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from people outside their own organization.⁸³ Such a situation works a great hardship on the individual innovator who lacks the necessary capital to exploit his own inventions. In such a case, the man who develops the idea is faced with a dilemma: should he disclose it without the assurance of a confidential relationship, or keep it to himself and never realize the fruits of his labor?⁸⁴ Such a Hobson's choice would not be forced on this valuable source of creative ideas if businessmen knew that the courts would impartially determine the relative rights of the parties upon termination of confidential relations. In short, the courts should balance their tendency toward "enforcing increasingly higher standards of fairness or commercial morality in trade" with the need for the contributions of individual inventors toward the "progress of science." By granting relief only to the extent of the rights of the parties involved, such a balance could be more effectively achieved.

EQUAL PROTECTION AND DISCRIMINATION IN PUBLIC ACCOMMODATIONS

The most controversial of the proposals before the present session of the United States Congress is a bill to eliminate discrimination in those public accommodations, specifically hotels, motels, retail and service establishments, affecting interstate commerce.¹ Since *Gibbons v. Ogden*,² congressional power

83. How To Sell An Idea, *Changing Times*, December, 1957, pp. 23-25; Ideas from Outsiders Can Be Dangerous, *Chemical Week*, August 17, 1957, pp. 108-18.

84. One major company, Johnson & Johnson, requires agreement to the following conditions before it will accept a suggestion from someone outside the company:

CONDITIONS OF SUBMISSION

1. The company does not solicit suggestions, and sending this policy folder does not constitute an invitation to disclose an idea.
2. No suggestion will be considered unless it is submitted in writing. Material submitted will not be returned, and the person forwarding it should retain a duplicate.
3. No suggestion will be accepted on the basis of a confidential relationship, or under a guarantee that the idea shall be kept secret, or on condition that the company shall agree to terms of compensation before it knows the suggestion.
4. A patented idea, or one for which a patent application has been filed, will only be considered on the basis that the submitter will rely exclusively on his rights under the Patent Statutes. (In the case of a patentable idea, it is suggested that the submitter protect himself by filing a patent application.)
5. In the case of an idea which has not been patented and for which no patent application is pending, the company must be the sole judge of the value of the idea to it after an evaluation on the merits. In no event shall the payment for such an idea exceed \$1,000.
6. The company shall not be obligated to give reasons for its decision or to reveal its past or present activities related to the submitted idea. Negotiating or offering to purchase an idea shall not prejudice the company nor be deemed an admission of the novelty, priority or originality of the idea.

1. S. 1732, H.R. 7152, 88th Cong., 1st Sess. (1963), are the separate versions. By way of compromise, H.R. 7152 has been amended, and now closely approximates the Senate Bill.

2. 22 U.S. (9 Wheat.) 1 (1824).

over interstate commerce has been said to be plenary.³ There is no longer any semblance of doubt as to the power of Congress to regulate hotels, motels and retail establishments⁴ or to impose on them restrictions proscribing racial discrimination, so long as their activities affect interstate commerce.⁵ Difficulties may be encountered, however, in determining whether a particular public accommodation sufficiently affects interstate commerce so as to sanction federal regulation.⁶ In close cases there may be a tendency to construe the statute so as to preclude all doubt as to its constitutionality. By so doing, the statute, however far Congress may intend it to reach, will be restricted in its application.⁷

I. THE STATE ACTION REQUIREMENT: ORIGIN AND DEVELOPMENT

The alternative constitutional basis most frequently suggested is the fourteenth amendment provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A law based on the fourteenth amendment would have the advantage of outlawing discrimination even in local businesses having no connection with interstate commerce, but at the same time the courts would face the problem of finding "state action," as that phrase was used in the *Civil Rights Cases*⁸ which declared unconstitutional a law very similar to that now under consideration. The Civil Rights Law of 1875 guaranteed "the full and equal enjoyment of the accommodations,

3. The Supreme Court described congressional power over commerce as the ability "to limit and restrain it at pleasure . . . [which] power must be exclusive . . ." *Id.* at 227. See *United States v. Darby*, 312 U.S. 100, 111 (1941).

4. See Fair Labor Standards Act, 75 Stat. 71 (1961), 29 U.S.C. § 213(a)(2)(ii) (Supp. IV, 1963). Since it was necessary in this section to exempt hotels from the act, one may conclude that such hotels may be engaged in interstate commerce. A retail sale falls within interstate commerce when the contract requires shipment of the buyer's goods to his out of state residence, *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 292 (1921), or when it is made after the seller transports goods into a state for the purpose of sale, *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 521 (1904). The same is true when the sale is made prior to the buyer's transporting the purchase out of state, *United States v. Rock Royal Co-op.*, 307 U.S. 533, (1939), when it is solicited from without the state, *Asher v. Texas*, 128 U.S. 129 (1888), and when the seller imports goods to sell to residents of his state, *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 447 (1898).

5. The Interstate Commerce Act, which contains a section outlawing discrimination in general on interstate carriers, has been interpreted as outlawing racial segregation. *Boynton v. Virginia*, 364 U.S. 454 (1960) (a bus terminal lunch counter serving interstate travelers held within the act); *Mitchell v. United States*, 313 U.S. 80 (1941) (railroad forced to contract with Negro to provide him Pullman service).

6. See *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The Court failed to find a sufficient effect on commerce in the operation of taxis which spent a large part of their time delivering passengers to terminals to embark on interstate journeys. *Id.* at 230-34.

7. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Court decided that although the provision that extends the National Labor Relations Act to all business "affecting" commerce could be read literally to embrace all business and would thus be unreasonable and unconstitutional, the words should be interpreted to include those businesses which clearly affect commerce. *Id.* at 30-33.

8. 109 U.S. 3 (1883).

advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement"⁹ It made no mention of state action. The Supreme Court, Mr. Justice Harlan dissenting,¹⁰ held that since it addressed itself to individuals acting as such, the law exceeded the constitutional authority of Congress. Mr. Justice Bradley, writing for the Court, stated:

Individual invasion of individual rights is not the subject-matter of the [fourteenth] amendment. . . . It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial¹¹

And further,

it is absurd to affirm that . . . because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection.¹²

From the time of the *Civil Rights Cases* to the present, the effective scope of the equal protection clause has been constantly expanded, but the "state action" test has never been seriously questioned by the courts. The elaborate rationalizations that have been devised to find state action, in order to extend the protection of the fourteenth amendment, have only served to make the requisite all the more "firmly embedded in our constitutional law."¹³ Even the cases which have gone farthest in extending the protection of the fourteenth amendment to new areas have done so in terms of the "state action" test.

It must be remembered, however, that the Court in the *Civil Rights Cases* had no occasion to lay down any detailed criteria for determining whether state action was present or not. The law considered in those cases made no mention whatsoever of the states or their involvement in the proscribed activities. Thus courts have had considerable leeway in defining "state action." As might be expected, no precise formula has ever been established, and the test is always stated in broad terms. A recent decision declares that: "[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has . . . become involved in it."¹⁴

These broad definitions, however, give little or no inkling of the wide variety of situations in which state action has been found to exist. State action was found to exist where a state merely enforced, through its judiciary, a racially re-

9. Ch. 114, § 1, 18 Stat. 335 (1875).

10. It is ironic that the lone dissenter was the first Mr. Justice Harlan, who argued for a more liberal interpretation of the amendment. The present Mr. Justice Harlan has tended to be more conservative than the rest of the Court. See, for example, his concurring opinion in *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

11. 109 U.S. at 11.

12. *Id.* at 13.

13. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

14. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). *Accord*, *Peterson v. City of Greenville*, 373 U.S. 244, 247 (1963).

strictive covenant among private individuals.¹⁵ Acts of state officials have been held to be acts of the state even when performed in clear violation of the laws of the state.¹⁶ The segregated seating rules of a municipally franchised bus company are acts of the state when criminal sanctions are provided for their violation,¹⁷ and one operating a business on property leased from the state may, under certain circumstances, be forbidden to discriminate.¹⁸ The Supreme Court has implied in the latter situation that the state was under a positive duty to require a clause in the lease forbidding discrimination.¹⁹ A state has similarly been held to be under a positive duty to act to protect individuals from mob violence,²⁰ thus, in effect, being guilty of unconstitutional state action in its very inaction.

In *Peterson v. City of Greenville*²¹ the mere existence of a municipal segregation ordinance (which was, of course, void and which the authorities did not attempt to enforce) was held sufficient to invalidate the convictions of a group of "sit-in" demonstrators found guilty, under a general trespass statute, of having refused to leave a restaurant after having been requested to do so by the owner. In *Lombard v. Louisiana*,²² decided the same day, the Court went further and held that the public statements of city officials in support of segregation constituted sufficient state action to invalidate similar trespass convictions, even in the absence of a municipal segregation law.

The last two cases probably represent the farthest limit to which the "state action" concept has thus far been stretched, and are likely to foster the impression that the decisions applying the fourteenth amendment to racial questions are founded more in policy than in logic. In *Peterson* the Court said that the lunch-counter management "in deciding to exclude Negroes, did precisely what the city law required."²³ But a careful reading of the ordinance shows that it merely forbade the management to "furnish meals" to Negroes at the same counter with whites;²⁴ their mere presence might have been tolerated without violating the ordinance. The Court presumably considered this distinction to be insignificant, as it well might if the majority opinion, like the concurring opinion of Mr. Justice Harlan, had been based upon the actual coercive effect of the ordinance. But the majority explicitly refused to enter into a discussion of what influence the ordinance had upon the manag-

15. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

16. See *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (judge's illegal exclusion of Negro jurymen was state action).

17. *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960).

18. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

19. *Id.* at 720.

20. *Lynch v. United States*, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951) (police failed to protect arrested persons from Ku Klux Klan mob); *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943) (sheriff failed to perform common-law duty of keeping the peace).

21. 373 U.S. 244 (1963).

22. 373 U.S. 267 (1963).

23. *Id.* at 248.

24. *Id.* at 246.

er's decision, on the ground that this decision had been "removed . . . from the sphere of private choice."²⁵ Clearly, this can only be said of the manager's decision not to *serve* Negroes; the decision to *exclude* them, however much it may have been influenced by the ordinance, was still very much within the sphere of private choice. And, of course, it is the latter decision that is relevant to a prosecution for refusing to leave after being ordered to do so, since the charge could never have arisen if the management had chosen to accept the economic loss involved in allowing the demonstrators to remain.

It may be worthy of note that the recent cases tend to avoid the words "state action" in favor of phrases having somewhat broader connotations, such as "state participation and involvement"²⁶ and "coercion."²⁷ The meaning of the new phrases differs only slightly, if at all, from that of the old, although the shift in terminology might conceivably presage a still greater attenuation of the state action requirement.

More significant than the change in semantics, and perhaps more so than the findings of state action in the cases above, is the absence of Supreme Court holdings on the negative side of the issue. There is not a single recent case unequivocally holding that the facts did not show state action and that the transaction in question was therefore beyond reach of the fourteenth amendment. Thus, we can sometimes say with certainty that a given situation *does* involve state action, but we can only rely on inference in saying that a given situation does *not* involve state action.

II. BASES FOR FINDING STATE ACTION

The steady diminution of the "state action" requisite has given rise to a number of arguments which might plausibly be used to defend the constitutionality of a public accommodations measure, and which might even be used to accomplish most of the bill's objectives through decisional law. These arguments vary not only in their legal validity, but also in the scope of activity that would be covered by laws or decisions based on them.²⁸

A. *State Enforcement*

One of the most far-reaching theories finds sufficient state action in the mere enforcement by the state of a private discriminatory choice. This theory relies principally upon *Shelley v. Kraemer*,²⁹ which held that a state court could not constitutionally enjoin a homeowner from selling his property to a Negro in

25. *Id.* at 248.

26. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 724 (1961).

27. *Lombard v. Louisiana*, 373 U.S. 267, 273 (1963).

28. The "nature of the act" argument, for example, which would extend the strictures of the fourteenth amendment to any activity affected with a substantial public interest, would obviously cover a greater number of activities than the "state property" argument, which would extend only to businesses receiving the benefit of the use of public property under a lease or franchise. On the other hand, the latter argument has a much firmer foundation in the cases.

29. 334 U.S. 1 (1948).

contravention of a racially restrictive covenant. The Court, in finding that the judicial action denied the prospective buyers equal protection of the law, emphasized that the owner himself was willing to sell and that, but for the intervention of the state through its judiciary at the suit of a covenantee, the buyers would have obtained possession of the property without hindrance.³⁰ The offense of the state was that it "made available . . . the full coercive power of government to deny to petitioners, on the ground of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell."³¹

Thus, it is not necessary that the state itself initiate or inspire the original discriminatory act; it may be enough that the state enforce a private discriminatory choice. *Shelley*, however, is not necessarily authority for the proposition that the state cannot enforce in any way a private choice based on discrimination. A distinction could undoubtedly be based upon the fact that *Shelley* did not involve a conflict between an individual demanding protection against discrimination, and a present owner of property in which that individual demanded rights. *Shelley*, in other words, involved a suit to enjoin a sale to a prospective Negro purchaser and not a suit by a Negro to annul the restrictive covenant or to compel the present owner to convey to a person with whom he chose not to deal. Another distinction, possibly more important, may be found in the fact that the state's enforcement of the covenant involved its adoption of a discriminatory standard in a much more formal manner than in the ordinary public accommodations case. In *Shelley*, the state court, taking official cognizance of a discriminatory agreement, consciously *carried out the discrimination*. It did not merely ratify the effect of a prior act of discrimination by a private individual. This is a case where the "State makes prejudice or intolerance its policy and enforces it . . ."³² However, in an instance where the state court convicts under a general trespass statute, it may be aware of the discriminatory standard behind the exclusion, but need not incorporate that standard into its own judicial processes in order to determine the result of the case.

This distinction may be clarified by considering one situation where the *Shelley* doctrine *might* be relevant to a public accommodations case. Let us suppose that "sit-in" demonstrators were convicted, not for having refused to leave, but for having entered after being forbidden to do so. Let us further suppose that the defendants were forbidden to enter only by a sign reading "Whites Only." In this situation, the fact that the defendants were Negroes would be an element of the proof, as would the discriminatory sign. The state court could not possibly convict without taking both into account, just as the state court in *Shelley* could not decide the case without considering both the terms of the discriminatory covenant and the potential buyers' race.

There is no apparent reason why the *Shelley* doctrine (whether or not limited

30. *Id.* at 19.

31. *Ibid.* The Court explicitly noted that the covenant itself does not violate the Constitution. *Id.* at 31.

32. *Garner v. Louisiana*, 368 U.S. 157, 178 (1961) (concurring opinion).

as suggested above) should not be applied to types of state action other than that of the state courts. An arrest or prosecution, for example, is another way in which the state can enforce the discriminatory choices of private persons.

A case often mentioned in conjunction with *Shelley* is *Marsh v. Alabama*,³³ which reversed a state trespass conviction on the ground that it violated the first amendment guarantees of freedom of press and religion. The defendant had attempted to distribute religious literature in a privately owned town over the objection of its corporate owner. The opinion emphasized the public nature of the property, and asserted that this public nature gave rise to certain limitations on the ordinary rights of property owners. Thus, it is clear that "the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."³⁴ Surely, this does not mean that the state is forbidden in any case to enforce a property right so as to enable a private owner to do what the state is forbidden to do directly. For example, although the state could not pass a law decreeing that no Negro would be allowed to enter the home of a white person, it may enforce the property right of a private home owner to exclude Negroes. Thus it is an open question, not to be decided by precedents involving direct state action, under what circumstances the state's enforcement of a private property interest will be considered to deny equal protection. It is difficult to draw any conclusions from *Marsh* on this point, due to the great weight there given to the "preferred position" of first amendment rights. It might even be argued that the "boundary" placed upon the state's power of enforcing property interests was imposed primarily by the *first* amendment, and by the *fourteenth* only in the sense that that amendment applies the first to the states.³⁵

Here, as elsewhere, in arguing against the application of the case to the equal protection clause, it is impossible to cite Supreme Court holdings; but the *dicta* generally classify *Marsh* among cases peculiarly involving first amendment problems.³⁶

B. State Property

An argument less speculative than the "state enforcement" theory, but not so far-reaching, is the doctrine that holds the state responsible for the conduct of those to whom it grants leases or franchises. A leading case in this area is *Burton v. Wilmington Parking Authority*³⁷ which decided that a state could not constitutionally permit the owner of a private business to discriminate, when that business was on property leased from a state agency and was operated in close connection with the public facilities of that agency in the same building.

33. 326 U.S. 501 (1946).

34. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

35. This seems to be the interpretation of *Marsh* adopted by the Deputy Attorney General of Maryland in oral argument before the Supreme Court in *Griffin v. Maryland*, a yet undecided "sit-in" case. 32 U.S.L. Week 3146 (U.S. Oct. 22, 1963).

36. E.g., *Dennis v. United States*, 341 U.S. 494, 508-09 (1951) (dictum); *Saia v. New York*, 334 U.S. 558, 562 (1948) (dictum).

37. 365 U.S. 715 (1961).

The Court carefully avoided laying down any general rule, so that we cannot say with certainty that any facilities leased from the state by a private business are subject to the fourteenth amendment. All that the Court held is "that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the lease itself."³⁸

In a somewhat analogous case, *Boman v. Birmingham Transit Co.*,³⁹ the court of appeals reversed breach-of-the-peace convictions of a group of Negroes, founded upon an ordinance making it a crime to disobey the reasonable seating regulations of a bus company enjoying a special franchise from the city. The company had adopted the requirement of segregated seating previously imposed directly by city ordinance. The court of appeals, giving great weight to the fact that the company enjoyed a special "privilege" (defined as such by the state constitution) of using the city streets for private profit, held the company rules to be state action.

The limits of the state property doctrine embodied in these two cases are not yet defined. It is doubtful, however, that a public accommodations law of any considerable scope could be founded upon this doctrine taken by itself.

C. State Licensing and Regulation

These same cases, however, are frequently cited in connection with a theory of substantially greater potential which seeks to place a business licensed by the state on a footing with the businesses in *Burton* and *Boman*. Thus, Mr. Justice Douglas concluded that a restaurant is an "instrumentality of the State" because of the state's "licensing . . . surveillance [and] . . . broad powers of visitation and control."⁴⁰ In his concurring opinion in *Garner v. Louisiana*,⁴¹ he could "see no way whereby licenses issued by a State to serve the public can be distinguished from leases of public facilities . . .,"⁴² citing *Burton*. But the distinguishing characteristic of a franchise, and implicitly of a lease, is nowhere more clearly stated than in *Boman*. Noting that the bus company's use of the streets was a privilege rather than a right, the court distinguished the public utility which holds what may be called a "special franchise," from an ordinary business corporation which in common with all others is granted the privilege of operating in corporate form but does not have that special franchise of using state property for private gain to perform a public function.⁴³

Since even the "ordinary business corporation" owes its existence to the state, the business which is merely licensed and not incorporated is one step further removed from the public utility or other business using state property.

The distinction between "franchise" and "license" was underscored by the

38. *Id.* at 726.

39. 280 F.2d 531 (5th Cir. 1960).

40. *Lombard v. Louisiana*, 373 U.S. 267, 282-83 (1963) (concurring opinion).

41. 368 U.S. 157 (1961).

42. *Id.* at 184.

43. 280 F.2d at 535.

New York Court of Appeals in *Madden v. Queens County Jockey Club*.⁴⁴ There the plaintiff argued that his arbitrary exclusion from a race track violated the fourteenth amendment. To satisfy the state action requirement he argued that "the license to conduct horse racing is a franchise to perform a public purpose."⁴⁵ In rejecting this argument the court said:

A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right

A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of the public welfare. The grant of a license to promote the public good, in and of itself, however, . . . neither renders the enterprise public nor places the licensee under obligation to the public.⁴⁶

The United States Supreme Court denied certiorari.⁴⁷

In *Williams v. Howard Johnson's Restaurant*,⁴⁸ a federal court of appeals rejected the licensing argument. The Negro plaintiff, suing the restaurant on the ground that it had violated his rights under the fourteenth amendment in excluding him from the premises, argued that "the state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities."⁴⁹ Speaking of the licensing law of Virginia, the court said: "The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served."⁵⁰

Williams was followed by *Slack v. Atlantic White Tower Sys., Inc.*,⁵¹ involving basically the same facts and arguments. Here the plaintiff also relied upon the fact that the defendant was a *foreign corporation*, admitted and licensed to do business by the State of Maryland. The court dismissed this argument as lacking support in the cases⁵² and rejected the licensing argument on much the same ground as in *Williams*, an additional factor being the complete absence of regulatory provisions of any kind in Maryland's restaurant licensing statute.⁵³

The strongest direct support for the licensing and regulation argument is to be found in *Public Util. Comm. v. Pollak*.⁵⁴ The action was brought by passengers of the mass transit lines of the District of Columbia, who alleged that certain practices of the Capital Transit Company violated their rights under the first and fifth amendments. The preliminary question of whether or not

44. 296 N.Y. 249, 72 N.E.2d 697, cert. denied, 332 U.S. 761 (1947).

45. Id. at 254, 72 N.E.2d at 698.

46. Id. at 255, 72 N.E.2d at 699.

47. 332 U.S. 761 (1947).

48. 268 F.2d 845 (4th Cir. 1959).

49. Id. at 847.

50. Id. at 848.

51. 181 F. Supp. 124 (D. Md.), aff'd per curiam, 284 F.2d 746 (4th Cir. 1960).

52. Id. at 129.

53. Ibid. The law, as set forth in the opinion, appears to be purely a revenue measure.

54. 343 U.S. 451 (1952).

the federal government could be held responsible for the practices of the company was answered affirmatively by the court of appeals, which based its finding on the fact that the company enjoyed a special monopolistic franchise from Congress, and that a federal regulatory agency, having conducted a formal inquiry into the practices, concluded that they were legally permissible and not contrary to the public welfare.⁵⁵ The Supreme Court, in sustaining the lower court on this question, relied on the fact "that Capital Transit operates its service under the regulatory supervision" of the congressional agency, and, more particularly, on the fact of the federal investigation and decision.⁵⁶ These factors were considered sufficient to establish a "relation" between the federal government and the company activities to which objection was made.⁵⁷

The peculiar facts of the *Pollak* case (particularly the monopolistic position of the company under congressional franchise) make it difficult to draw any conclusions from the Court's decision. But the case is not inconsistent with lower court decisions, which, insofar as they have considered the question of state licensing and regulation, have taken into account the closeness of the regulatory activities to the acts in question. In *Pollak* the regulation could not possibly have been closer, since it touched not only the same general area, but the very controversy before the Court.

From a purely logical viewpoint, the weakness of the licensing argument, insofar as it rests upon an analogy with the leasing and franchise cases, is that it confuses words with realities. We speak of the state as "granting" a license just as we speak of it "granting" a lease or franchise. The analogy between these transactions is purely verbal; their substance is quite different. Licensing is a device that gives the state certain procedural and administrative advantages coercing those whose activities present a threat to the health or safety of the community. If licensing were to be abolished, the same end might be accomplished (though perhaps less efficiently) by instituting separate court actions against violators of local regulations. In short, a system of "granting" licenses can hardly be called a favor to the businessman. Its object is to place limitations on him. The same cannot be said of the granting of a franchise or lease, which involves giving one corporation or group the use of public property denied to all or most of the rest of the populace. Since the act of incorporation, which creates a legal person where there was none before, has not been considered by the courts to "involve" the state in a corporation's discriminatory acts,⁵⁸ it would seem, a fortiori, that the granting of a license should not do so.

In practical terms, the weakness of the licensing argument would probably

55. *Pollak v. Public Util. Comm'n*, 191 F.2d 450 (D.C. Cir. 1951).

56. 343 U.S. at 462.

57. *Id.* at 463. Although the Government was thus held to be responsible for the practices, it was ultimately decided that they were not violative of the first or fifth amendments.

58. *Eaton v. Board of Managers*, 164 F. Supp. 191 (E.D.N.C.), *aff'd*, 261 F.2d 521 (4th Cir. 1958), cert. denied, 359 U.S. 984 (1959) (incorporated hospital not subject to fourteenth amendment). See *Slack v. Atlantic White Tower Sys., Inc.*, 181 F. Supp. 124, 129 (D. Md.), *aff'd per curiam*, 284 F.2d 746 (4th Cir. 1960) (admission of foreign corporation does not make state responsible for its discriminatory policy).

become apparent as soon as it was sanctioned by a statute or judicial decision. States wishing to evade the nondiscrimination requirement would abandon licensing and simply prosecute individuals who violated health and safety regulations. The analogy to the lease and franchise cases thus being eliminated as a basis for finding state action, the only remaining nexus between the state and the discrimination would be the regulatory activity itself—a weak link indeed. It is difficult to see how the state, by prosecuting the owner of restaurant *A* for serving adulterated food, thereby involves itself in state action denying equal protection of the law to patrons of segregated restaurant *B*.

D. *Inaction as State Action*

Let us suppose, however, that the courts did find sufficient state action in such spasmodic prosecutions alone, and that the states thereupon abandoned this as well as licensing. Could it then be argued that such total abandonment was a subterfuge, the purpose and effect of which was to perpetuate segregation? For the very act of abandoning regulation might be found to constitute state action sufficient to involve the state in the subsequent discrimination. Similarly, it could be argued that the refusal to adopt regulation in an area of activity in which regulation was customary would be sufficient state action.⁵⁹

In one recent case, the Supreme Court was faced squarely with the question of whether a state could abandon control for the precise purpose of avoiding the requirements of the fourteenth amendment. The Court had previously decided that a municipal agency could not discriminate in the admission of pupils to a college it operated, even though it was merely carrying out the terms of a private trust fund by which the institution was financed.⁶⁰ The case was remanded to the state court for "action not inconsistent with this opinion." The state court proceeded to remove the state agency as administrator of the trust and to place it under the control of private administrators, who continued the discriminatory admissions policy. This was done under the power of the state court to transfer control of a trust whenever the trustee becomes incapable of fulfilling its terms. Thus, the avowed objective of the state court's action was to make possible the continuance of the discrimination. The Pennsylvania Supreme Court upheld this action in *In re Girard College Trusteeship*.⁶¹ Subsequently, the United States Supreme Court denied review.⁶²

The case most nearly supporting the contention that failure to regulate may be state action is *Terry v. Adams*.⁶³ There it was held to be a violation of the fifteenth amendment for a private political club to exclude Negroes from a voice in its designation of candidates, where selection by the club was for all practical purposes equivalent to election to office. It is questionable, however, whether the application of this holding to state action under the fourteenth amendment

59. See Manning, *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition*, 27 *Fordham L. Rev.* 201, 206-07 (1958).

60. *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam).

61. 391 Pa. 434, 138 A.2d 844 (1958).

62. 357 U.S. 570 (1958) (per curiam).

63. 345 U.S. 461 (1953).

is warranted. In *Terry*, state regulation or lack of it, and the question of whether such regulation was customary or not, might have been ignored entirely in reaching the result. What was determinative was the particular *activity* in question, *i.e.*, the running of political primaries. *Terry* illustrates "the principle that governmental action may include the action of a private person who performs a governmental function . . ." ⁶⁴ The state cannot divorce itself from responsibility for the political mechanisms upon which it depends for its own existence. Large-scale political activities are so closely connected with the state as to be virtually a part of it, and hence subject to the fourteenth and fifteenth amendments.

E. Nature of the Act

Thus viewed, *Terry* is not so relevant to the licensing argument, or even to the theory of state inaction as constituting "state action," as it is to what may be called the "nature of the act" theory. This argument is as old as the *Civil Rights Cases* themselves, and more far-reaching than any of the more commonly accepted arguments. The Solicitor General of the United States, in defending the constitutionality of the public accommodations law in the *Civil Rights Cases*, contended that a hotel manager, in denying accommodations to a Negro, "did not act in an exclusively private capacity, but in one devoted to a public use, and so affected with a public, *i.e.*, a State interest."⁶⁵ Implicitly rejected in the *Civil Right Cases*, it has found relatively little support since. One court of appeals recently rejected the argument as applied to a hospital in *Eaton v. Board of Managers*.⁶⁶ It was held that a hospital was not violating the fourteenth amendment in discriminating against some of its Negro staff members, regardless of the importance of the institution in the community and of past state participation in its financing and operation. Over the objection of three Justices, the Supreme Court denied certiorari.⁶⁷

III. CONCLUSION

The potential scope and validity of public accommodations legislation under the fourteenth amendment is largely speculative. There seems to be no question but that the federal government could provide more effective remedies in the situations that have already been found to involve unconstitutional state

64. *Barnes v. City of Gadsden*, 268 F.2d 593, 598 (5th Cir. 1959) (opinion concurring in part and dissenting in part).

65. 109 U.S. at 6. For more recent examples of the same line of argument, see the concurring opinion of Mr. Justice Douglas in *Lombard v. Louisiana*, 373 U.S. 267, 274 (1963); and *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962). In the latter case, summary judgment was given for a Negro plaintiff seeking admission to Tulane, on the ground that the public nature of such an educational institution made it subject to the fourteenth amendment. The same court, differently constituted, subsequently vacated the summary judgment. On appeal of the procedural question, 306 F.2d 489 (5th Cir. 1962) (*per curiam*), this was held to be within the district court's discretion. After a trial on the merits, the district court held for the defendant university. 212 F. Supp. 674 (E.D. La. 1962).

66. 261 F.2d 521 (4th Cir. 1958).

67. 359 U.S. 984 (1959).