A CASE STUDY OF THE DISINTEGRATION OF THE JUDICIAL CONCEPT OF "STATE ACTION" UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS

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PART I

INTRODUCTION

The last sentence of Section 1 of the Fourteenth Amendment to the Constitution of the United States reads,

> 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.

The First Section of the Fifteenth Amendment reads,

> The right of citizens of the United States to vote shall not be denied by the United States or by any State on account of race, color, or previous condition of servitude.

A reading of the Amendments shows clearly that their inhibitions are not directed against action by individuals. The Fourteenth Amendment is directed against "state action" only while the Fifteenth is directed against both State and Federal action.

With the passage of time, more especially since 1939 when the Civil Rights Section was established in the United States Department of Justice, the judicial concept of what constitutes "state action" has been greatly extended--to the extent that time revered judicial guide posts are no longer recognizable. Necessarily the concept of "private action" has been narrowed and the corresponding result of this revolutionary disintegration of the "state action" concept

has been to bring within the range of judicial scrutiny by the federal courts more and more activity formerly considered either as private or as belonging to the state.

In conjunction with the problem of what now constitutes "state action", need arises for a reappraisal of the traditionary concept of what is the proper function of our United States Constitution in our federal system of constitutional government. Especially significant is the comparatively recent case of Screws v. United States[1] wherein a divided and apparently confused Supreme Court held constitutional a federal statute which had lain dormant for almost three quarters of a century, which statute makes it a federal crime for one acting under "color of law" to deny to any inhabitant any rights protected by the Constitution or laws of the United States.

Is our constitution becoming a penal code to be used in governing action among individuals merely by judicial amendment? This is a question every individual should ponder carefully.

Equally significant are the cases of Smith v. Allwright[2] and Marsh v. Alabama[3] wherein the Court enunciated the doctrine that "state action" included action of traditionally private organizations if such organizations are comprehen-

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[1] Screws v. United States, 325 U.S. 91 (1945).

[2] Smith v. Allwright, 321 U.S. 649 (1944).

[3] Marsh v. Alabama, 326 U.S. 501 (1946).

sively regulated by state laws or are engaged in activities which may be considered public.

Even more significant are the recent restrictive covenant cases wherein the Court extended the concept of "state action" to hold legal contracts between individuals unenforceable either in equity[4] or at law.[5]

To the student of government this revolutionary extension of "state action" gives cause for concern. From a conceptual point of view "state action" has undergone such a disintegration as to make definition today illusory if not impossible; and from a constitutional point of view there has been further encroachment of federal authority upon the states' and individual's traditional domain.

The purpose of this study is to trace the judicial history of the disintegration of the traditional concept of "state action" and the consequent development of the new concept that the prohibitions of the Fourteenth and Fifteenth Amendments apply to private action among individuals.

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

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

PART II

HISTORICAL BACKGROUND

Private rights as well as states' rights were the concern of the makers of our Federal Constitution. Hence, the Constitution outlined not only those powers specifically allowed the federal government and those powers specifically denied the federal government in order to protect the states, but also those powers denied the states in order to protect the individual.

As enunciated at Runnymede, unconstitutional action is by necessity generally limited to governmental action; consequently, the historical function of the Constitution is to protect the individual's rights against infringement by governmental authority. Interference with private rights by government is the great historic threat to individual freedom; so it is easy to understand why the makers of the Constitution were concerned with the threat to liberty inherent in governmental activity. They looked to the experience of the past, and, reflecting upon the evils of two centuries of English governmental practice, concluded that government was the enemy of liberty; consequently, in about two years from the ratification of the original document, the individual's protection against his government was further strengthened

by the addition of the Bill of Rights. Thus there was established, at least ostensibly so, a complete, although delicate, balance between the individual's rights and his government's powers, both state and national. And as Woodrow Wilson stated,

> We did not concentrate our constitutional arrangements in the federal government. We have multiplied our constitutional governments by the number of our states, and have set up in each commonwealth a separate constitutional government to which is entrusted the regulation of all the ordinary relations of citizens to each other.[1]

It was against government and government alone, that the Bill of Rights was directed. Moreover, it was the national government only that was limited. Proof of such intention is made clear in the First Amendment by the use of the word "Congress." There was little if any doubt that the remaining provisions were directed exclusively against the federal government. But there were those who endeavored to extend the Bill of Rights to "state action." Whatever lingering doubt remaining was unequivocally removed by Chief Justice Marshall when he said, "These Amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."[2]

At the close of the Civil War it seemed clear that without the intervention of the federal government the southern states would by legislative restrictions strip the newly freed

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[1] Woodrow Wilson, Constitutional Government in the United States, p. 19.

[2] Barron v. Baltimore, 7 Pet. 243, 250 (1833).

Negro of many of the ordinary rights and immunities of free citizens.[3] The war caused many to realize that perhaps the makers of the original Constitution and the Bill of Rights had overemphasized states' rights at the expense of the individual, in particular, the Negro. The Fourteenth and Fifteenth Amendments, pertinent sections of which have been given in the introduction to this study, were adopted soon after the war, the primary purpose being to protect the civil rights of the emancipated Negro from infringement by the southern states, some of which were reluctant to accept the results of defeat.

Almost simultaneously with the adoption of the Civil War Amendments, Congress enacted laws to carry them into effect.[4] The first of the statutes after the adoption of the Fourteenth Amendment was that enacted by Congress on May 31, 1870, entitled, "An Act to enforce the Rights of Citizens of the United States to vote in the several States of this Union, and for other purposes." This statute was amended by an Act of February 28, 1871. The two statutes were designed to protect the right to vote by providing for federal supervision of elections in the states. Severe penalties were provided for any interference, based on race or color, with the right to vote in either state or national elections; and it was made a felony for two or more persons to conspire to interfere with the

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[3] R. E. Cushman, Leading Constitutional Decisions, eighth edition, p. 40.

[4] For a collection of these statutes see:
R. K. Carr, Federal Protection of Civil Rights, p. 209.

free exercise of citizens' rights under the United States Constitution or statutes.

On April 20, 1871, the Ku Klux Klan or Antilynching Act was passed. This statute penalized action, "under color of law," which deprived persons of their rights under the laws or Constitution of the United States. It also provided penalties for conspiring to overthrow the federal government, or to prevent the execution of federal laws.

To get the Supreme Court's early comprehension of the ambit of the amendments and the consequent scope of the application of the statutes designed to carry them into effect, we look first to the Slaughter House Cases.[5] These cases are pertinent to this study because here the Court declared that neither the original Constitution nor the amendments established any great body of civil rights on a federal level which might be protected by congressional enactment. In these cases it was ruled that the privileges and immunities clause of the Fourteenth Amendment did not "federalize" the great body of fundamental civil rights or place any extensive group of rights under the special protection of the federal government--even against state encroachment, let alone infringements from private persons. The Supreme Court saw the Constitution in the same light that Wilson later saw it, and, hence, declared that civil liberty remained primarily

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[5] Slaughter House Cases, 16 Wall. 36 (1873).

a matter to be protected by state law, rather than by federal law.[6]

No federal statutes were involved in the Slaughter House Cases, the point at issue being the constitutionality of a Louisiana statute granting a monopoly in the business of slaughtering livestock in New Orleans. The statute in question was attacked on the ground that it abridged a privilege or immunity protected by the Fourteenth Amendment; namely, the privilege of engaging in the slaughtering business. The Court's refusal to hold that the amendment protected any such right implied that the federal government had little, if any, constitutional authority to provide a positive program for protecting civil rights.

The next declaration by the Supreme Court concerning the scope of the amendments in question came two years after the Slaughter House Cases in the case of United States v. Cruikshank.[7] Here the Court was concerned with one of the key sections of the statutes designed to effectuate the amendments--Section 6 of the Enforcement Act of May 31, 1870. This was the general conspiracy section, making it a federal crime for two or more persons to conspire to interfere with a citizen's exercise of any right granted by the Constitution or laws of the United States.

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[6]Woodrow Wilson, op. cit., p. 21.

[7]United States v. Cruikshank, 92 U.S. 542 (1875).

Defendants were among more than one hundred persons jointly indicted in the Federal Court in Louisiana under Section 6. Defendant and others had broken up a meeting of Negroes, the fracas culminating in the killing of some of the Negroes. The issue of constitutionality arose on a motion in arrest of judgment after a verdict of guilty. The Court did not go so far as to declare Section 6 unconstitutional, but it did take a very narrow view of the federal rights which might be subject to its protection. The Court declared that the victims' right of assembly, which the defendants had been charged with violating, was not a federal right, and thus could not be protected by the national government.

In reaching its decision the Court declared that the Fourteenth Amendment adds nothing to the rights of one citizen as against another.

> It is a guaranty against the exertion of the arbitrary and tyrannical power on the part of the government and legislature of the State, not a guaranty against the commission of individual offenses; and the powers of Congress, whether express or implied, does not extend to the passage of laws for the suppression of crime within the State.

The next case in a series of cases decided after the adoption of the Civil War Amendments in which the Supreme Court invalidated various provisions of the Civil Rights Acts was United States v. Reese, decided in 1876.[8]

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[8] United States v. Reese, 92 U.S. 214 (1876).

Two election inspectors in a Kentucky municipal election were indicted, under Sections 3 and 4 of the Act of May 31, 1870, for refusing to receive and count the vote of a Negro. The Court, considering only the Fifteenth Amendment issue, held the sections of the statute in question unconstitutional as going beyond the provisions of the amendment in that the statute was not limited to interference on account of "race, color, or previous condition of servitude." The Court was unwilling to uphold the validity of the statute even when limited, as in the principal case, to the protection of Negroes in the exercise of their right to vote. The Court said,

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step aside and say who would be rightfully retained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

That philosophy is a far cry from that enunciated by recent decisions of the same court which will be discussed at length in later sections of this study.

In Ex parte Virginia,[9] decided in 1880, the Supreme Court upheld the validity of Section 4 of the Act of March 1, 1875, under the Fourteenth Amendment. This section made it a misdemeanor to exclude citizens from jury service because of race, color, or previous condition of servitude. The indictment of a judge charged with excluding Negroes from state

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[9] Ex parte Virginia, 100 U.S. 339 (1880).

juries was upheld, the Court holding that the action of the judge was "state action" under the Fourteenth Amendment. The case is significant here because it held that a state acts not only through its legislative department but also through its judicial and executive agencies as well.

In United States v. Harris[10] twenty members of a Tennessee lynch mob seized four prisoners held by a state deputy sheriff and beat them severely, killing one. The mobsters were indicted under Section 2 of the Act of April 20, 1871, which prohibited a conspiracy by two or more persons to deprive another of equal protection of the laws or equal privileges or immunities under the laws, or from hindering state authorities from giving such protection. In sustaining demurrers to the indictments, the Court followed the Cruikshank case and held that the inhibitions of the Fourteenth Amendment applied only to state, not private, action, and that no other part of the constitution afforded authority for the statute in question.

In the Civil Rights Cases[11] decided in 1883 the Supreme Court was called upon to pass on the constitutionality of the key provision of the 1875 Civil Rights Act which provided in part,

> That all persons within the jurisdiction of the United States shall be entitled to the full and

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[10] United States v. Harris, 106 U.S. 629 (1882).

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

> equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The proceeding involved several indictments charging refusal to grant accommodations to Negroes in a hotel and in theaters in San Francisco and New York, and a civil action for damages alleging refusal to permit a Negro woman to ride in the ladies' car of a railroad in Tennessee.

Justice Bradley, speaking for the Court in declaring the statute invalid under the Fourteenth Amendment, held that the amendment was phohibitory upon the states only; "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." The Court declared that the amendment did not invest Congress with authority "to legislate upon subjects which are within the domain of state legislation." Positive rights are secured by the amendment, but only by way of prohibition against "state action." The amendment does not apply to wrongful acts of individuals unless "the evil or wrong actually committed rests upon some State law or State authority for its excuse or perpetration."

The essence of the decision was that the language of the Fourteenth Amendment was to be construed literally--it simply meant what it said it meant--its prohibitions applied to

"state action" only. Moreover, it was clearly pointed out that the amendment afforded only "negative" protection of the rights enumerated therein and could not be used as the basis of a positive civil rights program by the federal government. In other words, the individual had more protection from his state government after the Fourteenth Amendment was adopted than he had before its passage, but this protection was made effective only by the remedy furnished in the Judiciary Act of 1789. This was the remedy of permitting an aggrieved individual to go into a federal court and have the injuring act declared unconstitutional.

In the case of Baldwin v. Franks[12] decided in 1887 petitioner was arrested for assaulting Chinese citizens and driving them out of a California town. In habeas corpus proceedings the Supreme Court directed his release, again holding invalid the statutory provision involved in the Harris case, even though its use here against a private person protected a federal right--namely, the right of a Chinese, under a treaty between the United States and China, to remain in a California town and engage in business there on equal terms with American citizens. The Court held that the statute was too broadly worded.

In James v. Bowman[13] decided in 1903, two persons were indicted for bribing and preventing a Negro from voting in a

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[12] Baldwin v. Franks, 120 U.S. 678 (1887).

[13] James v. Bowman, 190 U.S. 127 (1903).

Kentucky congressional election under Section 5 of the Act of May 31, 1870, which prohibited any person from hindering or intimidating another from voting by various enumerated means. The Court held the statute in question invalid under the Fifteenth Amendment because that amendment, like the Fourteenth, was directed against "state action" only, not against private action. The Court also refused to uphold the validity of the statute under Section 4 of Article I of the Constitution, as an act designed to protect the right to vote in a federal election, because, while its use here was in connection with a federal election, it was worded so broadly as to apply to state elections also.

In the case of Hodges v. United States,[14] decided in 1906, defendant and others were indicted under the general conspiracy statute for conspiring to deny certain Negro citizens rights established by Section 16 of the Act of May 31, 1870. This act provided that all persons, regardless of color, had the same right to make contracts as white persons. Defendants had used violence in preventing Negroes from working in a lumber camp in accordance with the terms of a contract the Negroes had with their employer. The Court in sustaining demurrers to the indictments held the section unconstitutional under the Fourteenth Amendment because it applied to private, not state, action. The Court also refused to uphold the

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[14] Hodges v. United States, 203 U.S. 1 (1906).

validity of the statute under the Thirteenth Amendment.

An examination of the above cases reveals that many key sections of the statutes enacted to effectuate the Fourteenth and Fifteenth Amendments were held unconstitutional because such statutes were not strictly limited in their application to "state action" only. In only one case were any of the implementing statutes upheld under the Fourteenth or Fifteenth Amendments and that was in the case of Ex parte Virginia.

Thus the attempts to apply the limitations of the Fourteenth and Fifteenth Amendments to the acts of individuals during the period following the Civil War met with dismal failure. To the Court that decided the Civil Rights Cases and the other early cases interpreting the amendments it seemed quite clear that the amendments had a dual character. First, certain rights of the individual were protected. Second, this protection was to be afforded against "state action" only. Moreover, to the Civil Rights Court it seemed axiomatic that "state action" was one thing and private action another; and as a matter of basic constitutional theory the state regulated the individual, while federal control was addressed in turn primarily to the state. Private action enjoyed a constitutional immunity.

PART III

CASES APPLYING THE CONSTITUTION AS A FEDERAL CRIMINAL CODE

To appreciate more fully the importance and the possible implications in recent United States Supreme Court cases involving Sections 19 and 20 of the Criminal Code some attention should be given to background development.

In recent years the national government's power has been increasingly used to prevent agencies of state governments from interfering with the civil liberties of the individual. The principle of constitutional law common to these cases is that the due process clause and the equal protection of the laws clause of the Fourteenth Amendment are held to reenact certain provisions of the Federal Bill of Rights, which in itself provides protection only against federal encroachment. This principle affords the individual with protection, in the federal courts under the United States Constitution, against state interference with such traditional liberties as freedom of speech, press and religion.

In 1931 the Supreme Court held unconstitutional a state law for the first time on the ground that it deprived a person of one of the liberties enumerated in the Bill of Rights. In this case the Fourteenth Amendment was held to

protect freedom of press from deprivation by a state.[1]

Subsequent decisions brought other liberties enumerated in the Bill of Rights within the protection of the due process clause of the Fourteenth Amendment. But in 1937 the Court made it clear that the Amendment did not protect all the liberties enumerated in the Bill of Rights from invasion by "state action". Only "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" are protected against both state and federal encroachment.[2] The Supreme Court has not determined which provisions of the first ten amendments have been incorporated in the Fourteenth, but every one of the specific guarantees of the First Amendment has received some sort of federal protection against state encroachment.[3] It has also been held that a state may not deny the accused in a criminal case the right of counsel as guaranteed by the Sixth Amendment.[4] Yet the protection of this basic right has been questioned.[5]

Interference by the federal government in these cases was not antagonistic to the traditional concept of the proper

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[1] Near v. Minnesota, 288 U.S. 697 (1931).

[2] Palko v. Connecticut, 302 U.S. 319 (1937).

[3] Freedom of religion: see West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). Freedom of speech and press: Near v. Minnesota, op. cit.; Herndon v. Lowry, 301 U.S. 242 (1937). Right of assembly and petition: see Hague v. C. I. O., 307 U.S. 496 (1939).

[4] Powell v. Alabama, 287 U.S. 45 (1932).

[5] Betts v. Brady, 316 U.S. 455 (1942).

function or place of the National Constitution in our federal system of constitutional government. Federal interference proceeded along purely negative lines. But negative interference was not enough. Many individuals and organized groups began to demand a positive program on the part of the federal government. These have insisted that the federal government use its power to protect the individual against interferences with his liberties, not only from action of state officials, but also from the action of other private individuals as well.

It was, at least in part, to meet such demands for positive federal action that there was created in 1939 in the Criminal Division of the United States Department of Justice a Civil Rights Section. The function and purpose of this section was "to pursue a program of vigilant action in the prosecution of infringement" of civil liberties. As a result of the establishment of the Civil Rights Section, and as part of a general reawakening of interest brought about by militant groups, a new era in the life of the Civil Rights Acts began.[6]

Establishment of the Section was solely an act of administrative discretion. Congress did not create it and no legislation was passed giving it authority under which to operate.

The first major problem facing the newly created section was that of determining what possible statutory bases

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[6]T. I. Emerson and D. Haber, Political and Civil Rights in the United States, p. 44.

existed for the adoption of a positive program to enforce civil rights. It was soon determined that as a result of the revisions of 1909 the major surviving criminal provisions of the Civil Rights Acts became Sections 19 and 20 of the Criminal Code, which became Sections 51 and 52 of Title 18 U. S. C. (1926 codification), which in turn became Sections 241 and 242 of Title 18 U. S. C. (1948 codification). The statutes will hereinafter be referred to as Sections 19 and 20 regardless of the date involved. In their present form the sections read as follows:

> Section 19.
> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured--
> They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> Section 20.
> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

A reading of Section 19 shows a number of limitations: (1) it is a conspiracy statute; it cannot be violated by a single person acting alone; (2) the victim or the intended

victim must be a United States citizen; and (3) the design of the conspiracy must be to interfere with rights or privileges secured by the Constitution or laws of the United States.

There are a number of elements to be noted in Section 20: (1) its provisions may be violated by a single individual; (2) this section is for the protection of "any inhabitant;" and (3) it is directed only against persons acting under color of law.

Before the decision in the landmark case of Screws v. United States in 1945[7] the constitutionality of Section 19 was upheld in several cases decided prior to that time.[8] But it must be noted that in none of those cases was Section 19 used to protect rights secured only by the Fourteenth or Fifteenth Amendments.

Prior to the Screws case Section 20 had been involved in only two reported cases, both in federal district courts, but there was no conviction in either case.

In United States v. Buntin[9] a teacher was indicted under Section 20 for excluding Negroes from the only school in the district, but the defendant admitted he was acting under state law.

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[7]Screws v. United States, op. cit.

[8]In addition to the cases noted in the Introduction, see Ex parte Yarbrough, 110 U.S. 651 (1884); Motes v. United States, 178 U.S. 458 (1900); United States v. Classic, 313 U.S. 299 (1941).

[9]United States v. Buntin, 10 F. 730 (1882).

In United States v. Stone[10] certain Maryland election judges were indicted under the same section for preparing ballots in such a way as to make it easy to vote Democratic but difficult for illiterate Negroes to vote Republican. Clearly the defendants were acting under "color of law," for they were acting in compliance with a Maryland statute.

The Screws case involved a "shocking and revolting episode in law enforcement." Screws was sheriff of Baker County, Georgia. With the assistance of defendant Jones, a policeman, and defendant Kelly, a special deputy, Screws arrested Hall, a Negro citizen of Georgia. The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall was handcuffed and taken by car to the courthouse. As Hall alighted from the car at the courthouse square, the three defendants began beating him with their fists and with a blackjack. After Hall had been knocked to the ground, they continued to beat him from fifteen to thirty minutes until he was unconscious. Then he was dragged, feet first, through the courthouse square into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness.

The United States Attorney, working with the Civil Rights Section, brought the case to the attention of the federal grand jury and obtained an indictment against the three de-

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[10] United States v. Stone, 188 F. 836 (1911).

fendants. One count charged them with violation of Section 19; the second charged a violation of Section 20; and the third charged them with a conspiracy to violate Section 20 contrary to Section 37 of the Criminal Code.[11]

The District Court sustained demurrers to count one and there was no appeal from such ruling; consequently, the count one charge was dropped from the case.

The theory of the indictment under Section 20 was that Hall had been deprived under color of the laws of Georgia of rights guaranteed by the Fourteenth Amendment--the right not to be deprived of life without due process of law; and the right to be tried, upon the charge on which he was arrested, by due process of law and if found guilty to be punished in accordance with the laws of the State of Georgia.

The case was tried by a jury and a verdict of guilty was returned against all three defendants. A fine and imprisonment on each of the two remaining counts was imposed, making a total fine of $1,000 and a prison term of three years. On appeal the Circuit Court of Appeals affirmed[12] by a two to one vote. The Supreme Court took jurisdiction on certiorari to the Circuit Court of Appeals.

The dissenting judge in the Circuit Court pointed out

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[11]This statute makes it a crime for two or more persons to conspire to commit any offense against the United States. Apparently the reason for this additional count was to increase the maximum penalty in the event of conviction.

[12]140 F. (2nd) 662 (1944).

that to uphold the validity of such a vague statute would cause all judges and prosecuting officers to tread on dangerous ground--an intentional refusal to send for witnesses, to furnish counsel, to grant a prompt trial, or a full indictment might make them criminals.

Before the Supreme Court, two principal arguments were made in behalf of the defendants. First, it was contended that Section 20 is unconstitutional in so far as it makes acts in violation of the due process clause of the Fourteenth Amendment criminal, because the broad definitions of rights protected by the amendment provide no ascertainable standard of guilt. Section 20 has content only if there is incorporated in it by reference a large body of changing and uncertain law. But under the American system of government, criminal statutes must be specific.

> To enforce such a statute would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner so that no one could make a copy of it."

The essence of the second defense argument is that inasmuch as the defendants were clearly acting in violation of state law, they were not acting under "color of law" and hence there was no "state action."

The principal opinion was written by Justice Douglas, joined by Chief Justice Stone and Justices Black and Reed. Douglas seems perturbed by the issue of vagueness. Defendants had contended that if the word "willful" in Section 20

means that the accused must have sought to deprive a person of a specific constitutional right, there is no way for him to know with sufficient definiteness the range of rights involved. Douglas replies to that argument by saying that the answer is provided in that there must be an intent to deprive a person of a right which rests upon any one of three bases, a right which has become specific either by (1) the express terms of the Constitution, (2) the express terms of the laws of the United States, or (3) decisions interpreting them.

He further points out that if a local police officer persists in enforcing a type of ordinance which the court has held invalid as in violation of the guarantees of freedom of speech and religion or a local official continues to select juries in a manner which flies in the teeth of decisions of the court, they could not possibly claim that they had no fair warning that their acts were prohibited by Section 20.

Douglas was careful to point out that it is not necessary for the prosecution to show that the accused had a conscious and deliberate intent to flout a specific federal right. It was enough that they acted "in reckless disregard of constitutional prohibitions." Moreover, turning to the type of actions for which defendants were being prosecuted, Douglas states,

> Those who decide to take the law into their own hands and act as prosecutor, judge, jury and

> executioner plainly act to deprive a prisoner of the trial which due process of law guarantees him. And such a purpose need not be expressed; it may at time be reasonably inferred from the circumstances attendant on the act.

And again it is stated that the jury in determining the presence of bad intent may properly consider all the attendant circumstances--malice of defendants, weapons used in the assault, its character and duration, the provocation, if any, and the like.

The case against the defendants in the instant case might well seem to have met the test prescribed.

The argument that defendants were not acting under "color of law" and hence there was no violation of the Fourteenth Amendment apparently gave the court little if any trouble. The majority followed the Classic case wherein it was held that action taken under "pretense" of law is action taken under "color" of law and "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

The Court held that defendants clearly acted under "color of law" in making the arrest of Hall and in assaulting him. They were officers of the law and it was their duty under the laws of Georgia to make the arrest effective. Hence, their conduct comes within the statute.

The members of the Court split curiously on the method of final disposition. Justices Douglas, Black, Reed, and

Chief Justice Stone voted for a new trial on the ground that the jury had not been properly instructed to find a "willful" deprivation of a constitutional right. Justice Murphy, who thought the conviction should stand, dissented on the ground that a new trial could hardly make the existence of willfulness more evident. Justices Roberts, Frankfurter and Jackson dissented on the ground that Section 20 did not have the meaning ascribed to it; and if it did, it was unconstitutional for lack of definiteness. Justice Rutledge, although agreeing with Justice Murphy, cast his vote with the first four to avoid a stalemate and to strengthen the decision of the Court that Section 20 was constitutional.

It should be noted that on retrial of the case, following the remand, defendants were acquitted by the jury.[13]

Some writers argue with an air of certainty that the Screws case removes all doubt as to the constitutionality of federal Anti-Lynching laws.[14] Before proceeding further with such idea, attention should be directed to the pertinent provisions of a typical Anti-Lynching statute:

> Whenever a lynching occurs, any officer of a state or subdivision thereof who is charged with the duty or possesses the authority to protect such person from lynching, or has custody of the person and neglects or refuses to make diligent efforts to protect him from lynching, or who is charged with the duty or possesses the authority

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[13] T. I. Emerson and D. Haber, op. cit., p. 60.

[14] M. R. Konvitz, "Lynching as a Federal Crime", The Constitution and Civil Rights; and Julius Cohen, "The Screws Case: Federal Protection of Negro Rights", 46 Colum. L. Rev. 94 (1946).

> to apprehend, keep in custody, or prosecute the members of the lynching mob, and neglects or refuses to make diligent efforts to do so, shall be deemed guilty of a felony.[15]

It is apparent that the proposed statute is directed only against state officers, in so far as criminal liability is concerned.

It is contended that although the Screws case involved a situation in which the deprivation of a constitutional right consisted of affirmative acts of state officers acting under "color of law" the majority opinion is not couched in such delimiting terms as to preclude the possibility of applying Section 20 to negative acts of state officers.

It is further argued that the problem according to the Screws opinion is not whether state law has been violated, but whether one has been deprived of a federal right by one who acts under "color of law", consequently the failure of state officers to provide sufficient safeguards for a Negro in their custody--when they have reason to anticipate mob violence--is a taking of the law into their own hands within the meaning of the Screws case. Moreover, such negative action is plainly an act "to deprive a prisoner of the trial which due process of law guarantees him." Nor can it be doubted that such an officer is acting under "color of law:" for such inaction, though a misuse of official duty, would nevertheless be within the course of such official duty. And the "willful" purpose to expose a Negro prisoner to mob

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[15] Konvitz, op. cit., p. 76.

violence "need not be expressed; it may at times be reasonably inferred from all the circumstances attendant on the act." It is said that the lack of specificity in Section 20 with respect to the "willful" inaction of state officers would not raise any serious constitutional question, for usually the nature of the duties in such cases, e. g. removal of the prisoner to a safer prison, the swearing in of deputies, the notifying of the proper authorities of the need of protection, and the like, are sufficiently well known to such officials as to provide them with a sufficiently definite standard of conduct.[16]

Certainly the above thesis is a logical extension of the principles enunciated in the Screws case. But it is submitted that the hypothesis that "inaction" may constitute "state action" is a far cry from the traditional concept of "state action" under the Fourteenth and Fifteenth Amendments.

The last cases to be discussed in this part of the study involving Sections 19 and 20 are Williams v. United States[17] and United States v. Williams,[18] companion cases which emanated from the same facts and which were decided by the Supreme Court in 1951.

In Williams v. United States the Supreme Court upheld for the first time a conviction under Section 20 for depriving

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[16] Julius Cohen, op. cit.

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

[18] United States v. Williams, 341 U.S. 70 (1951).

one of rights under the Fourteenth Amendment. Williams, a private detective who held a special police card issued by the City of Miami, Florida, and who had taken an oath qualifying as a special police officer, was hired by a lumber company to investigate suspected thefts of company property. He was not on the public payroll, however. This detective, with two of his own employees and a regular city policeman who was sent by his superior to lend authority to the proceedings, took several suspects, without arresting them, to a shack upon the company premises and by third degree methods and beating secured confessions. Williams was indicted under Section 20. The indictment charged among other things that the defendant acting under "color of law" used force to make each victim confess his guilt, and that the victims were denied the right to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Georgia. Defendant was found guilty under instructions which conformed to the ruling in the Screws case.

The majority found that defendant was acting under "color of law" within the interpretations set forth in the Classic and Screws cases.

> This was an investigation conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it.

The main issue to the Supreme Court on certiorari was defendant's contention that application of Section 20 so as

to sustain a conviction for obtaining a confession by force and violence was unconstitutional because the statute was too vague. The defendant pointed to decisions of the Supreme Court where the justices were divided on whether "state action" violated due process, arguing that if the Court could not agree on the standard, police officers "walk on ground far too treacherous for criminal responsibility."

In answer to that contention Justice Douglas says that "a close construction will often save an act from vagueness that is fatal." The present case is a good illustration for while there may be doubt as to the legality of police methods of obtaining confessions in some cases, there is none here. "This is the classic use of force to make a man testify against himself." It was held that the defendant acted willfully and purposely; his aim was precisely to deny the protection that the constitution affords. "It strains at technicalities to say that any issue of vagueness of Section 20 as construed and applied is present in this case."

In the case of United States v. Williams, Williams and three others were originally indicted under Sections 19 and 20. Williams was convicted and the other defendants were acquitted on the substantive charge of violation of Section 20 (William's conviction was upheld by the Supreme Court),[19] and a mistrial was declared under Section 19 as to all de-

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[19] Williams v. United States, op. cit.

fendants. The four petitioners in the instant case were then retried and convicted under Section 19. The Circuit Court reversed and the Supreme Court affirmed.

Justice Frankfurter announced the judgment of the Court in an opinion in which Chief Justice Vinson and Justices Jackson and Minton joined.

Without denying the power of Congress to enforce by criminal sanction every right guaranteed by the due process of law clause of the Fourteenth Amendment, the four justices held that because of the history of Section 19, "its text and context, the statutory framework in which it stands, its practical and judicial application", Section 19 covers conduct which interferes only with rights arising from the substantive powers of the Federal Government.

Justice Black concurred on grounds of res adjudicata, thus finding it unnecessary to determine the validity of the application of Section 19.

It should be noted that four justices: Douglas, Reed, Burton and Clark, in their dissent, concluded that federal prosecution under Section 19 would be proper if defendants were acting under "color of law" although the conspiracy alleged is to violate a guaranteed right. The dissent says that the rights covered in Sections 19 and 20 are the same. Their explanation of failure in the past to prosecute successfully individuals under Section 19 where the conspiracies were to violate guaranteed rights is that in these prior

decisions the conspiracies were those of private individuals. This minority finds that it is the capacity of the individual that determines the coverage of Section 19; and where the individuals acted under "color of law", the scope of this section is enlarged. The effect of this is that Section 19 would be applied to conspiracies and Section 20 would be applied to the substantive offense.

Since the position of a substantial majority, which often becomes a majority, finds the rights covered in both sections are the same, it may be fruitful to speculate as to whether this would have the effect of extending present principles and techniques for prosecution. Under the reasoning of the minority conspiracies of private persons to violate guaranteed rights would appear to be susceptible to prosecution under Section 19, especially if any one of the co-conspirators were subject to prosecution.

In this connection note should be taken of the United States District Court case of United States v. Trierweiler[20] decided in 1943, which clearly indicates that one may be prosecuted for conspiring to violate Section 20 though not acting under "color of law" if one of the co-conspirators could have been convicted of the Section 20 offense.

Until the decisions in the Classic, Screws and Williams cases the traditional belief was that an individual's action could not be "state action" if the activity in question were

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[20] United States v. Trierweiler, 52 F. Supp. 4.

not authorized by the state. Action by a private individual could not be "state action" if the individual were violating the laws of his state.

Woodrow Wilson once stated the proposition in this manner:

> The theory of our law is that an officer is an officer only so long as he acts within his power; that when he transcends his authority he ceases to be an officer and is only a private individual.[21]

As pointed out by Justices Roberts, Frankfurter, and Jackson in the Screws case it is indeed difficult to understand how a state can be said to deprive a person of a right guaranteed by the Fourteenth Amendment when the very foundation of such claim is that a minor official has disobeyed the explicit command of his state. In this connection it should be carefully noted that in the Williams cases the defendant was not on the public payroll, he was only licensed by the municipality. The fact that he had been granted a license and that a city policeman was present during the commitment of the acts for which he was indicted was held sufficient to conclude that defendant was acting under "color of law" and hence there was "state action." Is it logical to determine that where one is acting in flagrant disregard of state law, one nevertheless remains the agent of his state and is still acting for it? The well-established rule of principal and

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[21]Woodrow Wilson, Constitutional Government in the United States, p. 18.

agent does not apply, for certainly when one commits murder, as in the Screws case, he cannot be said to be carrying out the business or furthering the interest of his principal, the state.

The Screws and Williams cases have not only destroyed the traditional concept of "state action", but also have taken the constitution away from its traditional function as a negative instrument which protects us from the agents of government. Logical application of the principles enunciated in the above cases would make of the constitution a criminal code, the provisions of which would be most uncertain and subject to constant change by court interpretation.

PART IV

CASES INVOLVING ELECTIONS

Perhaps in no field of activity can the disintegration of the traditional concept of what constitutes "state action" be more vividly portrayed than in an examination of the United States Supreme Court's decisions concerning elections. To be able to comprehend just how complete this disintegration has become, it becomes necessary to examine several cases beginning with some of those first decided after the adoption of the Fourteenth and Fifteenth Amendments.

In 1874, the Supreme Court, in deciding that the Fourteenth Amendment had not invested women with the right of suffrage, declared that the Constitution had not conferred the right of suffrage upon anyone and that the United States had no voters of its own creation.

The next year the Court held in United States v. Reese that the Fifteenth Amendment had invested United States citizens with a new constitutional right; i. e., exemption from discrimination by the United States or the States in the exercise of the elective franchise on account of race, color, or previous condition of servitude. The Court declared that the right to vote comes from the States; but that the right

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[1] Minor v. Happersett, 21 Wall. 178 (1874).

of exemption from the prohibited discrimination comes from the United States.[2]

Federal authority to punish state officers for offenses committed in conducting elections in which federal officers were elected was first sanctioned in a case decided by the Supreme Court in 1879.[3] Conviction of state election officials who had stuffed the ballot box in a congressional election was upheld under a federal law which made it an offense against the United States for an election official in a federal election to fail to perform his duty, as outlined in either a state or federal law. The officials had violated a Maryland statute. The rationale of the decision was that the United States had embraced the state law and made it its own.[4]

It was not until 1884 that the Supreme Court sanctioned the use of federal penal statutes to protect the right to vote in a federal election from interferences by private individuals. In the case of Ex parte Yarbrough,[5] commonly referred to as the "Ku Klux Case", the Court receded from its earlier stand in the Reese case and upheld the conviction of nine men charged with a federal crime for beating a Negro because he voted in a congressional election. The

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[2] United States v. Reese, 92 U.S. 214 (1875).

[3] Ex parte Siebold, 100 U.S. 379 (1879).

[4] United States Constitution, Article I, Section 4.

[5] Ex parte Yarbrough, 110 U.S. 651 (1884).

Court declared that the Fifteenth Amendment confers proprio vigore on the Negro the right to vote in any state which may by its own laws confine that right to white persons. It was further held that the right to vote in a federal election, while subject to the qualifications established by the states, was derived from the Federal Constitution and Congress had the implied power to protect that right against aggression by both private persons and public officials. Section 19 was upheld when used to protect the right to vote in a federal election against private encroachment.

In 1915, the Supreme Court held that in spite of Congressional repeal in 1894 of the more specific federal laws dealing with elections, Section 19 was still available to protect the right to vote in a federal election.[6] But only three years later the Court receded from that position when it took judicial notice of the congressional intent to end federal control of elections and refused to sanction the use of Section 19 against an alleged conspiracy to bribe voters in a congressional election.[7]

In 1917, the Court refused to apply Section 19 to protect the right of a Republican senatorial candidate to have ballots cast in a primary election honestly counted, holding that the rights which candidates for nomination for

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[6] United States v. Mosley, 238 U.S. 383 (1915).

[7] United States v. Bathgate, 246 U.S. 220 (1918).

the office of United States Senator or Representative may have in such a primary are derived wholly from state law.[8]

The next case to be noted arose out of the 1918 United States senatorial campaign in Michigan in which Truman H. Newberry, Republican, defeated Henry Ford, Democrat. The direct question presented to the Court was the legality of the actions of Newberry and one hundred and thirty-four others for violation of the Federal Corrupt Practices Act of 1910 limiting the amount which might be spent in securing a primary nomination for United States Senator. The principal opinion, designated in the reports as the "opinion of the Court", was written by Justice McReynolds for himself and Justices Day, Holmes, and Van Devanter. It joined the courts of several states in the position that elections and primaries are "radically different" and that general provisions in constitutions or statutes touching the one are not necessarily applicable to the other. The Court declared that "primaries are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors." Conviction was reversed on the ground that the Corrupt Practices Act was unconstitutional as applied to primaries.[9]

Justice McKenna concurred in the opinion as applied to the statute under consideration which was enacted prior

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[8] United States v. Gradwell, 243 U.S. 476 (1917).

[9] Newberry v. United States, 256 U.S. 232 (1921).

to the adoption of the Seventeenth Amendment; but he reserved the question of the power of Congress under the amendment.

Chief Justice White dissented from the McReynolds opinion on the question of constitutionality holding that the primary was such an integral part of the elective process that Congress did have the power to regulate.

The other three justices concurred in the judgment of reversal because of error in the submission of the case to the jury, but they felt that there was no constitutional infirmity in the statute.

In spite of the lack of majority opinion on the point, the Newberry case became recognized as authority for the proposition that a political party primary was not an election, and the right of a citizen to vote therein was not within those protected by the Fourteenth and Fifteenth Amendments.

Such a declaration was made in a decision of a United States District Court in the case of Chandler v. Neff[10] in which a Negro had brought an equitable action to restrain the enforcement of a Texas statute barring Negroes from participation in the Democratic primary.[11] The declaration was dictum, however, for the court had already held that an

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[10] Chandler v. Neff, 298 F. 515 (1924).

[11] Texas Revised Civil Statutes, Article 3107 (3093a in Acts 1923), (1925).

equity court was without power to restrain enforcement of state law on the ground that it deprived complainant of political rights guaranteed by the United States Constitution.

The same Texas statute was soon challenged at the bar of the United States Supreme Court in the case of Nixon v. Herndon.[12] A unanimous court avoided the question of the statute's violation of the Fifteenth Amendment, but found the statute invalid as a violation of the equal protection of the laws clause of the Fourteenth Amendment. The state's enactment of the statute was clearly "state action".

The decision concluded with a statement that color could not be made the basis of a "statutory classification" affecting the right to participate in primaries.

As might have been expected, the Democrats in Texas were not long in acting under the Court's suggestions. After the Nixon v. Herndon decision, the Texas Legislature in 1927 in a called session repealed the offensive statute and enacted one providing that

> Every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party...

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[12] Nixon v. Herndon, 273 U.S. 536 (1927).

[13] Tex. Rev. Civ. Stat., Art. 3107. (Sec. 1 of Acts 1927, 40th Leg., 1st. C. S., p. 193, ch. 67, repealed Rev. St. 1925, Art. 3107, but gave the new article the same number).

Acting under the new statute the Democratic State Executive Committee adopted a resolution in 1927 providing that only white persons would be permitted to vote in the party primary.

The first federal court expression concerning the new law was in the case of Grigsby v. Harris[14] wherein a federal district court refused an injunction to prevent the members of the Democratic Executive Committee of Harris County from carrying out the mandate of the State Executive Committee, adopted in pursuance of the above statute, restricting the right to participate in the Democratic primary to qualified voters who were white Democrats. The Court found no violation of either the Fourteenth or the Fifteenth Amendment in the party's discriminatory action against Negroes. The basis of the decision was that the state was not acting, and private individuals could not violate the amendments. To the argument of the plaintiff that the committee was exercising power delegated by the Legislature, the Court answered that the state had by legislative action simply affirmed the "inherent" power of political parties to determine their own membership.

The next United States District Court expression which was portentous of a later Supreme Court Declaration was the Virginia case of West v. Bliley.[15] In that case Plaintiff, a Negro, was excluded from voting in the primary because of a

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[14] Grigsby V. Harris, 27 F. (2nd) 942 (1928).

[15] West v. Bliley, 33 F. (2nd) 177 (1929).

resolution adopted by the State Democratic Convention, pursuant to a statute similar to the Texas Statute, declaring that only white persons should participate in the Democratic primary. The Court considered the primary as an integral part of the state's election machinery and, consequently, had no difficulty in finding discriminatory "state action" in violation of both the Fourteenth and Fifteenth Amendments.

In an action for damages the Texas Statute of 1927 was upheld by a second Federal District Court in Nixon v. Condon.[16] In upholding the trial court's decision, the Circuit Court of Appeals emphasized the proposition that the 1927 statute merely recognized a power "inherent" in the party, and the point that the party committee and the election judges were party representatives and in no sense government officials.[17]

When the case reached the United States Supreme Court, it was held that the statute in question had made the State Democratic Executive Committee an agency of the state of Texas; consequently, its discriminatory action in excluding Negroes was "state action" within the prohibitions of the Fourteenth Amendment. The Court did not say that deprivation of the right to vote in the Democratic primary was a violation of the Fifteenth Amendment, but it settled the question of constitutionality by extending the principle of Nixon v. Herndon to include the executive committee.[18]

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[16] Nixon v. Condon, 34 F. (2nd) 464 (1929).

[17] Ibid., 49 F. (2nd) 1012 (1931).

[18] Ibid., 286 U.S. 73 (1932).

The Court refused to answer the question of whether the deprivation would have been valid if it had come from the state convention of the party "wherein resides whatever inherent power a political party has to determine the content of its membership."

The dissent, written by Justice McReynolds and concurred in by Justices Van Devanter, Sutherland, and Butler, found no "state action". They held that the statute merely recognized a power already existing and did not grant power. The statute did not make the party committee an agency of the state--the resolution excluding Negroes "was the voice of the party and took from appellant no rights guaranteed by the Federal Constitution or laws."

Following the Supreme Court's decision, as might have been expected, the state convention of the Democratic Party on May 24, 1932, adopted a resolution providing that only white persons were eligible to membership in the Democratic Party in Texas.

The action of the State Democratic Convention was soon challenged in the Federal District Court. In White v. County Democratic Convention of Harris County[19] a federal district court held the state convention to be an agency of the state within the meaning of the majority opinion in Nixon v. Condon.

The first Supreme Court expression came in the case of Grovey v. Townsend[20] wherein the Court held that denial of a

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[19] White v. County Democratic Convention of Harris County, 60 F. (2nd) 973 (1932).

[20] Grovey v. Townsend, 295 U.S. 45 (1935).

ballot to a Negro for voting in a Democratic primary election, pursuant to a resolution adopted by the State Democratic Convention, was not "state action" inhibited by either the Fourteenth or Fifteenth Amendment. Statutes regulating party affairs and the fact that nomination by the Democratic Party was equivalent to election did not make the party a creature of the state, the Court declared.

The next case to be noted is United States v. Classic[21] in which the Supreme Court overruled demurrers of primary election officials in Louisiana who were indicted under Sections 19 and 20 because they altered ballots and counted them for the congressional candidate of their choice.

This was the first important case handled by the newly created Civil Rights Section of the United States Department of Justice. The Justice Department apparently believed that the case might be used to reverse the Newberry decision, a necessary step toward the ultimate goal of federal regulation of Democratic primaries.

The Civil Rights Section did not hope in vain for the Court upheld the right of federal regulation of primaries in which federal officials were nominated through consideration of the practical effect of the denial of the primary vote upon the right of choice. The criteria established for finding authorization for federal regulation was where the

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[21] United States v. Classic, 313 U.S. 299 (1941).

primary (1) was an integral part of the state's elective processes or (2) provided the only effective means of choice.

It should be noted, however, that the decision did not rest on the Fourteenth or Fifteenth Amendments, for the Court held that the Federal power to intervene arose under Article I, Section 4 and Article I, Section 8 (18) of the United States Constitution.[22]

The next landmark case to reach the Supreme Court in the trend toward applying the Fourteenth and Fifteenth Amendments to "private action" in the elections cases was the Texas case of Smith v. Allwright[23] which specifically overruled Grovey v. Townsend. Allwright, an election judge, and other primary election officials acting under the 1932 resolution of the State Democratic Convention denied Smith, a Negro, the right to participate in the 1940 Democratic primary, solely because of his race and color. Smith brought an action in the United States District Court under Title 8,

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[22] United States Constitution, Article I, Section 4,
The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

Ibid., Art. I, Sec. 8 (18),
The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

[23] Smith v. Allwright, 321 U.S. 649 (1944).

U. S. C., Sections 31 and 43,[24] asking for damages and a declaration of his right to vote. The District Court denied the relief sought and the Circuit Court of Appeals affirmed on the authority of Grovey v. Townsend. The Supreme Court granted certiorari to resolve a claimed inconsistency between the decision in the Grovey case and that of United States v. Classic.[25]

The defense was that there was no "state action" and, hence, no violation of the inhibitions of the Fourteenth or Fifteenth Amendments--the Democratic Party of Texas was simply a private and voluntary organization with members banded together for the purpose of selecting individuals of the

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[24] U. S. C., Title 8, Sec. 31:
"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without destinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Ibid., Sec. 43:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[25] The Dallas Morning News, June 28, 1954, p. 1.
It might be noted that this is the first record in the reports where Thurgood Marshall, Chief Counsel of the National Association for the Advancement of Colored People, appeared as counsel before the Supreme Court. The recently decided segregation cases marked his sixteenth victory before the Court.

group representing the common political beliefs as candidates in the general election. Primaries, it was contended, were private political party affairs, and as private organizations, parties were free to select their own membership. Such action, the answer asserted, did not violate the amendments in question, as officers of government cannot be chosen at primaries and the amendments were applicable only to general elections where governmental officials were actually elected.

In reaching its decision, the Supreme Court reviewed the various statutes regulating the conduct of primary elections and determined that because of the comprehensive statutory regulation the Democratic Party was an agency of the state, and, hence, its exclusion of Negroes constituted "state action" in violation of the Fifteenth Amendment.

It is interesting to note that although the plaintiff had alleged that the second rationale of the Classic case was applicable when the results of the primary determine the outcome of the general election, such was not mentioned in the decision of the Court. As a basis for finding "state action" the Court's emphasis was clearly on statutory regulation.

Apparently the only distinction the Court saw from the Classic case was that party expenses in Texas were met by the party and not by public funds as in the Louisiana case. But as pointed out by Justice Roberts in his dissent, in the

Classic case there was no question concerning the voters' qualifications to vote, and in Louisiana the primary was conducted by public officials while in Texas it was conducted solely by party officials.

In basing its decision on "statutory regulation," the Court took a rather tenuous position. Perhaps students of government become too grounded in traditionary constitutional concepts, but it is extremely difficult to trace any connection between regulation by the state and the application of the inhibitions of the Fourteenth and Fifteenth Amendments. It is impossible to chart a course to where logical application of the rationale of the Allwright case will eventually lead us. To clearly illustrate, a landlord may be subject to extensive control by zoning laws, building regulations, sanitary requirements, safety regulations, and in some cases perhaps rent ceilings. A logical application of the rationale of the principal case would make racial discrimination by him such an abuse of state power as to fall within the purview of the Fourteenth Amendment. The fact that individuals are subject to some restrictions should not be grounds for imposing others.

The Supreme Court's emphasis on statutory regulation in the Allwright case and its failure to pass upon the status of primaries when they in fact determine the outcome of the general elections, but are not regulated by statutes, did not go unnoticed by the Democrats of South Carolina. Eleven days

after the Court announced its decision in the Texas election case the South Carolina Legislature met in called session and repealed all statutes regulating primaries and, in addition, set in motion procedure to repeal the section of the state constitution providing for primary election laws. The constitutional provision was subsequently repealed by vote of the people. Thereafter, the Democratic primary was conducted under rules prescribed by the party.

In Rice v. Elmore[26] the Fourth Circuit Court of Appeals found that Democratic party officials in South Carolina had violated the Fourteenth and Fifteenth Amendments in denying Negroes participation in the Democratic primary, and the Supreme Court denied certiorari.[27]

In reaching its decision the Court declared that the fundamental error in defendant's position lay in the premise that a political party is a mere private aggregation of individuals and that the primary is a mere piece of party machinery. The Court's position was that "political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people." The Court stressed the fact that in South Carolina the primary effectively controlled the choice and was an integral part of the state's election machinery. Party offi-

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[26] Rice v. Elmore, 165 F. (2nd) 387 (1947).

[27] 68 S.C. 905.

cials were held to be de facto officers of the state. The continuation of party control under the same group and the same general rules was held to constitute a custom or usage which was not the act of individuals but "state action" within the purview of the Fourteenth and Fifteenth Amendments.

It is surprising that the Circuit Court did not find "state action" in the legislative repeal of the statutes regulating primaries in South Carolina subsequent to the Allwright decision. Under the authority of the Allwright case, Negroes would have had the right to participate in the South Carolina primaries had not the statutes been repealed.

The principle suggested in the Smith v. Allwright and Rice v. Elmore cases that whether the inhibitions of the Fourteenth and Fifteenth Amendments may be applied to private organizations depends on whether such organizations are performing governmental functions has been applied in at least one Supreme Court case not in the elections field but which might be appropriately noted here.

In the case of Marsh v. Alabama[28] the Supreme Court extended the concept of "state action" still further in order to reach a desired result. In that case the Court reversed a conviction under an Alabama statute which made it a crime for one to remain on the premises of another after having been warned not to do so. The defendant, a Jehovah's Witness,

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[28] Marsh v. Alabama, 326 U.S. 501 (1946).

distributed religious literature on the streets of Chickasaw, Alabama, a town wholly owned by Gulf Shipbuilding Corporation. She refused to leave at the request of company officials and was arrested and subsequently convicted of a misdemeanor under the state statute. The actual effect of the Court's decision in reversing the conviction was to nullify an action of the state--the conviction under the trespass statute. But to reach such a result the Court in effect had to hold that the Fourteenth Amendment limited the powers of the private organization which owned the town. The statute was not declared unconstitutional--not unconstitutional if applied to a small landowner. The Court declared that since the corporation was performing the functions of a municipality it could no more impair the rights of freedom of press and religion than a municipality regularly organized.

The latest Supreme Court decision in the series of election cases extending the concept of "state action" to private individuals is the case of Terry v. Adams[29] which was decided on May 4, 1953. This case might well be the last, for it appears that any further extension of the traditional concept would bring the Court to the point that it might as well admit that the requirement of "state action" is purely fictional.

Plaintiff and others brought a class action in the Federal District Court asking for a declaratory judgment and

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[29] Terry v. Adams, 345 U.S. 461 (1953).

an injunction entitling them to participate in the primaries held by the Jaybird Democratic Association of Fort Bend County, Texas. The District Court, finding that the Association's action in denying participation to Negroes violated the Fifteenth Amendment and Section 31, Title 8, United States Constitution, rendered a decree favorable to plaintiffs; the Circuit Court of Appeals reversed; and the Supreme Court affirmed the District Court's ruling.

The pertinent facts in the case are as follows:

1. The Association was formed in 1889 and for many years made its nominations or endorsements in convention. In recent years, however, has used the primary device;

2. It did not avail itself of or conform to state laws regulating primaries;

3. Only qualified white voters of the county could belong to the Association and participate in its endorsement primaries;

4. Its nominating or endorsement primary was held several weeks before the Democratic primary;

5. Its nominees entered the Democratic primary as individuals, but were under no compulsion to run in the Democratic primary;

6. Members of the Association who failed to secure endorsement by the Association could enter the Democratic primary but rarely, if ever, did so;

7. Nominees of the Association were not certified to any public official;

8. There was nothing on the ballot of the Democratic primary to indicate endorsement by the Association; and

9. Its candidates had won in both the Democratic primary and in the general election with only one exception.

The Supreme Court adopted at least three different theories in finding the necessary "state action" to declare the discriminatory acts of the Association invalid.

Justice Black, joined by Justices Douglas and Burton, seemed to find "state action" in the failure or "inaction" of the state in barring individuals from holding a discriminatory election, as evidenced by the statement, "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment."

Justice Frankfurter apparently found "state action" in his inference of participation in the Association's primary by the county officials, who, he thought, had abused their state authority by withdrawing significance from the regular and non-discriminatory Democratic primary.

Logical application of the point Frankfurter emphasized--that participation by county election officials in the Association's primary in their individual capacity as voters made the discrimination of the Association "state action"--would lead to ridiculous conclusions; for example, would it not logically follow that attendance of the election judge at a Lions Club meeting make subsequent discriminatory action of the club prohibited "state action"?

From the standpoint of court procedure Frankfurter's position is equally untenable. Inasmuch as these election officials were not made parties to the suit, and there is no

allegation that they exercised any control over the Association's primaries by virtue of any authority conferred upon them by the state, there is no justification to conclude that their activities were under "color of state law."

Justice Clark, joined by Chief Justice Vinson and Justices Reed and Jackson, concluded that the Association operated as an "auxiliary of the local Democratic party organization." When the state, he contended, has constructed

> . . . its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.

Clark's conclusion (assumption is a better word) that the Association's primary was part of the state's election machinery seems to be based on the results of the Association's primaries; i.e., Association endorsed candidates had consistently won in the Democratic primary and in the general election.

As pointed out by Justice Minton in dissent, the tests applied might logically include any dominant local pressure group which discriminates by race, sex, religion or economic position in canvassing for nominations. As pointed out by the dissenting judge in the Circuit Court and by Justice Minton, "The basis of this (the Court's) conclusion is rather difficult to ascertain. Apparently it derives mainly from a dislike of the goals of the Jaybird Association. I share that dislike. I fail to see how it makes "state action."

PART V

CASES INVOLVING RACIAL RESTRICTIVE COVENANTS

Recent Supreme Court decisions in which the Court refused to enforce racial restrictive covenants between individuals have not only greatly extended the concept of "state action" but also have rewritten old and well established real property laws. To understand the impact of these decisions it becomes necessary to give some attention to the history of this form of property restriction.

In general the American people have always desired to live in communities or geographical sections in which their neighbors were people with similar backgrounds especially in regard to race and color. In order to guarantee the continuance of "restricted" areas in urban residential centers resort was first had to state or municipal legislation. Beginning in 1910 with a Baltimore ordinance, quickly duplicated by Atlanta, Louisville and other cities, residential restriction through municipal ordinance was the favorite restrictive measure until that method was invalidated by a 1917 United States Supreme Court decision in the case of Buchanan v. Warley.[1]

That case involved the validity of a penal ordinance enacted by the City of Louisville, Kentucky. The ordinance in

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[1] Buchanan v. Warley, 245 U.S.60 (1917).

question forbade any white person or Negro, as the case might be, to move into and occupy as a residence or place of assembly any house in a city block in which a majority of the houses were already occupied by members of the other race.

The attack upon the ordinance was made by a white man who had contracted to sell to a Negro a lot in a certain block in which a majority of the houses was already occupied by white persons, the Negro's promise to buy being conditional, by the terms of the contract, upon his having a legal right to reside thereon. The white seller brought an action for specific performance and the defendant set up the ordinance as a defense. Plaintiff alleged that the ordinance was unconstitutional and hence no bar to his action.

The Supreme Court considered the case from the white seller's standpoint ignoring the contention that it abridged the privileges and immunities of citizens of the United States to acquire and enjoy property. The specific ground of the decision was that the ordinance in curtailing the owner's "jus disponendi," deprived him of property without due process of law. Clearly "state action" was present in this case.[2]

Until legislative restrictions were held invalid, the racial restrictive covenant had occupied a secondary role in enforcing segregation, but soon thereafter it emerged into primary significance. One of the basic reasons for the

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[2]Similar ordinances were held invalid in Harmon v. Tyler, 273 U.S. 668 (1927), and in City of Richmond v. Deans, 281 U.S. 704 (1930).

desire to preserve segregation and one which led to the adoption of the restrictive covenant device was the desire of home owners and real estate developers to prevent diminishing of property values by intrusion of heterogeneous racial groups.

These racial restrictions are found either in conveyances under seal, binding grantee and his successors in title, or in agreements under seal among property owners in a defined area, binding the parties to the agreement along with their successors in title usually for a certain stated time. In some cases the restriction was on alienation while in some cases it was on occupancy or use. As a means of assuring purchasers of a continuation of the residential environment established by the developer, covenants running with the land were included in the deed to each lot in the sub-division as it was sold thus creating covenants for the benefit of owners under the original plat.

Gandolfo v. Hartman[3] is apparently the first reported case involving the racial restrictive covenant. This was an action for an injunction to restrain defendant from leasing certain property to a Chinaman in violation of a covenant in a deed not to convey or lease to such persons. In effect, the plaintiff urged that there was not "state action" and consequently the case did not come within the inhibitions of the Fourteenth Amendment. In refusing relief the Court based

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[3] Gandolfo v. Hartman, 49 F. 181 (1892).

its decision squarely on the equal protection of the laws clause of the amendment and then as a sort of afterthought added that for the Court to enforce the covenant would violate our treaty with China.

In the state courts the first of a long line of cases holding such restrictions valid was the case of Queensborough Land Co. v. Cazeaux.[4] This earliest state case involving racial restrictive covenants was decided in Louisiana in 1915 under civil law principles, and set the pattern for subsequent state decisions.

The first decision in a common law jurisdiction which held as legal a restraint against sale to a Negro was the Missouri case of Koehler v. Rowland[5] decided in 1918.

With the exception of the Gandolfo case and two inferior court decisions, one in Pennsylvania and one in New Jersey, among the numerous American decisions in both state and federal courts prior to 1948 there are no reported cases ruling restrictive covenants fundamentally invalid.[6] It should be further noted that in the Pennsylvania and New Jersey cases referred to above, the restrictive covenants involved were unlimited as to time.

Some state courts refused to enforce racial restrictive covenants if the prohibition were against sale, especially

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[4] Queensborough Land Co. v. Cazeaux, 67 So. 641 (1915).

[5] Koehler v. Rowland, 205 S.W. 217 (1918).

[6] 3 A.L.R. (2nd) 466, 475 (1948).

if the stated period were for an appreciable length of time, not because there was any violation of the inhibitions of the Fourteenth Amendment, but because of violation of the public policy of the state as an undue restraint upon alienation. There are reported decisions of the highest courts in more than half the states enforcing the covenants when applied to (1) sale, (2) use or occupancy, or (3) both.

Corrigan v. Buckley[7] has been frequently cited by state and lower federal courts as settling the constitutionality of judicial enforcement of restrictive covenants. In that case Buckley filed in a lower court of the District of Columbia a bill of complaint to restrain defendant Corrigan from conveying to defendant Curtis certain real estate in the District of Columbia in violation of a twenty-one year racial restrictive covenant running with the land. Plaintiff alleged that defendant Corrigan had entered into a contract with Defendant Curtis, a Negro, to sell a house and lot included within the covenant. Plaintiff asked that Corrigan be enjoined for twenty-one years from the date of the covenant from carrying out the contract of sale and that the Negro be enjoined from taking title, use or occupancy. Defendant Curtis filed a motion to dismiss the bill on the ground that the covenant was void, in that it deprived defendant and others of property without due process of law, abridged the privileges and immunities of citizens of the United States, and denied equal

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[7] Corrigan v. Buckley, 271 U.S. 323 (1926).

protection of the laws. The lower court denied the motion to dismiss and, defendants electing to stand upon their motion, a decree of injunction was granted.

On appeal to the Appellate Court[8] the covenant was held enforceable. The Court held that the Negro's right to acquire property did not include power to compel sale to him.

When the case reached the Supreme Court in 1926 it was held that under the pleadings the only constitutional question involved was that arising under the allegations in the motion to dismiss--that the covenant which was the basis of the bill was void in that it was contrary to the Fifth, Thirteenth, and Fourteenth Amendments. The Court declared, "It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property."

It should be noted that the Supreme Court in this case concerned itself with the validity of the restrictive covenant, not with the judicial enforcement of such.

To emphasize the fact that the state courts certainly were not reluctant to enforce the racial restrictive covenants two unusual cases might be noted.

In an Alabama case plaintiff, a white man, leased part of a house from defendant, the lease containing no restriction as to the renting of the other part. Defendant rented the other part of the house to a Negro, whereupon the plaintiff abandoned the premises and sued for damages. The Court

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[8] Corrigan v. Buckley, 299 F. 899 (1926).

held that there was a custom in the district not to rent to Negroes premises having a toilet common to quarters rented to white people and that the renting was a breach of the implied covenant of quite enjoyment, a constructive eviction for which plaintiff could recover in damages and that there was no repugnance to the Fourteenth Amendment.[9]

The other is an Oklahoma case decided in 1942. Fifteen years after owners of several residential properties recorded a ninety-nine year agreement not to sell or transfer to a Negro, one owner sold lots to a Negro. At the suit of an owner of some of the other lots the Court held the restrictive covenant enforceable and awarded judgment cancelling the deeds to the Negro. The Court in effect awarded punitive damages against the Negro purchaser by giving the plaintiff a judgment for costs and attorney's fees, making the judgment a lien on the lots, a lien prior to that allowed the Negro to the extent of the amount he had paid for the lots he had purchased.[10]

For many years prior to 1948, notwithstanding the fact that no state or federal court had so held, some few legal writers had argued that even though racial restrictive covenants might not be fundamentally invalid, state court enforcement of such restrictions was "state action" within

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[9] Wyatt v. Adair, 110 So. 801 (1926).

[10] Lyons v. Wallen, 133 P. (2nd) 555 (1942).

the prohibitions of the Fourteenth Amendment. It is interesting to note that in 1944 one writer advanced the identical hypothesis that was later embraced by the United States Supreme Court in holding state court enforcement of restrictive covenants invalid.[11]

Shelley v. Kraemer[12] is one of four cases which were disposed of by the Supreme Court in two opinions handed down on May 3, 1948.

The first of these cases reached the Court on certiorari to the Supreme Court of Missouri. In 1911, thirty of thirty-nine owners of property in a certain block on both sides of a street in St. Louis had signed an agreement providing that the property was not to be used or occupied for fifty years by persons of the Negro or Mongolian races, the restriction being in the nature of a covenant running with the land. These thirty owners held title to forty-seven of fifty-seven parcels of land in the area described in the agreement. In 1945, petitioners, Negroes, purchased certain premises in the area and accepted warranty deeds in fee with constructive notice of the restrictive agreements.

Two months later plaintiffs, as other owners of property subject to the restrictions, brought an equitable action

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[11] D. O. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional," 33 Calif. Law Rev. 5 (1944).

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

seeking to divest petitioners of title and to restrain them from taking possession. The trial court denied the relief sought on the ground that the restrictive agreement had not become effective, since it was intended that it should be signed by all the owners in the district. On appeal to the State Supreme Court this ruling was reversed and the relief sought ordered.

The Michigan case involved a 1934 agreement among owners of certain Detroit property providing that it should not be used or occupied by any persons except those of the Caucasian race until 1960. The agreement further provided that it should not become effective until eighty per cent of the property in the block was similarly restricted. Percentage condition precedent to effectiveness had been met. The petitioners, Negroes, acquired title property in the block and moved in late in November, 1944. Suit was brought in January, 1945, in a lower state court for a decree requiring the Negroes to move from the property. Such a decree was ordered and subsequently upheld by the Supreme Court of the State of Michigan.

The other two cases arose in the District of Columbia where the enforcement of similar restrictive covenants had been upheld by the Appellate Court there.

Petitioners in the Missouri and Michigan cases contended that state enforcement of the restrictive agreements had violated the Fourteenth Amendment in that petitioners had

been denied the equal protection of the laws, had been deprived of property without due process of law, and had been denied privileges and immunities of citizens of the United States.

There were twenty-one voluminous briefs filed in these cases emphasizing the "undesirable" social effect of continued enforcement of racial segregation. Comprehensive data was submitted showing the urgent need for better housing for Negroes especially in the so-called "pressure" areas. Statistics were presented showing the high rate of crime in the pressure areas in comparison with a much lower crime rate where adequate living space was available, and the like. In short, all the ills of the Negro race were attributable to residential segregation which in turn was attributable to state enforcement of racial restrictive covenants. It might also be noted that special emphasis was placed on the international significance of segregation--the need for America to practice social democracy during this period of strife between democracy and totalitarianism.

This emphasis on social data led one legal writer to remark,

> This combination of the skills of lawyers and social scientists in preparation of briefs and materials for the record, as distinguished from the use of the 'expert witness', offers innumerable possibilities for use in litigation of broad public importance.[13]

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[13]William R. Ming, "Racial Restrictions and the 14th Amendment: The Racial Restrictive Covenant Cases," 16 Univ. Chi. L. Rev. 203, 212 (1949).

Just how much weight the Court gave to the so-called social briefs is impossible to ascertain, but it is significant that the voluminous social data was prepared under the direction of an attorney who perhaps has enjoyed more success before the Supreme Court than any other man in history.[14]

To say the least, emphasis on social data as authority or precedent for judicial decisions seems to be a radical departure from basic constitutional theory:--that policy making is essentially a prerogative of the legislative department of government.

The Supreme Court held that the covenants in themselves were not invalid--they were simply agreements between private property owners; and so long as the purposes of the agreements were effectuated by voluntary adherence to their terms, clearly there was no "state action." But in granting judicial enforcement of the restrictive agreements, the states had denied petitioners equal protection of the laws. In other words, judicial enforcement of the valid contracts of individual citizens constituted "state action" in violation of the equal protection of the laws clause of the Fourteenth Amendment.

It was held that similar covenants were incapable of enforcement by Federal Courts in the District of Columbia because of the provisions of Section 1978 of the Revised Statutes, derived from the Civil Rights Act of 1866, and because

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[14]Thurgood Marshall, Chief Counsel for the National Association for the Advancement of Colored People.

enforcement would be contrary to the public policy of the United States.

In reaching its decision in the principal case the Court reviewed the cases arising under statutes or city ordinances excluding Negroes from acquiring property in certain areas. In all these cases it is clear that the prohibited "state action" was present. To understand the impact of Shelley v. Kraemer it must be kept in mind that the restrictions were determined in the first instance not by state legislative action or local ordinance, but by a valid agreement among individuals--the only "state action" involved was the judicial enforcement of the restrictions. The crucial issue, therefore, with which the Court was confronted was whether this distinction was enough to remove the case from the inhibitions of the Fourteenth Amendment.

In deciding that action of state courts is to be regarded as "state action" within the meaning of the Fourteenth Amendment a long series of cases are cited. Apparently these cases are cited to support the proposition that all judicial action of state courts may be regarded as "state action" within the purview of the amendment, for after citing Virginia v. Rives[15] (selection of jury) and Ex parte Virginia[16] (selection of jury), the Court says,

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[15] Virginia v. Rives, 100 U.S. 313 (1880).

[16] Ex parte Virginia, 100 U.S. 313 (1880).

> Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment are found in numerous cases which have been recently decided.

Among other cases cited are Twining v. New Jersey[17] (self incrimination), Brinkerhoff-Faris Trust and Savings Co. v. Hill[18] (the right to be heard and defend substantive right), and Pennoyer v. Neff[19] (the right to be served with citation).

These cases do hold state judicial action to be "state action" under the Fourteenth Amendment, but all involved procedural rights under that amendment.

> In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. Convictions obtained by coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

That statement by the Court along with the cases cited strengthens the proposition that in the past the principle that the action of a state court may be "state action" under the Fourteenth Amendment was limited to cases involving procedural due process.

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[17] Twining v. New Jersey, 211 U.S. 78 (1908).

[18] Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930).

[19] Pennoyer v. Neff, 95 U.S. 714 (1878).

The Court apparently realized that the cases cited and relied on do not support its conclusion in the principal case, for it said, "But the examples of state judicial action which have been held by this court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair."

To substantiate that statement the Court cites Cantwell v. Connecticut[20] and Bridges v. California.[21] These were criminal actions. In each instance the state was a party; therefore, "state action" was clear in any event.

The Court declared that freedom from discrimination by the states in the enjoyment of property rights was among the basic objectives of the Fourteenth Amendment and that the Constitution conferred upon no individual the right to demand action of the state which results in the denial of equal protection of the laws to other individuals. It is submitted that those statements were made upon the assumption that the action of state courts is "state action" within the meaning of the Fourteenth Amendment.

Perhaps the social argument was the determining factor after all. Certainly there is creditable evidence, in the light of the decisions relied upon by the Court, to support the hypothesis that the Court simply decided the case on purely

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[20] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[21] Bridges v. California, 314 U.S. 242 (1941).

social grounds and then searched in vain for judicial precedent to substantiate the decision which it had already rendered.

Like its predecessor (Shelley's Case)[22] the new rule in Shelley's case arises in a context of real property law, however, unlike the famous English case, it has a potential importance far beyond its immediate context.

Apparently Shelley v. Kraemer is the first Supreme Court decision to hold that state court action, in the absence of procedural defects, is "state action" within the meaning of the Fourteenth Amendment. Under the logic of this case if any private social group decided to bar Negroes but Negroes attended its meetings anyway, the calling of the local police force to expel the unwanted guests would constitute "state action" and would make the discriminatory exclusion invalid. If state court judgments in the absence of procedural defects are "state action" within the meaning of the amendment, how can a state court enforce a union shop agreement lest it discriminate against a non-union worker? Would any contract of hire be enforceable lest it discriminate against those who were not hired?

"The Court's opinion has only its own reasoning to support it. Nothing that this Court has ever decided or sanctioned gives it strength."[23]

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[22] Shelley's Case, 1 Co. Rep. 936 (1581).

[23] Justice Frankfurter in dissent in Davis v. United States, 328 U.S. 582, 603 (1946).

After Shelley v. Kraemer was decided, state courts consistently denied injunctive relief for violation of restrictive covenants, but conflict developed among the states as to the effect of the decision on the question of whether covenantee should recover damages for breach.[24]

The Supreme Court was soon confronted with the question of whether a state court's awarding of damages for breach of a restrictive covenant constitutes "state action" under the Fourteenth Amendment in the case of Barrows v. Jackson[25] which was decided on June 15, 1953.

Petitioners sued at law for damages for breach of racial restrictive covenant which provided that no part of the restricted realty be used or occupied by any person not wholly of the white or Caucasian race and that the restriction should be incorporated in all deeds transferring the property. The agreement was agreed to be a covenant running with the land and each provision was for the benefit of all the lots.

The complaint alleged that respondent violated the covenant by conveying part of the restricted realty without incorporating restrictions in the deeds, and by permitting non-Caucasians to enter and occupy the premises. The trial court sustained a demurrer to the complaint, the California Court of Appeals affirmed, and the California Supreme Court

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[24] Weiss v. Leaon, 225 S.W. (2nd) 1054, (Mo. 1949), awarded damages; contra, Phillips v. Naff, 52 N.W. (2nd) 1071, (Mich., 1951).

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

affirmed, holding that an award of damages by a state court for breach of racial restrictive covenant constituted "state action" which deprived the excluded class of equal protection of the laws in violation of the Fourteenth Amendment.

The Court reasoned that

> To compel respondent to respond in damages would be for the state to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages.

But as pointed out be Chief Justice Vinson in the lone dissent in the case, the suit here was not brought against the Negro purchaser but against the very person whose solemn promise helped to bring the covenant into existence. The plaintiffs were asking only that the defendant do what she in turn had a right to ask of the plaintiffs--indemnify the plaintiffs for the bringing about of an event which she recognized would cause injury. Defendant had profited from the execution of the covenant; observance of the covenant by plaintiffs had raised the value of defendant's properties. By bringing suit for damages plaintiffs sought only to have defendant disgorge that which was gained at the expense of depreciation of plaintiffs' properties. Certainly the defendant

was not being coerced to continue to abide by the covenant, for the covenant had already been broken and the non-Caucasians were already in undisturbed occupancy.[26]

The concept of the contract which is unenforceable, yet not void, is not new to Anglo-American law. However, the previous instances in which the doctrine has been applied have involved contracts made unenforceable by either the Statute of Frauds or the Statute of Limitations. Such contracts, even though unenforceable, may still have some legal operation. But the rule applied to restrictive covenants is different, in that it allows for no possible legal operation of the unenforceable contracts. The Court has done indirectly what it stoutly maintains it has not done. It has rendered the restrictive covenant void for all practicable purposes.[27]

The real basis for the decisions in Shelley v. Kraemer and Barrows v. Jackson must have been that the Court simply felt that it was socially undesirable to enforce racial restrictive covenants either in equity or at law. But as pointed out by Chief Justice Vinson in the latter case the Supreme Court should set aside its predilections on social

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[26] It might be noted that there is now on appeal before the Supreme Court an action for damages for refusal of private cemetery to permit burial of plaintiffs non-Caucasian husband in a burial lot purchased by plaintiff under a contract restricting burial privileges to members of Caucasian race. (Rice v. Sioux City Memorial Park Cemetery, Inc., 60 N.W. /2nd/ 110 /Supreme Court Ia., 1953/).

[27] 25 Miss. L.J. 170, (Mar., 1954).

policy and rest its decisions on the Constitution alone.

The concept of "state action" as now extended means that every private contract partakes of "state action" the moment judicial aid is invoked to enforce it. In the latter case a discriminatory but valid contract between private individuals was held unenforceable because its enforcement in a state court discriminated against or denied the equal protection of the laws to third parties who were not before the Court. Under that doctrine can any executory contract be enforced without an examination by the state court to determine whether the parties have treated all outside persons with that scrupulous regard for fairness and equality which the Fourteenth Amendment demands of those who enjoy the public trust as state officials?

PART VI

CONCLUSION

This study shows a virtually complete disintegration of the traditional concept of "state action" under the Fourteenth and Fifteenth Amendments. If the Supreme Court makes any further extension of the concept, it will have virtually reached the point where it might as well declare that if the prohibited activity is carried on within a state, it is "state action" within the purview of the amendments. Certainly it is no longer true that "individual invasion of individual rights is not the subject-matter of the Amendments."

The old concept of "state action" was that it included only acts of agents of the state acting under the state's authority. But we have seen that cases applying the Constitution as a federal criminal code have extended the concept to include not only the acts of a minor state official acting in deliberate violation of his state's commands, but also to the acts of an individual who was not even on the public payroll and who did not purport to act for his state--his only connection with the state was that he was licensed by a municipality.

In the cases involving elections we have seen that the activities of traditionally private organizations have been brought within the inhibitions of the amendments. The Supreme Court in reaching its desired results developed at least three new criteria for finding "state action": first, if the

activity is comprehensively regulated by state statutes; second, if the discriminatory action precludes the excluded class from effective choice; and third, if the activity is considered "public", the state simply cannot divorce itself from such activity.

In the cases involving racial restrictive covenants we have seen the "state action" concept extended so as to prohibit the state court enforcement either in equity or at law of valid contracts between private individuals. The prohibitions of the amendments now cover not only procedural rights but also substantive rights as well. Until recently it has not been recognized that any prohibition on "state action" under the amendments must inevitably impose a corresponding limitation on the conduct of private individuals. In fact, even in the case of Shelley v. Kraemer the Court observed, "That Amendment [the Fourteenth] erects no shield against merely private conduct however discriminatory or wrongful." But the decision in the above case and the ones following make it eminently plain that this generalization must be qualified, since, if the private conduct in question requires recourse to a state agency to make it effective, the Fourteenth Amendment precludes such state aid.

As a necessary corollary to the disintegration of the "state action" concept careful students of government should recognize the development of the most significant deviation from basic theory of constitutional government since constitutional government began. From the inception of constitutional

government the constitution has been considered as a device adopted by the people to control the agents of government. Control of individuals by the government has been accomplished by the execution of statutory and administrative law enacted by the government in accordance with the constitutional grant of authority. The disintegration of the "state action" concept, together with the Court's application of criminal sanctions to individuals who deprive other individuals of constitutional rights, has perverted the Constitution to such an extent that it no longer performs its traditional function of controlling the agents of government, but it has become a tool or weapon to be used by the very government it created to control individual citizens in their relations with one another.

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