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I. INTRODUCTION

That the substantive and procedural restrictions of section 1 of the fourteenth amendment apply only to "state action" is axiomatic.[1] The application of that axiom to the complex arrangements that characterize human affairs, however, has proved considerably more difficult for the courts than has its articulation. For instance, consider the state officer acting in violation of state law, clearly

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1. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961); The Civil Rights Cases, 109 U.S. 3, 11 (1883).

outside the scope of his authority and thus in his "private capacity."[2] Can he violate the restrictions of section 1 of the fourteenth amendment? Is he included in the meaning of the words "No state shall . . . ."?[3] Consider also private contractual arrangements that would violate the restrictions of the fourteenth amendment if the state were a party to them. Since state contract law makes the contract enforceable,[4] does not that law violate section 1?[5] If the state contract law is not a violation, is not section 1 violated when a state court, called upon by one party to enforce the terms of the contract,[6] awards damages or an injunction? The judgment is, after all, state action coercing private conduct that would violate section 1 if it were state conduct.[7]

What about activity that private parties cannot engage in without a license from the state?[8] When a private party carries on that activity in a manner that would violate section 1, such as racial discrimination, would not the state's issuance of the license constitute a violation of section 1?[9] Would the answer change if the purpose of the state licensing system were to restrict narrowly the number of licensees, effectively protecting the license holders from competitors who might not discriminate?[10] The privately owned and operated public utility company presents an even more difficult question. Such a state-chartered corporation enjoys a state-created and state-protected monopoly and, as a result, is subject to detailed state regulation in every aspect of its operation.[11] Surely the neat

2. *E.g.*, United States v. Price, 383 U.S. 787, 799 (1966); Griffin v. Maryland, 378 U.S. 130, 135 (1964).

3. U.S. CONST. amend. XIV, § 1.

4. *E.g.*, Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974); Adams v. Egley, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); John Deere Co. v. Catalano, 186 Colo. 101, 525 P.2d 1153 (1974); Frost v. Mohawk Nat'l Bank, 74 Misc. 2d 912, 347 N.Y.S.2d 246 (1973).

5. *See* text accompanying notes 64-72 *infra*.

6. *E.g.*, Evans v. Abney, 396 U.S. 435 (1970); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

7. *See* text accompanying notes 27-40 *infra*.

8. *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Millenson v. New Hotel Monteleone, Inc., 475 F.2d 736 (5th Cir.), *rehearing denied*, 477 F.2d 596 (5th Cir.), *cert. denied*, 414 U.S. 1011 (1973); Sament v. Hahnemann Medical College & Hosp. of Philadelphia, 413 F. Supp. 434 (E.D. Pa. 1976), *aff'd*, 547 F.2d 1164 (3d Cir. 1977); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968); Ford v. Wisconsin Real Estate Examining Bd., 48 Wis. 2d 91, 179 N.W.2d 786 (1970), *cert. denied*, 401 U.S. 993 (1971).

9. *See* text accompanying notes 84-87 *infra* (the "state regulation" theory of state action).

10. *See* text accompanying notes 86-87 *infra* (the "state-created monopoly" theory of state action).

11. *E.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Public Utils.

conceptual line between private action and state action becomes badly blurred in such a case, but is the activity of the public utility company "state action" subject to the restrictions of section 1 of the fourteenth amendment?[12]

Difficult questions also arise when a private party enters a partnership with the state government to pursue some particular economic or social goal of mutual benefit.[13] Are only the state's half of the partnership and its half of the partnership's activity subject to the restrictions of section 1, or are both partners and all partnership activity subject to section 1 by virtue of the state's participation?[14] This in turn raises the question of when a private party has entered a partnership with the state as opposed to simply arranging as an independent contractor to supply goods and services to the state for a fee.

Finally, what of the private party who engages in activity or performs a role that traditionally is performed by an agency of state government? For instance, can a city or state escape the dictates of section 1 with respect to free speech in the town square simply by withdrawing from the scene and allowing private ownership and management of the town square and common access ways in the business district?[15] Does not a private actor who assumes a role usually filled by a state agency subject to the restrictions of section 1 also become subject to those restrictions?[16]

Since the Supreme Court's simple axiomatic pronouncement that the fourteenth amendment applies only to state action,[17] the federal courts have struggled regularly with the question presented by these hypotheticals—when should a private party be held to be the state for purposes of the fourteenth amendment?[18] Although

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Comm'n v. Pollak, 343 U.S. 451 (1952); Sorenson v. City of Bellingham, 80 Wash. 2d 547, 496 P.2d 512 (1972); Hsieh v. Civil Serv. Comm'n, 79 Wash. 2d 529, 488 P.2d 515 (1971).

12. *See* text accompanying notes 88-91 *infra* (the "monopoly" theory) and text accompanying notes 99-117 *infra* (the "regulation" theory).

13. *E.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

14. *See* text accompanying notes 92-98 *infra* (the "symbiosis" or "partnership" theory of state action).

15. *E.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Marsh v. Alabama, 326 U.S. 501 (1946).

16. *See* text accompanying notes 41-67 *infra* (the "state function" theory of state action).

17. The Civil Rights Cases, 109 U.S. 3, 11 (1883).

18. The courts have been faced with this kind of "state action" question in two different but closely related types of cases. The first and most common is the usual "§ 1983" action or a direct "*Bivens*-style" action by a private plaintiff against a private defendant alleging that the defendant has committed the tort of violating the plaintiff's fourteenth amendment (section 1) rights. Since the language of § 1 of the fourteenth amendment is prohibitory and since it prohibits only certain actions by a "state," the plaintiff's § 1 rights are only the right

almost every significant Supreme Court decision on the state action question lends itself to more than one interpretation,[19] some vague outline of a "state action doctrine" does emerge when, with the benefit of hindsight, one reads each discussion in the context of subsequent decisions.[20] When one turns to the considerable number of state action cases disposed of by the lower federal courts in recent years, however, conceptual and doctrinal clarity is often wholly lacking.

A similar observation made several years ago was accompanied by a demand for "principled bases for the maintenance of consistency in defining what is and what is not [state action]."[21] Unfortunately, these "principled bases" have not been forthcoming. Their absence is particularly conspicuous in recent cases brought by discharged employees of semi-public institutions, such as a large charitable hospital, alleging that their employer's activities constituted

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to be free of specified kinds of state action, that is, state action that denies procedural or substantive due process or equal protection. Thus, the question squarely presented by such a suit is whether the actions of the private defendant are "state actions" for purposes of § 1 of the fourteenth amendment.

The second, less common and less direct way the issue is encountered is as an element of a constitutional challenge to a statute passed by Congress purportedly in the exercise of the legislative power granted hy § 5 of the fourteenth amendment. Since § 5 by its express terms grants Congress only the power to enforce § 1, it is argued that Congress under its § 5 power can prohibit only activity that is itself a violation of § 1 or that Congress has reason to believe will lead to a violation of § 1. Katzenbach v. Morgan, 384 U.S. 641 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966). In other words, a statutory prohibition of private activity will not be within the § 5 power of Congress unless the prohibited activity is either state action for purposes of § 1 or is likely to lead to state activity in violation of § 1. Thus, a judicial decision that a statutory prohibition of certain activity is within the § 5 power of Congress should contribute to the definition of state action for purposes of § 1.

There is some authority, however, for the proposition that in spite of the language of § 1 and § 5, § 5 should be read as empowering Congress to prohibit at least some private action that is not itself state action and that is not designed to or likely to cause state action violative of § 1. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); United States v. Guest, 383 U.S. 745, 777 (1966). *But see* Oregon v. Mitchell, 400 U.S. 112, 128 (1970). Although neither the theoretical basis nor the reach of this argument is clear, it at least casts some doubt on the contribution of § 5 holdings to the definition of state action for purposes of § 1. *See generally* Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81 (1969); 25 STAN. L. REV. 885 (1973).

19. Supreme Court opinions on this question are characterized by what seems to be more than the usual failure to clearly articulate precise theoretical grounds for the holdings. They often offer completely independent theoretical rationales in consecutive sentences as if all were part of a single analytical approach. The Court seems to reconcile itself to this conspicuous lack of judicial craftsmanship with the repeated insistence that each case must be determined by a weighing and sifting of its unique facts. *E.g.,* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

20. *See* Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977); New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975).

21. Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 COLUM. L. REV. 656 (1974).

"state action" and that the discharge procedures, though often consistent with their contract rights, did not meet the equal protection or the due process requirements of the fourteenth amendment.

The popular explanation for the theoretical chaos in recent state action cases is that state action arguments, which gained wide judicial acceptance in the context of equal protection claims by blacks, are now being pressed in due process and equal protection cases not involving racial discrimination.[22] Proponents of this theory suggest that in racial discrimination cases a judicial aversion to the challenged activity prompted the courts to expand the range of private activity that would be considered state action subject to injunction as a violation of the fourteenth amendment. On the other hand, in nonrace cases, exemplified by the employee discharge-due process cases, the judicial inclination is to restrict the range of private action considered state action, thereby avoiding extensive judicial meddling in private affairs. These two determinative judicial inclinations require the chaotic juggling of theories to find state action when the challenged activity involves racial discrimination, while finding no state action when the same institution engages in the same activity but without racial discrimination.

If the distinction between race cases and nonrace cases is in fact determinative of the outcome of state action questions, much of the theoretical confusion could be eliminated by elevating that distinction to one of principle and candidly offering it as the basis for judicial opinions. The Second Circuit appears to have adopted this approach, rationalizing their position in terms of the historic purpose of the fourteenth amendment.[23] This notion that the presence or absence of racial discrimination in the challenged action determines whether the challenged activity is state action is rather difficult to accept as an abstract theoretical proposition. Certainly, once an activity is determined to be state action, the historic purposes of the fourteenth amendment might justify the application of stricter standards or a presumption of unconstitutionality when the activity in question is racially discriminatory. But the relevance of that factor in the determination that the private actor occupies the position of the state in his activity seems highly questionable.

Although the distinction between race and nonrace cases is unappealing as an abstract theoretical proposition, it may be the only available explanation for the apparent shift from relatively

22. Antown, *State Action: Judicial Perpetuation of the State/Private Distinction*, 2 OHIO N.U.L. REV. 722, 727 (1975); Note, *supra* note 21, at 661.

23. Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring).

liberal state action findings in the equal protection cases of the 1960's to the more restrictive state action holdings found in some recent cases brought by otherwise similarly situated plaintiffs.[24] There is, however, a far more satisfactory explanation for the shift to restrictive state action holdings in the increasingly common equal protection and due process cases brought by discharged employees of semi-public or state-aided institutions. It is the thesis of this Article that the shift in these cases is best explained, not by the evolution from race to nonrace cases, but by the evolution from claims brought by outside "consumers" of the private institution's "state action" to claims brought by employees challenging the internal management of the private institution. In the context of the private-charitable-hospital model, the courts have reacted intuitively to the difference between a claim by a potential patient that the hospital's admissions policies constitute state action and a claim by a dissatisfied employee—doctor, nurse, or janitor—that the hospital acts as the state in the implementation of the grievance procedures specified in his or her employment contract. It is merely an historic coincidence that almost all of the early "consumer" cases claiming state action involved blacks challenging racial discrimination by a private institution while almost all of the more recent "employee" cases involve some constitutional complaint other than racial discrimination.[25] This Article will argue further that, unlike the distinction between race and nonrace, the distinction between

24. Obviously this Article does not contend that the presence of racial discrimination bas no effect at all as a practical matter on a court's ultimate holding on the state action issue. On issues such as state action for which the applicable theory demands a judicial "weighing" of the cumulative effect of individually inconclusive factors, it is quite likely that tbe outcome of the "weighing" process will be influenced by elements of the case that are theoretically irrelevant to the issue under consideration. This well-recognized judicial inclination to decide close cases on the basis of theoretically irrelevant considerations is not adequate, however, to explain the wholesale theoretical inconsistency in state action cases that is well beyond the kind of alternative "weighing results" that can be articulated in terms of the same theory in a close case.

25. Of course, this phenomenon is not merely an unexplainable coincidence. The impetus behind the original state action claims was the civil rights movement. In more recent years, statutory prohibitions on private racial discrimination have proliferated, both by legislative enactment of new statutes and judicial reinterpretation of old ones. *E.g.*, 18 U.S.C. § 241 (1976), *construed in* United States v. Guest, 383 U.S. 745 (1966); 18 U.S.C. § 242 (1976), *construed in* United States v. Price, 383 U.S. 787 (1966); 42 U.S.C. § 1973b (1970), *construed in* Katzenbach v. Morgan, 384 U.S. 641 (1966); 42 U.S.C. § 1981 (1970), *construed in* Runyon v. McCrary, 427 U.S. 160 (1976); 42 U.S.C. § 1982 (1970), *construed in* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); 42 U.S.C. § 1985 (1970), *construed in* Griffin v. Breckenridge, 403 U.S. 88 (1971). These statutory remedies provide much broader protections than those available under fourteenth amendment state action theories with far greater certainty of result. Thus, only those individuals not protected by the statutory prohibitions now build their claims for relief on the shifting sands of fourteenth amendment state action theory.

consumers and employees provides a demonstrably sound theoretical basis for what the courts actually have been doing in many cases apparently without articulating a satisfactory rationale.

A thorough explanation of this thesis requires three major steps: first, a review of the current status or viability of the various state action arguments, all of which were developed by the Supreme Court in early "consumer" cases; second, a study of the judicial responses to these arguments in the context of employee discharge cases; and third, the reformulation of these responses in terms of sound theory, consistent with the policies underlying the original development of the various branches of the state action doctrine.

II. CURRENT STATE ACTION DOCTRINE

A. *The Contexts in Which State Action Claims Arise*

The state action doctrine that has emerged from the various Supreme Court encounters with the issue is, to say the least, multifaceted. In general, it encompasses two different situations in which private activity may give rise to a violation of the fourteenth amendment: (1) activity by a state government that does not on its face violate any of the prohibitions of the fourteenth amendment but that aids private parties in doing something that would violate the fourteenth amendment if done by the state, and (2) activity by private parties acting in partnership with the state, acting on behalf of the state in pursuit of some state goal, or acting voluntarily in place of the state in the performance of usual state functions. In the first type of case, the aid or encouragement of the state becomes a violation of the fourteenth amendment because of the questionable nature of the private activity aided. Thus the state aid may be enjoined,[26] but the private parties are free to continue the pursuit of their own goals without state assistance. In the second class of cases, which involve private parties performing state activities with, as agents for, or in place of the state, the actions of the private parties constitute state action and may be enjoined as if they were the actions of formal state agencies.

Several of the elements of state action discussed below will be present in each case, some indicating the first type of case and some indicating the second. Thus the practical objectives of the plaintiff will determine whether the state action issue is presented in the course of an attempt to force the state to withdraw from involve-

26. Ex parte *Young* establishes that the individual state officer may be enjoined by federal court in spite of the eleventh amendment prohibition of federal court suits against a state. 209 U.S. 123 (1908).

ment in questionable private activity or an attempt to force the private parties to cease the questionable activity in conformity to section 1 of the fourteenth amendment.

B. *Viable Elements of the Doctrine*

(1) *Shelley* and *Reitman*: Two Questionable Formulations

Two major elements of the state action doctrine, established by the Supreme Court in *Shelley v. Kraemer*[27] and *Reitman v. Mulkey*,[28] were ill-conceived at their outset and, as a result, have been left by the Court to atrophy. In *Shelley*, the Court held that judicial enforcement of a racially discriminatory private restrictive covenant constituted state action in violation of the equal protection clause of the fourteenth amendment. The Court conceded both the legality of the covenant under all state and federal law applicable at the time and its enforceability by injunction as a matter of state contract and property law. Nevertheless, the Court concluded that judicial enforcement of this particular property right pursuant to general state contract and property law violated the fourteenth amendment. Analytically, the case is indistinguishable from all other instances of judicial enforcement of private common law or statutory rights in which the private party's assertion of the right is motivated by racial discrimination.[29] In fact, the case seems indistinguishable from any case involving judicial enforcement of a private legal right to do something that the state could not do without violating the fourteenth amendment. For instance, when a private employment contract permits an employer to discharge an employee without the notice and hearing required of the state by the fourteenth amendment, *Shelley* seemingly would dictate a finding that state court enforcement of that contract right violates the fourteenth amendment.[30] A number of suggestions have been offered by commentators seeking to preserve the viability of *Shelley* by the

27. 334 U.S. 1 (1948).

28. 387 U.S. 369 (1967).

29. A favorite hypothetical of constitutional law teachers considering *Shelley* posits a white homeowner with hoth white and black neighhors. While all of his white neighbors are always welcome in his yard and home, entry by one of his uninvited black neighbors results in a criminal trespass prosecution and conviction of the neighhor. Is not the conviction by the state court under a generally applicable state law a violation of the fourteenth amendment hecause it is state action enforcing private racial discrimination?

30. Barrows v. Jackson, 346 U.S. 249 (1953), expanded the holding in *Shelley* to prohibit judicial enforcement of racially discriminatory contractual arrangements by the award of damages for their breach.

construction of theoretical boundaries to restrict its apparent unlimited applicability. They have variously argued that the *Shelley* doctrine is applicable only when the private right is asserted as part of the cause of action and not when it is asserted by way of defense;[31] that it is applicable only when the private contractual right impacts on a third party who initially was not a party to the contract but who assumes the contractual obligation;[32] and that *Shelley* is really a case concerning the assumption of municipal zoning powers by private parties rather than one of judicial enforcement of private rights.[33] None of the suggestions for limiting and preserving *Shelley* has gained currency for the simple reason that they are no more workable than the assumption on which they were based—that is, that *Shelley* was a sound decision needing only more careful theoretical articulation. With one minor exception,[34] each time the Supreme Court has encountered a case to which *Shelley* would be applicable,[35] it has conspicuously avoided reliance upon the *Shelley* reasoning or any revision thereof. Thus, *Shelley* is best explained as an early unrestrained exhibition of the now familiar Supreme Court inclination to sacrifice careful analysis in a determined effort to eliminate the more economically incapacitating forms of private racial discrimination.[36]

The second largely ignored element of the state action doctrine originated in the case of *Reitman v. Mulkey*.[37] Like the holding in

31. *E.g.*, Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W.2d 110 (1953), *aff'd per curiam without opinion by an equally divided court*, 348 U.S. 880 (1954), *vacated*, 349 U.S. 70 (1955).

32. *E.g.*, Evans v. Abney, 396 U.S. 435 (1970); Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955).

33. Reitman v. Mulkey, 387 U.S. 369, 384 (1967) (Douglas, J., concurring).

34. That exception is to be found in what looks like an afterthought tacked on to the end of the Court's opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972), in order to create the illusion of giving the hlack plaintiff some relief after rejecting his claim that the defendant club's discriminatory policies were state action on the basis of the state-preserved monopoly and state regulation theories. In order to divide the spoils of the case in a Solomon-like manner, the Court focused upon an obviously nondiscriminatory state regulation that required each private club holding a liquor license to adhere to the provisions of its charter and hy-laws. According to the Court, that regulation constituted state action in violation of the equal protection clause because the defendant club had chosen to include in its by-laws a ban on service to blacks. In enjoining enforcement of that state regulation, the Court conveniently overlooked the fact that no one had attempted to enforce the regulation in this context and that the defendant club had not sought to avoid such enforcement. The irrelevance of the Court's holding on this concocted issue is demonstrated by the lack of interference with the obvious intent of the defendant club to continue discriminating in conformity to its by-laws in the absence of the state regulation.

35. *E.g.*, Evans v. Abney, 396 U.S. 435, 444 (1970); Bell v. Maryland, 378 U.S. 226, 259 (1964); Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).

36. *E.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (reinterpreting 42 U.S.C. § 1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (reinterpreting 42 U.S.C. § 1982).

37. 387 U.S. 369 (1967).

Shelley, the doctrinal content of the *Reitman* holding is difficult to define because of its arguably unlimited applicability. At issue in *Reitman* was a state constitutional amendment forbidding legislative interference with the right of property owners to sell or rent to whomever they wished and thereby repealing two open housing statutes that had recently been passed by the state legislature. The Court held that the amendment was state action that violated the equal protection clause of the fourteenth amendment. The precise doctrinal grounds of the holding and the limits on its applicability are difficult to perceive. What exactly was the state action that violated the equal protection clause? The passage of the constitutional amendment certainly was state action, but what was the inequality of treatment in that act that violated the equal protection clause? Somehow, the racial discrimination of private sellers was attributed to the state as a result of this evenhanded amendment. Perhaps the amendment violated the equal protection clause because it "authorized" private discrimination, but private discrimination was equally "authorized" in the state by the absence of any legal prohibition prior to the passage of the open housing laws. Does the failure to pass open housing laws violate the equal protection clause on the grounds that private discrimination is "authorized" by the state in the absence of such laws? Perhaps the amendment was a violation of the equal protection clause because it repealed the open housing statutes. Does the case stand for the proposition that, although a state is under no equal protection obligation to pass open housing legislation, the repeal of such legislation once passed violates the equal protection clause?[38]

Finally, the key to the *Reitman* holding might be that either the "authorization" of private discrimination or the repeal of the open housing legislation was effected by an amendment of the state constitution rather than by legislative action or inaction. Does the case establish the principle that the legislature, which acts on behalf of the electorate and presumably reflects its wishes, may repeal open housing legislation, but the electorate may not directly express its wishes in a referendum on a constitutional amendment to the same effect? Alternatively, does the *Reitman* holding mean that, while a legislature may effectuate the wishes of the electorate by refusing to pass open housing legislation, the majority of the electorate may not guarantee conformity of the legislature to its wishes by constitu-

38. It is interesting to speculate on the nature of the federal constitutional claims that would have arisen under *Reitman* if, after the *Reitman* decision, the state authorities had embarked on a uniform, evenhanded policy of nonenforcement of the open housing laws in question.

tionally prohibiting the passage of such legislation?[39]

As was true in the aftermath of *Shelley,* many attempts have been made to convert the *Reitman* holding into a workable element of state action doctrine by constructing the theoretical underpinnings that the Court failed to supply. Unfortunately, the best explanation for the Court's holding again seems to be that it was a relatively unprincipled implementation of a strong judicial inclination to eliminate the more economically incapacitating forms of private racial discrimination. Both cases involved private *racial* discrimination and both involved the frustration of attempts by minority race members to purchase decent *housing.* The conjunction of these two factors—race and housing—apparently was sufficient to allow the Court to overlook analytical niceties in its rush to create federal law to fill the void left by Congress' refusal to prohibit effectively this particularly disabling form of private discrimination.[40]

39. Any thought that such questions may be mere academic speculation should be removed by consideration of the recent nationally publicized repeal by the city of Miami of its shortlived "gay rights" ordinance prohibiting private discrimination against homosexuals in certain contexts. The distinctions explored by these rhetorical questions could prove dispositive of a Miami gay plaintiff's claim of state action based upon *Reitman.*

40. Even viewed from this "realist" perspective, the Court's tentative measures in *Shelley* and *Reitman* appear haphazard at best. The holding in *Shelley* merely removed each state's judicial machinery from the process of enforcing private discriminatory arrangements in the sale of property against unwilling or no-longer-willing participants. All private sellers who individually or in combination wished to discriminate were left completely free to do so—certainly a much broader problem in terms of eliminating discrimination in the sale of housing. Because it was the repeal of open housing legislation applicable to all private sellers and renters that was held unconstitutional in *Reitman,* that holding in a sense enforced the old state open housing laws as a matter of federal constitutional law on all private sellers and renters in California. This effect was achieved, however, only because California was among the very few states to have passed such open housing legislation, a mistake unlikely to be repeated in other states after the holding in *Reitman* created the distinct possibility that such legislation was unrepealable. See Justice Harlan's dissenting opinion in *Reitman,* 387 U.S. at 395 (1967). Since *Shelley* merely removed state participation in private housing discrimination, and *Reitman,* though effectively prohibiting private discrimination, was applicable in very few states, the problem of private housing discrimination, which spawned those decisions, remained largely unsolved. The persistence of the problem of racial discrimination in private housing, due to Congress' failure to prohibit the practice completely and the inherent limitations of *Shelley* and *Reitman,* prompted the Court to devise a third approach—this time avoiding any direct entanglement with the state action requirement of the fourteenth amendment. In 1968, in the case of Jones v. Alfred Mayer, 392 U.S. 409 (1968), the Court rediscovered § 1982. Although prior to *Jones* it seemed well established that § 1982 prohibited only legally imposed racial bars to the purchase of property, the Court in *Jones* concluded that it was the intention of the 1866 Congress in passing § 1982 to prohibit all otherwise willing private sellers from refusing to sell on the grounds of race. The same two factors—*racial* barriers in the private *housing* market—which had caused the Court to overlook glaring defects in constitutional theory in *Shelley* and *Reitman* allowed the Court in *Jones* to overcome the apparent plain meaning of the words of § 1982 and 100 years of consistent judicial interpretation with the silent acquiesence of Congress, not to mention serious doubts about the constitutional source of Congress' authority to pass the statute as

Because the constitutional principles expressed in *Shelley* and *Reitman* have no validity or appeal independent of the problem they were concocted to ameliorate, and because that problem has been solved much more comprehensively and finally by the Court's reinterpretation of the 1866 Civil Rights Act, the Court's benign neglect of *Shelley* and *Reitman* is likely to continue for the foreseeable future.

If this observation of the gradual demise of *Shelley* and *Reitman* as viable elements in the state action doctrine is correct, four major elements of current importance remain: (1) voluntary assumption by private persons (with the acquiescence of the state by inaction) of functions traditionally performed by state government or of powers traditionally exercised by state government; (2) state aid (usually financial, but sometimes preferential regulatory treatment) to otherwise private activity; (3) a partnership or agency relationship between private actors and the state to pursue state goals; and (4) performance of private activity subject to a state regulatory framework.

(2) Assumption of State Functions or State Powers

In the landmark decision of *Marsh v. Alabama,*[41] the Supreme Court established the notion that a private party who assumes functions normally performed only by state government or exercises powers normally exercised only by state government is acting as the state and is, therefore, subject to the substantive and procedural restrictions of the fourteenth amendment. This is true even though the private party acts without any active approval or assistance from the state. In *Marsh* the Court faced an appeal by a Jehovah's Witness of a criminal trespass conviction arising from the unauthorized distribution of religious literature in the business district of a company-owned town. In overturning the conviction as a violation of the fourteenth amendment prohibition against state interference with the appellant's freedoms of expression and religion, the Court noted that the town "does not function differently from any other town"[42] and that "whether a corporation or municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."[43] Accordingly, the Court

newly construed. *See generally* Brooke, Ervin, Kinoy & Smedley, *Non-Discrimination in the Sale or Rental of Real Property: Comments on Jones v. Alfred H. Mayer Co. and Title VIII of the Civil Rights Act of 1968,* 22 VAND. L. REV. 455 (1969); 22 ARK. L. REV. 773 (1969).

41. 326 U.S. 501 (1946).

42. *Id.* at 508.

43. *Id.* at 507.

concluded that "the managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purpose of the Constitutional guarantees . . . ."[44] In an analagous case, *Terry v. Adams,*[45] the Court held that primary elections operated by a private political association constituted state action subject to the prohibitions of the fifteenth amendment. Although the number of separate opinions leaves the rationale for the *Terry* holding less than clear, a majority of the Justices appear ultimately to have rested their position on the association's effective appropriation to itself of the traditional state function of operating primary elections.[46]

Twenty years after *Marsh,* the Court held that because the ownership and operation of a public park is a role traditionally played by a unit of state government, a private owner-operator performing that "public function" would be acting as the state and would be subject to the fourteenth amendment.[47] Shortly thereafter,

44. *Id.* at 508. As was pointed out earlier, almost every major Supreme Court decision in the area of state action invites more than one interpretation, and *Marsh* is no exception. The court that convicted the pamphleteers of trespassing was a unit of state government applying a state statute, and the Supreme Court's opinion spoke of the imposition of criminal punishment as the due process violation. Thus, it is possible to read *Marsh* as holding that the action of the state court was the state action that violated the fourteenth amendment. Immediately following the language quoted in the text above, the same sentence continues "and a state statute, as the one here involved, which enforces such [a town manager's] action hy criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution." *Id.* The Court continued at the conclusion of its opinion: "Insofar as the *State* has attempted to impose criminal punishment on appellant for undertaking to distrihute religious literature in a company town, *its action* cannot stand." *Id.* at 509 (emphasis added). Under this reading of *Marsh* the town's company owner would not have been acting as the state and thus would not have violated the fourteenth amendment if it had used self help to enforce its prohihition, simply removing the pamphleteers physically from its property.

This reading of the *Marsh* opinion would be the equivalent of the Court's holding two years after *Marsh* in *Shelley v. Kraemer,* discussed in text accompanying notes 27-36 *supra.* If this were a correct reading of *Marsh,* one would expect to find heavy reliance in the *Shelley* opinion on the authority of *Marsh.* In describing and defending its decision in *Shelley,* however, the Court hardly mentioned *Marsh,* clearly indicating that the key to the *Marsh* holding was not the state court's act of enforcing the state-protected private property rights. The key, according to all recent readings of *Marsh* hy the Supreme Court, is to be found in the passages in the *Marsh* opinion detailing the extent to which the town owner had assumed the role traditionally filled by municipal government.

45. 345 U.S. 461 (1953).

46. *Terry* now seems to be viewed by the Court as an unambiguous example of assumption by a private entity of the traditional state function of operating elections. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

47. Evans v. Newton, 382 U.S. 296, 301-02 (1966). In Flagg Bros. v. Brooks, 98 S. Ct. 1729, 1735 n. 8 (1978), however, Justice Rehnquist argues that *Evans* should not be read as holding that the operation of a public park is a role traditionally performed by state government. According to Justice Rehnquist, *Evans* should be seen to rest "on a finding of ordinary state action under extraordinary circumstances." *Id.*

in *Amalgamated Food Employees Union v. Logan Valley Plaza*,[48] the Court faced an appeal from a state court injunction against the "trespassing" of labor pickets on a shopping center's sidewalk and parking lot without the permission of the center's owner. In a majority opinion by Justice Marshall, the Court concluded that the common areas of the privately owned shopping center were the "functional equivalent"[49] of the business district sidewalk of the company-owned town in *Marsh*, which to borrow Justice Marshall's phrase, had been held in *Marsh* to be the "functional equivalent" of the business district sidewalks in the ordinary municipality. Because the center owner had undertaken to provide and regulate the traditionally state-maintained "community business block" sidewalks and common areas, he could not "wholly . . . exclude those members of the public wishing to exercise their First Amendment rights on the premises and for a purpose generally consonant with the use to which the property is actually put."[50] Marshall's opinion contained a footnote pointing out that because the case involved only labor pickets protesting the practices of a store in the center the Court was not deciding whether the center owner could bar "picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put."[51] However, since speech on the municipal sidewalks of the community "business block" is protected from state interference whether or not it concerns one of the businesses on the block, nothing in the *Logan Valley* "functional equivalent" rationale seemed to limit that principle to the specific facts of *Logan Valley*.[52]

Justice Black, the author of the *Marsh* opinion, filed what has proved to be a prophetic dissent in *Logan Valley*. According to Justice Black, the key to the *Marsh* holding was that the privately owned property had "taken on *all* the attributes of a town, *i.e.*, 'residential buildings, streets, a system of sewers, a sewage disposal plant and a business block on which business places are situated.' "[53] Black distinguished *Marsh* on the grounds that in Logan Valley Center "there are no homes, there is no sewage disposal plant, there is not even a post office on this private property . . . ."[54]

Four years after *Logan Valley*, a Supreme Court of radically

48. 391 U.S. 308 (1968).
49. *Id.* at 325.
50. *Id.* at 319-20.
51. *Id.* at 320.
52. *Id.* at 339 (White, J., dissenting).
53. *Id.* at 332 (Black, J., dissenting).
54. *Id.* at 331.

altered membership gave prominence to Black's *Logan Valley* dissent and Marshall's disclaimer footnote in a holding limiting the applicability of *Logan Valley* to speech " 'directly related in its purpose to the use to which the shopping center property was being put.' "[55] The Court insisted in *Lloyd Corp. v. Tanner* that "the holding in *Logan Valley* was not dependent upon the suggestion that the privately owned streets and sidewalks of a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks."[56] Thus, in *Lloyd* the distribution by the plaintiffs of Vietnam war protest leaflets in the mall of a privately owned shopping cener was not protected by the fourteenth amendment from interference by the owner of the center. Justice Marshall's dissent made explicit what was obvious, if only implicit, in the majority opinion—because the Court could not legitimately follow *Logan Valley* without applying it to *Lloyd*,[57] the holding of the majority was an attack on the rationale of *Logan Valley*.[58]

Marshall's observation was confirmed in 1976 by the decision in *Hudgens v. NLRB*.[59] Confronted with facts similar to those in *Logan Valley*, the Court held simply that *Lloyd* had overruled *Logan Valley*. In distinguishing the shopping centers in *Hudgens*, *Lloyd*, and *Logan Valley* from the company town's business block in *Marsh*, the Court in *Hudgens* quoted extensively from both Black's dissent in *Logan Valley* and the *Lloyd* majority's expansion of that same theme: "*Marsh v. Alabama, supra*, involved the assumption by a private enterprise of all of the attributes of a state-created municipality . . . . In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State."[60] The Court's approach in *Lloyd* and *Hudgens* leaves the scope of the "government function" element of state action doctrine open to considerable doubt. Is the exercise by a private party of a single traditionally governmental power or the performance of a single significant governmental function, such as the operation of the public park in *Evans v. Newton*,[61] subject to the restrictions of the fourteenth amendment in the exercise of that power or the performance of that function? A literal reading of *Hudgens* and *Lloyd* indicates that the private party must assume

55. Lloyd Corp. v. Tanner, 407 U.S. 551, 563 (1972).
56. *Id.*
57. *Id.* at 584 (Marshall, J., dissenting).
58. *Id.* at 571.
59. 424 U.S. 507 (1976).
60. *Id.* at 519.
61. 382 U.S. 296 (1966).

all of the functions of a municipal or state government before he would be subject to the fourteenth amendment in the performance of any of those functions. This conclusion is reinforced by the majority's rejection of Marshall's argument in his *Hudgens* dissent that the assumption or nonassumption of other government functions is irrelevant to the application of the fourteenth amendment to the exercise of those functions actually assumed.[62]

On the other hand, the very assertion of the general principle that one must assume all governmental functions before becoming subject to the fourteenth amendment in the exercise of any one function seems a sufficient refutation of the principle. For instance, it is inconceivable that the *Hudgens* Court would have decided in *Terry v. Adams* that the political association was not subject to the fifteenth amendment in the operation of its primary election, which effectively controlled the outcome of the formal state elections, simply because the party did not also operate a sewer system. The almost inescapable conclusion is that in the eyes of the *Hudgens* Court, the shopping center owners in *Hudgens, Lloyd,* and *Logan Valley* simply had not sufficiently displaced the traditional municipally controlled alternative forums for communication,[63] while the "pre-primary" elections in *Terry* so fully displaced the traditional government function in that area that the Court had no trouble characterizing the activity as state action.

This interpretation of *Hudgens* is confirmed by the opinion in *Flagg Brothers v. Brooks,*[64] the Court's most recent encounter with the government function element of state action doctrine.[65] The plaintiff in *Flagg Brothers* contended that by statutorily authorizing creditors to utilize self-help techniques the state had delegated to the private creditors the traditional state function of dispute resolution. In rejecting the plaintiff's attempt to apply *Marsh* and *Terry* to the self-help action of the creditor in *Flagg Brothers,* the Court pointed out that:

> [The *Terry* and *Marsh*] branches of the public function doctrine have in common the feature of exclusivity. Although the elections held by the Demo-

62. Hudgens v. NLRB, 424 U.S. 507, 543 (1976) (Marshall, J., dissenting).

63. This position on the part of the majority is highly questionable in view of Justice Marshall's powerful demonstration to the contrary. *Id.* at 539.

64. 98 S. Ct. 1729 (1978).

65. A large element of imprecision has characterized the Court's several discussions of the government function element of state action theory. Loose reference to the doctrine as covering "public functions" has encouraged ambitious plaintiffs to attempt application of the doctrine to any private activity in the nature of a public accommodation. *See* note 135 *infra.* Whatever else might be said about the decision in *Flagg Brothers,* the majority opinion's use of the term "sovereign function doctrine," 98 S. Ct. at 1737, to refer to this branch of state action theory must be viewed as welcome, if long overdue, accuracy of expression.

> cratic Party and its affiliates were the only meaningful elections in Texas, and the streets owned by the Gulf Shipbuilding Corporation were the only streets in Chickasaw, the proposed sale by *Flagg Brothers* under § 7-210 is not the only means of resolving this purely private dispute.[66]

As in *Hudgens*, the Court felt that a range of alternative approaches, both state provided and purely private, remained available to the plaintiff. In *Hudgens* and *Flagg Brothers* the Court appears to have concluded that private activity that substantially parallels a traditional state function without completely displacing the state version is outside of the "carefully confined bounds"[67] of the government function doctrine.

(3) State Aid to Privately Initiated Activity

The distinction noted earlier[68] between cases in which the plaintiff seeks to enjoin continued state involvement with questionable private activity and those in which the plaintiff seeks to impose the fourteenth amendment by injunction of the private activity is particularly apparent in state action cases involving state aid. For instance, a private, racially segregated school receiving state financial assistance could find itself threatened by two different kinds of suits. On the one hand, a group of state taxpayers concerned about the school's discriminatory practices would sue appropriate state officials to enjoin continued payment of state funds to support the school. On the other hand, a teacher or students dismissed by the institution without the notice and hearing required of the state by the fourteenth amendment would sue the school to enjoin the administration's violation of the due process clause.

It is often assumed and occasionally argued that the level of state aid required to justify an injunction against the private action in the latter case is much higher than that required to justify an injunction against the continuation of the aid in the former case.[69] The basis for this assumption is the theory that the injunction against the private party restricts that party's interest in freely pursuing his goals, while the injunction against continued state aid involves no such interference with a private interest.[70] Thus, adherents of this approach conclude that the injunction of the private action is warranted only when siguificant government aid is shown, but an injunction against even minimal state aid is justified because no private interest is thereby restricted.

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66. *Id.* at 1735.
67. *Id.* at 1737.
68. *See* Part II (A) *supra.*
69. Note, *supra* note 21, at 700; 50 N.C.L. REV. 1132, 1145 (1972).
70. Note, *supra* note 21, at 700.

Although this theoretical distinction has considerable superficial appeal, primarily because it is formulated in terms of balancing competing constitutional interests, closer inspection reveals no significant difference between the cases. As a practical matter, the private defendant usually can avoid any long-term effects of an injunction simply by foregoing the state aid that subjected him to the fourteenth amendment.[71] For instance, our hypothetical segregated school could avoid the imposition of constitutional standards of procedural due process on future teacher and student dismissals simply by rejecting any future state aid. On the other hand, it seems equally clear that our hypothetical school faced with the taxpayer's suit to enjoin further state aid could avoid the loss of future aid by eliminating its racial policies. Thus either kind of suit presents the private actor with precisely the same basic option—either modify the private action to conform to fourteenth amendment standards or do without the state aid.[72] In other words, the two kinds of suits are indistinguishable in terms of the private interest interfered with, and therefore they should not present siguificantly different standards for the level of state aid required.

In many cases the choice between seeking an injunction against continued state aid and seeking an injunction against the private activity is simply a function of the plaintiff's ultimate objectives. For the dismissed teacher or students of our hypothetical school, the discontinuance of state aid would be cold comfort. Obviously, the objectives of the teacher or students are fulfilled only by coercing the school to conform to fourteenth amendment standards. In such a case the choice of the private school as the defendant is natural. In contrast, the objectives of the taxpayers seeking to prohibit state support of racial discrimination would be equally well served either by cutting off state aid or by eliminating the school's racial policies. The plaintiff's decision to enjoin the state aid rather than the school's discrimination probably reflects nothing more than the plaintiff's intuitive judgment that, if put to the choice between continued state aid and continued racial discrimination, the school administration would opt for the discontinuance of the aid. In cases in which state aid is so essential to the private activity that the private party would conform to the fourteenth amendment before

71. Of course, this would not be true in the occasional case in which the state aid has placed the private actor in some preferred position that thereafter cannot be completely dismantled.

72. Irvis v. Scott, 318 F. Supp. 1246, 1251 (M.D. Pa. 1970), *rev'd sub nom.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Wesley v. City of Savannah, 294 F. Supp. 698, 703 (S.D. Ga. 1969).

sacrificing the aid, the plaintiff intuitively would seek to enjoin the private party. Thus the level of state aid may be incidentally related to the choice of enjoining the state rather than the private party, but not because a theoretical distinction between the cases demands such a correlation.

State aid to privately initiated activity can take several forms: direct financial grants, the less obvious financial aid of a tax exemption for the private enterprise or tax deductions for private contributions to the enterprise, the provision of municipal services such as fire and police protection that the enterprise otherwise would be forced to finance itself, and preferential regulatory treatment such as the creation and maintenance of a monopoly for the private enterprise or the exercise of eminent domain power to assist the enterprise.

(a) Generalized Municipal Services

Not surprisingly, the evenhanded or "generalized" distribution of usual municipal services to private enterprises,[73] Although definitely an aid to the private organization in performing its challenged activity, never has been considered consequential by the Supreme Court in its scrutiny of a private organization for state involvement. Thus, even in cases of racially segregated private schools, the Supreme Court has indicated that the fourteenth amendment does not warrant enjoining the state from providing private organizations with the municipal services routinely provided to all citizens.[74] Beyond this clear proposition, the amount of state aid that will subject a private recipient to the choice between loss of the aid and conformity to the fourteenth amendment cannot be determined with any degree of certainty.

(b) Direct Financial Aid and Preferential Tax Treatment

Brief reflection reveals that preferential tax treatment is simply a less apparent form of direct financial aid by the state. Whether an institution receives a financial grant from the state or simply is exempted from the payment of a tax, the institution is the recipient

73. The provision of such services by a municipality is analogous to the evenhanded enforcement of private property rights in Shelley v. Kraemer, 334 U.S. 1 (1948). *See* text accompanying notes 27-30 *supra*.

74. Norwood v. Harrison, 413 U.S. 455, 463-66 (1973); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

of state financial aid in any practical or theoretical sense.[75] Whatever confusion exists on this point can readily be traced to the Supreme Court's less than lucid handling of establishment clause challenges to various forms of state aid to religiously oriented private schools. Religious schools traditionally have been exempted from most forms of state taxation, and this practice has never been held to raise serious establishment clause problems.[76] Consequently, defenders of similar tax exemptions for segregated schools have concluded that such exemptions must not constitute state action for purposes of the fourteenth amendment. This conclusion overlooks the actual explanation for the establishment clause results. While such state tax exemptions are clearly state action in aid of religious schools, historic reasons dictate the conclusion that such state action does not violate the establishment clause. Thus, these establishment clause results simply are not relevant when a state tax exemption is challenged as a violation of some other constitutional prohibition.

Even in cases of direct state financial grants to private schools, the issue of state action has been muddied by the construction of inapposite analogies to establishment clause cases. Various schemes of direct state aid to private religious schools, their students, and the students' parents have been upheld by the Supreme Court in the face of establishment clause challenges.[77] By assuming that the es-

75. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Minnesota Civil Liberties Union v. State, 302 Minn. 216, 224 N.W.2d 344 (1974), *cert. denied*, 421 U.S. 988 (1975).

76. Walz v. Tax Comm'n, 397 U.S. 664 (1970); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Note, *Tax Exemptions, Subsidies and Religious Freedom After* Walz v. Tax Commission, 45 N.Y.U.L. REV. 876 (1970).

77. The aid approaches that have survived constitutional challenge are: (1) loan hy state of secular textbooks to students, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Board of Educ. v. Allen, 392 U.S. 236 (1968); (2) transportation for children to and from both public and church-related schools, Everson v. Board of Educ., 330 U.S. 1 (1947); (3) aid to church-related colleges and universities, with use restricted to nonsectarian purposes, Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); (4) standardized tests and scoring services used in public schools, Wolman v. Walter, 433 U.S. 229 (1977); *contra,* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); (5) diagnostic and therapeutic services, Wolman v. Walter, 433 U.S. 229 (1977); *contra,* Meek v. Pittenger, 421 U.S. 349 (1975). The programs that have been held to violate the establishment clause are: (1) direct payments to elementary and secondary schools, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); (2) loan of instructional material to school, Wolman v. Walter, 433 U.S. 229 (1977) (schools retained control over materials although act provided for loan to students); Meek v. Pittenger, 421 U.S. 349 (1975); (3) reimbursement for parents for a percentage of private school tuition, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); (4) tax credits for parents, *id.* It seems quite possible that the Court's tolerance of these various schemes of state aid is an unarticulated (and sometimes consciously disavowed) recognition of the soundness of the legislative instinct that motivates the schemes. The various schemes are usually presented by their legislative authors

tablishment clause presents an absolute bar to any state action in aid of religion, proponents of state aid to segregated private schools have argued that the aid programs that have been upheld in the face of establishment clause challenge must not constitute state action for purposes of the fourteenth amendment. In *Norwood v. Harrison*[78] the Supreme Court finally confronted and unequivocally rejected this argument, pointedly acknowledging that although the various state aid schemes upheld in the establishment clause causes did not violate the establishment clause, they did constitute state action in aid of religion.[79] The Court then announced that "[t]he leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools."[80]

Thus, whatever its form, significant state financial aid to a private enterprise constitutes state action, which subjects the activity of the private recipient to fourteenth amendment restrictions. What is far from clear is the level of state aid required to reach the threshold of "significance" for state action purposes. Supreme Court authority on that question indicates that any state aid beyond the provision of usual municipal services is sufficient to trigger application of fourteenth amendment standards. For example, in *Norwood* the evenhanded lending of textbooks to all public and private school children of the state was held to be state action sufficient to require discontinuance of either the private school activity or the aid.[81] Aside from the establishment clause cases, however, all of the Supreme Court's major encounters with the question have involved challenges to state aid of racially discriminatory private educational and recreational programs. After being subjected by federal court order to the fourteenth amendment mandate to actively dismantle their dual school and recreational systems, many state and local governmental units persisted in elaborate attempts to evade the mandate. The most common technique was the funneling of state assistance in subtle forms to private groups who had assumed responsibility for the maintenance of segregated educa-

not as aid to religion but as the elimination of a state-created economic deterrent to its free exercise. The availability of a state-financed public school system arguably rewards with a free education those who choose to forego exercise of their religious preference for a religiously oriented school. Thus, the state's operation of a public school system would seem to impose precisely the same sort of inadvertant "penalty" on the free exercise of religion that resulted in the Court's invalidation of the state unemployment compensation system in Sherbert v. Verner, 374 U.S. 398 (1963).

78. 413 U.S. 455 (1973).

79. *Id.* at 464 n. 7.

80. *Id.*

81. *See also* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (disallowed the use of city recreational facilities by segregated private school groups).

tional or recreational facilities replacing those formerly operated openly by the state. The demonstrable presence of this purpose to evade or impede desegregation was specifically offered by the Supreme Court in several cases as the doctrinal basis for invalidating what might in some other context have been considered insignificant state aid.[82] The persistence and imaginativeness of the attempts to evade its desegregation decisions ultimately led the Supreme Court, as well as many lower federal courts, to view with insurmountable suspicion any form of state aid to racially discriminatory private educational or recreational programs.[83] Consequently, the broadly inclusive state action standard that can be gleaned from those cases probably is not transferable to cases involving other kinds of private activity challenged on grounds other than racial discrimination.

(c) State-Protected Monopoly

One might confidently have assumed that if any state aid to a private enterprise would subject the private institution to the restrictions of the fourteenth amendment, it would be the state's use of its regulatory power to create or preserve a monopoly for the private enterprise. The outcome of the Supreme Court's three significant encounters with this situation, however, casts considerable doubt on that assumption. In *Public Utilities Commission v. Pollak*[84] the Court faced a right of privacy challenge to the amplification of FM radio music and commercials on buses operated by a private transit company in the District of Columbia under an exclusive franchise from Congress. Though the Court seemed to hold that a regulatory agency's review and approval of the practice constituted federal action sufficient to subject the practice to the fifth amendment, it specifically disclaimed any reliance on the federally created and protected monopoly status of the company.[85] *Moose Lodge No. 107 v. Irvis*[86] involved a fourteenth amendment challenge to racial discrimination in the licensed sale of liquor by a private club. The state licensing scheme prohibited the issuance of liquor licenses beyond a certain number in the geographic area, irrespective of the qualifications of any further applicants. Since the maximum number of licenses for the area had long ago been issued, the

82. *E.g., id.;* Griffin v. County School Bd., 377 U.S. 218 (1964).

83. *See* Norwood v. Harrison, 413 U.S. at 464 n.7, *quoting* Cooper v. Aaron, 358 U.S. 1, 19 (1958).

84. 343 U.S. 451 (1952).

85. *Id.* at 462.

86. 407 U.S. 163 (1972).

holders of the existing licenses, including the defendent club, together enjoyed a state-created monopoly over the retail sale of liquor. To explain its refusal either to order the club's liquor license revoked or to subject the club to the fourteenth amendment, the Supreme Court simply minimized the extent of the club's monopolistic control over the market.[87] Most recently, in *Jackson v. Metropolitan Edison Co.*,[88] the Court heard a claim that termination of the plaintiff's electric service by a privately owned electric utility company was state action subject to the procedural due process requirements of the fourteenth amendment. The Court, in an opinion by Justice Rehnquist, held that the utility company's exercise of "something of a governmentally protected monopoly"[89] did not warrant a finding that the company's termination procedures were state action.

In *Jackson* Justice Rehnquist explained that in each of these three cases the Court's refusal to subject the operation of the governmentally protected monopoly to the fifth or fourteenth amendment was due to the "insufficient relationship between the challenged actions of the entities involved and their monopoly status."[90] Although Justice Rehnquist's requirement of a close relationship between the challenged activity and the monopoly status is theoretically sound,[91] it is difficult to imagine a case in which that requirement would be met more clearly than it was in *Moose Lodge* and *Jackson*. *Moose Lodge* involved the discriminatory denial of liquor-by-the-drink service, precisely the activity over which the Lodge exercised a state-protected partial monopoly. Similarly, in *Jackson* the plaintiff alleged arbitrary termination of electric service—the service over which Metropolitan Edison admittedly exercised "something of a governmentally protected monopoly." In neither case did the private institution possess any state-protected monopoly control over any aspect of its operations other than that aspect on which the challenge specifically focused. In light of these decisions, one must wonder what as a practical matter the requirement of a close relationship between the activity and the monopoly status means.

(4) Private Parties in a Partnership or Agency Relationship with the State—"Symbiosis"

Somewhere on the verbal continuum representing the infinite

87. *Id.* at 177.
88. 419 U.S. 345 (1974).
89. *Id.* at 351.
90. *Id.* at 352.
91. *See* text accompanying notes 124-26 *infra.*

number of variations in the relationship between state activity and private activity, state assistance to a private recipient shades over into a partnership between the state and the private actor in the pursuit of a shared goal. Justice Rehnquist is responsible for the common reference to this sort of relationship as "symbiosis."[92] When it is found, the activity of the entire partnership, including the activity of the private parties, is state action subject to the restrictions of the fourteenth amendment.

Though it was not named until later by Justice Rehnquist, this strand of the state action doctrine was launched by the Court's 1961 decision in *Burton v. Wilmington Parking Authority*.[93] In *Burton* a private restaurant operator and a state agency had entered a contractual relationship for the sole purpose of producing revenue from a part of a state-owned building. By carefully "sifting facts and weighing circumstances,"[94] the Court concluded that the state had "so far insinuated itself into a position of interdependence with [the restaurant operator] that it must be recognized as a joint participant in the challenged activity."[95] Because of this complex economic interrelationship, racial discrimination by the restaurant operator in pursuit of the partnership objectives was held to be state action in violation of the equal protection clause.

The Court has discussed and further refined the symbiosis principle in several cases since *Burton,* but in none has state action been found on that ground. Because every subsequent Supreme Court discussion of *Burton* has distinguished the decision rather than found it applicable, some have questioned its continued viability.[96] A careful review of those cases, however, leads to a contrary conclusion. The Court's discussions establishing the inapplicability of the symbiosis principle to the facts of those cases give no hint of disapproval of the principle; rather, the care taken by the Court to refine, but not significantly redefine, the principle of *Burton* and to demonstrate its inapplicability is evidence of the principle's substantial continuing impact.[97] Furthermore, the Court has been largely correct in those decisions holding *Burton* inapplicable. Although the *Burton* symbiosis argument was pressed by the plaintiffs in subsequent cases, the facts of each established a relationship between the

92. Moose Lodge No. 107 v. Irvis, 407 U.S. at 175.

93. 365 U.S. 715 (1961).

94. *Id.* at 722.

95. *Id.* at 725.

96. *E.g.*, Comment, *State Action: A Pathology and a Proposed Cure,* 64 CALIF. L. REV. 146, 161 (1976); Note, *State Action and the Burger Court,* 60 VA. L. REV. 840, 849-50 (1974).

97. *E.g.*, Justice Rehnquist's opinion for the Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See* Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978).

state agency as a regulator and the private party as the subject of extensive regulation—a relationship quite unlike the economic interdependence found in *Burton*. Thus, the Court's consistent refusal to apply the symbiosis principle in the context of cases presenting a regulatory relationship hardly leads to a conclusion that the principle itself is in disfavor.[98]

(5) Private Action Subject to a State Regulatory Scheme

A superficial review of the few Supreme Court cases dealing with the claim that private action subject to a comprehensive scheme of state regulation becomes state action gives the impression that established state action doctrine is at its clearest in addressing this kind of argument. The Supreme Court seems to have said simply that when the challenged private activity is required or "approved" by state regulations, the private action may be subject to the fourteenth amendment,[99] but when the challenged private activity is merely not prohibited by the state regulations, the activity is not state action.[100] In spite of its initial appeal for lawyers and judges who have grown tired of "sifting facts and weighing circumstances"[101] in state action cases, closer inspection reveals a serious problem with each branch of this simple doctrinal answer.

The problem with the first branch is the assumption that a state regulation requiring or approving challenged private conduct, such as racial discrimination, warrants subjecting the private action to the fourteenth amendment, rather than simply invalidating the state requirement or approval and leaving the private party free to discriminate if he wishes. The Supreme Court has never unambiguously enjoined private activity as a violation of the fourteenth amendment solely on the ground that the state had required or approved the activity. The assumption that such is a possible result is at the base of the plaintiff's argument in several of the cases, however, and the Court has accepted that assumption readily in deciding those cases for the defendant on other grounds. For exam-

98. The best reason to question the continued force of the *Burton* principle is the soundness of the theory itself as a guide to decisionmaking. "Symbiosis" is such an open-ended notion that it seems to place little or no restraint on the ability of a judge to assert that the facts of a particular case do or do not add up to "symbiosis" with the state.

99. Jackson v. Metropolitan Edison Co., 419 U.S. at 354-55; *Id.* at 368 (Marshall, J., dissenting); Moose Lodge No. 107 v. Irvis, 407 U.S. at 173, 175-77; Peterson v. City of Greenville, 373 U.S. 244, 248 (1963); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

100. Flagg Bros. v. Brooks, 98 S. Ct. 1729, 1738 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1972).

101. Burton v. Wilmington Parking Auth., 365 U.S. at 722.

ple, in the early case of *Public Utilities Commission v. Pollak*[102] the Court apparently held that a specific review and approval of the challenged private activity by the Utilities Commission converted the private action into federal action subject to the fifth amendment.[103] The Court then concluded that the challenged action conformed to the requirements of the due process clause. A similar analytical framework seems to have been accepted by the Court throughout the bulk of its opinion in *Moose Lodge No. 107 v. Irvis*.[104] In that case the Court concluded that, because the state liquor control board played no part in establishing the guest policies of the clubs that it licensed,[105] "the operation of the regulatory scheme . . . does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge *to make the latter 'state action'* within the ambit of . . . the Fourteenth Amendment."[106]

Jackson v. Metropolitan Edison Co.[107] and *Flagg Brothers v. Brooks*[108] present more recent examples of the same assumption. Although Justice Rehnquist's majority opinion in *Jackson* rejected the contention that Metropolitan Edison's action had been converted into state action by state authorization or approval, it was not because such approval would warrant only invalidation of the state approval rather than a conclusion that the private action had become state action. The holding was based on the finding that "there was no such [state] *imprimatur* placed on the practice of Metropolitan."[109] Justice Rehnquist explained: "Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' "[110] In his later opinion for the majority in *Flagg Brothers* Justice Rehnquist relied on this language from *Jackson* to reject a claim that a private creditor's self-help had been converted to state action by a state statute authorizing the practice in question.[111] By these statements Justice Rehnquist may have stiffened the doc-

102. 343 U.S. 451 (1952).

103. *Id.* at 462. *But see* Jackson v. Metropolitan Edison Co., 419 U.S. at 356 (suggesting that *Pollak* merely "assumed *arguendo*" that the private action was federal action for purposes of the fifth amendment).

104. 407 U.S. 163 (1972).

105. *Id.* at 175.

106. *Id.* at 177 (emphasis added).

107. 419 U.S. 345 (1974).

108. 98 S. Ct. 1729 (1978).

109. 419 U.S. at 357 (emphasis added).

110. *Id.*

111. 98 S. Ct. at 1737-38.

trinal criterion from state approval or authorization to state requirement of the activity, but he seems to have continued to accept the assumption that the private action could be "transmuted" into state action at least by a regulatory requirement.

It is precisely this assumption that is open to serious question. When a complaint is based upon a state requirement or approval of action that would violate the fourteenth amendment if done by the state, the state requirement or approval is itself the state action that violates the Constitution. If that unconstitutional state action is invalidated, the private actor would again be free to act as he chose, often continuing to pursue the course of activity challenged by the plaintiff. It is not at all apparent why an unconstitutional attempt by the state to coerce or "authorize" private activity that the actor would have pursued in the absence of any state action should subject the private actor to the substitution of fourteenth amendment coercion for the invalid state coercion. In spite of the methodology of *Pollak* and the pervasiveness of the same assumption in *Moose Lodge,* the Court conspicuously failed to implement the assumption when the opportunity arose near the end of the *Moose Lodge* opinion. After unwisely concluding that a nondiscriminatory regulation requiring each liquor licensee to conform to the provisions of its charter and by-laws should be treated as one requiring discrimination,[112] the Court merely enjoined enforcement of that regulation, leaving the licensee free to act as it chose.[113] In state action claims based upon state regulatory schemes, the focus should be on the state regulations. These regulations are the state action in such cases and only they should be subject to attack for violation of the restrictions of the fourteenth amendment.

The problem with the second branch of the state action doctrine for private conduct subject to a regulatory scheme also stems from the Court's acceptance, in cases like *Jackson,* of the plaintiff's tendency to focus on the private regulated activity as state action rather than on the state regulatory action itself. If one focuses simply on the private action that the state has not prohibited, it makes considerable sense to conclude as a general proposition that the private party's "exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment."[114] Certainly, one cannot argue successfully that the

112. *See* text accompanying notes 86-87, 104-06 *supra.*

113. Moose Lodge No. 107 v. Irvis, 407 U.S. at 179.

114. Jackson v. Metropolitan Edison Co., 419 U.S. at 357 (footnote omitted); *accord,* Flagg Bros. v. Brooks, 98 S. Ct. 1729, 1738 (1978).

failure of a state to legislatively prohibit certain private conduct makes that conduct state action subject to the restrictions of the fourteenth amendment. From the point of view of the private actor, it makes no difference whether the failure of the state to prohibit his conduct arises from inaction by the legislature or by a regulatory agency. Indeed, both legislative and regulatory restrictions necessarily are absent every time a state fails to prohibit certain private action. Thus, there is no more reason to conclude that the failure of a regulatory agency to prohibit the private practice transforms it into state action than there is to conclude that the state's failure to legislate against the practice transforms it into state action.

If one focuses directly on the state legislative or regulatory action in such cases, however, a significant distinction emerges between, for instance, the failure of a state to legislatively prohibit racial discrimination by a private homeowner in the sale of his house and a failure of the appropriate regulatory agency to prohibit discrimination by a privately owned utility company. As our governmental system was conceived and as it is popularly perceived, the individual is free to act as he wishes unless the state for good reason has prohibited the particular course of conduct. As a practical matter, such a state prohibition is the exception; freedom of the individual to choose among a wide range of courses of conduct, even those considered undesirable by most people, is the conceptual norm. Stated another way, in our system of government the state is not perceived as having been assigned either the responsibility or the power to prohibit all individual conduct that may popularly be viewed as undesirable. On the other hand, the public utility company is routinely subject to detailed and pervasive state regulation in all aspects of its operation, including the most central element of its existence, the profit margin. For the utility company, restriction of its range of choices by the state is commonly perceived as the norm rather than the exception; in a sense, regulation is the conceptual "state of nature" for a utility company that enjoys a state-protected monopoly. The monopoly position of the company is acceptable to the body politic only because of the perception that the state has assumed responsibility for the prohibition of all undesirable activity by the company toward its consumers. When a regulatory agency has been assigned responsibility for the elimination of all undesirable practices, and when the exercise of that responsibility has resulted in pervasive regulation of almost every aspect of the utility's operations, the conspicuous failure of the agency to prohibit a particular undesirable practice begins to assume the attributes of state "authorization" of the practice. In the context of such a regu-

latory scheme, a decision not to prohibit a utility from engaging in a particular practice becomes an affirmative state action rather than simple inactivity. Unlike the usual case of legislative inaction, such selective regulatory inaction may represent a violation of the fourteenth amendment. In such a case, the appropriate remedy would be to enjoin the agency from failing to prohibit the activity rather than to enjoin the private company on the ground that its activities had somehow been transformed into state action.

The Supreme Court's opinion in *Burton v. Wilmington Parking Authority*[115] presents both an analogous theme and an analogous conceptualization of the remedy. In its search for state action, the Court emphasized the terms of the state lease by which the state exercised something similar to pervasive regulatory power over the private lessee: "Its lease, however, contains no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities . . . ."[116] The state's failure to exercise its power on this issue through the close "regulatory" relationship of lessor and lessee was one of the factors prompting the Court to hold that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly *as though they were* binding covenants *written into the agreement* itself."[117]

III. Recent Employee Discharge Cases

In the last several years, discharged employees of "semi-public" or state-aided institutions have brought a considerable number of cases in the federal courts alleging that their employer's activities constituted state action under one or more of the theories discussed above and that their discharge, though often consistent with their contract rights, did not meet the equal protection or due process requirements of the fourteenth amendment. The nearly uniform result in these cases has been a finding of no state action, regardless of which theories of state action the complaining employees relied on and no matter how clearly the employer institution appeared to be engaged in state action.[118] Often, the courts have

115. 365 U.S. 715 (1961).

116. *Id.* at 720.

117. *Id.* at 726 (emphasis added).

118. *E.g.*, Jackson v. Norton-Children's Hosps., 487 F.2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000, *reh. denied*, 417 U.S. 978 (1974); Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973); Place v. Shepherd, 446 F.2d 1239 (6th Cir. 1971); Martin v. Pacific Northwest Bell Tel. Co., 441 F.2d 1116 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971).

obtained this result by simply deemphasizing the plaintiff's state function, state aid, and state partnership arguments and focusing on the plaintiff's state regulation argument. The courts then dispose of this argument by applying the *Jackson* regulatory nexus requirement that there be direct government regulatory involvement in the challenged activity.[119] In other cases, the court's opinion has purported to answer all state action arguments, no matter which theories the plaintiff relied upon, simply by finding no direct governmental involvement in the challenged activity, the actual discharge process itself.[120] For example, in *Cohen v. Illinois Institute of Technology*[121] a female professor at a private university alleged that her discharge was the result of sex discrimination and thus violated the equal protection clause. To establish that the defendant university acted as the state and therefore was subject to the fourteenth amendment, the plaintiff relied both on the presence of detailed state regulation and the presence of what the court conceded was "significant"[122] state financial aid to the institution. Justice Stevens, then sitting as a member of the Seventh Circuit Court of Appeals, rejected both theories of state action on the single ground that the state was not "alleged to have lent any support to any act of discrimination."[123]

This approach to all state action claims, no matter which theory is relied upon by the plaintiff, often is attributed to Justice Rehnquist's opinion in *Jackson v. Metropolitan Edison Co.*[124] By establishing the requirement of a "nexus" between the state and the challenged activity, Justice Rehnquist apparently meant to require state involvement in the challenged private activity. This nexus requirement, however, was imposed in a case in which the plaintiff's dominant state action theory was that the utility company acted as the state because it was subject to a comprehensive state regulatory scheme.[125] In fact, Justice Rehnquist's initial articulation of the test in *Jackson* demonstrates its connection to the state action argument

119. *E.g.*, Ward v. St. Anthony Hosp., 476 F.2d 671, 675 (10th Cir. 1973); Place v. Shepherd, 446 F.2d 1239, 1245 (6th Cir. 1971).

120. *E.g.*, Ward v. St. Anthony Hosp., 476 F.2d 671, 675 (10th Cir. 1973); Martin v. Pacific Northwest Bell Tel. Co., 441 F.2d 1116, 1118 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971).

121. 524 F.2d 818 (7th Cir. 1975).

122. *Id.* at 825.

123. *Id.* at 826.

124. 419 U.S. 345 (1974).

125. At least in the eyes of the Court, the dominant state action theory in the case was state regulation. Query whether the plaintiff's state-protected monopoly argument did not deserve considerably more attention than the Court devoted to it. *See* text accompanying notes 88-91 *supra*.

based upon the presence of a state regulatory scheme: "[t]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the *regulated entity* so that the action of the latter may be fairly treated as that of the State itself."[126]

Thus, in adopting the "nexus" approach in *Jackson,* the Court was merely requiring that when the plaintiff's state action argument rested on state regulatory involvement with a private actor, the plaintiff show state regulatory involvement in the challenged activity. Application of that same requirement to state action claims based on theories other than regulatory involvement is simply illogical. For example, in "state function" cases such as *Hudgens,*[127] *Lloyd,*[128] and *Logan Valley*[129] the plaintiff argues that the private actor has displaced the state in the performance of a traditional state function. The essence of the state function argument is that private conduct has been substituted for state conduct, thereby eliminating any actual state involvement in the challenged activity. By definition there is no actual state involvement under this theory of state action. Thus, a court finding of no actual state involvement in the challenged private activity is hardly an adequate or even a relevant answer to the argument that the private actor has subjected himself to the fourteenth amendment by acting in place of the state. Similarly, lack of actual state involvement in the challenged activity is not an adequate response to the claim that the actions of a private institution are state action because the institution receives substantial state aid, either financial or by preferential regulatory treatment. In most of these cases, the state's actual involvement ends with the aid. Rarely (and only coincidentally, when state regulation accompanies the aid) will one find any actual state involvement in the day-to-day activities of the aided institution. Therefore, a finding of no actual state involvement in the institution's discharge of an employee does not meet the substance of a state action claim based on the substantial state aid theory, which by definition assumes no continuous state involvement in the administration of the institution. To impose some form of the state regulatory nexus or direct state involvement requirement in cases relying on state action theories other than state regulation is in effect to hold that state action will be found only in state-action-by-regulation cases.

126. 419 U.S. at 351 (emphasis added).
127. Hudgens v. NLRB, 424 U.S. 507 (1976).
128. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
129. Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

Why, then, have a number of courts simply given little or no attention to theories of state action other than regulatory involvement in the context of claims brought by discharged employees, and why have other courts purported to apply the state regulatory nexus test to dispose of employees' claims based on state action theories other than regulatory involvement? Two separate explanations appear theoretically defensible.[130]

The first explanation is that the theories of state action other than regulatory involvement are obviously no longer viable. Consequently, a court need answer only the regulatory argument and may legitimately ignore all other state action theories in a case. Despite the contention that actual state regulatory involvement in the challenged activity is the only viable state action theory after *Moose Lodge*,[131] *Jackson*,[132] and *Hudgens*,[133] the above review of those cases against the background of earlier case law hardly indicates the total demise of all elements of the doctrine other than direct regulatory involvement. In fact, in each of those cases, the Court carefully demonstrated the inapplicability of each element raised by the plaintiff. For example, in reviewing each major element of state action doctrine in *Jackson* and holding them inapplicable to the facts of that case, the Court gave no hint that any of those elements were no longer considered sound constitutional theory. Of course, consistent refusal by the Court to employ a theory in cases to which it obviously applies is for practical purposes a rejection of the theory. One cannot conclude, however, that the plaintiff's state action theories were so obviously applicable in cases such as *Moose Lodge* and *Jackson* that the Supreme Court's refusal to apply them is tantamount to a rejection of the theories themselves.[134] For the most part, the plaintiffs in those cases attempted to expand the state action theories by applying them to factual situations beyond those that gave rise to the initial articulation of the theories by the Court.[135] At most, those decisions indicate the current Court's incli-

130. A third explanation, the distinction between cases challenging race discrimination and cases presenting some other fourteenth amendment complaint, does not seem theoretically sound. *See* Part II(A) *supra.*

131. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

132. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

133. Hudgens v. NLRB, 424 U.S. 507 (1976).

134. One might reasonably question, however, the effectiveness of the state-preserved monopoly theory in view of the casualness of its rejection in *Jackson* in spite of its apparent applicability. *See* text accompanying notes 88-91 *supra.*

135. "State function" and "symbiosis" are the two theories that have suffered most at the hands of plaintiffs seeking to create through purely verbal manipulation or equivocation the impression that their case is controlled by the theory. For example, the assumption of a function or functions traditionally performed by the state is clearly the foundation for the

nation to take a conservative approach in defining the scope of the classic state action theories, refusing to expand the basic notions beyond the relatively clear cases in which they originally were developed. In any event, the state function, state aid, and state partnership elements of the state action theory are not so obviously moribund that a court is justified in simply ignoring them in cases to which they apparently would apply.

The second and more likely explanation for the evident inclination to dispose casually of all state action claims in employee discharge cases is that there is an unarticulated theoretical defect in the use of any state action theory by employees in a challenge to the internal management of an institution as it affects them. In other words, if *Cohen* had presented a claim of sex discrimination asserted by a student of or an applicant to the state-aided university, rather than by an employee, the Court would have found the same "significant" state aid sufficient to subject the activity of the private institution to the fourteenth amendment. If this assumption is correct, the nexus requirement must be an inaccurate articulation of the intuitive judicial concern applicable to all state action theories in employee discharge cases.

IV. THE "NEXUS" NOTION

The thesis of this Article is that the findings of "no state action" in most employee discharge cases are theoretically sound in spite of the conspicuous failure by the courts to articulate a satisfactory rationale in their opinions. Furthermore, the appeal of the *Jackson* regulatory nexus language is that it comes relatively close to expressing the critical but unarticulated theoretical concern of the courts in those cases, no matter which theory was relied upon

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state function theory developed in *Marsh.* However, a loose description of the theory as covering "public" functions allows plaintiffs to argue for its application to institutions like the lodge in *Moose Lodge* and the electric utility company in *Jackson*—that is, to any institution in the nature of a "public accommodation." Since the operation of public accommodations is in no sense equivalent to the assumption of a function traditionally performed by the state, one cannot view the Court's consistent refusal to accept such attempts to misapply the doctrine as evidence that the doctrine is currently out of favor.

Similarly, the application of the symbiosis theory to simple licensing or regulatory relationships with the state in such cases as *Moose Lodge* and *Jackson* would press the theory far beyond the kind of close, publicly visible economic partnership that gave rise to the symbiosis holding in *Burton.* Nevertheless, the open-ended nature of the symbiosis concept encourages its use in the construction of a makeweight argument to buttress what is essentially a claim of state action by pervasive regulation.

It seems likely that the persistent attempts to expand applicability of the various state action theories through equivocation have contributed more than any changes in the Supreme Court's political viewpoint to wbatever judicial retrenchment has occurred on the state action question.

by the plaintiffs. More precisely, the *Jackson* nexus language is a specific application in a state-action-by-regulation case of a broader principle that is equally applicable to all types of state action cases. That principle is not, as the *Jackson* language apparently has led some to believe, a requirement that there be a nexus between the state and the challenged activity in each case. Rather, in each case, the required nexus must exist between the plaintiff's state action theory and the challenged activity. It is this basic theoretical requirement that proves fatal to almost all state action claims asserted by employees challenging the conduct of private institutions.

This thesis is supported by a careful reading of the *Jackson* opinion itself. The Court devoted the bulk of its opinion to disposing of the plaintiff's state-action-by-regulation argument, and the state nexus requirement was formulated in the context of that effort. Nevertheless, Justice Rehnquist's opinion for the Court also addressed the other state action theories asserted by the plaintiff, most notably the claim of state action by virtue of state aid to the utility company in the form of state preservation of its economic monopoly. In Justice Rehnquist's discussion of the state-preserved-monopoly argument, the nexus requirement underwent a subtle but absolutely essential reformulation. According to Rehnquist, "there was insufficient relationship between the challenged actions of the entities involved and their monopoly status."[136] Unlike his objection to the plaintiff's state regulation argument, his objection to the state-aid-by-monopoly argument was not based upon a lack of state involvement in the challenged activity. Such a lack of involvement would exist in every simple state aid case. Rather, he objected to the absence of a sufficient nexus between the protected monopoly status and the challenged activity. This is the form which the general nexus principle takes in the context of an argument of state action through state protection of monopoly status. The general principle that unifies or subsumes the two different versions of the "nexus requirement" in *Jackson* is the requirement that there be a substantial nexus between the characteristics of the institution that support the claim of state action and the activity challenged by the plaintiff.

In the context of a state-action-by-regulation claim, such as that developed in *Jackson,* the requirement of a nexus between the state action argument and the challenged activity becomes a requirement of state regulatory involvement in the challenged activity. Because this is only a specific application of the general principle for that particular kind of case, to require precisely the same sort

136. Jackson v. Metropolitan Edison Co., 419 U.S. at 352.

of state nexus with the challenged activity in cases based upon other state action theories would be to preclude any finding of state action in all such nonregulation cases. As was concluded earlier, that requirement simply would not be warranted by current Supreme Court case law recognizing the continued viability of the state function, state aid, and state partnership theories of state action. On the other hand, to require a nexus between the particular state action theory asserted and the activity challenged by the plaintiff is simply to articulate a general theoretical requirement that has at least unconsciously been assumed to inhere in all of the state action theories since their creation.

The existence of this requirement as an essential element of state action theory can be demonstrated most clearly in the context of a state action claim based on the state function theory. For example, the company town owner in *Marsh v. Alabama*[137] was held to be acting as the state, not in some abstract universal sense with respect to all individuals in all contexts, but only in its dealings with those seeking to exercise freedom of speech in the town's common areas. Only with respect to those plaintiffs and their specific interest did the Court declare that the company had assumed a traditional role of state government vis-à-vis its citizens. Presumably, potential consumers of the town's sewer service might also have argued successfully that, because the town's owner performed the service in lieu of its traditional performance by municipal government, the company was acting as the state with respect to them in all dealings concerning sewer service. It seems too clear to warrant argument, however, that the *Marsh* holding did not mean that the town's company owner was acting as the state subject to the restrictions of the fourteenth amendment in its manufacturing and sales practices. The critical difference is that in its dealings with the consumers of those activities, the company did not occupy the role of the state in a traditional state-citizen relationship. That is, the state action theory that established that the company's actions with respect to those plaintiffs were state actions simply does not apply to other actions of the company that impact on other individuals.

While the distinction may at this point appear simple in the extreme, this distinction is the theoretical key to a sound analysis of any state action claims asserted in employee discharge cases. To demonstrate, let us pursue the application of the distinction in *Marsh*. The company owner of the town was held to be the state for purposes of the fourteenth amendment in promulgating and enforc-

137. 326 U.S. 501 (1946). *See* text accompanying notes 41-44 *supra*.

ing its ban on religious solicitation in the town's common areas. But one cannot conclude therefrom that the company was acting as the state in setting and enforcing the terms of employment of the secretary who typed the statement of official company policy on use of the common areas. Could that secretary have argued persuasively that, under the authority of *Marsh,* the fourteenth amendment required her employer to afford her full procedural due process before she was discharged? Similarly, if she had been terminated for public criticism of her supervisor, could she successfully have challenged her discharge as a violation of her first amendment freedom of expression? Finally, could she successfully have contended on the basis of *Marsh* that a refusal by the company to promote her to a managerial position constituted race or sex discrimination in violation of the fourteenth amendment? The answer to all of these queries certainly must be no. With respect to that secretary, the company did not occupy the role of the state in a traditional state-citizen relationship. Her relationship to the town's company owner was simply the usual relationship of employee to employer. In other words, her status as an employee-participant in institutional activity, which under the state function theory was held to be state action with respect to those on whom it impacted, does not lead to the conclusion that she is a state employee entitled to the protection of the fourteenth amendment in her employment. Yet that is precisely the leap that the courts are asked by the plaintiffs to make in most employee discharge cases alleging state action by the employer on the basis of the state function, state aid, or state partnership theories.

Consider a few further examples. Suppose the Supreme Court had accepted the plaintiff's state function argument in *Lloyd Corp. v. Tanner*[138] and had held that, because the corporate owner of Lloyd Center had assumed the traditional state role of providing and regulating the common areas of a community business block, it was subject to the restrictions of the fourteenth amendment in the administration of the common areas. One could not seriously contend that such a holding in *Lloyd* would require the application of fourteenth amendment procedural due process restrictions to the Lloyd Corporation's hiring and firing of the janitors who sweep the shopping center mall. Nor would there be any more reason to conclude that the fourteenth amendment ban on race or sex discrimination would have been imposed on Lloyd Corporation's employment practices by our hypothetical holding in *Lloyd.* Only with respect to

138. 407 U.S. 551 (1972). *See* text accompanying notes 55-58 *supra.*

those seeking to exercise free speech in the common areas did the shopping center owner arguably occupy the role of the state. Similarly, the Court held in *Evans v. Newton*[139] that the fourteenth amendment prohibited racially discriminatory admission policies in the operation of a privately owned public park. Was this tantamount to holding either that the park's owners were subject to the procedural due process restrictions of the fourteenth amendment in discharging one of their groundskeepers, or that the fourteenth amendment prohibited the park's owner from discharging one of his groundskeepers for speech or religious practices that he considered unacceptable? That is in effect what the plaintiffs have been subtly asking the lower courts to hold in recent employee discharge state action cases.

The analytical difficulty that the courts are asked to overlook in such cases is the absence of any good reason for extending the restrictions of the fourteenth amendment to the particular challenged private activity contrary to the "plain meaning" of the words of the amendment that "No *state* shall . . . ." Extension of those restrictions to some activities of the private institution was warranted because of the peculiar state-citizen relationship between the institution and the individuals affected by the challenged activities. That justification is not present when the relationship between the institution and the parties affected by the challenged action is the ordinary relationship of employer and employee.[140] In other words, there is no nexus between the state action theory—state function—and the challenged activity—employee discharge. The plaintiff's position in the employee discharge state action cases is simply a subtle form of the notion that, once a private institution is held to be acting as the state with respect to one group of individuals in one context, the institution acts as the state with respect to all individuals in all contexts. This implicit argument must be met with a demand that the reason underlying the asserted state action theory be shown to apply to the particular challenged activity.

The inapplicability of the reason underlying the asserted state action theory is most apparent when aggrieved employees assert a

139. 382 U.S. 296 (1966). *See* text accompanying note 61 *supra.*

140. A similar use of an apparently applicable verbal formula without consideration of the reason underlying the formula was the keystone of the plaintiff's position and the California Supreme Court's holding in Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part and rev'd in part,* 98 S. Ct. 2733 (1978), that "reverse discrimination" should be subjected to the "compelling state interest" standard. *See* McCoy, *Recent Equal Protection Decisions—Fundamental Right To Travel or "Newcomers" as a Suspect Class?,* 28 VAND. L. REV. 987, 987 n.5 (1975); Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723 (1974).

claim of state action under either the state regulation or the state function theories, because the reasons underlying those theories are most easily ascertainable. Although the reasons underlying the state aid and state partnership theories often are assumed to be obvious, close inspection demonstrates that they are difficult to identify precisely. In its simplest applications, it is relatively clear that the state aid theory of state action is based on a concern for the beneficiaries or victims of the aided activity. Whether the aided activity is state action is determined from the perspective of the affected individual. If from the affected individual's point of view the private institution acts on him with the assistance of the state, that private action should be held to be state action entitling him to the protections of the fourteenth amendment. Thus, under the state aid theory of state action, state-aided private activity is state action only with respect to those upon whom the aided activity impacts, not ordinarily with respect to those who are employed to perform the aided activity. For example, the plaintiff in *Moose Lodge No. 107 v. Irvis*[141] argued that the racially discriminatory policy of the lodge governing service of liquor was state action because the lodge enjoyed a state-created and state-protected partial monopoly in the serving of liquor. If the Supreme Court had accepted the plaintiff's argument and had held that the lodge's service policies were state action, would the lodge then have been required to afford full procedural due process in the discharge of one of its cocktail waitresses? Again, the answer must certainly be no! The reason is simply that the lodge did not occupy a state-created monopoly position with respect to the discharged waitress. There would be no nexus between the characteristics of the lodge that supported the state-aid-by-state-created-monopoly theory and the challenged activity if the discharge of a waitress were the action challenged. For the same reason, if the Supreme Court had accepted the plaintiff's state-action-by-state-created-monopoly argument in *Jackson v. Metropolitan Edison Co.*,[142] only the customers of the utility company would have been entitled to the protection of fourteenth amendment due process in their dealings with the defendant. An accountant later passed over for promotion by the defendant company because of disapproved political activity could not successfully have pointed to our hypothetical holding in *Jackson* as authority for his claim that in refusing to promote him the company acted as the state in violation of his first amendment freedoms of expression and association.

141. 407 U.S. 163 (1972). *See* text accompanying notes 86-87 *supra.*
142. 419 U.S. 345 (1974). *See* text accompanying notes 88-89 *supra.*

In cases in which the state aid or state symbiosis theories of state action have been applied to situations involving more complex institutional and individual interrelationships, the reasons underlying those theories are difficult if not impossible to identify with precision.[143] Consequently, in these cases implementation of the requirement of a nexus between the state action theory and the activity challenged becomes considerably more difficult. Nevertheless, imposition of the requirement is essential in such cases if a rational result is desired. Consider the classic case of a private school that receives substantial state aid in the form of direct financial grants or preferential tax treatment. The state aid theory of state action and possibly the symbiosis theory establish that at least some activities of the private school with respect to some individuals are state action subject to the fourteenth amendment. But which activities with respect to which individuals?

At the outset, it is clear that both students and potential students are the intended beneficiaries or victims of the state aid. Thus, with respect to these individuals and their interests, the state-aided private school administration acts as the state, subject to the due process and equal protection restrictions under which a public school administration operates with respect to its students and potential students. By accepting a broad perspective on the educational process, one may conclude that some individuals employed by the school enjoy some protections resembling constitutional protections as an incident to the students' constitutional interests in the educational process. For example, teachers and even food service or maintenance personnel are role models and their simple presence is arguably a part of the educational process. Thus discrimination by race or sex in their selection or discharge may violate the students' equal protection or due process right that a state-provided education be race-neutral rather than one that enforces racial stereotypes. Similarly, a certain amount of freedom of speech for the teacher in the classroom might be judicially imposed on the private school administration, not as a matter of the teacher's fourteenth amendment rights but as a part of the students' fourteenth amendment interests in their state-aided education.

It is much more difficult if not impossible, however, to demonstrate any connection between a requirement of procedural due process in excess of a janitor's or even a teacher's contract rights and the students' fourteenth amendment interests in their state-aided

143. This imprecision, of course, may be indicative of a defect in the theories themselves.

education. Nor is it obvious that a teacher's or janitor's freedom of speech or association in nonschool contexts is closely connected to the content or quality of the state-aided education from the student's point of view. Moreover, because the state aid was designed to impact upon students by providing an education rather than upon teachers or janitors by providing jobs for the unemployed, the reasons giving rise to the state aid theory of state action do not appear to apply to actions of the private school that impact only upon its employees. The state aid theory may indeed reflect some concerns beyond those for the natural beneficiaries or victims of the state aid, but the burden of identifying those additional reasons for the theory and demonstrating their applicability to private institutional activities impacting upon employees should rest with the employees who assert the theory. So far, the plaintiff-employees in such cases have shown little inclination to shoulder that burden, relying instead on the defective assumption that, if an institution acts as the state with respect to one group of individuals in one context, it acts as the state with respect to all individuals in all contexts. Intuitive judicial dissatisfaction with this assumption gave rise to earlier attempts by the courts to use a "severability" notion to hold that some of the activities of the private institution were state-aided and others were not.[144] Though such an approach is subject to the criticism that any aid to the institution aids all of its activities,[145] the judicial instinct that gave rise to the approach is sound. The imprecise use of the *Jackson* nexus language in similar recent cases is simply a new expression of the same judicial concern.

Fortunately, most cases are not as difficult to analyze as the case of the private school receiving state aid. In most cases, the reasons underlying the asserted state action theories are readily ascertainable and their applicability to the challenged activity readily assessable. A paradigm case involving the potential for claims by different groups of individuals is the private nonprofit nonreligious hospital operated with substantial government subsidies. Consider the following three claims against the hospital administration: (1) a claim by a female potential patient alleging that the hospital's refusal to allow her the use of its facilities for nontherapeutic abortions constitutes a denial of equal protection in violation of the fourteenth amendment;[146] (2) a claim by a local physician alleging

144. *E.g.*, Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Oefelein v. Monsignor Farrell High School, 77 Misc. 2d 417, 418-19, 353 N.Y.S.2d 674, 675-76 (1974).

145. *E.g.*, Note, *supra* note 21, at 674-75.

146. *E.g.*, Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973); Doe v. Bridgeton Hosp. Ass'n, 130 N.J. Super. 416, 327 A.2d 448 (1974), *rev'd*, 71 N.J. 478, 366 A.2d 641 (1976) (did not adequately deal with state action issue), *cert. denied*, 429 U.S. 1086 (1977).

that the hospital director's revocation of his right to practice in the hospital because of his public criticism of the hospital administration constitutes a penalty on the exercise of his freedom of expression in violation of the fourteenth amendment;[147] (3) a claim by a physician formerly employed by the hospital as a full-time staff member that his firing by the hospital director without notice or hearing constitutes a denial of procedural due process in violation of the fourteenth amendment.[148] Each of the claimants would be likely to assert that the hospital's action was state action on the basis of the state financial aid theory and possibly the state-aid-through-state-preserved-monopoly theory.[149] Because each claimant is suing the same institution and because each would point to the same facts to support his invocation of the same state action theories, the superficial conclusion that the institution is either acting as the state for the purposes of all three claims or it is not acting as the state for any purpose has some initial appeal. However, an assessment of the applicability of the reasons underlying those theories to the institutional activity challenged in each claim quickly leads to different state action holdings on the different claims.

The potential patient is both the obvious object of the state aid to the hospital and the obvious victim of the hospital's monopoly if such a monopoly has been created or maintained by the state. Thus, the reasons embodied in the state financial aid and state-created monopoly theories for extending the restriction of the fourteenth amendment apply to the hospital's activity directed toward her, the challenged admissions policy.[150] On the other hand, those reasons clearly do not apply at all to the hospital's activity with respect to the discharged employee-doctor who raised the third claim or, for that matter, to a similar claim by a discharged janitor. The state financial aid did not have as even a secondary purpose the assistance of unemployed doctors or janitors by the creation of jobs. Nor does the hospital occupy a state-created monopoly with respect to the opportunities for employment for doctors or janitors. In short, there is no nexus between the state action theories asserted by the

147. *E.g.*, Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y.), *aff'd without opinion*, 506 F.2d 1395 (2d Cir. 1974); Shulman v. Washington Hosp. Center, 319 F. Supp. 252 (D.D.C. 1970).

148. *E.g.*, Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975); Jackson v. Norton-Children's Hosps., 487 F.2d 502 (6th Cir. 1973).

149. It is also quite likely that our hypothetical claimants would forcefully, though incorrectly, assert the applicability of the "state function" and "symbiosis" theories to their case. *See* note 135 *supra.*

150. *See* Doe v. Bridgeton Hosp. Ass'n, 71 N.J. 478, 366 A.2d 448 (1974). *Contra*, Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973).

discharged employee-doctor or janitor and the challenged activity, their discharges.[151] The relative simplicity of these results in the first and third claims points up with clarity the correct analytical approach to the more ambiguous second claim by the local physician denied staff privileges at the hospital. With regard to this claim, the critical questions become whether it was a purpose of the state financial aid to provide hospital facilities for the benefit of physicians practicing in the area and whether the hospital occupies a state-created or preserved monopoly with respect to the availability of such facilities to the area's doctors. Quite possibly the answer to one or both of these questions would be yes.[152] In that event, our doctor claimant would have demonstrated the requisite nexus between the state action theories he asserts and the hospital activity that he challenges, his exclusion.[153] Thus, that activity of the otherwise private institution would be subject to the fourteenth amendment prohibition against exacting a penalty for the exercise of freedom of expression.

V. CONCLUSION

The purpose of this Article has been to reestablish the continued vitality of the several branches of the state action doctrine in the face of recent decisions that have strained noticeably to avoid implementation of one or more elements of the doctrine, often by an illogical insistence on the application of the *Jackson* nexus requirement. At least in the employment discharge cases, the regular findings of no state action should not be read as casting doubt upon the continued viability of the various elements of state action doctrine, much less as indications that all elements except state-action-by-state-regulation are so obviously defunct that they legitimately can be ignored. Nor should those cases be read as establishing a

151. *See* Jackson v. Norton-Children's Hosps., 487 F.2d 502 (6th Cir. 1973). *Contra,* Klinge v. Lutheran Charities Ass'n, 523 F.2d 56 (8th Cir. 1975) (minimal procedural requirements); Large v. Reynolds, 414 F. Supp. 45 (W.D. Va. 1976) (discharge of non-doctor employee).

152. 42 C.F.R. § 53 (1976) contains numerous regulations regarding distribution of federal aid to hospitals and health care facilities. Basically, a facility is eligible for federal aid only if the total number of existing "conforming" beds does not exceed the specified number of needed beds in the service area. *Id.* at § 53.71. Once an area contains the minimum level of health care provided for by the regulations, facilities within that area become ineligible for federal aid to fund expansion programs. The practical result is that the number of hospitals in a given area will be restricted by the federal regulations.

153. *See* Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974); Suckle v. Madison Gen. Hosp., 362 F. Supp. 1196 (W.D. Wis. 1973), *aff'd,* 499 F.2d 1364 (7th Cir. 1974). *Contra,* Ward v. St. Anthony Hosp., 476 F.2d 671 (10th Cir. 1973); Barrett v. United Hosp., 376 F. Supp. 791 (S.D.N.Y. 1974).

theoretically unsound distinction that would confine the various elements of the state action doctrine to cases alleging racial discrimination, thus leaving first amendment claimants such as those in *Marsh* substantially without protection. Rather, those cases should be read as instances of increasing judicial sophistication, albeit intuitive or instinctive, in the assessment of state action claims. They should be read as a rejection by the courts of the superficial assumption that if a private institution acts as the state with respect to one group of individuals in one context, it acts as the state with respect to all individuals in all contexts.

The various theories of state action do not establish that a given private institution *is* the state in some existential or ontological sense. They merely embody in a shorthand form the judgment that in certain situations and under certain conditions there is good reason to extend the prohibitions of the fourteenth amendment to what is in fact not state government activity and thus is not covered by the specific wording of the amendment. Such cases have always been and continue to be unusual. The burden of demonstrating the applicability of those reasons to a particular case has always rested and continues to rest upon those who would argue for the extension of the fourteenth amendment's prohibition to private activity. The courts generally have rejected and should continue to reject state action claims by individuals who offer only the verbal formula of a state action theory without demonstrating that the underlying reasons apply to their case; that is, without the requisite "nexus" between their state action theory and the challenged activity. The imprecision in the expression of this fundamental requirement by a number of courts should not be taken as a weakening of the established state action theories that rest upon sound constitutional policy.