Chapter 10
The Reach of the Constitution: The State Action Dilemma

I. Introduction

The distinction between government and the individual is fundamental to American constitutional theory -- and to the ways most Americans ordinarily think about political matters. Almost without exception (but see the Thirteenth Amendment), the provisions of the Constitution are addressed to governmental entities and officials.[1] The central focus of the constitutional provisions concerned with individual rights and liberties is to protect against governmental infringement of the rights of the individual. A moment's reflection reveals differences between the restricted latitude of the government to deal with the citizenry and the broad liberties enjoyed by citizens in their dealings with each other. For example, the First Amendment precludes the state from expressing any views at all on certain matters, such as the truth of particular religious doctrines, and state officials may not pick and choose who may speak in public parks based on the acceptability of the speakers' views. Yet the First Amendment protects the right of individuals to be passionately committed to particular viewpoints and to use all resources at their disposal to promote them. It would be bizarre to expect a citizen to be as indifferent to deeply contentious public issues as we sometimes require the state to be. Our ordinary language usually includes a contrast between the ``private'' and the ``public'' realm, with the Constitution ostensibly regulating only the latter and, indeed, carving out ``private'' realms (religious belief, contraception, and the like) for protection from government regulation. (Henceforth, we omit the quotation marks, but the clarity and even the meaningfulness of these concepts are central questions of this chapter.)

Despite the emphasis on the division, the boundaries separating the public and private sectors have never been neat or static. As government has increasingly involved itself in what was formerly the private sector, either through regulation (Chapter 5) or the assumption of direct social welfare responsibilities (Chapter 9), traditional lines have often been obscured, if not indeed obliterated. Does a privately-owned hospital's acceptance of public funds, without more, entail that it comes under the antidiscrimination injunctions of the Fourteenth Amendment? A federal appeals court answered yes, and the Supreme Court saw no reason to review the decision.[2] However, complications immediately arise: Does the fact that a nursing home receives most of its funding from Medicaid reimbursement

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1. See Larry Alexander and Paul Horton, Whom Does the Constitution Command: A Conceptual Analysis with Practical Implications (1988).
2. See Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir.), cert. denied, 376 U.S. 938 (1964).

require that it must accord its patients due process as required of government by the Fourteenth Amendment? The Supreme Court answered in the negative.[3]

The previous paragraph addressed the implications of state involvement, through funding, in the affairs of a private entity. But another aspect of the state action dilemma concerns the possibility that decisions of ostnsibly private entities take on a sufficient level of public import to come under constitutional restraint. How indeed do we recognize the difference between the public state and private entities? Or consider the significance of the fact that legislatures can, especially after 1937, significantly regulate, and even prohibit, the behavior of private entities? Some analysts would describe a state's *not* regulating a particular matter as nothing other than a decision by political authorities to allocate decisionmaking authority to private parties and argue that in some circumstances (but which?) the actions of these private parties are infused with the "state action" that triggers the Fourteenth Amendment.[4]

The controversy over the reach of the Constitution has centered on the Fourteenth Amendment, and especially the equal protection clause: ``No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In the Civil Rights Cases, 109 U.S. 3 (1883), Chapter 4 supra, which invalidated the Civil Rights Act of 1875 on the ground that the Fourteenth Amendment did not empower Congress to prohibit racial discrimination by ostensibly private parties, Justice Bradley wrote, ``It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. . . . [The amendment does not come into operation] until some State law has been passed, or some State action through its officers or agents has been taken. . . ."

This interpretation of the amendment was not inevitable. In dissent, Justice Harlan argued that the businesses covered by the Act were ``agents" or ``instrumentalities" of the state, performing ``quasi-public functions." Moreover, the amendment might have been read to treat a state's failure to prevent discrimination by private entities as a denial of equal protection. Indeed, other parts of Bradley's opinion suggest this interpretation. But ambiguities that inhered in the Civil Rights Cases about the conceptualization of state action were resolved over time in favor of requiring some kind of active state encouragement of the conduct in question. Passive acquiescence in the defendant's exercise of presumptively discretionary choices would not count as ``state action." Recall in this context the discussion in Chapter Nine of Wisconsin's responsibility for the fate of Joshua DeShaney.

Concluding a survey of judicial decisions and scholarly commentary on the state action

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[3]. See Blum v. Yaretsky, 457 U.S. 991 (1982), discussed infra.

[4]. This is a basic argument associated with the movement known as American Legal Realism. See Chapter Four, "The Critique of the Public/Private Distinction," in William W. Fisher et al., eds., American Legal Realism 98 (1993), especially the excerpt from Morris R. Cohen, "Property and Sovereignty," at pp. 109-114.

doctrine, Professor Charles Black wrote:

> Taking it as a whole, what we see exhibited is a ``doctrine" without shape or line. The doctrine-in-chief is a slogan from 1883. The sub-doctrines are nothing but discordant suggestions. The whole thing has the flavor of a torchless search for a way out of a damp echoing cave. . . . The commentary confirms the inference we would draw from the decisions. The field is a conceptual disaster area; most constructive suggestions come down, one way or another, to the suggestion that attention shift from the inquiry after ``state action" to some other inquiry altogether.[5]

There are several explanations for this situation. First, the doctrines of state action are not entirely independent of the substantive social issues at stake. Many of the decisions, especially during the 1950s and '60s, involved racial discrimination, and the Court had seemingly assumed a special responsibility for eradicating at least its most blatant forms. The Court pursued this mission largely without legislative assistance until the mid-1960s, when Congress enacted the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. If the Court's post-World War II expansion of the scope of the Fourteenth Amendment is explicable in terms of this mission, the more restrictive decisions of more recent times can be understood partly as deference to congressional determinations of the reach of national antidiscrimination policy. State action decisions in nonracial areas may reflect the Court's sympathy, or lack of sympathy, with the substantive constitutional interests asserted.

Second, the state action doctrine may respond to at least three interests or concerns, which may be more or less present in particular cases.

1. *Federalism.* The doctrine may serve to protect the autonomous sphere of state power against the incursion of national power, whether exercised by Congress or the judiciary. From this perspective, the state-action doctrine is *not* a protection of individual rights; rather, it is a statement that certain regulation can take place only if the state affirmatively chooses.
2. *Individual autonomy.* The doctrine may serve to protect the sphere of individual autonomy against the incursion of government power. Justice Douglas, who consistently sought to expand the reach of the Fourteenth Amendment, nonetheless acknowledged the interest in protecting the right of individuals and groups to discriminate: ``The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (dissenting opinion), infra. This seemingly would protect the individual even against state, and not only national, regulation.

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[5] . Charles Black, ``State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967).

3. *Separation of powers.* As applied to the self-executing aspects of the amendment, the doctrine may serve to protect the domains of legislative policymaking from incursions by the judiciary. Perhaps Congress can regulate certain activity by denominating it "commerce," say, as was done with the Civil Rights Act of 1964, but perhaps courts should be far more hesitant to limit state or individual autonomy.

The characterization of action as ``state" or ``private" is at most a highly intuitive hermeneutic enterprise that attempts to capture generally held social and political norms of the time. At worst, it is a way of masking the fact that the distinction makes no sense in our legal culture -- and of manipulating the outcomes of decisions in order to achieve covert substantive goals. The main agenda of this chapter is to understand how the interpretive enterprise might work and to see whether the worst is true.

II. The Interweaving of State and Society

BURTON v. WILMINGTON PARKING AUTHORITY

365 U.S. 715 (1961)

CLARK, J.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in ``a purely private capacity" under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibitions contained in that Amendment. . . .

The Authority . . . is ``a public body corporate and politic, exercising public powers of the State as an agency thereof." Its statutory purpose is to provide adequate parking facilities for the convenience of the public. . . . To this end the Authority is granted wide powers including that of constructing or acquiring by lease, purchase or condemnation, lands and facilities, and that of leasing ``portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities.". . . Any and all property owned or used by the Authority is likewise exempt from state taxation. . . .

Before it began actual construction of the facility, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and proceeds from sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital . . . the

Authority decided it was necessary to enter long-term leases with responsible tenants for commercial use of some of the space available in the projected ``garage building." The public was invited to bid for these leases.

In April 1957 such a private lease, for 20 years and renewable for another 10 years, was made with Eagle Coffee Shoppe, Inc., for use as a ``restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose." The multi-level space of the building which was let to Eagle, although ``within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. . . ." Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags. . . .

The Civil Rights Cases ``embedded in our constitutional law" the principle ``that the action inhibited by the first section [equal protection clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Chief Justice Vinson in Shelley v. Kraemer, 334 U.S. 1, 13 (1948). It was language in the opinion in the Civil Rights Cases, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequence upon ``State action of every kind . . . which denies . . . the equal protection of the laws." And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon ``state participation through any arrangement, management, funds or property." Cooper v. Aaron, 358 U.S. 1, 4 (1958). It is clear, as it always has been since the Civil Rights Cases, that ``Individual invasion of individual rights is not the subject-matter of the amendment," and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an ``impossible task" which ``This Court has never attempted." Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

. . . [T]he opinion of the Supreme Court as well as that of the Chancellor presents the facts in sufficient detail for us to determine the degree of state participation in Eagle's refusal to serve petitioner. In this connection the Delaware Supreme Court seems to have placed controlling emphasis on its conclusion, as to the accuracy of which there is doubt, that only some 15% of the total cost of the facility was ``advanced" from public funds; that the cost of the entire facility was allocated three-fifths to the space for commercial leasing and two-fifths to parking space; that anticipated revenue from parking was only some 30.5% of the total income, the balance of which was expected to be earned by the leasing; that the Authority had no original intent to place a restaurant in the building, it being only a

happenstance resulting from the bidding; that Eagle expended considerable moneys on furnishings; that the restaurant's main and marked public entrance is on Ninth Street without any public entrance direct from the parking area; and that ``the only connection Eagle has with the public facility . . . is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise." While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged.

The land and building were publicly owned. As an entity, the building was dedicated to ``public uses" in performance of the Authority's ``essential governmental functions." The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. . . . As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted

discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so ``purely private" as to fall without the scope of the Fourteenth Amendment.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very ``largeness" of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account ``Differences in circumstances [which] beget appropriate differences in law." Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

The judgment of the Supreme Court of Delaware is reversed and the cause remanded for further proceedings consistent with this opinion.[6]

Discussion

1. If you follow the practice of “briefing” cases, what did you write down as the “facts” of this case?
2. Does *Burton* supply a mode of analysis or only a result? Must *all* leases of public property include anti-discrimination provisions? If you answer in the affirmative, does this mean that persons living in public housing are forbidden to engage in invidious discrimination when, say, inviting guests to their birthday parties? If your intuitions tell you that this can't be right, is the reason that leasing public housing does not involve "state action" or, rather, that there are "privacy" interests that trump any asserted state interest in non-discriminatory use of its facilities?

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[6]. Justice Stewart concurred on a different ground: ``In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve `persons whose reception or entertainment by him would be offensive to the major part of his customers. . . .' There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color." Cf. Reitman v. Mulkey, 387 U.S. 369 (1967). Justices Frankfurter and Harlan, the latter joined by Justice Whittaker, dissented, arguing that the state supreme court's construction of the statute was unclear and that the case should be remanded or certified to the court for clarification.

3. *The relevance of licensing* In Garner v. Louisiana, 368 U.S. 157 (1961), one of the "sit-in" cases where African-American students, after seating themselves at lunch counters and unsuccessfully demanding service, had been arrested for trespass, see below at __, Justice Douglas suggested in a concurring opinion that municipal licensing and regulation of a restaurant were sufficient to make it a ``public facility" bound by the equal protection clause. The Court disposed of the case on narrower grounds without discussing the question. To what extent should the state be required, as a condition of granting a license to engage in an activity, to demand that the recipients forego discriminatory conduct? In Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court considered this issue with respect to a ``private" fraternal club. Irvis, a guest of a member of the lodge, was refused service in its dining room and bar solely because he was black. He sued in a federal district court to have the lodge's liquor license revoked, in lieu of the Moose Club's changing its policy and welcoming non-whites. The court granted relief, finding two features of Pennsylvania's licensing scheme especially significant. First, each municipality in the state was allowed only one retail license for every 1,500 inhabitants; the Moose Lodge was located in Harrisburg, whose quota had been filled for many years. Second, a licensee was subject to a variety of regulations, including a requirement that a private club ``adhere to all the provisions of its constitution and by-laws"; and the Moose Lodge's constitution excluded nonwhites as members and guests.

The Supreme Court, however, reversed and held for the lodge. For the majority, Justice Rehnquist emphasized that ``Moose Lodge is a private social club in a private building." He mentioned the license quota only in passing and pointed out (apparently correctly) that the state regulation requiring a licensee to enforce its own rules was designed solely to prevent the subterfuge of ``a place of public accommodation masquerading as a private club."[7] Justices Douglas, Brennan, and Marshall dissented.

Consider three categories of licensing schemes: (1) those used for raising revenues (e.g., hunting and fishing licenses); (2) those used for certifying qualification (e.g., driver's or doctor's licenses); and (3) those that grant an exclusive or partly exclusive right to enjoy a scarce resource, as with the liquor license in *Moose Lodge*.[8] Or consider that special kind of license known as a corporate charter and the argument of Adolph Berle:[9]

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[7]. Nonetheless, the Court held that enforcement of this regulation should be enjoined: Although it is ``neutral in its terms, the result of its application in a case where the constitution and bylaws of a club require racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule."

[8]. Cf. labor relations statutes that confer special advantages on the union chosen by a majority of the relevant class of employees. See Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944); Wellingon, The Constitution, the Labor Union, and Governmental Action, 70 Yale L.J. 345 (1961).

[9]. A.A. Berle, Constitutional Limitations on Corporate Activity -- Protection of Personal Rights from Invasion Through Economic Power, 100 U. Pa. L. Rev. 933, 942-943 (1952).

> [T]he corporation, itself a creation of the state, [should be] as subject to constitutional limitations which limit action as is the state itself. . . . On logical analysis, a corporation, being a creature of the state, . . . could not offer its facilities to white men and refuse them to Negroes; could not, through whim or dislike, refuse to serve a family or a customer which it disliked; could not give undue favors to a group it wished to foster at the expense of the rest of its public. This would be true despite the fact that, as owner, it could theoretically do what it pleased with its own property.... The preconditions of application [of constitutional constraints] are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree.
> .... Under this theory certain human values are protected by the American Constitution; any fraction of the governmental system, economic as well as legal, is prohibited from invading or violating them.... Instead of nationalizing the enterprise, this doctrine ``constitutionalizes" the operation.

4. *The relevance of regulation.* Are there constitutional implications attached to heavy regulation by the state of a particular industry? Consider in this regard Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), which involved a claim that the refusal of a television broadcaster, heavily regulated by the Federal Communications Commission, to accept paid editorial advertisements constituted governmental action. As it happened, the Court avoided the issue, holding that CBS's policy it did not, in any case, contravene the First Amendment. There was, however, a vigorous side debate among some of the justices on the point. Chief Justice Burger, joined by Justices Stewart and Rehnquist, would have held that broadcasters are not bound by the First Amendment under the present regulatory scheme, which purposely accords licensees a broad sphere of journalistic discretion:

> In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain -- no matter how difficult the task -- essentially private broadcast journalism held only broadly accountable to public interest standards. . . .
>
> More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government . . .

Justice Brennan, joined by Justice Marshall, argued in response that ``the public nature of the airwaves, the governmentally created preferred status of the broadcast licensees, the pervasive regulation of

broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives." (Is it really conceivable that CBS and a television station owned and operated by a municipality or state are subject to the same "constitutional imperatives" in regard to programming policy? Recall the discussion in Chapter Eleven of FCC v. League of Women's Voters and Robert Post's analysis of the difference between general regulation and the state's operation of its own institutions.)

In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the Court held that state licensing and regulation of a privately owned public utility did not impose procedural due process requirements on the corporation's termination of petitioner's electric service for nonpayment.

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be ``state'' acts than will the acts of an entity lacking these characteristics. But 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. . . .
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> [Even if one assumes that Metropolitan was a monopoly,] this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was ``state action'' for purposes of the Fourteenth Amendment.
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> We also reject the notion that Metropolitan's termination is state action because the State ``has specifically authorized and approved'' the termination practice. . . . [T]he sole connection of the Commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it.
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> We also find absent in the instant case the symbiotic relationship presented in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). . . .

Justice Marshall, in dissent, emphasized "several factors clearly presented by this case: a state-sanctioned monopoly; an extensive pattern of cooperation between the ``private'' entity and the state; and a service uniquely public in nature."

> The 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. [Recall the discussions in Chapter Nine surrounding Goldberg v. Kelly.] The solution to this problem, however, is to require only abbreviated pretermination procedures for all utility companies, not to free the ``private'' companies to behave however they see fit. . . .

> What is perhaps most troubling about the Court's opinion is that it would appear to apply to a broad range of claimed constitutional violations by the company. The Court has not adopted the notion . . . that different standards should apply to state action analysis when different constitutional claims are presented. Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve. . . .

Does the extent of regulation of a private activity bear on its amenability to the Fourteenth Amendment? Are the nature and purposes of the regulatory scheme germane? Does the fact that a state regulates the sellers of food and other commodities and services to prevent fraud and protect health and safety imply that a regulated enterprise should be treated as ``public'' for purposes of the Fourteenth Amendment -- at least to the extent of prohibiting discrimination among customers? Does the state have a legitimate interest in affording consumer protection even in situations or transactions one might deem ``private''?

If it can be shown that certain types of regulatory schemes, by removing competitive market pressures, make it more likely that a business enterprise will indulge discriminatory tastes than in the absence of regulation,[10] should this render the private discrimination impermissible under the Fourteenth Amendment?

4. The Receipt of Public Funds to Reimburse Private Persons for Their Services

The social welfare responsibilities assumed by the contemporary state often include the payment or reimbursement for services provided to individuals. Under what circumstances does the receipt of such funds bind a putatively private entity to constitutional constraints? In Rendell-Baker v. Kohn, 457 U.S. 830 (1982), teachers employed by a private school claimed that its director violated the due process clause when he dismissed them without a hearing. Ninety percent of the school's funds came from the state's payment of tuition for students referred to the school by local school boards or from other state and federal agencies. Similarly, in Blum v. Yaretsky, 457 U.S. 991 (1982), a patient in a New York nursing home funded under Medicaid complained about the procedures by which he was determined to require a lower level of medical services than he desired. The Supreme Court refused to find state action in either case.

In *Rendell-Baker*, Chief Justice Burger, for a six-Justice majority, rejected the argument that the level of dependence on state funds subjected the school to the First and Fourteenth Amendments. ``The school, like the nursing homes [in *Blum,*] is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or

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[10]. See Ralph Winter, Improving the Economic Status of Negroes Through Laws Against Discrimination, 34 U. Chi. L. Rev. 817 (1967); Harold Demsetz, Minorities in the Market Place, 43 N.C.L. Rev. 271 (1965).

submarines for the government. Acts of such private contractors do not become acts of their government by reason of their significant or even total engagement in performing public contracts." The Court went on to cite Polk County v. Dodson, 454 U.S. 312 (1981), which had declined to hold that a state public defender's activities vis-à-vis her client implicated the state. Justice Marshall, joined by Justice Brennan, dissented.

The Justices' line-up was identical in *Blum;* they focused here on the private decisionmakers' independence from state coercion: ``[O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Although New York did require physicians to classify patients based on a computed ``score" of their need for services, the physicians retained the ultimate judgment to authorize nursing home care even if the patient had a ``low score": ``These decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State."

Discussion

To what extent does the claimed substantive violation drive the finding of state action? Imagine that there were no state or federal civil rights laws and that both the school in *Rendell-Baker* and the nursing home in *Blum*, as well as the other entities found to be private in the cases examined in this section, had adopted racially discriminatory policies in allocating their respective services. Are you confident that the Supreme Court would have decided these cases the same way?

B. The Special Problem of Judicial Enforcement of Private Agreements

SHELLEY v. KRAEMER, 334 U.S. 1 (1948):
[Prior to 1948, tracts of residential property in white neighborhoods were often subject to covenants, running with the land, prohibiting the sale of the property to racial minorities. Shelley v. Kraemer was a suit to enjoin Negroes from taking possession of a lot sold to them in breach of a racially restrictive covenant. The Court noted that the private contract as such was beyond the reach of the Fourteenth Amendment but held that a state court could not constitutionally enforce it by injunction.]
VINSON, C.J. . . . That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U.S. 313, 318 (1880), this Court stated: ``It is doubtless true that a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.". . .

[T]he examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment. . . . Thus, in American Federation of Labor v. Swing, 312 U.S. 321 (1941), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In Cantwell v. Connecticut, 310 U.S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In Bridges v. California, 314 U.S. 252 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment.

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. . . .

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are . . . cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

. . . [The Fourteenth Amendment is not] ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the

protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.

Respondents urge . . . that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

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In Barrows v. Jackson, 346 U.S. 249 (1953), the Court, over Chief Justice Vinson's dissent, extended *Shelley* to hold that a seller could not be held liable for damages for his breach of a racially restrictive covenant. Justice Minton noted that to permit such a suit would induce potential sellers not to sell to Negroes or to sell to them at higher prices.

The issue of state action through judicial enforcement arose again in the early 1960s in a series of criminal trespass prosecutions of Negroes who had refused to leave segregated lunch counters and restaurants. Through a variety of imaginative holdings, the Court reversed the convictions in every case without deciding whether the prosecutions constituted unlawful state action.[11] But concurring and dissenting justices discussed the question. In Lombard v. Louisiana, 373 U.S. 267 (1963), Justice Douglas would have held, inter alia, that the state judiciary cannot constitutionally ``put criminal sanctions behind racial discrimination in public places'': ``If this were an intrusion of a man's home or

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[11]. See Thomas Lewis, The Sit-In Cases: Great Expectations, 1963 Sup. Ct. Rev. 101; Monrad Paulsen, The Sit-In Cases of 1964: ``But Answer Came There None,'' 1964 Sup. Ct. Rev. 137. See also note 16 infra.

yard or farm or garden, the property owner could seek and obtain the aid of the State against the intruder"; a restaurant, however, has ``no aura of constitutionally protected privacy about it." Justice Harlan, dissenting, characterized the sit-in cases as involving ``a clash of competing constitutional claims of a high order: liberty and equality" and would have assigned considerably more weight than Justice Douglas to the restaurant owner's ``[f]reedom to . . . use and dispose of his property as he sees fit." In Bell v. Maryland, 378 U.S. 226 (1964), Justice Douglas reiterated his view, arguing that ``the preferences involved in Shelley v. Kraemer . . . were far more personal than the motivation of the corporate managers in the present case" and that ``[w]e should put these restaurant cases in line with *Shelley.*" Justice Black, joined by Justices Harlan and White, argued that *Shelley* was premised on a consensual relationship between the seller and buyer and that the state court's injunction in *Shelley* had infringed the owner's rights of ``free use, enjoyment, and disposal" of his property.[12] ``But equally, when one party is unwilling, as when the property owner chooses . . . *not* to admit" someone to his property, he is entitled to the law's protection. Justice Black also suggested that to deny the restaurant owner the state's assistance would leave him to self-help and ``betray our whole plan for a tranquil and orderly society."

In Evans v. Abney, 396 U.S. 435 (1970), following a decision that the city of Macon, Georgia, could not maintain a segregated park as required by Senator Bacon's devise granting it to the city,[13] the Georgia Supreme Court held that the grant had failed, that the doctrine of cy pres could not properly be applied to eliminate the racial restriction,[14] and that the trust property reverted to the senator's heirs. The Supreme Court upheld the decision, Justice Black writing:

> The situation presented in this case is . . . easily distinguishable from that presented in Shelley v. Kraemer, where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

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[12]. Quoting Buchanan v. Warley, 245 U.S. 60 (1917). Earlier in the opinion, Justice Black suggested that the interlocking convenants in *Shelley* amounted to the kind of racial zoning ordinance invalidated in *Buchanan.*

[13]. See Evans v. Newton, 382 U.S. 296 (1966), infra.

[14]. The relevant Georgia statute provides that ``when a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, . . . a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." The Georgia court found that the racial requirement was an inseparable part of the senator's intent.

Justices Douglas and Brennan dissented in separate opinions, the latter arguing, inter alia, that *Shelley* controlled:[15]

> Nothing in the record suggests that after our decisions in Evans v. Newton, . . . the City of Macon retracted its previous willingness to manage Baconsfield on a nonsegregated basis, or that the white beneficiaries of Senator Bacon's generosity were unwilling to share it with Negroes. . . . Thus, so far as the record shows, that is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another. [This] . . . constitutes state action denying equal protection.[16]

Discussion

1. Distinguish *Shelley* from the precedents relied on by Chief Justice Vinson -- decisions holding that ``the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment."
2. Should judicial enforcement be treated as an ``ordinary" benefit, like police and fire protection or as a special subsidy?

If the Moose Lodge is not entitled to a federal ``tax subsidy," may it invoke the state's judicial processes to evict an African-American trespasser who, but for his race, would be admitted as a member? If the lodge is granted a tax subsidy, may the state court evict the trespasser? May the state court *refuse* to evict? Is there any basis for distinguishing among judicial enforcement through injunctive relief, damages, and criminal prosecution?

3. If the state may not use its criminal processes to convict someone engaging in a sit-in for criminal trespass, may it use its law enforcement officials to remove him? If not, is the ``trespasser" entitled to an injunction against the proprietor's use of self-help (i.e., force) or to damages if the proprietor injures him in the attempt to remove him?

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15. Justice Brennan found other bases for unconstitutional state involvement, including statutory authorization for discriminatory trusts at the time of the devise, the city's acceptance of a trust with a racially discriminatory reversion clause, and the city's longtime operation of the park as a public facility. Justice Marshall did not participate in the case.

16. See also Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955), which gave effect to a provision of a will that ``[i]f any of my . . . children shall marry a person not born in the Hebrew faith then I hereby revoke the gift . . . and the provision . . . herein made to or for such child." The Supreme Judicial Court of Massachusetts asserted without discussion that *Shelley* and related cases ``seem to us to involve quite different considerations from the right to dispose of property by will." The United States Supreme Court denied certiorari, 349 U.S. 947 (1955).

4. Consider Professor Louis Henkin's ``notes for a revised opinion'' in *Shelley:*[17]

> If the competing claims of liberty and the possibility that they may sometimes prevail are recognized, Shelley v. Kraemer must be given a . . . limited reading, and new qualifications must be made to discussions of state responsibility for discrimination. *Shelley,* we would say, holds that generally a state may not enforce discrimination which it could not itself require or perpetrate. Such enforcement is state action, makes the state responsible for a denial of equal protection. But there are circumstances where the discriminator can invoke a protected liberty which is not constitutionally inferior to the claim of equal protection. There the Constitution requires or permits the state to favor the right to discriminate over the victim's claim to equal protection; the state, then, is not in violation of the fourteenth amendment when it legislates or affords a remedy in support of the discrimination. . . . The special cases, we suggest, are . . . those few where the state supports that basic liberty, privacy, autonomy, which outweighs even the equal protection of the laws. . . .
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> In the end, whether the freedom to discriminate may surpass the claim to equality and how ``neutral'' the forces of law may be in that conflict can only be decided in the light of a complex of considerations of varying import and relevance. The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from laissez-faire government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context.

Note: On State Repeal of Antidiscrimination Prohibitions and the ``Encouragement'' of Private Discrimination

The defendants in the cases read thus far almost invariably claim that they are private actors exercising autonomy traditionally protected by the law. That is, they claim that the state has had a ``hands off'' position with respect to the conduct in question. The plaintiffs assert that there is sufficient state involvement that the state may not be indifferent to the consequences of private discriminatory conduct.

Suppose that the state has not always been formally indifferent, but instead, having banned private conduct at one point, shifts its policy to one of formal indifference. This question was raised in Reitman v. Mulkey, 387 U.S. 369 (1967), in which the Court considered the constitutionality of an amendment to the California Constitution that protected ``the right of any person who is willing or

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[17]. Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962).

desires to sell, lease or rent 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." The passage of the amendment by popular referendum in 1964 was widely understood to be aimed at California statutes prohibiting racial discrimination in the sale or rental of most private dwellings; it was understood to establish a constitutional right (though obviously not a duty) to discriminate.

A majority of the Supreme Court agreed with the California Supreme Court that the amendment violated the Fourteenth Amendment. The violation did not consist in the mere ``repeal of an existing law prohibiting racial discriminations in housing." Rather, according to Justice White:

> Private discriminations in housing were now not only free from [the previous legislation] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. . . .
> [The amendment] was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State. The California Supreme Court believes that the [amendment] will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.

The opinion drew a strong dissent from Justice Harlan, joined by Justices Black, Clark, and Stewart, which emphasized California's ``neutrality" toward sellers or renters of housing: ``All that has happened is that California has effected a pro tanto repeal of its prior statutes forbidding private discrimination. 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." That the provision was constitutionally entrenched was, from the dissenters' perspective, irrelevant.

There are a number of possible descriptions of the holding in *Reitman,* among which are the following:

1. The state has an *affirmative duty* to prevent private discrimination (under some circumstances);
2. a state may not *authorize* private discrimination (how is this different from 1?);
3. a state may not *encourage* or otherwise give succor to private discrimination (how is this different from 1 and 2, at least on the facts of *Reitman*?);
4. once a state has prohibited private discrimination, it may not backtrack;
5. a state may not disable its agencies and subdivisions from prohibiting racial discrimination in the private sector (who is ``the state"?);

6. state provisions that have the effect of disadvantaging a racial minority demand an extraordinary justification, and ``freedom of contract'' is an insufficient justification.

Which, if any, of these rationales offers the best justification for the holding in *Reitman*? To what extent do the rationales accurately describe contemporary constitutional doctrine? For example, compare *Reitman* with the Court's later cases, canvassed in Chapter 6, that require demonstration of an ``intent'' to discriminate, rather than merely a detrimental impact on the interests of a racial minority, as a predicate condition for Fourteenth Amendment. *Reitman* was a 5-4 decision that included a vigorous dissent. Recall earlier discussions of precedent. Should a contemporary justice, if unpersuaded by the Justice White's opinion, hesitate to overrule it?

III. The ``Private'' Performance of ``Public Functions''

A. The Company Town Case

MARSH v. ALABAMA

326 U.S. 501 (1946)

BLACK, J.

In this case we are asked to decide whether a State, consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who undertakes to distribute religious literature on the premises of a company-owned town contrary to the wishes of the town's management. The town, a suburb of Mobile, Alabama, known as Chickasaw, is owned by the Gulf Shipbuilding Corporation. Except for that it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a ``business block'' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. The town and the surrounding neighborhood, which can not be distinguished from the Gulf property by anyone not familiar with the property lines, are thickly settled, and according to all indications the residents use the business block as their regular shopping center. To do so, they now, as they have for many years, make use of a company-owned paved street and sidewalk located alongside the store fronts in order to enter and leave the stores and the post office. Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival

a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.

Appellant, a Jehovah's Witness, came onto the sidewalk we have just described, stood near the post office and undertook to distribute religious literature. In the stores the corporation had posted a notice which read as follows: ``This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted.'' Appellant was warned that she could not distribute the literature without a permit and told that no permit would be issued to her. She protested that the company rule could not be constitutionally applied so as to prohibit her from distributing religious writings. When she was asked to leave the sidewalk and Chickasaw she declined. The deputy sheriff arrested her and she was charged in the state court with violating Title 14, §426 of the 1940 Alabama Code which makes it a crime to enter or remain on the premises of another after having been warned not to do so. Appellant contended that to construe the state statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution. This contention was rejected [by the state courts]. . . . Had the title to Chickasaw belonged not to a private but to a municipal corporation and had appellant been arrested for violating a municipal ordinance rather than a ruling by those appointed by the corporation to manage a company town it would have been clear that appellant's conviction must be reversed. . . . Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town? For it is the State's contention that the mere fact that all the property interest in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.

We do not agree that the corporation's property interests settle the question.[a] 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. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built

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[a]We do not question the state court's determination of the issue of ``dedication.'' That determination means that the corporation could, if it so desired, entirely close the sidewalk and the town to the public and is decisive of all questions of state law which depend on the owner's being estopped to reclaim possession of, and the public's holding the title to, or having received an irrevocable easement in, the premises. . . . But determination of the issue of ``dedication'' does not decide the question under the Federal Constitution here involved.

and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. . . .

Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The ``business block'' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

Many people in the United States live in company-owned towns.[b] These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.

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. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment ``lies at the foundation of free government by free men'' and we must in all cases ``weigh the circumstances and . . . appraise the . . . reasons . . . in support of the regulation . . . of the rights.'' In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand. The case is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

FRANKFURTER, J., concurring. . . .

[A] company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in adjusting the relations now before us, and more

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[b]In the bituminous coal industry alone, approximately one-half of the miners in the United States lived in company-owned houses in the period from 1922-23. The percentage varied from 9 per cent in Illinois and Indiana and 64 per cent in Kentucky, to almost 80 per cent in West Virginia. . . .

particularly in adjudicating the clash of freedoms which the Bill of Rights was designed to resolve -- the freedom of the community to regulate its life and the freedom of the individual to exercise his religion and to disseminate his ideas. Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations. And similarly the technical distinctions on which a finding of ``trespass'' so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution.

REED, J., joined by Stone, C.J., and Burton, J., dissenting. . . .

What the present decision establishes as a principle is that one may remain on private property against the will of the owner and contrary to the law of the state so long as the only objection to his presence is that he is exercising an asserted right to spread there his religious views. . . .
Both Federal and Alabama law permit, so far as we are aware, company towns. By that we mean an area occupied by numerous houses, connected by passways, fenced or not, as the owners may choose. These communities may be essential to furnish proper and convenient living conditions for employees on isolated operations in lumbering, mining, production of high explosives and large-scale farming. The restrictions imposed by the owners upon the occupants are sometimes galling to the employees and may appear unreasonable to outsiders. Unless they fall under the prohibition of some legal rule, however, they are a matter for adjustment between owner and licensee, or by appropriate legislation. . . .

Our Constitution guarantees to every man the right to express his views in an orderly fashion. An essential element of ``orderly'' is that the man shall also have a right to use the place he chooses for his exposition. The rights of the owner, which the Constitution protects as well as the right of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. We cannot say that Jehovah's Witnesses can claim the privilege of a license, which has never been granted, to hold their meetings in other private places, merely because the owner has admitted the public to them for other limited purposes. Even though we have reached the point where this Court is required to force private owners to open their property for the practice there of religious activities or propaganda distasteful to the owner; because of the public interest in freedom of speech and religion, there is no need for the application of such a doctrine here. Appellant, as we have said, was free to engage in such practices on the public highways, without becoming a trespasser on the company's property.

B. *Marsh*'s Progeny and Cousins

1. The Shopping Center Cases

In Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), the Court extended *Marsh* to hold that the petitioner labor union could not constitutionally be enjoined from picketing a supermarket situated entirely within a privately owned shopping center. Justice Marshall wrote that the shopping center was the ``functional equivalent . . . of a normal municipal business district . . . open to the public to the same extent as the commercial center of a normal town" and found that the union could not effectively reach its intended audience by picketing and canvassing outside the shopping center. To respondents' assertion of an ``absolute right . . . to prohibit any use of their property by others without their consent," Justice Marshall responded:

> [U]nlike a situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue.
>
> The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh.* The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.
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> These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a cordon sanitaire of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment.
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> . . . Logan Valley Mall is the functional equivalent of a ``business block" and for First Amendment purposes must be treated in substantially the same manner.

Justice Black dissented. *Marsh* required that ``private property be treated as though it were public" only ``when that property has taken on *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 businesses are situated' " (quoting *Marsh*). Otherwise, for the Court ``to confiscate a part of an owner's property and give its use to people who want to picket on it" is a ``taking" within the meaning of the Fifth Amendment, for which just compensation must be awarded. Justice White also dissented, elaborating on the difference between the company town in *Marsh* and the Logan Valley shopping center:

> Logan Valley Plaza is not a town but only a collection of stores. In no sense are any parts of the shopping center dedicated to the public for general purposes or the occupants of the Plaza exercising official powers. The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pickup zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. It may be more convenient for cars and trucks to cut through the shopping center to get from one place to another, but surely the Court does not mean to say that the public may use the shopping center property for this purpose. Even if the Plaza has some aspects of ``public" property, it is nevertheless true that some public property is available for some uses and not for others; some public property is neither designed nor dedicated for use by pickets or for other communicative activities. The point is whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.[18]

Logan Valley was severely limited four years later by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), which held that respondent leafleteers were not entitled to an injunction against petitioner's interference with their distribution of antiwar tracts in the interior mall of petitioner's large enclosed shopping center. Writing for the Court, Justice Powell distinguished *Logan Valley* on two grounds. First, unlike the picketing in the earlier case, the distribution of leaflets here ``had no relation to any purpose for which the center was . . . being used"; ``the message sought to be conveyed by respondents was directed to all members of the public, not solely to patrons of Lloyd Center. . . ."[19] Second, in *Logan Valley,* the picketers ``would have been deprived of all reasonable opportunity to convey their message to the

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[18]. Justice White did not reiterate Justice Black's suggestion that the Court's decision amounted to an unlawful taking of respondents' property. Indeed, he concluded the opinion by noting that ``[i]f it were shown that Congress has thought it necessary to permit picketing on private property, either to further the national labor policy under the Commerce Clause or to implement and enforce the First Amendment, we would have quite a different case." (Justice Harlan dissented, believing that federal labor legislation arguably was applicable, but that since petitioners had failed to raise this nonconstitutional question, the Court should dismiss the writ of certiorari as improvidently granted.)

[19]. In *Logan Valley* the Court had stated that it did not decide ``whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not . . . directly related in its purpose to the use to which the shopping center property was being put."

patrons of the [supermarket] had they been denied access to the shopping center." Here, by contrast, the shopping mall was surrounded by public sidewalks, and ``[i]t would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist." Justice Powell also emphasized, though not by way of distinction, that Lloyd Center had a nondiscriminatory policy ``enforced against *all* handbilling." The opinion concludes by reiterating the suggestion, voiced by Justice Black in *Logan Valley,* that the petitioner's right to control its private property is rooted in the Fifth Amendment:

> [Property does not] lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a freestanding store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores in a modern shopping center. This is not to say that no differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of activities carried on within a privately owned facility serving the public. There will be, for example, problems with respect to public health and safety which vary in degree and in the appropriate government response, depending upon the size and character of a shopping center, an office building, a sports arena, or other large facility serving the public for commercial purposes. We do say that the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.[20]

Justice Marshall joined by Justices Douglas, Brennan, and Stewart, dissented. Pointing out that petitioner allowed schools, presidential candidates, and service and veterans' organizations to speak, hold ceremonies and rallies, and solicit funds in the mall, he contended that ``respondents' activities were directly related in purpose to the use to which the shopping center was being put." But, in any

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[20]. Although Justice Powell purports to distinguish and limit, rather than overrule, *Logan Valley,* the opinion incorporates much language from the dissents in the earlier case. Justice Marshall suggests in dissent that ``one may suspect from reading the opinion of the Court that it is *Logan Valley* itself that the Court finds bothersome" and that the major difference is that ``the composition of this Court has radically changed in [the] four years" since *Logan Valley.*

event, there was no ``logical reason to treat differently speech that is related to subjects other than the Center and its member stores." In each case, rather, a balance must be struck between the ``preferred freedom" to speak and the property owner's interest. Justice Marshall argued that ``the only way [respondents] can express themselves to a broad range of citizens on issues of general public concern is to picket, or to handbill, or . . . to speak in those areas in which most of their fellow citizens can be found. One such area is the business district of a city or town or its functional equivalent." He dismissed petitioner's argument that the respondents' leafletting would disturb the Center's customers, noting that their message was less likely to deter potential customers from patronizing the stores than leafletting directed against the stores themselves (as in *Logan Valley*); and he found ``patently frivolous petitioner's argument that . . . [it] would face inordinate difficulties in removing litter from its premises." Justice Marshall concluded:

> It would not be surprising in the future to see cities rely more and more on private businesses to perform functions once performed by governmental agencies. The advantage of reduced expenses and an increased tax base cannot be overstated. 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. Only the wealthy may find effective communication possible unless we adhere to Marsh v. Alabama and continue to hold 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."

Hudgens v. NLRB, 424 U.S. 507 (1975), held that, in the absence of congressional legislation, the Constitution did not protect a union's right to picket a store located in a shopping center to protest the employer's practices at a different location. A majority agreed that *Logan Valley* had overruled *Lloyd* or that, in any case, *Lloyd* should now be overruled.

Note: Does the Finding of No State Action Entail a Right Protected Against State Regulation?

In the aftermath of *Hudgens* and the formal overruling of *Logan Valley,* some analysts suggested that the cases stood for the proposition that the property owners had in effect been found to possess a strong property right protected against state regulation. Thus in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), a shopping-center owner invoked Justice Powell's language in *Lloyd* to argue that the California Supreme Court violated the Fourteenth Amendment when it interpreted the California state constitution to grant political petitioners a right of access to the center. The owner argued, among other things, that this constituted a taking. "[I]t is, of course, well established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the

restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision."

Does this suggest that the ``state action'' limitation is best understood in terms of concerns about federalism or separation of powers rather than of an affirmative desire to safeguard individual autonomy as such?

2. The Park Case

In 1911, Senator Bacon devised Baconsfield to the city of Macon, Georgia, for use as a park for whites only. The city adhered to the terms of the will until some time after *Brown,* when it opened the park to Negroes. In Evans v. Newton (the *Park* case), the park's managers sued to remove the city as trustee and replace it with private trustees who would enforce the racial limitation, Negro citizens intervened in opposition, and heirs of the senator requested that the property revert to them unless the conditions of the will were met. The state court accepted the resignation of the city as trustee and appointed individual trustees to avoid failure of the trust.
The Court held that the private trustees could not exclude Negroes from the park. The central holding of Evans v. Newton is premised on the government's involvement of many years in maintaining and caring for the park.

EVANS v. NEWTON, 382 U.S. 296 (1966):
DOUGLAS, J. . . . For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patrolled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. §92-201. The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of ``private'' trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. Whether these public characteristics will in time be dissipated is wholly conjectural. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment just as the private utility in Public Utilities Commn. v. Pollak, 343 U.S. 451, 462, remained subject to the Fifth Amendment because of the surveillance which federal agencies had over its affairs. We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police

department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment.[21]

HARLAN, J., joined by Stewart, J., dissenting [criticized the first of the Court's grounds as based on unsupportable assumptions and conjecture, and then attacked the ``public function" theory:] . . . More serious than the absence of any firm doctrinal support for this theory of state action are its potentialities for the future. Its failing as a principle of decision in the realm of Fourteenth Amendment concerns can be shown by comparing -- among other examples that might be drawn from the still unfolding sweep of governmental functions -- the ``public function" of privately established schools with that of privately owned parks. Like parks, the purpose schools serve is important to the public. Like parks private control exists, but there is also a very strong tradition of public control in this field. Like parks, schools may be available to almost anyone of one race or religion but to no others. Like parks, there are normally alternatives for those shut out but there may also be inconveniences and disadvantages caused by the restriction. Like parks, the extent of school intimacy varies greatly depending on the size and character of the institution.

For all the resemblance, the majority assumes that its decision leaves unaffected the traditional view that the Fourteenth Amendment does not compel private schools to adapt their admission policies to its requirements, but that such matters are left to the States acting within constitutional bounds. I find it difficult, however, to avoid the conclusion that this decision opens the door to reversal of these basic constitutional concepts, and, at least in logic, jeopardizes the existence of denominationally restricted schools while making of every college entrance rejection letter a potential Fourteenth Amendment question.

While this process of analogy might be spun out to reach privately owned orphanages, libraries, garbage collection companies, detective agencies, and a host of other functions commonly regarded as nongovernmental though paralleling fields of governmental activity, the example of schools is, I think, sufficient to indicate the pervasive potentialities of this ``public function" theory of state action. It substitutes for the comparatively clear and concrete tests of state action a catch-phrase approach as vague and amorphous as it is far-reaching. It dispenses with the sound and careful principles of past

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21. See also Justice Douglas' introductory passage:

> There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. The other is the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality.

decisions in this realm. And it carries the seeds of transferring to federal authority vast areas of concern whose regulation has wisely been left by the Constitution to the States.

3. The White Primary Cases

In Nixon v. Herndon, 273 U.S. 536 (1927), the Court struck down under the equal protection clause a Texas statute providing that ``in no event shall a negro be eligible to participate in a Democratic party primary election." Texas responded by enacting a measure delegating to the state executive committee of the Democratic Party the authority to prescribe qualifications for voters in the primary. The committee then disqualified Negroes from voting. But in Nixon v. Condon, 286 U.S. 73 (1932), the Court found that the statute effectively made the committee an agent of the state and held that the committee's action violated the equal protection clause. Texas enacted no new statute, but the state Democratic convention then voted to exclude Negroes from the primary. In Grovey v. Townsend, 295 U.S. 45 (1935), the Court unanimously refused to invalidate the convention's rule, holding that the state was no longer unconstitutionally involved.

Grovey survived for only nine years. In Smith v. Allwright, 321 U.S. 649 (1944), the Court held that the all-white primary mandated by the state convention violated the Fifteenth Amendment: Where the primary is an ``integral part" of a state's election machinery, the state may not ``[cast] its electoral process in a form which permits a private organization to practice racial discrimination in the election."

The final decision of the series was Terry v. Adams, 345 U.S. 461 (1953). The Jaybird Democratic Association was a county political club in Texas that held a preprimary election, not recognized or assisted by the state or by the state Democratic Party, in which all white voters in the county were eligible to participate. Winning the Jaybird election carried no legal consequences, but Jaybird candidates almost invariably won the Democratic primary and the general election. In three opinions, none of which commanded a majority, the Court held that the Fifteenth Amendment prohibited the exclusion of Negro voters from the preprimary.
Justice Black, joined by Justices Burton and Douglas, noted that the Fifteenth Amendment reached ``any election in which public issues are decided or public officials selected" and that the state could not constitutionally permit the Jaybird's discriminatory ``duplication of its election processes," which had the effect of denying Negroes ``an effective voice in governmental affairs."[22] Justice Clark, joined by Chief Justice Vinson and Justices Reed and Jackson, took a similar approach, noting that the Jaybird Democratic Association is the ``decisive power in the county's recognized electoral process":

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[22]. See also Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), cited with approval by Justice Black: ``Having undertaken to perform an important function relating to the exercise of sovereignty by the people, [a political party] may not violate the fundamental principles laid down by the Constitution for its exercise."

> Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.[23]

Discussion

Assume that a group of college students organize themselves along ethnic or racial lines and nominate candidates to run for president of the University Student Council. Would it be unconstitutional for them to deny entrance to the caucus choosing who shall be the candidate to someone of the "wrong" race or ethnicity? Do the White Primary Cases stand for the proposition that it would be unconstitutional for a political party to organize itself on religious lines and limit its voting membership, in caucuses and primaries, to co-religionists?

4. The Public Utility Case

JACKSON v. METROPOLITAN EDISON CO., 419 U.S. 345 (1974):
REHNQUIST, J. . . . Petitioner next urges that state action is present because respondent provides an essential public service required to be supplied on a reasonably continuous basis by [state law] and hence performs a ``public function.'' We have of course found state action present in the exercise by private entity of powers traditionally exclusively reserved to the State. If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services are either state functions or municipal duties.

Perhaps in recognition of the fact that the supplying of utility service is not traditionally the exclusive prerogative of the State, petitioner invites the expansion of the doctrine of this limited line of cases into a broad principle that all businesses ``affected with the public interest'' are state actors in all their actions.

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[23]. Justice Frankfurter also wrote a concurring opinion that is somewhat obscure. He found state action in the fact that ``those charged by State law with the duty of assuring all eligible voters an opportunity to participate in the selection of candidates at the primary -- the county election officials who are normally leaders in their communities -- participate by voting in the Jaybird primary'' and thus ``condone'' its subversion of the laws regulating the state primary. Only Justice Minton dissented, finding that no state action had been shown.

We decline the invitation for reasons stated long ago in Nebbia v. New York, 291 U.S. 502 (1934), in the course of rejecting a substantive due process attack on state legislation: ``It is clear that there is no closed class or category of businesses affected with a public interest. . . . The phrase `affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. . . ."

Doctors, optometrists, lawyers, Metropolitan, and *Nebbia's* upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, ``affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State. . . .

MARSHALL, J., dissenting. . . . The fact that the Metropolitan Edison Company supplies an essential public service that is in many communities supplied by the government weighs more heavily for me than for the majority. The Court concedes that state action might be present if the activity in question were ``traditionally associated with sovereignty," but it then undercuts that point by suggesting that a particular service is not a public function if the State in question has not required that it be governmentally operated. This reads the ``public function" argument too narrowly. The whole point of the ``public function" cases is to look behind the State's decision to provide public services through private parties. In my view, utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a ``public function."

I agree with the majority that it requires more than a finding that a particular business is ``affected with the public interest" before constitutional burdens can be imposed on that business. But when the activity in question is of such public importance that the State invariably either provides the service itself or permits private companies to act as state surrogates in providing it, much more is involved than just a matter of public interest. In those cases, the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State. . . .

5. The Warehouseman's Lien Case

In Sniadach v. Family Finance Corp., 395 U.S. 337 (1972), the Court struck down a Wisconsin statute under which, when a creditor filed the appropriate papers, the clerk of court issued a garnishment order to an allegedly defaulting debtor's employer. The clerk's task was purely ministerial, and the order issued without notice to the debtor. The Supreme Court held that prejudgment garnishment without notice and a prior hearing deprived the debtor of her property without due process. *Sniadach* involved a contract between a finance company and a consumer. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court extended the holding to prohibit the

prejudgment garnishment of a commercial debtor's bank account under similar circumstances. Fuentes v. Shevin, 407 U.S. 67 (1972), relied on *Sniadach* to invalidate state statutes that authorized the sheriff to seize household goods sold under conditional sales contracts on the basis of a writ issued by the clerk of court upon the seller-creditor's ex parte application.

The only contested issue in these cases was whether the due process clause required a hearing before the debtor's property was garnished or seized. Both the majority and the dissenting Justices assumed, without discussion, the existence of state action -- that is, they assumed that the challenged procedures or transactions were constrained by the requirements of the due process clause of the Fourteenth Amendment.

In the years following *Sniadach,* other creditors' remedies were challenged on due process grounds. These included various ``self-help'' remedies, whereby creditors having security interests in goods repossessed them from defaulting debtors simply by taking them -- without even the ministerial intervention of a state official. Such self-help repossession by secured creditors has long been permitted in many jurisdictions, and the practice is codified by section 9-503 of the Uniform Commercial Code: ``Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace.'' Most courts dismissed constitutional challenges to section 9-503 on the ground that, in the absence of any participation by a state official, self-help repossession was private rather than state action and therefore not within the purview of the Fourteenth Amendment. In the following case, the Supreme Court addressed a variant of the self-help procedure and held that the debtors' complaint was properly dismissed on these grounds.

FLAGG BROS., INC. v. BROOKS

436 U.S. 149 (1978)

REHNQUIST, J.

The question presented by this litigation is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code §7-210 (McKinney 1964), is an action properly attributable to the state of New York. . . .

I

According to her complaint, the allegations of which we must accept as true, respondent Shirley Brooks and her family were evicted from their apartment in Mount Vernon, N.Y., on June 13, 1973. The city marshal arranged for Brooks' possessions to be stored by petitioner Flagg Brothers, Inc., in its warehouse. Brooks was informed of the cost of moving and storage, and she instructed the workmen to proceed, although she found the price too high. On August 25, 1973, after a series of disputes over the

validity of the charges being claimed by petitioner Flagg Brothers, Brooks received a letter demanding that her account be brought up to date within 10 days ``or your furniture will be sold." [Brooks then filed suit seeking, among other things, an injunction that such a sale pursuant to §7-210 would violate her constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. A divided panel of the Second Circuit reversed a district court decision in favor of Flagg Brothers.]

II

. . . [R]espondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York.

It must be noted that respondents have named no public officials as defendants in this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties. This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as North Georgia Finishing, Inc. v. Di-Chem, Inc; Fuentes v. Shevin; Sniadach v. Family Finance Corp. . . . Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York. We conclude that it may not.

III

Respondents' . . . argue that the resolution of private disputes is a traditional function of civil government, and that the State in §7-210 has delegated this function to Flagg Brothers. Respondents, however, have read too much into the language of our previous cases. While many functions have been traditionally performed by governments, very few have been ``exclusively reserved to the State."

One such area has been elections.... Although the rationale of [the white primary] cases may be subject to some dispute, their scope is carefully defined. The doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce ``the uncontested choice of public officials." *Terry,* supra, at 484 (Clark, J., concurring). . . .

A second line of cases under the public-function doctrine originated with Marsh v. Alabama. Just as the Texas Democratic Party in *Smith* and the Jaybird Democratic Association in *Terry* effectively performed the entire public function of selecting public officials, so too the Gulf Shipbuilding Corp. performed all the necessary municipal functions in the town of Chickasaw, Ala., which it owned....

These two branches of the public-function doctrine have in common the feature of exclusivity.[a] Although the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corp. were the only streets in Chickasaw, the proposed sale by Flagg Brothers under §7-210 is not the only means of resolving this purely private dispute. Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. See N.Y. Civ. Prac. Law §7101 et seq. (McKinney 1963). The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. N.Y.U.C.C. §7-210(9) (McKinney 1964). This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world,[b] can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.[c]

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[a]Respondents also contend that Evans v. Newton establishes that the operation of a park for recreational purposes is an exclusively public function. We doubt that *Newton* intended to establish any such broad doctrine in the teeth of the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes. We think *Newton* rests on a finding of ordinary state action under extraordinary circumstances. The Court's opinion emphasizes that the record showed ``no change in the municipal maintenance and concern over this facility" after the transfer of title to private trustees. That transfer had not been shown to have eliminated the actual involvement of the city in the daily maintenance and care of the park.

[b]Unlike the parade of horribles suggested by our Brother Stevens in dissent, this case does not involve state authorization of private breach of the peace.

[c]It is undoubtedly true, as our Brother Stevens says in dissent, that ``respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law. It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to ``state action" even though no state process or state officials were ever involved in enforcing that body of law.

The situation is clearly distinguishable from cases such as *DiChem*, Fuentes v. Shevin, and *Sniadach.*. In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred.

Whatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function. Cf. United States v. Kras, [Chapter Nine, supra]. Creditors and debtors have had available to them historically a far wider number of choices than has one who would be an elected public official, or a member of Jehovah's Witnesses who wished to distribute literature in Chickasaw, Ala., at the time *Marsh* was decided. Our analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that this entire field of activity is outside the scope of *Terry* and *Marsh.*[d] This is true whether these commercial rights and remedies are created by statute or decisional law. To rely upon the historical antecedents of a particular practice would result in the constitutional condemnation in one State of a remedy found perfectly permissible in another.

Thus, even if we were inclined to extend the sovereign-function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it. We conclude that our sovereign-function cases do not support a finding of state action here. . . .

[W]e would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called ``dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. . . .

The constitutional protection attaches not because, as in *Dichem,* a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *Dichem* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been property of the debtor.

[d]This is not to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints. We merely address the public-function doctrine as respondents would apply it to this case.

Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York's statute has done nothing more than authorize (and indeed limit) -- without participation by any public official -- what Flagg Brothers would tend to do, even in the absence of such authorization, i.e., dispose of respondents' property in order to free up its valuable storage space. The proposed sale pursuant to the lien in this case is not a significant departure from traditional private arrangements.

IV

Respondents further urge that Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting §7-210. Our cases state ``that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act." This Court, however, has never held that a State's mere acquiescence in a private action converts that action into that of the State…. If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner. . . .

Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. This statutory refusal to act is no different in principle from an ordinary statute of limitations whereby the State declines to provide a remedy for private deprivations of property after the passage of a given period of time. . . .

STEVENS, J., joined by White and Marshall, JJ., dissenting. . . .

In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the State's authorization of certain creditors' remedies.

There is no question in this case but that respondents have a property interest in the possessions that the warehouseman proposes to sell. It is also clear that, whatever power of sale the warehouseman has, it does not derive from the consent of the respondents. The claimed power derives solely from the State, and specifically from §7-210 of the New York Uniform Commercial Code. The question is whether a state statute which authorizes a private party to deprive a person of his property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections.[a]

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[a]It could be argued that since the State has the power to create property interests, it should also have the power to determine what procedures should attend the deprivation of those interests. See Arnett v. Kennedy, 416 U.S. 134, 153-154 (Rehnquist, J.). Although a majority of this Court has never adopted that position, today's opinion revives the theory in a somewhat different setting by holding that the State can shield its legislation affecting property interests from due process scrutiny by delegating authority to private parties.

In determining that New York's statute cannot be scrutinized under the Due Process Clause, the Court reasons that the warehouseman's proposed sale is solely private action because the state statute ``*permits* but does not compel" the sale (emphasis added), and because the warehouseman has not been delegated a power ``*exclusively* reserved to the State" (emphasis added). Under this approach a State could enact laws authorizing private citizens to use self-help in countless situations without any possibility of federal challenge. A state statute could authorize the warehouseman to retain all proceeds of the lien sale, even if they far exceeded the amount of the alleged debt; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize ``any person with sufficient physical power" to acquire and sell the property of his weaker neighbor. An attempt to challenge the validity of any such outrageous statute would be defeated by the reasoning the Court uses today: The Court's rationale would characterize action pursuant to such a statute as purely private action, which the State permits but does not compel, in an area not exclusively reserved to the State.

As these examples suggest, the distinctions between ``permission" and ``compulsion" on the one hand, and ``exclusive" and ``nonexclusive," on the other, cannot be determinative factors in state-action analysis. There is no great chasm between ``permission" and ``compulsion" requiring particular state action to fall within one or the other definitional camp. . . . In this case, the State of New York, by enacting §7-210 of the Uniform Commercial Code, has acted in the most effective and unambiguous way a State can act. This section specifically authorizes petitioner Flagg Brothers to sell respondents' possessions; it details the procedures that petitioner must follow; and it grants petitioner the power to convey good title to goods that are now owned by respondents to a third party.

. . . New York has authorized the warehouseman to perform what is clearly a state function. The test of what is a state function for purposes of the Due Process Clause has been variously phrased. Most frequently the issue is presented in terms of whether the State has delegated a function traditionally and historically associated with sovereignty. See, e.g., Jackson v. Metropolitan Edison Co.... In this Court, petitioners have attempted to argue that the nonconsensual transfer of property rights is not a traditional function of the sovereign. The overwhelming historical evidence is to the contrary, however,[b] and the Court wisely does not adopt this position. Instead, the Court reasons that state action cannot be found because the State has not delegated to the warehouseman an *exclusive*

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[b]. . . . I fully agree with the Court that the decision of whether or not a statute is subject to due process scrutiny should not depend on `` `whether a particular class of creditor did or did not enjoy the same freedom to act in Elizabethan or Georgian England.' " Nonetheless some reference to history and well-settled practice is necessary to determine whether a particular action is a ``traditional state function." See Jackson v. Metropolitan Edison Co. Indeed, in *Jackson* the Court specifically referred to Pennsylvania decisions, rendered in 1879 and 1898, which had rejected the contention that the furnishing of utility services was a state function.

sovereign function.[c] This distinction, however, is not consistent with our prior decisions on state action; is not even adhered to by the Court in this case[d] and, most importantly, is inconsistent with the line of cases beginning with Sniadach v. Family Finance Corp.

Since *Sniadach* this Court has scrutinized various state statutes regulating the debtor-creditor relationship for compliance with the Due Process Clause. See also North Georgia Finishing, Inc. v. Di-Chem, Inc.; Mitchell v. W.T. Grant Co.; Fuentes v. Shevin,. . . .
[These cases] must be viewed as reflecting this Court's recognition of the significance of the State's role in defining *and controlling* the debtor-creditor relationship. The Court's language to this effect in the various debtor-creditor cases has been unequivocal. In Fuentes v. Shevin the Court stressed that the statutes in question ``abdicate[d] effective state control over state power." And it is clear that what was of concern in *Shevin* was the *private* use of state power to achieve a nonconsensual resolution of a commercial dispute. The state statutes placed the state power to repossess property in the hands of an interested private party, just as the state statute in this case places the state power to conduct judicially binding sales in satisfaction of a lien in the hands of the warehouseman.

. . . Yet the very defect that made the statutes in *Shevin* and *North Georgia Finishing* unconstitutional -- lack of state control -- is, under today's decision, the factor that precludes constitutional review of the state statute. The Due Process Clause cannot command such incongruous results. If it is unconstitutional for a State to allow a private party to exercise a traditional state power

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[c]As I understand the Court's notion of ``exclusivity," the sovereign function here is not exclusive because there may be other state remedies, under different statutes or common-law theories, available to respondents. Even if I were to accept the notion that sovereign functions must be ``exclusive," the Court's description of exclusivity is incomprehensible. The question is whether a particular action is a uniquely sovereign function, not whether state law forecloses any possibility of recovering for damages for such activity. For instance, it is clear that the maintenance of a police force is a unique sovereign function, and the delegation of police power to a private party will entail state action. See Griffin v. Maryland, 378 U.S. 130. Under the Court's analysis, however, there would be no state action if the State provided a remedy, such as an action for wrongful imprisonment, for the individual injured by the ``private" policeman. This analysis is not based on ``exclusivity," but on some vague, and highly inappropriate, notion that respondents should not complain about this state statute if the State offers them a glimmer of hope of redeeming their possessions, or at least the value of the goods, through some other state action. Of course, the availability of other state remedies may be relevant in determining whether the statute provides sufficient procedural protections under the Due Process Clause, but it is not relevant to the state-action issue.
[d]As the Court is forced to recognize, its notion of exclusivity simply cannot be squared with the wide range of functions that are typically considered sovereign functions, such as ``education, fire and police protection, and tax collection."

because the state supervision of that power is purely mechanical, the State surely cannot immunize its actions from constitutional *scrutiny* by removing even the mechanical supervision. . . .

Whether termed ``traditional,'' ``exclusive,'' or ``significant,'' the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is accordingly, subject to due process scrutiny. . . .

It is important to emphasize that, contrary to the Court's apparent fears, this conclusion does not even remotely suggest that ``all private deprivations of property [will] be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.'' The focus is not on the private deprivation but on the state authorization.

.... The State's conduct in this case takes the concrete form of a statutory enactment, and it is that statute that may be challenged.

.... If there should be a deviation from the state statute -- such as a failure to give the notice required by the state law -- the defect could be remedied by a state court and there would be no occasion for [constitutinally based] relief. . . .

On the other hand, if there is compliance with the New York statute, the state legislative action which enabled the deprivation to take place must be subject to constitutional challenge in a federal court. . . .

[I]t is no longer possible, if it ever was, to believe that a sharp line can be drawn between private and public actions.[e]

In the broadest sense, we expect government ``to provide a reasonable and fair framework of rules which facilitate commercial transactions. . . .'' Mitchell v. W.T. Grant Co., 416 U.S., at 624 (Powell, J., concurring). This ``framework of rules'' is premised on the assumption that the State will control nonconsensual deprivations of property and that the State's control will, in turn, be subject to the restrictions of the Due Process Clause.[f] The power to order legally binding surrenders of property

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[e]See, e.g., Thompson, Piercing the Veil of State Action: The Revisionist Theory and A Mythical Application To Self-Help Repossession, 1977 Wis. L. Rev. 1; Glennon & Nowak, A Functional Analysis of the Fourteenth Amendment ``State Action'' Requirement, 1976 S. Ct. Rev. 221; Black, Foreword: ``State Action,'' Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69 (1967); Williams, The Twilight of State Action, 41 Texas L. Rev. 347 (1963); Van Alstyne & Karst, State Action, 14 Stan. L. Rev. 3 (1961).

[f] Mr. Justice Harlan explained this principle as follows:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth

and the constitutional restrictions on that power are necessary correlatives in our system. In effect, today's decision allows the State to divorce these two elements by the simple expedient of transferring the implementation of its policy to private parties. Because the Fourteenth Amendment does not countenance such a division of power and responsibility, I respectfully dissent.

Discussion

On what theory, if any, could the Court have required a hearing in *Flagg Bros.* without holding that every government decision not to intervene in a private dispute implicated the state in the dispute? Does this suggest that a hearing would thus be required in every private dispute or, rather, that courts would have to engage in some balancing test in order to determine when "the public interest" required hearings as against purely informal resolution?

Subsequent case: Many of the issues discussed above were present in American Manufactures Mutual Insurance Company v. Sullivan, 119 S.Ct. 977 (1999), which involved the administration of Pennsylvania's system of workers' compensation. Generally speaking, once a work-related injury is claimed to have occurred, the employer or its ensurer is obligated to pay for all "reasonable" and "necessary" medical treatment within thirty days of receiving a bill. In 1993 Pennsylvania amended its system to create a "utilization review" procedure by which the reasonableness and necessity of an employee's medical treatment, whether past, ongoing, or prospective, could be reviewed prior to payment. Should an insurer wish to dispute "the reasonableness or necessity of the treatment provided," it may, within thirty days, request utilization review by filing with the Pennsylvania Workers' Compensation Bureau a notice to that effect. The only function of the Bureau is to determine whether the form is "properly completed--i.e., that all information required by the form is provided." Once the request has been properly filed, the insurer is allowed to withhold payments to health care providers for the particular services being challenged. In the meantime, the Bureau notifies the relevant parties that utilization review has been requested and forwards the request to a randomly selected "utilization review

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> Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie v. Connecticut, 401 U.S. 371, 375.

organization" (URO), a private organizations composed of health care providers who are "licensed in the same profession and hav[e] the same or similar specialty as that of the provider of the treatment under review." The URO determines "whether the treatment under review is reasonable or necessary for the medical condition of the employee" in light of "generally accepted treatment protocols."

A number of affected employees and organizations representing them claimed that the procedures denied them due process of law. The first question, of course, was whether the relevant organizations implicated the state sufficiently to trigger any constitutional guarantees. Chief Justice Rehnquist, writing for a unanimous court (on this point), held that no such state action was present:

> II
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> …. In cases involving extensive state regulation of private activity, we have consistently held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Faithful application of the state-action requirement in these cases ensures that the prerogative of regulating private business remains with the States and the representative branches, not the courts. Thus, the private insurers in this case will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the latter may be fairly treated as that of the State itself." Whether such a "close nexus" exists, our cases state, depends on whether the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Action taken by private entities with the mere approval or acquiescence of the State is not state action.
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> Here, respondents do not assert that the decision to invoke utilization review should be attributed to the State because the State compels or is directly involved in that decision. Obviously the State is not so involved. It authorizes, but does not require, insurers to withhold payments for disputed medical treatment. The decision to withhold payment, like the decision to transfer Medicaid patients to a lower level of care in *Blum*, is made by concededly private parties, and "turns on ... judgments made by private parties" without "standards ... established by the State."
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> Respondents do assert, however, that the decision to withhold payment to providers may be fairly attributable to the State because the State has "authorized" and "encouraged" it. Respondents' primary argument in this regard is that, in amending the Act to provide for utilization review and to grant insurers an option they previously did not have, the State purposely "encouraged" insurers to withhold payments for disputed medical treatment. This argument reads too much into the State's reform, and in any event cannot be squared with our cases.
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> We do not doubt that the State's decision to provide insurers the option of deferring payment for unnecessary and unreasonable treatment pending review can in some sense be

seen as encouraging them to do just that. But, as petitioners note, this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy….

The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary. Before the 1993 amendments, Pennsylvania restricted the ability of an insurer (after liability had been established, of course) to defer workers' compensation medical benefits, including payment for unreasonable and unnecessary treatment, beyond 30 days of receipt of the bill. The 1993 amendments, in effect, restored to insurers the narrow option, historically exercised by employers and insurers before the adoption of Pennsylvania's workers' compensation law, to defer payment of a bill until it is substantiated. The most that can be said of the statutory scheme, therefore, is that whereas it previously prohibited insurers from withholding payment for disputed medical services, it no longer does so. Such permission of a private choice cannot support a finding of state action….

Nor does the State's role in creating, supervising, and setting standards for the URO process differ in any meaningful sense from the creation and administration of any forum for resolving disputes. While the decision of a URO, like that of any judicial official, may properly be considered state action, a private party's mere use of the State's dispute resolution machinery, without the "overt, significant assistance of state officials," cannot. The State, in the course of administering a many-faceted remedial system, has shifted one facet from favoring the employees to favoring the employer. This sort of decision occurs regularly in legislative review of such systems. But it cannot be said that such a change "encourages" or "authorizes" the insurer's actions as those terms are used in our state-action jurisprudence.

We also reject the notion, relied upon by the Court of Appeals, that the challenged decisions are state action because insurers must first obtain "authorization" or "permission" from the Bureau before withholding payment. . . ., [T]he Bureau's participation is limited to requiring insurers to file "a form prescribed by the Bureau," processing the request for technical compliance, and then forwarding the matter to a URO and informing the parties that utilization review has been requested. In *Blum,* we rejected the notion that the State, "by requiring completion of a form," is responsible for the private party's decision. The additional "paper shuffling" performed by the Bureau here in response to an insurers' request does not alter that conclusion.

Respondents next contend that state action is present because the State has delegated to insurers "powers traditionally exclusively reserved to the State." Their argument here is twofold. Relying on West v. Atkins, 487 U.S. 42 (1988), respondents first argue that workers' compensation benefits are state-mandated "public benefits," and that the State has delegated the provision of these "public benefits" to private insurers. They also contend that the State has

delegated to insurers the traditionally exclusive government function of determining whether and under what circumstances an injured worker's medical benefits may be suspended. The Court of Appeals apparently agreed on both points, stating that insurers "providing public benefits which honor State entitlements ... become an arm of the State, fulfilling a uniquely governmental obligation," and that "[t]he right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the State,"

We think neither argument has merit. *West* is readily distinguishable: there the State was constitutionally obligated to provide medical treatment to injured inmates, and the delegation of that traditionally exclusive public function to a private physician gave rise to a finding of state action. Here, on the other hand, nothing in Pennsylvania's constitution or statutory scheme obligates the State to provide either medical treatment or workers' compensation benefits to injured workers. Instead, the State's workers' compensation law imposes that obligation on employers. This case is therefore not unlike *Jackson*, where we noted that "while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State."

Nor is there any merit in respondents' argument that the State has delegated to insurers the traditionally exclusive governmental function of deciding whether to suspend payment for disputed medical treatment. Historical practice, as well as the state statutory scheme, does not support respondents' characterization. It is no doubt true that before the 1993 amendments an insurer who sought to withhold payment for disputed medical treatment was required to petition the Bureau, and could withhold payment only upon a favorable ruling by a workers' compensation judge, and then only for prospective treatment. But before Pennsylvania ever adopted its workers' compensation law, an insurer under contract with an employer to pay for its workers' reasonable and necessary medical expenses could withhold payment, for any reason or no reason, without any authorization or involvement of the State. The insurer, of course, might become liable to the employer (or its workers) if the refusal to pay breached the contract or constituted "bad faith," but the obligation to pay would only arise after the employer had initiated a claim and reduced it to a judgment. That Pennsylvania first recognized an insurer's traditionally private prerogative to withhold payment, then restricted it, and now (in one limited respect) has restored it, cannot constitute the delegation of a traditionally exclusive public function….

Perhaps the most significant feature of *Sullivan* is that the justices were unanimous on the state action point. As you read the final set of cases in this chapter, you might ask yourself if this represents, at long last, the achievement of a doctrinal consensus on the part of the justices, or whether it signifies merely a momentary truce in a continuing battle.

State action and the conduct of private attorneys: The issue of peremptory challenges

EDMONSON v. LEESVILLE CONCRETE CO.
111 S. Ct. 2077 (1991)

[In an African-American's civil suit for negligent injury, the defendant exercised peremptory challenges to strike prospective African-American jurors. The plaintiff argued that Batson v. Kentucky, page ___ supra, required defendant to articulate a race-neutral explanation for the peremptory strikes. Defendant argued, and the district court agreed, that *Batson* applied only to criminal trials. The Court of Appeals for the Fifth Circuit, en banc, affirmed the district court, holding, *inter alia,* that, in contrast to a prosecutor, a private litigant's use of peremptory challenges did not involve state action. Writing for a six-justice majority, Justice Kennedy reversed, holding both that *Batson* applied to civil trials and that requisite state action was present. The excerpts below focus only on the state action issue.]

KENNEDY, J.

We begin our discussion within the framework for state action analysis set forth in Lugar v. Edmonson Oil Co., 457 U.S. 922, at 937 (1982). There we considered the state action question in the context of a due process challenge to a State's procedure allowing private parties to obtain pre-judgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.
There can be no question that the first part of the *Lugar* inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. . . . Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury. . . .

Without [the] authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts.

. . . [T]he remainder of our state action analysis centers around the second part of the *Lugar* test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. . . . Our precedents establish that . . . it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits; whether the actor is performing a traditional governmental function; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges . . . was pursuant to a course of state action.

. . . [A] private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the ``final and

practical denial" of the excluded individual's opportunity to serve on the petit jury. Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court ``has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." Burton v. Wilmington Parking Authority, 365 U.S., at 725. . . .

[W]e next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. . . . [The jury performs] traditional functions of government, not of a select, private group beyond the reach of the Constitution.

If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race-neutrality. [Justice Kennedy goes on to discuss, among other cases, the Texas ``white primary" decisions and quotes from Justice Clark's concurring opinion in Terry v. Adams the principle that ``any `part of the machinery for choosing officials' becomes subject to the Constitution's constraints."]

. . . Though the motive for a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. . . . The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. The delegation of authority that in *Terry* occurred without the aid of legislation occurs here through explicit statutory authorization.

We find respondent's reliance on Polk County v. Dodson, 454 U.S. 312 (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. . . .

In the ordinary context of civil litigation, in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury-selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson,* so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race. . . .

If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. . . .

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. . . . To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

Justice O'CONNOR, with whom the Chief Justice and Justice Scalia join, dissenting:

. . . [The Court's conclusion rests] primarily on two empirical assertions. First, that private parties use peremptory challenges with the ``overt, significant participation of the government." Second, that the use of a peremptory challenge by a private party ``involves the performance of a traditional function of the government." Neither of these assertions is correct.

a

. . . The peremptory challenge ``allow[s] parties," in this case *private* parties, to exclude potential jurors. It is the nature of a peremptory that its exercise is left wholly within the discretion of the litigant. . . . In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of *private* choice in the pursuit of fairness. The peremptory is, by design, an enclave of private action in a government-managed proceeding.

The Court amasses much ostensible evidence of the Federal Government's ``overt, significant participation" in the peremptory process. Most of this evidence is irrelevant to the issue at hand. . . . All of this activity, as well as the trial judge's control over *voir dire,* are merely prerequisites to the use of a peremptory challenge; they do not constitute participation *in* the challenge. That these actions may be necessary to a peremptory challenge -- in the sense that there could be no such challenge without a venire from which to select -- no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

The entirety of the Government's actual participation in the peremptory challenge process boils down to a single fact: ``When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused." This is not significant participation. . . .
As an initial matter, the judge does not ``encourage" the use of a peremptory challenge at all. The decision to strike a juror is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge. It is the attorney who strikes. The judge does little more than acquiesce in this decision by excusing the juror. . . .

The alleged state action here is a far cry from that the Court found, for example, in Shelley v. Kraemer. In that case, state courts were called upon to enforce racially restrictive covenants against sellers of real property who did not wish to discriminate. The coercive power of the State was

necessary in order to enforce the private choice of those who had created the covenants. . . . Moreover, the courts in *Shelley* were asked to enforce a facially discriminatory contract. In contrast, peremptory challenges are ``exercised without a reason stated [and] without inquiry.'' A judge does not ``significantly encourage'' discrimination by the mere act of excusing a juror in response to an unexplained request.

There is another important distinction between *Shelley* and this case. The state court in *Shelley* used coercive force to impose conformance on parties who did not wish to discriminate. ``Enforcement'' of peremptory challenges, on the other hand, does not compel anyone to discriminate; the discrimination is wholly a matter of private choice. Judicial acquiescence does not convert private choice into that of the state. See Blum v. Yaretsky, 457 U.S., at 1004-1005.

Nor is this the kind of significant involvement found in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). There, we concluded that the actions of the executrix of an estate in providing notice to creditors that they might file claims could fairly be attributed to the State. The State's involvement in the notice process, we said, was ``pervasive and substantial.'' In particular, a state statute directed the executrix to publish notice. In addition, the District Court in that case had ``reinforced the statutory command with an order expressly requiring [the executrix] to `immediately give notice to creditors.' '' Notice was not only encouraged by the State, but positively required. There is no comparable state involvement here. No one is compelled by government action to use a peremptory challenge, let alone to use it in a racially discriminatory way.

The Court relies also on Burton v. Wilmington Parking Authority. But the decision in that case depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building. . . . Among the ``peculiar facts [and] circumstances'' leading to that conclusion was that the State stood to profit from the restaurant's discrimination. . . . [T]he government's involvement in the use of peremptory challenges falls far short of ``interdependence'' or ``joint participation.'' . . .

Jackson v. Metropolitan Edison Co. is a more appropriate analogy to this case. Metropolitan Edison terminated Jackson's electrical service under authority granted it by the State, pursuant to a procedure approved by the state utility commission. Nonetheless, we held that Jackson could not challenge the termination procedure on due process grounds. The termination was not state action because the State had done nothing to encourage the particular termination practice. . . .

To the same effect is Flagg Bros., Inc. v. Brooks. . . . [I]n the absence of compulsion, or at least encouragement, from the government in the use of peremptory challenges, the government is not responsible. . . .

b

The Court errs also when it concludes that the exercise of a peremptory challenge is a traditional government function. . . . Whatever reason a private litigant may have for using a peremptory

challenge, it is not the government's reason. The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service. . . .

The peremptory challenge is a practice of ancient origin, part of our common law heritage in criminal trials. Congress imported this tradition into federal civil trials. The practice of unrestrained private choice in the selection of civil juries is even older than that, however. . . . Peremptory challenges are not a traditional government function; the ``tradition'' is one of unguided private choice. . . .

[In regard to the various ``white primary'' cases,] we explained that the government functions in those cases had one thing in common: exclusivity. The public-function doctrine requires that the private actor exercise ``a power traditionally exclusively reserved to the State.'' In order to constitute state action under this doctrine, private conduct must not only comprise something that the government traditionally does, but something that *only* the government traditionally does. Even if one could fairly characterize the use of a peremptory strike as the performance of the traditional government function of jury selection, it has never been exclusively the function of the government to select juries; peremptory strikes are older than the Republic. . . .

c

None of this should be news, as this case is fairly well controlled by Polk County v. Dodson. We there held that a public defender, employed by the State, does not act under color of state law [-- the statutory equivalent of the ``state action'' requirement under the Fourteenth Amendment --] when representing a defendant in a criminal proceeding. In such a circumstance, government employment is not sufficient to create state action. More important for present purposes, neither is the performance of a lawyer's duties in a courtroom. This is because a lawyer, when representing a private client, cannot at the same time represent the government.

Trials in this country are adversarial proceedings. Attorneys for private litigants do not act on behalf of the government, or even the public as a whole; attorneys represent their clients. . . .

It cannot be gainsaid that a peremptory strike is a traditional adversarial act. . . . The Court does not challenge the rule of *Dodson,* yet concludes that private attorneys performing this adversarial function are state actors. Where is the distinction?

The Court wishes to limit the scope of *Dodson* to the actions of public defenders in an adversarial relationship with the government. At a minimum, then, the Court must concede that *Dodson* stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client, nor is an attorney representing a private litigant in a civil suit against the government. Both of these propositions are true, but the Court's distinction between this case and *Dodson* turns state action doctrine on its head. Attorneys in an adversarial relation to the state are not state actors, but that does not mean that attorneys who are not in such a relation *are* state actors.

The Court is plainly wrong when it asserts that ``[i]n the jury-selection process, the government and private litigants work for the same end." In a civil trial, the attorneys for each side are in ``an adversarial relation"; they use their peremptory strikes in direct opposition to one another, and for precisely contrary ends. The government cannot ``work for the same end" as both parties. In fact, the government is neutral as to private litigants' use of peremptory strikes. That's the point. . . .

II

Beyond ``significant participation" and ``traditional function," the Court's final argument is that the exercise of a peremptory challenge by a private litigant is state action because it takes place in a courtroom. In the end, this is all the Court is left with. . . . The Court is also wrong in its ultimate claim. If *Dodson* stands for anything, it is that the actions of a lawyer in a courtroom do not become those of the government by virtue of their location. This is true even if those actions are based on race.

Racism is a terrible thing. . . . But not every opprobrious and inequitable act is a constitutional violation. . . .

[A dissenting opinion by Justice Scalia is omitted.]

The following year, in Georgia v. McCollum, 112 S.Ct. 2348 (1992), the Court extended *Leesville* to cover "a criminal defendant's exercise of a peremptory challenge." "In exercising a peremptory challenge, a criminal defendant is wielding the power to choose a quintessential governmental body--indeed, the institution of government on which our judicial system depends." It is irrelevant that "a defendant exercises a peremptory challenge to further his interest in acquittal…. Whenever a private actor's conduct is deemed 'fairly attributable' to the government, it is likely that private motives will have animated the actor's decision."

Both Chief Justice Rehnquist and Justice concurred on the ground that *Edmundson* controlled the case, though both believe that it was wrongly decided. Justice O'Connor dissented, arguing that "our decisions specifically establish that criminal defendants and their lawyers are not government actors when they perform traditional trial functions." Justice Scalia, dissenting, agreed "that its judgment follows logically from *Edmundson,*" which is just another reason to recognize that "that case was wrongly decided" and overrule it. "Barely a year later, we witness its reduction to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state...."

Discussion

1. Does the state action doctrine require that a person "be acting *on behalf* of the state" or only in a way that would not have been possible in the absence of state authorization?
2. Return to *Flagg Brothers* and assume that the warehouse had followed a policy of selling the goods of African-Americans 30 days following the purported nonpayment of service charges while retaining the goods of whites for 90 days. Should *Edmundson* change the result?
3. Do any of these cases bring us closer to solving the riddle of state action? If not, is it because the riddle is insoluble or because you think that the Supreme Court is simply giving the wrong answer(s)?

Note: Congressional Regulation of ``Private Action" under the Thirteenth and Fourteenth Amendments

This chapter has focused on cases brought under the Fourteenth Amendment by claimants asserting direct rights under the Fourteenth Amendment or under federal statutes prohibiting the deprivation of civil rights ``under color of" state laws or customs. The state action issue has also arisen, however, in suits brought under certain federal antidiscrimination statutes that are not limited to conduct under ``color of law." Congress might enact such provisions pursuant to its power to enforce the Thirteenth and Fourteenth Amendments, and the question is whether either of these provisions (or both) authorizes Congress to forbid discrimination by private persons. In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court considered a prosecution for a conspiracy brought against Mississippi whites who assaulted African-American civil rights workers as part of an effort to prevent them and others ``from seeking the equal protection of the laws and from enjoying the equal rights, privileges, and immunities of citizens . . ." protected by 42 U.S.C. §1985(3). Holding that the statute indeed reached private conspiracies, the Court did not offer a general approach to Congress' Fourteenth Amendment power. (Recall that the Court had invalidated the Civil Rights Act of 1875 in the Civil Rights Cases precisely because Congress did not have the power to regulate merely private action.) Instead, it observed that ``Congress was wholly within its powers under §2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men."
The issue of state action under the Thirteenth Amendment has arisen almost exclusively in the application of federal statutes derived from the Civil Rights Act of 1866. This Act, of course, preceded the addition of the Fourteenth Amendment, and it was therefore based on the Thirteenth Amendment, which became part of the Constitution in December 1865.

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), is the leading case. There the Court construed 42 U.S.C. §1982, which provides that ``[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property," to apply to a realtor who had allegedly refused to sell a home to an

African-American on racial grounds. Although the central debate in the case involved the intent of the 1866 Congress in passing the Civil Rights Act, a collateral issue concerned the constitutional propriety of congressional regulation of the private housing market through the Thirteenth Amendment. Justice Stewart, writing for the majority, wrote:

> As its text reveals, the Thirteenth Amendment ``is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Civil Rights Cases, 109 U.S. 3, 20. It has never been doubted, therefore, ``that the power vested in Congress to enforce the article by appropriate legislation" includes the power to enact laws ``direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."
>
> Thus, the fact that §1982 operates upon the unofficial acts of private individuals, whether or not sanctioned by state law, presents no constitutional problem. If Congress has power under the Thirteenth Amendment to eradicate conditions that prevent Negroes from buying and renting property because of their race or color, then no federal statute calculated to achieve that objective can be thought to exceed the constitutional power of Congress simply because it reaches beyond state action to regulate the conduct of private individuals. The constitutional question in this case, therefore, comes to this: Does the authority of Congress to enforce the Thirteenth Amendment ``by appropriate legislation" include the power to eliminate all racial barriers to the acquisition of real and personal property? We think the answer to that question is plainly yes.

Justice Harlan, joined by Justice White, dissented, primarily on statutory grounds. He noted, though, that ``[i]n holding that the Thirteenth Amendment is sufficient constitutional authority for §1982 as interpreted, the Court also decides a question of great importance. Even contemporary supporters of the aims of the 1866 Civil Rights Act doubted that those goals could constitutionally be achieved under the Thirteenth Amendment, and this Court has twice expressed similar doubts." Justice Harlan did not go on to consider the constitutional question. He noted the recent enactment of the Civil Rights Act of 1968, which covered much housing discrimination, and suggested that under the circumstances the Court should dismiss the writ of certiorari as improvidently granted.

Jones was followed in Runyon v. McCrary, 427 U.S. 160 (1976), which was in turn specifically reaffirmed by a unanimous Court in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In both of the later cases, some Justices suggested that *Jones* had been wrongly decided as a matter of statutory construction, but indicated that they would adhere to it because of the importance of following precedent. (The Court in *Patterson* held that the protection against discrimination in the making of contracts did not extend to protection against racial harassment on the job. This holding was overruled by the Civil Rights Act of 1991.)