Washington University Law Review

Volume 1979
Issue 3 *Symposium: The Quest for Equality (Part III)*

January 1979

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COMMENTARY

THOUGHTS ON STATE ACTION: THE "GOVERNMENT FUNCTION" AND "POWER THEORY" APPROACHES

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The concept of "state action" continues to confound both courts and commentators. A dozen years ago, Charles Black aptly characterized modern judicial analysis of the state action problem as a "conceptual disaster area."[1] Just last year Laurence Tribe, echoing the conclusion two decades earlier of William Van Alstyne and Kenneth Karst, understandably found contemporary state action doctrine to be in a condition of "bankruptcy."[2] Indeed, the Supreme Court itself has acknowledged that "formulating an infallible test" for state action is an "impossible task."[3]

Given the formidable difficulties involved, I certainly will not attempt here to set forth any comprehensive solution to the problem. Rather, I would like to make a series of observations (and develop a few) that I hope will advance, rather than further confuse, analysis of this extremely perplexing constitutional issue.

I.

The primary purpose of the state action requirement of the fourteenth amendment's due process and equal protection provisions is not to protect individual autonomy; that is, it is not meant to guarantee individuals immunity from all governmental regulation. Rather, the state action requirement serves to allocate power within the federal sys-

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1. *See* Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

2. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978); *see* Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 58 (1961).

3. Reitman v. Mulkey, 387 U.S. 369, 378 (1967). *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

tem; it limits the power of the national government vis-à-vis the states.[4] Thus, in cases presenting a true state action issue, the question is not whether the individual whose conduct is being challenged has a constitutional right to engage in that conduct; the power of the state to forbid that conduct is ordinarily conceded. Rather, given the state's failure to do so, the question is whether, nonetheless, the authority delegated to the national government by the fourteenth amendment extends to prohibiting the individual's conduct. Usually, the question is whether section one of the amendment by its own force, as interpreted and applied by the federal courts, forbids the individual's conduct. Occasionally, when Congress has relied on the fourteenth amendment to enact a statute regulating the individual's conduct, the question is whether section five of the amendment delegates such legislative power to Congress, or whether the subject of the federal statute is reserved to the states by virtue of the tenth amendment.[5] In short, the requirement of state action is an affirmation that the fourteenth amendment "did not render relations between individuals a matter of federal concern, whether by judicial scrutiny or congressional regulation."[6]

II.

Until fairly recently, most litigation concerning the issue of state action dealt with racial discrimination by one individual against another. Because the state where this discrimination took place did not make it unlawful, the issue was whether the action of that private individual was state action. If it was held to be, then, because it was racial discrimination in violation of the constitutional norm of the equal protection clause of the fourteenth amendment, it was prohibited by the Constitution.

At least since the Civil Rights Act of 1964,[7] and since then because of decisions of the Supreme Court interpreting other federal statutes, the

4. *See* Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1554-57 (1977).

5. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883); *cf.* United States v. Guest, 383 U.S. 745 (1966) (Court sidestepped question whether § 5 of fourteenth amendment authorized Congress to enact 18 U.S.C. § 241, but Justices Clark and Brennan argued in separate opinions that Congress possessed such power).

6. Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 475 (1962).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 5, 18, 42 U.S.C.).

issue of private racial discrimination has largely been mooted. Several titles of the Civil Rights Act of 1964, which the Court sustained pursuant to Congress' power under the commerce clause,[8] forbid private racial discrimination concerning such matters as employment and service in places of public accommodation. Further, the Court has interpreted provisions of the Civil Rights Act of 1866, promulgated by Congress under section two of the thirteenth amendment, to forbid private individuals from engaging in racial discrimination against other persons in contracts and the sale and lease of real and personal property.[9] Finally, many states have enacted or strengthened their own civil rights laws in the past two decades.

As a consequence, the major focus of state action litigation today concerns matters other than racial discrimination. A number of cases in the lower federal courts concern private discrimination based on sex or gender to determine whether this discrimination is state action violative of equal protection.[10] A series of Supreme Court decisions has dealt with the issue of whether the action of a private institution that seeks to suppress the communicative activities of others is state action abridging the first and fourteenth amendments. This may be illustrated by the group of cases involving shopping centers' attempts to prohibit labor picketing and political leafletting on their premises.[11] The last and potentially most fruitful source of state action litigation raises the question of whether certain private individuals or businesses have denied others with whom they have dealt the fourteenth amendment's protection of procedural due process. In *Jackson v. Metropolitan Edison Co.*,[12] for example, the issue was whether a privately owned gas and electric company had to give notice and an opportunity for a hearing before it cut off service to someone whom the company claimed had failed to pay her electric bill. The threshold problem was whether this private company should be held to the constitutional responsibilities of the state under the due process clause of the fourteenth amendment.

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8. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

9. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

10. *See, e.g.*, Braden v. University of Pittsburgh, 552 F.2d 948 (3rd Cir. 1977); Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975).

11. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

12. 419 U.S. 345 (1974).

III.

It has been persuasively argued that state action is a false issue. The position, put most broadly, is that there is virtually always state action because all private conduct is undertaken under the aegis of the law of the state. The point was probably first elaborated by Harold Horowitz, who contended that "whenever, and however, a state gives legal consequences to transactions between private persons there is 'state action.' "[13] More recently, Robert Glennon and John Nowak have urged that there is state action whenever a private individual's conduct "is lawful within the state" and that "this is true whether the state has explicitly authorized the challenged practice or simply allowed it to exist."[14]

Another, only slightly qualified, statement of this position is that because the state has extensive power to regulate private individuals' conduct, all private action, except that which the state has no constitutional power to regulate, is state action because it is undertaken with either express state permission or tacit state toleration.[15] Thus, is it not only state action when a state statute or a state executive or administrative official denies government employment on the basis of race or when a state statute requires private employers to discriminate on the basis of race. It is also state action when state common law refuses to recognize a cause of action for damages or injunctive relief in favor of a job applicant who proves that he has been denied work by a private employer on the basis of race. In all these instances, the argument proceeds, the state—acting through its legislative, executive, or judicial branches—has made an affirmative policy choice. Therefore, in all these instances—including the last, because we may assume that the defendant-private employer has no constitutional right to racially discriminate[16]—there is state action subject to the constraints of the fourteenth amendment. As Horowitz summarizes the matter:

> There is state action in the definition and enforcement of the right-duty relationship, and there is state action in adjudicating that there is no

13. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 209 (1957).

14. Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230.

15. For versions of this view with some modifications, see Haber, *Notes on the Limits of* Shelley v. Kraemer, 18 RUTGERS L. REV. 811 (1964); Henkin, *supra* note 6.

16. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

right-duty relationship. The result reached by the court on the merits is irrelevant insofar as the presence or absence of state action is concerned. When state law is applied to determine legal relations between private persons there is "state action."[17]

A variation of this view is that the state is responsible for the acts of private individuals when its courts intervene to render the private acts effective. This approach reads the beleaguered case of *Shelley v. Kraemer*[18] for all it is worth. Any time a court enforces a private common-law or statutory right, there is state action. By virtue of this rationale, almost any private transaction can be converted into state action if one party balks at consensual compliance and forces the other party to bring legal proceedings to enforce his alleged rights. Once the state courts are brought in, there is state action.

In expounding this approach, Louis Henkin has suggested that judicial enforcement of certain private choices—choices that could not constitutionally be made by the state itself—although state action, nonetheless should not be held to violate the fourteenth amendment. If the state court, for example, would deprive a plaintiff of a constitutionally protected liberty interest, such as the right to privacy, by refusing to enforce his attempted racial discrimination claim on who can enter his home, the court may or should assist the plaintiff. If the state cannot constitutionally prohibit private discrimination within the home, then the defendant's constitutional right to equal protection is outweighed by the plaintiff's constitutional right to privacy. Judicial enforcement of the plaintiff's constitutional right is still state action, but it is not state action that denies the defendant equal protection.[19]

IV.

The difficulty with both the state permission-toleration and judicial enforcement theories of state action is not that they fail, either logically or analytically, "to satisfy the demand for 'neutral', general principles of adjudication" or "to promise consistent application to foreseeable situations."[20] Nor are they at war with the language of the fourteenth amendment, which requires only that the state neither "deprive" any person of due process nor "deny" equal protection—consequences that

17. Horowitz, *supra* note 13, at 209.
18. 334 U.S. 1 (1948).
19. Henkin, *supra* note 6, at 487.
20. *Id.* at 502.

literally may occur through state inaction as well as through state action.

Rather, the principal objection to these approaches is that they contradict a central feature of the fourteenth amendment. Although its major purpose was to augment the authority of the national government to secure certain constitutional rights, its primary thrust was to accomplish this goal by outlawing deprivations of these rights by state governments and their legal structures rather than by the impact of private choice. By effectively obliterating the distinction between state action and private action, these theories eviscerate the fourteenth amendment's restriction on the authority of the national government vis-à-vis the states regarding the regulation of the myriad relationships that occur between one individual and another. These approaches require that all private activity, except that small amount which is beyond all governmental control, conform to federal constitutional standards.

Thus, at the initiative of any litigant who is offended by another person's behavior, these theories would subject to the scrutiny of federal judges, under substantive constitutional standards customarily developed for measuring the actions of government, all sorts of private conduct that because of political constraints and collective good sense would probably never be mandated by law. Further, by permitting private actors to violate constitutional norms when they have a constitutionally protected liberty interest to do so, these theories would delegate to federal judges the power to implement the vague mandate of the due process clause in speaking the final word about the validity of virtually all transactions between individuals. In doing so, the national judiciary would be required to determine whether private conduct was constitutionally immune from governmental control even though, because of general political sensitivity to individual autonomy, such private conduct probably would never be regulated by the state. Finally, these approaches would empower federal legislators with vast authority under section five of the fourteenth amendment to establish a body of statutory rules governing many aspects of private affairs—although this last consequence is less significant because of the enormous power to regulate private conduct that Congress already has been held to possess under such other grants of authority as the commerce, taxing, and spending clauses of article one, section eight or section two of

the thirteenth amendment.[21]

This objection—especially that element concerning the transfer of decisionmaking authority to the federal courts—is significantly exacerbated by those who urge that the national judiciary go beyond simply weighing the competing *constitutional rights* of private individuals and instead balance the degree of injury to the constitutional rights of the victims against the competing *personal interests* of the offending parties. If the courts are only concerned with conflicting *constitutional rights*, then a private individual who violates a constitutional norm hardly ever will prevail because only rarely will the actor's conduct itself be constitutionally protected. The weighing function of the courts, therefore, will be employed only relatively infrequently. For example, assuming state action (as all these theories do), if a privately owned shopping center seeks to prohibit peaceful labor picketing, which directly relates to its business, on its premises, there would be a plain violation of the picketers' first amendment rights, but—at least under existing doctrine—the shopping center would have no colorable claim that it had a constitutionally protected property right to forbid the picketing.[22]

The role of the courts is greatly expanded, however, if they must balance constitutional rights against conflicting *personal interests*. Thus, in their influential article advocating this approach, Karst and Van Alstyne urged that in adjudicating these problems the courts should (1) identify the "multiplicity of interests which compete for respect in each case," (2) assess the impact that alternative judicial decisions would have on these interests, (3) determine the effect of federal intervention "on the policy of encouraging local responsibility," and then (4) ultimately balance and select the "values for constitutional preference."[23] The extremely detailed and refined policy-oriented scope of the suggested judicial inquiry—which, although developed in the late 1950's and early 1960's in response to the legislatively unremedied evil of widespread private racial discrimination, has also been forcefully articulated more recently—has been carefully described by a number of other thoughtful commentators.[24] For example,

21. *See* Choper, *supra* note 4, at 1594-95.

22. *See* Hudgens v. NLRB, 424 U.S. 507, 521-23 (1976); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

23. Van Alstyne & Karst, *supra* note 2, at 7-8, 58.

24. *See* L. TRIBE, *supra* note 2, at 1158-60; Glennon & Nowak, *supra* note 14; Morris & Powe, *Constitutional and Statutory Rights to Open Housing*, 44 WASH. L. REV. 1 (1968); Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146 (1976).

Horowitz points out that to determine the constitutionality of private racial discrimination, courts must consider various interdependent factors such as:

> the nature and degree of injury to the person discriminated against, the interest of the discriminator in being permitted to discriminate, and the interest of the discriminatee in having opportunity of access equal to that of other persons to the benefits of governmental assistance to the discriminator.[25]

Horowitz also noted:

> [i]f there is extensive state participation and involvement related to the activities of the discriminator, it is more likely that these activities will be public in nature, with consequent public indignity and humiliation suffered by the person discriminated against . . . . When there is governmental assistance to the discriminator in carrying on his activities, and the assistance is being provided to further the purposes of a governmental program designed to provide benefits for the public or a permissible segment of the public, the effect of the discrimination is to deny to the discriminatee the opportunity to have equal opportunity of access to the benefits of the governmental program.[26]

It would be foolish to deny that judges do—and must—exercise judgment, including the weighing and selecting of conflicting values in constitutional adjudication. But there are "differences of degree" on which, Justice Holmes reminded, "the whole law" depends "as soon as it is civilized."[27] It may be wholly appropriate for an appointed federal judiciary to perform an essentially legislative role, as it does by engaging in a process of particularized balancing of competing interests and values on an ad hoc, case-by-case basis, when passing on the validity of state regulations of interstate commerce. For there, "the Court does *not* exercise the momentous power of judicial review," but rather "acts only as an intermediate agency between the states and Congress" because its rulings "may be reversed or modified by ordinary federal statutes."[28] But when the Court finds that state action violates the Constitution, at least under orthodox theory, it speaks the final constitutional word. That being true, I believe that routinely vesting the federal judiciary with a discretion seemingly as broad as that which it

25. Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 19-20 (1964).

26. *Id.* at 12-13.

27. LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 354 (1914) (Holmes, J., concurring).

28. *See* Choper, *supra* note 4, at 1585.

employs in the interstate commerce area—as these approaches appear to do—should only be undertaken, if it should be done at all, with the greatest reticence and caution.

V.

Another substantial problem common to all these theories of state action arises as a consequence of a recently clarified doctrine delineating the scope of the fourteenth amendment's guarantee of equal protection. Unlike other substantive constitutional provisions such as the first amendment's guarantees of freedom of expression and religion, which may be violated by the *effect* of state action irrespective of its purpose, the Court has held that equal protection may be violated only by *intentionally* discriminatory action.[29] Before discussing these doctrines further, I wish to point out that application of these theories of state action to these substantive constitutional doctrines produces what I believe most would find to be incongruous results.

This apparent incongruity may be illustrated by varying the facts and the state action theories argued in *Jackson v. Metropolitan Edison Co.*[30] If the person whose electricity had been cut off by the privately owned utility sued in a state court for an injunction or damages, claiming that procedural due process required the utility to give her prior notice and an opportunity for a hearing, then pursuant to the state permission-toleration approach, the state court's refusal to recognize this cause of action would be state action, and under the decision in *Memphis Light, Gas & Water Division v. Craft*,[31] there would be a violation of due process. On the other hand, if the same person claimed that the utility had refused her service because of her race in violation of the equal protection clause, then again, pursuant to the state permission-toleration approach, the state court's refusal to recognize the cause of action would be state action, but under the rationale of *Washington v. Davis*,[32] there would be no violation of equal protection if the state court's refusal to grant the claim was based not on racial criteria, but rather on its racially neutral disinclination to recognize a cause of ac-

29. *See* Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

30. *See* text accompanying note 12 *supra*.

31. 436 U.S. 1 (1978).

32. *See* text accompanying note 29 *supra*.

tion for anyone who was refused service by a privately owned utility, regardless of the reason.

VI.

Although almost all decisions finding a violation of the first amendment's freedom of speech dealt with state action specifically and intentionally directed against expression, state action also may be held to abridge freedom of speech even though the purpose of the challenged legal restraint is not directed to suppressing communication, but rather is intended to accomplish some independent, nonspeech-related regulatory end.[33] Thus, in *United States v. O'Brien*[34] the Court rejected a first amendment claim in affirming a conviction for burning a draft card, but recognized that a statute, although it "furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression," nonetheless may be applied so that its effect on communicative activity violates the first amendment: "the incidental restriction on alleged First Amendment freedom" may be "no greater than is essential to the furtherance of" the governmental interest.[35] Similarly, the Court has unequivocally established in religion clause cases that even though a state regulation may have been fashioned to serve purely secular goals, its effects nonetheless may be found to impermissibly burden the free exercise of religion. For example, in *Wisconsin v. Yoder*[36] the Court held that Amish parents who declined to send their children to public school after the eighth grade could not be required to comply with a state law mandating attendance to age sixteen:

> [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children.[37]

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33. *See* Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163 (1970).

34. 391 U.S. 367 (1968).

35. *Id.* at 377. *See also* Murdock v. Pennsylvania, 319 U.S. 105 (1943). *But cf.* Mt. Healthy City School Dist Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (school district may refuse to rehire teacher even if teacher's constitutionally protected speech "played a substantial part in the decision," if school district proves "that it would have reached the same decision . . . even in the absence of the protected conduct").

36. 406 U.S. 205 (1972).

37. *Id.* at 214.

This rule is even plainer for the establishment of religion clause of the first amendment. Even though a law may have an exclusively secular purpose, it will be held violative of the establishment clause if "its principal or primary effect" either "advances" or "inhibits" religion.[38] Finally, although it is hard to conceive of a regulation, allegedly violative of procedural due process, that is not itself directed to the issue of what process is due, it appears that any governmental rule whose effect is to deny life, liberty, or property can be tested on due process grounds regardless of its motivation.

In contrast, the Court has unqualifiedly developed a doctrinal approach to the equal protection clause in a series of recent decisions that requires the state to act with a "purpose to discriminate."[39] A "law, neutral on its face and serving ends otherwise within the power of government to pursue" is *not* "invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[40] Nor does a state agency's awareness of the inevitable consequences of its action, even when extraordinarily discriminatory in effect, avoid the requirement of proof of a state's discriminatory intent.[41] Finally, this is true even though the discriminatory result is the product of another actor's deliberate violation of the equal protection norm—indeed, even when that other actor is a different governmental body.[42]

VII.

The foregoing doctrinal developments have powerful implications for many earlier decisions that found unconstitutional state action. Although the first that I will consider did not really present the state action issue in traditional form, it graphically illustrates the point. In *Norwood v. Harrison*[43] the Court held that Mississippi's practice of lending textbooks to students who attended racially segregated private academies, pursuant to a general program for students in all public and private elementary schools, violated equal protection. The state program constituted undeniable state action. Further, the private acade-

38. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

39. Washington v. Davis, 426 U.S. at 239.

40. *Id.* at 242.

41. *See* Personnel Adm'r v. Feeney, 99 S. Ct. 2282 (1979).

42. *Id.*

43. 413 U.S. 455 (1973).

mies engaged in unquestionably deliberate racial discrimination. But though the state was concededly "involved" with the private schools, petitioners made no showing, as required under existing doctrine to sustain a violation of the equal protection clause, that any state agency engaged in purposeful racial discrimination. Indeed, the Court explicitly disclaimed any need to assume "that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children."[44]

The Court's result could have been achieved on the ground that the state's program, although racially neutral, nonetheless violated equal protection because, as its attackers alleged, it impeded Mississippi's "acknowledged duty to establish a unitary school system."[45] In the special context of remedying prior deliberate school segregation, the Court earlier had held that "the existence of a permissible purpose cannot sustain an action that has an impermissible effect."[46] Since then, the Court has been even more explicit: "[T]he measure of the post-*Brown* conduct of a school board under the unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system."[47] But in *Norwood* the trial court found that the Mississippi program did *not* interfere with desegregation[48] and the Supreme Court, although casting doubt on that finding, held it to be "irrelevant"[49] in any event: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."[50]

In the later decision of *Gilmore v. City of Montgomery*[51] in which the Court similarly enjoined racially neutral state aid, in the form of exclusive use of public recreational facilities, to segregated private schools, the Court specifically relied on the fact that "this assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in

44. *Id.* at 466.
45. *Id.* at 460-61.
46. Wright v. Council of Emporia, 407 U.S. 451, 462 (1972).
47. Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971, 2979 (1979).
48. 413 U.S. at 460-61.
49. *Id.* at 468.
50. *Id.* at 467.
51. 417 U.S. 556 (1974).

Montgomery."[52] Indeed, in *Gilmore* the Court implied that the result in *Norwood* might also be so explained.[53] Without this justification, *Norwood* is exceedingly difficult to square with contemporary equal protection doctrine.

Even more perplexing is the task of reconciling *Norwood* with the earlier ruling in *Board of Education v. Allen*[54] in which the Court held that New York's lending of textbooks to students who attend church-related schools, pursuant to a general program for students in all public and private secondary schools, did not violate the establishment clause. As in *Norwood*, the state's program in *Allen* had a constitutionally neutral purpose: "furtherance of the educational opportunities available to the young."[55] But, unlike *Norwood*, the Court found no impermissible effect in *Allen*. Although I agree with the Court's conclusion in *Allen*[56]—which, although consistently reaffirmed, has been effectively gutted by subsequent decisions involving aid to church-related schools[57]—surely, if the effect of Mississippi's textbook law in *Norwood* "significantly aid[ed] the organization and continuation of a separate system of private schools"[58] that racially segregate, then so, too, did the effect of New York's textbook law in *Allen* aid parochial schools. Because a discriminatory effect is in itself inconsequential under equal protection doctrine, but an impermissible effect is dispositive under establishment clause doctrine, the results in *Norwood* and *Allen* seem strangely at odds with one another.

VIII.

Other Supreme Court state action decisions have been similarly confused by the recently articulated equal protection rationale. Foremost among them is *Shelley v. Kraemer*[59] in which the Court reversed a state court's enforcement of a racially restrictive covenant and held that the

52. *Id.* at 569.
53. *Id.* at 570 n.10.
54. 392 U.S. 236 (1968).
55. *Id.* at 243.
56. *See* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968).
57. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971).
58. 413 U.S. at 467.
59. 334 U.S. 1 (1948).

state court's action constituted state action in violation of equal protection.

Under the theories of state action that we have considered, it is obvious that state action existed in *Shelley*. What is not obvious, however, is whether the conceded state action violated the equal protection clause. Indeed, because it was not shown that the state court, the state agency involved in the case, had any racially discriminatory purpose, but rather appeared to be acting in a racially neutral manner in giving effect to a private agreement, there would be no violation of the fourteenth amendment under contemporary equal protection doctrine. Although the state court certainly knew that the consequences of its action would be to effectuate the private discrimination, this knowledge alone does not meet the need to find intentional discrimination by the state.

The required racial animus might be attributed to the state court on the basis of principles of property law. At common law (at least after the early decades of the twentieth century),[60] restraints on the alienation of property were presumptively void. Courts generally held restraints valid only if the restraints were found by the court to be reasonable and consistent with public policy.[61] Further, they were to be construed whenever possible to avoid the restraint.[62] Indeed, some state courts employed this principle to refuse enforcement to a racially restrictive covenant.[63] It might be argued, therefore, that by enforcing the restraint in *Shelley*, the state court awarded the restraint its own imprimatur, making a policy decision to favor racial discrimination and thus acting itself with a prohibited discriminatory intent.[64] (This situation would be analogous to a state commission's permitting enforcement of rules proposed by a regulated entity only after the commission's formal approval of the rule rather than by the commission's routine acceptance of the proposed rule without expression of approval

60. *See* Bowman, *The Constitution and Common Law Restraints on Alienation*, 8 B.U.L. REV. 1 (1928).

61. RESTATEMENT OF PROPERTY § 406 (1944) (especially § 406(1)). *See generally* Bruce, *Racial Zoning By Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation*, 21 ILL. L. REV. 704 (1927).

62. RESTATEMENT OF PROPERTY § 418 (1944).

63. *See* Fairchild v. Raines, 24 Cal. 2d 818, 151 P.2d 260 (1944); Clark v. Vaughan, 31 Kan. 438, 292 P. 783 (1930); Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938).

64. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW—CASES, COMMENTS & QUESTIONS 1412 (4th ed. 1975).

or disapproval.)[65] Whether this concept of property law was sufficiently clear to sustain this rationale and the result in *Shelley* is uncertain.[66] But the decision cannot be grounded simply by finding that state court enforcement of contracts is state action.

IX.

Another leading Supreme Court state action decision whose rationale and result may now be questioned by contemporary equal protection doctrine is *Reitman v. Mulkey*.[67] It concerned a racially neutral provision of the California constitution that established the right of real property owners to sell or lease to anyone they chose, thus nullifying California statutes that forbade racial discrimination in the sale or rental of housing and disempowering the California legislature from enacting such laws in the future. The Court held that this provision violated equal protection, although the precise basis for its conclusion was somewhat ambiguous. There is language in the opinion implying that state action—and the California constitutional provision was undoubtedly state action—runs afoul of the equal protection clause if it "encourages" or "authorizes" private racial discrimination.[68] Taken literally, this approach conflicts with the requirement of intentional discrimination by the state.

Several qualitative gradations of state action affect private individuals, some of which plainly satisfy the state intent requirement under current doctrine and some of which plainly do not. At one end of the spectrum is state action that *compels* private persons to discriminate. A law of this kind represents an affirmative choice by the people of the state to produce a uniform and pervasive rule for conduct in the community. Consequently, the intent of the collectivity, the state, governs rather than that of the individual.[69]

At the other end of the spectrum is state action—or, more frequently, state inaction—that merely *permits* (or *tolerates*) private discrimination. State permission may take the form of the state having no rule

65. *Compare* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952), *with* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

66. *See* McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5, 10-11 (1945).

67. 387 U.S. 369 (1967).

68. *Id.* at 380.

69. *See* Peterson v. City of Greenville, 373 U.S. 244 (1963).

that forbids the private discrimination or having a statute that simply codifies this condition.[70] In itself, this does not evidence a discriminatory purpose by the state. Nor is the requisite state intent supplied by characterizing this type of state action as *authorizing* or even *encouraging* private discrimination because the state does not forbid it. To illustrate, suppose a state has no rule that prohibits smoking in public buildings. It may fairly be said that the state permits or tolerates the conduct. The state may even be seen as authorizing or encouraging it in some sense. But this alone by no means shows collective endorsement of smoking generally or in public buildings particularly. Indeed, the state may simultaneously do many things strongly indicating its disapproval of smoking such as forbidding advertising, requiring health hazard warnings, or even posting signs urging no smoking in public buildings.

More difficult issues in demonstrating a discriminatory state purpose lie between these two extremes. If a state were to award benefits (such as money or jobs) on the explicit condition that the recipients engage in a certain kind of discrimination, then the state, although not compelling the discrimination, nonetheless would be encouraging it through an articulated collective policy choice that plainly manifests the state's motivation. A similar state policy choice would exist if the government, without announcing its intention, were to give assistance (financial or otherwise) to private persons because they engaged in a certain kind of discrimination. The government's purpose, because not openly stated, would be harder to prove, of course, but recent Supreme Court decisions[71] abandoning earlier dogmas[72] make that proof permissible and possible. Thus, if the purpose, rather than merely the effect, of the Mississippi textbook aid program in *Norwood* had been shown to encourage private school segregation, the Court's result would conform with present equal protection doctrine.

Further, if a state were to take racially neutral action, such as renting its property to a private individual without including a nondiscrimination clause in the lease, whose purpose could be shown to encourage, influence, or induce private racial discrimination, again there would be a violation of equal protection. One commentator has suggested that

70. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

71. *See, e.g.,* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

72. *See, e.g.,* United States v. O'Brien, 391 U.S. 367 (1968); McCray v. United States, 195 U.S. 27 (1904).

Burton v. Wilmington Parking Authority,[73] which is exceedingly hard to justify otherwise under contemporary equal protection doctrine, may be explained on this basis.[74]

Indeed, the same analysis is applicable, although problems of proof are extraordinarily compounded, if a state were to repeal a law that previously forbade private racial discrimination and if one could show that the state's purpose was not merely to permit or tolerate subsequent private discrimination, but was actually to encourage it. This rationale might preserve the result in *Reitman v. Mulkey* under present equal protection doctrine. The Court emphasized at several points in its opinion the conclusion of the California Supreme Court—which appears to be an excellent, if not preferred, arbiter for the presently permitted inquiry into the motive for its own state's actions[75]—that the challenged California provision's "design and intent"[76] was to encourage private discrimination. For example, "the [California] court could 'conceive of no other purpose . . . aside from authorizing the perpetuation of a purported private discrimination.' "[77]

On the facts it is debatable whether this interpretation is adequate to prove motive, because the California court's decision is also subject to an interpretation that the *effect* of the provision, which had been approved by a vote of 4.5 million to 2.4 million in a statewide election,[78] encouraged private discrimination. But the new doctrine, which allows proof of legislative motive to find state action violative of equal protection, provides the analytic framework. Indeed, taken the full length of its logic, this doctrine extends to holding unconstitutional a legislature's failure to pass an antidiscrimination law when, and if, one can demonstrate that the purpose for inaction was to promote private acts of racial bigotry.

X.

The foregoing discussion of how state action might be found to violate equal protection in various instances has not considered the issue of the remedy that follows a violation. The conventional remedy for

73. 365 U.S. 715 (1961).
74. *See* L. TRIBE, *supra* note 2, at 1160 n.13.
75. *See* note 71 *supra* and accompanying text.
76. Reitman v. Mulkey, 387 U.S. 369, 374 (1967).
77. *Id.* at 375.
78. *Id.* at 388 (Harlan, J., dissenting).

unconstitutional state action is to order the state to desist. But in state action cases, the principal relief often sought is not against the state, but against the offending private individual.[79]

In many contexts, this difference presents no real problem. If the Court had found the Mississippi textbook program in *Norwood* to have an impermissible purpose, its challengers would have accomplished their aim by obtaining an injunction against the state's continuing to lend books to students who attend racially segregated academies. (Indeed, it is possible that the schools would end their discriminatory policies if this were a condition for receiving the aid.) If the Court had found the state court's enforcement of the racially restrictive covenant in *Shelley* to be based on the court's policy judgment approving such restraints on alienation, prohibiting the state court enforcement would satisfy the needs of the black purchaser. If the Court had found the California constitutional provision in *Reitman* to be designed to influence private racial discrimination in housing, holding it inoperative would revive the California statutes that forbade racial discrimination and thus afford the victims the cause of action under the statutes that they originally pursued. Even in *Burton*, if the Court had found the state's failure to include a nondiscrimination clause in its lease to be the product of racial animus, ordering insertion of the clause would completely rectify the objectionable situation.

The matter of an effective remedy becomes more difficult, however, in other contexts. Suppose a state law compels privately owned restaurants to segregate racially and a restaurateur calls the police, who arrest a racially mixed group that remains on the premises after being refused service. Although the state law is plainly invalid, does a trespass conviction of the group constitute state action that violates equal protection even when the restaurateur testifies that he would have segregated regardless of the state law? In *Peterson v. City of Greenville*[80] the Court held that it was invalid state action, reasoning that the judiciary would not attempt "to separate the mental urges of the discriminators."[81]

This prophylactic rule of evidence may well be justified to reverse a state criminal conviction that enforces private conduct mandated by

79. *See, e.g.,* Moose Lodge v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

80. 373 U.S. 244 (1963).

81. *Id.* at 248.

state law at the time it occurred. Further, the rule that a private person's motivation is to be treated as if it were the state's might even be extended to an action by a rejected job applicant for an injunction (or damages?) against a private employer whose deliberately discriminatory hiring policy is shown to be responsive to his receipt of government benefits on the condition that he so discriminate. But it would be extremely problematic to construct an irrebuttable presumption that equates a private individual's act of racial prejudice with state action for the purpose of enjoining the discriminator or holding him liable for damages simply because the state has adopted a racially neutral regulation—or failed to enact a prohibitory rule—with the proven intention of encouraging or influencing discriminatory private action. The state regulation is plainly enjoinable—indeed, even the state inaction may be remediable, at least in theory—unless the state proves "that the same decision would have resulted even had the impermissible purpose not been considered."[82] But it does not follow that the private individual's conduct is unconstitutional if the individual shows that he would have acted the same way in any event. And if it is not unconstitutional, it cannot be remedied. Similarly, even when one proves that the state deliberately chose to assist private persons because they engage in discrimination that is forbidden to the state, it is quite unlikely that the state, once the invalid state aid is stopped, can be charged with the ongoing discrimination of the private actor (if he so continues); it is even more unlikely that the private actor's motivation can be identified as the state's. Thus, further remedies for equal protection violations are foreclosed.

XI.

We have seen that under the logically appealing state permission-toleration and judicial enforcement approaches to the problem, state action may be found in practically all dealings among private individuals. But even if it is analytically possible, although by no means necessarily desirable either in terms of original intent or the proper role of the national judiciary, to subject most private conduct to such constitutional norms as procedural due process and the freedoms of speech and religion, there may be no violation of equal protection under contemporary doctrine unless the state action is itself purposefully discrimina-

82. Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977).

tory. As a consequence, no matter how pervasive or profound the impact of intentional private discrimination (whether against racial or ethnic minorities, aliens, women, illegitimate children, or some other group that obtains solicitous judicial protection from invidious government action), it is not constitutionally remediable unless the state, acting through its legislative, executive, judicial, or administrative officers, has deliberately discriminated. Even then, as just indicated,[83] it may well be that one cannot obtain relief against the private discriminator.

Therefore, wholly apart from the other formidable objections to the theories that have been discussed, there may be substantial merit, despite vigorous and persuasive criticism to the contrary,[84] in directing state action analysis to the question of whether certain private individuals or organizations should be held to the constitutional responsibilities of the state. This "actor-focused"[85] inquiry would permit the federal judiciary in certain circumstances to conclude that equal protection has been denied and may be remedied, although there is no proof of an official discriminatory purpose, but only that the "private" actor has abridged the constitutional norm.

XII.

The "actor-focused" analysis with strongest judicial credentials is that which asks whether the conduct of a private group amounts to the performance of a "government function."[86] This analysis is a useful approach to the problem and I shall further explore its contours. In addition, I believe that from both the perspective of history and the contemporary demands of our system, there is much to say for Ralph Winter's view that a major function of the fourteenth amendment's state action provision is "to regulate the exercise of centralized power—the kind of power that might be consciously employed to foreclose individual competition in a free market."[87]

Although this is not the place to develop fully this idea, at its core is the fact that at the end of the eighteenth century and at the time of the framing of the fourteenth amendment, the most familiar wielder of

83. *See* text accompanying notes 79-82 *supra*.

84. *See, e.g.*, L. TRIBE, *supra* note 2, at 1147-74.

85. *See* Glennon & Nowak, *supra* note 14, at 227.

86. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 64, at 1386-1400.

87. Winter, *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U.L.Q. 741, 744.

such authority was the state. But because of the evolution of various nongovernmental institutions in our society as well as the growth of technology, personal liberties "that were once vulnerable only to the power of government become subject to private determination."[88] Thus, as an adjunct to the "government function" inquiry, I would suggest, under what I have elsewhere called the "power theory" approach to finding state action,[89] that conduct of a private individual or organization that has a widespread and fundamental impact on other private individuals should be held to the obligations that the Constitution imposes on the state. Although these several terms obviously are not self-defining and, as we shall see,[90] occasional applications of these approaches will require courts to weigh legitimately competing constitutional claims, I believe that the process is manageable in a way that conforms with the appropriate role of an independent judiciary under our scheme of government.

There is little dispute, at least within the Supreme Court, that the action of a private organization in conducting the only meaningful election of public officials in a particular area,[91] or in controlling who may speak on the sidewalks or streets of a particular town all of whose property it owns,[92] meets the criteria of both the "power theory" and "government function" approaches and should be held to the state's constitutional responsibilities. It should be emphasized that whether these activities have been consciously delegated by the state to the private organization (by a statute, or a license, or the like), or whether they are extensively regulated by the state, is irrelevant to the outcome.[93] Of course, if it could be shown that the state formally delegated this or any other activity to a private party with the intent of facilitating the denial of constitutional rights, even under prevailing equal protection doctrine the state's delegation could readily be enjoined and so, too, perhaps, could the conduct of the private actor.[94] But, in the instances under consideration, it is the exercise of power rather than its source that is determinative.

88. Note, *State Action Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 698 (1974).

89. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, *supra* note 64, at 1398-1400.

90. *See* text accompanying notes 101-04 *infra*.

91. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

92. Marsh v. Alabama, 326 U.S. 501 (1946).

93. *See* Terry v. Adams, 345 U.S. 461 (1953).

94. *See* text accompanying notes 79-82 *supra*.

The Court, speaking twice in recent years through Justice Rehnquist, would limit the reach of this rationale to the private exercise of a "government function" (or "public function"), which it defines as a power "traditionally exclusively reserved to the State."[95] But although this condition plainly satisfies the "government function" and "power theory" approaches, it does not exhaust them. For example, it may well be that given "the experience of several American entrepreneurs who amassed great fortunes by operating parks for recreational purposes,"[96] the maintenance of such a park is not a function that is "traditionally *exclusively* reserved to the state." Empirical data might actually reveal that in some American cities the size of, say, Macon, Georgia, where *Evans v. Newton*[97] arose, the only park (or all the parks) is privately owned. But if our nation's experience also disclosed that virtually all communities like Macon have parks that are generally open to the public, and that our cities' tradition is to have at least one such municipally owned park unless otherwise supplied by a private donor, courts should hold private ownership or operation of the only park to be a "government function" and thus subject to the fourteenth amendment.

Similarly, it is clear that the operation of elementary and secondary schools is not an enterprise that is "traditionally *exclusively* reserved to the State." But a comprehensive survey of school districts in the United States would surely show that virtually all maintained at least one public elementary and secondary school unless, because of some peculiar development, the educational needs of the community's children were historically always met by a privately funded school. Such a school—or at least one of such schools if there are several in the hypothetical community (and which one is *the* one may present a nice question)—is, in effect, serving as a substitute for the conventional public school that the school district would otherwise provide. In this sense, it is performing a function "traditionally *exclusively* reserved to the State." In terms of this function—providing public education—the private school is wielding monopoly power and should be held to the constitutional responsibilities of the state. The same analysis should apply for other providers of basic services—the sole hospital in a community might prove to be one—which our historic and evolving traditions indi-

95. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

96. *Id.* at 159 n.8.

97. 382 U.S. 296 (1966).

cate would be supplied by the public but for the existence of the private counterpart.

A slightly different situation arises with an activity that, although not traditionally performed by government, is nonetheless, as Justice Marshall described the provision of gas and electricity, "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."[98] When a private institution exclusively controls such an essential service, it possesses that kind of monopolistic, government-like control which meets the "power-theory" test for finding state action. Although judicial determination of this matter plainly will not be mechanical, a perception of reality, widely shared values, and common sense may provide adequate guidance in most instances to properly confine the courts' discretion. As Justice Douglas put it in the *Metropolitan Edison* case, when gas or electricity "is denied a householder, the home, under modern conditions, is likely to become unlivable."[99]

Other illustrations are readily available. The most obvious may be found when "government creates a situation of scarcity, whether by conferring territorial monopoly power or by issuing a limited number of licenses and forbidding performance of a designated service without a license,"[100] such as in *Metropolitan Edison*. Thus, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[101] there should have been no difficulty in finding that federally licensed broadcasting stations held sufficient power over people's ability to communicate effectively to be subjected to first amendment responsibilities in exercising that power, although, as Justice Brennan observed,[102] the broadcasters' substantial first amendment rights (which arguably may be qualified because of the power the broadcasters voluntarily acquired) that had to be accommodated with the competing rights of those who wished to use their broadcasting facilities complicated resolution of the particular substantive issue in the case.

A similar analysis is applicable in *Moose Lodge v. Irvis*.[103] Justice Douglas contended in dissent that because of Pennsylvania's "complex

98. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 372 (1974) (Marshall, J., dissenting).
99. *Id.* at 361 (Douglas, J., dissenting).
100. L. TRIBE, *supra* note 2, at 1172.
101. 412 U.S. 94 (1973).
102. *Id.* at 182-83 n.12 (Brennan, J., dissenting).
103. 407 U.S. 163 (1972).

quota system" for issuing licenses, liquor was "commercially available *only* at private clubs for a significant portion of each week,"[104] and that no more club licenses could be issued in Harrisburg where the Moose Lodge was located. But the critical question under the "power theory"—the question that was not addressed in any opinion in the case—was whether all (or most) club licensees discriminated against blacks. If a substantial number did not and, therefore, liquor was readily accessible to persons irrespective of race, then neither the Moose Lodge nor any other club licensee that did racially discriminate could be found to possess the requisite power to justify burdening them with the state's constitutional obligations. But if all or most club licensees refused to serve blacks, the action of at least one should be subjected to fourteenth amendment constraints. Again, the ultimate decision on the merits must account for the club licensee's legitimate competing claim of constitutionally protected freedom of association.

When the state has deemed a particular service or commodity sufficiently important to confer on its providers monopoly status, the conferral constitutes persuasive, perhaps conclusive, evidence that the requisites of the "power theory" have been met.[105] But, as indicated above,[106] it is the possession of exclusionary force, not its origins, that controls. Thus, even though it has no license from the state, a single private institution that functions as a "natural monopoly" for a basic service—a position "created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale"[107]—falls within the coverage of the "power theory."

A nonlicensed private company that is the exclusive supplier of gas and electricity in a particular area fits this description. A large modern shopping center that is shown on the facts to have realistically replaced the downtown area of the traditional American city by exercising effective monopoly power over people's opportunities to communicate to the public also qualifies for inclusion. So, too, may a group of private persons who constitute the sole source of a basic good or service. For example, if all the restaurants (or lawyers, or doctors, or the like) in a particular community adopt a uniform policy—whether pursuant to

104. *Id.* at 182 (Douglas, J., dissenting).

105. *Cf.* Ginzburg v. United States, 383 U.S. 463 (1966) (purveyor's characterization of written material is relevant in determining whether it is "obscene").

106. *See* text following note 94 *supra*.

107. Jackson v. Metropolitan Edison Co., 419 U.S. at 352 n.8.

agreement, custom, or individual preference—that violates a constitutional norm, one may view the impact of their action as having the monopolistic force of law.[108] As a consequence, at least one of them—and again, the problem of which person or group it should be must be explored—is a strong candidate for imposition of the state's constitutional obligations.

XIII.

Stated broadly, the government function and power theory approaches to state action result in holdings that find the conduct of certain kinds of private individuals and organizations to constitute state action. An important qualification, however, which is probably already clear from earlier discussion, should now be emphasized.

A private institution that has monopolistic, government-like power should be held to the state's constitutional responsibilities only in regard to specific aspects of its activities. It should be subject to the fourteenth amendment only in the exercise of the monopolistic, government-like control that it possesses. In the *Jackson* case, for example, the Metropolitan Edison Company had sufficient power over a basic service to come within the power theory. Consequently, the company would be barred from abridging fourteenth amendment norms in selling gas and electricity. But unless the company were shown to have market exclusionary force in employment opportunities—and it is conceivable that in some communities the facts might substantiate this conclusion[109]—it would not be subject to constitutional constraints in its hiring process. Nor would the Jaybird Democratic Association in *Terry v. Adams*[110] be constitutionally forbidden from refusing to employ blacks as office personnel. The power exercised by Metropolitan Edison concerned the provision of gas and electricity, not employment opportunities; the government function performed by the Jaybirds concerned holding elections, not affording a labor market.

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108. *See generally* Adickes v. S.H. Kress & Co., 398 U.S. 144, 192 (1970) (Brennan, J., concurring in part and dissenting in part).

109. *Cf.* Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (California constitution's equal protection provision held to forbid employment discrimination against homosexuals by privately owned utility with state-guaranteed monopoly over 80% of in-state telephone service market).

110. 345 U.S. 461 (1953).

XIV.

A major feature of the government function and power theory approaches is to permit courts to find certain conduct by certain kinds of private individuals or organizations violative of equal protection and to remedy the violation even in the absence of any official purpose to discriminate. But the efficacy of these approaches need not be so limited. Because they harmonize historically cherished values with the realities of contemporary society, these approaches also might be used when private actors who exercise monopolistic, government-like power transgress the norms of other constitutional protections such as procedural due process and the freedoms of expression and religion. In contrast to the state permission-toleration and judicial enforcement theories of state action, the government function and power theory approaches tend to avoid conflict with a central purpose of the fourteenth amendment—preserving a meaningful distinction between state action and private action—and to ameliorate the problem of vesting federal courts with an enormous discretion to adjust the allocation of authority within our federal system of government.