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in such cases, it has done so without recognition of the apparent dilemma. If the courts apply remedial freezing, it seemingly entails an alteration of voter qualifications in violation of the states' constitutional rights to prescribe voter qualifications. If the courts do not invoke remedial freezing in cases which warrant it, the effects of past discrimination will be sealed into permanent existence. If freezing is to be used by the courts the Supreme Court should solve this dilemma.

The most obvious answer lies in the recognition that though the states have the right to prescribe voter qualifications,[31] they do not have the power to deny the right of an individual to vote on account of race, color or previous condition of servitude.[32] The adoption of the fifteenth amendment was intended to limit the states' rights to prescribe voter qualifications. To permanently freeze the unconstitutionally gained preferred status of the white voter under the guise of states' rights is as much a denial of the right to vote in violation of the fifteenth amendment as the the voting requirements which the courts have consistently struck down.

Conclusion

Remedial freezing appears to be a useful equitable remedy to be applied by the federal courts in voter registration cases. Although its use may be a big step towards achieving equal rights for a deprived class, the courts must consider the warning offered that it should only be applied where there is great need.[33] Otherwise many states which at one time were guilty of discrimination in voter qualifications shall never be able to tighten voter qualifications in an honest effort to raise the quality of their electorate.

In light of this warning the fairest solution in situations where there has been discrimination would be to have a complete registration of *all* voters and potential voters under the same standards. But since the federal courts do not have the power to order a re-registration, remedial freezing must be invoked where states refuse to re-register their electorate.

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[31] Cases cited notes 21, 27 *supra.*

[32] U.S. CONST. amend. XV; see Lane v. Wilson, 307 U.S. 268 (1939).

[33] United States v. Atkins, 323 F.2d 733, 744 (5th Cir. 1963).

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THE USE OF TRESPASS LAWS TO ENFORCE PRIVATE POLICIES OF DISCRIMINATION

The Problem

In 1964 the Supreme Court decided a group of sit-in cases which involved the arrests and convictions of civil rights demonstrators under state criminal trespass statutes.[1] The demonstrations were on the premises of privately owned

[1] Bouie v. City of Columbia, 378 U.S. 347 (1964); Bell v. Maryland, 378 U.S.

amusement parks[2] and at lunch counters in department stores,[3] drug stores,[4] and restaurants.[5] In all of these cases the management had a policy of racial segregation which it attempted to enforce by utilization of local police, prosecutors, and courts. In all of these cases the defendants asserted that the state violated the first section of the fourteenth amendment prohibition against state action which denies to any person the equal protection of the laws. The basic constitutional issue raised in these cases was, then, whether it is violative of the equal protection clause for the state, through local police, prosecutors, and courts, to respond to a call by a private citizen who seeks to employ criminal trespass laws to enforce his private policy of segregation. In none of the cases was a majority of the Supreme Court able to resolve this issue, although six Justices expressed the opinion that the exigencies of contemporary racial conflict demanded a judicial determination.[6]

The reason for the Court's failure to resolve this issue seems to lie more in the application of the state action concept to the fact situations presented, than in the Court's policy of refusing to decide a federal question when state grounds might be found upon which to decide the case.[7] The purpose of this note is to discuss the problems raised in applying fourteenth amendment principles to situations where trespass laws are used to enforce private policies of racial segregation.

The Fourteenth Amendment: In General

Section 1 of the fourteenth amendment is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State* deprive any person of life, liberty, or property, without due process of law; nor *deny to any person within its jurisdiction the equal protection of the laws.*[8]

The first Supreme Court construction of the Civil War Amendments (thirteen, fourteen, and fifteen) was in the *Slaughter-House Cases*[9] in 1873. It was said there that the primary purpose of the amendments was to establish freedom for a race recently emancipated from slavery and to protect these

226 (1964); Robinson v. Florida, 378 U.S. 153 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964) (breach of the peace and trespass); Griffin v. Maryland, 378 U.S. 130 (1964).

[2] Griffin v. Maryland, 378 U.S. 130 (1964).

[3] Robinson v. Florida, 378 U.S. 153 (1964).

[4] Bouie v. City of Columbia, 378 U.S. 347 (1964); Barr v. City of Columbia, 378 U.S. 146 (1964).

[5] Bell v. Maryland, 378 U.S. 226 (1964).

[6] Bell v. Maryland, 378 U.S. 226, 286 (Warren, C.J., Douglas, and Goldberg, JJ., concurring), 318 (Black, Harlan, and White, JJ., dissenting) (1964).

[7] *Id.* at 243. Douglas, J., indicated that the Court "resurrected" a state law issue which was not raised during the argument in order to avoid facing the constitutional question.

[8] U.S. CONST. amend. XIV, § 1. (Emphasis added.)

[9] 83 U.S. (16 Wall.) 36 (1873).

freedmen from the oppressions of their former masters.[10] The first sentence of the fourteenth amendment overturned the *Dred Scott*[11] decision and established national and state citizenship for the freedman.[12] It was also determined that only those privileges and immunities incident to national citizenship were guaranteed by the amendment.[13] Such privileges and immunities were those already protected by article four, section two of the Constitution: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."[14] The Court found that a "general idea" of the civil rights guaranteed could be determined by examining the privileges and immunities clause of the Articles of Confederation.[15] Those rights included the right of all free inhabitants of each state to free ingress and regress to and from any other state and the right to enjoy in any state all the privileges of trade and commerce, subject to the same duties and restrictions as the inhabitants thereof.[16] Other express limitations upon the states were also included, such as the prohibitions against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts.[17] The right to public accommodations, incidentally, was not specifically included as an incident of national citizenship.

In *Strauder v. West Virginia*,[18] decided in 1880, the Court held that a state statute which discriminated on the basis of race in the selection of jurors violated the equal protection clause. The right to a trial by a jury of one's peers, while an incident of state citizenship and therefore not a privilege or immunity incident to national citizenship, is nevertheless protected against action by the state which denies the equal protection of that right.[19] It was established that the fourteenth amendment should be given a liberal interpretation, securing for the freedman "all the civil rights that the superior race enjoys," and rendering the law in the states identical for black and white.[20] The Court also stated that Congress made no attempt to enumerate the rights the amendment was designed to protect, in order to make its terms as comprehensive as possible.[21]

In *Virginia v. Rives*,[22] a companion case to *Strauder*, the variation in form

[10] *Id.* at 67-76.

[11] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[12] 83 U.S. (16 Wall.) at 67.

[13] *Id.* at 68-70. In regard to the privileges and immunities clause the Court stated that the clause protected the same privileges and immunities as found in the fourth article of the Articles of Confederation. Free ingress and regress to and from any other state and privileges of trade and commerce were specified in the articles, although they were not intended to be exclusive.

[14] U.S. CONST. art. IV, § 2.

[15] 83 U.S. (16 Wall.) at 75. See also Strauder v. West Virginia, 100 U.S. 303, 310 (1880), where the Court concluded that state statutes which discriminated on the grounds of race in the selection of jurors denied a civil right in violation of the equal protection clause.

[16] 83 U.S. (16 Wall.) at 75.

[17] *Id.* at 77.

[18] 100 U.S. 303 (1880).

[19] *Id.* at 308-09.

[20] *Id.* at 306-07.

[21] *Id.* at 310.

[22] 100 U.S. 313 (1880).

which the prohibited state action could take was expressed: "It is, doubtless, true that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws . . . ."[23] Yet in the *Civil Rights Cases*[24] of 1883 it was made clear that the fourteenth amendment does not prohibit private conduct, however wrongful or discriminatory it may be, and that the individual invasion of individual rights is not the subject matter of the amendment. In applying these early cases to situations where an individual is arrested for trespassing at a lunch counter or amusement park, it is clear that the right to enjoy the use of such establishments is not protected under the privileges and immunities clause unless it is a right incidental to national citizenship.[25] However, if it is an incident of state citizenship, only action by the state falls within the prohibitions of the due process or equal protection clauses.[26] Thus a distinction between individual and state action concerned the Court at an early date.

Turning for the moment from cases initially construing the fourteenth amendment, some light can be shed on exactly what rights, or class of rights, the framers of the amendment intended the equal protection clause to secure by examining speeches delivered in Congress at the time of its inception. In the opinion of the author of the first section of the amendment, Congressman John A. Bingham, its purpose was to protect by national law the "inborn rights of every person within its [the Republic's] jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[27] He was, furthermore, of the opinion that the amendment empowered Congress to define, by law, what rights and privileges should be secured to all citizens.[28] In introducing what later became the first section of the amendment to the House, Mr. Bingham proposed that the Bill of Rights, as found in the first eight amendments, be incorporated in the fourteenth amendment.[29] An objection to the proposal was immediately raised on the grounds that power would be centralized in the federal government in derogation of the states, since Congress would be empowered to protect rights which theretofore lay within the exclusive realm of state legislation.[30] Apparently, both the proponents and opponents of the proposed amendment agreed it would increase federal power, the major dissension being over whether or not such an expansion of centralized authority was desirable.[31]

In introducing the proposed amendment to the Senate, J. M. Howard, Republican, Michigan, stated that the equal protection clause was designed to abolish all class legislation and to subject all persons to the same laws and

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[23] *Id.* at 318.

[24] 109 U.S. 3 (1883).

[25] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67 (1873).

[26] Civil Rights Cases, 109 U.S. 3, 11 (1883).

[27] CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1886); see FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 79 (1908) [hereinafter cited as FLACK].

[28] FLACK 81.

[29] *Id.* at 56-57. *Compare* Adamson v. California, 332 U.S. 46, 124 (1947) (four Justices dissenting), *with* Palko v. Connecticut, 302 U.S. 319 (1937).

[30] FLACK 57-58.

[31] *Id.* at 81.

punishments.[32] No attempt was made in either house to enumerate precisely what rights were deserving of equal protection, although all the privileges, immunities and rights guaranteed by the second section of article four and by the first eight amendments were to be within the ambit of the privileges and immunities clause of the fourteenth amendment.[33] Indeed, the object of the equal protection afforded was to inhibit all manner of discrimination which might be devised under the so-called "Black Codes."[34] After the amendment was adopted, a Congressman who had been present when the amendment was before the House suggested that *all* the rights found in both the Constitution and the common law were guaranteed. Thus the state could not prevent anyone from attending public schools, from visiting an inn, or from enjoying the benefits of a common carrier without violating a right secured by section one.[35]

Although the preceding argument was reflected in the vehement dissenting opinion of Mr. Justice Harlan in the *Civil Rights Cases*,[36] the other eight Justices agreed that if an individual is refused accommodations at an inn, public conveyance, or place of public amusement by the owner thereof, his remedy must be sought under the laws of the state.[37] The Court held that the fourteenth amendment did not give Congress the power to enact those portions of the Civil Rights Act of 1875 which attempted to grant the right against racial discrimination in places of public accommodations and to impose penalties upon individuals who so discriminated.[38]

> Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.[39]

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[32] *Id.* at 87.

[33] *Id.* at 84-87.

[34] *Id.* at 96. It has been suggested that one of the purposes of the fourteenth amendment was to give validity to the Civil Rights Bill of 1866, which Mr. Bingham believed to be unconstitutional. It was feared that the bill would be repealed even if held constitutional when the Democrats came to power. The Civil Rights Bill was directed against the "Black Codes" of the South and the fourteenth amendment would have to be broad enough to prohibit whatever discriminatory legislation might be devised under the Codes. FLACK 94-95.

[35] *Id.* at 256. In Bell v. Maryland, 378 U.S. 226, 240 (1964) (concurring opinion), Goldberg, J., commented that the congressional debates demonstrated that access to public accommodations was a right guaranteed by the fourteenth amendment. The Justice's citations, however, referred to debates over proposed legislation, but not to the amendment itself. 378 U.S. at 335. The textual material above referred to the amendment directly, but during a debate over proposed legislation.

[36] 109 U.S. 3, 26 (1883).

[37] *Id.* at 24.

[38] *Id.* at 26.

[39] *Id.* at 11-12. But the right to certain areas of public accommodations can be derived from the right to travel, a federal privilege under U.S. CONST. art. IV, § 2, as established by Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). See also Bell v. Maryland, 378 U.S. 226, 250-51 (1964) (Douglas, J., concurring).

Accordingly, discrimination at places of public accommodation is prohibited by the fourteenth amendment only to the extent state laws and proceedings discriminate. Whether or not this result accurately reflects the intent of Congress, however, is a question still debated.[40]

Problems in Applying the Fourteenth Amendment

As an aid in applying the equal protection clause to a given fact situation it is useful to determine (1) whether the offending action was that of the state and (2) if so, whether that action denied the petitioners the equal protection which the amendment was intended to secure.[41] The preceding text dealt generally with both questions. The first question presents the concept of state action, which has led to several theories that tend to broaden the application of the amendment. The second raises the problem of finding a case of discrimination against the petitioners. The emphasis herein is placed primarily upon the state action concept because the fact of discrimination on the basis of race was admitted in the 1964 sit-in cases.

In general, there is no "ironclad test" to determine when state involvement is state action within the prohibitions of the fourteenth amendment.[42] There is also no need for the state action to have a discriminatory purpose. If the state leases land to a tenant who excludes Negroes from his cafeteria, the lessee stands in the place of the state and his purpose is that of the state.[43] Yet the prohibited action must be such as may fairly be said to be that of the state.[44] The Court has indicated that even state inaction may constitute state action, as demonstrated in another lease case, *Burton v. Wilmington Parking Authority*,[45] where the State leased part of its building to a privately managed cafeteria and did nothing to prevent segregation on the premises. The Court there relied in part on *Cooper v. Aaron*,[46] in which state action was extended to state participation in the challenged activity "through any arrangement, management, funds, or property . . . ."[47] Some theories which have evolved from the state action concept will next be examined, in order to determine how the Court has applied the theory within various contexts.

Under Color of State Law Theory

In dealing with the acts of state officials, the under color of state law theory was developed to bring the acts of these officials within federal statutes

[40] *Compare* concurring opinion of Goldberg, J., in Bell v. Maryland, 378 U.S. 226, 286 (1964) (that the fourteenth amendment removed disabilities from Negroes in places of public accommodations), *with* the dissenting opinion of Black, J., 378 U.S. at 335, 340.

[41] See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1, 18 (1948).

[42] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[43] Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).

[44] Burton v. Wilmington Parking Authority, 365 U.S. 715, 721 (1961); Civil Rights Cases, 109 U.S. 3, 17 (1883).

[45] 365 U.S. 715 (1961).

[46] 358 U.S. 1 (1958).

[47] *Id.* at 19.

which prohibit the deprivation of rights secured by the fourteenth amendment.[48] In *Ex parte Virginia*,[49] a State judge was indicted under the Civil Rights Act of 1875[50] for excluding from juries citizens of African descent who possessed all other qualifications prescribed by law. The fourteenth amendment was interpreted to mean that "whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name of the State, and is clothed with the State's power, his act is that of the State."[51] The particular act of the state officer need not be authorized by the state, for as long as he is clothed with state power, even the misuse of such power is action taken under color of state law.[52] A warrant of arrest in the hands of a sheriff or his deputy is color of authority and acts done in the execution thereof are under color of law.[53] Even when a private detective acts under the orders and pay of a private employer and uses force to obtain a confession, a jury is entitled to find that the detective acted under color of law if he had a special city police officer's card.[54] Similarly, where plant guards under the plant owner's pay and control are also sworn in as civilian auxiliaries to military police, their performance of police functions is under color of state law, even though they simultaneously act as company employees.[55] Thus it appears an officer's conduct may be under color of state law within the inhibitions of the fourteenth amendment even though contrary to, or in excess of, the authority granted him under state law.[56]

Instrumentality Theory

It has already been observed that state action may be taken through various agencies.[57] Yet problems arise in determining to what extent such action falls within the prohibitions of the fourteenth amendment. In applying the equal protection clause to situations where a private property owner attempts to use criminal trespass laws, the landmark case of *Shelley v. Kraemer*[58] is a useful starting point. In *Shelley* the State court was called upon by private parties

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[48] REV. STAT. § 5510 (1875), 18 U.S.C. § 242 (1948).

[49] 100 U.S. 339 (1880).

[50] Section 4, 18 Stat. 336 (1875), 18 U.S.C. § 243 (1948).

[51] 100 U.S. at 377; *accord*, Home Telephone & Telg. Co. v. Los Angeles, 227 U.S. 278, 287 (1913).

[52] United States v. Classic, 313 U.S. 299 (1941). Even where a deputy sheriff removed his badge and stated his acts thereafter were not to be in the name of the law, he was acting under color of law. Catlette v. United States, 132 F.2d 902, 906 (4th Cir. 1943).

[53] Screws v. United States, 140 F.2d 662, 665 (5th Cir. 1944), *aff'd*, 325 U.S. 91 (1945).

[54] Williams v. United States, 341 U.S. 97 (1951).

[55] NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416 (1947).

[56] Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958).

[57] See text accompanying note 23 *supra*.

[58] 334 U.S. 1 (1948). See generally T. P. LEWIS, THE MEANING OF STATE ACTION, 60 COLUM. L. REV. 1083 (1960); SCHWELB, THE SIT-IN DEMONSTRATION: CRIMINAL TRESPASS OR CONSTITUTIONAL RIGHT?, 36 N.Y.U.L. REV. 779 (1961); SUTTERFIELD, LAW AND LAWYERS IN A CHANGING WORLD, 48 A.B.A.J. 922, 928-30 (1962); 44 CALIF. L. REV. 718 (1956).

to enforce racially restrictive covenants on land.[59] Both the vendor and vendee were willing to conclude the sale, but the owners of other property subject to the same covenants brought suit to specifically enforce them.[60] The Supreme Court, in an opinion by Mr. Chief Justice Vinson, concluded that while "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment,"[61] the courts' enforcement of the restrictions "denied petitioners the equal protection of the laws."[62] *Shelley* then stands for the proposition that while purely individual discrimination does not constitute state action, state court enforcement of that discrimination is violative of the equal protection clause. In a subsequent restrictive covenant case,[63] the *Shelley* doctrine was extended somewhat by a holding that an award by a state court of damages against the covenantor for breach of the covenant would also constitute state action and deprive non-Caucasians of equal protection of the laws.[64] Although the Court has shown some hesitance to further extend the *Shelley* doctrine,[65] the language used in the case was broad enough to include situations where "the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement."[66]

As exemplified by *Shelley*, state action within the prohibitions of the fourteenth amendment refers to exertions of state power in all forms, and by any instrumentality, or agency, of the state without regard to the fact the discrimination has its inception in a private agreement. This interpretation of the constitutional provision has been criticized on the grounds that private discrimination is not forbidden by the fourteenth amendment,[67] and that the mere invoking of judicial assistance transforms individual action into prohibited state action.[68] Yet it appears well established that one of the purposes of the fourteenth amendment was to secure the right of all to own, purchase, and dispose of property.[69] Furthermore, in *Shelley* this right was guaranteed by federal legislation.[70] And since both the vendor and vendee were willing to conclude

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[59] 334 U.S. at 4.

[60] *Id.* at 19.

[61] *Id.* at 13.

[62] *Id.* at 20.

[63] Barrows v. Jackson, 346 U.S. 249 (1953).

[64] *Id.* at 254.

[65] Black v. Cutter Laboratories, 351 U.S. 292 (1956) (decided on narrow grounds). The dissenting opinion of Douglas, J., joined by Warren, C. J., and Black, J., indicated *Shelley* should apply because the government through its judicial branch gave legal effect to a contract. 351 U.S. at 302-03. See also Dorsey v. Stuyvesant, 299 N.Y. 512, 87 N.E.2d 541 (1949).

[66] 334 U.S. at 20.

[67] LEWIS, *supra* note 58, at 1113.

[68] SUTTERFIELD, *supra* note 58, at 928-30.

[69] See FLACK 85, 87.

[70] 334 U.S. 1, 11 (1948). REV. STAT. § 1977 (1875), 42 U.S.C. § 1981 (1870), gives to all persons the same right to make and enforce contracts as is enjoyed by white citizens. REV. STAT. § 1978 (1875), 42 U.S.C. § 1982 (1866), gives to all citizens of the United States the same right to inherit, purchase, lease, sell, hold, and convey real and personal property as is enjoyed by white citizens.

the sale, the exercise of that right would have been uninhibited but for the action of the State courts.

Another case illustrating the instrumentality theory is *Pennsylvania v. Board of Trusts*,[71] in which the policy of discrimination was initiated by the will of Stephen Girard, probated in 1831, which left a fund in trust for the establishment of a college.[72] By the terms of the will, the college was to admit "as many poor white, male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain." The will named the City of Philadelphia as trustee and the Philadelphia Board of Directors of City Trusts was appointed to that position. The board refused to admit the petitioners, who met all the entrance qualifications except that they were Negroes.[73] The orphan's court rejected the petitioners' contention that the board had violated the fourteenth amendment.[74] The Supreme Court of the United States reversed and remanded the Pennsylvania judgment on the grounds that since the board which operated Girard College was an agency of the State, its refusal to admit the Negroes was discrimination by the State, even though the board acted as a trustee.[75]

The Supreme Court has asserted that state action prohibited by the fourteenth amendment includes all state action which infringes upon those rights which the amendment sought to secure, no matter what agency of the state takes the action or under what guise it is taken.[76] It is enough that the Court recognizes the state as a "joint participant in the challenged activity" for the instrumentality doctrine to apply.[77]

Other Theories

It has been urged that for the state to enforce a custom of segregation constitutes state action. *Garner v. Louisiana*,[78] the first sit-in case to reach the Supreme Court, reversed State convictions for disturbing the peace during a sit-in at segregated lunch counters. Although the reversal was based upon insufficient evidence,[79] the petitioners had advanced the theory that the participation of police and the courts to enforce a state custom of segregation resulted in state action.[80] Subsequent sit-in cases, however, have tended to examine the extent of the state's participation in the discriminatory activity, rather than merely the existence of a custom, in order to establish state action.

Still another theory of state action was advanced in Mr. Justice Douglas' concurring opinion in *Garner*,[81] in which he urged broader grounds for reversal based on what may be described as a licensing theory. His thesis was that

[71] 353 U.S. 230 (1957) (*per curiam*) (also called the *Girard College* case).

[72] *Ibid.*

[73] *Ibid.*

[74] *In re* Girard's Estate, 4 Pa. D. & C.2d 671 (Orphans Ct. Philadelphia), *aff'd*, 386 Pa. 548, 127 A.2d 287 (1956), *rev'd sub nom.* Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

[75] Pennsylvania v. Board of Trusts, 353 U.S. 230, 231 (1957).

[76] Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[77] Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

[78] 368 U.S. 157 (1961).

[79] *Id.* at 163.

[80] *Ibid.*

[81] *Id.* at 176.

since an eating establishment must be licensed by the state to conduct business, the state may not constitutionally license a restaurant which segregates its premises.[82] He drew an analogy between licenses issued by the state to establishments serving the public and leases of public facilities to similar establishments, such as occurred in the *Burton* case.[83] The root of this theory goes back to the dissenting opinion of the first Mr. Justice Harlan in the *Civil Rights Cases*.[84] He argued that places of public accommodation are themselves agencies or instrumentalities of the states since their duties and functions are amenable to state regulation.[85] Of course he was proposing an instrumentality doctrine, but it brought restaurants within the category of a state agency through the state's exercise of regulatory (licensing) power. The licensing theory has been criticized on the grounds that it is too inclusive, since practically all business establishments are subject to state regulation.[86]

The 1964 Sit-in Cases

Griffin v. Maryland[87]

In *Griffin* a Negro civil rights demonstrator obtained from a Caucasian a ticket which entitled the bearer to one ride on the carousel at the privately owned and managed Glen Echo Amusement Park in Montgomery County, Maryland. Although the park sought the patronage of the general public through advertisements, the demonstrators were aware of the management's policy of discrimination. The Negro, Griffin, entered the park (no general admission ticket was required) and sat down on the carousel. The park employed Collins to enforce its policy of racial discrimination. Collins was also retained and paid by the National Detective Agency and wore its uniform, although he was subject to the control and direction of the park's management. At the request of the park he was deputized as a sheriff of Montgomery County pursuant to a county ordinance[88] and wore a deputy sheriff's badge during the following incident.

After consulting with the management Collins approached Griffin, informed him of the park's policy and told him he would be arrested for trespassing if he failed to leave the premises. After a reasonable time had elapsed, Collins informed Griffin that he was under arrest and took him to the Montgomery County police station where he filed an application for a warrant by a police officer, charging

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[82] *Id.* at 184.

[83] See text accompanying note 45 *supra.*

[84] 109 U.S. 3, 26 (1883).

[85] *Id.* at 37-42.

[86] Still other theories which have been suggested are: "balancing the interests" in which the courts balance competing constitutional rights to determine if equal protection was denied by the state, and "significant state involvement" in which the fourteenth amendment is only applied when state agencies or officials directed or forbade the specific conduct in question. LEWIS, *supra* note 58, at 121-140.

[87] 378 U.S. 130 (1964). Compare Drews v. State, 224 Md. 186, 167 A.2d 341 (1961), *vacated and remanded sub nom.* Drews v. Maryland, 378 U.S. 547 (1964) (*per curiam*), *aff'd*, 33 U.S.L. WEEK 2200 (Md. Ct. App. Oct. 22, 1964).

[88] *Id.* at 132 n.1. Section 2-91 of the MONTGOMERY CO. CODE of 1955 provides that special deputy sheriffs may be appointed for duty in connection with the property of individuals or corporations.

Griffin with criminal trespass under the Maryland statute.[89] The warrant itself recited that the complaint had been made by "Collins Deputy Sheriff" and that Griffin had been asked to leave by the Deputy Sheriff of Glen Echo Park. An amended warrant was later filed which charged Griffin with unlawfully entering after having been told not to do so by "an agent" of the corporation which operated the park. The Maryland Court of Appeals in affirming the subsequent conviction,[90] stated that "the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State."[91]

In an opinion written by Mr. Chief Justice Warren, the Supreme Court reversed,[92] and held that the action of Collins who was a sheriff and also a park employee hired to enforce a racial segregation policy, denied Griffin equal protection of the laws secured by the fourteenth amendment.[93]

Mr. Justice Harlan, dissenting in *Griffin*,[94] conceded that Collins acted as deputy sheriff even though he had a right as a private citizen to arrest Griffin for a misdemeanor committed in his presence; but, he said, the State involvement was "no different from what it would have been had the arrest been made by a regular policeman dispatched from police headquarters."[95] The State involvement was different. There was a greater degree of State participation in the denial of equal protection than in the case posed by Mr. Justice Harlan because the State had clothed with its authority one whose very purpose of employment was to enforce a policy of discrimination. According to the under color of law theory, it was immaterial that Collins could have acted in his private capacity or that the State did not specifically authorize him to take the action he took.[96] Collins' status was that of a deputy sheriff under contract to enforce a private policy of discrimination.

The *Griffin* decision relied in part on the *Girard College* case in which a state agency was authorized to act as trustee for a private institution.[97] Just as the trustee, an agency of the state, enforced a private policy of discrimination, so did Collins. As the *Shelley* case demonstrated, it was immaterial that the discrimination had its inception in a private agreement.[98] Yet *Shelley* is distinguishable from *Griffin* by the fact that in the former both the owner of the land subject to a restrictive covenant and the vendee were willing to carry out the proposed sale. Only through state interference upon the instigation of others subject to the terms of the covenant were the willing parties inhibited. In *Griffin* the owner of the land was quite unwilling to allow Negroes to remain

[89] MD. ANN. CODE art. 27, § 577 (Supp. 1961), makes it a misdemeanor to "enter upon or cross over the land . . . of any person . . . after having been duly notified by the owner or his agent not to do so."

[90] Griffin v. State, 225 Md. 422, 171 A.2d 717 (1961).

[91] *Id.* at 431, 171 A.2d at 721.

[92] Griffin v. Maryland, 378 U.S. 130 (1964).

[93] *Id.* at 135.

[94] *Id.* at 138.

[95] *Ibid.*

[96] *Id.* at 135; see Screws v. United States, 325 U.S. 91 (1945).

[97] 353 U.S. 230 (1957). See text accompanying note 71 *supra.*

[98] 334 U.S. 1, 19-20 (1948).

upon the premises. In *Shelley*, furthermore, the parties who were seeking to enforce the policy of discrimination were in no way clothed with state authority, as was the board of trustees in the *Girard College* case or Collins in *Griffin*. In the latter two cases there is present the element of a private party whose policy of racial discrimination is enforced through his agent who, in turn, is also an agent of the state. Omit these elements of dual agency and state inhibition of a property transaction, and the fundamental constitutional issue is raised. Is it violative of the equal protection clause for the state, through local police, prosecutors, and courts, to respond to a call by a private citizen who seeks to enforce his private policy of segregation through criminal trespass laws? The issue was squarely placed before the Supreme Court in the following case.

Bell v. Maryland[99]

In *Bell v. Maryland*, a companion case to *Griffin*,[100] the petitioners, all Negro sit-in demonstrators, entered a segregated restaurant and were asked to leave by an employee of the owner, a corporation. The employee was acting under orders from the president of the corporation, and the request to leave was admittedly made on the basis of color alone. When the petitioners refused to leave, the owner went to the police station and swore out warrants for their arrest. They were subsequently arrested by the police and convicted under the same criminal trespass statute upon which the convictions were based in *Griffin*.[101] After the convictions were affirmed by the Maryland Court of Appeals, however, Maryland and Baltimore enacted public accomodations laws which abolished the crime of which the petitioners were convicted.[102] The Court avoided reaching the broad constitutional issue, reversed the convictions, and remanded the case to the Maryland Court of Appeals with instructions to determine whether the State's general saving clause statute would save the convictions.[103] Six Justices, however, splitting three to three, did reach the broad issue.

In a concurring opinion, Mr. Justice Goldberg,[104] joined by Mr. Chief Justice Warren, and Mr. Justice Douglas, concluded that a state may not frustrate the constitutionally secured right to be admitted to places of public accommodations on a racially equal basis through the use of its criminal trespass

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[99] 378 U.S. 226 (1964).

[100] There were three other sit-in cases decided on the same day as *Bell* and *Griffin:* Bouie v. City of Columbia, 378 U.S. 347 (1964), Robinson v. Florida, 378 U.S. 153 (1964), and Barr v. City of Columbia, 378 U.S. 146 (1964). All three, however, were decided on narrow grounds without reaching the constitutional issue which is the subject of this note. Although *Bell* was also decided on narrow grounds, six Justices did discuss the constitutional issue, splitting three to three.

[101] MD. ANN. CODE art. 27, § 577 (Supp. 1961).

[102] MD. ANN. CODE art. 49B, § 11 (Supp. 1963); BALTIMORE, MD., CITY CODE art. 14A, § 10A (1950 ed.).

[103] MD. ANN. CODE art. 1, § 3 (1957). The common-law rule, as followed in Maryland, requires the dismissal of pending criminal proceedings where the defendant's conduct is no longer deemed criminal due to a supervening change in state law. 378 U.S. at 230-32. The saving clause statute, however, saves state convictions from the effect of the common-law rule in certain circumstances. 378 U.S. at 232-37.

[104] 378 U.S. 226, 286 (1964).

laws.[105] A distinction was drawn between "civil rights," which the fourteenth amendment was intended to protect, and "social rights," such as rights pertaining to privacy and private association, which are also entitled to constitutional protection. The "history and the purposes of the Fourteenth Amendment compel the conclusion that the right to be served in places of public accommodation regardless of color cannot constitutionally be subordinated to the proprietor's interest in discriminatorily refusing service."[106] To support this conclusion Mr. Justice Goldberg argued that even the *Civil Rights Cases* assumed that a state cannot abridge the right to enjoy equal accommodations in public conveyances, inns, and places of public amusement, even though Congress cannot legislate to prohibit individual action.[107] Since equal protection may be denied by the failure of the state to take preventative measures, as in the *Burton* case, state failure to protect the petitioners' right to public accommodations is prohibited state action.[108]

The Justice then appealed to the "logic" of *Brown v. Board of Educ.*,[109] which concluded that in public education the doctrine of "separate but equal" had no place.[110] This appeal may be criticized on the grounds that *Brown* neither referred to public accommodations nor to property owners who attempt to use trespass laws to enforce segregation. The "logic" of the decision, while condemning racial segregation, was directed at state action through discriminatory legislation and not through the conduct of police or the courts.[111]

Mr. Justice Douglas, in his concurring opinion joined by Mr. Justice Goldberg,[112] relied on *Shelley v. Kraemer* for the proposition that if a court decree is state action in *Shelley*, the same result should be reached here.[113] He concluded that "when the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery [segregation in restaurants], the 'State' violates the Fourteenth Amendment."[114] He urged also that since restaurants are as essential as common carriers to interstate travelers, the right to be served in restaurants is an incident of national citizenship; therefore, it is within the privileges and immunities clauses of article IV, section 2, and the fourteenth amendment.[115] He avoided drawing distinctions between "civil" and "social" rights by demonstrating that the owners of the restaurants involved in the sit-in cases are usually large corporations and, consequently, the corporate managers and stockholders have no personal right to private association because "fastening *apartheid* on America [is not] a worthy occasion for tearing aside the corporate veil."[116] This argument is open to criticism on the grounds that it

[105] *Id.* at 311.

[106] *Id.* at 315.

[107] *Id.* at 306. A more accurate statement would be that the *Civil Rights Cases* "assumed, without deciding, for the sake of argument." 109 U.S. at 19.

[108] 378 U.S. at 310-11.

[109] 347 U.S. 483 (1954).

[110] *Id.* at 495.

[111] *Id.* at 486 n.1.

[112] 378 U.S. 226, 242.

[113] *Id.* at 259.

[114] *Id.* at 260.

[115] *Id.* at 250-52, 255.

[116] *Id.* at 271 (Appendix I to the opinion of Douglas, J.).

relies heavily on *Shelley v. Kraemer* to find state action,[117] as the dissenting opinion in *Bell* pointed out.[118]

Three dissenting Justices also reached the basic constitutional question in an opinion written by Mr. Justice Black, joined by Justices Harlan and White.[119] They asserted that the fourteenth amendment "does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be."[120] The dissenters insisted that the petitioners' reliance on *Shelley v. Kraemer* to establish prohibited state action was misplaced.[121] When a property owner chooses not to sell to an individual, or not to admit him, the owner is entitled to due process of law to protect his enjoyment of property. This argument adopts the view expressed in the *Civil Rights Cases*[122] that there must be valid federal legislation based upon some constitutional grant of power before the fourteenth amendment limits a private owner's free use of his property.[123]

In *Shelley* legislation had been enacted, thereby protecting the willing vendor and vendee.[124] Consequently, for the Court to enforce the restrictive covenant denied the equal protection of a right guaranteed by valid federal legislation.[125] In *Bell*, however, the restaurant owner's right to enjoy his property had not been diminished by such legislation.[126] Furthermore, when one party refuses to transact, the situation is no longer analogous to *Shelley*.[127] The *Bell* dissenters were of the opinion that the historical proof offered by Justices Douglas and Goldberg did not establish that the right to public accommodations is an incident of national citizenship,[128] and that much of it was out of context.[129]

Conclusion

The questions raised in the 1964 sit-in cases have not all been rendered moot by the enactment of the public accommodations section of the Civil Rights Act of 1964.[130] The reason is that the act's definition of establishments serving the public which are classified as places of public accommodation is not all-inclusive.[131] Omitted, for example, are establishments which provide lodging to transient guests

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[117] Note, 53 GEO. L.J. 226, 234 (1964).

[118] 378 U.S. at 328.

[119] *Id.* at 318.

[120] *Id.* at 327.

[121] *Id.* at 328.

[122] 109 U.S. 3 (1883).

[123] *Ibid.*

[124] See text accompanying note 70 *supra.*

[125] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[126] See Buchanan v. Warley, 245 U.S. 60, 74 (1917), which established that once one becomes a property owner he acquires all the rights that go with ownership unless a valid statute diminishes those rights.

[127] Bell v. Maryland, 378 U.S. 226, 331 (dissenting opinion).

[128] *Id.* at 340.

[129] *Id.* at 335-40.

[130] 42 U.S.C.A. §§ 2000a-2000a-6, 2000(a), 2000(b)(1), 2000(c)(1) (1964). Held constitutional under the commerce clause in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). See also Hamm v. City of Rock Hill, 379 U.S. 306 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

[131] 42 U.S.C.A. § 2000a(b) (1964).