

# California Law Review

VOL. 52

MARCH, 1964

No. 1

## Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing<sup>†</sup>

Harold W. Horowitz\*

THIS ARTICLE will explore constitutional aspects of racial discrimination in selling and leasing of "private" housing.<sup>1</sup> The constitutional questions which arise with respect to private housing discrimination are not unique to that area. They require analysis, in a relatively narrow setting, of a fundamental problem in the federal system: the application of constitutional limitations on "state action" to principles of state law determining legal relationships between private persons, involving the articulation of constitutionally imposed minimum levels of legal protection which states must provide to private persons with regard to the actions of other private persons.<sup>2</sup> The following discussion of this problem is in two main parts: a

---

† This article was prepared for the Conference on Discrimination and the Law, sponsored by the Law School, The University of Chicago, and the Anti-Defamation League of B'Nai B'rith, on November 22-23, 1963.

\* A.B., 1943, University of California, Los Angeles; LL.B., 1949, Harvard University; LL.M., 1954, University of Southern California; Associate General Counsel, United States Department of Health, Education, and Welfare.

The views expressed in this paper are those of the author, and should not be understood as expressing any official position of the Department of Health, Education, and Welfare.

---

<sup>1</sup> See generally GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 275-312 (1959); Groner & Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948); Ming, *Racial Restrictions and the Fourteenth Amendment; The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Robison, *Housing—The Northern Civil Rights Frontier*, 13 W. RES. L. REV. 101 (1961); Saks & Rabkin, *Racial and Religious Discrimination in Housing: A Report of Legal Progress*, 45 IOWA L. REV. 488 (1960); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959). See also materials cited in note 3 *infra*.

<sup>2</sup> See CARR, *FEDERAL PROTECTION OF CIVIL RIGHTS* 204 (1947); HALE, *FREEDOM THROUGH LAW* 333-35 (1952); Hart, *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 515, 519-20 (1954); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 480, nn.11 & 12 (1962); Holcombe, *The Coercion of States in a Federal System*, in *FEDERALISM MATURE AND EMERGENT* 137 (MacMahon ed. 1955); Miller, *The Constitutional Law of the "Security State"*, 10 STAN. L. REV. 620 (1958); Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399 (1962); Miller, *Foreword: The Public Interest Undefined*, 10 J. PUB. L. 184 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 19 (1961).

general inquiry into fourteenth amendment limitations on state law pertaining to private discrimination, followed by an inquiry into the applicability of those limitations to provisions of state law concerning private housing discrimination.

## I

### FOURTEENTH AMENDMENT LIMITATIONS ON STATE LAW PERTAINING TO "PRIVATE" RACIAL DISCRIMINATION

#### *A. The General Principle*

The inquiry here centers on provisions of the law of a state which determine the legal relationship between a "private" person who discriminates on grounds of race and the "private" person discriminated against. The word "private" is used here to denote legal persons other than "agents" or "instrumentalities" of a state, or a state itself. No attempt need be made here to define the term "private" more precisely than as "non-state"; as will be apparent in the following discussion, a more precise definition is not necessary for present purposes.

Fourteenth amendment limitations are applicable, of course, only to the action of a state.<sup>3</sup> Unconstitutional state action with respect to a private person may occur in the direct legal relationships between a state and a private person—as in the operation of a racially segregated public school, or in the conduct of a procedurally unfair criminal trial. State law defining legal relations between private persons is also clearly the product of

---

<sup>3</sup> In addition to the authorities cited in notes 1-2 *supra*, see generally GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 46-61 (1959); PEKELIS, *LAW AND SOCIAL ACTION* (1950); Barnett, *What is "State" Action*, 24 ORE. L. REV. 227 (1945); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Horowitz, *The Misleading Search for "State Action" under the Fourteenth Amendment*, 30 SO. CAL. L. REV. 208 (1957); Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Shanks, *"State Action" and the Girard Estate Case*, 105 U. PA. L. REV. 213 (1956); Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230; Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345 (1961); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956); Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344 (1948); Note, *State Action*, 1 RACE REL. L. REP. 613 (1956).

"action" of a state, and is therefore subject to the limitations imposed by the fourteenth amendment on state "action."

State law—statutory and decisional—may deal in varying ways with legal relationships concerning racial discrimination by one private person against another. A vendor's refusal to sell a home in a privately-owned housing tract to a Negro will provide an example. The state law determining the legal relationship between the vendor and the vendee will generally either compel, prohibit, or permit the vendor's refusal to sell.<sup>4</sup> This is a situation in which it is not sound to conclude that there is "no-law" determining the legal relationship between the private persons. If the pertinent principle of law has not been declared by the legislature or the courts of the state before the fact situation arises, either the would-be vendee or the resistant vendor can bring about an authoritative declaration of the legal relationship between them by bringing the situation before a court for adjudication. There is, then, state action—either compelling, prohibiting, or permitting the discrimination—present in connection with the tract owner's refusal to sell to the Negro.

If state law compels the refusal to sell to the Negro—as, for example, by a zoning ordinance or by making enforceable a restrictive covenant—*Buchanan v. Warley*<sup>5</sup> and *Shelley v. Kraemer*<sup>6</sup> make clear that the vendor and the Negro have a constitutional right that the state not prevent the prospective vendor from having freedom of choice to decide whether to sell to the Negro.<sup>7</sup>

If state law prohibits the housing tract owner from selecting vendees on the basis of race—i.e., if state law prefers the interests of the would-be vendee to those of the tract owner—that state action will fairly clearly not violate the fourteenth amendment.<sup>8</sup>

---

<sup>4</sup> The categories of "compel," "prohibit," and "permit" are generalizations; state action with respect to private discrimination can range over a wide spectrum. For example, in *Anderson v. Martin*, 375 U.S. 399 (1964), the Supreme Court held unconstitutional a state-imposed requirement that a candidate's race be designated on the ballot; the Court said that this was an impermissible encouragement of racial discrimination by voters.

<sup>5</sup> 245 U.S. 60 (1917). See also *City of Richmond v. Deans*, 281 U.S. 704 (1930); *Harmon v. Tyler*, 273 U.S. 668 (1927).

<sup>6</sup> 334 U.S. 1 (1948).

<sup>7</sup> See also *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Truax v. Raich*, 239 U.S. 33 (1915); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala), *aff'd*, 352 U.S. 903 (1956).

<sup>8</sup> See generally GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 306-10 (1959); Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13 (1960); Branscomb, *An Analysis of Attempts to Prohibit Racial Discrimination in the Sale and Rental of Publicly Assisted Private Housing*, 28 GEO. WASH. L. REV. 758 (1960); Forster & Rabkin, *The Constitutionality of Laws Against Discrimination in Publicly Assisted Housing*, 6 N.Y.L.F. 38 (1960); Robison, *Housing—The Northern Civil Rights Frontier*, 13 W. RES. L. REV. 101 (1961); Saks & Rabkin, *Racial and Religious Discrimination in Housing; A Report of Legal Progress*, 45 IOWA L. REV. 488 (1960); Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Housing Laws*, 8 HOW. L.J. 158 (1962).

It is when state law permits the housing tract owner to refuse on grounds of race to sell a home to a would-be vendee—*i.e.*, when the owner has a privilege to refuse on the basis of race to sell, and the vendee has a correlative no-right to purchase—that the fourteenth amendment problems to be discussed in this article arise. The privilege-no-right relationship might conceivably be declared by statute. Or it could be declared and applied by judicial decision, as, for example, by the dismissal of a complaint by the would-be vendee for an injunction to restrain the tract owner from refusing because of the vendee's race to sell a home to him. Such a principle of state law would be the product of state action, and would be subject to fourteenth amendment limitations on state action. The constitutional issue would be whether state law preferring the interests of the tract owner to those of the would-be vendee deprives the Negro of life, liberty, or property without due process of law or denies to him the equal protection of the laws. This article will examine the thesis that such a principle of state law may, in some circumstances, violate fourteenth amendment limitations, and that the state is consequently required to subordinate the interests of the tract owner to those of the would-be vendee and to provide through its legal system a minimum level of protection for the vendee's interest in not being discriminated against because of his race.

### *B. Judicial Authorities*

There are a number of cases which support the thesis that the fourteenth amendment requires states to provide minimum legal protection for various interests of private persons with regard to the actions of other private persons.<sup>9</sup> Some of these cases are citable for the principle that in

---

<sup>9</sup> In direct relationships between a state and an individual, constitutional limitations on state action, to assure a required minimum level of legal protection to the individual, are clearly illustrated. Indeed, that is a basic purpose of the fourteenth and fifteenth amendments. Constitutional limitations are placed, for example, on the conduct of a state's criminal trial procedure, and on the method of assignment of children to public schools. To select examples more in point with respect to the present discussion, there are decisions that a state is constitutionally required to take measures to undo *de facto* racial segregation in public schools caused by neighborhood housing patterns, *Branche v. Board of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963), and that there is unconstitutional state action if a state law officer fails to take adequate measures to protect a prisoner against mob violence. *Lynch v. United States*, 189 F.2d 476, 479 (5th Cir. 1951) ("We are of the opinion that 'equal protection of the law' relates not only to the right to protection from the officer himself, but also relates to the right of protection due the prisoner by the arresting officers against injury by third persons. There was a time when the denial of equal protection of the laws was confined to affirmative acts, but the law now is that culpable official inaction may also constitute a denial of equal protection."); *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943). Another analogous example is the principle that the supremacy clause precludes a state court of otherwise competent jurisdiction from refusing to enforce a claim which one private person has against another under federal law. *Testa v. Katt*, 330 U.S. 386 (1947).

some circumstances a state cannot constitutionally permit a private person to discriminate on racial grounds in his relationships with other private persons.

In these cases several interdependent factors can be isolated as pertinent in determining the constitutionality of a particular principle of state law articulating a legal relationship between private persons. There is involved here, in determining whether a particular principle of state law violates the fourteenth amendment, an assessment of the relative weight, in the specific fact situation, of the conflicting interests of the discriminatee and the discriminator, and of any pertinent broader public interests. A principle of state law determining the legal relationship between the discriminatee and the discriminator represents a choice by the state from among the various competing interests. The constitutional question is whether state law, in the choice it represents, in the specific case, exceeds fourteenth amendment limitations on state action. For purposes of clarity, though it is somewhat artificial to do so, the factors which the decided cases show to be pertinent in answering the constitutional question will be discussed under two headings: (1) the relative weight of the conflicting interests of the discriminatee and the discriminator—the nature and degree of injury to the discriminatee, and the interest of the discriminator in being permitted to discriminate,<sup>10</sup> and (2) the interest of the discriminatee in having equality of access to the benefits of governmental assistance to the activities of the private discriminator. The first raises a question which can be put either in terms of due process limitations on the balance made in state law of the conflicting interests or in terms of denial of equal protection of the laws,<sup>11</sup> and the second raises primarily a question of denial of equal protection.

### *1. The relative weight of the conflicting interests*

When the legal interests of two private persons are in conflict, state law determining the legal relationship between those persons with regard to the matter in issue is, in ultimate effect, a preference for one person's interests over the interests of the other. The preference made by state law in any specific fact situation may violate the due process or equal protection clauses of the fourteenth amendment, or the fifteenth amendment.

In the voting cases, for example, judicial relief has been granted requiring private political parties and clubs not to exclude Negroes from primary or pre-primary elections, when the practical effect of the exclu-

---

<sup>10</sup> See generally Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 7 (1961); Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962).

<sup>11</sup> See note 65 *infra*.

sion was loss of the opportunity to participate fully in the electoral process.<sup>12</sup> The fifteenth amendment provides that no state shall, on account of race, deny or abridge a citizen's right to vote. In *Terry v. Adams*<sup>13</sup> the state can be said to have effectively "denied" the excluded Negroes their right to vote, because of their race, by preferring the interests of freedom of association of the members of the Jaybird Democratic Association to the interests of the Negroes in participating fully and effectively in the general election. The only constitutionally permissible balance of the conflicting interests of the Jaybirds and the Negroes was to prefer the interests of the Negroes. This analysis of *Terry v. Adams* is reflected in the following language of two of the justices in the majority:

*Mr. Justice Black:*

It violates the Fifteenth Amendment for a State, by such circumvention, to *permit* within its borders the use of any device that produces an equivalent of the prohibited election.<sup>14</sup>

*Mr. Justice Frankfurter:*

The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has *permitted* white voters to go through a procedure which predetermines the legally devised primary.<sup>15</sup>

Similarly, in *Smith v. Allwright*<sup>16</sup> Mr. Justice Reed, for the majority, said:

This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form [general election ballot made up of party nominees chosen by state-required electoral procedure; electorate's choice at general election limited, "practically speaking," to nominees named on ballot] which *permits* a private organization to practice racial discrimination in the election.<sup>17</sup>

In the white primary cases it was held that the state could not prefer the interests of the private group where the result was in effect to disenfranchise the Negro at the general election. It need not follow that a state could not prefer the interests of the private group if that total effect on the Negro's right to vote at the general election were not present. Hence there would not be a similar denial by the state of the right to vote, in violation of the fifteenth amendment, in a principle of state law which permits a private group to conduct a poll of its members to ascertain their preferences in a forthcoming public election, and to exclude Negroes from that poll, when there was not present the ultimate effect on the general election which was present in the case of the Jaybirds' pre-primary.

<sup>12</sup> See HALE, FREEDOM THROUGH LAW 344 (1952). Cf. *Anderson v. Martin*, 375 U.S. 399 (1964).

<sup>13</sup> 345 U.S. 461 (1953).

<sup>14</sup> *Id.* at 469. (Emphasis added.)

<sup>15</sup> *Id.* at 477. (Emphasis added.)

<sup>16</sup> 321 U.S. 649 (1944).

<sup>17</sup> *Id.* at 664. (Emphasis added.)

State law may not constitutionally prefer the interests of a common carrier, which provides the only, or one of the limited, means of transportation in a specific locality, to select or segregate its clientele on a racial basis, over the interests of the discriminatees in (1) having access to that means of transportation and (2) not being subjected to public indignity and humiliation. State law which permits the privately-owned common carrier to discriminate on racial grounds in making available its facilities can be said to deprive the persons discriminated against of liberty without due process of law or perhaps to deny those persons a constitutionally required equal legal protection.

For example, in *McCabe v. Atchison, Topeka & Santa Fe Ry.*,<sup>18</sup> state law permitted a railroad to provide sleeping car and dining car facilities for whites only. The Supreme Court held, in effect, that state law was constitutionally required to prohibit such racial discrimination by the railroad:

It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.<sup>19</sup>

The transportation cases have involved access to, and treatment on, common carriers which provided the only, or one of a limited number of, means of transportation in the locality. The interests of the passengers in not being subjected to discriminatory treatment by the carrier would change significantly if the carrier did not have the monopoly, or near monopoly, status of the carriers in these cases, and if the racial discrimination did not occur in such public view, with the consequent infliction of public indignity and humiliation on the discriminatees. These cases would not, for example, lead to the conclusion that a state cannot constitutionally permit persons organizing a neighborhood car pool to use race as a standard in determining who could participate in the venture. There the effect on and injury to the persons excluded would be less than in the common carrier cases, and the interests of the persons in the group in freedom of association would be greater than any interests the common carrier might advance in being permitted to discriminate.

---

<sup>18</sup> 235 U.S. 151 (1914).

<sup>19</sup> *Id.* at 162-63. Another case, *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960), involving a privately-owned city bus line, held, in effect, analogously to *McCabe*, that state law could not constitutionally permit the bus line to segregate passengers on a racial basis. See also *Public Util. Comm'n v. Pollak*, 343 U.S. 451 (1952), where the Court found "federal action," subject to scrutiny under the first and fifth amendments, in the action of the privately-owned street car and bus line in broadcasting radio programs in its vehicles and the action of the Public Utilities Commission in permitting this to be done.

In another group of cases—notably illustrated by *Burton v. Wilmington Parking Authority*<sup>20</sup>—it has been held, in effect, that state law must prefer the interests of a Negro, excluded on racial grounds from a privately operated restaurant or other facility operated on leased state-owned premises, to the interests of the private entrepreneur. The Negro here primarily asserts interests in not being subjected to public indignity and humiliation and in not being denied the opportunity to obtain a meal or to enjoy recreational or similar facilities, while the entrepreneur asserts interests in his freedom of personal association, control of his property, and protection of his economic well-being by excluding persons who, he believes, may lead others in his clientele to cease patronizing his establishment. In *Burton* the Supreme Court held, in effect, that in the circumstances of that case the state court was required by the fourteenth amendment to prefer the interests of the excluded Negro and grant him injunctive relief.<sup>21</sup>

The Court of Appeals for the Fourth Circuit has recently held in *Simkins v. Moses H. Cone Memorial Hosp.*<sup>22</sup> that non-profit private hospitals, which have received federal construction grants, pursuant to an approved "state plan" under the Hill-Burton Act,<sup>23</sup> could not, on grounds of race, deny admission to patients or staff privileges to physicians and dentists. This can be said to be, in effect, a holding that state law must prefer the interests of the discriminatees. The significance of those interests is suggested in the following language in the majority opinion:

We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans. But we emphasize that this is not merely a controversy over a sum of money. Viewed from the plaintiffs' standpoint it is an effort by a group of citizens to escape the consequences of discrimination in a concern touching health and life itself . . . . Racial discrimination by hospitals visits severe consequences upon Negro physicians and their patients.<sup>24</sup>

In *Marsh v. Alabama*<sup>25</sup> the state enforced, through a trespass prosecution, a principle of state law that permitted a privately-owned company town to refuse to allow a private person to distribute religious literature within the confines of the town. The interests of the distributor involved freedom of speech and exercise of religion, and the opportunity to have access, for those purposes, to all persons in the town. The interests of the

---

<sup>20</sup> 365 U.S. 715 (1961).

<sup>21</sup> See Karst & Van Alstyne, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962).

<sup>22</sup> 323 F.2d 959 (4th Cir. 1963), *cert. denied*, ..... U.S. .... (1964).

<sup>23</sup> 60 Stat. 1040 (1946), as amended, 42 U.S.C. § 291 (1958).

<sup>24</sup> 323 F.2d at 967, 970.

<sup>25</sup> 326 U.S. 501 (1946).



town were, apparently, being permitted to have absolute control of its property, and being permitted to protect from harassment those persons in the town who did not wish to receive the religious literature. The Supreme Court held that state law could not prefer the interests of the owners of the town. Mr. Justice Black said:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. . . . In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.<sup>26</sup>

The state, *Marsh* held, could not prefer the interests of the owners of the town, if the distributor's access to all inhabitants of the town was prohibited by the owners. It seems clear, however, that the state could constitutionally prefer the interests of the property owner, even though there is a large number of prospective recipients of the literature, if the owner makes reasonable arrangements for the distributor to have access to those recipients.<sup>27</sup> Similarly, the state could prefer the interests of the property owner if the distributor is being deprived of access to only a relatively small number of prospective recipients, and has other reasonable means available to reach them. Such a case, for example, would be the enforcement of a principle of state law that a home owner could refuse to permit the distributor to enter his home to distribute literature to the family and guests of the owner.

Though its holding on the constitutional issue which was involved is no longer sound, *Truax v. Corrigan*<sup>28</sup> provides an illustration of the principle that preference in state law for one private person's interests over another's, with consequent denial of a cause of action to the latter for

---

<sup>26</sup> *Id.* at 509. (Emphasis added.) The holding of the Court on the unconstitutionality of the preference in state law for the interests of the owners of the town over those of the distributor of the literature is highlighted by Mr. Justice Reed's dissenting opinion in *Marsh*: "A state does have the moral duty of furnishing the opportunity for information, education and religious enlightenment to its inhabitants, including those who live in company towns, but it has not heretofore been adjudged that it *must commandeer*, without compensation, the private property of other citizens to carry out that obligation. . . . The rights of the owner, which the Constitution protects as well as the rights of free speech, are not outweighed by the interests of the trespasser, even though he trespasses in behalf of religion or free speech. *Id.* at 515-16. (Emphasis added.)

<sup>27</sup> See *Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E.2d 433 (1948).

<sup>28</sup> 257 U.S. 312 (1921).

judicial relief, involves state action which is subject to fourteenth amendment limitations.<sup>29</sup> Plaintiff employers sought an injunction to restrain picketing by employees of plaintiffs and by a union in a labor dispute. The state court sustained a demurrer, based upon a state statute which provided that state courts could not grant injunctions in labor disputes. The majority in the Supreme Court held that the denial of a cause of action to the employers—*i.e.*, preference in state law for the interests of the employees and the union in advancing their economic well-being over the interests of the employers in not having their business interfered with—was violative of the due process and equal protection clauses. The dissenting justices did not dispute that the principle of state law preferring the interests of the employees, with a consequent denial of a cause of action to the employers, was subject to fourteenth amendment limitations on state action.

Decisions reversing state court judgments which prohibit picketing in labor disputes, on freedom of speech grounds, are analogous illustrations of fourteenth amendment requirements that in some circumstances state law must provide legal protection for the interests of some private persons in preference to those of others. In the picketing cases, the interests of the pickets in advancing, by means of speech, their economic well-being was preferred over the interest of the person picketed in not being subjected to economic injury.<sup>30</sup>

---

<sup>29</sup> See *HALE, FREEDOM THROUGH LAW* 329 (1952).

<sup>30</sup> See also *Steel v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946); *Park v. Detroit Free Press Co.*, 72 Mich. 560, 566, 40 N.W. 731, 733 (1888) ("There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization."); *Carter, J., dissenting in Werner v. Southern Calif. Associated Newspapers*, 35 Cal.2d 121, 144, 216 P.2d 825, 839 (1950) ("I maintain that the person injured by such libel or slander has a cause of action guaranteed to him by the due process clause of both Constitutions. . . . If the Legislature should abolish causes of action of replevin and conversion . . . leaving me thus remediless for the loss of my car, I would consider that I was being deprived of my property without due process of law, and I consider the loss of a reputation a valuable property right which cannot be taken from an individual without giving him a fully adequate legal remedy so that he may be compensated, so far as possible, for the loss he has suffered and which he will suffer from the wrong done him."); *Fairchild, J., dissenting in Ross v. Ebert*, 275 Wis. 523, 534-37, 82 N.W.2d 315, 321-22 (1957) ("Exclusion of persons from membership [in a labor union] solely because of their race cannot . . . possibly contribute to the advancement of the legitimate causes of the union. Where an applicant meets every reasonable standard and is excluded solely because he is a Negro or belongs to some other racial or religious group, the injustice done him is obvious and great. . . . If it be proved as charged that the rejection of plaintiffs was solely because of their race, defendants should be ordered to accept plaintiffs into membership. In doing otherwise the court is permitting (if the charges are true) the present members of defendant union to exclude other people, merely because of their race, from the full protection afforded by our employment statutes and the agency which administers them.").

2. *The interest of the discriminatee in equality of access to governmental benefits*

To this point the only "state action" which has been discussed has been state law determining the legal relationship between the discriminator and discriminatee—in effect, the ultimate result which a state court would reach in adjudicating a dispute between the two private persons concerning the discrimination. That state action, it was seen, would either be, in effect, to compel, prohibit, or permit the discrimination. The cases discussed in the preceding section all involved holdings which can support the conclusion that state law permitting private racial discrimination can violate the fourteenth amendment.

But there can be, in addition to state law determining the legal relationship between the discriminatee and the discriminator, varying other forms of state action, for fourteenth amendment purposes, related to private racial discrimination. Mr. Justice Clark's opinion for the majority in *Burton v. Wilmington Parking Authority* directed attention to such state action in the reference to, and conclusion that there was present, "that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."<sup>31</sup> For example, in the cases discussed in the preceding section, there was significant state "participation and involvement" in the activities of the discriminator, in addition to permission under state law to discriminate, in the following ways: in the voting cases, "casting its electoral process in a form which permits a private organization to practice racial discrimination in the election;"<sup>32</sup> in the transportation cases, granting a monopoly franchise, making available publicly-owned streets and, perhaps, making grants of state-owned land; in the restaurant and analogous cases, leasing publicly-owned premises for the conduct of commercial enterprises; and in the hospital case, inclusion of the hospital in the "state plan" and granting of public funds to meet part of the costs of construction. These are examples of what could be an almost limitless catalog of state participation and involvement in the activities of private persons. Further illustrations of governmental participation and involvement in private racial discrimination, in addition to declaration of the legal relationship between the discriminatee and the discriminator, could include such diverse governmental action as licensing a business establishment; granting a corporate charter; granting a building permit for the construction of a private home; supplying police and fire protection and services such as water and power to an occupant of real property; granting public funds to assist in the construc-

---

<sup>31</sup> 365 U.S. 715, 724 (1961).

<sup>32</sup> *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

tion or operation of a privately controlled educational institution; certifying a labor union as a bargaining representative; granting a tax exemption to a charitable organization; and, in housing, making available mortgage insurance, or including a private entrepreneur in an urban redevelopment plan, or closely supervising and regulating financial institutions which provide mortgage loans.

In determining the constitutionality of state law permitting a private person to discriminate on racial grounds in his relationships with another private person, what significance should be given to varying forms of state participation and involvement in the activities of the private discriminator?

The preceding examples of state participation and involvement in the activities of the private discriminator are not necessarily participation and involvement in the discrimination itself, in the sense of the state requiring or specifically encouraging that there be discrimination. They are, at the minimum, assistance to private persons in carrying on their activities. In that sense they may have a "but-for" causal relationship to the private discrimination, in that the particular private activity and, therefore, the racial discrimination, might not be carried on at all if the state participation and involvement were not present. This "but-for" causal relationship cannot be enough, in itself, to justify a conclusion that state law permitting the discrimination violates the fourteenth amendment. That type of causal relationship of state action to private action can be found in wide areas of private activity in which it would be unsound to conclude that state law could not validly permit private racial discrimination. A single example will suffice: racial discrimination by a private home owner in inviting guests to his home, the home owner having received a required governmental permit to construct his home, and being the recipient of police and fire protection and of various public services such as water supply, sewage disposal, and street maintenance. Indeed, if "but-for-causation" by the state were alone sufficient to make state law permitting private racial discrimination unconstitutional, the privilege under state law to discriminate, in a situation in which the state could constitutionally prohibit such discrimination, would be such "but-for-causation," and therefore unconstitutional, simply because the state did not prohibit the discrimination.

What then should be the effect of state participation and involvement in the activities of the private racial discriminator in determining the constitutionality of state law permitting him to discriminate? It may be noted, first, that participation and involvement may be pertinent to the nature and degree of injury to the person discriminated against, and the interests of the discriminator in being permitted to discriminate. If there is extensive state participation and involvement related to the activities of the discriminator, it is more likely that those activities will be public in nature,

with consequent public indignity and humiliation suffered by the person discriminated against, and more likely that denial of access to those activities will be of some significance to the discriminatee. As the California Supreme Court said, in another context: "The closer the connection of the discrimination with governmental activity, the more odious its character . . . ."<sup>33</sup> For example, if racial discrimination is openly carried on in continuing private activity conducted on state-owned land, the interests of the discriminatee in not being discriminated against will be weighty. This was so in *Burton v. Wilmington Parking Authority*, and would appear to be most significant in support of the decision in that case. And extensive state participation and involvement in a private enterprise may tend to make less significant the associational, proprietary, and economic interests which may be asserted by the discriminator.<sup>34</sup>

But state participation and involvement in the activities of the private discriminator can have an additional significant effect in determining whether a principle of state law permitting the discrimination violates the fourteenth amendment. That effect arises from application of the general principle that no person can be denied, on grounds of race, an equal opportunity of access to the benefits of governmental programs. When there is governmental assistance to the discriminator in carrying on his activities, and the assistance is being provided to further the purposes of a governmental program designed to provide benefits for the public or a permissible segment of the public, the effect of the discrimination is to deny to the discriminatee the opportunity to have equal opportunity of access to the benefits of the governmental program. Application of this principle requires isolation of the dominant purposes of that governmental program. The more the private racial discrimination tends to deny equality of access to the benefits of a governmental program the more likely will state law permitting the discrimination be unconstitutional.<sup>35</sup>

There are varied illustrations of the application of this principle. In the white primary and Jaybirds cases, for example, the state participation and involvement in the activities of the political parties, in addition to permission under state law to exclude Negroes, was what Mr. Justice Reed referred to in *Smith v. Allwright* as the state's "casting its electoral process

---

<sup>33</sup> *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 476, 370 P.2d 313, 320, 20 Cal. Rptr. 609, 616 (1962).

<sup>34</sup> See Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 39 (1961).

<sup>35</sup> See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1102-08 (1960); Van Alstyne, *Discrimination in State University Housing Programs—Policy and Constitutional Consideration*, 13 STAN. L. REV. 60 (1960). This principle is illustrated in holdings that individuals cannot be unreasonably excluded from the benefits of completely state financed and operated activities, such as public schools. See *James v. Almond*, 170 F. Supp. 331 (E.D. Va. 1959).

in a form" in which the primary election controlled the result in the general election.<sup>36</sup> To state the obvious, the constitutionally required purposes of the general election were completely frustrated by the exclusion of Negroes in the primary and pre-primary elections. The state's involvement in the activities of the political parties and the Jaybirds was the incorporation of their elections into the matrix of the general election; Negroes could not constitutionally be denied access to the benefits of that state involvement, because racial discrimination there, by the recipient of the state assistance, became a barrier to access to the benefits of the governmental program involved—the general election.

The transportation cases are also illustrative. The state participation and involvement, in the form of monopoly franchises, rights of way, and the like, were for the dominant purpose of encouraging operation of a public transportation system. The significance of that form of state action is to be contrasted with state action in granting business licenses to all those who apply and meet any pertinent qualifications. Exclusion or unequal treatment of a Negro by the private railroad or bus line is closely related to the dominant purpose of the state participation and involvement in the activities of the common carrier. The dominant purpose of the governmental assistance to the carrier is the providing of public transportation; state law cannot constitutionally permit the carrier to deny to the Negro equality of access to the benefits of that assistance.

The cases, such as *Burton v. Wilmington Parking Authority*, in which there was operation of privately-owned restaurants and similar facilities on state-owned land, involved state participation and involvement in a more tangible form in the activities of the private discriminators. The clearest case is that of the lease of state-owned premises for the purpose of having the lessee carry on activities which the state specifically wishes to have conducted there—for example, the operation of a restaurant in a courthouse,<sup>37</sup> or of a park,<sup>38</sup> or a swimming pool.<sup>39</sup> In these situations, it should be noted, it is not significant whether there is a net benefit to the lessee. The governmental purpose in such situations is to have specific services or facilities provided at governmentally owned premises; state law

---

<sup>36</sup> 321 U.S. at 664. See *HALE, FREEDOM THROUGH LAW* 344 (1952).

<sup>37</sup> *Derrington v. Plummer*, 240 F.2d 922, 925 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957) ("[T]he courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.")

<sup>38</sup> *Department of Conservation & Dev. v. Tate*, 231 F.2d 615 (4th Cir.), *cert. denied*, 352 U.S. 838 (1956).

<sup>39</sup> *Lawrence v. Hancock*, 76 F. Supp. 1004 (S.D. W.Va. 1948).

cannot constitutionally permit the private lessee to raise a barrier to equality of access to those premises.<sup>40</sup>

In the hospital case there was governmental participation and involvement in the activities of the private hospitals, by the state's inclusion of the hospitals in the overall "state plan" for provision of hospital facilities, pursuant to which the hospitals received federal construction grants. Here the dominant purpose of the governmental participation and involvement was clear, and the racial discrimination by the hospitals resulted in a denial of equal access to the benefits of that assistance—more specifically, a denial of equal access to the benefits of federal funds appropriated for the purpose of construction of hospitals.

The dominant purposes of state participation and involvement in the activities of a private discriminator may not always be precisely isolated. But the preceding cases—and others, such as a grant of public funds to assist in the conduct of specific activities such as operation of an educational institution,<sup>41</sup> or certification of a labor union as a bargaining representative<sup>42</sup>—seem relatively clear. Similarly, cases can be suggested where the dominant purposes of the state action appear not to be frustrated by the private discrimination and in which the private discrimination does not result in denial of opportunity for equal benefits—for example, making public assistance payments to an individual who uses racial standards in selecting retail merchants in whose establishments he will spend the funds;<sup>43</sup> or providing a building permit, police and fire protection, and other public services to a private home owner who discriminates in the selection of guests; or granting a corporate charter, or, perhaps, issuing a general business license, for operation of a retail store which discriminates in the selection or treatment of its clientele. The state participation and involvement in these cases would be neutral in determining whether

---

<sup>40</sup> See *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962), in which the city sold city-owned golf courses to private owners, after public bidding, with title to revert to the city if the properties were used other than for golf courses. The court held that Negroes could not be excluded from the privately owned and operated courses. There was no majority opinion. Chief Judge Tuttle based his opinion on the lack of any distinction between the power of reverter in this case, and the leases of public property in cases such as *Burton*, where in each case a specific use of the property is required. In the terminology used in this article, the sale with power of reverter was a transaction for the purpose of providing golf facilities in the city, and the private owners of the courses could not be constitutionally permitted to exclude Negroes, for that would deny to Negroes equality of access to the benefits of that state participation and involvement in the activities of the private discriminator.

<sup>41</sup> See, e.g., *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), cert. denied, 326 U.S. 721 (1945).

<sup>42</sup> See Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

<sup>43</sup> See Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1103 (1960).

state law permitting the private discrimination violates the fourteenth amendment. Other cases will be less clear—for example, tax exemptions to charitable institutions, which are designed to encourage carrying on a broad range of activities of benefit to the community.<sup>44</sup>

An additional variable, once governmental purposes are identified, will be the degree of state participation and involvement in the combined state-private activity. This is well illustrated by grants of public funds to private institutions to assist in carrying on health or education programs, where funds may be supplied to pay a part or all of the costs of conducting the activity, or of constructing the facilities in which the activity is carried on. In such a case racial discrimination by the private institution would deny equality of access to the benefits of the public funds.<sup>45</sup> But if that state participation is in only a small and separable portion of the total activities of the private discriminator, state law permitting the discrimination may perhaps be unconstitutional only with respect to the discriminatee's access to the benefits of the state participation itself, as distinguished from the discriminatee's access to the activities of the discriminator which the governmental program has not specifically and directly assisted. An example would be a grant of public funds to a private educational institution to pay all of the costs of conducting a specific course or program in the institution. With respect to denial of equality of access to the benefits of the governmental assistance, state law may perhaps violate the fourteenth amendment only to the extent it permits denial of admission to the institution as a student in the governmentally-assisted course or program, as distinguished from denial of admission to other non-assisted courses or programs.

Similarly, it will be significant to take into account the quality of governmental assistance to the activities of the discriminator. For example, if a grant of public funds is made to a private educational institution to sup-

---

<sup>44</sup> See Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

In *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633 (1913), it was held that the college could not be given the power of eminent domain because there was no guarantee of equal right of the public to admission "without religious, racial, or social distinction." The court said: "The constitutional authority of the Legislature to delegate the power of eminent domain to private corporations does not depend solely on the character of their corporate purposes as to whether they are governmental in their nature or not, but, as is universally agreed, depends also upon the common and equal right of the public to the benefit of the service rendered, free from unreasonable discrimination." 87 Conn. at 428, 88 Atl. at 636.

<sup>45</sup> See, e.g., *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, ..... U.S. .... 1964).



port its entire educational program, it would appear that state law permitting the institution to deny admission to Negroes would more likely be unconstitutional the greater the proportion of governmental assistance in the support of the institution. It may not be sound to conclude that state law permitting the educational institution to deny admission to Negroes would violate the fourteenth amendment solely because of receipt of governmental financial support for its entire educational program, if that support is only a relatively small contribution to the institution's operating budget.

The preceding discussion of the interest of the discriminatee in having equal opportunity of access to the benefits of governmental participation and involvement in the activities of the private discriminator has been in the context of the significance of that factor in determining, as between the discriminatee and the discriminator, whether state law permitting the discrimination violates the fourteenth amendment. It may be that when denial of equal access is significant in determining unconstitutionality, the discriminatee—leaving aside potential questions of standing and sovereign immunity—is also entitled to enjoin the state participation and involvement.<sup>46</sup> The total state action in these cases is the combination of state participation and involvement and state law permitting the discrimination. One means of remedying the unconstitutional state action is judicial relief to require the private discriminator not to discriminate. Another is to enjoin state participation and involvement which, when combined with permission under state law for the discriminator to discriminate, makes the total state action unconstitutional. An injunction would be the sole means of remedying a denial of equality of access to the governmental benefit if the assistance to the discriminator is relatively small and it is concluded that state law can, under the particular circumstances, constitutionally permit the discrimination.

The cases concerning private operation of commercial and other enterprises on state-owned premises provide an example of injunctive relief against state participation and involvement in the activities of a private discriminator. In some of these cases, relief was granted against the state agency which entered into the lease, as well as against the lessee. The majority opinion in *Burton* said, on this question:

[I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no state may effectively abdicate its responsibilities by either

---

<sup>46</sup> Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 CORN. L.Q. 375, 394 (1958).

ignoring them or by merely failing to discharge them whatever the motive may be.<sup>47</sup>

In *Derrington v. Plummer*,<sup>48</sup> which involved a county which built a courthouse and leased a portion of the building to a private person to operate a cafeteria, the court of appeals enjoined the county

from renewing or extending the present lease, or from executing a new lease, or otherwise divesting itself of management and control of the premises comprising the Courthouse cafeteria without specific assurances that facilities will be made available for the use of colored persons . . .<sup>49</sup>

And in *Simkins v. Moses H. Cone Memorial Hosp.* the court held, in a proceeding seeking a declaratory judgment, that the "separate but equal" provision of the Hill-Burton hospital construction act, in effect authorizing the making of federal grants for the construction of white-only non-profit private hospitals, was unconstitutional.

There is not a great deal of judicial doctrine on the question of enjoining governmental participation and involvement in the activities of a private discriminator on the grounds that it would be unconstitutional governmental action.<sup>50</sup> This is an issue which may be expected to have significance in the future.

In the preceding discussion of equality of access to the benefits of a governmental program, no distinction was made between state and federal programs. In the field of housing there are major federal programs,<sup>51</sup> the dominant purposes of which are to assist individuals in acquiring housing, and it is important to note the effect on the analysis of the constitutional problem of federal assistance to the discriminator. More is involved than the fourteenth amendment. With respect to the legal relationship between the discriminatee and the discriminator there would appear to be fifth amendment limitations on the extent to which federal law can permit the discrimination. When the effect of the discrimination is to deny equality

---

<sup>47</sup> 365 U.S. at 725.

<sup>48</sup> 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957).

<sup>49</sup> 240 F.2d at 923.

<sup>50</sup> See generally *Anderson v. Martin*, 375 U.S. 399 (1964); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *City of Greensboro v. Simkins*, 246 F.2d 425 (4th Cir. 1957); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960); *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (D. Md. 1960); *Statom v. Board of Comm'rs*, 195 A.2d 41 (Ct. App. Md. 1963); *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633 (1913); 34 OPS. CAL. ATT'Y GEN. 1 (1959), in 4 RACE REL. L. REP. 1089 (state redevelopment agency cannot service listings of discriminatory private landlords); 32 OPS. CAL. ATT'Y GEN. 264 (1959), in 4 RACE REL. L. REP. 493 (state university constitutionally precluded from extending substantial assistance to racially discriminatory private fraternities); Van Alstyne, *Discrimination in State University Housing Programs—Policy and Constitutional Consideration*, 13 STAN. L. REV. 60 (1960).

<sup>51</sup> See notes 85-95 *infra* and accompanying text.

of access to the benefits of the federal assistance, it is arguable that federal law must provide adequate legal protection for the discriminatee, and that federal participation and involvement in the activities of the private discriminator could be enjoined unless it were conditioned on non-discrimination.<sup>52</sup> On this analysis, if there is present a denial of equal access to the benefits of a federal program, a federal court would be required by the fifth amendment to provide adequate redress for the discriminatee against the discriminator. In a similar action in a state court, the fifth amendment limitations on federal law concerning access to the benefits of a federal program would be applicable, either because of the effect of the supremacy clause or the due process or equal protection clauses of the fourteenth amendment. Under either approach, the denial of equal access to the benefits of the federal program because of the act of the discriminator would be critical in determining constitutional limitations on state law determining the legal relationship between the discriminatee and the discriminator.

### C. Summary

The determination of the constitutionality under the fourteenth amendment of state law permitting a private person to discriminate, on racial grounds, against another private person in a specific fact situation requires consideration of various interdependent factors: the nature and degree of injury to the person discriminated against, the interest of the discriminator in being permitted to discriminate, and the interest of the discriminatee in

---

<sup>52</sup> There would be difficult standing problems where federal assistance to a grantee was involved. A federal taxpayer, as such, probably would not have standing to enjoin the making of a federal grant where the recipient would deny Negroes equal access to the benefits of the grant. But it is arguable that a Negro, particularly if a taxpayer, should have standing to enjoin, as a violation of the fifth amendment, a grant of federal funds to a grantee who will use the funds in carrying on an activity in the locality where the Negro lives, in accordance with a governmental purpose that the funds be used in such an activity, and which will deny to the Negro equality of access to the benefits of the government program. In *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, ..... U.S. .... (1964), the court held unconstitutional the provision of the federal Hill-Burton hospital construction act which in effect authorizes the making of federal grants for the construction of white-only non-profit private hospitals. Plaintiffs in that suit were Negro physicians, dentists, and patients. They sought to enjoin racial discrimination by the defendant hospitals and a declaratory judgment that the "separate-but-equal" provision of the Hill-Burton Act was unconstitutional. The United States intervened and argued that the federal statute authorizing grants for construction of separate but equal hospitals was unconstitutional. On the standing question the court said: "We agree with the plaintiffs and the Government that adjudication of the statute's constitutionality is not advisory merely and that the plaintiffs have standing to challenge the constitutionality of 42 U.S.C. § 291e(f) and 42 C.F.R. § 53.112 which promote federally assisted and approved hospital facilities. To make any relief against the hospitals' discriminatory practices effective it becomes necessary to pass upon the validity of the statute and the regulation, because they contain an affirmative sanction of the unconstitutional practice." 323 F.2d at 969.

having opportunity of access equal to that of other persons to the benefits of governmental assistance to the discriminator in the carrying on of his activities.

These factors can vary in significance from case to case. It may be helpful at this point to summarize the combinations of these factors in the cases which have been discussed, to illustrate the overall analysis of the constitutional issue in each case.

In the voting cases there was injury of great magnitude to the person discriminated against, no legitimate interests were advanced by permitting the discriminator to discriminate, and there was significant state participation and involvement in "casting . . . [the] electoral process" in such a way that the primary and pre-primary were an integral part of the total electoral process. In the transportation cases there was again an injury of great magnitude to the person discriminated against (impairment of opportunity to travel and subjection to public indignity and humiliation); there was no advancement of significant interests of the discriminator (no potential loss of customers, because no competition, or, if there was competition, all competitors would have the same duty not to discriminate), and there was significant denial of equality of access to the benefits of governmental assistance to the common carrier (such as the monopoly franchise and rights of way).

In the restaurant-on-state-owned-premises and similar cases, the injury to the discriminatee included denial of access to the specific service or facility, such as opportunity to get a meal, and subjection to public indignity and humiliation. In determining the degree of injury inflicted on the discriminatee it may perhaps be pertinent to consider how many other similar facilities are accessible to the discriminatee. The discriminator could assert interests in freedom to select those persons with whom he would personally associate, freedom to select those whom he would permit to enter his real property, and preservation of the economic soundness of his enterprise. In some of the cases, there was some degree of denial of equal access to the benefits of governmental assistance to the discriminator in the carrying on of the discriminator's activities. The sit-in cases<sup>53</sup> now before the Supreme Court raise the question of the constitutionality of state law permitting racial discrimination in places of public accommodation in which the state does not own the premises, as in *Burton*. The sit-in cases include

---

<sup>53</sup> *Robinson v. State*, 144 So. 2d 811 (Fla. 1962), *prob. juris. noted*, 374 U.S. 803 (1963); *Griffin v. State*, 225 Md. 422, 171 A.2d 717 (1961), *cert. granted*, 370 U.S. 935 (1962), *restored to calendar for reargument*, 373 U.S. 920 (1963); *Bell v. State*, 227 Md. 302, 176 A.2d 771 (1962), *cert. granted*, 374 U.S. 805 (1963); *City of Columbia v. Barr*, 239 S.C. 395, 123 S.E.2d 521 (1961), *cert. granted*, 374 U.S. 804 (1963); *City of Columbia v. Bouie* 239 S.C. 570, 124 S.E.2d 332 (1962), *cert. granted*, 374 U.S. 805 (1963).

an added injury to the discriminatee—denial of opportunity to exercise the liberty of speech, in order to make known to the public his protest against the discrimination.

In the hospital case, there was injury of great magnitude to the discriminatees: denial to the patients of admission to a facility essential to the preservation of their lives and alleged by them to be the "most complete medical facilities in the locality," and denial to the doctors of opportunity to practice and advance in their professions. It is difficult to isolate any significant interests of the hospital advanced by the policy of complete exclusion of Negroes. In addition, the discriminatees are denied access to the benefits of governmental funds granted to the private discriminator for the very purpose of constructing the hospital. In view of the magnitude of injury to the discriminatees in the hospital case it would appear sound to conclude that state law could not constitutionally permit the discrimination even though a hospital was not included in an overall "state plan" and did not receive public funds to meet a substantial part of the costs of construction.

A comment is pertinent here on the terminology used in this discussion. The issue has been stated in terms of the constitutionality of state law permitting the private racial discrimination, and of the constitutionality of state participation and involvement in the activities of the private discriminator, instead of asking whether the private discriminator is, as such, subject to fourteenth amendment limitations on state action.<sup>54</sup> The terminology used would appear to contribute to clarity, for it concentrates attention on the conflicting private interests involved, on the requirement of equality of access to the benefits of state participation and involvement in the activities of the private discriminator, and on the function of the fourteenth amendment and the state action concept in the federal system.<sup>55</sup> In addition, this terminology more clearly prevents attribution of "stateness" to the private discriminator with respect to all activities of the discriminator. For example, the restaurateur in *Burton*, who could not be constitu-

---

<sup>54</sup> See Lewis, *supra* note 43, at 1100.

<sup>55</sup> See Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 8 (1961); PEKELIS, LAW AND SOCIAL ACTION 122-23 (1950): "It should be emphasized at this point that this . . . approach to our problem—based on the notion that state action in the constitutional sense may embrace state inaction as well—has a particular advantage because of the federal character of the Constitution we are expounding. Our present suggestion, indeed, does not impair the rightful independence of the state and does not purport to create a federal cause of action for every wrong or injury that an individual could suffer through the action of a private lawful or unlawful group. It preserves that complementary, secondary, interstitial character of the national government which is the essence of our federal system. It gives the state governments a chance. . . . Only when the state enforcement machinery breaks down should the Federal Government step in."

tionally permitted by the state to discriminate on racial grounds in selecting his clientele, could, perhaps, be constitutionally permitted to discriminate in hiring employees.

#### *D. The Civil Rights Cases*

The preceding discussion has examined the thesis that under some circumstances it can be a deprivation of life, liberty, or property without due process of law, or a denial of equal protection of the laws, for a state to fail to provide adequate legal protection for a private person against racial discrimination by another private person. It may be desirable at this point to relate this discussion to the *Civil Rights Cases*<sup>56</sup> and analogous Supreme Court decisions interpreting the fourteenth amendment, and to make clear that no departure from those decisions is involved.<sup>57</sup>

The fourteenth amendment, those cases held, limits only the action of states—it does not apply to the actions of private persons. No suggestion to the contrary is made in the present discussion. The thesis advanced is that in the federal system those legal relationships between private persons which do not have their source in federal law are created by state law, and are the product of state action in a fourteenth amendment sense. State law permitting private racial discrimination is such a legal principle. And state participation and involvement in the activities of a private discriminator are state action for purposes of the fourteenth amendment. The thesis is not that private persons are subject, in their activities, to fourteenth amendment limitations, nor does it rest on a concept of private persons taking on a mantle of “stateness,” to become, in themselves, subject to the limitations of the amendment on state action. That the legal relationships which are involved concern private persons should not obscure the state action, which, like all state law, is subject to fourteenth amendment limitations.

In the *Civil Rights Cases*, the Court held unconstitutional a federal statute which provided for civil and criminal liability of inn-keepers, theater owners, and operators of public conveyances who discriminated on the basis of race in offering their facilities to the public. The federal statute applied in all states, regardless of the content of specific state law on the duties of places of public accommodation. The Court apparently assumed that the defendants in the *Civil Rights Cases* carried on their activities in states in which their racial discrimination was in violation of state law, and in which there were remedies available under state law to the persons discriminated against. There was then, in the specific cases before the Court, no violation of the fourteenth amendment in the principles of state law

---

<sup>56</sup> 109 U.S. 3 (1883).

<sup>57</sup> But see *Williams v. Howard Johnson's, Inc.*, 323 F.2d 102, 106 (4th Cir. 1963).

applicable to the private discrimination, and hence the federal statute, as applied in those cases, could not be sustained, under section 5 of the amendment, as legislation "to enforce . . . the provisions . . ." of the amendment. And, regardless of the content of state law on the duties of places of public accommodation in any specific case, the federal statute could not be sustained, the Court suggested, because it was too broadly drafted, being applicable in all states. This conclusion followed, whatever result might be reached on the validity of a federal statute limited in application only to states which did not require places of public accommodation to serve all persons. The following language in Mr. Justice Bradley's opinion is illustrative:

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. . . . *It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment.*<sup>58</sup>

The significance of this language is underscored by Mr. Justice Bradley's discussion of the validity of a hypothetical federal statute which would be directed at correcting state laws which were violative of the provision in article I of the Constitution that "No State shall . . . pass any . . . law impairing the obligation of contracts . . ." The hypothetical federal statute declared

that the validity of contracts should not be impaired, and that if any person bound by a contract should refuse to comply with it, under color or pretence that it had been rendered void or invalid by a State law, he should be liable to an action upon it in the courts of the United States, with the addition of a penalty for setting up such an unjust and unconstitutional defence.<sup>59</sup>

This statute, being "corrective" of unconstitutional state action, would, Mr. Justice Bradley said, be valid. Because the federal statute involved in the *Civil Rights Cases* was not limited, as required by the fourteenth amendment, to "correcting" unconstitutional state action, Mr. Justice Bradley found it unnecessary to determine whether "a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no

---

<sup>58</sup> 109 U.S. at 14. (Emphasis added.)

<sup>59</sup> *Id.* at 17.

State can abridge or interfere with."<sup>60</sup> This issue, undecided in the *Civil Rights Cases*, is now before the Supreme Court in the sit-in cases.<sup>61</sup>

A similar point can be made with respect to other basic Supreme Court decisions dealing with the powers of Congress to enforce the fourteenth amendment in situations involving the actions of private persons. In *United States v. Cruikshank*,<sup>62</sup> the Court said:

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. *That duty was originally assumed by the States, and it still remains there. The only obligation resting on the United States is to see that the States do not deny the right.*<sup>63</sup>

In *United States v. Harris*, the Court said:

[W]hen . . . the laws of the State, as enacted by its legislature, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the [fourteenth] amendment imposes no duty and confers no power upon Congress . . .

As . . . the section of the [federal] law under consideration is directed exclusively against the action of private persons, *without reference to the laws of the State or their administration by her officers*, we are clear in the opinion that it is not warranted by any clause in the Fourteenth amendment . . .<sup>64</sup>

There should be added to these statements in the basic cases applying the fourteenth amendment the many references in the debates in Congress during consideration of legislation to enforce the fourteenth and fifteenth amendments which also support the thesis that a state can violate the

<sup>60</sup> *Id.* at 19.

<sup>61</sup> In *State v. Brown*, 195 A.2d 379 (Del. 1963), the court held that a private restaurant owner has the right to select his patrons but that the state cannot prosecute and convict for trespass a person who refuses, upon request, to leave the premises after being denied service because of his race. If state law can constitutionally permit the restaurant owner to discriminate on racial grounds in determining whom he will serve, it does not seem sound to conclude that the state cannot give effect to that principle of state law in judicial proceedings. Such a conclusion is not required by *Shelley v. Kraemer*, which does not hold that all judicial enforcement of private discrimination is violative of the fourteenth amendment. See note 102 *infra*. The basic issue in the sit-in cases would appear to be the constitutionality of the underlying principles of state law permitting restaurant owners to refuse to serve Negroes.

<sup>62</sup> 92 U.S. 542 (1875).

<sup>63</sup> *Id.* at 555. (Emphasis added.)

<sup>64</sup> 106 U.S. 629, 639-40 (1882). (Emphasis added.) And in *Collins v. Hardyman*, 341 U.S. 651 (1951), the Court said: "Plaintiff's rights were certainly invaded, disregarded and lawlessly violated, but neither their rights nor their equality of rights under the law have been, or were intended to be, denied or impaired. Their rights *under the laws* and to *protection of the laws* remain untouched and equal to the rights of every other Californian, and may be vindicated in the same way and with the same effect as those of any other citizen who suffers violence at the hands of a mob. . . . The facts alleged fall short of a conspiracy to alter, impair or deny equality of rights under the law, though they do show a lawless invasion of rights for which there are remedies in the law of California." *Id.* at 661-63.



amendments by failing to provide adequate legal protection for private persons against acts of other private persons.<sup>65</sup>

---

<sup>65</sup> See generally FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); HARRIS, *THE QUEST FOR EQUALITY* 3-4, 42, 53 (1960): "From a blending of feudal law and the principles of the social compact there emerged the principle of Western constitutionalism which asserts that it is the duty of government to protect all persons under standing and general laws impartially administered by upright judges. . . ."

"The states, by law or otherwise, cannot deny equal protection of the laws. None has ever disputed the proposition that the clause establishes equality before the law and requires the states to treat all persons equally. However, to confine the meaning of equal protection to equality before the law is to overlook the meaning of 'deny' and the inclusion of 'protection.'"

"The clause does more, therefore, than condemn unequal state laws or the unequal enforcement of equal laws; it requires the states to provide or afford equal protection of the laws. Neither a strenuous exercise in philology nor an examination of usage in 1866 is required to define the word 'deny.' It meant then within the context of the amendment what it meant long before and continues to mean, to refuse to grant, to withhold, to forbid access to, to refrain from giving some claim, right, or favor. Accordingly, the prohibition against the denial of equal protection of the laws is the same thing as a positive requirement which could read, 'Every state shall afford, or furnish, every person within its jurisdiction the equal protection of the laws. . . .'

"[A majority of members of the 39th, 42nd, and 43rd Congresses] . . . believed that the equal protection clause did more than condemn official or state action. They believed that it vested Congress at the very least with a primary power to set aside unequal state laws and a secondary power to afford protection to all persons in their enjoyment of constitutional rights when the states failed in their primary responsibility to do so either by neglecting to enact laws or by refusal or impotence to enforce them."

See also Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 *COLUM. L. REV.* 131, 163 (1950): "It is clear beyond reasonable doubt that the Fourteenth Amendment was meant to enable Congress to legislate affirmatively in behalf of a racial group which a state might, because it was a racial group, choose not to protect from action of private persons."

Following are extracts from Congressional debates which reflect contemporary understanding of some members of Congress on the question whether the fourteenth and fifteenth amendments require the states to provide minimum legal protection for individuals against the acts of others.

In the debate on the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981 (1958), before the adoption of the fourteenth amendment, Senator Trumbull said: "Why, sir, if the State of Kentucky makes no discrimination in civil rights between its citizens the bill has no operation in the State of Kentucky . . . . The bill draws to the Federal Government no power whatever if the States will perform their constitutional obligations."

"These words, 'under color of law' were inserted as words of limitation, and not for the purpose of punishing persons who would not have been subject to punishment under the act if they had been omitted. If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection." *CONG. GLOBE*, 39th Cong., 1st Sess. 600, 1758 (1866).

In the debate on the Enforcement Act of May 31, 1870, 16 Stat. 140, in the 41st Congress, Senator Pool said: "To say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. It shall not deny by acts of omission, by a failure to prevent its own citizens from depriving by force any of their fellow

## II

## PRIVATE HOUSING DISCRIMINATION

Private housing discrimination can occur in varying factual situations. A discriminatee may be denied the opportunity to acquire housing because a vendor or lessor of real property uses racial standards in determining to whom to sell or lease his property. The discriminator may range from an individual selling his home to a corporate enterprise which has, in a specific geographical area, a large number of homes to sell or apartments to lease. There may be a shortage or a surplus of housing accommodations of the type sought by the discriminatee in that area. And there may be varying forms of state participation and involvement in the activities of the specific discriminator. Racial discrimination by real estate brokers in performing their functions in the real estate market, or by lending institutions in determining whether to make a loan to assist in the acquisition of real property, may also contribute to a discriminatee's inability to acquire housing.<sup>66</sup>

Before discussing the constitutionality under the fourteenth amendment of principles of state law which permit private housing discrimination

---

citizens of these rights. It is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment would be called into operation . . .

"There is no legislation that could reach a State to prevent its passing a law. It can only reach the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State." CONO. GLOBE, 41st Cong., 2d Sess. 3611 (1870).

In the 42nd Congress, which enacted the Ku Klux Klan Act of April 20, 1871, ch. 22, 17 Stat. 13, the following was said.

*Senator Frelinghuysen*: "A State denies equal protection whenever it fails to give it. Denying includes inaction as well as action. A State denies protection as effectually by not executing as by not making laws. . . . It is the citizen's right to have laws for his protection, to have them executed, and it is the constitutional right and duty of the General Government to see to it that the fundamental rights of citizens of the United States are protected." CONO. GLOBE, 42d Cong., 1st Sess. 501 (1871).

*Senator Pratt*: "Though the laws do not in terms discriminate against them, still the fact is that they invoke their protection in vain in a great many localities, counties, and districts. There is either such a condition of public sentiment that they cannot be executed, or there is a complicity with their oppressors on the part of the officers who should, but do not, execute them.

"Now, sir, is not this state of things a practical denial of the equal protection of the laws? . . . Now, can it with fairness be said this equal protection is not denied, when it is withheld, when it is not afforded? Is there not a positive duty imposed on the States by this language to see to it—not only that the laws are equal, affording protection to all alike, but that they are executed, enforced; that their protection is not withheld, but afforded affirmatively, positively, to all in equal degree." *Id.* at 506. See also *id.* at 322, 334, 368, 375, 428, 448.

<sup>66</sup> See generally McENTIRE, RESIDENCE AND RACE 218-50 (1960); 4 UNITED STATES COMM'N ON CIVIL RIGHTS REPORT—HOUSING (1961).

it will be well to take note of the following language in Mr. Chief Justice Vinson's opinion in *Shelley v. Kraemer*:

[T]he restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.<sup>67</sup>

This language suggests that there is no unconstitutional state action involved in "voluntary" racial discrimination in private housing (at least where an individual's sale of his own home is involved, as in *Shelley*). This conclusion cannot be soundly based on the reason given—that there "has been no action by the State." State law pertaining to the restrictive covenant can, conceivably, either be to require, prohibit, or permit adherence to its terms. *Shelley* held that state law requiring adherence to the covenant violates the equal protection clause. If state law permits a covenantor voluntarily to refuse to sell to a Negro, in compliance with a restrictive covenant—i.e., if state law denies to the would-be purchaser a cause of action to restrain the covenantor from adhering to the covenant and, *because of the covenant*, using race as a criterion in deciding whether to sell—there is state action in the application of state law in determining the legal relationship between the covenantor and the discriminatee. There would be state action, then, for fourteenth amendment purposes, if "the purposes of those agreements are effectuated by voluntary adherence to their terms." Analysis and weighing of the factors discussed in the preceding section should be the bases for any conclusion as to the constitutionality of a principle of state law permitting voluntary adherence to the terms of the covenant. The failure in the *Shelley* opinion to recognize more clearly that there is state action with respect to all legal relationships between private persons, and the statement, instead, in *Shelley* that the constitutional distinction between state-compelled and state-permitted adherence to the terms of the covenant rested upon the presence of state action in the former and its absence in the latter, are contributing causes of questions which have been raised about the difficulties in containing the *Shelley* principle and in extracting a "neutral" principle from the holding.<sup>68</sup> The dictum in *Shelley* concerning "voluntary" racial discrimination in housing, then, should not control in determining the constitutionality of state law permitting private housing discrimination.

Attention can now be directed to the issue of the validity under the

<sup>67</sup> 334 U.S. at 13.

<sup>68</sup> See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31 (1959).

fourteenth amendment of principles of state law permitting racial discrimination in private housing in the varying factual contexts in which discrimination can occur.

*A. The Relative Weight of the Conflicting Interests of the Discriminatee and the Discriminator*

*1. The nature and degree of injury to the discriminatee*

Appraisal of the nature and degree of injury to the discriminatee should be made in the context of the reference in *Shelley* to "equality in the enforcement of property rights" as having been "regarded by the framers of . . . [the Fourteenth] Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee."<sup>69</sup> And in considering specifically the interests of the person seeking access to housing without regard to his race, and in determining the constitutionality of a state's preferring the interests of the discriminator, there should be kept in mind, as analogies, the interests in full and effective participation in the general election, in having access on a nondiscriminatory basis to the facilities of a common carrier and of a hospital, and in being admitted to privately operated restaurants and similar facilities on state-owned land, which were held in the cases discussed earlier to be constitutionally required to be protected by state law against the acts of private persons.

The injury to the discriminatee as a result of private housing discrimination includes at least the following.

*a. Denial of the opportunity to have adequate, healthy, and safe living conditions.* Racial discrimination in access to the total housing market in a specific locality contributes to overcrowding in the housing facilities which are available to the group discriminated against, with the consequent creation of inadequate, unhealthy, and unsafe living conditions for that group. An additional result is the relatively higher cost of whatever housing is available within the area in which that group is in effect confined. The degree of injury to a specific discriminatee, in a specific place at a specific time, will depend upon the overall availability to him of housing in the community, and the portion of the housing market to which he is denied access by the action of the specific discriminator (and all other similarly situated discriminators). Hence, degrees of housing shortages in different communities, the practices of other private vendors or lessors of housing similar to the housing provided by the specific discriminator, and the portion of the housing market controlled by the specific discriminator

---

<sup>69</sup> 334 U.S. at 10.

all are relevant in determining the degree of injury to the discriminatee caused by a specific discriminator's refusal to deal with him.<sup>70</sup> If the discriminator controls a substantial quantity of housing in the locality, the injury to the discriminatee is no less than would be the case if there were a great number of individual owners and racial restrictive covenants entered into by all of them were enforced. If there has been significant state participation and involvement in the activities of the private discriminator, the injury to the discriminatee may be increased, aside from the question of equality of access to the benefits of governmental programs, if the state participation makes the housing accommodations more desirable than other similar housing with respect to such matters as cost, location, or mortgage credit terms.

The effect on an individual discriminatee of denial of access to housing involves, then, a basic aspect of a decent and productive life.<sup>71</sup> Certainly this injury to him, entirely aside from other effects on him of the discrimination, is no less significant than the injuries to the discriminatees in the voting, transportation, hospital, and restaurant-in-state-owned-premises cases. The interest of the discriminatee in not being subjected to this magnitude of injury by the acts of private discriminators should be weighty in determining whether state law can constitutionally permit private housing discrimination.

*b. Subjection to public indignity and humiliation.* The premise here is that racial discrimination in public causes a far greater degree of injury to the discriminatee, in the infliction of public indignity and humiliation, than discrimination in private.<sup>72</sup> The distinction is, in a sense, a geographic one

---

<sup>70</sup> See Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 50-52 (1961); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 952-53 (1952); *Slack v. Atlantic White Tower Sys., Inc.*, 181 F. Supp. 124 (D. Md. 1960), where, in holding that plaintiff Negro did not have a cause of action to enjoin defendant restaurant's refusal to serve him, the court pointed out that there were a number of other restaurant facilities in the area available to plaintiff; *Eaton v. Grubbs*, 216 F. Supp. 465, 468 (E.D. N.C. 1963), where, in holding that plaintiffs did not have a cause of action to restrain a private non-profit hospital from refusing to admit Negroes as patients and as staff members, the court said: "Whether the hospital is superior or inferior to others in the immediate area is not a significant fact of State manifestation in the conduct of the hospital."; note 101 *infra*.

<sup>71</sup> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." *Berman v. Parker*, 348 U.S. 26, 32-33 (1954).

<sup>72</sup> See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 497 (1962); Pollak, *The Supreme Court and the States: Reflections on Boynton v. Virginia*, 49 CALIF. L. REV. 15, 43 (1961).

—racial discrimination in places in which members of the community are in daily contact and association, such as restaurants, theaters, and common carriers, as compared, to use the standard example, to a home owner's use of racial standards in determining whom to invite to his home. The "publicness" of the discrimination should be of great significance in determining the constitutionality of the principles of state law involved in the sit-in cases, concerning restaurants and places of public amusement, now before the Supreme Court. Racial discrimination in housing, because of its continuing and pervasive public effect on the discriminatee, inflicts on the individual, and the racial group of which he is a member, what can be described as continuing subjection to public indignity and humiliation, causing injury similar to but more serious than that caused by discrimination in places of public accommodation. The effect is magnified if there has been significant state participation and involvement in the activities of the private discriminator.

*c. Broader consequences to the discriminatee.* Residential segregation affects the "enjoyment of many other liberties and opportunities, . . . [and] has far-reaching consequences which touch virtually every aspect of life of the segregated group and of the relations between them and the dominant majority."<sup>73</sup> Denial of access to housing because of race subjects the discriminatee to de facto segregated neighborhoods, resulting in de facto segregation in education and other aspects of the general public life of the community.<sup>74</sup> From this point of view, too, the injury to the discriminatee is no less significant than the injuries to discriminatees in the voting, transportation, hospital, and restaurant-in-state-owned-premises cases.

The injury to the discriminatee, then, from private housing discrimination can be of great magnitude. What interests of the discriminator are to be considered in determining whether state law violates the fourteenth amendment if it prefers the interests of the discriminator?

## *2. The interests of the discriminator in being permitted to discriminate*

*a. Freedom to select those with whom he will associate.* A starting point for consideration of this interest of the discriminator can be the example of a private person selecting those with whom he will have personal relationships, or, in the real property context of the housing problem, the home owner selecting those who will be invited as guests to his home. This is an

---

<sup>73</sup> McENTIRE, RESIDENCE AND RACE 88-89 (1960).

<sup>74</sup> See generally ABRAMS, FORBIDDEN NEIGHBORS (1955); GREENBERG, RACE RELATIONS AND AMERICAN LAW 275 (1959); MYRDAL, AN AMERICAN DILEMMA 618-32 (Twentieth Anniversary ed. 1962); Weaver, *Integration in Public and Private Housing*, 304 ANNALS 86 (Mar. 1956).

important interest, and there are certainly fourteenth amendment limitations on the extent to which state law can subordinate this interest of the discriminator in liberty to the interests of a discriminatee in equality.<sup>75</sup>

An initial question in the case of private housing discrimination is to what extent personal associations of this sort are meaningfully involved. The discriminator's interest in being completely free to select those with whom he will associate would be strongest in the case of rental of housing in a relatively small housing facility, with a resident individual lessor. There is no such significant interest of the lessor when the problem shifts to that of rental of apartments in Stuyvesant Town.<sup>76</sup> In the sale of his home by a home owner, who will then be leaving the premises, there are likely not to be continuing personal associations. And in the case of sale of housing in a large tract, with all the homes owned by one developer, there is no meaningful continuing personal relationship between vendor and vendee. In many cases, then, the discriminator's personal interest here will involve freedom to refuse to enter into a commercial transaction with another person for any reason he chooses, as distinguished from freedom to select, on any standard he chooses, those with whom he will have close personal associations.

In the case of the lease of an apartment in a relatively large apartment house, or the sale of a home by the homeowner or by the developer of a housing tract, the lessor or vendor may assert an interest in being permitted to refuse to lease or sell to a person with whom other tenants or owners would not want to associate, and who, as neighbors, in the view of the other tenants or owners, would lower their social status.<sup>77</sup> At least in the absence of some indication of what the wishes of these others might be, there would appear to be, in considering the impact on the discriminatee, some analogy to *Marsh v. Alabama*, where the owners of the company town, in denying permission to distribute literature in the town, were preventing the Jehovah's Witness from seeking to distribute literature to, and speak to, all of those who were present in the town.

If the wishes of the other lessees or owners were in some way to be ascertained, and the lessor or vendor were to be considered as a representative of or as advancing those interests, there would be a concerted action quality to the interest assertedly advanced by permitting the discrimination—the specific lessor or vendor dealing, or refusing to deal, with the discriminatee according to the wishes of the group. The introduction of the

---

<sup>75</sup> See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

<sup>76</sup> *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

<sup>77</sup> See ABRAMS, *FORBIDDEN NEIGHBORS* 137-50 (1955).

element of concerted action would tend to lessen the relative weight of the interests advanced in permitting the private discrimination. In *Shelley v. Kraemer* it was held that state law could not, by enforcing the restrictive covenant, constitutionally subordinate the interests of the discriminatee to the interests of a land owner in controlling to whom his neighbor (the covenantor) might sell his home. The discriminatee was constitutionally entitled, *Shelley and Barrows v. Jackson*<sup>78</sup> held, to have his prospective vendor have freedom of choice in determining whether to deal with the discriminatee.<sup>79</sup> If the discriminator is not advancing his own personal interests, but instead the assumed-to-be-known interests of other lessees or owners as a group, the discriminator's interest begins to approach that in *Shelley, Barrows, and Harmon v. Tyler*,<sup>80</sup> in that he is less clearly making a "voluntary" choice not to deal with the discriminatee the more responsive he becomes to the wishes of the other lessees or owners.<sup>81</sup>

*b. Control of one's own private property.* The proprietary interest of a land owner in determining who can enter his land, or to whom he will convey his property interests, is simply stated. Evaluation of its substance is more difficult. It may be that the interest of the owner of real property in absolute control over those who will be given access to that property is, essentially, another way of stating the interest in freedom of selection of those with whom a person will associate. The owner's freedom to be the sole judge of whether to sell or lease at all is not involved, but only what would appear to be a considerably less weighty interest—his freedom, if he wishes to sell or lease, to utilize racial standards in determining whether to sell or lease to a specific person.

---

<sup>78</sup> 346 U.S. 249 (1953). "If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue 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." *Id.* at 254.

<sup>79</sup> See Lewis, *supra* note 35, at 1115-16; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 13 (1959).

<sup>80</sup> 273 U.S. 668 (1927). There the Court held unconstitutional, on the authority of *Buchanan v. Warley*, 245 U.S. 60 (1917), a city ordinance requiring the written consent of a majority of the white persons in a neighborhood for a Negro to acquire a home in that neighborhood. There the wishes of a majority of the group were made binding on the would-be vendor.

<sup>81</sup> *Buchanan, Shelley, and Harmon* form a spectrum: In *Buchanan* the ordinance prohibited any owner in a white area to sell to a Negro even if all whites consented; in *Shelley* state law prohibited any covenantor to sell to a Negro, but if all covenantors agreed to rescind the covenant a sale to a Negro could then take place; in *Harmon* the ordinance prohibited sale to a Negro in a white area unless a majority of the whites consented. In these cases the Negro was deprived of having his prospective vendor have a free choice to determine whether to sell to him. Where a large tract owner or apartment house owner refuses to sell or lease to a Negro because of the wishes (which state law does not compel him to follow) of other vendees or lessees he is bringing about a similar factual result, in the effect on the discriminatee, to that in *Harmon*.



*c. Avoidance of economic harm.* The discriminator may urge that he has an interest in not having his property decrease in value, and that the use of racial standards in determining to whom to sell or lease his property will advance that interest. The relationship between racial integration of a neighborhood and falling property values is not clear, and cannot, because of the variables involved, be generalized upon.<sup>82</sup> But, aside from that question, and assuming that risk of decrease in property value could be demonstrated, it is necessary carefully to define the economic interests which may be involved.<sup>83</sup>

In the case of the individual owner selling his home there can be no economic loss to him because of the identity of the vendee, as long as he receives his price. The economic interests he asserts must be, then, those of other home owners, whose property values he does not wish to jeopard-

---

<sup>82</sup> See LAURENTI, PROPERTY VALUES AND RACE 47-48 (1960):

"The major statistical finding of the present study is that during the time period and for the cases studied the entry of nonwhites into previously all-white neighborhoods was much more often associated with price improvement or stability than with price weakening. A corollary and possibly more significant finding is that no single or uniform pattern of nonwhite influence on property prices could be detected. Rather what happens to prices when nonwhites enter a neighborhood seems to depend on a variety of circumstances which, on balance, may influence prices upward or downward or leave them unaffected . . . .

"The major variables interacting in these local situations appear to be: (1) strength of whites' desire to move out; (2) strength of nonwhites' desire to move in; (3) willingness of whites to purchase property in racially mixed neighborhoods; (4) housing choices open to whites; (5) housing choices open to nonwhites; (6) absolute and relative purchasing power of nonwhites; (7) absolute and relative levels of house prices; (8) state of general business conditions; (9) long-run trend of values in areas involved; (10) time.

"The first three variables, in addition to being influenced by the others, are affected by a number of further conditions, including at least the following: the way in which nonwhite entry is initiated and continued; the socioeconomic status of both groups; the 'attitudinal flexibility' of both groups; the existing state of race relations in the community at large and in the particular area; the availability and character of leadership in the community, not only in religious and secular organizations, but in local government agencies."

See also Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 47-48 (1961). In *Buckanan v. Warley* the Court said, with respect to the argument that the racial zoning ordinance was justified because it would prevent depreciation of property values: "But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results." 245 U.S. at 82.

<sup>83</sup> In *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914), the Court held that a state could not constitutionally permit a railroad to provide sleeping car and dining car facilities only for whites. One argument of the railroads was that it would be unprofitable, because of the lack of demand, to provide such facilities for Negroes. The Court said that "This argument with respect to volume of traffic seems to us to be without merit. . . . Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused." *Id.* at 161. To some extent, at least, the economic harm argument by a private housing discriminator may call for a similar answer.

dize. The same considerations arise in his assertion of the interests of those others as were discussed in connection with the associational interests of others in the locality.

The asserted economic risk to the vendor of a large tract of individual homes, or the lessor of apartments, would be with respect to the homes and apartments to be sold or leased in the future, and the interrelated questions of the price at which they could be sold or leased and the competitive position which the vendor or lessor would be in as compared to other housing accommodations on the market. In evaluating that interest it is essential that the individual vendor or lessor not be considered in isolation. The appraisal of the interests of the discriminator must be in the context of all similarly situated discriminators. If it were to be held that the developer of the tract or the lessor of the apartment house could not be constitutionally permitted to discriminate, that principle would be applicable to all similarly situated vendors and lessors. If the principle were narrower, and were determined to apply only, for example, to relatively large housing tracts and relatively large apartment houses, or to vendors and lessors in whose activities there had been constitutionally significant state participation or involvement, there might be no economic harm to the vendors and lessors within those groups, as compared to each other; any economic harm, if it were to occur, would appear then to be limited to whatever competitive loss there might be with respect to other categories of vendors and lessors who were permitted by state law, constitutionally, to discriminate.

The interests of real estate brokers and financial institutions which are advanced by their being permitted to discriminate on racial grounds in their activities can best be considered at this point, for those interests would be primarily economic. The broker might assert that he has an interest in the maintenance of high property values in a specific locality, and hence should be permitted to refuse to provide his services to a person who might, by moving into the locality, cause a decrease in property values. The financial institution, extending mortgage credit, might assert the same thing, seeking to protect the security for its loans, and to avoid impairment of its relationships with other members of the real estate and financial community which might follow upon assisting nonwhites to move into white neighborhoods. Aside from grounding these interests on the questionable premise that property values would decrease, these asserted interests of brokers and financial institutions should not be considered in isolation. For example, if it should be held that the prospective vendors in a specific category in the locality could not be constitutionally permitted to discriminate, then the interests of the brokers and financial institutions in being permitted to protect their economic interests in property in that locality would be lessened, or, in any event, put beyond their control. In

addition, the relative weight of the interests of the brokers and financial institutions would be lessened, when balanced against the interests of the prospective vendee or lessee, for, if state law could not constitutionally permit the vendor or lessor to discriminate, it would seem that what might be referred to as the derivative interests of the broker and financial institutions in the vendor-vendee relationship would similarly be constitutionally required to be subordinated to the interests of the vendee.

*B. Equality of Access to the Benefits of Governmental Assistance to the Activities of the Discriminator*

In the preceding discussion of governmental participation and involvement in the activities of the private discriminator, it was suggested that the major significance of such state action in the overall problem of the constitutionality of state law permitting the private discrimination should be determined by an evaluation of the extent to which the private discrimination results in denial of equality of access to the benefits of that participation and involvement. This, in turn, concentrates attention on the dominant purposes of the governmental assistance to the private discriminator, and a determination whether the discrimination impairs the achievement of the purposes of a governmental program designed to provide benefits for the public or a constitutionally permissible segment of the public. With this general approach in mind, two broad categories of governmental participation and involvement in the activities of private owners and lessors of real property can be suggested: (1) programs of assistance to private activity in which the dominant purposes of the programs are specifically related to provision of housing, and (2) all other programs.

The second category would include such "but-for-causation" participation in private housing as granting a corporate or business license to the vendor, lessor, financial institution, or broker; federal chartering of commercial banks and savings and loan institutions; issuance of building permits; providing police and fire protection; providing public services such as water supply and sewage disposal to the vendor or lessor; and exercise of varying degrees of supervision and control over the operations of the private discriminator. Governmental participation and involvement of this type would not appear to have any great significance in determining whether state law can constitutionally permit the private discrimination.<sup>84</sup>

The first category would include various types of governmental assistance to the private housing discriminator in his housing activities: feder-

---

<sup>84</sup> See *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851 (D. Md. 1960) (receipt by private tract developer of water and sewage disposal service from a public corporation does not subject developer to same duties as public corporations).

ally assisted urban renewal programs,<sup>85</sup> Federal Housing Administration loan insurance,<sup>86</sup> Veterans Administration loan guarantees,<sup>87</sup> and their equivalents at a state and local level, including there, in addition, tax exemptions and the like. The analogy here in the voting, transportation, hospital, and restaurant-in-state-owned-premises cases is close. Some of these governmental programs are designed to assist in providing housing of the type of which racial minorities are most critically in need. For example, FHA loan insurance and VA loan guarantees are geared to providing mortgage loan insurance against economic risks commonly associated with low income groups subject to unstable economic conditions.<sup>88</sup> Federal urban renewal programs, which provide financial assistance to local governmental entities for the assembly of land to be made available for private redevelopment, provide assistance for renewal areas which are to be redeveloped for "predominantly residential uses."<sup>89</sup> Urban renewal projects involve specific plans for redevelopment of specific areas, and hence there is a close analogy to the lease cases in that a governmental agency has determined that housing of a particular type is to be built on the government-owned land which is sold to the private developer. Racial discrimination by the developer is a barrier to equality of access to the benefits of that governmental program.<sup>90</sup> Existing case law suggests that benefits from this type of governmental assistance to private enterprise must be equally available to all persons, and that the state may not constitutionally extend such assistance to a private discriminator.<sup>91</sup> These points are expressed in the preamble to the President's Executive Order on Equal Opportunity in Housing:

WHEREAS the granting of Federal assistance for the provision, rehabilitation, or operation of housing and related facilities from which Americans are excluded because of their race, color, creed, or national origin is unfair, unjust, and inconsistent with the public policy of the United States as manifested in its Constitution and laws; and

WHEREAS discriminatory policies and practices based upon race, color, creed or national origin now operate to deny many Americans the benefits

---

<sup>85</sup> 63 Stat. 413 (1949), as amended, 42 U.S.C. §§ 1450-64 (Supp. IV 1962).

<sup>86</sup> 48 Stat. 1246 (1934), as amended, 12 U.S.C. §§ 1702-23 (Supp. IV 1962).

<sup>87</sup> 38 U.S.C. §§ 1801-24 (1958), as amended, (Supp. IV 1962).

<sup>88</sup> See McENTIRE, *RESIDENCE AND RACE* 299-314 (1960); Van Alstyne, *The O'Meara Case and Constitutional Requirements of State Anti-Discrimination Housing Laws*, 8 How. L.J. 158, 164 (1962).

<sup>89</sup> 63 Stat. 420 (1949), as amended, 42 U.S.C. § 1460 (Supp. IV 1962). See McENTIRE, *RESIDENCE AND RACE* 333-46 (1960).

<sup>90</sup> The urban renewal case is very similar to *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir. 1962), discussed in note 40 *supra*.

<sup>91</sup> There would be no denial, on grounds of race, of equality of access to the governmental benefit where a private home owner, who had purchased his home with the assistance of an FHA insured loan, refused thereafter to sell his home to a Negro.

of housing financed through Federal assistance and as a consequence prevent such assistance from providing them with an alternative to substandard, unsafe, unsanitary, and overcrowded housing, and

WHEREAS the executive branch of the Government, in faithfully executing the laws of the United States which authorize Federal financial assistance, directly or indirectly, for the provision, rehabilitation, and operation of housing and related facilities, is charged with an obligation and duty to assure that those laws are fairly administered and that benefits thereunder are made available to all Americans without regard to their race, color, creed, or national origin . . . .<sup>92</sup>

The executive order directs federal agencies to take action to prevent discrimination in the sale or leasing of housing that is provided, after the date of the order, with the aid of loans made or insured by the federal government, or provided by redevelopment of land acquired from a governmental agency which has received federal financial assistance for slum clearance or urban renewal.

Governmental participation and involvement of this type in the activities of the private discriminator should be significant in determining whether state law can constitutionally permit the private discrimination.

In the case of governmental insurance of individuals' deposits in commercial banks<sup>93</sup> and investments in savings and loan institutions,<sup>94</sup> racial discrimination by a financial institution within such an insurance plan in making loans to persons seeking mortgage credit to acquire housing less clearly results in denial of access to the benefits of the governmental assistance. A major purpose of these governmental insurance programs is to maximize the availability of commercial credit in the economy. Particularly with respect to savings and loan institutions, this means to achieve maximum availability of housing mortgage credit, because of their concentration of lending in the housing field. But the deposit and investment insurance is provided more directly for the benefit of the financial institution, and the depositor or investor, than, as in the FHA case, for the financial institution and the borrower who is acquiring housing. Discrimination by an insured commercial bank or savings and loan institution in selecting borrowers may, therefore, not as directly impair achievement of the objectives of the governmental insurance programs.<sup>95</sup> Governmental

<sup>92</sup> Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962). See *Civil Rights '63*, 1963 REPORT OF THE UNITED STATES COMM'N ON CIVIL RIGHTS 93; Sloane & Freedman, *The Executive Order on Housing: The Constitutional Basis for What It Fails to Do*, 9 How. L.J. 1 (1963).

<sup>93</sup> See, e.g., 64 Stat. 873 (1950), as amended, 12 U.S.C. §§ 1811-31 (Supp. IV 1962).

<sup>94</sup> See, e.g., 48 Stat. 1255 (1934), as amended, 12 U.S.C. §§ 1724-30 (Supp. IV 1962).

<sup>95</sup> But see Sloane & Freedman, *supra* note 92, at 19: "[A] basic purpose in creating the systems of FDIC and FSLIC insurance and the Federal Home Loan Bank System was to aid and preserve the free flow of credit, of which housing credit is an important aspect. To the extent that persons are arbitrarily denied equal access to such credit on grounds of race, religion, or national origin, the achievement of this purpose is frustrated."

insurance of bank deposits and investments in savings and loan institutions illustrates that no precise line can be drawn in determining when private discrimination results in denial of equality of access to the benefits of a governmental program. No more definite statement can be made, it would appear, in determining the effect of the governmental assistance to the institution on the issue of the constitutionality of state law permitting it to use racial standards in selecting those persons to whom it will lend than that such insurance programs move down the spectrum toward the granting of corporate charters and governmental supervision and control over the activities of a financial institution.

### *C. Conclusions*

Two interrelated considerations are pertinent in determining whether principles of state law permitting private housing discrimination violate the fourteenth amendment: (1) the relative weight of the conflicting interests of the discriminator and the discriminatee, and (2) the requirement of equality of access to the benefits of governmental programs established to assist in providing housing. As in the analogous voting, transportation, hospital, and restaurant-in-state-owned-premises cases, state law permitting a private person to discriminate on racial grounds in the sale or lease of housing to other persons can at least in some situations be unconstitutional because the state has failed to provide minimum legal protection required by the fourteenth amendment for the opportunity to acquire housing. There will have been a deprivation without due process of law of the Negro's liberty to acquire real property, and a denial of his opportunity to acquire real property on the same basis as whites.<sup>90</sup> Some tentative con-

---

<sup>90</sup> If a specific principle of state law permitting racial discrimination in private housing were held to be violative of the fourteenth amendment, the provision in the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982 (1958), concerning property rights would be validly applicable to the legal relationship between the discriminator and discriminatee, because the federal statute would there be correcting unconstitutional state action. The provision reads: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." It was relied on in the Supreme Court's decision in the District of Columbia restrictive covenant case, which held that such a covenant could not be enforced by courts in the District. *Hurd v. Hodge*, 334 U.S. 24 (1948).

The question would arise whether the private discriminator was acting under "color of any statute, ordinance, regulation, custom, or usage" of the state for purposes of REV. STAT. § 1978 (1875), 42 U.S.C. § 1983 (1958), creating a civil action over which a federal district court would have jurisdiction without regard to jurisdictional amount, under 28 U.S.C. § 1343(3) (1958). There does not appear to be much material concerning the origin of the color of law concept, which was included in the Civil Rights Act of 1866 in creating a criminal offense. It was, significantly, included in a federal statute which was enacted before the adoption of the fourteenth amendment, with its limitation to "state action." As originally introduced in 1866, before a committee amendment, the phrase was "cover" of law. CONG. GLOBE, 39th Cong. 1st Sess. 212 (1866). See the statement of Senator Trumbull in note 65 *supra*, which suggests

clusions can be offered about the application in specific fact situations of fourteenth amendment limitations on state law permitting private housing discrimination.

*1. Denial on grounds of race of opportunity to purchase or lease housing constructed by a private developer as part of a federal or local urban renewal project or similar plan*

Here, as developed in the preceding discussion, there would be an injury of serious magnitude to the discriminatee, varying perhaps from case to case depending upon the quantity of housing controlled by the discriminator, and the availability to the discriminatee of other similar housing. The major interests of the discriminator which might be asserted would be his interest in protection against economic loss because of decrease in property values or impairment of competitive position in the housing market, and associational and economic interests of other owners or tenants. The relative weight of these interests, in view of the variations in effect on property values which may result from racial integration of a neighborhood, the fact that similarly situated competitors of the discriminator would have the same duty not to discriminate which state law is constitutionally required to impose on the discriminator, and whether the associational or economic interests of others should be taken into account in determining the legal relationship between the discriminatee and the discriminator, has been discussed. Federal and local funds will have been utilized to assemble the renewal project area, and, perhaps, to make it available to the developer at a subsidized cost. Other forms of governmental assistance in the development of the project may have been provided, such as a property tax exemption for a period of time.

The purpose of governmental assistance is to help provide the facilities included in the renewal plan, including the housing. The racial discrimination by the developer here results in the denial to the Negro of equal access to the benefits of that governmental assistance. It should therefore be concluded that state law cannot here prefer the interests of the discriminator to the interests of the discriminatee in obtaining housing

---

that "color of law" would not necessarily restrict the applicability of the statute to officials or agents of a state, but might also include actions of private persons where those actions were not in violation of state law. See also statement of Representative Shellabarger, CONG. GLOBE, 39th Cong. 1st Sess. 1294 (1866). See *Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *appeal dismissed*, 351 U.S. 901 (1956), holding that action of an apparently privately-owned bus company in segregating passengers, as required by state law, was action "under color of state law" for purposes of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). See also the discussion of the *Civil Rights Cases* in text accompanying note 56 *supra*; *Monroe v. Pape*, 365 U.S. 167 (1961); *Baldwin v. Morgan*, 251 F.2d 780 (5th Cir. 1958); *Harrison v. Murphy*, 205 F. Supp. 449 (D. Del. 1962).

and in having equal access to the governmental benefits. The fourteenth amendment should be held to require that state law provide adequate legal protection for the discriminatee against the discriminator. The recently decided *Smith v. Holiday Inns of America, Inc.*,<sup>97</sup> and Judge Fuld's dissenting opinion in *Dorsey v. Stuyvesant Town Corp.*<sup>98</sup> reached this result.

*2. Denial on grounds of race of opportunity to purchase or lease housing for the purchase of which, or in the construction of which, governmental loan insurance and guarantees are made available*

Racial discrimination by the vendor of homes in a tract on which there is an FHA commitment to insure loans made to vendees is, it is submitted, indistinguishable from the urban renewal case. The same magnitude of injury to the discriminatee would be present, and the same interests of the discriminator. The governmental assistance, in the form of the credit of the government, would be made available for the purpose of providing housing, and the tract developer's use of racial standards in selecting vendees would result in denial to some prospective vendees of equal access to the benefits of that governmental assistance. A California trial court decision, *Ming v. Horgan*,<sup>99</sup> reached this result, but a federal district court, in *Johnson v. Levitt and Sons*,<sup>100</sup> dismissed a complaint seeking to restrain the defendant from refusing to sell homes in an FHA insured tract to Negroes. A financial institution's refusal to make a governmentally-insured loan to a Negro who was planning to purchase a home in an all-white neighborhood would be a similar case. There the financial institution's discrimination would result in denial of equal access, on grounds of race, to the governmental benefit; in addition, the interests of the discriminatee would appear no less constitutionally to outweigh the interests of the financial

<sup>97</sup> 220 F. Supp. 1 (M.D. Tenn. 1963). See also Rives, J., dissenting in *Barnes v. City of Gadsden*, 268 F.2d 593, 598 (5th Cir.), *cert. denied*, 361 U.S. 915 (1959): "[T]he plan has not been completed until the property passes out of the control of the redeveloper, and hence in disposing of property . . . the redeveloper may not discriminate between purchasers on the basis of race or color."

<sup>98</sup> In his opinion Judge Fuld referred to the two major factors pertinent to the constitutional decision discussed in this article: [*Stuyvesant Town yields*] . . . to those eligible as tenants tremendous advantages in modern housing and at rentals far below those charged in purely private developments. As citizens and residents of the City, Negroes as well as white people have contributed to the development. Those who have paid and will continue to pay should share in the benefits to be derived." 299 N.Y. at 545, 87 N.E.2d at 557.

<sup>99</sup> 3 RACE REL. L. REP. 693 (Sacramento County, Calif., Super. Ct. 1958). "If it be objected that Congress refused to so ordain, it must be replied that Congress could not ordain otherwise—the law does not permit it to differentiate between races, and whether it expresses that limitation in so many words or not, those who operate under that law and seek and gain the advantage it confers are as much bound thereby as the administrative agencies of government which have functions to perform in connection therewith." *Id.* at 699. See Comment, 59 COLUM. L. REV. 782 (1959).

<sup>100</sup> 131 F. Supp. 114 (E.D. Pa. 1955).



institution than in the case where the discriminator is the vendor of the housing. And the same conclusion would seem to be applicable where a discriminator was assisted in building rental housing facilities by governmental insurance of a construction loan made to him. As was suggested above, there would appear to be less of a denial of equality of access to governmental assistance when there was a refusal to extend mortgage credit to a Negro, who was seeking to purchase a home in an all-white neighborhood, by a financial institution in which the only assistance was governmentally insured deposits or investments.

*3. Denial on grounds of race of opportunity to purchase or lease housing in situations in which there is not involved a denial of equality of access to a governmental benefit*

Even without constitutionally significant governmental participation and involvement in the activities of the discriminator, it is arguable that in view of the relative magnitude of the injury to the discriminatee in being denied the opportunity to acquire housing as compared to the weight of the interests advanced by the discriminator, it should, at least in some situations, be held that state law cannot constitutionally prefer the interests of the discriminator. Here the quantity of housing in the locality controlled by the discriminator, and the availability of other housing to the discriminatee, might be more pertinent in judging the magnitude of the injury to the discriminatee than in the cases where there is additional injury to the discriminatee in the form of denial of equal access to governmental benefits.<sup>101</sup> In a situation in which a denial of equality of access to a governmental benefit was not involved, a recent California appellate court decision held in effect that a private lessor of an apartment house could not use racial standards in renting apartments, but the court did not analyze the basic problem in detail.<sup>102</sup> A closely analogous question has been raised in the sit-in cases now before the Supreme Court—whether state law can

---

<sup>101</sup> See *Hackley v. Art Builders, Inc.*, 179 F. Supp. 851 (D. Md. 1960), in which the court dismissed a complaint seeking to enjoin a tract developer from refusing to sell homes to Negroes. In his opinion the district judge said that he was "not satisfied that they would be unable to purchase a satisfactory home within a reasonable distance of" where the plaintiff worked. *Id.* at 856.

<sup>102</sup> *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (1962). There a landlord sought to repossess premises held by a tenant on a month-to-month tenancy. The tenant's defense was that the landlord wished to evict the tenant solely because the tenant was a Negro. The court said that the tenant could have the opportunity to prove the defense. "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such 'state action' would be violative of both federal and state Constitutions." *Id.* at 255, 22 Cal. Rptr. at 317. The court's analysis appears to have stopped with the determination that there would be "state action" if the court decided the case, on the assumption that all state action giving effect to private racial discrimination is unconstitutional. The

constitutionally permit a place of public accommodation to deny its services or facilities to individuals on grounds of race. The interests of the discriminatee in the housing factual pattern appear to be no less weighty than the interests of the discriminatee in the sit-in cases. If the Supreme Court should reverse the convictions in the sit-in cases on the ground that state law permitting the private discrimination is unconstitutional, the same conclusion would seem as clearly to follow in the case of at least some state law permitting private housing discrimination.

#### 4. The "benign quota" in private housing

Racial quotas in private housing, where "voluntarily" adopted and designed to prevent the "tipping" of housing in a locality so as to become all Negro after the first Negro families have moved in, could, conceivably, take two forms: in the case of the lessor of multi-unit housing, or the vendor of homes in a large tract, the lessor or vendor might utilize a quota in determining to whom to lease or to sell; or the vendor might seek, by the use of covenants, to create a judicially enforceable method of maintaining a stable quota as individual resales occur in the future. The constitutional problems which such quota plans would raise would be these: whether, in the first case, state law can constitutionally permit a private lessor or vendor to refuse, on racial grounds, to lease or sell to a person who would exceed the quota for his race, in a situation in which it is assumed that state law cannot constitutionally permit the lessor or vendor completely to exclude or to refuse to sell to persons on racial grounds; and whether, in the second case, state law can constitutionally make enforceable a private person's promise not to sell his home to a person whose race's quota in the locality is filled.

Racial quotas—in housing, in education, or elsewhere—raise challenging legal and ethical problems, for they result in treating a specific person in a specific way because of his race.<sup>103</sup> In general, a state is precluded by

---

constitutional issue in the case was, assuming that California law would permit a landlord to refuse to continue leasing premises to a tenant because of the tenant's race, whether that principle of state law was constitutional. A court effectively obscures that issue by confining its analysis to whether the state "acts" if the court gives effect to private discrimination. See Note, 10 U.C.L.A.L. REV. 401 (1963). See also *Novick v. Levitt & Sons, Inc.*, 200 Misc. 694, 108 N.Y.S.2d 615 (Sup. Ct.), *aff'd*, 279 App. Div. 617, 107 N.Y.S.2d 1016 (1951).

<sup>103</sup> See generally BICKEL, *THE LEAST DANGEROUS BRANCH* 60-65 (1962); GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 292 (1959); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Brown, Book Review, 62 COLUM. L. REV. 386 (1962); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960); Pollak, *Constitutional Adjudication: Relative or Absolute Neutrality*, 11 J. PUB. L. 48, 62-63 (1962); Comment, *Racial Discrimination and the Role of the State*, 59 MICH. L. REV. 1054 (1961); Comment, *Benign Quotas: A Plan for Integrated Private Housing*, 70 YALE L.J. 126 (1960); Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515 (1959).

the fourteenth amendment from so doing in its direct relationships with private persons, and, as discussed in this article, in some situations a state is required by the fourteenth amendment to protect private persons from racial discrimination by other private persons. Racial quotas in public housing have been held to violate the fourteenth amendment.<sup>104</sup> Several courts have now dealt, in different ways, with whether race of children can be taken into account so as to make public school assignments in a way which will tend to overcome de facto segregation in schools.<sup>105</sup>

The constitutional problem poses a conflict between individual rights not to be discriminated against on grounds of race, on the one hand, and, the interests of the racial group, as a group, of which the individual is a member, as well as broader public interests. The group and public interests, which in the quota situation may be opposed to the immediate interests of the individual who is denied a benefit because his group's quota is filled, caution against too-quick resolution of the constitutional issue on the basis that constitutional rights are "personal" rights.<sup>106</sup> The enforceability as against an individual employee of the terms of a collective bargaining agreement regulating the wages which the employer will pay for the work the employee performs,<sup>107</sup> and, in the racial context, judicial approval of school desegregation plans which will take years to complete,<sup>108</sup> are examples in which group and public interests on one side and the individual's immediate interest on the other may not coincide, and in which the individual's rights give way to advancement of the broader group and public interests.

In the case of racial quotas in housing, the argument is that the quota will result in making the specific housing facilities available at least to some individuals in the minority group, "tipping" will be prevented, and a basic step will thus be taken toward breaking down de facto segregation in other aspects of community life. The conflict between the interests of the individual who is outside his group's quota and the group and public

---

<sup>104</sup> See, e.g., *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P.2d 668 (1953), *cert. denied*, 347 U.S. 974 (1954).

<sup>105</sup> See *Bell v. School City*, 324 F.2d 209 (7th Cir. 1963); *Branche v. Board of Educ.*, 204 F. Supp. 150 (E.D.N.Y. 1962); *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal. Rptr. 606 (1963); 42 OPS. CAL. ATT'Y GEN. 33 (1963) (school districts "may consider race as a factor in adopting a school attendance plan, if the purpose of considering the racial factor is to effect desegregation in the schools, and the plan is reasonably related to the accomplishment of that purpose").

<sup>106</sup> "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

<sup>107</sup> See Comment, *Racial Discrimination and the Role of the State*, 59 MICH. L. REV. 1054, 1077 (1961).

<sup>108</sup> See Navasky, *supra* note 103, at 61.

interests is more marked in the housing situation than it is in making school assignments on the basis of race so as to eliminate de facto segregation. In the school case the purpose, presumably, is to benefit all children; in theory, at least, no child is being educationally disadvantaged by the use of the racial assignment plan. In the housing case the individual who is outside his group's quota is being immediately seriously disadvantaged, by being denied access to housing.

There are more specific factors which would enter into the determination of the constitutional question involving the validity under the fourteenth amendment of state law pertaining to racial quotas in privately-owned housing. Even if racial quotas cannot constitutionally be utilized in public housing, it need not necessarily follow that state law could not constitutionally subordinate the interests of an individual discriminatee to the broader group and public interests which would arguably be advanced by a private lessor's or vendor's use of a quota in those situations where state law could not constitutionally permit the lessor completely to exclude the racial group, or the vendor to refuse to sell to any member of the group. It can at least be said that because of the addition of the group and public interests the argument for constitutionality of state law permitting the private lessor or vendor to utilize a racial quota is stronger than the argument for constitutionality of state law permitting complete exclusion. Also pertinent to the constitutional decision in this type of case would be whether the private lessor's or vendor's use of a racial standard results in denial to the discriminatee of equal access to governmental benefits designed to increase the availability of housing. The injury to the individual who is outside his group's quota would be weightier, and should probably be controlling, when the use of the quota results, among other things, in denial, on grounds of race, of access to such governmental benefits.

Where the private vendor of housing seeks to use judicially-enforceable covenants in order to maintain a specific racial balance in the housing as future resales occur, the problem would be similar to that in *Shelley v. Kraemer*.<sup>109</sup> *Shelley* held that the discriminatee is, at a minimum, constitutionally entitled to have state law guarantee to him that the discriminator will have freedom of choice to determine whether or not to sell to the discriminatee. It was, therefore, unconstitutional for state law to give effect to the restrictive covenant. The preceding discussion of the "voluntary" use of a racial quota by a private lessor or vendor would be applicable in determining whether the group and public interests which are arguably

---

<sup>109</sup> *Shelley* itself in a sense involved a quota, in that not all of the property owners in the specific area were signatories to the covenant. Thirty of 39 owners signed the covenant; at that time five of the parcels of land in that district were owned by Negroes.

advanced by use of a quota would be weighty enough to permit state law constitutionally to deprive the individual who is outside his group's quota of the vendor's freedom of choice. There would be a sound argument that the quota-based covenant should not be enforced, in spite of the group and public interests which might thereby be advanced, because, though a quota might advance those interests, there are dangers, too, that a quota will undesirably freeze patterns of housing occupancy.<sup>110</sup> Hence any realm for state law constitutionally to permit the use of racial quotas in private housing should perhaps be limited, at most, to cases in which there is freedom of choice with respect to adherence, at any particular time, to the quota.

---

<sup>110</sup> See *Progress Dev. Corp. v. Mitchell*, 182 F. Supp. 681 (N.D. Ill. 1960), *modified and remanded*, 286 F.2d 222 (7th Cir. 1961); Comment, *Benign Quotas: A Plan for Integrated Private Housing*, 70 YALE L.J. 126 (1960).