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Comments

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COMMENTS

CONSTITUTIONAL LAW—DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT—EXPANSION OF THE STATE ACTION CONCEPT.

The recent sit-in demonstrations which have been waged against private individuals and groups serve to point up an important principal of federal constitutional law; the fourteenth amendment and statutes enacted pursuant thereto prohibit only discrimination by a *state* and do not affect the actions of individuals.[1] Although not the first, probably the most famous cases to construe the fourteenth amendment in this respect were the *Civil Rights Cases*,[2] in which the Civil Rights Act of 1875, enacted under the enabling provision of the fourteenth amendment, was held unconstitutional on the basis that the amendment did not confer upon Congress plenary power to regulate the conduct of individuals. Thus at an early date the applicability of the amendment was limited to "state action."

The history of the state action concept is the history of a Court reluctant to overturn settled precedent but unwilling to be fettered by its obvious limitations. As a result the expansion of the state action concept began as soon as the concept itself was formulated. In fact, even prior to the *Civil Rights Cases* the United States Supreme Court had held that acts of a state judge constituted state action under the fourteenth amendment,[3] and as early as 1880 the Court invalidated a state statute on the basis that it constituted unlawful state action in violation of the fourteenth amendment.[4] The subsequent course of expansion includes holdings that acts of executive officers,[5] acts of administrative boards,[6] acts of state officials even when in violation of state laws,[7]

1. U.S. CONST. amend. XIV, § 1: *"No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall *any State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

2. 109 U.S. 3 (1883).

3. *Ex parte* Virginia, 100 U.S. 339 (1880). See also Virginia v. Rives, 100 U.S. 313 (1880).

4. Strauder v. West Virginia, 100 U.S. 303 (1880).

5. *Ex parte* Young, 209 U.S. 123 (1907); Virginia v. Rives, 100 U.S. 313 (1880).

6. Raymond v. Chicago Traction Co., 207 U.S. 20 (1907).

7. Screws v. United States, 325 U.S. 91 (1945); *Compare* Raymond v. Chicago Union Traction Co., *supra* note 6, *with* Barney v. City of New York, 193 U.S. 430 (1904).

acts of a municipality,[8] and improper enforcement of valid state laws[9] all constitute state action within the meaning of the amendment.

In the above situations, where the state itself is the primary actor, the concept of state action is more or less clearly defined. Less clear is the penumbral area, wherein private individuals are the active discriminators. The major problem in this area is the determination of what amount of state control or participation is necessary to render acts of private individuals or groups state action and hence subject to the constitutional limitations of the fourteenth amendment. The confusion and uncertainty in this area stems mainly from the fact that the United States Supreme Court has not spoken on much of the law of state action, and is compounded by the inexact and often conflicting language which the Court has used when it has dealt with this topic.[10] The purpose of this comment is to analyze the existing cases and to attempt to develop the criteria for determining what acts constitute state action in this fringe area.

I.

THEORIES OF STATE ACTION

The extension of the concept has taken place by the process of assimilation of individual action not authorized by the state but performed under color of state law and of individual action which is in some way sanctioned by the state.[11] Thus in the areas with which we are primarily concerned the search is not for affirmative action by the state as such but rather for state responsibility for acts of individuals.[12] The connection between the state and the private party which renders the actions of the latter state action and thereby subject to the constitutional limitations may arise in various ways, including the following: the use of state property, the granting of various forms of state aid and resultant state control, or the granting by the state of special powers and privileges.

A.

State Property Theory

It seems clear that the state itself cannot use its property in a discriminatory manner.[13] Thus in *Henry v. Greenville Airport Comm'n* the Court of Appeals for the Fourth Circuit declared: "It is well settled that

8. Buchanan v. Warley, 245 U.S. 60 (1917).
9. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Neal v. Delaware, 103 U.S. 370 (1880).
10. *Compare* the following statements, "It is state action of a particular character that is prohibited [by the fourteenth amendment]," Civil Rights Cases, 109 U.S. 3, 11 (1883), *with* "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to the exertion of state power in all forms." Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
11. Comment, 96 U. PA. L. REV. 402, 403 (1948).
12. Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring opinion).
13. Mayor & City Council v. Dawson, 350 U.S. 877 (1956).

property acquired, maintained, and operated by a state or its political subdivisions must be available to citizens without discrimination because of race."[14] Likewise, state action results when the state leases its property to a private party but retains control over the policies of the lessee.[15] However, when public property is leased to a private party without any state control over its use being involved a finding of state action appears to be more dubious. The proponents of the state property theory declare that whenever property is leased to a private individual or group for a public purpose the lessee is subject to the same constitutional restraints on its use as the state.[16] However, the cases do not seem to substantiate such a broad generalization.

In cases which would come within the ambit of the state property theory certain elements have always been present. The first of these elements is naturally a lease of public property from a federal,[17] state,[18] or municipal[19] government. Next it appears that the property must be more than a bare lot of land; it must have been improved with public funds.[20] The problem that arises is how much of an improvement is required. Must the facility itself be provided or need only the building which is to house the facility be provided with government funds? Since in most of the cases the facility was in fact provided there is little discussion of that point. However, in *Wilmington Parking Authority v. Burton*,[21] where only the bare minimum of necessary space was provided with public funds, the court failed to find state action and emphasized that the facility itself was furnished with private capital. Thus it would seem that the facility must be constructed with public funds or at least public funds must constitute a substantial portion of the money expended to furnish the facility. The third of the requisite elements is that the property be used by the lessee for a public purpose. There is no litmus paper test to determine just what is a public purpose, however, whether the activity involved is open to the public or a large segment thereof is the most important single consideration.[22]

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14. 279 F.2d 751, 753 (4th Cir. 1960).
15. Anderson v. Moses, 185 F. Supp. 727 (S.D.N.Y. 1960).
16. Shanks, *"State Action" and The Girard College Case*, 105 U. PA. L. REV. 213, 221, 227 (1956).
17. Nash v. Air Terminal Service, 85 F. Supp. 545 (E.D. Va. 1949).
18. Dep't of Conservation & Dev. v. Tate, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).
19. Kern v. City Comm'rs, 151 Kan. 565, 100 P.2d 709 (1940).
20. Holley v. City of Portsmouth, 150 F. Supp. 6 (E.D. Va. 1957) (dictum). Suppose private capital and public monies are co-mingled to purchase or improve land. The Supreme Court of Delaware in *Wilmington Parking Authority v. Burton*, 157 A.2d 894 (Del. 1960), declared that where public monies constituted only 15% of the total fund state action would not result. However, it would seem that state action should result whenever public monies constitute a substantial portion of the total fund involved.
21. 157 A.2d 894 (Del. 1960). See Holley v. City of Portsmouth, *supra* note 20, at 9 n.1, where the court declared in dictum that the government must actually supply the facility itself if it is to be held responsible for the actions of the lessee.
22. Shanks, *supra* note 16, at 225.

By far the most vexatious problem in this area is the determination of whether the lease has been made in good faith or is a sham made solely to aid in discrimination. In an obvious analogy to corporation cases, some courts have declared that they will pierce any superficial form.[23] These courts make an allegation and proof of intent to work discrimination via the lease a necessary element to justify holding the lessee subject to constitutional limitations. Thus in *Easterly v. Dempster*[24] a city leased its municipal golf course because it was losing money in its operation. When the lessee, who had complete control over the use of the golf course, denied admittance to plaintiff, a Negro, the court found no state action because the lease was a good faith measure utilized by the city for financial reasons and not a mere sham to avoid the limitations of the fourteenth amendment. Although no court has flatly declared that a showing of intent to discriminate via a lease was not a necessary element, some courts have done so by implication. In *Kern v. City Comm'rs*[25] the lessee of a municipal swimming pool constructed with public funds was found to have unlawfully discriminated on the basis of color. The state action question was decided on the pleadings which contained no averment of the city's bad faith in leasing the pool, but nonetheless, the court held the lessees subject to the constitutional limitation. A fair conclusion from this case is that discriminatory intent is not necessary to a finding of state action and consequent subjection of the lessee to the same limitations on the use of the leased property that would be involved if the lessor had itself operated the facility. The case of *Dep't of Conservation & Tate*[26] would seem to support this conclusion. In that case the state had begun to arrange a lease of state parks in order to circumvent the expected result of an action by a group of Negroes to gain admittance to a park which had been built with state funds. The court in granting an injunction in the case declared that the state has a positive duty to see that the lease of the state parks does not directly or indirectly operate so as to discriminate against members of any race. No showing of bad faith was required, and it appears that the court did not deem such a necessary element. However, the intent to discriminate was obvious even to the most casual observer and it is uncertain to what extent this factor contributed to the court's decision. Similar situations have been presented in which the court mentions and obviously assumes bad faith but speaks in language that would apply even where the lease is made in good faith.[27] Other courts have tried to steer

23. Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948). Just as a subsidiary or auxiliary corporation which is created by a parent corporation merely as an agent for the latter may be regarded as identical with the parent corporation the acts of an individual may be regarded as the acts of the state in a similar situation.

24. 112 F. Supp. 214 (E.D. Tenn. 1953).

25. 151 Kan. 565, 100 P.2d 709 (1940).

26. 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).

27. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W.Va. 1948).

a middle course, as in *Derrington v. Plummer*[28] where the lessee of a cafeteria in a newly constructed courthouse refused to serve plaintiff, a Negro. Although it was found that the lease had been made in good faith the court found state action, distinguishing between surplus government property and property needed for county purposes and held that only where there is a lease of surplus property must plaintiff show an intent to discriminate via the lease.

Let us suppose that a municipality leases an auditorium to a group which has complete control over the auditorium during the term of the lease. The lease is for a relatively short time and the lessee discriminates against Negroes by refusing to allow them admittance. Let us further suppose that the auditorium can also be leased by Negroes on the same terms. In this situation there is a lease of improved public property to a private group, which property is to be used for a public purpose. However, the problem presented is whether the fact the lease is for a relatively short time and the property is available to Negroes on identical terms is sufficient to relieve the state of the responsibility for the discriminatory action of the lessee. The case of *Harris v. St. Louis*[29] held that in such a situation the discriminatory action of the lessee is not state action; however, that case was decided during the reign of the now repudiated "separate but equal" doctrine. When a case on analogous facts reached the Supreme Court of the United States after the decision in *Brown v. Board of Education*,[30] the Court remanded the case to be considered in light of the *Brown* decision.[31] Since the doctrine of "separate but equal" was the only reason for differentiating between the two cases it would seem that the same rules that apply to long term leases should now apply in the short term lease situation. Thus if the auditorium is leased for a function that is open to the public the lessee should be subject to the same constitutional limitations on its use as the state. But if the lease is to a private organization such as the Masons, or even the Ku Klux Klan, such private organization will be free to make its own requirements for admission.[32]

The question of intent is the crucial one. If there is intent on the part of the state to work discrimination through the lease state action will definitely be found, but if there is no showing of intent whether state action will be found depends upon the considerations discussed above.

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28. 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957). See Coke v. Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960), where the reasoning of the *Derrington* case is adopted.

29. 233 Mo. App. 911, 11 S.W.2d 995 (1938).

30. 347 U.S. 483 (1954).

31. Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954).

32. Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORNELL L.Q. 375, 398 (1958).

B.

State Assistance Theory

Valuable assistance can be given to a private enterprise by the state in various ways. Proponents of the state assistance theory argue that any operation which is public in nature should be subject to constitutional limitations in its exercise when it is encouraged by state assistance[33] such as the appropriation of state monies therefor, use of eminent domain proceedings and granting of tax benefits. The cases, however, indicate that the further element of state control is also necessary.[34]

No general rules can be laid down for the determination of the amount and kind of assistance and control that is essential. In *Kerr v. Enoch Pratt Free Library*[35] the state assistance consisted of legislative enactments, tax exemptions and direct financial aid. The control exercised by the city consisted of approval of the budget for the library, ownership of the real and personal property involved and establishment of rules for the appointment of trustees. In finding state action when the library discriminated, the court asked: "How then can the well known policy of the Library, so long continued and now formally expressed in the resolution of the Board, be justified as solely the act of a private organization when the state, through the municipality, continues to *support it with the means of its existence?*"[36] Perhaps then the state assistance must be found to be critical to the continued existence of the facility or service before state action will be found. In *Norris v. Mayor & City Council of Baltimore*[37] the state assistance involved was direct financial aid and a lease of city property. The court in finding no state action emphasized that there was no showing of city control over the operations or policy of the recipient and that the facility involved was private rather than public. Another factor which the court did not mention was that the assistance was not critical to the existence of the facility. The case of *Dorsey v. Stuyvesant Town*[38] reached the same result as the *Norris* case, but for different reasons. The town of Stuyvesant was built by the Metropolitan Insurance Company and was wholly owned subsidiary of that company. Land was taken by the city through its eminent domain power and sold to the defendant corporation, and in addition defendant was granted tax exemptions for twenty-five years. The New York Court of Appeals held, in a four to three decision, that since there was neither a private group exercising a governmental function nor direct govern-

33. Abernathy, *supra* note 31, at 386, 391.

34. Norris v. Mayor & City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

35. 149 F.2d 212 (4th Cir. 1945), *cert. denied,* 326 U.S. 721 (1945).

36. *Id.* at 219. Compare Girard Will Case, 386 Pa. 548, 127 A.2d 287 (1956), *rev'd,* 353 U.S. 230 (1957).

37. 78 F. Supp. 451 (D. Md. 1948).

38. 299 N.Y. 519, 87 N.E.2d 541 (1949), *cert. denied,* 339, U.S. 981 (1950).

mental aid to the discrimination there could be no state action under the fourteenth amendment. However, in no previous case had it been held that there must be direct aid to the discrimination. Although there was no actual state control involved in that case the city had the power to control the town by making requirements for its prospective tenants and there was state assistance amounting to over a million dollars. Aside from the fact that there was only power to control and not actual control the *Dorsey* case is indistinguishable in its essential facts from the *Kerr* case. In both cases the operation was public in nature and in both the assistance given was crucial to the existence of the private enterprise. The fact that there was no actual control but only the power to control should not be determinative since neither a state nor its subdivisions should be allowed to escape its obligations by abdicating its power. The cases rather should turn on the basis of the amount and type of control which the state is able to exercise. A "meticulous control over the operations" of the public facility or service[39] should render the actions of the discriminating individual state action if the requisite state assistance is also present.

C.

Grant of Special Privileges or Powers

Closely akin to the state assistance theory is the view that when a state grants special powers or privileges to a private party or group the state is under a positive obligation to see that this power is not used in a discriminatory manner.[40] In determining just what powers and privileges will render the recipient, in effect, an agent of the state each case will have to be decided on its own peculiar facts; however, the following test is a useful guide: Does the power or privilege confer on a private party an especially advantageous position so that in substance the state can be said to be taking part in the project?[41]

In considering this theory the question immediately occurs as to whether the grant of a corporate charter or a license necessary to do business is sufficient state action to render the recipient subject to constitutional limitations. In *Williams v. Howard Johnson's Restaurant*[42] plaintiff was refused service in a restaurant which had obtained a state license. The Court of Appeals for the Fourth Circuit held that the mere grant of a license to operate a restaurant does not constitute sufficient state action to render the restaurateur subject to constitutional limitations on his actions, emphasizing that the licensing included no control over the management of the restaurant. In *Slack v. Atl. White Tower*[43] a foreign

39. Anderson v. Moses, 185 F. Supp. 727 (S.D.N.Y. 1960).
40. Shanks, *supra* note 16, at 232.
41. *Id.* at 233.
42. 268 F.2d 845 (4th Cir. 1959). See generally 6 VILL. L. REV. 301 (1959).
43. 181 F. Supp. 124 (D. Md. 1960).

corporation, to which Maryland had issued a restaurant license and which it had admitted to do business within her borders, discriminated. The Maryland District Court likewise held this insufficient state action to make the discrimination of the restaurateur the discrimination of the state.

However, if the privilege granted is exclusive it would seem more likely that the state would be responsible for the actions of the recipient. In *Steele v. Louisville & N.R.R.*[44] plaintiff sought to enjoin the enforcement of discriminatory agreements among the defendants. Mr. Justice Murphy, in his concurring opinion,[45] declared that a union could not discriminate in the area in which a federal statute gave it the privilege of exclusive bargaining power. This reasoning would seem to apply with equal force when a state gives a private organization special privileges or powers, except that the fourteenth and not the fifth amendment would prescribe the limitations on the action of the organization. In *Bowman v. Birmingham Transit Co.*[46] a public utility was granted a special power to make rules for seating its passengers and to make the violation of such rules a crime. The Court of Appeals for the Fourth Circuit declared that this privilege rendered the actions of the transit company the actions of the state and therefore subject to the fourteenth amendment. It would seem then that whenever a private individual is given authority in an area traditionally controlled by the state and through the use of this authority he could deprive others of civil rights, he should be subject to fourteenth amendment restrictions in the exercise of this authority.

The court distinguished between a special franchise and an ordinary franchise.[47] An ordinary franchise is one which merely grants the privilege of existing in a corporate form, while a special franchise grants certain additional rights and privileges. Thus a special franchise would be one given to allow a private party to do what a state deems useful for the public necessity or convenience. It involves the use of state property for private gain to perform a public function. Because of the advantageous position that it confers on the recipient and the closeness of the relationship to the state, it should render the recipient subject to constitutional limitations in its exercise, even if the privilege is not exclusive.

Let us suppose that all the milk producers and distributors in a given state refuse to sell to Negroes and all such producers and distributors are incorporated in and licensed by the state. Let us further suppose that the entire operation is wholly intrastate. Would the corporate charter and the licensing be sufficient to render the milk producers and distributors subject to the fourteenth amendment? In view of the great public interest of the state in seeing to it that the people are

44. 323 U.S. 192 (1944).
45. *Id.* at 202 (concurring opinion.)
46. 280 F.2d 531 (5th Cir. 1960).
47. *Id.* at 535.

properly fed and because the state has granted to the discriminating party certain privileges and powers, it would seem that the producers and distributors would be held to be subject to the fourteenth amendment.

Thus although the mere grant of a corporate charter or a license to do business is not alone sufficient to render the recipient subject to constitutional limitations on his actions, where the added element of considerable public interest is involved the courts might well intervene. An exclusive privilege or a special franchise would also be sufficient, as would authority to act in an area in which the state usually retains complete control where this authority carries with it the power to effectively hinder others in the exercise of their civil right.

II.

THE EXTREMITIES OF THE STATE ACTION CONCEPT

At the extreme edge of the penumbral area surrounding the state action concept two unsettled problems dwell. The first is the question of to what extent can the rationale underlying the case of *Shelley v. Kraemer*[48] be applied to different and varying factual situations? And the second is the question of when state inaction results in a finding of state action? The remainder of this comment will deal with an analysis of these two problems.

A.

Extension of the Doctrine of *Shelley v. Kraemer*

In *Shelley v. Kraemer*[49] property owners who were the beneficiaries of a racially restrictive covenant sought to restrain Negroes from taking title to property purchased by them in violation of the covenant. The Supreme Court of Missouri directed the trial court to enforce the covenant, but the Supreme Court of the United States reversed the Missouri court and held that it was state action violative of the fourteenth amendment for a state court to enforce a racially restrictive covenant.[50] The Court declared: "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals."[51] Thus the test implicit in *Shelley* is that whenever actions by the state, through its legislature, executive, or judiciary, will directly aid a private party in denying to others the equal protection of the laws, prohibited state action results. The later case of *Barrows v. Jackson*[52] went even further in declaring that a state court may not grant damages to the aggrieved party when a racially

48. 334 U.S. 1 (1948).
49. *Ibid.*
50. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).
51. *Id.* at 18.
52. 346 U.S. 249 (1953).

restrictive covenant is breached. Thus it would seem that the aid need not be direct if it is sought through traditional state functions.

The rationale of the *Shelley* case was later sought to be applied to a situation in which a testator in his will attempted to revoke any gift granted therein if the recipient should marry any person not of the Hebrew faith, but there the Supreme Judicial Court of Massachusetts held that a decree of a probate court that had the effect of enforcing such a restriction was not state action.[53] The court disposed of *Shelley* by judicial fiat, declaring simply that clearly a will is distinguishable from a restrictive covenant, without elaborating on the distinction. Although the rule of *Shelley* would seem to logically apply to this situation, the court apparently felt that federal interference was unwarranted in such a private matter as disposition of property by will among members of a family since there was not a sufficient public interest involved.

Now, let us hypothesize that a Negro is refused service in a restaurant because of his color. When he is requested to leave he refuses but remains peacefully seated in the restaurant. Let us further suppose that, on the owners request, a public officer ejects the Negro. State action? This situation would seem to be one where the principle underlying the *Shelley* case would apply. In *Whiteside v. So. Bus Lines*[54] the court declared, albeit in dictum, that ". . . if state action is a prerequisite to the invalidity of the regulation here considered [bus company seating regulations] as applied to appellant, *the state action is clearly to be perceived in the ejection of the appellant by the state police officer.*"[55] It should be noted that here the state action applied only to the particular transaction and this would always be the case in this type of situation. The same question arose in *Valle v. Stengel*[56] where the court directly held that a chief of police who ejects Negroes from an amusement park makes the acts of both the officer and the amusement park owner acts done under the color of state law. However, in *Dinwiddie v. Brown*[57] the court held that where state officers act wholly within their official responsibilities and do not intentionally co-operate in any scheme to discriminate they are not acting under color of state law and their action is not state action for fourteenth amendment purposes. This conclusion would not seem to follow since although their knowledge may be relevant as to their own individual responsibility in a civil action, it has nothing to do with whether they were acting under color of state law as far as the persons they were aiding are concerned. The case of *Griffin v. Collins*[58] held that the mere arrest by Maryland police of Negroes who refused to leave an amusement park was not state action so as to bring the conduct

53. Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955).
54. 177 F.2d 949 (6th Cir. 1949).
55. *Id.* at 953. (Emphasis added.)
56. 176 F.2d 697 (3rd Cir. 1949).
57. 231 F.2d 465 (4th Cir. 1956).
58. 29 U.S.L. WEEK 2109 (D. Md. Sept. 20, 1960).

under the fourteenth amendment. The court, however, particularly avoided deciding whether state action would arise from the fact that park guards specifically charged with the enforcement of the discriminatory policy were all appointed special deputy sheriffs.[59]

It is submitted that the reasoning of the *Shelley* case should be applied to the arresting officer situation. To be sure, just as a citizen has a right to have access to the courts, he has the right to have police eject trespassers from his property. However, in neither case does he have the right to require the state to aid him in his discriminatory policy. It will no doubt be argued that private property is in fact valueless if there is no police protection for it and that such a refusal in this situation will deprive the property owner of equal protection of the laws. The Court contended with a similar argument in the *Shelley* and *Barrows* cases and disposed of it by declaring that the Constitution gives no individual the right to demand action by the state which would result in the denial of equal protection of the laws to others.[60] Applying this reasoning to our hypothetical situation, the refusal of the police to give assistance to racial discrimination by ejecting a sit-in would not deprive the complaining property owner of equal protection of the laws, in fact; the ejection of the sit-in would deprive him of equal protection.

B.

State Inaction as State Action

Let us here reconsider a hypothetical case stated previously, in a different light. Suppose all the milk producers in a state refuse to sell milk to Negroes. All the producers are incorporated in and licensed by the state and the production and distribution is purely intrastate. While it seems clear that a state, under its police power, could act to prevent this discrimination, must it so act? Or, more precisely, will the refusal of a state to act in such a situation be state action for the purpose of the fourteenth amendment?

It has long been thought that the equal protection clause could be violated by state inaction as well as by positive state action,[61] although later cases have modified this position to an extent. In *Catlette v. United States*[62] a deputy sheriff did not protect a number of Jehovah's Witnesses who were attacked. In finding this inaction to be state action the court held that culpable inaction by a state official violates the equal protection clause of the fourteenth amendment. In a case which arose under a similar factual situation the Court of Appeals for the Fifth Circuit stated: "There was a time when equal protection of law was confined to

59. *Id.* at 2110.
60. Barrows v. Jackson, 346 U.S. 249, 260 (1953); Shelley v. Kraemer, 334 U.S. 1, 18 (1948).
61. Louisville & N.R.R. v. Bosworth, 230 Fed. 191 (E.D. Ky.), *modified*, 244 U.S. 522 (1917); United States v. Blackburn, 23 Fed. Cas. 1158 (No. 14603) (W.D. Mo. 1874) (charge to jury).
62. 132 F.2d 902 (4th Cir. 1943).

affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."[63] Thus it is inaction in the face of a duty to act, culpable inaction, that violates the equal protection clause.

Having determined that state inaction in the face of a duty to act can be state action it is necessary to determine when the state has a duty to act. A state must act to prevent a criminal act. If it does not act there is culpable inaction and state action as comprehended by the fourteenth amendment results. Whether a state has a duty to act when it knows that one person is being discriminated against because of color by another person is not clear. It seems certain that where the discrimination is violative of the Constitution, that is, where it is done under color of state law, a failure to act by state officials who have the power and authority to prevent the discrimination will also violate the fourteenth amendment.[64] However, no court has gone so far as to say that a state has a duty to prevent private acts of discrimination not in themselves violative of the Constitution.[65]

Another aspect of this problem is whether the fourteenth amendment can be interpreted so as to impose on the states a positive duty to prevent all discrimination in certain spheres of economic and social intercourse. This interpretation would supply the duty which would render state inaction in these fields "state action."

The mere fact that the amendment is stated in negative language and has not been so interpreted in previous decisions should not be controlling. The argument may be presented that it is the duty of the state merely to uphold the Constitution and since private acts of discrimination are not unconstitutional the states have no duty to prevent such discrimination. But this argument does not reach the problem of whether such discrimination is in fact "state action," and would be valid only if the fourteenth amendment were held not to impose on the states a positive duty. Thus, if the United States Supreme Court were to decide that the fourteenth amendment does have a positive application to the states, then the states would have a duty to act in certain situations and the failure of the state to act in these instances would amount to a state sanctioning the private discrimination and the discrimination would then become violative of the fourteenth amendment. Under this view where there exists a right protected by the fourteenth amendment against improper state abridgement, and where the state could, within the due process clause, constitutionally create a similar right running against

63. Lynch v. United States, 189 F.2d 476, 479 (5th Cir. 1951), *cert. denied,* 342 U.S. 831 (1951).

64. Robeson v. Fanelli, 94 F. Supp. 62 (S.D.N.Y. 1950); See 17 Stat. 13, 15 (1871), 42 U.S.C. §§ 1985-86 (1957).

65. See Abernathy, *supra* note 26, at 416, where the author states that in his opinion this, in effect, is the position of a dissent by Mr. Justice Douglas in the case of *Black v. Cutter Laboratories,* 351 U.S. 292 (1956). Mr. Justice Black and Chief Justice Warren concurred in the dissent.

private abridgement, the state acts in violation of the fourteenth amendment if it fails to offer a remedy, upon request, against such private abridgement.[66] This would not mean that henceforth private acts of discrimination will be unconstitutional, nor would it mean that the fourteenth amendment now applies to individuals. What it would mean is that the state, because of the fourteenth amendment, has a duty to see that no discrimination by individuals is practiced within the area in which a state can constitutionally prevent such discrimination; and further, that the state would be responsible for its own inaction in this field. Thus the fourteenth amendment would act upon the state which in turn would act upon private individuals to make certain that no individual does what the fourteenth amendment forbids a state from doing.

If this construction of the fourteenth amendment were judicially adopted, and this is doubtful at this time, it would become necessary to determine the areas in which the state may lawfully prevent acts of discrimination. It is within the ambit of the police power that the state should be compelled to prevent private acts of discrimination since this is the area in which it has acted to protect the health, welfare, and morals of the people.[67] Some states have already passed civil rights acts dealing with education,[68] employment,[69] housing[70] and public accommodation.[71] It is in these and other areas of fundamental and indispensable rights that the fourteenth amendment should require the states to act. The view that the state has a duty to act in these areas is consistent with the modern political view that the state is not only a negative censor but has a duty to provide for the welfare of the people when they are unable to adequately provide for themselves.[72] In addition, since a state can deny or deprive individuals of rights as effectively by failing to secure the rights as it can by affirmative denial thereof, it is reasonable to make the state responsible for this failure by placing a duty on the state to secure these rights. In answer to the hypothetical question previously posed, it would seem that a state would have a duty to act in this situation and its refusal to act would be a state sanctioning of the discrimination which would result in discriminatory state action violative of the fourteenth amendment.

III.

CONCLUSION

The essential characteristic of state action, as we have seen, is not really state action at all but is state responsibility. When a state acts it

66. Black v. Cutter Laboratories, 351 U.S. 292 (1956); Abernathy, *supra* note 26, at 412-18.
67. See Comment, 47 MICH. L. REV. 369, 372-73 (1949).
68. GREENBERG, RACE RELATIONS AND AMERICAN LAW 388 (1959).
69. *Id.* at 379.
70. Greenberg, *op. cit. supra* note 69, at 390.
71. Greenberg, *op. cit. supra* note 69, at 375.
72. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 9 (1947).

will be responsible for its actions and when it fails to act it is responsible for such abdication which occurs in the face of a duty to act. The responsibility when it acts can be supplied by various connections between the state and the discriminating individual such as a lease of state property, a grant of state aid plus state control, or a grant of special powers and privileges. Each of these nexus has been held to be sufficient to render the state responsible for any discrimination and to render the actions of the private party subject to the constitutional limitations of the fourteenth amendment. The state responsibility for inaction, it is submitted, can only be found when the state refuses to act when it has a duty to act. This duty may arise from the nature of the private activity or by positive command of the fourteenth amendment.

The expansion of the state action concept is a vindication of Mr. Justice Harlan's dissent in the *Civil Rights Cases* and it shows the tremendous capacity of the law for growth and adaptation. It is true that the law cannot legislate morals but the law can, within prescribed spheres of action, prevent prejudice from spilling over into discriminatory conduct. Prejudice can only be eliminated by education, but the effects of prejudice can be eliminated by law. The extension of the state action concept shows that the courts are aware of this "American Dilemma" and of the new found social consciousness on the part of a great segment of the American populace. It is an attempt of the courts to reflect in a nineteenth century amendment to an eighteenth century Constitution, the social mores of a twentieth century people.

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LABOR LAW—ARBITRATION—LIMITED FUNCTION OF THE COURTS IN SUITS TO COMPEL ARBITRATION UNDER SECTION 301(a).

In 1957, the United States Supreme Court in the case of Textile Workers Union v. Lincoln Mills,[1] rendered a landmark decision in the field of labor arbitration. Faced with the problem of whether a grievance arbitration provision in a collective bargaining agreement could be specifically enforced in a federal court by reason of section 301(a) of the Labor Management Relations Act,[2] the Court not only upheld the

* Aided in research by Lewis H. Gold.

1. 353 U.S. 448 (1957).

2. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952), provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

district court's acceptance of jurisdiction, but also determined that section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements."[3] In fashioning this body of law, the policy to be applied is that reflected in our national labor laws.[4] More specifically, the policy is one of promoting industrial stabilization through the collective bargaining agreement[5] and would be epitomized in an agreement containing both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes. Having been thus admonished to encourage arbitration, the federal courts commenced fashioning a body of law. It is the purpose of this comment to indicate the development of this body of law insofar as it restricts the function of the court in a suit to compel arbitration[6] brought under an agreement containing a normal arbitration clause, such as the following:

> Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, shall be submitted to the Board of Arbitration for decision . . .[7]

It will be presumed throughout that the adjustment procedures "herein provided" have failed, thus effectuating the possible application of the quoted clause.

I.

JURISDICTIONAL CONSIDERATIONS.

Although *Lincoln Mills*[8] upheld the jurisdiction of federal courts to compel arbitration and, in addition, authorized the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements, the opinion did not make it clear whether, in a suit to enforce the arbitration provision of a collective bargaining agreement, state jurisdiction, as well as the application of state substantive law, is foreclosed. Federal district court opinions indicate that the jurisdiction conferred on the federal courts by section 301 is not exclusive, and that Congress did not intend to preclude state courts from entertaining suits for violation of contracts between employers and labor organizations

3. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 451 (1957).
4. *Id.* at 456-57.
5. *Id.* at 453-54.
6. Suits for the enforcement of the arbitrator's award are also within the ambit of this comment since the policy behind enforcement of an award is necessarily the same as that behind compelling arbitration. See A. L. Kornman Co. v. Amalgamated Clothing Workers, 264 F.2d 733, 737 (6th Cir. 1959). The policy behind limiting the function of the courts is likewise the same in both cases. See United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358, 1360 (1960).
7. See United Steelworkers v. Am. Mfg. Co., 80 Sup. Ct. 1343, 1345 n.1 (1960).
8. 353 U.S. 448 (1957).

representing employees in an industry affecting commerce.[9] Representative of state court decisions in this area is *McCarrol v. Los Angeles County Dist. Council of Carpenters,*[10] which held that "state courts . . . have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under section 301."[11]

Concurrent jurisdiction of state and federal courts will not result, however, in the application of a different body of rules by each court accepting jurisdiction to enforce collective bargaining contracts. On the contrary, both federal and state courts have guaranteed a uniform body of rules by holding that only the federal substantive law may be applied in suits for the enforcement of collective bargaining contracts.[12] Yet state law in the labor arbitration field is hardly insignificant. *Lincoln Mills*[13] has instructed that state law may be consulted in order to find the rule that will best effectuate the federal policy, but only if compatible with the purpose of section 301.[14] Any state law so applied will, of course, be absorbed as federal law.[15] Thus, in determining the limitations imposed by the federal substantive law, state court decisions will be relevant only insofar as they have been absorbed into the federal law, or, in the event that there has not yet been an opportunity for absorption, insofar as the state law is conducive to the policy reflected in the national labor laws.

Nor need there be any fear, it would seem, that the National Labor Relations Board would destroy uniformity in the fashioning of this federal substantive law by virtue of the Board's pre-emption in the area of unfair labor practices. It is generally held that the federal district courts have jurisdiction under section 301 to order arbitration of a grievance even though the grievance might also constitute an unfair labor practice within the exclusive jurisdiction of the NLRB, since the submission to arbitration will not affect the power of the Board to act.[16]

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9. Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870, 877 (S.D.N.Y. 1959); Ingraham Co. v. Local 260, Int'l Union, 171 F. Supp. 103, 106 (D. Conn. 1959). *Contra,* Int'l Ass'n of Machinists v. Gen. Elec. Co., 164 F. Supp. 794, 798 (S.D. Ohio 1958).

10. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied,* 355 U.S. 932 (1958).

11. *Id.* at 60, 315 P.2d at 330.

12. Minkoff v. Scranton Frocks, Inc., 172 F. Supp. 870, 877 (S.D.N.Y. 1959); Ingraham Co. v. Local 260, Int'l Union, 171 F. Supp. 103, 106 (D. Conn. 1959); Oil and Chemical Workers v. Lone Star Prod. Co., 332 S.W.2d 151, 154 (Tex. 1959). *But cf.* Ryan Aero v. Int'l Union, UAW, 179 F. Supp. 1 (S.D. Cal. 1959). Compare McCarroll v. Los Angeles County Dist. Council of Carpenters, *supra* note 11, in which a state court used procedural, as opposed to substantive law to defeat the uniform approach desired in suits concerning collective bargaining agreements.

13. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

14. *Id.* at 457.

15. *Ibid.*

16. United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir. 1959); Machinists Ass'n v. Cameron Iron Workers, 257 F.2d 467 (5th Cir. 1958), *cert. denied,* 358 U.S. 880 (1958); Ryan Aero v. Int'l Union, UAW, 179 F. Supp. 1, 4 (S.D. Cal. 1959); Grunwald-Marx v. Clothing Workers, 52 Cal. 2d 568, 343 P.2d 23, 29 (1959).

II.

FINALITY OF ARBITRATOR'S DECISION.

In *Engineers' Ass'n v. Sperry Gyroscope Co.*[17] the Court of Appeals for the Second Circuit stated, "We may look to the Federal Arbitration Act which, though not binding upon us in suits brought under section 301, does provide a 'guiding analogy.' "[18] Thus, prior to the United States Supreme Court decision in the case of *United Steelworkers v. Enterprise Wheel & Car Corp.*,[19] the effect of which will be discussed subsequently, it would not have been beyond the realm of reasonable conjecture to suppose that the federal courts, when dealing with the enforcement of labor arbitration awards in suits under section 301, would fashion the law applicable to the validity of the awards from the pattern established by the Federal Arbitration Act.[20] Section 10 of this act authorizes the federal district court in which an award has been made to vacate the award:

> (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption on the part of an arbitrator; (3) where an arbitrator was guilty of misconduct in refusing to postpone a hearing where good cause was shown for postponing it, or in refusing to hear evidence which was pertinent and material to the case, or where the arbitrator was guilty of any other misbehavior prejudicial to any of the parties; and (4) where the arbitrator exceeded his powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[21]

The function of courts, therefore, in suits to enforce an arbitration award, would be restricted, in the absence of dishonorable practices, to a determination of whether the arbitrator exceeded his powers. But before the court may address itself to this issue, it need first determine what the powers of the arbitrator are, a determination which will depend, in any given case, upon the scope of the arbitrator's powers as designated by the arbitration provisions of the collective bargaining agreement.

In like manner, where suit is brought to compel arbitration under the normal arbitration clause it is the function of the court to determine whether the grievance for which arbitration is sought is an arbitrable

17. 251 F.2d 133 (2d Cir. 1957).
18. *Id.* at 136.
19. 363 U.S. 593, 80 Sup. Ct. 1358 (1960).
20. 61 Stat. 669 (1947), 9 U.S.C. § 10 (1947). See also 63 Stat. 107 (1949), 45 U.S.C. § 159 (1949); CAL. CODE CIV. PROC. § 1288; CONN. GEN. STAT. ANN. ch. 909 §§ 52-418 (1958); MASS. GEN. LAWS ch. 150 C, § 11 (1959).
21. It should be noted that adoption of subsection (4) in full would be beyond the realm of reasonable conjecture since a rule forbidding resubmission of an imperfectly executed award, which rule was developed when the courts looked with disfavor upon arbitration proceedings, is incompatible with the spirit of *Lincoln Mills*. See Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327, 332 (4th Cir. 1959).

grievance.[22] Again such a determination will depend, in any given case, on the scope of arbitrability as created by the arbitration provisions of the collective bargaining agreement. The most common deterrent, therefore, to the exercise of an arbitrator's power, or to the enforcement of his award, is a determination by the court that the parties have not agreed to extend the scope of the arbitrator's power to include the grievance in question.

III.

SCOPE OF ARBITRABILITY.

A.

Preliminary Considerations.

It is a recognized principle of arbitration law that the question of arbitrability is for the courts to decide unless there has been a clear demonstration by the parties of an intent to vest in the arbitrator power to determine the arbitrability of a grievance.[23] One view of the function of the court in deciding this issue has been aptly described by Judge Magruder, of the Court of Appeals for the First Circuit in the case of *Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co.*,[24] as follows:

> But when one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise.

In contrast with Judge Magruder's dutiful reluctance to abandon a traditional function of the court is the liberal position taken by those who, desirous of encouraging arbitration in accordance with the admonition of *Lincoln Mills*,[25] are willing to enhance the authority of labor arbitrators to include the determination of the issue of arbitrability, even at the cost of reducing court functions in labor arbitration to the infinitesimal.[26] The basis for this position is judicial incompetence in the field of labor relations, as contrasted with a certain expertise among arbitrators. Provocation for this point of view has been furnished by

22. United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1343, 1353 n.7 (1960).
23. *Ibid.*
24. 250 F.2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).
25. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
26. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922, 926-27 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958); see, *e.g.*, Refinery Employees Union v. Continental Oil Co., 268 F.2d 447, 460 (5th Cir. 1959) (dissenting opinion); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952).

cases in which the court, in carrying out its function as enunciated by Judge Magruder, has incidentally, but necessarily, determined the merits of the grievance. Illustrative of such cases is *Employees Labor Ass'n v. Proctor & Gamble*,[27] in which the collective bargaining agreement provided that all new jobs should be posted so that employees might bid for them. Defendant company introduced into its operations a fork lift machine to which the company did not assign an exclusive operator. Rather, the machine was operated by a considerable number of different employees from different departments, even though it was in operation during ninety percent of the working day. Suit to compel arbitration was brought and the court decided, under the normal arbitration clause, that the matter would be arbitrable as to whether the job created was a "new" job only if the court should first find that a "job" had been created, since otherwise the dispute would not concern an issue which the company agreed to submit to arbitration. The court thereupon decided that the machine was a tool used to perform jobs already in existence and that no job had been created, thus, necessarily precluding the arbitrator from determining whether a new job had been created. Thus, the court's decision in determining the question of arbitrability was unavoidably determinative of the merits of the grievance, a result which provokes in the liberal camp a charge of court usurpation of a function entrusted to the arbitrator.

These two points of view served as boundaries to encompass the developing body of substantive law with regard to the function of the courts in the field of labor arbitration. The Court of Appeals for the Second Circuit initiated a middle ground in *Eng'rs Ass'n v. Sperry Gyroscope Co.*[28] by reserving, at least to an extent, the function of the court without impinging upon the power of the arbitrator to decide the merits of the dispute. This was accomplished by requiring a lesser amount of proof to warrant a court determination of arbitrability than is required to warrant an arbitration award of relief on the claim. The court would require only that the moving party produce evidence which tends to establish his claim while the arbitrator is to weigh all the evidence and determine whether the contract was broken.[29]

Since one of these divergent viewpoints, or some variation thereof, was exercising its influence on every decision which the federal courts rendered in the field of labor arbitration, the substantive federal law that was fashioned was inevitably a confused body of law. To achieve uni-

27. 172 F. Supp. 210 (D. Kan. 1959).

28. 251 F.2d 133 (2d Cir. 1957), *cert. denied*, 356 U.S. 932 (1958).

29. *Id.* at 137. In Boston Mut. Life Ins. Co. v. Ins. Agents' Int'l Union, 258 F.2d 516, 517 (1st Cir. 1958), Judge Magruder, after reaffirming his position as heretofore indicated, made a stride in the direction of the second circuit's policy by adding to a restatement of his policy: "Of course, practical considerations as to what would best promote effective labor arbitration might lead the court, in construing ambiguous language, to adopt an interpretation giving a broad scope to the arbitrator's function."

formity in the federal substantive law, the United States Supreme Court, on June 20, 1960, handed down three decisions[30] through which it spoke quite definitely on the respective roles of courts and arbitrators in labor arbitration, thereby furnishing the courts with a tangible yardstick by which they might fashion in the future the federal substantive law with regard to the function of court and arbitrator in the field of labor arbitration.

B.

Frivolous Claims.

In the *Am. Mfg. Co.* case[31] the Court held that the judiciary may not deprive a party of his right to arbitration by determining that his grievance is frivolous and patently baseless, since, "when the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under the regime is entrusted to the arbitration tribunal."[32] The Court of Appeals for the Sixth Circuit, which the United States Supreme Court reversed, had held that although the grievance would be arbitrable if meritorious, the evidence indicated that the grievance was "a frivolous and patently baseless one, not subject to arbitration under the collective bargaining agreement."[33] The court of appeals cited as authority dictum from a Judge Magruder opinion,[34] even though Judge Magruder had, in fact, previously denied allegiance with this viewpoint when, in a 1958 case,[35] he aligned himself with the point of view now adopted by the United States Supreme Court. Indeed, theorizing that a *court* can dispose of a crystal clear claim, Judge Magruder found the arbitrator in an analogous situation, to be lawgiver, as well as trier of fact, so that a grievance clearly not meritorious would not deprive him of his jurisdiction. On the contrary, he found the merits of the grievance to be beyond the reach of the court, as long as the parties had agreed to submit the issue to arbitration. The federal substantive law has been settled, then, with regard to frivolous claims, and without serious offense to any of the divergent viewpoints contending to fashion the federal substantive law in the field of labor arbitration, for the Court of Appeals for

30. United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347 (1960); United Steelworkers v. Am. Mfg. Co., 80 Sup. Ct. 1343 (1960).

31. United Steelworkers v. Am. Mfg. Co., 80 Sup. Ct. 1343 (1960).

32. *Id.* at 1347. This was an action to compel arbitration of a grievance involving the company's refusal to reinstate to employment an employee who had settled a workmen's compensation claim against the company, based upon a permanent partial disability. The agreement reserved to management power to discharge for cause, and also contained a provision that the employer will employ employees on the principle of seniority "where ability and efficiency are equal."

33. United Steelworkers v. Am. Mfg. Co., 264 F.2d 624 (6th Cir. 1959).

34. Local 205, United Elec. Workers v. Gen. Elec. Co., 233 F.2d 85, 101 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957).

35. New Bedford Defense Prod. Div. v. Local 1113, Int'l Union, UAW, 258 F.2d 522, 526-27 (1st Cir. 1958).

the Sixth Circuit was relying only on dicta[36] for its holding, not on ideology. Only the *Cutler-Hammer* doctrine[37] stood in serious opposition to the holding of the Supreme Court, and this doctrine the Court expressly rejected as being capable only of having "a crippling effect on grievance arbitration."[38]

C.

Effect of Specific Exclusion From Arbitration.

In *United Steelworkers v. Warrior & Gulf Nav. Co.* the courts were confronted with a collective bargaining agreement which excepted from arbitration matters "which are strictly a function of management."[39] Under what is basically a normal arbitration clause[40] suit was brought to enforce arbitration of a grievance protesting the company's contracting out work, because this caused unemployment of a number of employees due to lack of work, thus allegedly constituting a partial lockout in violation of a "no lockout" provision. Citing the Magruder opinion in *Local 149*[41] and the Second Circuit's *Eng'rs Ass'n* case,[42] the Court of Appeals for the Fifth Circuit, with Judge Rives dissenting, affirmed the district court's dismissal of the complaint, relying on the clause excluding from arbitration matters "which are strictly a function of management," and on the "ample evidence" at trial level to the effect that the parties had failed to agree to submit to arbitration the company's right to contract out work. The dissenting opinion viewed the matter of sub-contracting as not without restriction, though it be "strictly a function of management," but rather, limited by another section of the agreement, which "expressly subordinates all management functions to the over-riding limitation that they 'not be used for purposes of discrimination against any members of the Union.'" Therefore, Judge Rives opined, since the union's grievance was premised upon the theory that the employer had utilized the practice of sub-contracting to discriminate against the members of the union, arbitration of its grievance should be compelled.

36. United Steelworkers v. Am. Mfg. Co., 264 F.2d 624, 627 (6th Cir. 1959).

37. Int'l Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947). In this case, the New York Court of Appeals held that if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.

38. United Steelworkers v. Am. Mfg. Co., 80 Sup. Ct. 1343, 1346 (1960).

39. 80 Sup. Ct. 1347, 1349 (1960).

40. *Id.* at 1349. The Court considered the clause somewhat broader than normal, since the grievance procedure would become applicable to handle "any local trouble of any kind."

41. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

42. Eng'rs Ass'n v. Sperry Gyroscope, 251 F.2d 133 (2d Cir. 1957), *cert. denied*, 356 U.S. 932 (1958).

The majority represents the *Local 149*[43] point of view, for they performed their inescapable duty of determining as a preliminary matter whether defendant contracted to refer the grievance to arbitration, even though such determination depended on the same facts relevant to a decision by an arbitrator upon the merits of the grievance. The majority reasoned that if the grievance constituted a matter which was not strictly a function of management it would be subject to arbitration, but it was found that the evidence clearly disclosed that the matter involved was considered by the parties to be strictly a function of management.[44] On the other hand, the dissent was representative of the *Eng'rs Ass'n*[45] theory in that it decided that the grievance might be a utilization of the practice of subcontracting to discriminate against the members of the union, and as such, would be arbitrable under another section of the contract. In addition, the moving party had produced evidence tending to establish its claim.[46] The Court, while reversing the majority decision, was not content to adopt the dissenting view, but fashioned a much more liberal set of rules geared to enhance the authority of the arbitrator. Pertinent excerpts from the opinion, illustrating the Court's conception of the federal substantive law, follow:

> . . . judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said *with positive assurance* that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. (Emphasis added.)[47]
>
> *Apart from matters that the parties specifically exclude,* all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement. . . . (Emphasis added.)[48]
>
> . . . In the absence of any express provision excluding a particular grievance from arbitration, we think *only the most forceful evidence* of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a

43. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied,* 356 U.S. 938 (1958).
44. United Steelworkers v. Warrior & Gulf Nav. Co., 269 F.2d 633, 636-37 (5th Cir. 1959).
45. Eng'rs Ass'n v. Sperry Gyroscope, 251 F.2d 133 (2d Cir. 1957), *cert. denied,* 356 U.S. 932 (1958).
46. United Steelworkers v. Warrior & Gulf Nav. Co., 269 F.2d 633, 640 n.8 (5th Cir. 1959).
47. United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347, 1353 (1960). This excerpt does no more than vary in degree the *Eng'rs Ass'n* doctrine, but radical innovations are contained in the remaining excerpts.
48. *Id.* at 1352.

purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator. (Emphasis added.)[49]

Mr. Justice Whittaker in a lone, but vigorous, dissent adopted the lower court's decision and the *Local 149*[50] doctrine, placing great emphasis on the intent of the parties in agreeing to submit to arbitration. His understanding of the "unquestioned law" is that the arbitrators' "power to decide issues with finality, thus ousting the normal functions of the courts, must rest upon a clear, definitive agreement of the parties, as such powers can never be implied."[51] The lone dissenting voice agrees with the majority that courts have no proper concern with the merits of claims which by contract the parties have agreed to submit to the exclusive jurisdiction of arbitrators. To ascertain what the parties have agreed to submit to the exclusive jurisdiction of arbitrators, however, Justice Whittaker says the test is:

Did the parties in their contract "manifest by plain language" their willingness to submit the issue in controversy to arbitrators? If they did, then the arbitrators have exclusive jurisdiction of it, and the courts, absent fraud or the like, must respect that exclusive jurisdiction and cannot interfere. But if they did not, then the courts must exercise their jurisdiction, when properly invoked, to protect the citizen against the attempted use by arbitrators of pretended powers actually never conferred. That question always is, and from its very nature must be a judicial one.[52]

D.

Enforcement of Arbitrator's Award.

The *Enterprise Wheel & Car Corp.*, case[53] involved a suit for enforcement of an arbitrator's award under a contract containing the normal

49. *Id.* at 1354.
50. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).
51. United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347, 1354-55 (1960) (dissenting opinion).
52. *Id.* at 1358. Compare Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706 (7th Cir. 1960); Local 1912, Int'l Ass'n of Machinists v. United States Potash Co., 270 F.2d 496 (10th Cir. 1959). The Courts of Appeal for the Seventh and Tenth Circuits, while performing their traditional tasks of determining arbitrability under the pertinent provisions of the contract, came to opposite conclusions on the question of whether sub-contracting of work by an employer is arbitrable in the absence of express reference to sub-contracting, but the factual situations were distinguishable, as is often the case when the intent of the parties is in question.
53. United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358 (1960).

arbitration clause. Unjust discharge was an arbitrable issue, and the contract provided that if an arbitrator found that an employee had been unjustly discharged the company "shall reinstate the employee and pay full compensation at the employee's regular rate of pay for the time lost." The contract had expired on April 4, 1957 and, on April 10, 1958, the arbitrator filed an award for the unjust discharge of several employees prior to the expiration date of the contract, the award directing reinstatement of the aggrieved employees with back pay. The Court of Appeals for the Fourth Circuit modified the district court's direction to the employer to comply, holding that an award for reinstatement and for back pay for the period subsequent to the date of termination of the collective bargaining agreement could not be enforced.[54] The court reasoned that a party suing for specific performance under section 301 is restricted by the terms of the contract between the employer and the union.[55] This constitutes but an adaptation of the *Local 149*[56] doctrine to the enforcement of awards. The United States Supreme Court, consistent with its liberal viewpoint in *Warrior & Gulf Nav. Co.*,[57] reversed the judgment of the court of appeals, basing their decision on the following rationale:

> An arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
>
> . . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce an award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator has abused the trust the parties confided in him and has not stayed within the area marked out for his consideration. *It is not apparent* that he went beyond the submission. . . .
>
> The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. . . . [I]nterpretation of the collective bargaining agreement is a question for the arbitrators. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's

54. Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327 (4th Cir. 1959).

55. *Id.* at 330-31.

56. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

57. United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347 (1960).

decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[58]

Again Justice Whittaker adopts the lower court's decision and the *Local 149*[59] doctrine, contending that the "sole question here is whether the arbitrators exceeded the submission and their powers in awarding reinstatement and back pay for any period after expiration of the collective agreements,"[60] and that the correct answer is that they did since "I find nothing in the collective agreement that purports to so authorize."[61]

E.

Synopsis of the Rules of the Supreme Court Decisions.

The following are among the most significant principles laid down by the Supreme Court in these three landmark decisions which so "vastly enhance the authority and status of labor arbitrators and correspondingly diminish the role of the courts in labor arbitration."[62]

1. The courts have no business weighing the merits of a grievance and even frivolous claims are subject to arbitration. The *Cutler-Hammer* doctrine[63] is specifically rejected as having a crippling effect on grievance arbitration.

2. A grievance should not be excluded from arbitration by the courts unless it can be said with positive assurance that the subject is not arbitrable. Doubts should be resolved in favor of coverage.

3. In the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim can prevail, particularly where the exclusion clause is vague and the arbitration clause quite broad.

4. Courts should refuse enforcement of an arbitrator's award when his words manifest an infidelity to his obligation. But it must be apparent that he went beyond the authority granted to him.

As if by design the court relegated to a footnote[64] a colorable acknowledgement of the traditional rule that the question of arbitrability of a grievance is for the courts, not the arbitrators, to decide, and when it is

58. United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358, 1361-62 (1960). (Emphasis added.)
59. Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).
60. United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358, 1363 (1960) (dissenting opinion).
61. *Ibid.*
62. 15 ARB. J. 114 (1960).
63. Int'l Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1947), *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).
64. United Steelworkers v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347, 1353 n.7 (1960).

claimed that an arbitrator rather than a court should resolve such a question, the claimant must bear the burden of a clear demonstration of the purpose.

IV.

CONCLUSION.

The conflict which the Supreme Court faced and resolved in the *Warrior & Gulf Nav. Co.*[65] and the *Enterprise Wheel & Car Corp.*[66] cases is one between the congressional policy in favor of settlement of disputes through the machinery of arbitration and regard for the intent of the parties not to submit a dispute to arbitration,[67] between those who advocate judicial abnegation[68] and those who would preserve the traditional function of the court by seeking the intent of the parties to the agreement.[69] This latter point of view is probably motivated much less by a jealous eye, scanning the arbitration device lest it infringe upon or oust the courts from their historic role,[70] than by a sense of obligation to the parties involved[71] and to the historical principles of Anglo-American law.[72] A firm advocate of the latter point of view, yet appreciative of the opposing viewpoint, Judge Magruder urged that judicial abnegation and the enhancement of the arbitrator's authority should be achieved through a voluntary submission of the threshold question of arbitrability to the arbitrator.[73] It is submitted that this would have been a more proper course to follow than that chosen by the Supreme Court; that the terms of an arbitration agreement should be resolved at the bargaining table and should not be imposed by judicial legislation. The Court of Appeals for the Fifth Circuit rested its decision in the *Warrior & Gulf Nav. Co.* case[74] in part on the theory that it would be unconscionable to find arbitrable an issue which the union at the conference table was unable to

65. *Supra* note 64.
66. United Steelworkers v. Enterprise Wheel & Car Corp., 80 Sup. Ct. 1358 (1960).
67. United Steelworkers of America v. Warrior & Gulf Nav. Co., 80 Sup. Ct. 1347, 1353 (1960).
68. Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1483 (1959); Shulman, *Reason, Contracts, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955); Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1299 (1959).
69. See Local 1912, Int'l Ass'n of Machinists v. United States Potash Co., 270 F.2d 496, 498 (10th Cir. 1959); Local 149, Am. Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922, 927 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958); Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 549 (1960).
70. Refining Employees Union v. Continental Oil Co., 268 F.2d 447, 460 (5th Cir. 1959) (dissenting opinion).
71. Local 149, American Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).
72. Refinery Employees Union v. Continental Oil Co., 268 F.2d 447, 460 (5th Cir. 1959) (concurring opinion).
73. Local 149, American Fed'n of Technical Eng'rs v. Gen. Elec. Co., 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).
74. United Steelworkers v. Warrior & Gulf Nav. Co., 269 F.2d 633 (5th Cir. 1959).

obtain the employer's consent to include within the arbitration clause.[75] The intent of many employers will be frustrated, employers who, like Mr. Justice Whittaker, understood at the time of contracting that the authority of the arbitrator was dependent upon proof by the moving party that the grievance is included within the scope of the agreement. Today, under the normal arbitration clause, these employers find that the party reluctant to arbitrate must show, either by an express provision or by the most forceful evidence, that it was the purpose of the parties to exclude this matter from arbitration.

Expressions of disapproval notwithstanding, the Law of the Land has been established in this particular area. But it is submitted that the idea of court ascertainment of the parties' intention has not yet earned a decent interment, as its opponents might hopefully think.[76] The United States Supreme Court has found in other areas[77] that tradition is not so shallow as to be uprooted by one of its decisions. It is submitted that the traditionalists will find ingenious distinctions by which they will whittle away at principles that frustrate the intent of the parties.[78] Meanwhile employers, now wary of arbitration clauses in that they are susceptible to judicially added terms, will learn to fashion arbitration provisions which will abound in exclusion clauses.

*L. Francis Murphy**

75. *Id.* at 636-37.

76. Refinery Employees Union v. Continental Oil Co., 268 F.2d 447, 460 (5th Cir. 1959) (dissenting opinion).

77. See, *e.g.*, Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala. 1958), *aff'd per curiam*, 358 U.S. 101 (1958).

78. See United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 Sup. Ct. 1347, 1354 (1960) (dissenting opinion). With the emphasis that Mr. Justice Whittaker gives to the nineteen years of union acquiescence in the employer's interpretation that contracting out work is "strictly a function of management," it is readily conceivable that such a factor could be held to constitute "the most forceful evidence of a purpose to exclude."

* Aided in research by Arthur T. Downey.