been able to move to the public sidewalks and streets adjoining the Center and to distribute their leaflets to the same people on their way home.[143]

Whatever the persuasiveness of these distinctions, and the dissenters found them not at all persuasive,[144] the majority opinion in *Tanner*

138. 407 U.S. at 558.

139. *Id.* at 561. Notwithstanding *Tanner*, several courts have found *Marsh* controlling in cases involving migrant worker camps, which still resemble in many respects the company town of Chickasaw. *E.g.*, Illinois Migrant Council v. Campbell Soup Co., 519 F.2d 391 (7th Cir. 1975); Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); *see* Asociacion de Trabajadores Agricolas v. Green Giant Co., 518 F.2d 130 (3d Cir. 1975).

140. Surprising as it seemed coming from Justice Black, the *Marsh* opinion did contain language indicating a balancing approach: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." 326 U.S. at 509.

141. Justice Powell's majority opinion in *Tanner* quoted at length from Justice Black's dissent in *Logan Valley*, in which the author of the *Marsh* opinion objected to its extension to a shopping center case. *See* note 112 *supra*.

142. 391 U.S. at 320 n.9.

143. 407 U.S. at 566-67.

144. Justice Marshall's dissent, joined by Justices Douglas, Brennan, and Stewart, was stinging. He read the majority opinion as "an attack not only on the rationale of *Logan Valley* [where Justice Marshall had written for a six-member majority], but also on this Court's longstand-

once again indicated a changed mood. Put most simply, the Court declined to further undermine the state action concept as a limitation on federal power. On the contrary, as in *Moose Lodge*, the Court held the line against further erosion, choosing instead to recall once again that "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property . . . ."[145] Perhaps even a more significant

ing decision in *Marsh* . . . ." 407 U.S. at 571. Justice Marshall pointed to the district court's finding that Lloyd Center was the functional equivalent of a public business district—much like the business district in *Marsh*. Moreover, the history of the Center illustrated that the city of Portland had participated in the planning of the Center. The city had vacated public streets to make room for the Center and had planned and constructed new streets to accommodate the increased traffic in the area. "From its inception," added Justice Marshall, "the city viewed it as a 'business district' of the city . . . ." *Id.* at 576. All this led Justice Marshall to conclude that the city of Portland had effectively delegated a public function to Lloyd Center, just as had occurred in *Logan Valley*. As a second ground of his dissent, Justice Marshall took issue with the majority's hasty conclusion that the leaflets distributed at Lloyd Center were not "generally consonant with the use to which the property is actually put." *Id.* at 578, *quoting* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 (1968) (footnote omitted). Marshall noted that the Center invited schools, Veterans organizations, volunteer groups, and political candidates to use its facilities to express their views on a variety of issues. The Center had thus opened its doors to the public, not only for the purpose of shopping at its stores, but for expression as well. That being the case, Justice Marshall would have held that Lloyd was not free to discriminate among groups on the basis of the content of their expression. Apparently on an analogy to the public forum cases, he argued that these leaflets *were* related to the purpose to which the Center was being put—at least so long as the Center embraced others with dissimilar views. Finally, Justice Marshall made the common sense argument that given the inaccessibility of other forms of expression many people, particularly the poor and the powerless, must resort to leaflets in order to be heard. If cities tend to depend more and more on "private" shopping centers as they plan for the future, the ability of these groups to express themselves effectively will surely be curtailed. "As governments rely on private enterprise, public property decreases in favor of privately owned property. It becomes harder and harder for citizens to find means to communicate with other citizens." 407 U.S. at 586. In order to ensure that the purpose of the first amendment is achieved, Justice Marshall would apply that constitutional limitation to shopping centers like Lloyd. *Cf.* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 645-53 (1970) (examining the state's *duty* to furnish physical facilities for expression-related activities).

145. 407 U.S. at 567 (emphasis in original). A caveat, however, is in order. The quoted language to the contrary, there is some basis for reading the *Marsh-Logan Valley-Tanner* line of cases as outside the mainstream of the development of the state action concept. Clearly, all three opinions were written with as much attention paid to the first amendment implications as to the extent of the state's involvement in the actions of private landowners. Thus Justice Powell's opinion in *Tanner* may better illustrate his balancing approach to first amendment questions than his thinking on the related state action question. It can be argued that the holding in *Tanner* was not that there was insufficient state involvement in Lloyd Center to implicate the fourteenth amendment but rather that, the application of the fourteenth amendment assumed, on balance the first amendment rights of the respondents were not violated by a rule that restricted leafletting to the public sidewalks outside the mall. Support for such a reading can be found in his opinion: "It would be an unwarranted infringement of property rights to require them to yield to the exercise of First

case than *Moose Lodge*, *Tanner* rejected the proposition that private action becomes subject to constitutional limitations to the extent it takes on public characteristics. The clear message from *Tanner* was that private property does not become public merely because it is used for activity associated with public affairs. Thus, in the future it would not be enough to show that a private entity is performing what normally is a public function. Rather, it would be necessary to show that the state has played a significant, perhaps a conscious, role in bringing about the challenged private action.[146]

Perhaps both the *Moose Lodge* holding—that state aid to private

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Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the *asserted* right of free speech." *Id.* (emphasis supplied). By his use of the adjective *asserted*, Justice Powell may have intended to convey to the reader that he was merely pointing out what the constitutional analysis *would* be *if* the first amendment issue were presented, that is, if sufficient state action were shown. On the other hand, read literally this language suggests that Justice Powell saw the task in *Tanner* as balancing competing constitutional rights and not merely ascertaining whether the fourteenth amendment came into play at all in the case. This, of course, would not be the first instance in which the Court has blurred the threshold question regarding state action with the substantive question whether the challenged action, if sufficiently state-related, violates the Constitution. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 129 (1973), *discussed in* text accompanying notes 195-224 *infra*. *See also* 412 U.S. at 133-34 (Stewart, J., concurring) (suggesting that the *Marsh*, *Logan Valley*, and *Tanner* cases constitute an independent basis for applying constitutional restrictions—apart from the "evolution of the 'state action' concept").

146. After this article went to galleys, the Supreme Court decided Hudgens v. NLRB, 44 U.S.L.W. 4281 (U.S. March 2, 1976), another case that, like *Logan Valley*, involved labor union picketing at a privately operated shopping center. In an opinion by Justice Stewart, who had been with Marshall dissenting in *Tanner*, the Court held that *Tanner* could not be squared with the reasoning in *Logan Valley*. Accordingly, even though the majority opinion in *Tanner* had been at pains to distinguish *Logan Valley* and to leave that decision intact, Justice Stewart was prepared to face reality: "Our institutional duty is to follow until changed the law as it now is, not as some members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. . . . [T]he ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*." *Id.* at 4285. In a concurring opinion, Justice White admitted his discontent with *Logan Valley*, but nevertheless argued that the case need not be overruled. Justice Powell, also concurring, conceded that White offered tenable factual distinctions, but chose not to rely upon them. Instead, he acknowledged that his opinion for the Court in *Tanner* would have done better "to have confronted this disharmony [with *Logan Valley*] rather than draw distinctions based upon rather attenuated factual differences." *Id.* at 4287. The most interesting opinion came from Justice Marshall, who asserted that, while in *Tanner* he had argued that *Logan Valley* could not be distinguished and thus must have been overruled, he had "on reflection" decided that the two cases were reconcilable after all—for the very reasons given by Justice Powell at the time. Accordingly, in Marshall's view at least, *Logan Valley* remained "good law" to control *Hudgens*, a case he found closer to *Logan Valley* than *Tanner*. *Id.* at 4290-91.

entities will not alone justify upsetting the balance between state and national power—and the *Tanner* warning—that what looks public may nevertheless be private—contributed to the confusion the Court experienced in *Gilmore v. City of Montgomery*.[147] That case involved the validity of the city's policy permitting segregated private groups to use public recreational facilities. The circuit court had approved an injunction against the *exclusive* use of facilities by school groups, but held that the district court's order barring use of public facilities by nonschool groups was not founded upon a sufficient showing of state action.[148] In the Supreme Court Justice Blackmun's opinion for the Court affirmed the holding that the city could not validly give segregated private schools *exclusive* use of such things as playing fields and parks. But the Court found the record inadequate for a resolution of the question whether *nonexclusive* use by school groups might be enjoined and the final question whether nonschool groups might also be barred from public facilities.[149] *Gilmore* has been examined elsewhere, and it will suffice to say

147. 417 U.S. 556 (1974).

148. At the culmination of longstanding civil rights litigation in Montgomery, the district court had enjoined city authorities from permitting the use of public recreational facilities by any private segregated school group or any nonschool group that had a racially discriminatory admissions policy. Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972). On appeal the Fifth Circuit drew a distinction between a private school's exclusive possession and use of a facility and independent use by individual students, saying of the latter: "[T]o the extent that the [district] court's order may be read to prohibit the use and enjoyment of public recreational facilities by individual children or groups of students enrolled at private schools in common with other members of the public, we find the order to be overbroad." 473 F.2d 832, 837 (5th Cir. 1973). So long as the order barred only the exclusive use of facilities for official functions, the circuit court could approve, but it would not countenance depriving individual students enrolled at segregationist academies the opportunity to use public facilities independently. On the further question whether private non-school groups might be enjoined from using facilities, the issue changed considerably. In the context of schools, any state aid to segregated private schools might frustrate the state's affirmative duty to disestablish the dual public school system. *See* Green v. County School Bd., 391 U.S. 430, 437-38 (1968). But there is no affirmative duty to desegregate private nonschool groups, and the case for state involvement in the discrimination practiced by such groups is much more difficult to make. *See* National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). In *Gilmore* the circuit court concluded that the Montgomery petitioners had failed to make that case.

149. Since *Gilmore* the Fifth Circuit has indicated that in some cases *nonexclusive* use of public facilities will be found sufficient to implicate the fourteenth amendment. Golden v. Biscayne Bay Yacht Club, 521 F.2d 344, 352 (5th Cir. 1975). The Supreme Court in *Gilmore* also indicated uncertainty about the petitioners' standing. While the petitioners were parties to an outstanding order requiring the desegregation of public parks in the city, it was not altogether clear that they were entitled to have the benefit of another order commanding desegregation of public schools. It was the latter that might support the claim that nonexclusive use of facilities would have a "significant tendency to facilitate, reinforce, and support private discrimination," so as to frustrate the

here that the decision sheds little light on the significant questions presented.[150]

Yet Justice Blackmun's opinion offered scattered indications of the considerations the Burger Court finds relevant to the identification of state action. Citing *Moose Lodge*, the Court reminded the district court that the provision of "traditional state monopolies, such as electricity, water, and police and fire protection" does not sufficiently involve the state in the activities of the groups that receive such "generalized governmental services."[151] In *Gilmore* Justice Blackmun added parks and similar recreational facilities to the list from *Moose Lodge*, concluding accordingly that to the extent the district court's order barred the mere use of facilities by *any* segregated group it was invalid for want of a proper finding of state action.[152] That said, the Court went on to suggest that a different result might be reached if the petitioners were able to show that the city rationed recreational facilities that otherwise would be freely accessible to all. As an example, Justice Blackmun suggested that if the city were to engage in scheduling softball games for an all-white church league, the city's role in the racial discrimination practiced by the league would be "dangerously close to what was found to exist in *Burton* . . . ."[153] Perhaps the Court meant to attach crucial significance to the conscious role of city officials in planning the exclusive use of public facilities by segregated groups. In other cases the Court had not demanded that agents of the state participate consciously in racial discrimination before the fourteenth amendment came into play; such a holding would break with numerous cases in which state action was found apart from intentional discrimination by a public employee.[154]

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city's affirmative responsibility to disestablish the dual public school system. *See* Gilmore v. City of Montgomery, 417 U.S. 556, 570 n.10 (1974), *quoting* Norwood v. Harrison, 413 U.S. 455, 466 (1973).

150. *See* Yackle, *Private Use of Public Facilities: A Comment on Gilmore v. City of Montgomery*, 10 WAKE FOREST L. REV. 659 (1974). *See also* Gooden v. Mississippi State Univ., 499 F.2d 441 (5th Cir.), *cert. denied*, 419 U.S. 1093 (1974).

151. 417 U.S. at 574.

152. *Id.* Echoing the views expressed by those who would develop a more expansive state action concept, see text accompanying notes 57-65 *supra*, Justice White's concurring opinion would have made it clear that "there is very plainly state action of some sort involved in the leasing . . . of scarce city-owned recreational facilities to . . . private groups. . . . [T]he question is not whether there is state action, but whether the conceded state action by the city . . . is such that the State must be deemed to have denied the equal protection of the laws." *Id.* at 582.

153. *Id.* at 574.

154. *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Marsh v. Alabama, 326 U.S. 501 (1946).

Nevertheless, *Gilmore* seemed to look in a new direction, perhaps suggesting further developments to come.

The next Term, in *Jackson v. Metropolitan Edison Co.*,[155] what had been only a suggestion in *Gilmore* was apparently turned into an express holding. In another opinion by Justice Rehnquist the Court held that the action of a privately owned utility company in terminating service to a customer for alleged nonpayment of bills was *not* subject to the constraints of the fourteenth amendment. The customer contended that she possessed an entitlement to electrical service under state statutes and that she could not be deprived of that property interest without due process of law.[156] Although Metropolitan was not formally an agent of the state, she argued that the extensive state regulatory scheme to which the company was subject sufficiently involved the state in its actions to implicate constitutional protection for individual customers. Rejecting that position, Justice Rehnquist said that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[157] Standing alone, this is a

155. 419 U.S. 345 (1974).

156. In Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), the Court held that *property* protected by the due process clause of the fourteenth amendment is determined by nonconstitutional law that explicitly or implicitly creates an *entitlement* to a benefit dispensed by government in the form of largesse. For example, at least since Goldberg v. Kelly, 397 U.S. 254 (1970), the receipt of public assistance has been considered such an entitlement, a property interest of which a recipient cannot be deprived without sufficient procedural safeguards to assure correct fact-finding. *See* Richardson v. Belcher, 404 U.S. 78, 81 (1971); Reich, *The New Property*, 73 YALE L.J. 733 (1964). In *Jackson* the petitioner contended that a provision of the Pennsylvania statutes relating to public utilities, which expressly required the power company to provide service without unreasonable interruptions, created such a property interest in her. Accordingly, she argued that the company was barred by the due process clause from terminating service to her home prior to notice and a hearing into the facts surrounding her alleged failure to pay her bills. *See* 419 U.S. at 348 n.2; Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

157. 419 U.S. at 351. In dissent, Justice Douglas complained that the majority had repudiated *Burton* by examining each contact with the state separately. "It is not enough to examine *seriatim* each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling." *Id.* at 360. Of course, since the majority opinion did just that it seems clear that, at least after *Jackson*, the aggregate is *not* controlling. In his separate dissent Justice Marshall also complained that the majority had given "short shrift to the extensive interaction between the company and the State," choosing to focus instead "solely on the extent of state support for the particular activity under challenge." *Id.* at 369. Although *Burton* was distinguished in *Jackson* as involving a "symbiotic relationship" between the state and private discriminatory activity, there is some question whether that case remains good authority. *See* text accompanying note 124 *supra*. It seems clear that the *Burton* Court did not attach constitutional significance to any particular contact between the

demanding standard. Apparently what is required is a close, rational connection between the state and the particular conduct challenged by the individual. After *Jackson* it is no longer sufficient to show numerous contacts between the state and the private entity; the only contacts that merit attention are those that rationally relate to the specific action under attack.[158] In *Jackson* itself Metropolitan was heavily regulated by the state, but neither its monopoly status nor its effect on the public interest established a rational nexus between the state and the procedure by which the company had terminated the petitioner's electrical service.[159]

Parking Authority and Eagle, but instead rested its decision on the aggregate of contacts, precisely the rationale rejected in *Jackson*. Nevertheless, at least so far as the "symbiotic relationship" analysis will take it, *Burton* continues to be cited. *E.g.*, Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975); Braden v. University of Pittsburgh, 392 F. Supp. 118, 125 (W.D. Pa. 1975). *But see* Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) (giving *Burton* a very narrow reading).

158. This has been the view of lower federal courts in decisions since *Jackson*. *E.g.*, Taylor v. Saint Vincent's Hosp., 523 F.2d 75 (9th Cir. 1975); Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975); Spark v. Catholic Univ. of America, 510 F.2d 1277 (D.C. Cir. 1975); Blouin v. Loyola Univ., 506 F.2d 20 (5th Cir. 1975). The Second Circuit has taken the position that even when government financial aid is conditioned upon a private entity's agreement to comply with antidiscrimination rules the Constitution is not implicated unless the action under attack relates to those rules. Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974). The Supreme Court's rational nexus test is perhaps analogous to its approach in *Tanner*, in which the Constitution was not invoked in a shopping center case because the plaintiffs' expression-related activity was not tied to the purpose for which the center was open to the public. In cases involving governmental funding of private activities it might be argued that even though government money is not used in the particular activity under attack, funding is fungible and money saved on other projects that *are* paid for by government may be diverted to the project involved in the litigation. The argument, where made, has not been successful. *See* Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975); Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975). To the extent that analogy to establishment clause precedents is reliable, it may be noted that the Supreme Court has rejected the argument that all aid to sectarian schools is forbidden "because aid to one aspect of an institution frees it to spend its other resources on religious ends." Hunt v. McNair, 413 U.S. 734, 743 (1973).

159. In rejecting the petitioner's argument that Metropolitan's monopoly status would support a finding of state action, Justice Rehnquist said that the company was a *natural* monopoly. It did not owe its monopoly status to the state but to the economics of the marketplace that made it infeasible for others to compete. On this theory, since the company was regulated not to maintain its monopoly position but only to ensure adequate service to the public, the state was considered less responsible for the actions of the utility. 419 U.S. at 350 n.7. In dissent, Justice Marshall found in these facts even more reason to subject the company to constitutional limitations. In his view, the state's policy of regulating the company's operations in the public interest was tied to its decision not to provide electrical power itself but instead to offer service to consumers through the private company. Effectively, then, the state had delegated a public function to Metropolitan. 419 U.S. at 371; *see The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 142 (1975).

In dissent, Justice Marshall argued persuasively that, at least by implication, the majority opinion had gone even further. Focusing upon the portion of the majority opinion that had distinguished *Public Utilities Commission v. Pollak*,[160] Marshall concluded that the majority would require conscious action by a state agent before invoking the fourteenth amendment.[161] In *Pollak* the Court had found no substantive violation of the first amendment in a District of Columbia transit company's practice of piping music into its buses. The Court had apparently[162] found sufficient governmental involvement[163] in the case not only because the transit company was subject to extensive regulation as a public utility, but also because the Public Utilities Commission had investigated the music policy and affirmatively approved it.[164] In *Jackson*, argued the majority, "there was no such *imprimatur* placed on the practice of Metropolitan about which petitioner complains."[165] On the facts, this conclusion was arguable at best, for Metropolitan had submitted its procedure in termination cases to the state Public

160. 343 U.S. 451 (1952).

161. 419 U.S. at 368 (Marshall, J., dissenting).

162. As Justice Rehnquist pointed out in *Jackson*, it is unclear from the opinion in the case whether the Court found sufficient governmental action to require a decision on the substantive issue or instead merely assumed the threshold governmental action question for purposes of treating the merits. 419 U.S. at 356 n.16. In dissent, Justice Marshall maintained that, even if the *Pollak* opinion was itself unclear on this point, decisions since had read the case as having squarely decided the "state action" question presented. *Id.* at 371 n.3.

163. Since the District of Columbia is not subject to the fourteenth amendment, the Court in *Pollak* was presented with a case arising directly under the first amendment, not filtered through the due process clause of the fourteenth. Accordingly, the case cannot properly be considered a *state* action decision at all. On the other hand, since the first amendment protects the individual only from the actions of the national government, similar *governmental* action questions arise. Indeed, courts often treat the issues—state action under the fourteenth amendment and governmental action under the provisions of the Bill of Rights—as the same. *E.g.*, Junior Chamber of Commerce v. Missouri State Junior Chamber of Commerce, 508 F.2d 1031, 1033 (8th Cir. 1975); Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511, 513 n.4 (D.C. Cir. 1974); Jackson v. Statler Foundation, 496 F.2d 623, 627 n.5 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). At most the issues are only *analogous*. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 133 (1973) (Stewart, J., concurring). In an argument constructed *infra*, this article will suggest that a clear distinction between state and governmental action cases is crucial to an understanding of the present stage of doctrinal development in this area.

164. *Pollak* is perhaps best remembered for Justice Frankfurter's separate opinion explaining his decision to recuse himself in the case. Fearing that subconscious feelings might affect his objectivity, he said: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." 343 U.S. at 467. The Justice used the buses and was subjected to the piped-in music about which Pollak complained—one might suspect, in Frankfurter's estimation, with some justification.

165. 419 U.S. at 357 (emphasis in original).

Utilities Commission in a tariff filed with that office. Although the Court noted that it was questionable whether state law required the company to file the tariff, and even whether the commission was empowered to disapprove it, it conceded that the tariff became effective only when the commission did not affirmatively disapprove it within 60 days of submission. Still, the Court maintained that, since the commission's consideration of the tariff had been merely perfunctory—as opposed to the extensive consideration given the music policy in *Pollak* —the case for state action had not been made out.[166]

Justice Marshall seized upon the precise language used by the majority opinion and found in the words a significant departure from state action precedents. The Court wrote:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into "state action."[167]

Read literally, this seems to say that even the affirmative approval of the termination practice by the commission would have been insufficient. The fourteenth amendment would have been applicable only if the commission had actually *ordered* Metropolitan to terminate service according to the procedure challenged by Mrs. Jackson. Justice Marshall could not accept such a proposition in light of the precedents,[168] and it seems unlikely that the Burger Court will take it to its

166. In dissent, Mr. Justice Marshall argued:

> The majority's test puts potential plaintiffs in a difficult position: if the Commission approves the tariff without argument or a hearing, the State has not sufficiently demonstrated its approval and support for the company's practices. If, on the other hand, the State challenges the tariff provision on the ground, for example, that the "reasonable notice" does not meet the standards of fairness that it expects of the utility, then the State has not put its weight behind the termination procedure employed by the company, and again there is no state action. Apparently, authorization and approval would require the kind of hearing that was held in *Pollak*, where the Public Utilities Commission expressly stated that the bus company's installation of radios in buses and streetcars was not inconsistent with the public convenience, safety, and necessity.

Id. at 370-71.

167. *Id.* at 357.

168. He found the proposition inconsistent with, for example, *Reitman* and *Moose Lodge*, both of which had indicated that any state authorization that tends to encourage the action under

logical conclusion. To require an order from a state agency to engage in the conduct alleged to be invalid is, of course, to eliminate from consideration any case in which the argument for state action is founded upon state involvement with private conduct. This is to find state action only when a state legislature commands race discrimination by positive enactment, or a deputy sheriff himself leads a band of gunmen to impose summary punishment upon civil rights workers, or a state court orders a litigant to discriminate against blacks in selling his property. These are the classic cases in which state action is explicit. At the very least the public function cases would seem to stand for the proposition that indirect state action, funneled through private hands, can also violate the fourteenth amendment.[169] Indeed, only a half dozen pages earlier in *Jackson*, the Court had stated its task as deciding when the actions of a *private* entity "may be fairly *treated* as that of the State . . . ."[170]

Of course, even a rule requiring considered approval or authorization of a private entity's actions, indeed even one requiring a nexus between the state and the particular private action under attack, sweeps away the expansive notions of state action that were suggested, and some thought adopted, during the Warren Court years. Clearly nothing in *Jackson* permits state action to be found in a state's failure to protect individual interests against the acts of other individuals or private groups and organizations. And certainly nothing in *Jackson* suggests that the state law that underlies private ordering of any kind and necessarily operates in every case to give legal effect to private actions might itself constitute sufficient state action to implicate the fourteenth

attack will be sufficient to invoke constitutional limitations on that action. *Id.* at 369 n.2.

169. *See* text accompanying notes 28-43 *supra*. Of course, it is possible but unlikely that the Court intended to discard the public function rationale altogether. In a recent opinion, the Second Circuit concluded that "the service involved must not only be one which is traditionally the exclusive prerogative of the state but . . . it must in addition be one which the state itself is under an affirmative duty to provide." New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 860 (2d Cir. 1975). There being few if any services the state *must* provide, such a holding would effectively overrule the public function cases. The language in *Jackson*, taken literally, might even suggest a return to the view that an action of a state agent that itself violates state law cannot be challenged as unconstitutional. *See* text accompanying notes 22-27 *supra*. Once again, it is unlikely that Justice Rehnquist intended to go too far.

170. 419 U.S. at 351 (emphasis supplied). It has been argued that Justice Rehnquist "took pains to stress that the absence of any proof of state initiation [of the action under attack] or enforcement would not necessarily be dispositive in all cases." Holodnak v. Avco Corp., 514 F.2d 285, 288 (2d Cir. 1975).

amendment.[171] In short, the Court rejected the view that it should effectively disregard the state action limitation and proceed immediately to a balancing test to determine whether the conceded state action violates the Constitution. On the contrary, *Jackson* settled upon a wooden state action concept that follows the familiar two-step pattern of first looking for sufficient state action to invoke the fourteenth amendment—now requiring evidence of official participation in the private conduct under attack—and only upon finding state action as a threshold matter treating the merits of the alleged substantive violation.[172] Thus, a finding of state action carries a very specific meaning. It is not that the state in some shadowy fashion has brought about or permitted conduct in circumstances that justify the invocation of constitutional limitations.[173] When the Burger Court finds state action in a case, it means that the private actor involved *is* the state for purposes of fourteenth amendment

171. *See* text accompanying notes 57-106 *supra*. That the post-*Jackson* world will admit of no such argument is made clear by Judge Wisdom's recent opinion in Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975). In that case the court upheld a Texas statutory scheme that permitted creditors to foreclose on deeds of trust without judicial proceedings. In a passage that recognized the expansive state action argument but nevertheless rejected it as inconsistent with *Jackson*, Judge Wisdom wrote:

> A sale under a deed of trust, to be an effective creditor remedy, must of course pass good title. The contract that provides for a power of sale thus relies, ultimately, on the state's acknowledgement of the legal effect of the involuntary change in ownership brought about by the exercise of the power of sale. That the state merely recognizes the legal effect of such private arrangements does not convert them into state acts for Fourteenth Amendment purposes. . . . Virtually all formal private arrangements assume, at some point, the supportive role of the state. To hold that the state, by recognizing the legal effect of those arrangements, converts them into state acts for constitutional purposes would effectively erase to a significant extent the constitutional line between private and state action and subject to judicial scrutiny under the Fourteenth Amendment virtually all private arrangements that purport to have binding legal effect.

519 F.2d at 1170. To be sure. Although Judge Wisdom's language suggests that the plaintiffs' argument asks far too much of the Constitution, one suspects that he might have been sympathetic to it a few brief years ago. Now, however, with the Burger Court's decisions on the books, he is clearly right that the argument has been soundly rejected—at least insofar as the fourteenth amendment [of its own force] is concerned. *But see* text accompanying notes 389-98 *infra*.

172. This is not to say that the results reached will necessarily be different because of the different analysis. Those who would take a broader view of state action would still institute a balancing test to determine whether the state involvement violates the fourteenth amendment. And that balance might well take into consideration the connection between the state action conceded to be present and the ostensibly private conduct under attack. In discussing the application of the fourteenth amendment to charitable institutions, for example, Professor Lewis has said that "[t]he important consideration for the state action problem is whether exemption involves the government in an endorsement of the specific policies and goals of an exempt organization." Lewis, *supra* note 24, at 1108.

173. *See* note 59 *supra*.

analysis.[174] This is an exceedingly narrow construction, especially in light of the development of the state action doctrine over the last 3 decades.[175] Precisely why the present Court has taken such a position is

174. *Cf.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 133 (1973) (Stewart, J., concurring). One may fairly ask, however, why it is important to tie the *particular* conduct under attack to government. If the question in a case in which a private entity is sued is whether the entity is an arm of the state, whether it *is* the state, then a general assessment of its relationship to government similar to the *Burton* approach would seem appropriate.

175. The Burger Court may draw support from Judge Friendly's treatment of the tax exemption cases. He has argued that there is a crucial distinction to be drawn between precedents holding that public officials may be enjoined from granting tax exemptions to institutions that practice racial discrimination and cases in which a plaintiff sues a private institution, seeking to impose constitutional restrictions upon its activities by proving sufficient governmental contacts. When a public official is sued, the question is not whether sufficient state action is present but whether the conceded state action violates the Constitution. If it does, the remedy is an order lifting the exemption. In actions directly against private institutions, on the other hand, a finding of state action must mean a holding that the institution is an arm of the state, exposing it to all manner of constitutional restrictions both in its relations with outsiders and in its internal affairs. In some narrowly defined cases Judge Friendly would be prepared to hold that government agents might be ordered to withhold an exemption. *See* Bob Jones Univ. v. Simon, 416 U.S. 725 (1974); *cf.* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd per curiam sub nom.* Coit v. Green, 404 U.S. 997 (1971). However, he views cases finding tax exempt institutions subject to constitutional limits "analytically unsound, dangerously open-ended, and at war with controlling precedent . . . ." Jackson v. Statler Foundation, 496 F.2d 623, 636 (2d Cir. 1974) (Friendly, J., dissenting), *cert. denied*, 420 U.S. 927 (1975). *Compare* Jackson v. Statler Foundation, *supra*, *with* McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court). *See also* Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51, 61-63 (1972). Taking Judge Friendly's position a bit further, it is arguable that the Constitution never should be invoked in a lawsuit that names someone or something other than a public body or agent as defendant. If that is the case, and if the Burger Court adopts a similar view, the real problem in *Moose Lodge* was the plaintiff's decision to sue the Lodge rather than the Pennsylvania Liquor Control Board, and the problem in *Jackson* was that Metropolitan and not the Public Utilities Commission was named as defendant.

If there is a satisfying answer to Judge Friendly, perhaps it lies in an understanding of the different perspectives from which state action cases may be analyzed. On the one hand, the question may be put as whether the action of some ostensibly private entity is sufficiently bound up with the state to justify ascribing the action to the government and subjecting it to constitutional scrutiny. This is the approach generally taken when a private concern is named as defendant. On the other hand, the same case may be viewed from the perspective of the state officials who allegedly have ties to the private action under attack, and the question may be reframed as whether what the officials have done violates the Constitution. The case that comes first to mind is Reitman v. Mulkey, 387 U.S. 369 (1967), *discussed in* text accompanying notes 88-106 *supra*. Given the positive enactment of a constitutional amendment in *Reitman*, there was no serious question whether state action was involved. The issue in the case was whether the admitted state action violated the fourteenth amendment as an encouragement to race discrimination. Nevertheless, *Reitman* is properly recognized as a key case in the development of state action doctrine. *See* Palmer v. Thompson, 403 U.S. 217 (1971), *discussed in* note 115 *supra*.

Not surprisingly, the discussion leads back to the argument made just after *Shelley* that the search for state action is misleading—that state action is always present when plaintiffs can point

unclear from the cases, but a number of possibilities come to mind.[176]

The principal basis for the apparent retreat may lie in the Burger Court's essential conservatism. The men who have come to the Court since 1969 have taken the bench with the firm conviction that in a

to state involvement of any sort. *See* note 152 *supra*; *cf.* Gilmore v. City of Montgomery, 417 U.S. 556, 582 (1974) (White, J., concurring). On this reasoning, it should make no constitutional difference whether private entities or governmental officials are named as defendants in fourteenth amendment cases. *Cf.* Goodloe v. Davis, 514 F.2d 1274 (5th Cir. 1975) (private service club can be named as defendant in suit challenging the discriminatory operation of public athletic facilities). Once it is established that what the state is doing violates the Constitution, the private entity or the state itself can presumably choose from two alternatives. Either all ties to government must somehow be severed, as when a tax exemption is withdrawn, *see* Coit v. Green, *supra*, or the entity must change its policy, as when a restaurant stops discriminating on the basis of race. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). Of course, if the very expansive notion of state action suggested earlier in this article is embraced, there will be no way for the private concern to rid itself entirely of state involvement. The underlying state law that recognizes a private right to discriminate can never be escaped. At all events, however, Judge Friendly's real concern seems to be with the proper *remedy* for unconstitutional state action when it is identified rather than with the substantive question whether the action is indeed invalid.

176. It is, of course, possible that the results reached in the most recent cases stem not so much from the Court's changing notions of state action as from its views on the substantive issues that must be reached if sufficient state action is found. It has already been suggested that in *Tanner* the Court was much more concerned with the substantive first amendment question than with state action. *See* note 145 *supra*. In *Jackson* the majority may have hesitated to find state action in order to avoid facing the question whether, assuming the application of the due process clause, a consumer of electrical power is entitled to a hearing prior to termination of service. The Court's recent decisions indicate substantial uncertainty about what process is due in various factual situations. *See* Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Note, *supra* note 156. *Compare* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), *and* Fuentes v. Shevin, 407 U.S. 67 (1972), *with* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), *and* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975). In his dissent in *Jackson* Justice Marshall suggested that "[t]he majority's conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. Elaborate hearings prior to termination might be quite expensive, and for a responsible company there might be relatively few cases in which such hearings would do any good." 419 U.S. at 373. Justice Marshall's solution, however, was not to withhold application of the due process clause altogether but instead to require relatively little process, perhaps only informal prior notice, before electrical service may be terminated. Marshall was additionally troubled that the majority's position, in part determined by the character of the constitutional violation alleged, might be extended to other cases—namely those involving racial discrimination. A handful of lower court opinions have adopted the view that a less stringent standard for finding state action should be applied in race discrimination cases than in others. *E.g.*, Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 931-33 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Jackson v. Statler Foundation, 496 F.2d 623, 635 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974). At least one circuit has indicated a willingness to look for state action with special care in sex discrimination cases. Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975). The Supreme Court itself has never taken such a position in race or sex classification cases. *See* Henkin, *supra* note 50, at 473 n.2; *cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 190-91 (1970) (Brennan, J., concurring and dissenting).

democratic society the judiciary should and must exercise restraint. An activist Court that wades quickly, perhaps too quickly, into the thick of what are arguably legislative concerns soon finds itself at sea, unable to perform its fundamental function of reasoned adjudication.[177] This Court would adhere to precedent, at least so long as the logic of precedent does not offend,[178] and would reject modes of analysis that force its members to make value judgments for their fellow citizens. It is understandable, then, that this Court should seek to avoid the further erosion of the state action limitation on the fourteenth amendment, for, to be sure, the demise of that concept necessarily would thrust the Court further into increasingly complex social problems.[179] Blurring into the Court's resistance to activism is its related judgment that, whatever the need for judicial intervention in local affairs during the past few decades,

177. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1017 (1973); Wechsler, *supra* note 33.

178. In discussing *Moose Lodge*, Professor Kurland wrote:

> No doubt that there is some validity in the dissenting position if it is taken to assert that the Court as earlier constituted, perhaps even as of last Term, would have reached a different conclusion. But there is nothing in the proposition that prior decisions compel the result that they would reach. The decisions on state action remained unprincipled, except to the extent that it be regarded as a principle to expand the concept even if rational justification is not forthcoming. It is obvious that the new Court is not going to be so latitudinarian in its reading of the Fourteenth Amendment's strictures. But it can take this stand even while paying full obligation to *stare decisis*.

Kurland, *supra* note 116, at 190.

179. The time is gone, of course, when anyone seriously contends that the work of the Supreme Court might be done without the delicate balancing of various societal and individual interests and values. As Professor Kurland has put it, "there are only as many such living 'strict constructionists' as there are living dodo birds." Kurland, *supra* note 115, at 266. Nevertheless, the Burger Court has attempted to limit its value judgments in most instances. In its equal protection decisions, for example, the Court has largely rejected the two-tier analysis developed in the Warren Court years because of its tendency to require the Court to assess the importance of competing interests in order to ascertain the appropriate standard of review. While the more flexible analysis adopted instead also calls for judgment, the Court now exercises that judgment on the merits of the classification under attack by applying an intermediate standard of review in most cases and then balancing interests in deciding whether the classification satisfies the fourteenth amendment. *See* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV L. REV. 1 (1972); *cf.* Sosna v. Iowa, 419 U.S. 393, 418 (1975) (Marshall, J., dissenting). On the other hand, in very recent cases the Court has revived what can only be regarded as substantive due process doctrine in cases involving personal privacy. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973). Here the Court has been much criticized for its alleged willingness to substitute its judgment for that of the legislature. *See* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973). *But see* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973).

this is a time for stock-taking. There are indications that the Burger Court believes that the great social upheavals of the fifties and sixties are over and, accordingly, whatever may be said for the moral leadership of the Court during those troubled times,[180] in the seventies the Court's role should be more passive.[181] This Court conceives of itself as fundamentally a dispute-resolving institution empowered to make law only insofar as it is necessary in case-by-case adjudication. That, of course, is theory to which all would subscribe, indeed, theory commanded by Article III.[182] But the Burger Court perhaps places greater emphasis upon its limited role in the constitutional scheme than did its predecessor. Now more than ever, in these days following the spirited civil rights movement of the sixties when the issues affecting individual liberty are less crisp and clear,[183] the Court should not stray from its

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180. *See* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 804 (1971).

181. After examining the cases, Professor Kurland concluded:

> In terms of voting patterns during the 1969 Term on civil rights cases, one could discern, if one had to, three blocs. The one most sympathetic to the utilization of the judicial process for aiding black equality included only Justices Douglas and Brennan. The one least willing to write social policy inhibiting individual racial discrimination would contain the new Chief Justice and Justices Harlan and White. In the middle, but leaning toward the second group, would be Justices Black, Stewart, and Marshall, with the last recusing himself in most of the cases.

Kurland, *Enter the Burger Court: The Constitutional Business of the Supreme Court, O.T. 1969*, 1970 SUP. CT. REV. 1, 19.

> The data then is clear that the Minnesota Twins [the Chief Justice and Justice Blackmun] have expanded into the Nixon quartet [with the coming of Justices Rehnquist and Powell], while the Warren Court trio [Justices Douglas, Brennan, and Marshall] remains a minority of three. . . .
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> . . . That the issues deriving from the consistent confrontation of the black and white races in this country will continue to call for judicial resolution seems patent. That the Court's attitude is changing from one of commitment to give black litigants what they want to one perhaps more consonant with the concept of the equality of the races is also apparent.

Kurland, *supra* note 116, at 185, 187.

182. For recent cases treating the "case or controversy" limitation on the exercise of federal judicial power, see Schlesinger v. Reservists Comm. To Stop The War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974).

183. *See* J. WILKINSON, SERVING JUSTICE 136-37 (1974). It is quite true that the cases presenting brutal beatings, murders, and reprehensible affronts to dignity no longer reach the Court in the numbers in which they came during the Warren Court years. In *Jackson*, for example, the issue was not overt race discrimination but a less odious question of rational procedure. *See* note 176 *supra*. In this vein it has been suggested that the application of the fourteenth amendment requires two elements: "governmental action in fact, and governmental action *in a context of sufficiently grave social implication to persuade the Supreme Court of the necessity of federal correction*." Clark, *supra* note 48, at 1002 (emphasis supplied).

assigned place in this peculiarly American scheme. This is a Court that wants to decide, will decide, only what is necessary to decide.

Moreover, this is a Court with a genuine concern for the system of federalism, an ideal the Court finds at the core of the American constitutional structure.[184] It must be remembered that, when the Court determines that a case does not present sufficient state action to implicate the Constitution, the effect is to remand the underlying problem to the states for resolution as they see fit. It is hardly questionable in our time that the states are empowered to make far-reaching changes in the law governing private affairs. The police power to legislate for the public health, safety, morals, and welfare is limited only by ultimate constitutional bounds that play virtually no role in the day-to-day work of state legislatures and courts.[185] To be specific, it can hardly be doubted that the states might have reached, indeed may yet reach, the same results sought by the litigants in the major state action cases—but through nonconstitutional means. Thus, Missouri might have outlawed restrictive covenants, the Wilmington Parking Authority might have inserted in its contract with the Eagle Coffee Shoppe a prohibition on race discrimination, California voters might have rejected Proposition 14 and thereby chosen to retain existing open housing legislation, Pennsylvania might have adopted a public accommodation law, the city of Portland might have conditioned its support of Lloyd Center on the Center's agreement to permit expression-related activity in the mall, the city of Montgomery might have barred the discriminatory use of its public facilities, and, finally, Pennsylvania might have added to its many utility regulations one more requiring notice and a hearing before service is terminated. The point is belabored but important. The Burger Court sees in every state action case the fundamental question whether the problem presented should be constitutionalized, whether it should be resolved by the Court itself as a matter of constitutional adjudication or, instead, left to the judgment of the state involved. To the extent more and more problems are constitutionalized, less and less is consequently

184. Mr. Justice Rehnquist's opinions in *Moose Lodge* and *Jackson* indicate a pronounced appreciation for federalism, and Justice Powell is even better known as one enamored of the decentralization of power in this system. *See* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 44 (1973). Professor Howard has pointed out that the only memorandum Powell carried to his confirmation hearings was a statement that emphasized the related notions of judicial restraint and federalism. Howard, *Mr. Justice Powell and the Emerging Nixon Majority*, 70 MICH. L. REV. 445, 451 (1972). *See also* Burke & Reber, *supra* note 177, at 1014.

185. *E.g.*, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

left to the states, and the system of federalism, in some minds at least, suffers proportionately.

Against the temperament of the Burger Court is set the history of the Nation in this half-century. It can be persuasively argued that the Warren Court took the lead in the protection of individual liberties not because of the personal political views of the sitting Justices but because the Congress, state courts, and perhaps most importantly state legislatures defaulted in their primary role in the ordering of human affairs.[186] There are times in the course of a nation's history when what it is right to do is apparent to all with eyes to see, but when as a practical matter corrective legislation cannot muster sufficient support to meet the growing need for reform. The American answer has been the Supreme Court, which can take an essentially moral position, supported as well as possible by existing law and precedent, and facilitate national coalescence around the identified ideal. There are obvious theoretical objections to this process, all of which come down to the charge that the Court is a fundamentally undemocratic institution, purposefully designed to be unresponsive to the people who in this system are deemed to hold ultimate power.[187] Government is legitimate only when it governs with the consent of the governed. This is, of course, all very true, and friends of the Warren Court would hardly dispute the basics of the argument. Nevertheless, it must be understood that while the Nation surely does look principally to the legislative branch to perform the law declaration function, in the American system the Supreme Court has traditionally stood as the defender of minorities and the individual against the majority will.[188] It is precisely because the Court need not be responsive to

186. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970). Professor Cox has made the point:

> But constitutional adjudication is part of government and government must be pragmatic as well as ideal. In the practical world there is, and probably has to be, a good deal of play in the joints. If one arm of government cannot or will not solve an insistent problem, the pressure falls upon another. It would have been best, no doubt, for the Congress to have taken the initiative in compelling school desegregation, but legislative action was blocked by the power of the southern congressmen and the filibuster. The Executive theoretically could have given more leadership. As a practical matter, however, the task of initiating steps to realize a national ideal fell to the Court; either it had to act or nothing would have been done. Similarly, the state legislatures initially and, when they failed, the Congress should have dealt with the spreading cancer of malapportionment . . . . The same is true of judicial activism in criminal procedure.

Cox, *supra* note 10, at 122.

187. *See generally* A. BICKEL, *supra* note 177.

188. Wright, *supra* note 180, at 785. Even one of the Warren Court's persistent critics

political pressures that it is able to hold the threat of majoritarian tyranny in check. Were this not so, the great promise of the Bill of Rights and the fourteenth amendment would be relegated to lofty theory that never finds its way to application in a concrete case. Thus, the argument that "activism" in the Supreme Court is to be avoided for fear of usurping the legislative function may fail to recognize the role of the Court and the Constitution in this system. It is in times when individual liberty is threatened by the action or inaction of legislatures that the Court must intervene.

In the cases for which the Warren Court is best remembered, hindsight finds ample justification for judicial intervention to safeguard individual liberty. In decisions involving the constitutional aspects of the criminal process, the Court imposed process on an irrational system rife with patently unfair methods of prosecution.[189] Similarly, in the apportionment cases the Court acted only when state legislatures had shown themselves unwilling to make the changes necessary to preserve participatory democracy.[190] Even in the crucial field of race relations, the Warren Court hardly "injected itself" into the complex problems facing the Nation.[191] Moreover, after stating the pertinent constitutional principles, the Court has regularly relied for the enforcement of its basic holdings on local officials acting in light of local conditions. Only when the "energies of our federal process" were "employed in the ingenuities of evasion" did the Court become more adamant.[192] The unfortunate conclusion to be drawn is that even after the Court has pulled the country away from impasse, in all too many places a recalcitrant major-

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warned the incoming Nixon appointees that "the vital role of the Court is to protect the individual against the incursions of the Leviathan." Kurland, *supra* note 115, at 321.

189. In discussing particularly the Warren Court's decisions affecting police practices, Professor Amsterdam offered these views:

> The ubiquitous lack of legislative and executive attention to the problems of police treatment of suspects both forces the Court into the role of lawmaker in this area and makes it virtually impossible for the Court effectively to play that role.
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> This point has been largely ignored by the Court's conservative critics. The judicial "activism" that they deplore . . . has been the almost inevitable consequence of the failure of other agencies of law to assume responsibility for regulating police practices. . . . In the area of controls upon the police, a vast abnegation of responsibility . . . has forced the Court to construct *all* the law regulating the everyday functioning of the police. Of course, the Court has responded by being "activist"; it has had to.

Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 790 (1970) (emphasis in original).

190. *See* A. COX, *supra* note 103, at 117-18.

191. P. FREUND, THE SUPREME COURT OF THE UNITED STATES 172 (1961).

192. *Id.* at 173.

ity will afford little protection for individual liberty. The tendency in this society is to view compliance with *minimal* constitutional requirements not only to be "fair" but also to be *all* the protection to which the individual is entitled.[193] Accordingly, if the Burger Court's purpose is to restrict its own impact in defense of liberty in favor of permitting other organs of government—particularly state legislatures—to take up the slack, there is little reason to anticipate a favorable response. A glance at the Court's decisions in recent Terms should put to rest any thought that the states are now prepared to accept the fair apportionment of legislative bodies and racial equality without vigilant judicial oversight.[194] There is even less reason to think that private entities like Lloyd Corporation or Metropolitan Edison will mend their ways voluntarily. Absent corrective state statutes or regulations, an unlikely prospect, these companies will continue doing just what they have done in the past, now with the perceived approval of the Supreme Court of the United States.

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193. As Justice Frankfurter put it, "[t]he tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 670 (1943) (dissenting opinion). To some extent, of course, the Court itself may bear the blame for the states' refusal to take responsibility for the protection of individual liberty *beyond* the floor established by the Constitution. Perhaps the Court's willingness to protect the individual in the past has left other agencies of government insensitive to their own responsibilities. Of this Professor Lewis has written:

> [T]here remains the tendency of many people to equate conduct constitutionally permissible with conduct that is morally right. The area of race relations is one in which many courts will follow the Supreme Court's directions, but with great care will avoid taking one step forward not positively required by those directions. The responsibility for development of this area of the law having long ago been shifted to the Court by some states, the Court must realize that when it draws the line circumscribing the power of the Constitution to resolve problems of racial discrimination, these states will remain within the confines of the circle.

Lewis, *supra* note 68, at 1467. There is a decided predisposition, then, to see no spur to legislative action in a Supreme Court decision refusing to exercise federal judicial power to protect individual liberty. On the contrary, the opposite conclusion is drawn, and the decision is read to *approve* whatever conduct was challenged. Indeed, there is some basis for arguing that the Court's activism in constitutional adjudication can discourage the states from themselves interpreting the Federal Constitution to protect individual liberty. *Cf.* Connecticut v. Menillo, 96 S. Ct. 170 (1975) (state court erred in holding that Federal Constitution made state abortion statute null and void); Oregon v. Hass, 420 U.S. 714 (1975) (state may not impose greater restrictions on police activity as a matter of federal constitutional law than those the United States Supreme Court finds necessary).

194. *E.g.*, Keyes v. School Dist., 413 U.S. 189 (1973); White v. Weiser, 412 U.S. 783 (1973).

B. *The Impact of Federal Legislation—An Aside for the CBS Case*

This article has been concerned so far only with the Supreme Court's development of the concept of state action as a limitation on the invocation of the fourteenth amendment. On this question *Jackson* is the most recent and definitive statement, and the conclusion to be drawn from that opinion is that the newly constituted Court takes an exceedingly narrow view of the circumstances in which the fourteenth amendment *of its own force* comes into play. In other words, the Burger Court apparently will be slow to exercise federal *judicial* power in local affairs by applying the fourteenth amendment to an increasing number of cases. The great expansion of judicial power in past years has come to an end. On the other hand, the picture of the Court's thinking is not complete without attention to the related discussion in *Columbia Broadcasting System, Inc. v. Democratic National Committee.*[195]

The *CBS* case involved one of the most significant first amendment questions to reach the Court in recent years. Roughly, the Democratic National Committee wished to establish an affirmative dimension to the first amendment that would *require* broadcasters to sell air time for political advertisements.[196] The Committee had attempted to purchase

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195. 412 U.S. 94 (1973).

196. The question whether the first amendment imposes any affirmative duties on government to facilitate the exercise of expression-related rights has been exhaustively treated in the literature. *E.g.*, J. BARRON, FREEDOM OF THE PRESS FOR WHOM? (1973); T. EMERSON, *supra* note 144, at 646. The principal focus of the discussion has been on the broadcast media, which have traditionally been subjected to controls that would have been invalid if applied to newspapers. *See* National Broadcasting Company v. United States, 319 U.S. 190 (1943); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967). In general, it is argued that the fundamental purpose of the first amendment is to ensure that the public at large is exposed to all manner of opinion and information regarding public issues and that, given the concentration of control existent in the broadcasting industry, the only effective way to see that unpopular views are heard is to provide an opportunity for those who hold such views to themselves obtain air time to offer their opinions to others. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1653-54 (1967); Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971). *But see* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972). After the setback in the *CBS* case, proponents of a right of access failed to persuade the Court that newspapers might validly be required to publish offerings from outsiders. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

More narrowly, the petitioners in *CBS* contended that since the broadcasters who had refused to sell time for editorial advertisements sold time to commercial advertisers, the resulting discrimination on the basis of content violated the first amendment on an analogy to the public forum cases. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972). Chief Justice Burger's opinion for the Court rejected that argument on the ground that broadcasters are required to give evenhanded treatment

time from several independent broadcasters and, when they were refused, asked the Federal Communications Commission (FCC) for a ruling that a broadcaster's rejection of *all* political advertisements violates the Communications Act and the first amendment.[197] The FCC determined that a ban on editorials is permissible so long as the broadcaster meets its statutory obligation to provide full and fair coverage of public issues.[198] That judgment was affirmed in the Supreme Court by an odd alignment of opinions.[199] In one section of his opinion for the

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to public issues under the FCC's Fairness Doctrine and, accordingly, the views of the petitioners *were* heard, albeit through the mouths of news commentators rather than their own. 412 U.S. at 128-31; *see* note 198 *infra*. In dissent, Justice Brennan declined to distinguish the public forum cases and would have found unconstitutional discrimination. 412 U.S. at 200-01.

197. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1970), contains provisions requiring broadcasters to operate in the public interest. 47 U.S.C. § 309(a) (1970). The FCC is empowered to oversee the industry, to make such rules and regulations, and to adjudicate such matters as the public convenience, interest, or necessity require. 47 U.S.C. § 303 (1970). In *CBS* the petitioners contended before the Commission and the circuit court, and ultimately before the Supreme Court, that aside from the first amendment they were entitled under the Act to purchase time from broadcasters. As the Chief Justice conceived the issues, many of the policies embodied in the statutory "public interest" standard had been drawn from the first amendment and an interpretation of the statute thus "necessarily invites reference to First Amendment principles." 412 U.S. at 122. The statutory and constitutional questions in the case thus tended to blur once the Court had passed over the threshold hurdle of finding sufficient governmental action to invoke the first amendment. *Id.* at 170 n.2 (Brennan, J., dissenting). *Contra, id.* at 142-43 (Stewart, J., concurring).

198. Title 47 U.S.C. § 315(a)(4) (1970), has been read as a codification of the Fairness Doctrine, established by the FCC in its early decisions and a statement published in 1949. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949); *see Fairness Doctrine and Public Interest Standards*, 39 Fed. Reg. 26372 (1974). Essentially, the Fairness Doctrine imposes a two-fold duty upon licensees. They must give adequate treatment to matters of public concern, and the coverage of those issues must fairly reflect conflicting views. Although in some circumstances existing FCC rules require the broadcaster to permit members of the public to use its facilities, in general the Fairness Doctrine does not govern *who* the licensee puts in front of the camera to cover public issues, so long as someone does it and that someone does it fairly. *See* note 210 *infra*. Normally, then, broadcasters meet their Fairness Doctrine responsibilities through public affairs programming by their own employees. While the Fairness Doctrine itself is clearly an intrusion into the journalistic discretion of broadcasters, the Supreme Court has upheld it against constitutional attack. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *But see* 412 U.S. at 186 n.21 (Brennan, J., dissenting) (giving *Red Lion* a narrow reading); *id.* at 154 (Douglas, J., concurring) (indicating a willingness to overrule *Red Lion* entirely).

199. The Chief Justice wrote for the Court in a four-part decision. Parts I and II reviewed the *Red Lion* litigation, the Court's general deference to legislative judgment on constitutional matters, and the history of federal regulation of the broadcasting industry. In these two introductory and mood-setting sections of his opinion, the Chief Justice carried a majority of the Court's members, apparently all but the dissenters. But in part III, in which the Chief Justice determined that there was insufficient governmental involvement in the broadcasters' ban on political advertisements to invoke the first amendment, only Justices Rehnquist and Stewart concurred. Justices Blackmun, Powell, and White found it unnecessary to decide that question. 412 U.S. at 147 (White,

Court the Chief Justice determined that the actions of private broadcasters are not subject to the first amendment even though they are heavily regulated by the federal government and enjoy a partial monopoly of the airwaves.[200] If the Chief Justice had garnered the support of a majority, he might have concluded his opinion without going further.[201] But only Justices Rehnquist and Stewart subscribed to his treatment of the threshold issue.[202] Accordingly, the Chief Justice *assumed* that sufficient governmental action existed to implicate the first amendment and went on to hold the ban on political editorials valid.[203] On the substantive issue he carried the additional votes of Justices White, Blackmun, and Powell. Remarkably, the latter three apparently found the governmental action issue so difficult that they chose to avoid it and deal directly with the first amendment question presented. Having decided that the broadcasters' policy could be upheld in any event, they declined to address the threshold issue on the ground that it could no longer affect the outcome of the case.[204]

J., concurring); *id.* at 148 (Blackmun, J., concurring). Justice Douglas avoided the governmental action issue, and concluded on the merits that not only was the ban on editorial advertising valid but that the Fairness Doctrine might be an unconstitutional infringement upon broadcasters' freedom of speech. *See* note 202 *infra*. He was understandably careful to point out that he had not participated in *Red Lion*. 412 U.S. at 154. Justice Brennan dissented in an opinion in which Justice Marshall concurred. *Id.* at 170.

200. For a contrary argument, see Johnson & Westen, *supra* note 196. A student note published in the same volume reviewed the relevant theories and concluded that the Johnson-Westen view "remains without authoritative support." Note, *Free Speech and the Mass Media*, 57 VA. L. REV. 636, 656 (1971).

201. Indeed, in the tradition of the indefatigable advocate, the dissent argued that since the Chief Justice lacked the support of a majority in his treatment of the governmental action issue, the last part of his opinion must be considered *obiter dicta* to the extent it reached the substantive first amendment issue. 412 U.S. at 171 (Brennan, J., dissenting).

202. Justice Douglas was faced at the outset with his many prior statements that mere licensing by government is sufficient to invoke constitutional limitations on the acts of licensees. *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972) (dissenting opinion). In his separate concurring opinion in *CBS* he circumvented those opinions by the statement, certainly correct, that his view had not been accepted and that, in any event, the Chief Justice's opinion had not decided "whether a broadcast licensee is a federal agency *within the context of these cases*." 412 U.S. at 150 (emphasis supplied).

203. 412 U.S. at 130-32.

204. In his separate concurring opinion Justice Stewart objected strenuously. He said that the conflation of the statutory and constitutional issues was "quite wrong . . . for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive." 412 U.S. at 142. In his absolutist view of the case, to find sufficient governmental action to invoke the first amendment would be to find that broadcast licensees *are* government for purposes of constitutional analysis. If that were the case, there would be no protection for the broadcasters themselves, for the first amendment confers no right to speak on *government*. Justice Stewart wrote:

On the question whether the government was sufficiently involved in the broadcasters' policy to require review under the first amendment, the opinion of the Chief Justice was both predictable and illuminating. After a review of the history of federal regulation of the broadcasting industry in the first two parts of his opinion, he turned in part III to the governmental action question. The circuit court had held that the broadcasters' policy was subject to the first amendment because private broadcasters are "proxies" or "fiduciaries" of the people, granted monopoly use of part of the public domain.[205] Perhaps anticipating *Jackson*, the Chief Justice rejected the view that significant involvement alone might implicate the first amendment; instead "there must be cautious analysis of the quality and degree of Government relationship *to the particular acts in question*."[206] In the beginning, Congress made the fundamental judgment that, while other nations chose to place the broadcast media under governmental ownership and control, in the United States broadcasting should be left in private hands, subject to extensive governmental regulation.[207] Since then the FCC has acted as an overseer to assure that broadcasters meet their statutory responsibility to be fair in the treatment of public issues.[208] The result, in the Burger

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Were the Government really operating the electronic press, it would, as my Brother Douglas points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of "fairness" to deny time to any person or group on the grounds that their views had been heard "enough." Yet broadcasters perform precisely these functions and enjoy precisely these freedoms under the Act. The constitutional and statutory issues in these cases are thus quite different.

Id. at 143 (emphasis in original); *see* T. EMERSON, *supra* note 144, at 663.

205. 412 U.S. at 115; *see* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 652 (D.C. Cir. 1971). In dissent, Justice Brennan essentially adopted the circuit court's view. He emphasized that broadcasters use a public resource, that they depend upon government for their right to use this public resource, and that they operate under regulations promulgated by the FCC—including the Fairness Doctrine which Justice Brennan found to be directly related to the ban on all editorial advertisements. 412 U.S. at 172-81.

206. *Id.* at 115 (emphasis supplied); *see* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), *discussed in* text accompanying notes 155-76 *supra*.

207. 412 U.S. at 117. *See generally* W. EMERY, BROADCASTING AND GOVERNMENT (1971).

208. *See* note 198 *supra*. It is perhaps useful to note that the Chief Justice wrote in *CBS* against a background of regulation that over the years had been the subject of extensive debate, disagreement, and litigation. Yet arguably at least, out of that history had come a roughly workable administrative scheme for wrestling with the enormously complex problems created by modern communications systems. As a circuit judge, the Chief Justice had himself been instrumental in the development of a scheme more attuned to the needs of minority interests. *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (expanding the definition of standing in FCC matters). It is, then, entirely likely that the Chief Justice was hesitant to announce a new constitutional principle that would upset the precarious balance struck by prior decisions and the FCC's many-faceted controls. Since in the view of at least two of the

reading, has been a basic division of responsibility between independent broadcasters and the FCC. While the FCC demands that broadcasters give full and fair treatment to public issues, it is for broadcasters themselves to decide *how* their responsibilities will be carried out.[209] Within limits,[210] it is for the broadcaster to determine whose voice carries information about public issues over the airwaves to the station's customers. This is the federal legislative scheme. Accordingly, the Chief Justice concluded that the particular policy under attack in *CBS* was related not to the overseer role played by the FCC, but rather to the essentially private conduct of the independent broadcaster in deciding to treat public issues with commentary by station employees instead of providing air time to outside groups. On this reading of the case, there was no rational nexus between the FCC's regulation of broadcasters and the specific policy under attack.[211]

To shore up this basic holding, the Chief Justice next turned to the state action precedents. He cited *Moose Lodge* for the familiar proposition that mere regulation by the state does not constitute state action and distinguished *Burton* on the ground that in *CBS* the government was not involved in a symbiotic relationship with the broadcasters

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Court's members, Stewart and Douglas, a finding of governmental action would do precisely that, it is perhaps understandable that the Chief Justice came to the brink and then balked.

209. In his separate concurring opinion, Justice White repeated the view that neither the Fairness Doctrine nor any other provision of the Act or regulation promulgated by the FCC requires broadcasters to permit outsiders to use their facilities.

> Congress intended that the Fairness Doctrine be complied with, but it also intended that broadcasters have wide discretion with respect to the method of compliance. There is no requirement that broadcasters accept editorial ads; they could, instead, provide their own programs, with their own format, opinion and opinion sources. Congress intended that there be no *right* of access such as claimed in these cases; and, in the Commission's view, to recognize that right would require major revisions in statutory and regulatory policy.

412 U.S. at 147 (emphasis in original); *see* note 198 *supra*.

210. There are some exceptions to the general proposition that the Fairness Doctrine permits broadcasters to satisfy their responsibilities by programming of their choice. In *Red Lion* itself the Court dealt with—and upheld—the personal attack aspect of the Doctrine, which requires a licensee to afford a political candidate an opportunity to respond on the air if he is personally attacked by the station or if the station endorses an opposing candidate. 47 C.F.R. § 73.679 (1973); *see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Fairness Doctrine is to be distinguished from the equal time requirements concerning the use of the broadcast media by qualified candidates for public office. *See* 47 U.S.C. § 315 (1970); *Use of Broadcast Facilities by Candidates for Public Office*, 35 Fed. Reg. 13038 (1970); Friedenthal & Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445 (1959); *cf.* 412 U.S. at 186 n.21 (Brennan, J., dissenting).

211. Justice Brennan took strenuous exception. 412 U.S. at 177-78 (Brennan, J., dissenting); *see* note 205, *supra*.

through which it might benefit from the challenged private conduct.[212] He had more difficulty with *Pollak*, in which the Court had found sufficient governmental involvement in the policy of putting radio receivers in public buses in the District of Columbia.[213] In that case, the Chief Justice contended, the Public Utilities Commission had not only investigated and approved the policy, but had done so pursuant to express congressional authorization to intervene in the affairs of the carrier. In *CBS*, on the other hand, while the FCC had approved the ban on editorial advertisements as not inconsistent with the Communications Act, it had come to that conclusion in light of Congress' long-standing view that such matters should be left to private journalistic discretion.[214] Additionally, the Chief Justice argued that the bus line in *Pollak* could not itself claim first amendment protection, while broadcasters surely can.[215] In conclusion he again pressed the point that a holding that broadcasters are subject to the first amendment would upset a half century of congressional communications policy.[216]

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212. *Id.* at 119; *see* text accompanying note 124 *supra*.

213. *See* text accompanying notes 160-66 *supra*.

214. 412 U.S. at 119-21; *cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

215. Justice Stewart made the most of the point. Taking the position that a decision to invoke the first amendment in *CBS* would be a decision that broadcasters *are* government, Stewart could not conceive of simultaneously holding that broadcasters might retain their own first amendment rights. If broadcasters *are* government they can only establish reasonable schedules for dividing up air time among all comers, much the same as park police can validly fix time limits for use of a public soapbox. If broadcasters *are* government, they can be no more than traffic cops, for the first amendment offers no protection to speech by government. *See* T. EMERSON, *supra* note 144, at 663. In Stewart's view, such a proposition was untenable in light of the Communications Act, and he accordingly voted against finding governmental action in the case. In dissent, Justice Brennan found the Stewart view to reflect "a complete misunderstanding of the nature of the governmental involvement in these cases." 412 U.S. at 181 n.12. Far from making broadcasters themselves the government, Brennan contended that invoking the first amendment would merely cause the Court to engage in balancing the first amendment rights of broadcasters against those of others who wish to purchase time for editorial advertising. The Brennan position partakes of the notion that the governmental or state action inquiry goes not to finding agents of government but instead to identifying sufficient governmental involvement in private action to justify holding government ultimately responsible for what is done privately. *See* note 59 *supra*. This disagreement on the fundamentals of the issue left the two men passing as ships in the night.

216. The precise holding in *CBS* was narrow—that the Communications Act, and *perhaps* the first amendment do not establish a right of access to the broadcast media for persons who wish to purchase air time for editorial advertisements. *See* note 197 *supra*. It is clear that the Court was influenced by the existence of the Fairness Doctrine, which it was thought would prevent discrimination against unpopular viewpoints. *See* note 196 *supra*. Significantly, the Court refrained from holding that Congress or the FCC acting on its own cannot in the future impose a right of access upon broadcast licensees, if one or the other finds it in the public interest to do so. Indeed, the Chief Justice expressly pretermitted that issue. 412 U.S. at 118-19. If the government were to

Given the exceedingly difficult first amendment question in *CBS*, the position taken by the Chief Justice is hardly without defense.[217] Yet his treatment of *Pollak* was less than convincing in light of the FCC's consideration and approval of the broadcasters' policy. *Pollak* was clearly the closest precedent to the facts in *CBS*, for in that case, too, the first amendment's application to the actions of the federal government was involved. On the other hand, the cases upon which Chief Justice Burger relied for his result involved not federal *governmental* action but *state* action.[218] *Moose Lodge* and *Burton* were fourteenth amendment cases requiring the Court to take into account the values of federalism in determining whether federal judicial power should be exercised. In *CBS* federalism was not at issue. At most the fourteenth amendment cases were *analogous* precedents;[219] they could not govern because they were founded at least in part upon constitutional considerations not present in *CBS*. Although the Chief Justice passed over this distinction without discussion, it is clear that he understood very well that *Moose Lodge* could not control *CBS*. Hence his more extensive treatment of *Pollak*, the only real precedent with which he had to deal.

Even without federalism as a basis for failing to find sufficient governmental involvement to invoke the Constitution, the Chief Justice concluded that the first amendment did not apply to the broadcasters' policy. He did so in response to another powerful constitutional principle—the Court's deference to the acts of its co-equal branch, the Congress.[220] Paradoxically, while in fourteenth amendment cases a state's significant involvement in private conduct leads to the conclusion that sufficient state action should be found, in cases involving the Bill of Rights extensive involvement by the Congress may cut the other way. Substantial federal governmental involvement may in some cases justify

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promulgate such a rule, it is entirely unclear whether the Court would uphold it, given the views of Justices Stewart and Douglas and the deferential language used by the Chief Justice in describing the values of private journalistic discretion. *Id.* at 120-21. Nevertheless, several model acts have been proposed. *See, e.g.*, Comment, *Right of Access to the Broadcast Media for Paid Editorial Advertisements -A Plea to Congress*, 22 U.C.L.A.L. REV. 258 (1974).

217. *See, e.g.*, Traynor, *Speech Impediments and Hurricane Flo: The Implications of a Right of Reply to Newspapers*, 43 U. CIN. L. REV. 247 (1974).

218. *See* text accompanying note 212 *supra*.

219. Only Justice Stewart expressly recognized that "[t]he evolution of the 'state action' concept under the Fourteenth Amendment is one available *analogy*." 412 U.S. at 133 (footnote omitted) (emphasis supplied). And even he may not have been thinking of federalism. Elsewhere in his opinion Stewart suggested that it was the broadcasters' claim to first amendment rights of their own that distinguished *Moose Lodge* and *Pollak*. *Id.* at 140-41 & n.11.

220. *See* note 208 *supra*.

the application of constitutional limitations to private acts. That occurred in *Pollak*, which has never been overruled. Yet involvement that is tied to a congressional attempt to protect the same interests safeguarded by the Constitution presents a different case. The invocation of the Constitution of its own force to frustrate the congressional scheme is essentially the exercise of the Court's enormous power of judicial review, which, of course, is not implicated in fourteenth amendment cases in which the Congress is not involved.[221] Even the Warren Court only rarely challenged the interpretation given constitutional provisions by the Congress.[222] The newly constituted Burger Court is, if anything, more deferential to the legislative branch. It is not surprising, then, that some of the Court's caution should spill over into its consideration of the threshold governmental action issue. In *CBS* the Chief Justice emphasized that the Communications Act did not contemplate that individual broadcasters would be viewed as acting for the national government.[223] To hold otherwise because of the extensive regulatory scheme established by that Act would be to upset the congressional plan. Such a holding would reject Congress' attempt to avoid governmental control of the media and, instead, to regulate private broadcasting in the public interest. It would be to tell Congress that, no matter what its intent, it *has* taken control of the broadcasting industry—at least for purposes of applying constitutional limitations to the conduct of individual broadcasters.

The *CBS* case, then, illustrates yet another aspect of the Burger Court's tendency toward judicial restraint. If this Court is hesitant to exercise federal judicial power in state matters by way of the fourteenth amendment, it is even more hesitant to challenge the constitutionality of congressional action in related fields. This is of crucial significance for the protection of individual liberty. Once again, the effect of failing to find state action in a fourteenth amendment case is to remand the underlying social problem to other agencies of government.[224] If state legislatures and courts do not respond, perhaps the Congress will and,

221. Although "judicial review" may be given a broader meaning, perhaps taking into account the Court's review of state legislation or other action, review in its pristine form is that which was involved in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the review of acts of Congress. This "pure" judicial review raises a number of problems not present in the review of state action but does not involve others, for example, federalism. *See* Frank, *Review and Basic Liberties*, in SUPREME COURT AND SUPREME LAW 109 (Cahn ed. 1954).

222. *See* Frank, *supra* note 221.

223. *See* text accompanying notes 207 & 216 *supra*.

224. *See* text accompanying notes 184 & 185 *supra*.

if *CBS* is a fair guide, it is likely in such circumstances that the Burger Court will accede. Then, while federal power will still be exercised, it will be legislative rather than judicial power, a significant distinction to a Court that sees for itself a relatively passive role. If this is correct, then it may be expected that the Burger Court will be prepared to approve federal legislation designed to protect individual liberties even while it withdraws from aggressive judicial action in cases involving the Constitution of its own force.

III. Congressional Enforcement of the Civil War Amendments

> You must take care of the civil rights bill,—my bill, the civil rights bill,—don't let it fail!
>
> —Charles Sumner
> (on his death bed in 1874)[225]

A. Federal Civil Rights Legislation—A Synopsis

In the years immediately following the Civil War the Reconstruction Congress successfully initiated and the states ratified three constitutional amendments: the thirteenth amendment in 1865, the fourteenth in 1868, and the fifteenth in 1870.[226] Although the amendments were self-executing, each contained a final section giving the Congress power to enforce the amendment itself with appropriate legislation.[227] And, in the early years, the Radical-controlled Congress was quick to exercise its new-found power to promote individual liberty. The first enactment, the Civil Rights Act of 1866,[228] contained language that was later recast

225. 1 B. Schwartz, Statutory History of the United States: Civil Rights 657 (1970). Senator Charles Sumner, a Republican from Massachusetts, was the driving force behind much of the congressional action in behalf of individual liberty during the Civil War period. It was he who drafted the Civil Rights Act of 1875, discussed *infra*, and his death just before the crucial vote is said to have been the catalyst for passage.

226. The text of the amendments is set forth in notes 3, 6, & 8 *supra*. The dates given are the dates of ratification.

227. Indeed, the enforcement provisions may have been the primary focus of the framers, who were principally interested in expanding the power of the Congress rather than the federal judiciary, which had not in the recent past been sympathetic to the Radical cause. R. Harris, The Quest for Equality 53-54 (1960); J. James, *supra* note 7, at 184; Frantz, *supra* note 16, at 1353-54.

228. Act of April 9, 1866, ch. 31, 14 Stat. 27.

as the first section of the fourteenth amendment in response to doubts concerning its constitutionality under the thirteenth amendment.[229] Other sections of the Act condemned discrimination against black people in the making and enforcing of contracts and in transactions affecting real and personal property.[230] In the next year the Anti-Peonage Act[231] made it a criminal offense to hold or return any person to a condition of slavery. In 1870 Congress, in response to Ku Klux Klan activity in the Southern States, enacted the Enforcement Act,[232] which

229. At the time, the only plausible source of authority for the Act was the enforcement clause of the thirteenth amendment, and proponents pinned their claims for validity to that provision. Opponents contended that the thirteenth amendment was limited to the abolition of slavery and that it could not therefore support sweeping civil rights legislation prohibiting racial discrimination. Even Congressman Bingham of Ohio, a Republican supporter of civil rights for blacks, questioned the Congress' power to enact the proposed legislation without further constitutional authority. *See* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952). Bingham later became the principal draftsman of the fourteenth amendment which was intended, at least by some in the Congress, to shore up constitutional support for the earlier legislation. *See* ten Broek, *Thirteenth Amendment to the Constitution of the United States-Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CALIF. L. REV. 171, 200-02 (1951). *See generally* H. FLACK, *supra* note 7, at 20. For an exhaustive treatment of the thirteenth amendment generally, see Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUSTON L. REV. 1, 330, 592 (1975).

230. Passed over President Johnson's veto, the key provisions of the 1866 Act are preserved today as 42 U.S.C. § 1981 (1970):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

And as 42 U.S.C. § 1982 (1970):

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

In the criminal code, 18 U.S.C. § 242 (1970) is also derived from the 1866 Act. *See* United States v. Williams, 341 U.S. 70, 83 (1951) (appendix to opinion of Frankfurter, J.).

231. Act of March 2, 1867, ch. 187, 14 Stat. 546 (codified in scattered sections of 18, 42 U.S.C.). The Anti-Peonage Act was a relatively noncontroversial statute intended to end the Spanish peonage system in the New Mexico Territory. The Act was upheld in Clyatt v. United States, 197 U.S. 207 (1905). *See also* United States v. Reynolds, 235 U.S. 133 (1914); Bailey v. Alabama, 219 U.S. 219 (1911); Gressman, *supra* note 229, at 1328; Putzel, *Federal Civil Rights Enforcement: A Current Appraisal*, 99 U. PA. L. REV. 439, 442 (1951).

232. Act of May 31, 1870, ch. 114, 16 Stat. 140. After the war military governments had been established in 10 southern states, and there was pressure from Congress both to permit blacks to vote and to ratify the fourteenth amendment as soon as possible. Organized in 1866, the Klan began a terrorist campaign to thwart the will of Congress and the martial governments. In 1868 a wave of murders and assaults spread through the South in an attempt to deter black people from voting. The Enforcement Act sought to enforce the newly ratified fourteenth and fifteenth amendments by bringing such activities within the scope of the federal criminal laws. United States v.

established criminal penalties for violations of the fifteenth amendment's prohibition of racial discrimination in voting. Section 18 of the 1870 legislation reenacted the key provisions of the Civil Rights Act of 1866, this time on the authority of the fourteenth amendment, apparently to assure the validity of that important legislation.[233] The Force Act of 1871[234] went beyond the Enforcements Act's use of criminal penalties and established machinery for monitoring elections to ensure, through federal election officials, that blacks were not denied the right to vote. The Ku Klux Klan Act,[235] enacted in 1871 on the authority of the fourteenth amendment, provided criminal and civil sanctions to deter infringements upon civil rights and authorized the federal government to deal effectively with the conspiratorial violence that was then sweeping the Southern States. Finally, the most broad-ranging of all the Reconstruction legislation, the Civil Rights Act of 1875,[236] also enacted on the authority of the fourteenth amendment, barred racial discrimination in places of public accommodation, public conveyances, theaters, and other recreational facilities. With the 1875 Act, however, congressional activity in the civil rights field came to a halt, not to be revived

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Price, 383 U.S. 787, 803-05 (1966). The Act was upheld in *Ex parte* Yarbrough, 110 U.S. 651 (1884). Its key provisions have survived in 18 U.S.C. § 241 (1970). *See* United States v. Williams, 341 U.S. 70, 83 (1951) (appendix to opinion of Frankfurter, J.).

233. *See* note 229 *supra*.

234. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433. The Force Act provided for the appointment of federal officials to supervise elections in larger cities and towns, both in the South and in the North, in order to protect the right of black people to vote. 1 B. SCHWARTZ, *supra* note 225, at 547. The Act was upheld in *Ex parte* Siebold, 100 U.S. 371 (1879), and was retained until repealed in 1894. *See* text accompanying note 239 *infra*.

235. Act of April 20, 1871, ch. 22, 17 Stat. 13. Early in the year President Grant had sent a special message to Congress requesting legislation authorizing the government to act against the Klan. In testimony taken in congressional hearings the Klan's activities were extensively documented and thus formed the factual record for the legislation ultimately enacted. The Act, the key provisions of which survive in 42 U.S.C. §§ 1983, 1985 (1970), established civil and criminal sanctions for violations of civil rights and additionally gave the President power to declare martial law in areas where he found it necessary to protect the rights of black people. In October 1871 President Grant used the power granted in the Act when he sent federal troops to several counties in South Carolina. 1 B. SCHWARTZ, *supra* note 225, at 591-92; Gressman, *supra* note 229, at 1334; *see* Collins v. Hardyman, 341 U.S. 651 (1951).

236. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335 (codified in scattered sections of 10, 42 U.S.C.).

> The Civil Rights Act of 1875 was the most important of the post-Civil War statutes designed to ensure equal rights for the Negro. As such, it constituted the culmination of the program of the Radical Republicans, which had begun with the Thirteenth Amendment and the Civil Rights Act of 1866. . . . The 1875 statute climaxed a decade of efforts by the Radical Republicans to elevate the ideal of racial equality to the legal plane.

1 B. SCHWARTZ, *supra* note 225, at 657.

for 80 years. In point of fact, the 1875 Act itself was adopted by a lame duck Radical Congress after many Republicans lost their seats in the 1874 elections.[237] Only the timely death of Senator Sumner, the bill's principal sponsor, prompted the defeated congressmen to pass it before leaving office.[238] When the Democratic Party won control of the government in 1892, most of the provisions related to voting in the Enforcement Act of 1870 and the Force Act of 1871 were repealed.[239]

After decades of inactivity, the Congress once again took up the cause of individual liberty in the late stages of the Eisenhower Administration. The Civil Rights Act of 1957[240] established the Commission on Civil Rights, legislatively endorsed the Civil Rights Division already established in the Justice Department, and authorized the Attorney General to seek injunctions to protect voting rights. The Civil Rights Act of 1960[241] went further, but still did not accomplish a great deal in the face of strong opposition in the Senate. After a Senate filibuster had blocked a plan to establish a system of administrative registrars to assure nondiscriminatory election procedures in the South, the Act in its final form created a scheme by which court-appointed referees might monitor elections.[242] But in the Civil Rights Act of 1964[243] Congress produced the most far-reaching civil rights legislation ever enacted. The Act contains 11 titles, each dealing with a significant aspect of the intractable problem of racial discrimination.[244] In the three most important sections, titles II, VI, and VII, the Congress launched a far-ranging attack on discrimination in public accommodations, federally funded projects, and employment. Title II, banning discrimination in public

237. *Id.* at 658-59.

238. *See* note 225 *supra*.

239. Act of Feb. 8, 1894, ch 25, 28 Stat. 36.

240. Act of Sept. 9, 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C.); *see* 2 B. SCHWARTZ, *supra* note 225, at 837-39; Buchanan, *supra* note 229, at 610-13.

241. Act of May 6, 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C.); *see* 2 B. SCHWARTZ, *supra* note 225, at 935-38.

242. *See* 2 B. SCHWARTZ, *supra* note 225, at 935-38.

243. Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 28, 42 U.S.C.) [principally codified in 42 U.S.C. §§ 2000a-h (1970)]; *see* Buchanan, *supra* note 229, at 614-15.

244. The titles, in brief, deal with voting rights (I), injunctive relief against discrimination in places of public accommodation (II), desegregation of public facilities (III), desegregation of public education (IV), the Commission on Civil Rights (V), nondiscrimination in programs funded by the federal government (VI), nondiscrimination in employment (VII), registration and voting statistics (VIII), procedure in removal cases (IX), community relations services (X), and miscellaneous matters (XI). *See* Note, *The Civil Rights Act of 1964*, 78 HARV. L. REV. 684 (1965).

accommodations in language that tracks the 1875 Civil Rights Act,[245] finds its authority not in the enforcement section of the fourteenth amendment but rather in the expansive commerce clause.[246] Title VI, which condemns discrimination in programs receiving federal funds, is based upon Congress' power to lay and collect taxes, which has long been held to include the power to spend upon conditions established by the Congress.[247] Title VII makes it an unfair employment practice for an employer engaged in interstate commerce to discriminate on the basis of race, religion, or sex.[248] The Voting Rights Act of 1965[249] soon followed to enforce the fifteenth amendment by suspending state literacy tests and similar voting impediments when substantial discrimination is found, suspending new voting requirements pending review by federal authorities to determine whether they may perpetuate discrimination, and assigning federal examiners to identify qualified electors. Finally, Congress provided in the Civil Rights Act of 1968[250] for broad-ranging protection from discrimination in housing.

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245. *See* text accompanying note 236 *supra*.

246. *See* 2 B. SCHWARTZ, *supra* note 225, at 1019. The reach of the legislation is thus limited to those establishments that can be linked to the flow of commerce across state lines. Given open-ended precedents under the commerce clause, however, it is clear that Congress has power to regulate most places of public accommodation. *See* Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 461-62 (1974).

247. 2 B. SCHWARTZ, *supra* note 225, at 1019.

248. The original act exempted from coverage employers with fewer than 25 employees, most labor unions, educational institutions, and state and federal governments. The Equal Employment Opportunities Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972), amended the 1964 Act to bring these groups within its scope. Labor unions and employers, including governmental and educational employers, with as few as 15 employees are now covered. *See* Supe & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 847 (1972); Comment, *Suing the State Under Title VII in the Face of the Eleventh Amendment*, 1973 WIS. L. REV. 1099. *See also* Note, *Federal Employee Civil Actions Under the Equal Employment Opportunity Act of 1972: The Right to De Novo Review*, 12 HOUSTON L. REV. 178 (1974).

249. 42 U.S.C. §§ 1971, 1973-1973p (1970).

250. Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 18, 25, 28, 42 U.S.C.). The constitutional basis for the fair housing provisions of the 1968 Act is obscure. It has been suggested that the Act might be upheld under the Congress' power to enforce the fourteenth amendment. *E.g.*, Cox, *supra* note 10, at 118. However, the courts that have thus far considered the question have held that the thirteenth amendment is the constitutional ground. *E.g.*, United States v. Bob Lawrence Realty, Inc., 474 F.2d 115, 120 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973) (upholding the ban on "blockbusting"); United States v. Hunter, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (upholding the ban on discriminatory advertising).

B. The Judicial Response

The Supreme Court decisions construing federal civil rights legislation fall, like the statutes themselves, into two broad categories: the early cases on the Civil War legislation and more recent cases examining both the older statutes and the modern legislation enacted since 1957. In order to reach this article's particular concern—the Burger Court's treatment of civil rights legislation—it is necessary to break the second category down into subcategories and to distinguish some modern decisions as products of the Warren Court, thereby identifying others as the work of the Burger Court. A fixed date for the end of the Warren Court era is difficult to identify because of the staged entrance of President Nixon's appointees. When Chief Justice Burger was seated in 1969, he hardly took control of the Court. It was not until 1972 and the seating of Justices Powell and Rehnquist that the Court took on a distinct new look, and perhaps it is misleading to regard any decision handed down prior to that time as having been decided by the "Burger Court." On the other hand, some decisions during the interim period bear the mark of the new Chief Justice and the second Nixon appointee, Justice Blackmun. Accordingly, in the discussion below such cases will be cited as illustrations of the thinking of the Court as it is now constituted.

1. The Commerce Clause Decisions.—Since the early legislation was uniformly based upon the enforcement clauses of the Civil War amendments,[251] the judicial decisions of that period do not reflect how the Court might have viewed civil rights statutes grounded in the commerce clause. On the other hand, since the great expansion of federal power under that clause did not begin until the 1937 realignment, it is probable that such legislation would not have fared well.[252] More recently, however, the commerce power has become virtually limitless,[253] and it was hardly surprising that when Congress based the public accommodations and employment provisions of the 1964 Civil Rights Act on that power, the Warren Court had no difficulty upholding the legislation. In *Heart of Atlanta Motel, Inc. v. United States*,[254] decided a bare 5 months after the Act was signed into law, the Court held that Congress could rationally determine that racial discrimination in public establish-

251. U.S. CONST. amends. XIII, XIV, XV; *see* notes 3, 6, & 8 *supra*.

252. *See* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 681-82 (1946).

253. *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971).

254. 379 U.S. 241 (1964).

ments might discourage the interstate travel of black people. In a companion case, *Katzenbach v. McClung*,[255] the Court extended the Act to a restaurant that enjoyed no patronage from interstate travelers but served food that had moved in interstate commerce. The two decisions virtually overruled the *Civil Rights Cases*,[256] which had struck down the very similar Civil Rights Act of 1875 on the ground that Congress lacked power to enforce the fourteenth amendment by legislation reaching private action.[257] The Warren Court's position, then, seemed clear. Far from following the lead of the Reconstruction precedents, the Court was prepared to add to its constitutional decisions protecting individual liberty a concomitant line of cases upholding statutory enactments with a similar purpose.

Yet *Heart of Atlanta* and *McClung* came late in the day, a decade after the Warren Court had set the tone of its Term in the *Segregation Cases*[258] and only 5 years before Chief Justice Warren's retirement. In a real sense it was the incoming Burger Court that was to be faced with the difficult issues in statutory construction. Thus, it was of crucial significance that the new Chief Justice himself authored the Court's 1971 decision in *Griggs v. Duke Power Company*.[259] In *Griggs* the Court was not confronted with the threshold question whether the 1964 Act was valid, but instead was called upon to construe Title VII of the Act, the section dealing with employment discrimination. In a landmark opinion, Chief Justice Burger held that racial discrimination within the meaning of the Act depends not upon the evil intent of employers but rather upon the consequences of their employment practices. Irrespective of motive, when it is shown that educational and testing requirements operate to disqualify black job applicants at a substantially higher rate than whites, Title VII prohibits employers from requiring a high school diploma or a passing mark on a standard intelligence test as a condition of employment, unless such requirements are shown to be

255. 379 U.S. 294 (1964).

256. 109 U.S. 3 (1883); *see* text accompanying notes 10-14 *supra*.

257. In light of the Court's decision to turn both cases on the commerce clause, the question whether the *Civil Rights Cases* remain viable was expressly left open. 379 U.S. at 252. However, in separate concurring opinions Justices Douglas and Goldberg stated that they would have preferred the fourteenth amendment ground in order to make clear that individual liberty is to be given more constitutional protection than goods moving in commerce. 379 U.S. at 279-80, 293.

258. Brown v. Board of Educ., 347 U.S. 483 (1954).

259. 401 U.S. 424 (1971).

rationally related to job performance.[260] The decision was greeted with well-deserved praise:

> Although issued without fanfare, *Griggs* is in the tradition of the great cases of constitutional and tort law which announce and apply fundamental legal principles to the resolution of basic and difficult problems of human relationships.
>
> . . . .
>
> The case was decided during a time in which the Supreme Court appeared to be shifting toward a cautious approach to constitutional issues. Yet, it is a sensitive, liberal interpretation of title VII. It has the imprimatur of permanence and may become a symbol of the Burger Court's concern for equal opportunity. Although the Court may take a more cautious approach to constitutional rights of minorities, *Griggs* makes clear that sympathetic interpretation of *statutory* rights is the order of the day.[261]

This is the point precisely. At the same time the Burger Court declines to exercise federal judicial power to protect individual liberty through the Constitution of its own force, the Court is forthrightly prepared to give a liberal reading to congressional action designed to achieve the same ends.[262] In a case such as *Griggs* the Court is able to do at once the two things it thinks the Supreme Court ought to do—restrain itself in the exercise of its enormous power and defer to the extent possible to the constitutional and policy judgments of the Congress.[263]

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260. *Id.* at 429-33.

261. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 62-63 (1972) (emphasis in original) (footnotes omitted).

262. For other liberal, if less far-reaching, constructions, see Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court's most recent opinion treats the showing necessary to establish that preemployment tests are sufficiently job-related to pass muster under Title VII. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). While the Nixon appointees expressed reservations in *Albemarle*, their separate opinions reflected no hesitation to fully enforce civil rights legislation. Perhaps indicating that the lower courts, too, recognize that the Burger Court is more comfortable construing legislation than in exercising constitutional judgment, very recent decisions have found private disability plans that deny benefits for pregnancy-related disabilities to discriminate against female employees in violation of Title VII, even though the Supreme Court, in Geduldig v. Aiello, 417 U.S. 484 (1974), held that such plans do not violate the equal protection clause. *E.g.*, Communications Workers v. AT&T, 513 F.2d 1024 (2d Cir. 1975); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir.), *cert. granted*, 421 U.S. 987 (1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975). Apparently, the assumption is that the Burger Court will distinguish between the constitutional and statutory standards. On Title VII generally, see *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

263. *See* text accompanying notes 177-85 *supra*.

2. The Fifteenth Amendment Decisions.—The Supreme Court's approach to civil rights legislation was from the outset guided by the standard that the three Civil War amendments "[w]ere intended to be, what they really are, limitations on the power of the States and enlargements of the power of Congress."[264] Accordingly, Congress may enact any appropriate legislation that furthers the objectives of the amendments.[265] Congressional attempts to enforce the fifteenth amendment's ban on race discrimination in voting met with general success in the early decisions. Although the Court held that the fifteenth amendment does not confer an affirmative right to vote on black people but only prohibits the denial of the franchise on the basis of race,[266] in other cases the Court approved the voting provisions of the Enforcement Act of 1870[267] and the Force Act of 1871.[268] The Warren Court embraced the modern fifteenth amendment legislation with equal warmth. In rapid succession the Court upheld the principal provisions of the 1957[269] and 1960[270] Civil Rights Acts and, in *South Carolina v. Katzenbach*,[271] gave sweeping approval to the more significant Voting Rights Act of 1965.[272]

In *South Carolina* the Court entertained an original action to enjoin enforcement of a complex statutory scheme designed to eliminate racial discrimination at the polls in the Southern States. The primary issue was the validity of a provision that suspended literacy tests and similar devices for 5 years in any state or county in which the Attorney General determined that such a test had been used and the Bureau of the Census certified that less than half the adult population had voted in the previous Presidential election.[273] The objective was to identify

264. *Ex parte* Virginia, 100 U.S. 339, 345 (1879) (involving the enforcement of the fourteenth amendment); *see* Emerson, *Congress' Power to Enhance The Civil War Amendments*, 49 NOTRE DAME LAW. 544 (1974).

265. *See* text accompanying note 277 *infra*.

266. United States v. Reese, 92 U.S. 214 (1875); *see* James v. Bowman, 190 U.S. 127 (1903).

267. *Ex parte* Yarbrough, 110 U.S. 651 (1884); *see* note 232 *supra* and accompanying text.

268. *Ex parte* Siebold, 100 U.S. 371 (1879) (apparently relying on the fourteenth amendment); *see* note 234 *supra* and accompanying text.

269. United States v. Raines, 362 U.S. 17 (1960); United States v. Thomas, 362 U.S. 58 (1960) (involving provisions authorizing the Attorney General to seek injunctions against discriminatory practices); *see* Hannah v. Larche, 363 U.S. 420 (1960) (approving the creation of the Civil Rights Commission); note 240 *supra* and accompanying text.

270. Louisiana v. United States, 380 U.S. 145 (1965); United States v. Mississippi, 380 U.S. 128 (1965); Alabama v. United States, 371 U.S. 37 (1962); *see* notes 241 & 242 *supra* and accompanying text.

271. 383 U.S. 301 (1966).

272. *See* note 249 *supra* and accompanying text.

273. The Southern States particularly objected to this "triggering" device which brought the

those areas in which black people had been denied the right to vote by the use of literacy tests nondiscriminatory on their face but administered in a discriminatory manner.[274] Although the Court itself had never held that literacy tests might violate the fifteenth amendment,[275] *South Carolina* held that Congress might employ any reasonable means to avert the danger of discrimination. The upshot was that Congress is empowered under the enforcement section of the fifteenth amendment to enact prophylactic measures when it reasonably determines, as it did in the 1965 Act, that such measures are necessary to further the objectives of the amendment itself.[276] In a crucial passage *South Carolina* held that congressional power in the case was subject only to the open-ended standard set forth in the "necessary and proper" clause precedents:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[277]

On this principle the Court was unanimous, although Justice Black took the position that the Act's provisions requiring affected states to obtain federal approval before changing state election laws impermissibly infringed upon states' responsibility for their own law.[278] The door to

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machinery of the Act into play upon an administrative finding of discrimination. Contending that the resultant difference in treatment among the states penalized the South, they argued that the doctrine of equality of states barred legislation directed only to a few identifiable states. In response the Court held that the doctrine dealt only with the terms upon which states are admitted to the Union, Coyle v. Smith, 221 U.S. 559 (1911), and did not prevent Congress from legislating against an evil it found in some states and feared might spread to others. 383 U.S. at 328-29.

274. The *South Carolina* Court noted that "[d]iscriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment." 383 U.S. at 312 (footnote omitted). The Court also drew illustrations from the lower courts. In United States v. Lynd, 301 F.2d 818, 821 (5th Cir. 1962), a Mississippi registrar had rejected six blacks, all of whom were college graduates. Three held master's degrees.

275. Indeed, the Court had held in Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959), that literacy tests do not necessarily discriminate against black voters.

276. 383 U.S. at 326-27.

277. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), *quoted in* 383 U.S. at 326; *accord, Ex parte* Virginia, 100 U.S. 339, 345-46 (1879), *quoted in* 383 U.S. at 327.

278. Justice Black first made it clear that he fully agreed that Congress had power under the enforcement clause of the fifteenth amendment to suspend literacy tests found to be discriminatory, to authorize federal examiners to monitor elections, and to establish a triggering device for application of the new Act. On this latter question he seemed to hold that the Court should not even have inquired whether the Congress had acted *rationally*. For Black it was enough that the

congressional enforcement of the Civil War amendments was thus thrown open, allowing the legislative branch to promote individual liberty to the extent reason permits.

Chief Justice Burger and Justice Blackmun joined the Court in 1969 openly prepared to enforce civil rights legislation with the same vigor as had their predecessors. In *Perkins v. Mathews*[279] they joined in a concurring opinion that clearly sided with the Court on the broad issue of congressional power under the enforcement provisions. Nor did the mood change when Justices Powell and Rehnquist took their seats in 1972. In *Georgia v. United States*[280] the majority extended the approval provisions of the Act to apportionment schemes, the Chief Justice and Justice Blackmun again concurring. Justices Powell and Rehnquist joined a dissenting opinion by Justice White that agreed that the Act reached apportionment plans but took the position that the Attorney General had not objected to the plan in the manner contemplated by the statute.[281] Justice Powell's separate dissenting opinion seemed to agree with Justice Black that the approval provisions infringed upon state responsibility, but on the more significant question of congressional power generally to enforce the fifteenth amendment he forthrightly argued that Congress has not only the power but the *duty* to legislate an end to racial discrimination in voting.[282]

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legislature had exercised its "hitherto unquestioned and undisputed power to decide when, where, and upon what conditions its laws shall go into effect." 383 U.S. at 356. But Justice Black could not approve the provision in the Act requiring states subject to it to obtain the approval of the Attorney General and the federal courts before making changes in their election laws. On that question he said that Congress had sought to use its fifteenth amendment power in a manner that conflicted with basic structural principles of the Constitution. Not only did the provision require the rendering of an advisory opinion, in Black's view, but it made the states' power to amend their own laws and state constitutions depend upon the approval of federal authorities in Washington. *Id.* at 358-62. In subsequent cases, however, the Court continued to uphold the approval provisions of the 1965 Act. Allen v. Board of Elections, 393 U.S. 544 (1969); *see* Gaston County v. United States, 395 U.S. 285 (1969). Justice Black dissented in both *Allen* and *Gaston.*

279. 400 U.S. 379 (1971).

280. 411 U.S. 526 (1973).

281. *Id.* at 543 (White, J., dissenting).

282. Justice Powell made his views clear:

> I have no doubt as to the power of the Congress under the Fifteenth Amendment to enact appropriate legislation to assure that the rights of citizens to vote shall not be denied, abridged, or infringed in any way "on account of race, color, or previous condition of servitude." *Indeed, in my view there is more than a power to enact such legislation, there is a duty.* My disagreement is with the unprecedented requirement of advance review of state or local legislative acts by federal authorities, rendered the more noxious by its selective application to only a few States.

Id. at 545 n.* (Powell, J., dissenting) (emphasis supplied). Of course, having taken the position with

In *Oregon v. Mitchell*[283] the Court again addressed the question of the scope of congressional power to legislatively enforce the fifteenth amendment. In 1970 Congress had extended the 1965 Act for another 5 years, barred the use of literacy tests in all elections, and lowered the voting age in all elections to age 18.[284] Oregon's challenge to the latter two provisions provoked a series of opinions requiring 184 pages in the official reports. Significantly, even as they sharply split on the age requirement issue, the Justices were unanimous in the judgment that Congress had power to ban literacy tests nation-wide. Justice Stewart, in an opinion joined by Chief Justice Burger and Justice Blackmun, saw "no constitutional impediment" to the action.[285] Not only might Congress bar the discriminatory use of such tests, but it might determine that even a fairly administered literacy test impermissibly tends to sort blacks out of the electoral process.[286] The disagreement in *Oregon* came over the age requirements. Justice Black agreed that Congress could fix age requirements for national elections under Article I, but he was not persuaded that the voting age might be lowered for state and local elections on the basis of the fourteenth amendment.[287] Since the other Justices were divided on the question,[288] Justice Black's vote was decisive, and he prepared the Court's opinion upholding the age requirement for national elections but striking down the similar provision for state and local elections.[289]

Justice White that in this case the Attorney General had not properly objected to the changes in Georgia's state laws, Justice Powell did not reach the constitutional question whether, given a proper objection, the state might validly be required to seek federal approval before instituting the planned changes. Powell's reference to a congressional *duty* to legislate under the enforcement section of the fifteenth amendment has not been reiterated in subsequent cases.

283. 400 U.S. 112 (1970).

284. Voting Rights Act Amendments of 1970, 42 U.S.C. §§ 1973b, 1973c, 1973aa to 1973bb-4 (1970).

285. 400 U.S. at 283.

286. *See* Gaston County v. United States, 395 U.S. 285 (1969).

287. Of course, the age limit provisions of the 1970 legislation could not be supported by the fifteenth amendment. Justice Black pointed out that the Congress had made no legislative finding that states which required voters to be 21 years of age used the age requirement to discriminate on the basis of race. Indeed, he doubted that any such finding could be supported by substantial evidence. 400 U.S. at 130.

288. Justices Douglas, Brennan, White, and Marshall took the position that the entire Act was valid. 400 U.S. at 135 (opinion of Douglas, J.); *id.* at 229 (opinion of Brennan, J., joined by White and Marshall, JJ.). Justices Harlan, Stewart, and Blackmun and the Chief Justice would have invalidated the voting age provisions for both federal and state elections. *Id.* at 154 (opinion of Harlan, J.); *id.* at 281-82 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.).

289. The 1970 Act also fixed residency requirements and established procedures for absentee voting in elections for Presidential and Vice-Presidential electors. All members of the Court except

3. The Thirteenth Amendment Decisions.—While the fifteenth amendment cases give some indication of the Burger Court's willingness to construe enforcement legislation liberally, cases involving civil rights legislation enacted on the authority of the thirteenth amendment, which is not limited to state action, offer more fertile ground for an exploration of the Court's position. With the exception of a few decisions by individual Justices on circuit,[290] the Reconstruction Court gave the thirteenth amendment a narrow reading. In the *Civil Rights Cases*,[291] the Court said that it would be "running the slavery argument into the ground" to hold that the public accommodations provisions of the 1875 Civil Rights Act were authorized by an amendment that only abolished involuntary servitude.[292] Similarly, in *Hodges v. United States*[293] the Court held that only conduct that actually enslaves a person can be made punishable under a criminal statute enacted to enforce the thirteenth amendment. Once the 1866 Act had been reenacted to shore up its constitutional underpinnings,[294] both the Congress and the Court turned their focus away from the thirteenth amendment, which drifted accordingly into obscurity.[295]

Yet a century later, in the last year of Chief Justice Warren's career on the Court, the 1866 Act and the original constitutional basis for its enactment, the thirteenth amendment, were revived in the much-criticized decision in *Jones v. Alfred H. Mayer Co.*[296] The petitioners in *Jones* had filed a complaint in the district court that was as startling as it was simple. They alleged that the defendant, a builder, had refused to sell them a house in its subdivision solely because they were black, and that the refusal violated section 1982 of the codified version of the 1866 Act.[297] After a tortured review of the relevant legislative history,[298]

Justice Harlan agreed that those provisions were constitutional. 400 U.S. at 213-16 (opinion of Harlan, J.). Since the decision in *Oregon* the twenty-sixth amendment has achieved the result Congress unsuccessfully sought to accomplish by legislation.

290. *See* Frantz, *supra* note 16, at 1365-70.

291. 109 U.S. 3 (1883).

292. *Id.* at 24.

293. 203 U.S. 1 (1906).

294. *See* note 229 *supra*; United States v. Harris, 106 U.S. 629 (1882).

295. *See* ten Broek, *supra* note 229, at 200-02.

296. 392 U.S. 409 (1968); *see* Henkin, *The Supreme Court, 1967 Term, Foreword: On Drawing Lines*, 82 HARV. L. REV. 63, 82-87 (1968); Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470.

297. 42 U.S.C. § 1982 (1970); *see* note 230 *supra*.

298. *See* Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89. *See generally* C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888 (1971).

Justice Stewart's majority opinion concluded that 1982 means what it says—discrimination against blacks in the housing market, even discrimination unconnected with government, is unlawful.[299] Drawing heavily on dicta from the *Civil Rights Cases*[300] and squarely overruling *Hodges*,[301] the Court held that 1982 could validly reach private discrimination in order to abolish the "badges and incidents of slavery" in the United States.[302] The thirteenth amendment had itself, at the very least,[303] prohibited slavery in this country; and *Jones* now held

299. In coming to the conclusion that 1982 reaches *private* racial discrimination, the Court rejected the contention that because the 1866 Act was reenacted in 1870 under the apparent authority of the fourteenth amendment the Congress intended to limit the Act to *state* action. In the only recent application of 1982, Hurd v. Hodge, 334 U.S. 24 (1948), the action of a federal judge in the District of Columbia had been involved. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (decided with *Hurd*); District of Columbia v. Carter, 409 U.S. 418 (1973). While the Court agreed that dicta in *Hurd* and some older decisions seemed to say that state action is required, Virginia v. Rives, 100 U.S. 313, 317-18 (1879), the "cardinal rule . . . that repeals by implication are not favored," Posadas v. National City Bank, 296 U.S. 497, 503 (1936), ruled the day in *Jones*. Accordingly, at least as to the property-related rights protected by the 1866 Act, reenactment in section 18 of the 1870 Act had no erosive effect. *Jones* did not squarely decide the same question regarding the right under section 1981 to make and enforce contracts. *See* note 326 *infra*. Of course, if Congress has power to reach private action under the enforcement section of the fourteenth amendment as will be argued *infra*, the source of 1981 and 1982 in the 1866 or 1870 Acts is immaterial.

300. As Professor Henkin put it:

> The Court quoted from the *Civil Rights Cases* that Congress has the 'power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.' . . . The earlier Court might well have agreed that state laws denying to Negroes equality in fundamental respects were a badge of slavery, but it expressly denied that private discrimination was such a vestige of slavery. The Court in *Mayer* also gave some weight to the fact that all the Justices in the *Civil Rights Cases* agreed that Congress had authority to adopt the provision of the 1866 Act which was invoked in *Mayer*. But that surely was because they rejected the reading of that provision now adopted by the Court.

Henkin, *supra* note 296, at 87 n.79. The *Jones* Court actually took a view of the 1866 Act similar to that of the first Justice Harlan in his dissent in the *Civil Rights Cases*. *See* note 14 *supra*. But even he seemed to limit the Act's intrusion into private conduct to "corporations and individuals in the exercise of their public or quasi-public functions . . . ." 109 U.S. at 43; *see* Watt & Orlikoff, *supra* note 6.

301. 392 U.S. at 441 n.78. *Hodges* could not withstand the *Jones* Court's square holding that congressional power under the thirteenth amendment reaches beyond penalizing actual enslavement to racial discrimination with vestiges of slavery. Similarly, the *holding* in the *Civil Rights Cases* that Congress' power was limited to lifting restrictions on former slaves' legal status was also effectively if not expressly rejected in *Jones*. *See* Note, *supra* note 246, at 466-67.

302. 392 U.S. at 440.

303. The Court expressly declined to say whether the thirteenth amendment of its own force might bar any private discrimination that constitutes a badge or incident of slavery. 392 U.S. at 439. Yet, on the face of it, it is difficult to see why the Congress can say what is or is not a vestige of slavery in a statute like the 1866 Act while the Court, acting on the authority of a self-executing constitutional amendment, cannot. That is to say, why did the *Jones* Court find 1982 necessary to

that Congress has power to enforce that amendment by barring even private action tending to perpetuate the "relics" of that discarded social order. Just as it had in the voting rights cases, the Court embraced the formulation developed under the "necessary and proper" clause as the only limit on congressional enforcement power.[304]

In dissent, Justice Harlan, joined by Justice White, objected both to the Court's questionable reading of historical materials and to its willingness to decide the case at all on the authority of a statute long forgotten after a century of disuse.[305] Justice Harlan urged that the

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strike down private discrimination in the housing market? Might not the same result have been reached without the aid of legislation? Once again, of course, the Court offered no judgment on that score, but it is fair a inference that a statute *is* necessary. Two points must be made. First, it seems clear that the Court will permit Congress to enact prophylactic legislation that prohibits conduct that does *not* violate the amendment itself but that the Congress finds necessary to head off violations of the amendment that may occur if precautions are not taken. This, of course, is what the Court has done in the voting rights cases. *See* text accompanying note 276 *supra*. Second, underscoring the first point is the proposition that the Burger Court wishes to stay its own hand in the name of judicial restraint and federalism, but is prepared to approve congressional action to accomplish identical ends. The best indication of the Court's thinking on the scope of the thirteenth amendment of its own force comes from Justice Black's opinion for the Court in Palmer v. Thompson, 403 U.S. 217 (1971), in which Chief Justice Burger and Justice Blackmun concurred separately. *Palmer* upheld the closing of public swimming pools in Jackson, Mississippi in the face of court-ordered desegregation. In response to the argument that closing the pools violated the thirteenth amendment, Justice Black wrote:

> The denial of the right of Negroes to swim in pools with white people is said to be a 'badge or incident' of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw 'badges of slavery.' . . . But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.

Id. at 226-27. The upshot is that the Court is not prepared to exercise judicial power on the authority of the thirteenth amendment itself in many cases in which it *is* prepared to let Congress legislate. This, of course, is the essential thesis of this article. *Cf.* Kinoy, *The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Alfred H. Mayer Company*, 22 RUTGERS L. REV. 537 (1968) (contending that the amendment itself should be invoked).

304. 392 U.S. at 443-44; *see* text accompanying note 277 *supra*.

305. 392 U.S. at 449. For an examination of the majority and minority opinions and a criticism of both, see Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272 (1969).

Court dismiss the writ of certiorari as improvidently granted in light of the passage of the Civil Rights Act of 1968,[306] which had been enacted after argument but before the decision in *Jones*. While the law could not affect the rights of the parties in the case,[307] the identical relief claimed by them under 1982 would be available to future litigants under the new statute.[308] Justice Harlan would have sacrificed the interests of the parties before the Court in order to avoid a far-reaching decision grounded in an ancient statute, which on its face seemed to provide even more protection for individual liberty than the complex statutory scheme just enacted.[309]

306. *See* note 250 *supra*.

307. Justice Harlan conceded that the new legislation would not become effective for 7 months after the date of the decision in *Jones*. It was not his view that the petitioners should have proceeded pursuant to the new statute or that they should begin again with its support. These litigants would rise or fall on the Court's interpretation of 1982. 392 U.S. at 476-80.

308. While Justice Harlan made clear that he was not prepared to decide the constitutional validity of the new legislation in *Jones*, he noted that the new Act was "presumptively constitutional." 392 U.S. at 478. The Court has never squarely held that the 1968 Act is valid, but there is little doubt on the question. *See* note 250 *supra*.

309. The majority in *Jones* recognized that the language of 1982 is broad and that it is not subject to many of the exceptions to the scope of the 1968 Act. Nevertheless, the Court insisted that 1982 is not a "comprehensive open housing law." 392 U.S. at 413. Unlike the 1968 Act, 1982 is restricted to race discrimination and does not reach discrimination on the basis of religion or national origin; it does not on its face reach even racial discrimination in the provision of services or facilities related to the sale or rental of housing; it establishes no administrative system of enforcement; and it does not on its face support an award of damages—as opposed to the injunctive relief obtained in *Jones*. *See generally* Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969). All this is true, of course, but even as the Court wrote it was clear that in time the limits of 1982 would have to be probed, and at some point the statute would have to be reconciled with the much more complex 1968 legislation. While the simpler language in 1982 certainly does not expressly prohibit discrimination in all the many particulars that might be imagined, it remained only for the statutory construction process to read such protections into the old statute in order to ensure that its purpose is achieved. In the next term, for example, the Court had no difficulty finding that 1982 authorizes the award of damages or any other appropriate remedy when a violation is shown. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). In cases since *Jones* and *Sullivan* litigants challenging racial discrimination in housing have cited both 1982 and the applicable provisions of the 1968 Act in order to have the benefits of both. *See, e.g.*, Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 n.8 (1972). And the lower federal courts are even now wrestling with the cases in which the protections provided by the two statutes do not overlap. The 1968 Act appears superior to 1982 in protecting against discrimination on the basis of religion and national origin as well as race, in prohibiting discriminatory advertising and brokerage practices, and in barring discriminatory financing. *See* cases cited in Note, *supra* note 246, at 471 n.125. On the other hand, 1982 applies to all transactions involving both personal and commercial property, while the 1968 Act is principally concerned with private dwellings. In addition, 1982 has generally not been held subject to the exemptions and the procedural requirements set forth in the 1968 Act. *Id.* at 471-72 nn. 128 & 129. On the difficulties with procedure under the new legislation, see D. BELL, RACE, RACISM, AND AMERICAN LAW 640-42 (1973).

But the Harlan position was rejected in *Jones* and again in *Sullivan v. Little Hunting Park, Inc.*,[310] decided the following Term. *Sullivan* involved a private swimming pool corporation whose bylaws provided that a member who leased his home in the neighborhood could assign his membership in the corporation to his tenant, subject to the approval of the board of directors. When the board refused to approve an assignment to a black tenant, suit was instituted in reliance upon 1982. In his opinion for the Court, Justice Douglas did not pause to consider whether the assignment was real or personal property, saying that 1982 protects both in any event and there could be no doubt that the black tenant had paid part of his monthly rent for the use of the pool.[311] Accordingly, the refusal of the board to approve the assignment constituted an interference with the petitioner's right to lease his property. *Sullivan*, involving as it did the use of a private swimming pool, raised the question of the scope of 1982 in an emotion-charged context. The defendant corporation contended, plausibly enough, that its operations were protected under the exception for private clubs in the 1964 Civil Rights Act,[312] which the corporation urged the Court to import into 1982. The Court passed lightly over the issue with the comment that since the corporation was freely open to all whites in the geographic area without regard to membership criteria other than race, the swimming pool could not have the benefit of the exception in any event.[313] In dissent, Justices Harlan and White, now joined by the new Chief Justice, again protested that

310. 396 U.S. 229 (1969).

311. *Id.* at 236-37; *see* note 230 *supra.*

312. 42 U.S.C. § 2000a(e) (1970):

> The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

See Note, *The Private Club Exemption to the Civil Rights Act of 1964: A Study in Judicial Confusion*, 44 N.Y.U.L. REV. 1112 (1969). The 1964 Act, of course, is concerned with public accommodations rather than housing transactions, but the expansive notion of property adopted in *Sullivan* brought 1982 to bear on the same problem with which the 1964 Act was designed to deal. Professor Henkin reasonably asked whether even *Jones* made the 1964 Act superfluous by apparently reading 1982 to prohibit discrimination in all property transactions. When a lunch counter refuses to serve blacks, it discriminates in the provision of services in violation of the 1964 Act, but also refuses to sell personal property—food and drink—arguably in violation of 1982. Importantly, 1982 would apply to businesses whose operations do not affect interstate commerce. With the revival of 1981 in *Tillman*, the same transaction might also be considered an invalid infringement on the right to make and enforce contracts. *See* Henkin, *supra* note 296, at 85; text accompanying note 325 *infra.*

313. 396 U.S. at 236.

the Court should avoid reliance upon the 1866 Act when the much more recent 1968 legislation was available.[314]

The stage was set for a retreat from *Jones* and *Sullivan* four years later in *Tillman v. Wheaton-Haven Recreation Association, Inc.*[315] Justice Harlan had left the Court, but by all accounts the new appointees were even less disposed to extend the development of 1982. It was not to be so. In a unanimous decision behind Justice Blackmun the Court ratified everything that had gone before and found even new ground to break. The case involved another private swimming pool corporation and allegations that it had violated various federal statutes.[316] This corporation's bylaws did not entitle a member to assign his membership to a tenant, but membership was nonetheless tied to property ownership in the neighborhood. A person who owned property within a fixed area surrounding the pool was entitled to three preferences when applying for membership: (1) He need not be recommended for membership by a present member; (2) his application received a priority over applications from persons not residing in the area; and (3) if he became a member, he was able to pass on a "first-option" to his successor in title.[317] The preferences were most important during periods when membership in the corporation was full, as it was when the events in *Tillman* took place. All this was enough for the Court. Without the slightest suggestion of a narrow definition of "property" within the meaning of 1982, the Court adopted an amorphous notion it could only describe as a "bundle of rights" associated with property ownership and use.[318] The unmistakable aim was to take the statute at face value and to interpret it to prohibit *any* race discrimination reasonably related to property—an unexpected approach for a Court thought to be unsympathetic to individual liberty.

Once again the Court was urged to limit 1982 by finding in it an implied exemption similar to that for private clubs in the 1964 Civil

314. 396 U.S. at 241. *Sullivan* was one of the first cases decided by the Court after Chief Justice Burger took his seat. While at the time it seemed that his dissenting vote signaled a coming retreat from *Jones*, more recently in *Tillman* those thoughts were put to rest.

315. 410 U.S. 431 (1973).

316. The petitioners alleged violations of the 1866 and 1870 Acts, 42 U.S.C. §§ 1981, 1982 (1970), and the public accommodations provision of the 1964 Civil Rights Act, 42 U.S.C. § 2000(a) (1970). *See* 410 U.S. at 434.

317. 410 U.S. at 433.

318. Justice Blackmun's language was as follows: "When an organization links membership benefits to residency in a narrow geographical area, that decision infuses those benefits into the bundle of rights for which an individual pays when buying or leasing within the area." *Id.* at 437.

Rights Act,[319] or the exception for "Mrs. Murphy's boarding house" in the 1968 fair housing legislation.[320] And once again the Court declined on the ground that, in the case at bar, the swimming pool corporation had opened its doors to all white residents within the area. The corporation could not qualify for exemption in any event, and the question whether 1982 should be qualified by the exception for private clubs need not be decided.[321] Whether the Court will in future cases import the precise exceptions set forth in the modern acts into 1982 is an open question, but the issue is hardly critical.[322] Clearly there is *some* limitation on the reach of 1982, if only a *constitutional* check on how far the Congress can intrude into wholly private decision-making. If a noncommercial organization establishes membership requirements that are genuinely selective in order to preserve the associational interests of its members, it can hardly be contended that the Congress can prohibit the organization from establishing race as one of its membership criteria.[323] The Constitution *does* protect private bias, when it is honestly private, and when the time comes the Court will necessarily hold that 1982 does not mean that an individual must choose his dormitory roommate without regard to race.[324]

While *Tillman's* elaboration on *Jones* and *Sullivan* was surprising enough, the Court went on to revive 1982's companion provision from the 1866 Civil Rights Act, section 1981.[325] The petitioners had alleged that, in addition to discriminating against blacks in property transactions, the swimming pool corporation had denied blacks an equal opportunity to make and enforce contracts. Although the Court devoted most

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319. 42 U.S.C. § 2000a(e) (1970); *see* note 312 *supra*.

320. 42 U.S.C. § 3603(b)(2) (1970).

> The term "Mrs. Murphy's boarding house" refers to an owner-occupied dwelling. In the interest of associational privacy such dwellings, if sufficiently small, were excluded from coverage both by Title II [of the 1964 Act] and Title VIII [of the 1968 Act]. The Title II exemption is for boarding houses of five or fewer rooms that provide "lodging to transient guests," . . . while the Title VIII exemption is for dwellings that provide "living quarters" for no more than four families . . . .

Note, *supra* note 246, at 476 n.159 (citations omitted).

321. 410 U.S. at 338-39.

322. Note, *supra* note 246, at 492. Given the congressional view that the exemptions do no more than protect associational privacy, it seems likely that they limit the reach of civil rights legislation little more than does the Constitution itself. Indeed, it is entirely possible that in most cases the Court would find the statutory and constitutional standards coextensive.

323. *Cf.* Daniel v. Paul, 395 U.S. 298 (1969) (setting forth criteria for determining what is a private club for purposes of the 1964 Act).

324. Moose Lodge No. 101 v. Irvis, 407 U.S. 163, 179-80 (1972) (Douglas, J., dissenting).

325. 42 U.S.C. § 1981 (1970); *see* note 230 *supra*.

of its discussion to 1982, it held as well that the corporation was not exempt from the reach of 1981, implying in the process that 1981 is to be given a construction similar to that of 1982.[326] If that is the case, individual liberty has yet another significant source of protection. The lower courts have uniformly held that 1981 prohibits a refusal to *enter* a contract on the basis of race[327] and, given a definition of "contract" that is as expansive as that given "property" under 1982, 1981 promises to wipe out race discrimination in a wide variety of contexts not touched by existing law, constitutional or statutory. The statute's broad language may be read, for example, to supplement or surpass the protection now offered by the employment[328] and public accommodations[329]

326. In an extended footnote the Court appeared to decide that 1981, like 1982, reaches private as well as state action. *See* note 299 *supra*. A debate has long raged over the effect of the 1870 reenactment of the 1866 Act, particularly with regard to 1981. In Cook v. Montgomery Advertiser Co., 323 F. Supp. 1212 (M.D. Ala. 1971), *aff'd on other grounds*, 458 F.2d 1119 (5th Cir. 1972), the district court noted that the 1866 Act protected "all citizens" from discrimination in transactions related to property and the right of contract. Section 18 of the 1870 Act merely reenacted the 1866 Act without repeating its terms, and 1982 retains the "all citizens" language. On the other hand, 1981 protects "all persons." The more inclusive language derives from § 16 of the 1870 Act, a separate provision apparently enacted to protect Chinese aliens as well as citizens. Comment, *Section 1981 and Private Discrimination: An Historical Justification for a Judicial Trend*, 40 GEO. WASH. L. REV. 1024, 1030 (1972). In *Cook* the district court reasoned that, notwithstanding the reenactment in § 18, 1981 can find its source only in § 16 of the 1870 Act rather than the earlier Civil Rights Act of 1866 from which 1982 is derived. The conclusion drawn in *Cook* was that since 1981 derives from the 1870 Act, which enforced the fourteenth rather than the thirteenth amendment, then 1981 does not necessarily reach private action as does 1982. *Contra* Young v. International Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971) (viewing the 1866 Act as the ultimate source of 1981 and thus applying the contract provision to private action). Although the Supreme Court has on a number of occasions held that 1981 protects aliens as well as black people, Graham v. Richardson, 403 U.S. 365 (1971), and thus recognized that the "all persons" language in 1981 can be traced no further back than the 1870 Act, in *Tillman* it was clear that the Court viewed the key language as derived, along with 1982, from the 1866 Act. Specifically, the Court said that while the changes in wording that occurred in the 1870 Act may have reflected the language of the fourteenth amendment upon which that Act was based, "[t]he 1866 Act was reenacted in 1870, and the predecessor of the present § 1981 was to be 'enforced according to the provisions' of the 1866 Act." 410 U.S. at 440 n.11. While the Court stopped short of saying flatly that 1981 is not subject to a state action limitation, the clear inference was that the Court viewed both 1981 and 1982 as grounded in the earlier legislation, the confusion surrounding the 1870 Act notwithstanding. At all events, more recently in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court held that 1981 is based on the thirteenth amendment and does indeed provide a federal remedy for private racial discrimination falling within its terms.

327. *See, e.g.*, Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975); Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974); Scott v. Young, 307 F. Supp. 1005 (E.D. Va. 1969), *aff'd*, 421 F.2d 143 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970).

328. 42 U.S.C. § 2000(e) (1970). Clearly, if an employer discriminates on the basis of race in employment, he denies black people an equal opportunity to make and enforce contracts. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) (1981 affords a federal remedy

titles of the Civil Rights Act of 1964.

Like 1982, of course, 1981 must be limited, if not by importing statutory exemptions into it as a method of construction, then by constitutional judgment. All human relationships are not contractual, and it is beyond argument that Congress cannot, for example, desegregate all private organizations on the convoluted theory that discriminatory admissions policies deny blacks the right to form a contract. The constitutional analysis here is identical to that the Court must employ when it interprets 1982. In each case the Court must ask whether the organization has established membership criteria that are genuinely selective. If not, the organization cannot legitimately maintain that it has a constitutionally protected associational interest that prevents government from prohibiting racial discrimination. If, as in *Sullivan* and *Tillman*, membership is open to all whites in an area but no blacks, the private club label cannot obscure the truth. The organization is not protecting the warmth of personal relationships but rather is plainly attempting to evade the statutory prohibition on race discrimination in arm's-length contractual dealings.[330] Ultimately the task is indistinguishable from the balancing process urged on the Court shortly after *Shelley v. Kraemer*.[331] At that time it was urged that the Court should itself reach and prohibit race discrimination having the most tenuous connection with government, and only when the discriminating party can establish a countervailing, constitutionally protected interest should the Court countenance discrimination.[332] Now, in the context of interpreting enforcement legislation unencumbered by the state action limitation,

against racial discrimination in private employment). For a review of the cases applying 1981 to employment discrimination problems, see Larson, *The Development of Section 1981 as a Remedy for Racial Discrimination in Private Employment*, 7 HARV. CIV. RIGHTS—CIV. LIBS. L. REV. 56 (1972). Of course, it can also be argued that 1982 bars racial discrimination in employment on the theory that wages are personal property within the meaning given to the statutory language in *Sullivan* and *Tillman*. *Cf.* Espinoza v. Farah Mfg. Co., 414 U.S. 86, 96 n.9 (1973) (suggesting but not deciding the question).

329. 42 U.S.C. § 2000a (1970). If a motel operator or restaurant manager refuses service to blacks, the discrimination would seem to deny blacks an equal opportunity to make and enforce contracts for those services. Moreover, 1982 may similarly be brought to bear. When a traveler is refused a room on the basis of race, surely he is denied an equal opportunity to lease real property for the night; and if he is refused a cup of coffee at a lunch counter, in a like manner he is denied an equal opportunity to purchase personal property. *See* note 312 *supra*; Seldin, *Eradicating Racial Discrimination at Public Accommodations Not Covered by Title II*, 28 RUTGERS L. REV. 1 (1974).

330. *Cf.* Daniel v. Paul, 395 U.S. 298 (1969).

331. 334 U.S. 1 (1948); *see* text accompanying notes 62-65 *supra*.

332. *See* text accompanying note 63 *supra*.

the Burger Court appears ready and willing to engage in just that inquiry.

Just where the line is to be drawn may well be determined when the Supreme Court examines the cases involving 1981 suits to desegregate private segregationist academies. For 3 years civil rights groups have been following *Gonzales v. Fairfax-Brewster School*,[333] in which the district court held that the discriminatory admissions policies of two such schools constituted violations of blacks' right to make and enforce contracts.[334] The Fourth Circuit affirmed the judgment awarding both damages and injunctive relief to black children who were denied admission to the schools when admission was generally open to similarly situated white children.[335] As might be expected, the dissent emphasized the private nature of the schools and contended with some force that if 1981 reaches the schools it is unconstitutional.[336] Whatever the intellectual appeal of these views, it must be clear that racial discrimination is, even at this late date in our history, the most pressing problem confronting American law.[337] The shame of racism casts its shadow over all our lives; it is inescapable. Accordingly, with due deference to the first amendment-related interests presented in a case such as *Gonzales*, it would be unthinkable for the Court to hold that Congress lacks power to root out and eradicate racial discrimination in the schooling of elementary school children.[338] This is true no matter what statute is before the Court, no matter when it was enacted, and no matter what its constitutional authority. It is far too late in the day to urge that the outrageous double-think of racism lies beyond the power of the legislative branch.[339] To do so is to ignore 200 years of national

333. 363 F. Supp. 1200 (E.D. Va. 1973), *aff'd sub nom.* McCrary v. Runyon, 515 F.2d 1082 (4th Cir.), *cert. granted*, 96 S. Ct. 354 (1975).

334. Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973).

335. For a general discussion of private school segregation, see Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973).

336. McCrary v. Runyon, 515 F.2d 1082, 1096 (4th Cir. 1975) (Russell, Field & Widener, JJ., concurring & dissenting).

337. *See* Black, *supra* note 102, at 69; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

338. In *Gonzales*, since the schools were open to all whites in the area who met academic and financial standards, they could hardly maintain that admission was restricted in order to preserve close personal relations. While enrollment at the two schools was low in comparison to public schools, each school provided places for well over 200 students. 363 F. Supp. at 1201.

339. *See generally* Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473 (1971); Note, *Desegregation of Private Schools: Section 1981 as an Alternative to State Action*, 62 GEO. L.J. 1363 (1974); Note, *The Desegregation of Private Schools: Is Section 1981 the Answer?* 48 N.Y.U.L. REV. 1147 (1973).

striving toward the ideal of equality among men. If, on the other hand, a case arises in which a private school establishes selection criteria that go beyond race, and it appears that admission is limited in order to protect interests that have constitutional significance of their own, an accommodation must and can be reached.[340]

4. The Fourteenth Amendment Decisions.—An examination of the protection of individual liberty through federal legislation must come finally to a discussion of congressional power under the enforcement provision of the fourteenth amendment.[341] The fifteenth amendment provides a source of authority only for statutes affecting the franchise,[342] and the thirteenth seems to be limited to discrimination against persons who can assert a history of involuntary servitude.[343] Conse-

340. *Cf.* Riley v. Adirondack S. School for Girls, 368 F. Supp. 392 (M.D. Fla. 1973), *appeal pending*, 522 F.2d 622 (5th Cir. 1975). *See generally* Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975).

341. *See* note 3 *supra*.

342. *See* note 6 *supra*.

343. A footnote in the district court's opinion in *Gonzales* stated:

> The analogy to all black academies, all Chinese schools, and all rabbinical schools is inapposite. These institutions don't fall within the proscription of § 1981. Whatever else may be said of their policies, those institutions are free to discriminate against whites, or against other non-whites if whites are similarly discriminated against, without running afoul of § 1981.

363 F. Supp. at 1204 n.3. This is plausible in light of the language in 1981 that guarantees persons only the rights enjoyed by whites. *See* note 230 *supra*. On the other hand, in Hollander v. Sears, Roebuck & Co., 392 F. Supp. 90 (D. Conn. 1975), the court held that 1981 does not protect *only* blacks, but may come into play in any case of race discrimination. This, too, is plausible, particularly in light of Clyatt v. United States, 197 U.S. 207 (1905), which upheld the Anti-Peonage Act of 1867 on the authority of the thirteenth amendment. That Act was aimed primarily at the peonage system in the New Mexico Territory, rather than at the vestiges of black slavery. Yet *Hollander's* assertion that a white person may have the benefit of 1981 if he can establish that he is being denied rights ordinarily available to members of his race is difficult to accept. If 1981 is to depend upon the thirteenth amendment, it would seem that a plaintiff must not only show that he is not being afforded rights available to whites but that the denial is a vestige of slavery. While there may be some persons other than blacks who can make such an assertion, see *Clyatt*, *supra*, query whether whites are among them. Generally, the cases have restricted the reach of 1981 to blacks. *See, e.g.*, Macdonald v. Shawnee Country Club, Inc., 438 F.2d 632 (6th Cir.), *cert. denied*, 403 U.S. 932 (1971) (1981 inapplicable to religious discrimination); League of Academic Women v. Regents, 343 F. Supp. 636 (N.D. Cal. 1972) (1981 inapplicable to sex discrimination). *But see* Scott v. Eversole Mortuary, 522 F.2d 1110 (9th Cir. 1975) (holding that 1981 protects native Americans). The Supreme Court is due to decide whether a white person can have the benefit of 1981 in McDonald v. Santa Fe Trans. Co., 513 F.2d 90 (5th Cir.), *cert. granted*, 96 S. Ct. 264 (1975). None of this is to say that whites may not rely on 1981 to vindicate the rights of blacks or to protect their own desires for interracial associations. *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); *cf.* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210 (1972); Dematteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975). *But see* Ripp v. Dobbs Houses,

quently, if Congress is to reach the multifarious instances of arbitrary treatment of individuals by private entities unaided by disingenuous appeals to the commerce and taxing powers, the only apparent vehicle is the fourteenth amendment. This is the amendment that in its own right prohibits state government from acting arbitrarily; the unanswered question is whether it permits the Congress to impose similar restrictions upon private action as well in order to shield individual liberty from the enormous economic and political power amassed by private entities in the modern age. At this stage in our history, the individual must contend not only with the excesses of public power but also with the arbitrariness of faceless corporate giants that claim the right to bar individuals of their choosing from a dining hall,[344] to suppress views with which they disagree at a shopping center,[345] and to terminate an individual's essential electrical power without a fair examination of the underlying facts.[346] Here is the nettle of the thing. If the Burger Court is unprepared to exercise the power of the federal judiciary to eradicate arbitrariness wherever it may be found, then congressional power to legislate a similar result comes immediately to the fore. Other constitutional questions, albeit important on some scale, pale to insignificance in comparison.

The most apparent impediment to a holding that Congress has broad authority to reach private action through the fourteenth amendment is Justice Bradley's opinion in the *Civil Rights Cases*.[347] In striking down the Civil Rights Act of 1875 the Court held that the grant of congressional authority in section five of the amendment permits the Congress to enact only "corrective legislation" which invalidates discriminatory state laws.[348] This is so because the first section of the amendment is limited by the state action requirement and, in the Court's view, any legislation to *enforce* that section must also be di-

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Inc., 366 F. Supp. 205, 209 (N.D. Ala. 1973). And, of course, by virtue of its partial derivation from § 16 of the 1870 Act, 1981 protects aliens even though they can adduce no evidence of involuntary servitude. *See* note 326 *supra*. It has been suggested that the Congress might have acted in behalf of aliens under its plenary power over immigration and naturalization. Guerra v. Manchester Terminal Corp., 498 F.2d 641, 654 n.32 (5th Cir. 1974).

344. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), *discussed in* text accompanying notes 117-33 *supra*.

345. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), *discussed in* text accompanying notes 134-46 *supra*.

346. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), *discussed in* text accompanying notes 155-76 *supra*.

347. 109 U.S. 3 (1883).

348. *Id.* at 11.

rected to the actions of the states.[349] The Court held that by legislating an end to *private* discrimination in public accommodations in the 1875 Act, Congress had exceeded its constitutional power and invaded the province of state responsibility.[350] While the issue is not free from doubt,[351] in the years since, the reach of congressional power under section five has generally been thought to be limited to official action that the fourteenth amendment of its own force prohibits.[352]

On the other hand, two recent cases have seemingly revived Congress' enforcement power under the fourteenth amendment. Although

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349. *Id.* at 13-14:

> [U]ntil some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceedings under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority.

350. Justice Bradley emphasized that Congress had not conditioned the operation of the 1875 Act on any action by the states:

> An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offences, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed.

Id. at 14.

351. A survey of the relevant historical materials and a careful examination of the precise language used in the *Civil Rights Cases* have convinced Laurent Frantz that Justice Bradley did not intend to say that Congress can never reach private action through its enforcement power, but only that Congress must condition such legislation on a state's failure to perform its "responsibility" to enforce equality of civil rights. Frantz, *supra* note 16 at 1359. On the one hand, given the decisions on the reach of the fourteenth amendment of its own force, it is difficult to see where Frantz finds any *responsibility* in the states to protect individuals from private action. On the other hand, as will be seen *infra*, it may well be that the Burger Court is prepared to allow Congress broad legislative authority to fill in the gaps in state legislation wherever the Congress sees fit. If that is the case, then the Court may choose to adopt the Frantz reading of the *Civil Rights Cases* or to overrule Justice Bradley's opinion outright.

352. *See* Frantz, *supra* note 16, at 1353. And, it must be conceded, there is ample support for this conclusion in Justice Bradley's opinion:

> The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States.
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> . . . [T]he last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.

109 U.S. at 10-11.

Katzenbach v. Morgan[353] and *Oregon v. Mitchell*[354] did not involve statutes aimed at private action, they nevertheless breathed new life into the hope that federal legislation might yet provide increased protection for individual liberty. In an opinion by Justice Brennan, *Morgan* upheld a provision of the 1965 Voting Rights Act that prohibited the states from denying the franchise to persons with an elementary school education in American-flag schools.[355] The Act was designed to proscribe the use of English-language literacy tests to prevent Spanish-speaking Puerto Ricans in New York from voting.[356] In alternative holdings Brennan said, first, that Congress has power under the fourteenth amendment to legislate prophylactically—that is, to prohibit state action that is itself not a violation of the fourteenth amendment but that potentially may lead to violations[357]—and, second, that Congress' superior fact-finding capacity enables it to identify violations of the fourteenth amendment that the Court itself would not find in the course of litigation unaided by extensive legislative investigation.[358] In the *Oregon* case a strong minority of holdover Justices from the Warren Court, led by Justice Brennan, would have upheld federal legislation lowering the voting age to 18 in state elections.[359] The theory of the dissent was that, relying on the second rationale in *Morgan*, Congress had exercised its superior fact-finding ability and determined that the state's reasons for retaining the voting age above age 18 could not justify the resultant discrimination against young voters.[360] In the opinion of

353. 384 U.S. 641 (1966).
354. 400 U.S. 112 (1970).
355. 42 U.S.C. § 1973b(e) (1970).
356. 384 U.S. at 652.
357. 384 U.S. at 650-51.
358. *Id.* at 656.

It is unclear from Justice Brennan's opinion . . . whether Congress has power under section 5 to define the substantive scope of the amendment. Since *Morgan* involved what was essentially an alienage classification restricting the exercise of voting, a judicially denominated "fundamental right," Justice Brennan's second branch could be read narrowly as acknowledging Congress' power under section 5 to subject a state's justification for such a classification to its own "compelling state purpose" test. Under this reading of the second rationale, Congress would not have the power to recognize new "fundamental rights" or "suspect categories." Rather, with respect to state legislation involving either of these judicially-defined occasions for strict scrutiny, Congress' superior fact-finding resources would enable it to override a state justification that the Court, necessarily engaging in a more limited inquiry because of institutional restraints, might sustain.

Note, *supra* note 246, at 506-07. *See generally* Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975).

359. 400 U.S. at 240 (Brennan, J., concurring & dissenting).
360. *See* note 358 *supra*.

Justice Stewart, who wrote for Chief Justice Burger and Justice Blackmun, the federal provision could not be upheld because the Constitution squarely leaves the fixing of qualifications for voting with the states.[361] Additionally, he denied that *Morgan* had approved congressional power to define the substantive reach of the fourteenth amendment.[362] Justice Black's tie-breaking vote against the legislation left the Stewart opinion as the most significant on the question of Congress' enforcement power.[363]

While *Oregon* may have undermined the second rationale in *Morgan*,[364] the first ground for that decision apparently remains intact. Essentially the notion is that Congress has more power than the Court in dealing with violations of the fourteenth amendment. Although the Court can intervene only after a state has violated the amendment, Congress can install protective legislation that reaches even private action that interferes with the state's responsibility to afford equal protection and due process to its citizens.[365] In *United States v. Guest*[366] the Court upheld a criminal indictment charging conspiracy to interfere with the exercise of rights secured by the equal protection clause, in violation of section 241 of the criminal code.[367] Justice Stewart's opin-

361. 400 U.S. at 294-95 (Stewart, J., concurring & dissenting).

362. In the *Morgan* case Justice Stewart had been prepared to permit Congress to act against state laws that discriminated against aliens, who compose what the Court has often characterized as a suspect class. On the other hand, he viewed the Act in *Oregon* as a congressional attempt to identify age classifications for voting as a new constitutionally suspect category without the aid of prior Supreme Court consideration of the issue. That far he would not permit Congress to go. *See* Note, *supra* note 246, at 508-09; *cf.* note 358 *supra*.

363. *See* text accompanying notes 287-89 *supra*.

364. *See* Orloski, *The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power*, 49 ST. JOHN'S L. REV. 493 (1975); *Developments: Congressional Power Under Section Five of the Fourteenth Amendment*, 25 STAN. L. REV. 885 (1973).

365. The most extensive development of this thesis can be found in Cox, *supra* note 10. *Cf.* note 351 *supra*.

366. 383 U.S. 745 (1966).

367. 18 U.S.C. § 241 (1970):

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . .
>
> . . . .
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The statute is derived from the Enforcement Act of 1870. *See* note 232 *supra*. The indictment in *Guest* charged, first, that the defendants had conspired to intimidate black people in the exercise of their right to use *privately operated* places of public accommodation guaranteed by the 1964 Civil Rights Act. But since the indictment failed to allege that the conspiracy had been racially motivated, the district court dismissed the charge based on the 1964 Act for improper pleading.

ion for the Court avoided the question whether Congress has power to reach private action by finding an obscure allegation of state complicity in the conspiracy.[368] Justice Brennan, in contrast, would have sustained the indictment even absent state action.[369] Counting noses among other concurring Justices, Brennan pointed out that six members of the Court would hold that Congress has power under section five of the fourteenth amendment to penalize purely private conspiracies that interfere with a state's responsibilities under section one.[370] Once again repeating the familiar language quoted in *South Carolina v. Katzenbach*, the fifteenth amendment case, and *Jones v. Alfred H. Mayer Co.*, the thirteenth amendment case, he said that Congress can enforce the fourteenth amendment by any appropriate legislation plainly adapted to that end and not prohibited by some other constitutional provision.[371]

While the Brennan position would presumably require the Court to finally overrule the *Civil Rights Cases* on the narrow question of congressional power, given the erosion Justice Bradley's opinion has

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In the circumstances, the Supreme Court lacked jurisdiction to consider that judgment on direct appeal. 383 U.S. at 751-52; *see* Criminal Appeal Act, 18 U.S.C. § 3731 (1970). The Court accordingly confined itself to an examination of the second paragraph in the indictment, which alleged that the defendants conspired to intimidate blacks in the exercise of their right to use *public* facilities. This charge the Court characterized as embracing rights secured by the equal protection clause. 383 U.S. at 753.

368. The indictment charged that one means by which the conspiracy was carried out was by causing the arrest of blacks on false charges. Justice Stewart found that allegation broad enough to cover a charge of "active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination . . . ." 383 U.S. at 756-57. While he conceded that a bill of particulars might reveal an entirely private conspiracy with no links to state officials, Stewart thought it prudent at this stage of the proceedings to put off the difficult question whether Congress might punish purely private action under its enforcement power. *Id.* at 757.

369. 383 U.S. at 774-81 (Brennan, J., concurring & dissenting).

370. Justice Brennan's opinion spoke for Chief Justice Warren and Justice Douglas, and a separate concurring opinion by Justice Clark, concurred in by Justices Black and Fortas, offered a similar analysis:

> The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth Amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth Amendment. The Court's interpretation of the indictment clearly avoids the question whether Congress, by appropriate legislation, has the power to punish private conspiracies that interfere with Fourteenth Amendment rights, such as the right to utilize public facilities. . . . Although the Court specifically rejects any such connotation . . . it is, I believe, both appropriate and necessary under the circumstances here to say that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.

383 U.S. at 762.

371. 383 U.S. at 783-84; *see* notes 277 & 304 *supra* and accompanying text.

already suffered, that result seems a relatively insignificant consequence.[372] Moreover, there is substantial evidence in the legislative history of the fourteenth amendment to support the conclusion that Justice Bradley was wrong even in 1883. Indeed, in dissent the first Justice Harlan took precisely that position:

> It was perfectly well known that the great danger to the equal enjoyment by citizens of their rights, as citizens, was to be apprehended not altogether from unfriendly State legislation, but from the hostile action of corporations and individuals in the States. And it is to be presumed that it was intended, by that section [section five of the fourteenth amendment], to clothe Congress with power and authority to meet that danger.[373]

Finally, there is a fair amount of authority for the proposition that the courts can penalize private interference with state attempts to conform to the fourteenth amendment. If, for example, a federal district court can hold in contempt a private person whose actions impede a school board's attempts to desegregate public schools, it follows that the Congress must have that much power and perhaps more under the enforcement section of the amendment.[374]

Thus far the Court has not turned the first rationale in *Morgan* and the concurring opinions in *Guest* into a square holding, and the lower federal courts have indicated doubts.[375] The best vehicle for reaching the question may be section 1985(3) of the codified version of the Ku Klux Klan Act of 1871.[376] Section 1985(3) is roughly the civil equivalent

372. Justice Brennan expressly noted that his view of congressional enforcement power was inconsistent with the position adopted in the *Civil Rights Cases*. 383 U.S. at 782-83. Since Justice Bradley's construction of the scope of congressional power under the thirteenth amendment was substantially rejected in *Jones*, see note 301 *supra*, and the 1964 Civil Rights Act left even the result in the *Civil Rights Cases* ineffectual, see note 312 *supra*, a holding that Justice Bradley's interpretation of the fourteenth amendment was also incorrect would hardly startle students of constitutional history. *See* Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment From the Slaughterhouse Cases to the Civil Rights Cases*, 25 RUTGERS L. REV. 552 (1971).

373. Civil Rights Cases, 109 U.S. 3, 54 (1883) (Harlan, J., dissenting); *see* 383 U.S. at 783 n.8 (Brennan, J., concurring & dissenting); United States v. Price, 383 U.S. 787, 803-06 (1966); *cf.* J. TEN BROEK, *supra* note 7, at 185-88, 217; R. HARRIS, *supra* note 227, at 53; Frantz, *supra* note 16, at 1352-59. *Contra*, Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967).

374. *E.g.*, Bullock v. United States, 265 F.2d 683 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959); Kasper v. Brittain, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957); Brewer v. Hoxie School Dist. No. 4, 238 F.2d 91 (8th Cir. 1956); *see* Cox, *supra* note 10, at 112; 70 HARV. L. REV. 1299, 1301-02 (1957).

375. The cases are reviewed in Note, *supra* note 246, at 516-17. *See* note 382 *infra*.

376. 42 U.S.C. § 1985(3) (1970); *see* text accompanying note 235 *supra*. The Court has only

of the criminal statute involved in *Guest*; it establishes a remedy for conspiracies to deprive persons of the equal protection of the laws.[377] In *Griffin v. Breckenridge*[378] the Court construed 1985(3) to reach private conspiracies in which there is a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[379] Turning to the question of constitutional power to enact such a statute, the Court, in another opinion by Justice Stewart, held that 1985(3) is authorized under the thirteenth amendment as a statutory cause of action for the imposition of badges or incidents of slavery.[380] Accordingly, the Court avoided dealing with congressional power under section five of the fourteenth amendment, upon which the Congress had actually acted in 1871.[381] Since *Griffin* involved black victims of a private conspiracy, the thirteenth amendment was available as a constitutional ground, but in other cases in the lower courts a decision on the fourteenth amendment power of Congress has been necessary. On that

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rarely dealt with 1985. *See, e.g.*, Allee v. Medrano, 416 U.S. 802 (1974); Lauchli v. United States, 405 U.S. 965 (1972) (denying certiorari) (Douglas, J., dissenting); Dyson v. Stein, 401 U.S. 200 (1971).

377. The statute establishes a civil action for damages and injunctive relief under the following circumstances:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . .

42 U.S.C. § 1985(3) (1970).

378. 403 U.S. 88 (1971).

379. *Id.* at 102. This limitation was necessary to avoid the charge that 1985(3), if applicable to private conspiracies, would constitute a federal tort law. The odd language of 1985(3) reflects its purpose to deal with the Ku Klux Klan just after the Civil War, leading the Court to comment that the statute must have been directed at private conspiracies. Persons who "go in disguise on the highway" are hardly likely to be officers on their governmental rounds. 403 U.S. at 98; *see* United States v. Williams, 341 U.S. 70, 76 (1951). The Court declined to say what sorts of class-based discrimination outside race might come within the statute, and the lower courts have struggled with the problem since. *Compare* Hahn v. Sargent, 523 F.2d 461 (1st Cir. 1975) (single plaintiff unable to maintain an action), *with* Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975) (the statute reaches conspiracies against a class composed of those who are critical of the President—a very large class indeed).

380. 403 U.S. at 104-06; *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), *discussed in* text accompanying notes 296-309 *supra*. Justice Stewart also garnered the support of all but Justice Harlan for an alternative theory that 1985(3) might be supported by Congress' power to protect the right to travel. 403 U.S. at 105-06. *See* Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?* 39 U. CHI. L. REV. 612 (1972).

381. 403 U.S. at 107.

crucial question the circuits are split.[382]

Of course, even if Congress can reach private action that interferes with a state's responsibility under the fourteenth amendment, it does not necessarily follow that there are no restraints on its enforcement power. To take a familiar example, it has been contended that Congress can legislate an end to discrimination in privately operated restaurants.[383] This is, of course, precisely what the *Civil Rights Cases* held that Congress cannot do, but the argument holds that after *Morgan* and *Guest* that precedent must be reexamined.[384] The question that comes to mind is this: Where is the interference with state constitutional responsibility? It is one thing to hold that Congress can punish private citizens who seize a prisoner from state custody and lynch him, thus interfering with the state's duty to give the prisoner a fair trial,[385] and quite another to hold that the proprietor of a local cafe can be punished for failing to serve blacks on the theory that his private action somehow makes it more difficult for the state to afford black people the equal protection of the laws. The argument for interference in the latter case is difficult to grasp.[386] If the state has enacted a statute which prohibits race

382. The Eighth Circuit has held that Congress has power to reach wholly private conspiracies through the fourteenth amendment. Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (en banc); *cf.* Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973); Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971). The Fifth Circuit first followed *Action*, *supra*, but then withdrew its opinion before rehearing. In a memorandum dismissing the cause as moot, the court indicated the gravity of the issue by directing the district court to withdraw its opinion as well "so that it will spawn no legal precedents." Westberry v. Gilman Paper Co., 507 F.2d 206, 216 (5th Cir. 1975). The Fourth Circuit has rejected *Action*, choosing to wait for direction from Congress or the Supreme Court. Bellamy v. Mason's Stores, Inc., 508 F.2d 504 (4th Cir. 1974). Other circuits have used various techniques to avoid the question, indicating their view that, at the very least, there are grave doubts about the validity of *Action*. *E.g.*, Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); *see* Note, *supra* note 246, at 516-17.

383. In Bell v. Maryland, 378 U.S. 226 (1964), in which the question was whether the fourteenth amendment of its own force proscribes trespass convictions for restaurant sit-ins, see text accompanying notes 80-87 *supra*, even Justice Black's dissent suggested that the existence of federal legislation might have changed his view. 378 U.S. at 335-43.

384. United States v. Guest, 383 U.S. 745, 782-83 (1966) (Brennan, J., concurring & dissenting); *see* Note, *Fourteenth Amendment Congressional Power to Legislate Against Private Discriminations: The Guest Case*, 52 CORNELL L.Q. 586 (1967).

385. *Cf.* United States v. Harris, 106 U.S. 629 (1882).

386. Professor Cox nevertheless insists that interference *can* be found. "If A steals B's horse, B has been deprived, strictly speaking, of his enjoyment of the constitutional right not to have the state take the horse without just compensation . . . ." Cox, *supra* note 10, at 117. Yet the argument is tenuous at best, and Cox concedes that "[t]here would be an utter lack of proportion between the federal punishment of all horse stealing and the federal interest in safeguarding enjoyment of the constitutional right of horse-owners to have the states refrain from taking their property without due process of law." *Id.*

discrimination in public accommodations, perhaps it can be argued that a violation of the statute interferes with the state's good faith attempt to comply with the spirit of the fourteenth amendment.[387] Yet it is precisely because the states have thus far been unwilling to enact such legislation that the intervention of federal power is necessary. If a state statute already prohibits discrimination at the cafe, it hardly need be pondered whether the Congress has power to do the same. The crucial case is one in which no state statute exists. Up to now at least, the Court has resisted the argument that the states have an affirmative duty to enact legislation prohibiting private discrimination.[388] Will the Burger Court now permit the *Congress* to legislate where the states can but do not act? If this is the case, once again it appears that the Court will allow the Congress to root out the very evils the Court itself will not reach on the authority of the fourteenth amendment of its own force.[389] It must be recalled that the expansive theories urged on the Court 10 years ago would have viewed state *inaction* in the face of private discrimination as a violation of the fourteenth amendment, thus recognizing that all transactions between individuals look ultimately to state law for legal effect and that the state is accordingly responsible for what it permits as well as for what it requires of individuals.[390] Even the Warren Court was reluctant to go so far on the authority of the fourteenth amendment alone, and surely the Burger Court is unprepared to do so. It can be argued, however, that this Court *is* prepared to embrace the same broad definition of state action when Congress has legislated in an area in which the states have power to act in defense of individual liberty.[391]

387. It should be recalled that the Court has rejected the contention that a violation of state law cannot also violate the fourteenth amendment. *See* text accompanying notes 22-27 *supra* In addition, one reading of Bradley's opinion in the *Civil Rights Cases* places emphasis on his assumption that under state law race discrimination in public accommodations was already proscribed. Accordingly, it may have been the federal Act's attempt to preempt parallel state law that Justice Bradley found objectionable. Frantz, *supra* note 16, at 1365-66.

388. *But cf.* Reitman v. Mulkey, 387 U.S. 369 (1967), *discussed in* text accompanying notes 96-106 *supra*.

389. *See* text accompanying notes 331-32 *supra*.

390. *See* text accompanying notes 57-61 *supra*.

391. Professor Cox reaches a similar conclusion but for slightly different reasons. In his view, "if there is an interference with fourteenth amendment rights in any one case—as *Guest* holds there is—then there is an interference in every instance and the only remaining question is whether the interference is sufficiently significant to warrant the exercise of national power." Cox, *supra* note 10, at 117. After *Morgan*, Cox suggests that the Court may well leave that judgment to the Congress. He builds his argument for broad congressional power on the logical proposition that private action against individuals ultimately interferes with the state's responsibility to afford those individuals *some* rights in *some* fashion. *See* note 386 *supra*. Thus, he would defend open housing

This is to recognize that the search for state action *is* misleading after all—at least insofar as legislative enforcement of the fourteenth amendment is concerned. It is to find in the Congress the very power to intervene in local affairs to protect individual liberty that the Court, since *Moose Lodge*, has declined for itself.

The implications of such power are enormous. Given its head, Congress might revive the 1875 Act to ban racial discrimination in *all* public accommodations, not merely those affecting interstate commerce. Thus the result in *Moose Lodge* might be legislatively turned around.[392] Similar legislation might be enacted to ban various forms of discrimination in employment and housing. Moreover, Congress might proscribe not only racial discrimination and irrational classifications based on national origin, religion, or sex.[393] Under the fourteenth amendment Congress might prohibit *any* irrational classification that treats similarly situated persons in a discriminatory manner. Going further, Congress might impose upon private entities the same restric-

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legislation based on the fourteenth amendment as a congressional guarantee of the state's ability to provide public services on an equal basis. Put simply, the argument is essentially that Congress can act to ensure that the state will be able to—when the state finally gets around to doing what it has power to do. In contrast, the argument in the text suggests that the Burger Court, having lived through the Warren Court years, is prepared to go even further. The proposition is that the Burger Court will permit Congress to enact legislation that would be within the state's power, irrespective of whether the state acts or not. This is to embrace the most expansive theories of fourteenth amendment jurisprudence advanced over the years, yet to place the Congress in the position urged for the Court itself. Since all legal meaning attaching to relations among individuals may be ascribed to the state, *inaction* in an area where state power exists is alone sufficient to warrant federal legislation to protect individual liberty.

392. Indeed, it has been suggested that the 1875 Act, never repealed by Congress, might now be used by the Attorney General or private plaintiffs. Nimmer, *A Proposal for Judicial Vindication of a Previously Unconstitutional Law: The Civil Rights Act of 1875*, 65 COLUM. L. REV. 1394 (1965). The opinion in *Moose Lodge* emphasized that the only issue before the Court was the question whether the Lodge was sufficiently linked with the state to implicate the fourteenth amendment of its own force. The Pennsylvania courts had found that the Lodge was not a place of public accommodations within the meaning of the *state* Human Relations Act, Pennsylvania Human Relations Comm'n v. Loyal Order of Moose, Lodge No. 107, 220 Pa. Super. 356, 286 A.2d 374 (1971), and the parties had stipulated that the Lodge was in all respects private. Accordingly, the case was tried "solely on the theory that granting a Pennsylvania liquor license to a club assumed to be purely private was sufficient state involvement to trigger the Equal Protection Clause." 407 U.S. at 179 n.1 (Douglas, J., dissenting). There was, then, no occasion to consider other theories of state action, to determine whether the Lodge was subject to the 1964 Civil Rights Act, or, given congressional power to reach private action under the fourteenth amendment, to consider whether the Lodge was sufficiently private as to be beyond the reach of governmental interference in its internal affairs. *Id; see* text accompanying notes 323-24, 330-40 *supra*.

393. The categories set forth in the text are, of course, the classifications proscribed by the public accommodations, employment, and housing provisions of the 1964 and 1968 Civil Rights Acts. *See* notes 243 & 250 *supra*.

tions now applied to government under the due process clause. Thus, Congress might require Lloyd Center to tolerate reasonable expression-related activity in its mall and demand that Metropolitan Edison afford its customers a fair hearing before service is terminated. In sum, if section five is read broadly the Congress might discard the distinction between the public and private sectors and impose on the latter all the constitutional limitations to which government is subject—in order to protect individual liberty from any significant threat.[394]

The proposition strikes at the heart of federalism, yet it is of vital importance to recognize that the exercise of legislative power arguably poses a lesser danger than does the use of judicial power by a Supreme Court composed of life-tenured appointees. The Congress is subject in the first instance to the desires of the electorate and, unlike the Constitution itself or Supreme Court pronouncements on its meaning, legislative enactments can be changed without undue difficulty.[395] Given these truths, it can fairly be argued that the Burger Court will countenance legislation enacted by Congress with due deference to its coordinate branch. Moreover, there remain important restraints. First, the existence of power is not to be confused with its exercise. The Congress' own discretion in determining how and when to exercise its enforcement power will no doubt counsel restraint in some instances.[396] Surely Congress can be depended upon to watch its step; if anything, the legislative department may need prodding if individual liberty is to receive adequate protection.[397] And, second, there are constitutional limits on the

394. *But see* text accompanying note 398 *infra*. This is precisely what Justice Bradley feared in the *Civil Rights Cases*:

> If this legislation [the Civil Rights Act of 1875] is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life liberty, and property? . . . [W]hy should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case . . . . The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound.

109 U.S. at 14-15; *see* Cox, *supra* note 10, at 118-19.

395. *But see* Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (indicating that the Court may not hesitate to overrule its own precedents involving constitutional interpretations—on the theory that amending the Constitution itself is "practically impossible").

396. *See* Cox, *supra* note 10, at 118-19.

397. *Cf.* Kinoy, *supra* note 303, at 544; text accompanying notes 186-94 *supra*. Building upon views expressed in his earlier article, Kinoy, *The Constitutional Right of Negro Freedom*, 21

extent to which any legislation can reach into private affairs to require individuals and groups to refrain from actions that would be barred to government. Even as the public-private dichotomy fades in arm's-length transactions among individuals, business entities, and government, other constitutionally protected interests survive in genuinely private human behavior. And when federal legislation appears to favor, for example, the right of one individual to be free of racial discrimination over the right of another to privacy, it will be the Court's task to balance the considerations and come to an accommodation of competing interests. Congress can hardly intrude into a private home to proscribe arbitrary decision-making, and there can be no doubt that in cases raising genuine privacy issues the Court can construe federal legislation to apply only where it constitutionally can.[398]

IV. CONCLUSION

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.
>
> —Mr. Justice Holmes[399]

This article's evaluation of the Burger Court's state action decisions has been necessarily ambivalent. On the one hand, the Court's marked retreat from Warren Court precedents appears at best a dangerous doctrinal departure and at worst a surrender of judicial responsibility. The fundamental principle of majority rule in democratic government aside, the fact remains that, at least in this country, legislative majorities have been notoriously insensitive to individual interests. The very existence of the Bill of Rights and the three Civil War amendments attests to the need to protect minorities from unfettered majoritarian power. It is then startling, to say the least, to find in the Burger Court's decisions the notion that the maintenance of individual liberty should

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RUTGERS L. REV. 387 (1967), Professor Kinoy maintains that while *Jones* is clearly a challenge to the legislature to act in behalf of black people faced with discrimination at the hands of private entities, history teaches that the Congress cannot act alone. Kinoy would have the Court play the more significant role by applying the thirteenth amendment of its own force to proscribe badges and incidents of slavery. *See* note 303 *supra*.

398. *See* text accompanying notes 323-24, 330-40 *supra*.

399. Missouri, Kan. & Tex. Ry. v. May, 194 U.S. 267, 270 (1904) (opinion of the Court).

generally be left to state legislatures or the Congress. These are the very bodies from which the individual often needs protection. And historically that protection has come from the courts, charged as they are with interpreting the Constitution that stands between the individual and his government. In sum, when in recent cases the Burger Court has declined to invoke the Constitution of its own force, the task of safeguarding the individual has fallen to majority-controlled legislatures that have historically been slow to take up the burden. That the Court hopes the legislative branch will prove equal to the task seems apparent; that the Court's hopes will be realized is less clear.

On the other hand, this article has contended that there is a glimmer of hope to be found in the Court's decisions involving federal legislation designed to protect the individual from arbitrary treatment by both government and private entities. Here the Court has permitted, even encouraged, legislative answers to the most perplexing individual liberty issues. The unsettling fear is that this society is increasingly governed by faceless bureaucracies that in time will churn up personal liberty in an endless maze of arbitrary decision-making. If this is not to be so, the time is ripe for rational, compassionate governmental action to alter the course of events. During the Warren Court years the Nation looked to the Supreme Court to carve out of the complexity a constitutional haven for the individual. Yet, for all its successes, the Court proved unequal to the task. In this system one branch of the national government cannot for long shoulder the entire burden; it was, indeed, far from accidental that the Warren era opened with *Brown* and closed with *Jones v. Alfred H. Mayer Co.*[400] The future demands a persistent sensitivity to the meaning for individual liberty of the ever-growing power of big government and big business. What is required is precision—careful line-drawing that sorts out the confusion and protects liberty from the excesses of both. From the cases it appears that the Burger Court sees this as a legislative function. That judgment having been made, if liberty is to be maintained in the Nation's third century, it must be served by a grand partnership between the judicial and legislative branches.[401] The Justices must stand ready to uphold reasonable congressional action, and the Congress must push forward with legisla-

400. Kinoy, *supra* note 303, at 539 (contending that the thirteenth amendment itself should be read to prohibit much racial discrimination).

401. *See* Cox, *supra* note 10, at 122.

tive programs to reach by whatever means, but principally by its enforcement power under the fourteenth amendment, *all* threats to liberty posed by the modern industrial state.