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State Responsibility under the Fourteenth Amendment: An Adherence to Tradition

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nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdic-
tion the equal protection of the laws.¹

Only eleven years after Secretary Seward had certified that the four-
teenth amendment had become a part of the Constitution, Mr. Justice Strong speaking for the United States Supreme Court in Ex parte Virginia² and speaking of the due process and equal protection clauses and of the thirteenth amendment³ said,

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possiblity of oppression by law because of race or color.⁴

When is equality perfect? When can we be satisfied that we have removed “all possibility of oppression”? Most certainly the language of Mr. Justice Strong is of the “liberal” tradition, what Professor Morse—we might reasonably infer from the preceding article—might label a “policy” declaration. And it is equally as certain that the Justice drew a radius for this protective circle far longer than any ever measured off by the Congress of the United States or ever actually recognized by any state or federal judiciary. The language of the Court in Ex parte Virginia underscores the consummate sophistry of Plessy v. Ferguson,⁵

¹ U.S. Const. amend. XIV, § 1.
² 100 U.S. 339 (1879).
³ U.S. Const. amend. XIII, § 1. “Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”
⁴ 100 U.S. at 344-45. Mr. Justice Strong mentions only the civil rights of the col-
ored race. The fourteenth amendment is not limited to the proscription of racial dis-
crimination. The Justice was speaking only in the context of the case then before the Court, a case wherein a state court judge excluded Negroes from jury service. Ex parte Virginia is discussed more fully infra p. 204. The due process and equal protection clauses, quoted at the outset, make no mention of the colored race or racial discrimina-
tion. “Persons” are protected. The clauses protect all persons of any class or race, whether they be Arab, Japanese, or Chinese, Jews, Christians or atheists, aliens or citizens, residents or nonresidents, men or women, individuals or corporations. See, e.g., Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); Yick Wo v. Hopkins, 118 U.S. 356 (1885); County of Santa Clara v. Southern Pac. R.R., 18 Fed. 385 (C.C. D. Cal. 1883).
⁵ 163 U.S. 537 (1896). Plessy v. Ferguson established the “separate but equal” doc-
and accentuates the genuine wisdom of *Brown v. Board of Educ.* What was true in 1879 when the court decided *Ex parte Virginia* was true in 1896 when it decided *Plessy*—that the fourteenth amendment required equality of persons, not of school facilities, or transportation facilities or recreational facilities. Indeed, it was obvious in 1938 when the Court announced *Missouri ex rel. Gaines v. Canada* that *Plessy* was destined for eventual reversal. For it was palpably unwise and contradictory for a court, which disdained to become involved with "the witty diversities of the law of sales," to sit as an educational epicure and to plunge into the diversities, the qualifications, the virtues or vices of separate academic institutions.

If Professor Morse would affix the label of "policy decision" on *Brown v. Board of Educ.* then the same stamp must be impressed upon the "perfect equality" phrasing of *Ex parte Virginia*. And that is to admit that *Brown* does not bespeak a "new liberalism" but rather an old sentiment suggested by Mr. Justice Strong over 68 years ago.

That is why, initially at least, I question the validity of Professor Morse's assertion that recent decisions have avoided "the restriction of the fourteenth amendment to state action or have attenuated the fiction of state action" and that "new meanings" have been appended to that deceptive phrase. If Mr. Justice Strong's language was acceptable to the Court in 1879 can we speak of the "disintegration of the strict and conventional interpretation of the fourteenth amendment"? Or is it accurate to reflect that "policy and interpretation have supplanted application with respect to the fourteenth amendment?"

I am not certain that I comprehend what Professor Morse means by "policy" or by "application." If by "application" is meant an adherence to stare decisis and an adjustment of the due process and equal protection clauses to new situations in reasonable accord with the original trine, holding that the fourteenth amendment was not violated by racially segregated state operated schools so long as Negroes were afforded equal, though separate, school facilities.

6. 347 U.S. 483 (1954). This case held that the very segregation of Negroes in schools apart from whites violated the equal protection clause of the fourteenth amendment. On the same day the Court also announced *Bolling v. Sharpe*, 347 U.S. 497 (1954), holding that segregated public schools in the District of Columbia violated the due process clause of the fifth amendment.

7. 305 U.S. 337 (1938), holding, pursuant to the *Plessy* doctrine, that the state of Missouri was required to provide equal law school facilities within the state of Missouri, and that attendance at an out-of-state law school could not be equated with attendance at a Missouri law school.


9. Id. at 200.

10. Ibid.

11. The equal protection clause prohibits only such classification as is unreasonable
intendment of the fourteenth amendment, I cannot see where "application" has been abandoned by the Court. If by "policy" is meant that a new liberalism has engulfed the concept of state action, again I demur. Certainly a "perfect equality of civil rights" is the plain intendment and the combined effect of the various clauses of the fourteenth amendment.

**WHAT IS STATE ACTION**

It is not Professor Morse's undertaking to re-evaluate *Brown v. Board of Educ.* or to revisit *Plessy*. He has no disagreement, so far as I can perceive, with the Court's definition of discrimination. He accepts *Brown* and is ready to entomb *Plessy*. But with that acceptance he reminds us that the due process and equal protection clauses restrict the states alone and he therefore asks, what is state action? He puts the entire emphasis on the word "action." His is a search for a distinction between activity and inactivity, citing the *Civil Rights Cases* as posing the distinction between the antonyms. But the *Civil Rights Cases* did not so much distinguish between state action and state inaction as it did between state activity and private activity.

Overemphasizing the word "action" plays a double fault. It adds a word to the fourteenth amendment which simply is not there, and it tends to confuse the real issue. Surely the state has acted, in the conventional use of the word, when its legislature refuses to enact a proposed civil rights law. And the state has acted when its legislature repeals existing civil rights legislation. A state acts when a judge finds that there is no statute and no rule of common law which would require a private club to admit Negroes. The state, through its agents, has, in the words or arbitrary. See, e.g., *Tigner v. Texas*, 310 U.S. 141 (1940); *Radice v. New York*, 264 U.S. 292 (1924); *Muller v. Oregon*, 208 U.S. 412 (1908); cf. *Terrace v. Thompson*, 263 U.S. 197 (1923). The due process clause also prohibits unreasonable and arbitrary legislation. Mr. Justice Roberts wrote in *Nebbia v. New York*, 291 U.S. 502, 537 (1934), "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio." It would follow, therefore, that any denial of equal protection is ipso facto a denial of due process, conceding, as indeed we must, that discrimination against a person's political or civil rights by reason of race, religion or creed is per se unreasonable. Nevertheless, the Court has often returned to an old practice of separating the two clauses. In *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948), for example, Mr. Chief Justice Vinson, after reasoning that judicial enforcement of restrictive covenants based on racial discrimination constituted a denial of equal protection, concluded: "Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law . . . ."

12. Webster defines "action" simply as "the doing of something."

of Mr. Webster, done something. But is the legislature required by the Constitution to enact a particular civil rights law, or any civil rights law at all? Or is it forbidden by the Constitution to repeal existing civil rights legislation? Or is there any constitutional compulsion imposed upon the state court to penalize a private invasion of private rights or enjoin discrimination as between private individuals? "State action" is a handy phrase but it can be beguiling and misleading. When used it must be used with caution, for it is quite conceivable that inactivity, or the refusal to act, or the abdication of sovereign or governmental functions might violate the fourteenth amendment. Suppose, for example, a particular municipality surrendered itself to the mob hysteria of white supremacists. Suppose that Negroes, accused of crime, were systematically subjected to mob-dominated trials conducted by private individuals and were denied by private groups recourse to judicial processes. Would not the abdication of its policing powers by the state, its refusal or failure to protect all its citizens alike, be a denial of equal protection and due process?

Only with the understanding that there might arise situations wherein a state through its abject inactivity has frustrated the fourteenth amendment and only with the antecedent accord that we require neither authorized nor fulsome nor formal enactments and that we seek not a plethora of activity, as one judge characterized it,14 may we ask, what is state action?

The Landmark Decisions of the Supreme Court

Ex parte Virginia

Section five of the fourteenth amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." Pursuant thereto Congress adopted legislation which made unlawful the disqualification, on account of race, color or previous condition of servitude, of any person from grand or petit jury service. It provided that "any officer or other person, charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor. . . ."15 J. D. Coles, a county court judge of Virginia, was indicted in the federal court of that state charged with violating the federal statute. The state statute which authorized Judge Coles to select jurors made no discrimination against members of the colored race. It simply required him to prepare a jury list of inhabitants of the county who were "well qualified to serve as jurors." He, joined by the

State of Virginia, sought release from federal custody by habeas corpus; challenging the constitutionality of the federal statute as applied to state judicial officers.\(^{16}\)

The question thus raised was whether Judge Coles' discrimination was chargeable to the State of Virginia. Was his discrimination a denial by the state of equal protection of the laws? It is to be particularly noted that the state statute under which Judge Coles acted was not discriminatory. Had there been discriminatory legislation pursuant to which Judge Coles acted the case against him would not have been notable for, at the same term the Court had already announced \textit{Strauder v. West Virginia},\(^ {17}\) holding, what was fairly obvious, that a state statute which required the exclusion of colored persons from jury service was per se unconstitutional, and that judicial enforcement of the state law violated the equal protection clause. To this the Court, in refusing Judge Coles' application, added,

A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.\(^ {18}\)

The dissenting opinion\(^ {19}\) of Mr. Justice Field argued that the federal government was constitutionally incapable of interfering with state judicial officers. To this argument the majority gave a most significant reply. It said in effect that it was not the character of the actor but the character of the act which determined the classification or the nature of Judge Coles' conduct. Its language has a modern appeal. It is pregnant with the "new meanings" which Professor Morse has found in \textit{Plummer v. Casey},\(^ {20}\) \textit{Pennsylvania v. Board of Directors}\(^ {21}\) and \textit{Brewer v. Hoxie School District No. 46}.\(^ {22}\) It is a warning to those southern states which, to avoid the effect of \textit{Brown v. Board of Educ.} would surrender

\begin{itemize}
\item \textit{Ex parte Virginia}, 100 U.S. 339 (1879).
\item 100 U.S. 303 (1879).
\item 100 U.S. at 347.
\item Id. at 349. Ex parte Virginia was a six-two decision. Mr. Justice Clifford joined in the dissent. Mr. Justice Hunt did not participate.
\item 353 U.S. 230 (1957).
\item 238 F.2d 91 (8th Cir. 1956).
\end{itemize}
the operation of public schools to private institutions and private agencies. Mr. Justice Strong wrote,

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Coles, selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, etc. Is their election or their appointment a judicial act?23

The court’s fear of finding federal interference with judicial acts is hard to understand. The state itself is not immune from the United States Constitution. Neither are its legislative nor its executive officers. There is no reason why an aura of immunity should envelop its judicial officers even in the performance of judicial functions. Be that as it may, the words of the Court in 1879 suggest some “liberal” answers to some modern problems and foreshadow the shape of things to come.

If our criterion for judicial action is the character of the act and not the character of the actor, might the same not be said of state action? And if the act would be offensive even if “the duty of selecting jurors might have been entrusted to private persons” can the state escape the strictures of the fourteenth amendment by its abdication of customary state functions? Can it immunize itself from the fifteenth amendment24 by giving control of its primary elections to private organizations?25 Can it deed the ownership of its statehouse or its court houses to private parties and disclaim responsibility for the discrimination found therein? Can it avoid due process and equal protection by surrendering the operation of its parks and beaches and transportation facilities? Can it discharge its duty to integrate public schools by removing itself from the field of education? There are certain functions customarily performed by a state or a county or a municipality and when these functions are sur-

23. 100 U.S. 339, 348.
24. The fifteenth amendment provides, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”
rendered to private agencies the very surrender itself must be state action, and the state must continue to bear responsibility for the execution of those functions. Can we not draw such a conclusion from Mr. Justice Strong's _dictum_ in _Ex parte Virginia_? There are also certain functions which the states have undertaken to perform. Perhaps they are not what we once called "governmental" functions, but they have been performed by the state. They have become impressed with the indelible mark of their state origin, and the state cannot abdicate these functions without assuming responsibility for any subsequent "private" discrimination in the discharge thereof.

I am aware, to be sure, that the Supreme Court has lampooned the distinctions drawn between governmental and proprietary functions. I recall what Mr. Justice Frankfurter, with respect to another article of the Constitution, wrote in concluding the Court's opinion in _New York v. United States_:

> So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as 'proprietary' against 'governmental' activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

I would not revive those nagging niceties by which courts were accustomed to distinguish governmental and proprietary functions. What is suggested is that for the purpose of due process and equal protection all distinctions be discarded. There is a logical consistency between Mr. Justice Frankfurter's reasoning in _New York v. United States_ and the Court's refusal in _Ex parte Virginia_ to garb Judge Coles in a robe of judicial immunity. For is it not obvious that a state can act only through its agents, its executive, its legislature, its courts, its administrative tribunals, and whether the act be called sovereign or proprietary, public or personal, whether it be general or private legislation, whether it be the operation of bus lines, or parks or schools or restaurant facilities, whether in so acting the state competes with private enterprises, it is nonetheless state action? And if it is the kind of act customarily done by a state, or an enterprise which the state has originated or once administered, the state cannot shirk responsibility by deeding or leasing the functions to private concessionaires. I would submit that this does no more to state action than the Court's _dictum_ in _Ex parte Virginia_ does to judicial action.

Might we not suggest, therefore, that the search is not for state action, at least not as the word is defined by Mr. Webster, but rather for state

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participation, state responsibility, state favor, state origin, state preference. It does not follow that we must conclude, as one author suggests, that private activities of private origin might grow so immense as to assume public (and, therefore, I suppose, state) proportions or become so affected with a public interest as to impose responsibility upon the state for its operation even without state intervention.

Professor Horowitz suggests, for example, that if the Ford Foundation were to pursue a policy of racial discrimination it would be a denial of equal protection. There is a semblance of support for this reasoning in *Marsh v. Alabama*, but there is a danger too. Pushed to its "dryly logical extreme" this reasoning would require overruling the *Civil Rights Cases*. Every trust, every foundation is touched with a public interest. Need we be reminded of Mr. Justice Robert's warning in *Nebbia v. New York* that there is no closed category of businesses affected with a public interest?

**The Civil Rights Cases**

What has been said thus far presupposes the distinction drawn, four years after *Ex parte Virginia*, between state action and private action. It is on the pivot of the *Civil Rights Cases* that Professor Morse's article turns. The *Civil Rights Cases* held unconstitutional a federal statute which prescribed criminal sanctions for refusing hotel accommodations for reasons of race or color. State law, in these cases, was silent on the subject. In holding that the fourteenth amendment is not concerned with private invasions of private rights, the Court speaking through Mr. Justice Bradley, said,

The first section of the Fourteenth Amendment . . . is prohibitory in its character, and prohibitory upon the States. . . .


28. Ibid.

29. 326 U.S. 501 (1946). This case held the state could not, consistently with the first and fourteenth amendments, impose a criminal punishment upon a person who undertook, contrary to the wishes of the town's management, to distribute religious literature on the premises of a company-owned town. While Mr. Justice Black did note that the private town assumed public responsibilities and became affected with something akin to a public interest, the critical facts were that the appellant was arrested by a state sheriff, prosecuted by a state attorney, and convicted by a state court for the violation of a state statute. Surely then, there was state action. The holding of *Marsh v. Alabama* with respect to religious liberty is almost a perfect analogue to the Court's holding with respect to racial discrimination in *Shelley v. Kraemer*, 334 U.S. 1 (1948) discussed infra p. 211.

30. Note 13 supra.


32. 109 U.S. 3 (1883).
It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws.\textsuperscript{33}

The Justice added that private invasion of private rights is not unconstitutional unless the wrongdoer is “protected in these wrongful acts by some shield of State law or State authority,”\textsuperscript{34} and that the “abrogation and denial of rights . . . for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.”\textsuperscript{35}

The holding of the Civil Rights Cases is cast in sharper relief by the dissent of Mr. Justice Harlan. He argued that congressional legislation proscribing discrimination may assume a direct and primary character and may operate upon the states, their officers and agents and also upon such \textit{individuals and corporations} as exercise public functions and wield power and authority under the state. His argument is that the states have the right to legislate respecting all businesses affected with a public interest, and that by reason of the public nature of the innkeeper’s employment he is forbidden to discriminate against any person seeking admission as a guest.

Mr. Justice Harlan’s argument bears a curious resemblance to the public interest test proposed by Professor Horowitz.\textsuperscript{36} The latter is a refined echo of the former. Since the Harlan dissent is the antithesis of the majority’s holding, it is difficult to reconcile the public interest test with the Civil Rights Cases. The Civil Rights Cases certainly require some affirmative activity or active responsibility imputable to the state. That being so it is reasonable to conclude that the public interest test would require the eventual overruling of the Civil Rights Cases. And it is reasonable to predict that the test would beget a weird progeny of cases drawing shallow shades of distinction between purely private activity and activity affected with a public interest. I rather suspect, recalling the line of cases from \textit{Munn v. Illinois}\textsuperscript{37} to \textit{Nebbia v. New York},\textsuperscript{38} that the terminal point would be the classification of all private foundations, private trusts or private enterprises as foundations, trusts, or enterprise affected with a public interest. And if that is done then the word “state” might just as well be erased from the fourteenth amendment.

\textsuperscript{33} Id. at 10-11.
\textsuperscript{34} Id. at 17.
\textsuperscript{35} Id. at 17-18.
\textsuperscript{36} Note 27 supra.
\textsuperscript{37} 94 U.S. 113 (1876).
\textsuperscript{38} 291 U.S. 502 (1934).
The alternative is to require a finding of active state responsibility for the fourteenth amendment to operate. This responsibility need not emanate from direct and primary action by the state, but may spring from the fact that the activity originated with the state, or received state sponsorship, state aid or state encouragement or, from the fact that the state carried the discriminatory enterprise into execution.

At any rate the holding and *dicta* of the Court in *Ex parte Virginia* and in the *Civil Rights Cases* permit the fixing of some categories of state action under the fourteenth amendment. It was safe enough in 1882 and is still safe today to say that the following three propositions are acceptable to the Supreme Court. The cases decided since 1882 have served simply to perfect the classification.

**Categories of State Action**

*State Origin—State Execution*

A state statute or rule of common law which is in itself discriminatory and which with its discriminatory features is enforced or applied by a state officer violates the fourteenth amendment. This is state participation in the fullest. The discrimination has its origin in state law and it is executed by state officers. *Strauder v. West Virginia* discountenanced just such a situation and the rule of *Strauder* was readily accepted as settled law by *Virginia v. Rives* and *Ex parte Virginia*. The execution may be the work of any agent of the state, legislative, executive or judicial, and it remains state action whether the agent exercises his authority at the state, county or municipal level of government. It is sufficient that the agent’s authority has its ultimate source in state government.

*Private Origin—State Execution*

When state law is silent or even when state law prohibits discriminatory practices, but a state officer performing his state assigned duties is guilty of discriminatory conduct, there is state participation, state action and, therefore, a denial of due process and equal protection. This is the ultimate effect of *Ex parte Virginia*. Although in *Ex parte Virginia* state law was silent, Mr. Justice Strong’s implication was clear that the result would be the same even though the state agent acted in violation of state law. It is enough that the officer or agent acted under color of his office, that he was able to do what he did only because he held state office or state employment. Thus, the state is not the author of the discrimination, that is to say, there is no state statute, common-law rule, judicial rule or executive order which would require the exclusion of Negroes. The discrimination emanates from the individual; it is con-

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39. 100 U.S. 313 (1879).
ceived in the individual's personal prejudices. Had he given vent to his bias in the operation of a private restaurant or a private establishment his discrimination would be free of constitutional restraints. We would then have the Civil Rights Cases. But if he practices his private prejudices under color of his state office the state must assume responsibility because a state agent has executed the discriminatory practice.

Shelley v. Kraemer is perhaps a clearer illustration of this principle. In Shelley the discrimination had its origin in private covenants privately arrived at. The real estate covenants alone were discriminatory, excluding Negroes from the use and occupancy of the land so encumbered. The Supreme Court held that a state court could not, consistently with the fourteenth amendment, enforce the covenants. Though privately conceived, the discrimination was abetted, buttressed, acted upon, and executed by a state officer. There was, therefore, state responsibility for the discrimination. "It is clear," wrote Mr. Chief Justice Vinson, "that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."

It might be argued that Ex parte Virginia is a more "liberal" decision than Shelley v. Kraemer. In Shelley, state law sanctioned the restrictive covenants. In Ex parte Virginia it was assumed that state law forbade the exclusion of Negroes from the jury. We might even argue that in Ex parte Virginia there was no state action at all but rather a failure to act. The state failed to enact legislation or to take appropriate measures to bring to an end the discriminatory practices of its agent. But there was, nevertheless, state responsibility because the state put the officer in a position to discriminate. The Court borrowed, as it were, the "but for" rule sometimes employed as a test of negligence. But for the fact that the state put Judge Coles in a position to discriminate, there would have been no exclusion of Negroes; and but for the active intervention of the state courts, said Mr. Chief Justice Vinson in Shelley v. Kraemer, the negro purchasers would have enjoyed the unmolested occupancy of their homes. Or, perhaps, we have in these cases an over-extended respondeat superior doctrine with responsibility imputable to the state even when the state agent or servant acts in excess of his authority or outside the course of his employment.

State Origin—Private Execution

When the state statute or rule of common law is per se discriminatory, but the offensive act is that of a private individual, there is nonetheless a violation of the fourteenth amendment. Here the discrimination is
created by the state and imposed upon the individual who, thus re-
strained, can refuse to discriminate only at the risk of violating state law. Both \textit{Strauder v. West Virginia} and the \textit{Civil Rights Cases} conceded, though neither case so held, the constitutional responsibility of the state present in such a situation. There is, because of the holding in the \textit{Civil Rights Cases}, an inherent difficulty here. Might we not envisage a scene wherein the state law requires discrimination but the individual, who in his private capacity discriminates, would have done so regardless of state law? Suppose, for example, a state statute forbade innkeepers to lodge colored and white people indiscriminately. May the innkeeper defend by arguing that he would not have offered accommodations to Negroes even in the absence of the state law? It is here incumbent upon the court to declare the state statute unconstitutional, but after the statute has been nullified, any discrimination by the individual would, under the \textit{Civil Rights Cases}, be immune.

In this category of cases concerned with “state origin—private execu-
tion” we should advert to the situation wherein the state is not the source of the discrimination itself but rather the source of the activity or enterprise which is involved in the discrimination. In cases of this type Professor Morse seems to have found his “new meanings” for state action. While there is no landmark Supreme Court decision in point, might we return to the “perfect equality” and the “character of the act, rather than the character of the actor” reasoning of \textit{Ex parte Virginia} already discussed? Might we also revert to the “but for” rule of both \textit{Ex parte Virginia} and \textit{Shelley v. Kraemer}? We speak now of instances where the state entrusts the enterprise to private entrepreneurs and the latter alone are guilty of discrimination. Shall the state share responsibility? Has the state participated in the discrimination? State participation may arise by reason of state ownership of property, or by granting state preferences or by favoring with privileges those who embark upon a course of discriminatory conduct. Unless this transfixes state respon-
sibility, it seems to me, we have not achieved the “perfect equality of civil rights” of which Mr. Justice Strong wrote. I would submit that the Supreme Court admitted as much in the line of cases beginning with \textit{Smith v. Allwright} in 1944, running through \textit{Rice v. Elmore} and \textit{Baskin v. Brown} and culminating in \textit{Terry v. Adams} in 1953.

In \textit{Smith v. Allwright} the Court held that the exclusion, by political parties, of Negroes from participation in state primary elections violated the fifteenth amendment. The political parties were actually performing

\begin{thebibliography}{99}
\bibitem{2}321 U.S. 649 (1944).
\bibitem{3}165 F.2d 387 (4th Cir. 1947).
\bibitem{4}174 F.2d 391 (4th Cir. 1949).
\bibitem{5}345 U.S. 461 (1953).
\end{thebibliography}
state functions pursuant to state law (which, however, did not itself require the exclusion) under state supervision and subject to statutory control. The Court stated that every part of the machinery for choosing federal, state or municipal officials became a part of the constitutional restraints embodied in the fifteenth amendment. We thought we had witnessed the demise of the "white primaries."

*Rice v. Elmore* was the Court's reply to South Carolina's answer to *Smith v. Allwright*. After the *Smith* case South Carolina repealed every trace of statutory control and transferred the conduct of primary elections to "private" organizations, the political parties, unfettered by state supervision. *Rice v. Elmore* responded firmly that the political parties had become state institutions, governmental agencies through which the sovereign power of the state was exercised and that no election machinery could be sustained if its purpose or effect was to deny Negroes, on account of their race, an effective voice in governmental affairs. *Baskin v. Brown* was substantially and essentially the same case. Both were decisions by United States Courts of Appeal but are properly taken in conjunction with Supreme Court decisions because the complete reasoning of both cases was affirmatively accepted by the Court in *Terry v. Adams*. This was the case of the Jaybird Democratic Association, which masqueraded as a private club, but which was substantially identified with the regular Democratic Party. Its exclusion of negro participation in primary elections, was, therefore, unconstitutional under the reasoning of *Rice v. Elmore*. Mr. Justice Black, speaking for the Court, declared that facts and findings were wholly identical with those of *Rice*.

General or primary elections, fashioned as they are by the Constitution itself for the selection of governmental officers, reach to the very sovereignty of the state. It might be said that an election is per se a governmental or state function. Indeed, the Constitution entrusts the supervision of elections to the states. It may well be that the matter of discrimination in elections should be kept in a closed corner by itself. But this, it seems to me, is simply another way of saying that discrimination with respect to elections violates the fifteenth amendment while all other types of discrimination come under the interdict of the fourteenth amendment. It is a distinction without a difference because it is state action rather than private action which is proscribed by both amendments. It is also true that there was obvious and deliberate evasion of constitutional obligations in the *Rice, Baskin, and Terry* cases. In this last case, Mr. Justice Frankfurter, concurring, spoke of the "subversion" of the Constitution. But the Court's opinion found that the transfer of electoral functions would be unconstitutional if the purpose or effect was disfranchisement of the Negro.

It would follow, therefore, that despite the abdication of the state function, in good faith and without intent to discriminate, state responsibility continues. Here again, but for the surrender there would have been no discrimination. Here the very act of abdication is state action. The enterprise or function has its origin in the state though its execution is accomplished by the individual. There is state participation because the activity originated in the state.

It is only a half step from Rice v. Elmore to a case wherein a state surrenders to individual management a facility it has itself created or operated. There is no particular virtue in adhering to the discredited distinctions between sovereign or proprietary, governmental or competitive functions. But for the state's surrender, the discrimination would never have quickened.

This is not to say that state responsibility is wholly a matter of origin within the state. State responsibility will also attach when state favor or state preference is given the guilty enterprise. It is surely reasonable to suggest that the state is forbidden to encourage or assist those who would discriminate or to grant them the use, to the exclusion of other citizens, of its lands or the benefit of its state powers. The Supreme Court has not yet entertained a case of this type. It is unfortunate that it declined the opportunity in Dorsey v. Stuyvesant Town Corp.\(^47\) and it is understandable why Mr. Justice Douglas and Mr. Justice Black published their preference for the granting of certiorari.\(^48\)

The recognition of state origin, state favor or state preference or the acceptance of a "but for" rule as a test of state responsibility might well impose almost unlimited responsibility upon the state. Noting the fact that it is most common today for private clubs to incorporate, consider the case of corporate activity. A corporation is said to be a creature of the legislature. It exists by grace of the state. Might it not be argued that any time a corporation discriminates, responsibility is traceable to the state because the corporation owes its existence to the state? Or would this be akin to inculpating the parent for the sins of the child? Or might it be said that the corporation itself does not discriminate but rather the individuals within the corporation? Accepting for the moment the latter we would certainly be piling Pelion on Ossa; we would have an agency twice removed; and perhaps this would be attenuating the fiction to the breaking point. However logical it might be, it would not seem to be in the offing either by the Supreme Court or any of the lower federal courts. Recognizing that logic is not a hallmark of Constitutional


\(^{48}\) Announcement of a particular Justice's opinion regarding a denial of certiorari is rather rare.
construction, I should think that something more than mere favor of state incorporation must be present in order to have state participation.

NEW OR OLD MEANINGS

Now, may we ask what "new meanings" of state action are to be found in the trio of cases reviewed by Professor Morse: *Derrington v. Plummer*, 49 Pennsylvania v. Board of Directors, 50 and *Brewer v. Hoxie School District No. 46*. 51 The facts in each are given in ample detail in the preceding article.

*Derrington v. Plummer*

*Derrington* is at the center point between the *Civil Rights Cases* and active state participation by state officers. *Derrington* illustrates the principle of state origin. Is it not, however, enough to note in *Derrington* and in the district court's opinion in *Plummer v. Casey* 52 that the lessee was operating on state owned property, in a county courthouse? Is not state ownership enough to fix state responsibility? Should a state be free to permit discrimination on state lands or be free to permit state property to be used in such a way as to deny to any class equal enjoyment of the use? Is it not incumbent upon the state to guarantee that the property, leased but still owned by the state, shall be available for use by *all* the citizens of the state?

If public schools cannot be utilized by private citizens for the conduct of religious classes 53 certainly they cannot be used for the pursuit of discriminatory practices by individual citizens. What is true of state owned schools must also be true of state owned parks, state owned transportation and state owned buildings.

*Plummer v. Casey* is notable on another score. It has a naive and narrow twist to it. Decided almost two years after *Brown v. Board of Educ.* at a time when the "separate but equal" doctrine of *Plessy v. Ferguson* was as dead as both the door nail and Mr. Marley, it conjured up Marley's ghost and held that there was a denial of due process only because comparable cafeteria facilities were not available to Negroes within the courthouse building. Paradoxically it also decided, aping *Brown v. Board of Educ.* 54 to make haste slowly in formulating its decree. The court concluded,

49. 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957).
51. 238 F.2d 91 (8th Cir. 1956).
54. 349 U.S. 294 (1954). In this case, the Court formulated its decree based on its prior decision. See note 6 supra.
under the circumstances here prevailing, the defendant Derrington, subsequent to the date hereafter mentioned, may not continue to exclude members of the colored race.

By reason of the fact that changes in many of the policies and practices now prevailing in the operation of the cafeteria may be desired by the defendants, the entry of an injunction will be withheld for a period of ninety days.55

One can understand the deliberation and delay required to integrate public schools. It entails among other things the realignment of school districts, reappointment of classes and the reassignment of teachers. But it is impossible to understand why ninety days or ten days or even one day should be required to accommodate Negroes in a restaurant or a cafeteria.

Pennsylvania v. Board of Directors

Professor Morse has sifted Pennsylvania v. Board of Directors quite carefully. But, it seems to me, the entire story is tersely told in the per curiam opinion56 of the Supreme Court.57 And, it seems to me, this is Ex parte Virginia revisited. Here the origin of the trust was private, it is true, but the state had acted upon it and within it. The city officials who administered the trust were able to do so only because they were city officials. The ornate dissent of Judge Mussmano in In re Girard's Estate recited a "plethora of state activity" but the Supreme Court said all that need be said.

The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as a trustee, its refusal to admit Foust and Felder to the college because they were Negroes was discrimination by the State.58

Brewer v. Hoxie School District No. 46

In Brewer v. Hoxie School District No. 46, a school board, intent upon obeying the mandate of Brown v. Board of Educ., sought an injunction to restrain certain citizens from conspiring by mass violence to obstruct the board in enforcing desegregation. The injunction was granted. Professor Morse suggests that here the fourteenth amendment was given positive application, that the court imposed a duty upon the board to take affirmative action rather than a restraint upon discriminatory conduct, and that the board was acting in violation of state law which sanctioned segregation. I would question whether the Brewer case is related to state action at all.

56. It is not correct to imply, as Professor Morse seems to do, that a per curiam opinion reversing a lower court is an acceptance of the lower court's dissenting opinion. This is no more true than the somewhat common misconception that a denial of certiorari by the Supreme Court is tantamount to an affirmance of the lower court's holding.
58. Id. at 231.
The school board was not acting in violation of state law. The state law which required segregation was nullified by *Brown v. Board of Educ.*, and *Brown*, not *Brewer*, required the school board to integrate its public schools with "all deliberate speed." The *Brewer* court did not impose an affirmative duty upon the board. It simply restrained the appellants from obstructing the board in the performance of a duty which the board itself chose to perform. The court did not require the board to adopt non-discriminatory rules; it required those citizens who interfered with the adoption of such rules to cease and desist.

**Conclusion**

The disintegration, if any, of the strict and conventional construction of state action has been slight, indeed, and certainly elusive. The cases which purport to add new meanings to the concept of state action reach back to the liberal language of *Ex parte Virginia*. We have now no more than new wine in old bottles. *Pennsylvania v. Board of Directors* is a mild echo of *Ex parte Virginia*, and *Derrington v. Plummer* is an advanced illustration of the principle set out in *Terry v. Adams* and *Rice v. Elmore*. These, in turn, can also find support in *Ex parte Virginia*, which will abort speculation that the states may escape *Brown v. Board of Educ.* by abdicating the supervision of public education.

Though it has never been "among the last to lay the old aside," the Supreme Court has followed the concept of state action with a certain consistency and an adherence to tradition. There has been an adherence, though not always disciplined, to the conventional construction. What we have witnessed is simply the adjustment of old rules to new circumstances.