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Policy and the Fourteenth Amendment: A New Semantics

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POLICY AND THE FOURTEENTH AMENDMENT: A NEW SEMANTICS

*OLIVER MORSE**

IN 1883, it was decided in the *Civil Rights Cases*[1] that the limitations of the fourteenth amendment were applicable to *state action* only. Even before the *Civil Rights Cases,* in 1879, it was held that state action included executive and judicial action as well as legislative action.[2] Since that time the courts have been developing concepts of state action to insure a liberal operation of the fourteenth amendment.[3] The search has been for state action; for a link between the right allegedly violated and some action by or on behalf of the state. Lately, policy decisions have been handed down to avert escape from the limitations imposed by the amendment. These decisions have either avoided (not violated) the restriction of the fourteenth amendment to state action or they have attenuated the fiction of state action. In the courts' declared intention to interpret the fourteenth amendment liberally new symbols and metaphors have been used or intimated to underwrite this policy.[4] Perhaps an acquaintance with these new "meanings" of state action will afford some insight as to how far the courts will go in support of a liberal policy of construction.

Within the past year and a half, three decisions have been handed down by the federal courts which are considered herein as policy de-

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1. 109 U.S. 3 (1883).

2. Virginia v. Rives, 100 U.S. 313, 318 (1879).

3. See Note, The Disintegration of a Concept—State Action Under the 14th and 15th Amendments, 96 U. Pa. L. Rev. 402 (1948).

4. "It is a fundamental canon of construction that a Constitution should receive a liberal interpretation in favor of a citizen, especially with respect to those provisions which were designed to safeguard the liberty and security of the citizen in regard to both person and property.

" . . . In construing a Constitution it cannot be carried out with mathematical nicety to logical extremes. Thus, the provisions of the Federal Constitution are not mathematical formulas having their essence in form, but they are organic living institutions transplanted from English soil. Their significance is vital, not formal, and is to be gathered by considering their origin and the line of their growth, not simply by taking the words and a dictionary." 11 Am. Jur., Constitutional Law § 59 (1937) (footnote numbers omitted). See this reference and the cases cited therein.

"The rule is firmly imbedded in American law that the guaranty of due process—whether the Fifth Amendment, as a limitation upon the power of the federal government, or under the Fourteenth Amendment, as a limitation upon the power of the states—is to be liberally construed to effectuate its purpose of protecting the citizen against arbitrary invasion of his rights of life, liberty and property." Betts v. Easley, 161 Kan. 459, 474, 169 P.2d 831, 843 (1946).

cisions illustrating the trend toward liberal construction of the fourteenth amendment. These decisions are found in the cases of *Derrington v. Plummer*,[5] *Pennsylvania v. Board of Directors*[6] and *Brewer v. Hoxie School District No. 46*.[7] Most of the discussion herein will revolve around these cases.

Public Purposes and Governmental Functions

In *Plummer v. Casey*,[8] a suit was brought by Negroes against county officials and the lessee and operator of a courthouse cafeteria for a judgment declaring the exclusion of Negroes from the cafeteria facilities as violative of the equal protection clause of the fourteenth amendment. Also requested was a permanent injunction restraining all the defendants from such exclusion. It was established that a new courthouse was built with public funds derived from taxes and an authorized bond issue; that in the basement thereof a kitchen and other cafeteria facilities were installed; that the county never operated the cafeteria but leased it to the defendant, Derrington, from the beginning and that Derrington acquired the lease by bid. It was further established that the lease granted sole and exclusive control of the leased premises to Derrington to operate a cafeteria; that the cafeteria was patronized principally by the courthouse employees, jurors and others having business in the building; that it was always open to the general public as a cafeteria; and that Derrington served only members of the white race. To the claim that equal protection of the laws had been denied, the county answered that under the state law it could sell or lease county property not immediately needed for government purposes; that by reason of its lease to Derrington it had divested itself of control of the premises and the operation thereof; that its execution of the lease was done in a private capacity; that the leased premises were not public or committed to public use; and that Derrington as a private restaurateur could serve whom he pleased. The defendant, Derrington, claimed that as a private individual he was not within the coverage of the fourteenth amendment. The federal district court held that the county having undertaken to furnish eating facilities to citizens must do so for all citizens on an equal basis. It further reasoned that the county's renewal of the lease with knowledge both of the lack of equal facilities and of the pendency of this action, coupled with no action on the part of the county to provide appropriate facilities for the plaintiffs, entitled them to relief. Turning to the defendant Derrington, the court stated:

5. 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957).

6. 353 U.S. 230 (1957).

7. 238 F.2d 91 (8th Cir. 1956).

8. 148 F. Supp. 326 (S.D. Tex. 1955), aff'd sub nom. Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957).

[T]he operation of the cafeteria here is too close, in origin and purpose, to the *functions of the County government* to allow the concessionaire the right to refuse service without good cause.[9]

The court therefore enjoined the county from denying the plaintiffs the right to patronize the cafeteria, a right which the county had not itself denied. The court also enjoined the county from renewing or extending the lease "without specific assurances that facilities will be made available for the use of colored persons under circumstances and conditions substantially equal to those afforded members of the white race."[10] Derrington was also enjoined from continued exclusion of Negroes from the facilities of the cafeteria.

At this point it should be noted that there exists a dichotomy in the rationale defining the obligations of the county and of Derrington. Here the very conduct of the county in leasing with the knowledge of the unavailability of facilities to the plaintiffs, apart from the conduct of Derrington in refusing to serve them, was considered unconstitutional. The court's opinion indicates that the violation of the plaintiffs' rights by the county did not derive from Derrington's conduct; that Derrington's conduct was but an incidence of that violation; and that Derrington's actions were not imputed to the county. Bearing witness to this dichotomy is the fact that the court felt that the granting of relief against Derrington presented "a more difficult question."[11] With respect to Derrington, the court concerned itself with the constructive notice that he had of the public purpose of the cafeteria facilities. In addition to this the court felt that Derrington was engaged in an activity too close in origin and purpose to a governmental function to allow his conduct to continue.

Although the above analysis may sound like circumlocution, the result thereof is important. It shows that a court was willing to fix a constitutional obligation without a technical allusion to the "private acts" that violated the alleged constitutional right. Here the search for state action was not sought by inference, nor did it derive from Derrington's acts which were in essence the only acts of actual exclusion of the plaintiffs. Here the obligation was fixed at the inception of the state activity, to wit, the building and leasing of the cafeteria facilities with no appropriate facilities for the plaintiffs.[12] With the duty fixed at this point, the court,

9. Id. at 329. (Emphasis added.) Cf. Nash v. Air Terminal Services, 85 F. Supp. 545, 549 (E.D. Va. 1949), a case using the same language but with respect to the fifth amendment. See also note 20 infra.

10. 148 F. Supp. at 329.

11. Ibid.

12. The Plummer v. Casey case lends itself quite easily to the fixing of a constitutional obligation at the inception of state activity because it was decided on the basis of the continued existence of the separate-but-equal doctrine. As a result, it was not difficult for

in pursuance of policy, had logical basis for granting a decree of such dimensions as it did. It must be borne in mind that the decree did not merely enjoin Derrington from his discriminatory conduct. It went further and enjoined the county from renewing or extending the present lease or executing a new lease or otherwise divesting itself of control of the premises "without specific assurances that facilities will be made available for the use of colored persons." The practical effect of this decree is to write a provision in the lease for the county and forestall any such inferential violation of the fourteenth amendment. The usual application of the fourteenth amendment would be negative and decree that a lease could not be executed with a condition enforcing segregation.[13] The logic of the *Plummer* case is positive in that it imposes on the government a duty to make conditions in a lease avoiding segregation.[14] This portrays the fourteenth amendment as positive rather than negative and indicates that under its aegis a state can be told what to do as well as what not to do.

On appeal, the judgment in *Plummer v. Casey* was affirmed in *Derrington v. Plummer*.[15] The court of appeals held that the premises in question were established for a public purpose and as such could not

the court to find an initial constitutional obligation on the county to provide appropriate facilities at the outset. For discussion in the text the Plummer case was selected for its approach and form and not its content. Using the approach of the Plummer case, the constitutional obligation can still be fixed at the inception of state activity in a situation where the point of departure is not the separate-but-equal doctrine. This approach could very well be used to meet the threat of some of the southern states to avoid integration by turning over the state schools to private individuals or corporations. The very act of doing so could be held illegal under the rationale of the Plummer case and state action would not have to derive from the refusal on the part of these private individuals or corporations to integrate.

13. However, "there are, undoubtedly, instances of occasional leasings of property owned by Federal, State or Municipal authorities, which are permitted even though admission is restricted. A lease of a public auditorium or other public facility to a bona fide and lawful private organization or individual for limited hours or days, and for express purposes, is legal although admission is limited to certain individuals or groups but, in such cases, the same right to lease must rest in any and all groups seeking such a lease." Tate v. Department of Conservation and Development, 133 F. Supp. 53, 61 (E.D. Va. 1955), aff'd, 231 F.2d 615 (4th Cir.), cert. denied, 352 U.S. 838 (1956).

14. See Tate v. Department of Conservation and Development, supra note 13, where in order to avert future violation of the plaintiffs' constitutional rights by the leasing of a state park, the court said: "Accordingly, the defendants are required to elect to operate on a non-discriminatory basis, or, if leased, to see that the park is operated by the lessee without discrimination." The Plummer case was decided on the basis that the separate-but-equal doctrine still obtained, so its exact holding would not be authority for insistence in a lease that segregation be avoided. However, the rationale of the decision would support the existence of an obligation to make such a condition in a lease. See also note 12 supra.

15. 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 1924 (1957).

be diverted to a purely private use.[16] It further reasoned that if the county could not refuse the plaintiffs service neither could Derrington, hence Derrington's conduct was *state action.* Although the language of this affirmance is not in all respects similar to that of the lower court, two factors indicate that the court of appeals was in accord with the policy followed in the lower court. One, the court of appeals, realizing that the present lease with Derrington would expire before the appellate mandate would take effect, recognized a moot aspect in the plaintiffs' claims. Despite this it felt that the illegality of the practice should be settled. Two, the injunctive decree of the lower court was affirmed without disturbance.

The term "public purpose," in constitutional law, is generally thought to be one of the prerequisites for the exercise of the power of eminent domain. According to the *Plummer* cases, discussed above and the cases cited therein, public purpose has assumed another connotation.[17] It would seem that anything governmentally supplied, established or ordained *for the use, benefit or control of citizens generally* has a public inception and hence has a public purpose. In addition to this a public purpose would seem to be a determinate of a governmental function. Activity which directly carries into effect a public purpose would appear to be the performance of a governmental function. A fortiori, the existence of a public purpose presumes the existence of a governmental function. Things which are private in nature can also be the proper subject matter of a public purpose. As was stated in *St. Petersburg v. Alsup*:

> It is doubtful whether a municipality may ever engage in purely private action that would not be action of the state.[18]

16. "[T]he courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could contenance the diversion of such property to a purely private use." 240 F.2d at 925.

17. Other facilities held to have had a public inception (and hence a public purpose) include: public schools, Brown v. Board of Educ., 347 U.S. 483 (1954); golf courses: Beal v. Holcome, 193 F.2d 384 (5th Cir. 1951); Holmes v. Atlanta, 223 F.2d 93 (5th Cir. 1955); Sweeney v. Louisville, 102 F. Supp. 525 (W.D. Ky. 1951); swimming pools: Kansas City v. Williams, 205 F.2d 47 (8th Cir. 1953); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948); public parks, Tate v. Department of Conservation and Development, 133 F. Supp. 53 (E.D. Va. 1955), aff'd, 231 F.2d 615 (4th Cir.), cert. denied, 352 U.S. 838 (1956); and beaches: Dawson v. Mayor, 220 F.2d 386 (4th Cir. 1955); St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956), cert. denied, 356 U.S. 922 (1957).

18. 238 F.2d 830, 832 (5th Cir. 1956). Following this statement, the court footnoted, as an exception, a municipality acting in a fiduciary capacity and cited, as its authority, In re Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956). This exception has since been obviated. See the text at note 21 infra.

Although a governmental function derives from a public purpose the new meaning attached to governmental function does not seem to be restricted by a public purpose. State action is no longer restricted to the performance or exercise of a governmental function.[19] Now activities which are close in origin and purpose to a governmental function symbolize state action.[20] If the origin and purpose of a governmental function are to be found in a public purpose then activities "close to" a public purpose are not therein confined. So it is that activities affecting and effecting a public purpose could well be analogized as the performance of a governmental function and thus state action. This is not unhappy logic. It has the credence of inference residing in the *Girard* and *Hoxie* cases later discussed herein.

GOVERNMENTAL ACTIVITY AND GOVERNMENTAL CHARACTER

The discussion in the preceding section embraced those instances where the right allegedly denied had its inception in a public act by a public body or agency. In this section the discussion will deal with those instances in which the right had its inception in a private act by a private individual.

In the case of *In re Girard's Estate*,[21] Girard, a private individual, devised and bequeathed his entire residuary estate to "The Mayor, Aldermen and Citizens of Philadelphia," their successors and assigns, in trust to establish and maintain a college for "poor male white orphan

19. Perhaps the first important departure from the idea that action by an organization "unfettered by statutory control" could only be private action was expressed in Smith v. Allwright, 321 U.S. 649 (1944), where it was held that, even though subject to no state regulation in setting up the qualifications for voting in primaries, a private political organization in so doing was performing a state function because there were in existence numerous state statutes regulating the primary process.

In Elmore v. Rice, 72 F. Supp. 516 (E.D.S.C. 1947), aff'd, 165 F.2d 387 (4th Cir. 1947), the court went further and declared that, even in the absence of state regulation of the primary process, a private political organization, in defining the qualifications for voting in primaries, was performing a state function. Both of these cases reason in terms of a direct performance of a state function. The Plummer case goes further and speaks of the performance of acts which are close in origin and purpose to a governmental function. Cf. Terry v. Adams, 345 U.S. 461 (1953).

20. See Nash v. Air Terminal Services, 85 F. Supp. 545, 549 (E.D. Va. 1949), where the court said: "We do not hold that Air Terminal was an air carrier, or engaged in air transportation; we do hold its restaurants are too close, in origin and purpose, to the functions of the public government to allow them the right to refuse service without good cause." See note 9 supra.

21. 386 Pa. 548, 127 A.2d 287 (1956), rev'd sub nom. Pennsylvania v. Board of Directors, 353 U.S. 230 (1957). Cf. Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir. 1945), where a private individual donated to a city a library building and a fund to maintain the library and erect and maintain four library branches if the city would create a perpetual

children." A year after the death of Girard, the Pennsylvania Legislature enabled the city of Philadelphia to enact such ordinances and do such acts as were necessary to execute the will's provisions. Thirty-nine years later, legislation was passed providing a Board of Directors of City Trusts to administer all trusts confided to the city. According to the act such Board was to be "dissociated from the general government of the city." The Board consisted of fifteen persons, including the Mayor, Presidents of the Councils and twelve other citizens appointed by certain judges. The City Treasurer served as treasurer of the Board. In 1954, two Negro orphans applied for admission to the college and were refused by the Board because it felt it had no power, under Girard's will, to admit other than white boys. Following this, the rejected applicants, the City of Philadelphia, through its mayor, and others, filed separate petitions in the Orphans Court for a citation upon the Board to show cause why the applicants should not have been admitted. The Board admitted that the applicants were refused admission solely on the basis of their race. The petitioners contended that this was in violation of the fourteenth amendment; that the trust for the college was a public trust and involved state action. The Orphans Court upheld the action of the Board and this decision was appealed to the Supreme Court of Pennsylvania which affirmed the holding of the Orphans Court. After discussing the fundamental right of an individual to dispose of his own property according to his conscience, the state supreme court then wrestled with the question as to whether the action of the Board, in administering the trust, was state action to come within the purview of the fourteenth amendment. It reasoned that the Board was merely the title holder of Girard's property and not the beneficial owner; that as a trustee it could only act in a fiduciary capacity like any other private individual or trust company acting as a trustee. The court felt that if the Board were engaged in state action, it could have legislated and changed the terms of the will, which it actually could not have done. The court then stated as facts that the college controlled its own policies and management; that its employees were employees of the college and not those of the city; that the college was erected on land owned by Girard and built with Girard's funds; that it was supported and maintained for over a hundred years by Girard's estate and not by taxpayers' money; and that the Board had to account, not to the city, but to the Orphans Court for its acts as trustee as did any other trustee. The court interpreted the charter of the city as excluding the Board from the general government of the city.

annuity therefor to be paid to a board of trustees selected by the donor; such board was to be incorporated and have the power to manage the library, and the duty to make annual reports to the city of the library's proceedings, condition, receipts and disbursements: held, the board's action was state action.

In view of all of this, the court concluded that the action of the Board was private action exercised as a private trustee under a private trust. In addition to this, it was also concluded that even if the Board were thought to be engaging in state action, the petitioners were not entitled to the remedy they sought because if the fourteenth amendment prohibited the Board from carrying out the will of Girard, the will should not suffer change but rather a new trustee should be substituted. Finally, the court speculated that the reason Girard appointed the city as trustee was to insure the selection of a perpetual and responsible one.

On appeal, in *Pennsylvania v. Board of Directors*,[22] the United States Supreme Court, in a per curiam opinion, reversed the judgment of the Pennsylvania Supreme Court. The Court in unequivocal language held that the Board was an agency of the State of Pennsylvania and its refusal to admit the Negro applicants was violative of the fourteenth amendment. This is all that was said. Following this, the Court cited *Brown v. Board of Educ.*[23] What is being suggested here is the adherence to a policy.

Inasmuch as the opinion of the United States Supreme Court in the *Girard* case is a per curiam opinion, some credence can be given to the dissenting opinion in the *In re Girard's Estate* case. Such a license is being exercised herein because this dissent at least displays quite supportable rationale for its conclusions. Also, this dissent is probably one of the more comprehensive dissents written. It is longer than the majority opinion and addresses itself to practically all the premises of or positions taken by the majority. It seems to display a mastery of the use of *reductio ad absurdum* and a fortiori logic, the latter essential to the maintenance of policy. It is also quite literary and well merits the time spent in reading and understanding it.

At the outset, the dissent pointed out that Girard's will would have been but a "dream" without state action. To secure this position it was revealed that from 1831 to 1953, five legislative acts were passed to give legal effect to the provisions of Girard's will, and that between 1832 and 1869, forty-eight ordinances were enacted by the City Council "devoted exclusively to Girard College." In addition to this a special committee of the Pennsylvania House of Representatives was appointed to superintend the Girard estate.[24] The dissent pointed out that the Girard estate did not have to pay commissions on income and capital gains which were required of private trustees. It was reasoned that a Board dissociated or excluded from the general government was not one dissociated or excluded from sovereign authority and hence the Board

22. 353 U.S. 230 (1957).

23. 347 U.S. 483 (1954). This case held that segregation in public schools was violative of the equal protection clause of the fourteenth amendment.

24. See In re Girard's Estate, 386 Pa. 548, 620-26, 127 A.2d 287, 321-23 (1956).

was in fact a department of the municipality. Carrying this further it was submitted that a municipal corporation could only be trustees where the grant involved a public purpose, hence Girard's trust was not a private trust. The dissent could not imagine how the city could be the agent of a private individual since public officials have but one master, the public. Neither could the dissent imagine how the city could act as a fiduciary since it had not a fiduciary existence but only a municipal existence. Coupled with the inability of the city or its departments to act in a private capacity, the dissent felt that the "plethora" of governmental activity displayed made the actions of the Board those of the state.[25]

It is obvious from the rationale of this dissent and the "it goes without saying" attitude of the United States Supreme Court, that anything having a private inception may assume a governmental character if substantial governmental activity is involved in underwriting the success of that private endeavour. So it would seem that a new symbol for state action could be governmental character which would be determined by the amount of governmental activity involved. Governmental activity would appear to be legislation, enactments, ordinances, public superintendence, public assistance or the use of public facilities, all or some of which are used to facilitate the purposes of a private undertaking. The dissent in the *Girard* case speaks of a "plethora" of governmental activity. Just what constitutes a "plethora" will have to depend on how far the courts are willing to extend the policy of liberal construction of the fourteenth amendment. There can be no fixed yardstick.

In *Dorsey v. Stuyvesant Town Corp.*,[26] the court rejected the theory that the municipality in passing statutes granting tax exemptions and governmental assistance by eminent domain to a private housing project imbued the project with a governmental character as to make it violative of the fourteenth amendment because of its racial discrimination in rentals. It is submitted herein that, policy-wise, such a situation could very well be considered today as sufficient and substantial governmental activity to give such a project a governmental character.[27] Now since it

25. "[I]n effectuating the objectives of his will, Stephen Girard called on the Legislature of Pennsylvania, the City Council of Philadelphia, the Mayor of Philadelphia, and the Treasurer of Philadelphia. Then the General Assembly of the Commonwealth added for his benefit the services of the judges of the Courts of Common Pleas (now 21) in appointing the Board of City Trusts administering his estate. If such a plethora of governmental activity does not make Girard's trust a public trust, then the word 'public' has undergone a mysterious transformation which is not recorded in the dictionaries of the English language or the lexicon of the law." 386 Pa. at 630-31, 127 A.2d at 326.

26. 190 Misc. 187, 74 N.Y.S.2d 220 (Sup. Ct. 1947).

27. Compare this reasoning with the rationale of Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946), discussed in the text at note 28 infra. See also Steele v. Louisville & N. R.R.,

seems that the courts have begun to think in terms of governmental activity another idea presents itself. If the governmental activity is not sufficient to support the idea of a governmental character could not the governmental activity itself be limited by the fourteenth amendment? Quaere: Could not a tax exemption to a private enterprize whose acts transcend the limitations of the fourteenth amendment be stricken as participation in that violation? There is no doubt that the exemption itself is state action.

Statutory Status

Closely related to the policy of finding state action in the existence of a governmental character are those instances where the private agency is found to have a *statutory status*. The case of *Betts v. Easley*[28] is illustrative of this. It espouses the proposition that a union, given the capacity to act as a craft's sole bargaining agent under the Railway Labor Act, has such a governmental character as to be restricted by the fifth amendment of the Constitution. The same rationale could be applied to an analogous situation involving state legislation. However, the analogy should limit itself to legislation endorsing a public policy and/or purpose such as a private corporation supplying a public utility. That the *Betts* case is a policy decision there can be no doubt. It is interesting to note that out of the fourteen head notes to this case only one is captioned "Constitutional Law," and that note merely recites that the constitution is to be liberally construed. The *Betts* case should be limited to its facts and like situations. On the other hand, the rationale of the *Betts* case, in pursuance of policy, might well imply the existence of state action, in a private institution or agency, as action under governmental authority solely by reason of that institution's or agency's statutory status. Portentous though it be, the future may find state action residing in the activities of a purely private corporation, performing private functions, because of its statutory status, to wit, that its existence and authority to act was governmentally authorized by statute.

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323 U.S. 192 (1944), where it was held, that since Congress could not discriminate by an act giving a union the capacity to act as a craft's sole bargaining agent, a union acting under the aegis of that act could not discriminate because it was bound by the limitations that inhered in the act.

28. 161 Kan. 459, 169 P.2d 831 (1946). See also Central of Georgia Ry. v. Jones, 229 F.2d 648, 650 (5th Cir. 1956), where in an action for injunctive and other relief against the enforcement of contract provisions, in an agreement between an employer and a union, which prohibited the plaintiffs from being employed in certain jobs, the effect of the Betts case was extended to require the employer to pay damages "and affirmatively afford equal opportunity for actual employment in each of these jobs for the future."

GOVERNMENTAL RESPONSIBILITY AND QUASI-PUBLIC ACTION

The most intriguing and expansive of policy in the trilogy of cases discussed herein is the *Brewer v. Hoxie School District No. 46* decision.[29] It involved an action by a consolidated school district, its directors and superintendent against certain private individuals for a declaratory judgment and an injunction against interference by the defendants with the operation of schools, within the plaintiffs' jurisdiction, on a desegregated basis. Following the decision in *Brown v. Board of Educ.*,[30] the school board decided to desegregate schools within its jurisdiction, feeling that the *Brown* case invalidated all state laws requiring segregation. It was the thinking of the Board that article VI, clause 3 of the United States Constitution, requiring state officers to bind themselves by oath to the Constitution, imposed upon it the right and *duty* to desegregate without awaiting legislative compliance with the *Brown* case. In view of this the schools were opened without segregation. After a while, the defendants carried on systematic attempts to obstruct and prevent such integration. As a result of this, the school district brought this action and alleged that the defendants entered into and carried on a conspiracy to prevent the school board "from securing equal protection of the laws in the operation of the public schools to all persons within the district."[31] The acts by or on behalf of the defendants, private individuals, alleged as violative of equal protection included: trespassing upon school property; annoying, threatening and intimidating the plaintiffs; making inflammatory speeches inciting physical violence and imploring mass action to resist integration; threatening boycotts of the schools; threatening to subject the plaintiffs to endless and expensive litigation; and attempting by fear to stop the children from attending school. It was further alleged that these acts caused a reduction in school attendance and the discontinuance of a school session. In support of their claim, the plaintiffs contended that article VI, clause 3 coupled with the fourteenth amendment gave them the right to bring this action; that they had a constitutional duty to support and obey the fourteenth amendment. Among other things, the defendants contended that the complaint failed to state a cause of action. In granting the plaintiffs the injunctive relief they sought, the court stated:

> The plaintiffs being bound by constitutionally imposed *duty* and their oaths of office to support the Fourteenth Amendment and to accord equal protection of the laws to all persons in their operation of the Hoxie schools must be deemed to have a right, which is a federal right, to be free from direct interference in the performance of that *duty*.[32]

29. 238 F.2d 91 (8th Cir. 1956).
30. See note 23 supra.
31. 238 F.2d 91, 93 (8th Cir. 1956).
32. Id. at 98, 99. (Emphasis added.)

The court went on to reason that the right to be free from a deliberate and direct interference with the performance of what it considered a constitutionally imposed duty arose by implication in that within a duty exists a correlative right to be free from interference in performing that duty. In true policy language, fortified with a fortiori reasoning, the court said:

> In many cases the implied rights which have been upheld by the courts have been of far less importance than the right against being interfered with in obeying the Constitution which is here involved.[33]

Recognizing that this case essentially involved an enforcement of the fourteenth amendment *limitations,* the court made some dialectic overtures to the existence of state action. It took the position that the defendants' conduct was "not in the nature of merely private conduct," and that if the defendants succeeded in coercing the school board to rescind its desegregation order, such rescission could have been accomplished only through state action. Here is a hint of private action not quite private but rather quasi-public.

It would seem that the languge in the *Hoxie* case could lend support to the idea that state action is capable of being found in action which is quasi-public. Further, *quasi-public action* would be that action by or on behalf of private individuals, of a public nature, in a public setting, effecting a public function, or private action which will affect or result in some state action.

The *Hoxie* case has many interesting facets. Its approach is novel in many respects. The fourteenth amendment is of negative proportions; it is couched in negative terms; it is an amendment of limitations and restrictions. In the *Hoxie* case the amendment was given positive application. It was used primarily to support the actions of the school board. The language of the case seems to indicate that its primary sights were fixed upon applying the fourteenth amendment in support of the plaintiffs' actions rather than in limiting the defendants' conduct, to wit, the focal point of its application was in favor of the plaintiffs and not against the defendants. Also, in supporting the plaintiffs' contention that as a state agency it had a positive responsibility to desegregate, the court recognized what seems to be a new aspect in fourteenth amendment construction. Conventionally, a state's conformance to the fourteenth amendment lies in its duty not to avert the limitations therein. The state's duty has not been to internally activate the provisos of the amendment. Although the amendment is supreme to state law, the state has never had to make the limitations in the fourteenth amendment a part of its law regulating its citizenry. However, the *Hoxie* case seems to purport such a positive responsibility; it makes it the duty of the state

33. Id. at 99.

to see that the limitations of the fourteenth amendment are internally enforced. Witness to this is the fact that the court did not define the plaintiffs' action, in desegregating, as a right to be enforced but rather as a duty; the term "right" was used only with respect to the availability of the injunction to the plaintiffs. Mention should also be made of the fact that the Board, a state agency, was acting in contravention to the laws of its own ordination, a fact conventionally possible only where the internal laws of its sovereign have been repealed, changed or struck down as unconstitutional. This had not happened. Yet the *Hoxie* case achieved that result by giving credence to the proposition that a positive governmental responsibility existed which was bound to ignore the internal law of the plaintiffs' state and defer to the limitations of the fourteenth amendment. So it is that, under the aegis of the *Hoxie* case, it can be proposed that the fourteenth amendment *compels* state action in addition to limiting it.

Assuming that the governmental responsibility concept herein imagined in the *Hoxie* case does exist, the refusal on the part of state agencies to enforce the limitations of the fourteenth amendment by itself could be reasoned to be state action. In *Shelly v. Kraemer*,[34] and the subsequent restrictive covenant cases, it was felt that the enforcement by the courts of private action violative of the fourteenth amendment limitations was state action. With governmental responsibility as a point of departure, the refusal of the courts to enforce fourteenth amendment limitations, abridged by private individuals, could be state action. In other words, inaction by the state could be interpreted to be state action. With governmental responsibility as a legal fixture, refusal would be the same as denial.[35]

Another interesting phase of the *Hoxie* case is that the injunction was granted in spite of the claim that it violated the first amendment protections of freedom of speech and assembly. Quaere: Could this be fourteenth amendment sedition?

34. 334 U.S. 1 (1948). The case of Shelley v. Kraemer involved a restrictive covenant excluding persons of certain races from ownership or occupancy of real property. It held that judicial enforcement of such a covenant was state action in violation of the fourteenth amendment. Barrows v. Jackson, 346 U.S. 249 (1953), involved an action at law brought by a co-covenantor for damages for the breach of a racial restrictive covenant. The case held that judicial enforcement of this action was likewise state action violative of the fourteenth amendment. It was reasoned that if the courts awarded damages for such a breach the result would be either a refusal to sell restricted property to members of a restricted race or the imposition of a higher sale price on those restricted to offset the damages which the seller may incur, thus denying those restricted the right to purchase, own and enjoy property on the same terms as others. See also Hurd v. Hodge, 334 U.S. 24 (1948), a case illustrating adherence to the policy established by Shelley v. Kraemer.

35. Compare Horowitz, The Misleading Search for "State Action" Under The Fourteenth Amendment, 30 So. Calif. L. Rev. 208, 212, 213, 215 (1957).

It is evident that the policy of liberal construction is being followed. *Brown v. Board of Educ.* has set the policy for desegregation and integration.[36] The holdings, conclusions, logic, implications, meanings and language of the cases discussed herein are "signposts on the road" toward the disintegration of the strict and conventional interpretations of the fourteenth amendment. Policy and interpretation have supplanted application with respect to the fourteenth amendment.[37]

36. See note 23 supra.

37. "All law, even constitutional law, is not static, but progressive, and is to be construed with respect to sound economic conditions, and an enlightened public policy." 16 C.J.S., Constitutional Law § 17 (1956).