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Revolution in Private Law?

Richard G. Huber
University of South Carolina

REVOLUTION IN PRIVATE LAW?

RICHARD G. HUBER*

More than five years ago the United States Supreme Court decided the case of *Shelley v. Kraemer*,[1] holding that a state court could not enforce the terms of a racial restrictive covenant. The opinion in this case suggested, if it did not foretell, a possible revolution in the field of private law. During the last term the Court decided *Barrows v. Jackson*,[2] which indicates more clearly that such a revolution may be in process. An analysis of these two cases and a forecast of their future effect on private law would therefore seem to be profitable.

I.

BACKGROUND

One manner of stating the basis of democratic government is to define it as a government where the opposing principles of liberty and equality are in equilibrium.[3] Both "liberty" and "equality" are incapable of precise definition, but for our illustrative purposes we can define them simply in terms of the idea of restraint. "Liberty" is freedom of the individual from restraint,[4] whereas "equality" is the subjection of a group of individuals to the same restraint,

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*Associate Professor of Law, University of South Carolina, School of Law. This article was in part written in a seminar under Professor Paul A. Freund, Harvard Law School, as part of work toward a master's degree. The article has been expanded and updated, and several new points discussed.

1. 334 U. S. 1 (1948).
2. 73 SUP. CT. 1031 (1953).
3. HADLEY, THE CONFLICT BETWEEN LIBERTY AND EQUALITY (1925); Silving, *The Conflict of Liberty and Equality*, 35 IOWA L. REV. 360 *et seq.* (1950). "Freedom for everybody to do what he wants is not necessarily the sole purpose of organized society. There may be other admirable social ends which conflict with, or demand limitations upon, freedom." WOOTTON, FREEDOM UNDER PLANNING 5 (1945). And see Mr. Justice Jackson's separate opinion in American Communications Ass'n v. Douds, 339 U. S. 382, 422 at 445 (1950), where he states: "The task of this Court to maintain a balance between liberty and authority is never done, because new conditions today upset the equilibriums of yesterday . . . . The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false claims in the name of security which would undermine our freedoms and open the way to oppression."
4. ". . . freedom may be simply defined as ability to do what you want." WOOTTON, FREEDOM UNDER PLANNING 4 (1945). This quotation may better suggest that freedom is not entirely negative. Freedom is actually more the opportunity to do something than an opportunity to avoid doing something.

now most often government imposed.[5] These terms certainly need some sort of definition.[6] The Communistic governments speak continually about the freedom their citizens enjoy, and point to the American negro as one not free. But Communism is, if we use the definitions of "liberty" and "equality" given above, essentially egalitarian, and the American negro enjoys much more freedom than he does equality. Similarly, when we speak in this country of every child born here having an equal opportunity of becoming president, we are really referring more to the child's use of his freedom to obtain that position than to his equal opportunity to obtain it. Certainly members of unpopular religious and racial groups do not, in any true sense, have, or at least have not had, an equal opportunity with the white male Protestant of becoming president. And we have seen recently that even geographic considerations can prevent some persons from being considered for that position. Any member of one of these groups who desires the position, however, has the freedom to try to gain it through any means not unlawful.

If we properly understand the principles of "liberty" and "equality," we can see that they are in conflict in a democratic government. Of course, certain fields of human activity in a democracy are so restrained that "equality" is completely dominant, as the imposition of such taxes as sales taxes to which all are equally subject. In turn, certain other areas are unrestricted and free, as is, traditionally, the right to think as one pleases.[7] But in most areas of human activity in a democracy there is this conflict and revolution eventually become necessary. The success of any democracy depends on whether there is equilibrium between these forces in those fields where they conflict.

In the United States, because of our historical development, the

5. This restraint, of course, need not be government imposed. In the Middle Ages, feudalism imposed on each class an equality obtained by private means through the ownership of real property. Even the power of the king depended less on any political concept than through his overlordship of all the land in the nation. And see note 12 *infra*.

6. See WOOTTON, FREEDOM UNDER PLANNING 5-6 (1945), where, in discussing the great use of such phrases as "freedom from want" and "freedom from ignorance," Miss Wootton states: ". . . and the very possibility of conflict, real enough in experience, between freedom and other praiseworthy social ends is disposed of by a verbal trick."

7. But see the separate opinions of Justices Frankfurter, Jackson, and Black in American Communications Ass'n v. Douds, 339 U. S. 382, 415, 422, 445 (1950) and the dissenting opinion of Mr. Justice Black in Adler v. Board of Education, 342 U. S. 485, 496 (1952), where the opinions suggest that the majority opinions are permitting the regulation of thought.

stress has always been on the "liberty" rather than the "equality" side of our democracy. An excellent case can and has been made, certainly, that the Constitution was written by a group of men much more interested in freedom of the individual than in any equality among individuals. The average American of today does not think in terms of his being equally restrained with everyone else. He will not, of course, deny that in many ways he is restrained. Anyone who has listened to a group of farmers discussing the Federal farm program well knows that, vocally at least, many resent the restrictions more than they appreciate the government checks. A great number of the restrictions now imposed in this country are a product of the past twenty-five or thirty years. Because this quite heavy incidence of restrictions is relatively recent, the average citizen still thinks of himself as primarily free, not primarily equal with others, and probably not as any combination of free and equal together.

It seems incontestable, also, that the average American citizen thinks of liberty and freedom in a different manner than the courts do. This is not, of course, to say that the courts are wrong. The courts, in discussing the problem of liberty, generally are working with the Federal and state constitutions. Those instruments theoretically and to a large extent practically establish certain principles as immutable and unaffected by the will of the majority of the people. But when the average person speaks of his freedom, he is not concerned with his freedom of religion or his freedom of speech. The reason, of course, is obvious. It is a typical American whose religion and expressed ideas are not acceptable to the majority of the persons with whom he associates. Thus, when a typical American is speaking of his freedom, he is generally discussing, more or less rationally, what is pinching him, and that is generally some restriction on what we consider his property interests. Everyone, no matter how acceptable his religion and his views, can be restricted by zoning, price control, or income tax laws. This is not to say that the average American does not favor any restrictions, since he realizes that his rights, and here again usually property rights, can be interfered with by others. But when the government takes something of value from the average American, he will certainly talk of his rights, his freedom to use what he owns as he pleases, being violated, even though, as an abstract proposition, he may favor the projects for which his property is being taken.

Unquestionably we are a nation composed largely of those whom the Communist calls the bourgeoisie. Our people are property-minded, probably because security is a strongly-felt need, and security and property are to the average American much the same thing. It is certainly not accidental that *laissez faire* was such a successful economic doctrine in this country, and the tendency to speak of the pre-Roosevelt Court as a big business Court is to misunderstand the prevalence among a great percentage of our people of the idea that, somehow or other, property is a sacred institution. Whether this attitude is a good one is not our problem here but we must recognize its existence. We can overemphasize this tendency, since our citizens are not anarchists certainly, but of all governments existing at present in the world, ours most of all stresses freedom, and particularly the liberty to use our property as we see fit.

Another reason why the principle of "liberty" is much more stressed in this country than is "equality" lies in the history of our foreign relations since this country became a world power. Those countries with whom we have found ourselves in serious opposition have not been democracies and, since World War I, have been totalitarian states. Totalitarianism, especially Communism, is essentially egalitarian as previously pointed out.[8] Everyone, except the ruling classes and the unreconstructed or unreconstructable, is theoretically equal to everyone else. Thus, in the propaganda fight presently existing between this country and the Soviet Union, we stress our freedoms — our liberty from restraint.[9] Anyone who

8. See text supported by note 6 *supra* and following. Even in the European democracies, there is a greater tendency toward equality than toward liberty in their governments. This has a historical basis, for the ancient Greek republics did not recognize civil liberties. And, the French Revolution, the very fountainhead of European revolutionary movements, produced no modern democracy as we know it, but an egalitarian centralized state. Silving, *op cit. supra* note 3, at 358-64. And it is also true that economic pressures in these European democracies seemed to require at all times greater government restriction and planning than was necessary in the United States.

9. The very fact that we stress that side of democratic government which is less stressed in the countries in which our propaganda is being used helps account for the only partial success our propaganda has had. European democracy is much closer to the egalitarianism of Communism or other totalitarian government forms than this country is, but, in turn, we are closer to an anarchical form of government than they are. And they fear anarchy as much as we, and they, fear dictatorship. For a recent example of typical European attitude toward our government we have only to observe the comments of former Prime Minister Attlee of Great Britain, when he observed that our Constitution made it difficult and nearly impossible to conduct foreign relations with this country. While his statements undoubtedly had political overtones, still the tenor of them indicates a not untypical attitude in European thought about our government form.

reads our official and semi-official propaganda will realize that the concept of freedom is stressed a great deal more than such equalizing elements in our form of government as social security and the graduated income tax.[10] By such stressing of freedom we naturally tend to forget that this government is not a government of the free alone, but is a government of the somewhat free and the somewhat equal. To the extent that our citizens accept our propaganda as fully representative of our government they forget the principle of equality which is one of the twin bases of our form of government.

With this background it is easy to see why the decision in *Shelley v. Kraemer* created considerable unfavorable comment and why the recent decision in *Barrows v. Jackson* will do likewise.[11] Superficially the decisions seem to force an equality that probably a majority of Americans do not desire.[12] Despite this, however, the decisions were in the area of negro housing, where many realized that, particularly in the large cities in the North, a change is necessary to avoid tremendous strains on race relations. Thus the effect of these decisions in areas less crucial than negro housing

10. Even when our propaganda is stressing something like our social security, systems, there is a great tendency to emphasize any freedom involved, even if it involves distortion. When we get into the area where social security should be emphasized, that is, in the area of our standard of living, we find stressed the fact that we have the necessary freedom to obtain that standard of living. To call everything that seems good "freedom," or a product of it, is a type of chicanery that will be discovered by those who are subject to this propaganda. The truth is not so disconcerting that it must be hidden; in fact the truth might make the propaganda more saleable.

11. In Comment, 45 MICH. L. REV. 733 (1947), it was stated that it was unlikely that racial restrictive covenants could be outlawed by statute in any jurisdiction in this country. Kahen, *Validity of anti-Negro Restrictive Covenants,* 12 U. CHI. L. REV. 198, 210 (1945) describes the unsuccessful Illinois attempts to bar these agreements by legislation. In STERNER, THE NEGRO'S SHARE 201 n. 12 (1943), the author gives the result of a poll taken by Fortune Magazine. Depending on the area in the country, 77 to 87% of the people polled favored residential segregation, based either on legal provisions or social pressure.

12. It is interesting to note that, while most people would tend to reject the result of this case on the basis that it interferes with their freedom to use their property as they wish, actually the result has been the requirement of one equality in place of another. Property subject to a racial restrictive covenant is by self-definition restrained as to ownership or occupancy. And, except for the original convenantees, there is no contract involved. While the initial parties to the agreement are bound by privity of contract, later owners of the property are bound only by privity of estate. See CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 111-5 (2d ed. 1947). And these later owners may well be bound against their will, even if they have not courted law suits by selling to a member of one of the races restricted. So, in actual effect, despite the talk about freedoms being destroyed by the decision, the actual case decided only that an exchange of equality publicly imposed must be made for one privately imposed. And a person who sells property to a restricted class member has really regained more freedom to use his property as he wishes, that is, to sell it to anyone he desires to.

will undoubtedly cause even more of a furore. Areas traditionally considered purely private will now have to be scanned for constitutional objections never before faced in those areas. Since the possible coverage of the decisions may greatly expand those fields where the state and Federal governments can interpose their restraining hands, an analysis of the effect of these cases seems to be required.

Shelley v. Kraemer was decided on two points. First, it was held that action of the state court in enforcing a racial restrictive covenant privately entered into was state action, and, second, that this enforcement was a denial of equal protection of the laws. *Barrows v. Jackson,* basing its decision on the state action theory of the *Shelley* case, found a denial of equal protection of the laws in a state court's granting damages for the violation of a racial restrictive covenant, even though the suit was between the white vendor and other white owners whose property was subject to the same covenant. In this article, an analysis will first be made of the state action concept of *Shelley v. Kraemer,* and then an analysis will be made of the equal protection of the laws argument in the opinions.

II.

STATE ACTION

Shelley v. Kraemer[13] has been characterized as the most important case decided by the United States Supreme Court during its 1947-48 term.[14] The reason is clear. By finding, from the facts of the case, state action under the terms of the Fourteenth Amendment, the Court notably changed the area of protection of the Amendment. Once the Court found the presence of state action, the equal protection argument could be settled on the authority of *Buchanan v. Warley,*[15] certainly not a recent nor novel case.

13. 334 U. S. 1 (1948).

14. Frank, *The United States Supreme Court: 1947-48,* 16 U. CHI. L. REV. 1, 22 (1948). Professor Frank adds: "Paradoxically, its practical consequence in the immediately foreseeable future will be small."

15. 245 U. S. 60 (1917). This case held that a city ordinance which in effect zoned areas for white and negro occupancy was unconstitutional, as denying equal protection of the laws. A somewhat similar ordinance was declared unconstitutional in Harmon v. Tyler, 273 U. S. 668 (1927). These two cases arose where white sellers were attempting to dispose of their properties free of these zoning requirements. In City of Richmond v. Deans, 281 U. S. 704 (1939), the Court, on authority of the Buchanan case, declared a negro-white zoning ordinance unconstitutional as applied to a negro barred from occupancy of certain property. These cases are discussed in the opinion of the Shelley case, 334 U. S. at 11, 12.

Thus, it seems advisable to analyze *Shelley v. Kraemer* by shortly reviewing the concept of state action and then determining what changes to the pre-1948 concept were made by the case.

In part, Section 1 of the Fourteenth Amendment to the Constitution states:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

The Fifteenth[16] and Nineteenth[17] Amendments, as well as certain sections of the original articles of the Constitution,[18] also speak of action by the state. What does this term, state action, mean in these sections of the Constitution? If, at this time, without aid of any prior decisions or writings, an analysis of the concept of state action under the Fourteenth Amendment was made, one of two conclusions would be arrived at. The first, and obvious one, is to interpret it as the common understanding of the average man would construe it, that the state must officially act through one of its official agencies. But, using legal theory, one might come to a second conclusion. Private action, such as the making of a contract, creates law for that specific contract, and this law is of as binding force in its own area as a law passed by a state legislature.[19] As such acts create law of the state, the action of creating them is state action. Looking at the problem a trifle differently but still arriving at the same result, using again the making of a contract as our example, we find that all action is either prohibited or permitted by the state, with the exception of certain constitutionally guaranteed individual rights. Thus, if the state has allowed us to make a certain contract, it has acted as a party to the making

16. "The right of citizens . . . to vote shall not be denied or abridged . . . by any state on account of race, color, or previous condition of servitude."

17. "The right of citizens . . . to vote shall not be denied or abridged . . . by any state on account of sex."

18. Most such restrictions on state action are enumerated in Article I, Section 10, of the Constitution. Implied restrictions on the states exist, of course, by reason of the grant of certain powers by the Constitution to the Federal government, such as the commerce power.

19. "They are commands of the sovereign as political superiors although they are set by the sovereign circuitously or remotely." I AUSTIN, LECTURES ON JURISPRUDENCE 180 (5th ed. 1885). See also Akzin, *The Concept of Legislation*, 21 IOWA L. REV. 713, 744 (1936).

of it.[20] Either of these theories, or better analytically, a combination of the two,[21] makes nearly all acts of individuals state action. For better or worse, the first and readily comprehensible interpretation of state action was used by the courts, though if the other had been used[22] the courts at least would have been able to avoid spending considerable time creating fine distinctions which eventually crumbled before other fine distinctions.

The history of the adoption of the Fourteenth Amendment suggests why there was undoubtedly a conscious effort made to limit its effect after its adoption. The Amendment, along with the Thirteenth and the Fifteenth, were drafted by a Congress interested in assuring Republican domination of the country in perpetuity. One method by which this was to be done was the assurance of effective negro voting, and the assurance of the negro's attachment to the party by obtaining for the negro the same rights and privileges that white citizens[23] enjoyed.[24] After the drafting of these Amendments, Congress required that the Southern states

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20. 3 BENTHAM, WORKS 159-60; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COL. L. REV. 149, 199 (1935); Barnett, *What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 OREG. L. REV. 227, 228 (1945); Comment, 45 MICH. L. REV. 733, 747 (1947). See Mr. Justice Harlan, dissenting, in Civil Rights Cases, 109 U. S. 3, 26, 57-9 (1883).

21. Most commentators, as those cited in notes 19 and 20 *supra*, have joined these two theories to justify their conclusion that action by an individual is action of the state.

22. In FLACK, ADOPTION OF THE FOURTEENTH AMENDMENT 262-3 (1908), it is stated that early opinion about the Amendment indicated that it included action of individuals. See also Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13, 28-33 (1949). For a contrary view, see Note, 96 U. PA. L. REV. 402, 403 (1948), where the writer states: "Evidence would indicate that both those who proposed the Amendments and the Congress that passed them has in mind only state legislative action."

23. The Fifteenth Amendment and the "privileges and immunities" clause of the Fourteenth apply to citizens of the United States. The "due process of law" and "equal protection of the laws" clauses of the Fourteenth Amendment apply to all persons within the jurisdiction of a state, and are not limited to citizens.

24. See 14 STAT. 27, 8 U.S.C. § 42 (1946), cited in the Shelley case, 334 U. S. at 11: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." And in *Ex parte* Virginia, 100 U. S. 339, 344-5 (1879), the Court stated: "One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons with the jurisdiction of the State. They were intended to take away all possibility of oppression by law because of race or color." See Mr. Justice Black, dissenting, Adamson v. California, 332 U. S. 46, 68, 72 n. 5 (1947); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COL. L. REV. 131, 134-5, 166-7 (1950).

seeking readmission to the Union ratify these Amendments.[25]

But, by the time the Fourteenth and Fifteenth Amendments reached the United States Supreme Court, the temper of the country, or at least of the Court itself, was somewhat less intent on carrying out the original purposes of the Amendments.[26] There was less interest in the protection of the Negro as opposed to the white.[27] When the *Civil Rights Cases*[28] came before the Court, it could limit the effect of the Amendments. The Court therefore interpreted action of the state as the more common understanding of the term would suggest, as not applying to actions by one individual in relation to another but to direct action by the state upon the individual.[29] Thus the Court effectively prevented Federal control of non-public action in the field covered by the Amendments; and action by the state was limited to that action which was obviously and immediately that of a state agency. The Federal government was to police only the states and the states were to be left to police the individuals.

It has been aptly suggested that public action and private action are opposite poles of a continuous spectrum.[30] Certainly we find that, except in certain areas near those poles, there is considerable difference of opinion as to whether a given action should be defined

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25. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STANFORD L. REV. 5, 126 (1948).

26. Certainly the "privileges and immunities" clause of the Fourteenth Amendment had already been rendered ineffective in the Slaughterhouse Cases, 16 Wall. 36 (1873), and the clause has shown little life since then. The emasculation of the clause is doubly surprising since the best information available indicated that the draftsmen thought of this clause as the heart of the Amendment, and the "due process" and "equal protection" clauses were added perhaps more for euphony and balance of expression than for content.

27. See Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13, 28-33 (1949), for a picture of the changes in the political situation and, particularly, in the outlook of the Republican party, which took place during the period from 1865 to 1880. For a view that it was the original purpose of the draftsmen of the Fourteenth Amendment and of the Congress that passed it to protect property interests, as the Amendment eventually came to be interpreted, see LEARY, DUE PROCESS AND EQUAL PROTECTION (unpublished thesis in the Princeton University Library, 1932). The view is unusual.

28. 109 U. S. 3 (1883).

29. *Id.* at 17. "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or executive or judicial proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong . . . ." This idea did not spring full-grown in this case. See, e. g., Cruikshank v. United States, 92 U. S. 542, 545 (1875): "This [due process of law] adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against any encroachment by the state upon the fundamental rights which belong to every citizen as a member of society."

30. Comment, *Race Discrimination in Housing*, 57 YALE L. J. 426, 434 (1948).

as public or private.[31] To the *Civil Rights Cases* Court it was apparent that action by the legislative, executive, and judicial bodies of the state government was action by the state. But when governments increased their regulation of the individual, when private agencies began to exercise what had been considered public functions, and when attempts were made to circumvent the Amendments by the use of what was purportedly individual action, the Court expanded its concept of what constituted state action. If this had not been done the Amendments could easily have become dead letters in many areas of discrimination. More and more of what had been considered private action came to be considered action by the state.

The fact that state action has had to move further and further across the spectrum toward the pole of private action may well indicate that the original concept of state action as accepted by the Court was an error in constitutional law theory, if not in political judgment. A certain amount of the movement has undoubtedly been caused by the economic, social, and political changes in this country, but the larger part of the movement has been caused by the Court's desire to try to maintain the Amendments as effective instruments of Federal control of states and their governments.

The Court's expansion of the original concept of state action has taken two channels.[32] The first has been through the use of what has been referred to as the instrumentality theory.[33] Under this theory, simply stated, action by a private individual or group becomes the action of the state when the ability to discriminate within the meanings of the Amendments is, in some manner, given by the state to the private individual or group.[34] An example of

31. Compare, e. g., Note, *Disintegration of a Concept — State Action Under the Fourteenth and Fifteenth Amendments,* 96 U. PA. L. REV. 402 (1948), with Lathrop, *The Restrictive Covenant Cases,* [1948] WIS. L. REV. 508.

32. Note, *State Action Reconsidered in the Light of Shelley v. Kraemer,* 48 COL. L. REV. 1241, 1242 (1948).

33. *Ibid.* See Note, *Applicability of the Fourteenth Amendment to Private Organizations,* 61 HARV. L. REV. 344 (1948), for an excellent analysis of the present state of the law by which private agencies are considered arms of the state. "The cases . . . seem to establish the principle that the Fourteenth Amendment sets limits to the activities of a private organization which exercises a governmental function or which has a sufficient nexus with the state. Such doubts as exist stem from two circumstances: (1) the Supreme Court, while implicitly subscribing to this view, has never expressly stated the proposition; (2) much uncertainty exists as to the exact relationship necessary to invoke the Amendment." *Id.* at 347.

34. The writer in a note in 23 TEMP. L. Q. 209 at 210 (1950) suggests the following: "An over simplification of the test for the rule (if a rule can be deduced) might be: It is not *who* does, (or acts), but *what* is done, to *whom,* with *what* effect." It would seem that this test is a bit too broad and all-

the use of this theory is in the primary election cases, where a state political party, a private organization, in a succession of ways attempted to prevent negroes from voting in the primaries for any candidates of the party.[35] While this trend has existed, it has not had what would seem like logical and uniform application.[36] It may be that, in this area, an empirical determination of whether a given group or individual is a state agency is necessary. Certainly a conceptual approach is difficult to use if courts will consider that slightly different facts make a great difference in result. But the very confusion in this area suggests that the instrumentality theory is only a device on which to hang a result. It gives the courts a considerable area of freedom and they can, still using the theory, decide many cases either way.

The other channel through which the area of public action has been increased at the expense of private action has been through the expansion of the area of what action by an admittedly state agency is state action under the Amendments.[37] Even before the *Civil Rights Cases*[38] the Court had decided in Ex parte *Virginia*[39] that discriminatory action by a state judge in selecting a jury under a non-discriminatory state statute was state action. But Mr. Justice Field in dissent pleaded that this, as a judicial and not a minis-

inclusive, for it does not sufficiently suggest the necessity of state action in some manner. In Note, *Applicability of the Fourteenth Amendment to Private Organizations*, 61 HARV. L. REV. 344, 345, the writer suggests: "A more realistic justification for applying the Fourteenth Amendment would rely less on the anthropomorphic concept of state action and more on the conjunction of the individual act and governmental authority." This applies to the entire state action concept, of course, but it suggests an excellent testing method to use in applying the instrumentality theory to a set of facts.

35. Nixon v. Herndon, 273 U. S. 536 (1927); Nixon v. Condon, 286 U. S. 73 (1932); Grovey v. Townsend, 295 U. S. 45 (1935); United States v. Classic, 313 U. S. 299 (1941); Smith v. Allwright, 321 U. S. 649 (1944); Rice v. Elmore, 165 F. 2d 287 (4th Cir. 1947), *cert. denied*, 333 U. S. 875 (1948); Terry v. Adams, 73 Sup. Ct. 809 (1953).

36. Certainly arriving at opposite results in determining if there is state action has depended in many cases on the slightest differences. An example of this confusion can be found in Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (4th Cir. 1947) (finding state action) and Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948) (not finding state action). The latter case has been subjected to criticism, 62 HARV. L. REV. 126 (1948), both for its use of the "subject to public control" test, rejected by the U. S. Supreme Court in 1932, and its very narrow distinguishing of the Pratt Library case, which was decided in the same circuit in which the district court was sitting.

37. "The . . . problem is one of determining whether the causal relation between acts of what is admittedly a state agency and the resultant denial of a civil right is sufficiently direct to bring that action within the constitutional ban." Note, *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 COL. L. REV. 1241, 1242 (1948).

38. 109 U. S. 3 (1883).

39. 100 U. S. 339 (1879).

terial act, was beyond the Fourteenth Amendment.[40] And the battle has continually been fought as to exactly what action of a state agency is sufficient to deny rights under the Amendment, particularly if the state agency acted beyond, in violation of, or in direct opposition to the authority given it by the state.[41] Even as late as 1945, the Court was not exactly certain if an act by a state official in violation of state law was clearly state action.[42] Logically it is difficult to see how action in direct violation of state law could be state action, and this, too, may suggest that the entire concept of state action is artificial. Not only has the original limitation had to be continually expanded through the use of two separate theories, but in addition the expansion of the two separate theories has failed to follow any logical road, unless a general though erratic trend toward effectuating the purpose of the Amendments, no matter how, can be considered logical development.

This short and elementary analysis of the concept of state action as it existed before *Shelley v. Kraemer*[43] was decided, establishes a background from which to consider exactly what change that case did make in the law. Its holding made judicial enforcement of racial restrictive covenants state action within the meaning of the Fourteenth Amendment. Thus, even though, as the Court stated, the covenants as purely private agreements did not violate the Amendment,[44] enforcement of the agreements by state courts was such state action as denied the equal protection of the laws under the Fourteenth Amendment.[45] But an opinion of this sort generally presents many more problems than it actually answers, and many of these problems arise here from attempting to determine the limits,

40. *Id.* at 349. And see also Field's dissent in Virginia v. Rives, 100 U. S. 313, 324 (1879).

41. The uneven history has been excellently reviewed in Barnett, *What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 OREG. L. REV. 229, 233-43 (1945). Dual limitations developed to restrict the application of the state action concept to all action by officers or agencies of the state. The first arose from the case of Arrowsmith v. Harmoning, 118 U. S. 194 (1886), where the Court held that no state action was present when the state law would, if properly enforced by the state executive and judicial officers, provide the protection guaranteed by the Amendments. This case, though occasionally cited, was expressly repudiated as early as 1907 and the doctrine is only a matter of history. But several years earlier, in Barney v. City of New York, 193 U. S. 430 (1904), the Court held that no state action in violation of the Amendments existed when state officers and agencies act beyond the scope of their authority as determined by state law. This doctrine has had very spotty acceptance since the time it was promulgated, being sometimes accepted completely and at other times expressly repudiated.

42. Screws v. United States, 325 U. S. 91 (1945).

43. 334 U. S. 1 (1948).

44. *Id.* at 13.

45. *Id.* at 23.

or lack of limits, of the concept of state action from the expressions of the Court. We have discussed briefly the two channels by which the United States Supreme Court and other federal courts have expanded the original concept of state action. It would seem, from the opinion in the *Shelley* case, that the second channel has now been completely opened, *i. e.*, any action by an admitted state agency, although its action may be very attenuated in relation to a deprivation of rights under the Fourteenth Amendment, becomes state action in violation of the Amendment.

Shelley v. Kraemer arose in a critical area, that of negro housing. The sociological, political, and economic factors creating and created by the negro housing situation have been extensively covered elsewhere.[46] Despite the fact that perhaps even a majority of the people in this country did not favor improving the housing situation of the negroes by destroying racial restrictive covenant enforceability, still those persons living in the larger cities, particularly in the North, and interested in the problem knew the tensions being created and the great harms being done. The Court was thus faced with a problem which was by nature incendiary and where equality, in any true sense, was being denied. The conscience of the Court was stirred by the dangerous situation which existed, at least in part, through the use of racial restrictive covenants.[47] To an extent, the language of the Chief Justice carried some of the Court's emotional and intellectual dislike for the situation before it, and it is necessary to recall this in analyzing the case.

During the course of the opinion the Chief Justice stated:

> It is clear that but for the active intervention of the state

46. The literature is so extensive that it would be unprofitable to compile even a fairly representative list. But, in addition to a large number of law review articles, see: TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947); ABRAMS, RACE BIAS IN HOUSING (1947); GERTZ, AMERICAN GHETTOS (1947); MOON, THE HIGH COST OF PREJUDICE (1947); JOHNSON, PATTERNS OF NEGRO SEGREGATION (1945); MYRDAL, AN AMERICAN DILEMMA (1944); STERNER, THE NEGRO'S SHARE (1943).

47. But see Frank, *op. cit. supra* note 14, and the quotation there about the practical effectiveness of the decision. Professor Frank analyzes the Indianapolis, Indiana, situation in his article, and finds that restrictive covenants had been the last-ditch defense of those working to keep the negroes out of certain areas. Effective racial segregation was obtained by other means, since negroes had not been able to break into white residential areas, and no case litigating a restrictive covenant could be found. It is worthy of note that Indianapolis is one of the northern cities where the negro population is limited to a very restricted area, and where the natural tendency would be to try by all possible means to get out of the present areas which are completely inadequate. Where negro housing is adequate to take care of the negro population, there is very little likelihood of negroes trying to purchase property in white districts, since the pressure is much less.

courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.[48]

And, later, he stated:

. . . these are cases in which the States have made available to such individuals the full coercive power of government . . . .[49]

It is possible to argue that these phrases limit the concept of state action to only those actions of any arm of the state which exhibit "the full panoply of state power" or where "the full coercive power of government" is present.[50] But any such argument would seem to ignore the location of these statements in the opinion. They were made as answers to the contention that any action of the state existing here did not create the discrimination, that the states' part in such a discrimination was too attenuated to be under the Amendment.[51] These statements of the Chief Justice exposed the weakness in the arguments being used, by stressing the actual effect of the judicial action on the ability to discriminate. The statements also are very vague, and it is impossible to define what is "the full panoply of state power," of "the full coercive power of government." It is difficult to imagine an instance where an agency of the state, after in some manner directing certain action, would allow disobedience on the ground that the agency had not used "the full panoply of state power." Certainly, for example, the ruling of an administrative board is enforceable without legislative approval of the specific ruling, even though the power to make the rulings is through a grant of legislative power. But if the Chief Justice meant to describe only the most formal and complete action of the state courts by these phrases, he was still using them to describe only what actually existed in these cases, and it would not appear that there was any intent to set up any test of state action based on these phrases.[52] Certainly

48. 334 U. S. at 19.
49. *Ibid.*
50. In Note, *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 COL. L. REV. 1241 (1948), the writer suggests such an argument might be made if it is found desirable by the Court to limit the Shelley case. It is apparent that any such argument would do violence to the logic of the decision and such manner of limiting the case is unlikely to be used unless the Court is heavily pressed.
51. 334 U. S. at 14.
52. It is questionable, of course, if the Court would want to set up any test anyway. It appears that the decision was largely based on the facts before the Court and not on conceptual grounds. But, empirical or not, the decision abounds in language which might later be used as tests. Whether such will be done probably depends on the Court's desire in later cases to limit or expand the doctrine of the case.

the results of some of the cases cited by the Chief Justice could not have been obtained using these phrases as tests, if they were meant by the Chief Justice to do anything more than suggest the extent of the power of a state court. It would seem that certain procedural due process cases, such as the mob-dominated-trial cases,[53] would not meet the requirements of any test based on these phrases. The cases were reversed not because the highest court in the state upheld the lower court, but because in the lower court itself there was a denial of due process.[54] The same is now true of rulings of administrative tribunals, for if they properly reach the Court, the Court's decision does not depend on whether the ruling has the sanction of the highest state court, but on the ruling itself.[55] In the first case involving the judicial branch of the state government and state action under the Fourteenth Amendment, Ex parte *Virginia*,[56] the action of the judge in discriminatorily selecting a jury in disregard of a state statute was held to be state action. Since the judge had violated state law himself it would be logically difficult to say that his action used "the full coercive power of government" or exhibited "the full panoply of state power."

But, more conclusively, we have the statement of the Chief Justice that:

> State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertion of state power in all forms.[57]

53. The Chief Justice cites Moore v. Dempsey, 261 U. S. 86 (1923), at 334 U. S. at 16. Other procedural due process cases, where the denial interdicted was that of the trial court, and not that of the appellate courts, are cited by the Court, 334 U. S. at 17.

54. The Chief Justice speaks of the failure of the courts "to provide the essentials of a fair hearing," in stating the holding of these cases. 334 U. S. at 16, 17.

55. See note 41 *supra*. The law may not have been completely settled before the Shelley case that a clear violation of state law by an administrative body might not have run into the difficulties of the Barney doctrine. The case of Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278 (1913), however, clearly held such illegal action by an administrative body to be state action, and it has never been overruled, or even questioned in a majority opinion of the Court.

56. 100 U. S. 339 (1879).

57. 334 U. S. at 20. Similar statements had been made by Mr. Justice Bradley in the Civil Rights Cases, 109 U. S. 3, 11 (1883), and by Mr. Chief Justice White in Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278, 286 (1912). The latter case's interpretation of state action was broad but the Civil Rights Cases are often considered to have a narrow holding as to what constitutes state action, at least as compared with the dissent of Mr. Justice Harlan. But the language of the case was broad, and the narrowness of the holding only relates to the failure to accept individual action as within the Fourteenth Amendment, and not to language limiting the meaning of what is state action.

This statement was made not during the course of argument in the opinion, but is really the last sentence in that part of the opinion which is limited to the determination of what is state action.[58] Being the conclusion of the Chief Justice, the phrase would seem, best of all sentences in the opinion, to express the Court's actual considered view of what constitutes state action. It is a reasoned conclusion, not a statement made in answer to various contentions. If we accept the analysis that this phrase is the best statement of the Court's position concerning what is state action, it appears certain that any action of a state court would be state action. The Chief Justice, in using the word "power," seems to suggest that he is not limiting state action to those actions which are authorized, but means to include all actions where the "power" of the state, or of one of its agencies or officers, is sufficient to deny a civil right. The aura of authority about a state officer or agency would create power to deny a right, although actual authority did not exist. This analysis is strengthened by the following statement of the Chief Justice:

> And when the effect of that [state] action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.[59]

The use of the word "effect" suggests that the Court was interested in the end result, not just the immediate consequence. It would seem that the Chief Justice would not have used the vague word "effect" if he was interested in limiting the meaning of the phrase only to that which is immediate and direct. And, while not mentioned in the opinion, the Court has generally looked through any smokescreens or veils to see if the final result of the action is such a deprivation of a civil right as the Amendment disapproves.

The Court, during the course of its argument, in stating that the racial restrictive agreements were valid as private agreements, further said:

> So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that

58. The opinion, after this sentence, proceeds to settle the equal protection of the laws argument. 334 U. S. at 20-3.

59. *Id.* at 20.

there has been no action by the States and the provisions of the Amendment have not been violated.[60]

Standing alone, this statement would not be conclusive, of course. But, in relation to the other statements that we have just examined, particularly the one stating that "state action . . . refers to exertions of state power in all forms,"[61] it supports the contention that any action by an arm of the state is state action under the Amendment. This statement was made as the initial premise from which the Court worked in determining whether state action existed in these cases, and is important as the only statement of what action the Court excluded from the term state action. The Court, at least, was not willing to exclude any other type of action as being clearly not state action under the Amendment, even though the closer the premise could be made to the actual facts, the simpler the decision of the Court would have been.

It would thus appear that the language of the Supreme Court in *Shelley v. Kraemer* made any and all action by any arm of the state, whether direct or indirect, close or distant, alone or in conjunction with private individuals or groups, state action under the Fourteenth Amendment. Only such action as could be considered purely private, voluntarily taken, and voluntarily complied with, by the private parties involved, would appear to escape the sanctions of the Amendment, if the result would be the denial of a right there protected against state action.

But, as has been previously noted, the expansion of state action has been in two directions. When we have been discussing what action of an admitted state agency was state action under the Amendment, we have been, in effect, deciding how deep the Amendment has cut into the total area of discriminatory action. And we have seen that it is probable that the Supreme Court in *Shelley v. Kraemer* meant the depth of the Amendment to cut down until it arrived at an area of purely private action, where no help of any instrumentality or agency of the state was sought or received.

But we still have a second direction to consider. While there has been a continuing increase in the depth, to continue our simile, of what constitutes state action, there has also been, through the use of the instrumentality theory, a gradual widening of the area of state action, where private individuals or groups have, for various reasons, been construed as acting as an arm of the state. Has the result of

60. *Id.* at 13.
61. *Id.* at 20.

Shelley v. Kraemer changed the width of the area of state action? It is considered that it has, although not in any direct sense. The state instrumentality involved in the *Shelley* case was a state court, and from the earliest cases such a court has been held an agency of the state for purposes of state action under the Fourteenth Amendment.[62] But, indirectly, the case seems to undermine the whole instrumentality theory.

The Court, in *Shelley v. Kraemer,* was faced with the problem of a discriminatory private agreement becoming state action by state court enforcement. Instrumentality problems have also led to court actions.[63] As an example, in the primary election cases, the state courts had enforced the discrimination of the political party. Whether the political party was an instrumentality of the state or not, the enforcement of its discrimination was state action. In an area similar to the racial restrictive covenant situation, we can take the recent New York case of *Dorsey v. Stuyvesant Town Corporation.*[64] There the corporation discriminated against negroes in selecting tenants. The corporation had been created under a special state law for redevelopment corporations, it used the state's power of eminent domain to obtain the property for the project, it obtained all street areas in the property from the city in return for a certain lesser area around the edge of the community, and it obtained from the city a twenty-five year tax exemption on the value of the improvements. The New York Court of Appeals, in a closely divided decision,[65] held that the corporation was not such an instrumentality of the state that state action could have been said to have caused or sufficiently aided the discrimination to bring it within the Fourteenth Amendment. If we ignore the actual holding of the case as to whether the corporation was a state instrumentality, and look upon the case as a court's supporting discrimination by a corporation, whether public or private, we can see the application of *Shelley v. Kraemer* to the instrumentality theory.[66] It is not important if Stuyvesant Town Corporation is an instrumentality of the state, for, on its refusal to rent to negroes *qua* negroes, those refused can

62. *Ex parte* Virginia, 100 U. S. 339 (1879).
63. Not all individuals and groups which might have been called state instrumentalities have been brought into court when deprivation of some right has existed, since, of course, the aggrieved party or parties may not ask for protection of their constitutional rights.
64. 229 N. Y. 512, 87 N. E. 2d 541 (1949), *cert. denied,* 339 U. S. 981 (1950).
65. *Ibid.* The decision was 4 to 3.
66. In the actual case it appears that the possible application of the rule of Shelley v. Kraemer was not argued. *Id.* at 520-1, 532.

sue. If the state courts support this refusal, there is state action under the Fourteenth Amendment. The only question that arises here is the standing of one so refused to sue in a state court. This, of course, presents problems under that language of *Shelley v. Kraemer* stating that all discrimination which is purely private is legal.

The pertinent language of the Chief Justice is as follows:

> . . . that Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[67]

He later states:

> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.[68]

With the emphasis, in these statements, on "merely private conduct," "standing alone," and "voluntary adherence," it would appear that the Court's idea of what action is clearly not state action is very limited. Certainly the whole tenor of the opinion is that what may start out as private discrimination may easily become state action. Thus, certainly, there is no shield given the person discriminating merely because, initially, his action was not violative of the Amendment.

To return again to the *Stuyvesant Town* case, let us assume that the corporation refused to rent to a negro applicant solely on the ground of color. What can the negro do? It would seem, under *Shelley v. Kraemer,* that he could bring suit alleging denial of equal protection of the laws.[69] Even if the court wished to dismiss the suit as not stating a cause of action, on the basis that only private, not public, action was involved in the discrimination, it would seem that the court could not do so without supporting the discrimination.

67. 334 U. S. at 13.
68. *Ibid.*
69. The Chief Justice stressed the Fourteenth Amendment was intended to secure "equality in the enjoyment of property rights." 334 U. S. at 10. And property rights include the right to lease property. 334 U. S. at 11, quoting section 1978 of the Revised Statutes, derived from section 1 of the Civil Rights Act of 1866. In the Dorsey case, the majority opinion held that the right to lease was not a civil right under the New York Constitution. 229 N. Y. at 531. No mention is made of any such right under the Federal Constitution.

Since the *Shelley* case would seem to require only the most indirect state support or aid to private discrimination in order to make the Amendment applicable, the court would, therefore, have to find for the negro plaintiff, presuming the establishment of the truth of his allegations of discrimination.

There might be, of course, some difficulty in appealing a dismissal of the negro's petition. Logically, the state court would seem to be in a dilemma. If the court dismisses the action, the *Shelley* rule is applicable, and if it does not dismiss the case but finds for the negro petitioner, it is saying that purely private discrimination is unconstitutional. But, by analogy to the *Shelley* case, the latter situation is not as extreme as it first seems. Granted the differences in parties plaintiff, which should not affect the result of a case, the difference between our case and the *Shelley* case lies in the effectiveness of the purely private part of the discriminatory action. In our *Stuyvesant Town*-type situation, discrimination is complete unless the negro wins a court action, while in the *Shelley*-type of case, the discrimination is not effective until the court finds for the one desiring to support the discriminatory practices. But, as we saw above in our analysis of the language of *Shelley v. Kraemer,* it seems to be the end effect, not the direct result, of the state court action which is crucial. Thus, if the court, by denying the negro relief, whether for an injunction, damages, or declaratory judgment, supports private discrimination, there is a denial of rights to the negro under the Fourteenth Amendment. It would seem, therefore, that any dismissal of a suit would be appealable on Fourteenth Amendment grounds.[70] In addition, it would appear that the extraordinary remedy of mandamus would lie against an inferior court refusing relief, so that, even where appeal might be questioned, this remedy would be available.[71]

Using this analysis, it is apparent that, from the standpoint of theory, the instrumentality doctrine has largely outlived its usefulness. It, of course, still has merit as a practical device to use in these discrimination suits. If Stuyvesant Town Corporation could

70. Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. CHI. L. REV. 203, 234, 238 (1949).

71. Mandamus would seem to lie against an inferior court which refused to hear this action but dismissed on motion or sustained a demurrer. HIGH, EXTRAORDINARY REMEDIES §§ 147, 150 (3d ed. 1896). This remedy was used against the boards controlling state educational institutions in State of Missouri *ex rel.* Gaines v. Canada, 305 U. S. 337 (1938); Sipuel v. Board of Regents of University of Oklahoma, 332 U. S. 631 (1948); and Sweatt v. Painter, 339 U. S. 629 (1950).

be enjoined, as a state agency, from discriminating against prospective tenants because of their race or color, the entire problem, by that one action, would be solved, with only some policing of the corporation to check for contempt. If we use the theory derived from *Shelley v. Kraemer,* the initial act of discrimination by Stuyvesant Town would not be wrongful, so that if the corporation persisted in its policy, a separate suit would be necessary for each refusal before the discrimination became that protected against by the Fourteenth Amendment. A class suit would not seem to lie,[72] nor would an injunction be issuable running for anyone but the party plaintiff against whom the corporation had originally discriminated. But, although the mechanics of the actual suits would be different, it does not seem that the instrumentality theory has any validity except as a rationale which would tend to avoid a number of suits to obtain a result obtainable in one suit.[73] Substantively, the results would now seem to be the same, whether we have an instrumentality theory or not.

Since the two methods by which the Court has expanded the concept of state action have been, in effect, by-passed by the interpretation of the concept in *Shelley v. Kraemer,* are we to assume the concept has no further validity? This is certainly not true if we accept the words of Mr. Chief Justice Vinson in the case, for he states:

> Since the decision of this Court in the Civil Rights Cases . . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to

72. Of course, once the corporation had refused to rent to a number of the restricted group, there could be a spurious class suit for the benefit of that group. 3 MOORE, FEDERAL PRACTICE 3442-56 (2d ed. 1948). But there is no class suit device available for relief of all members of the restricted class, independent of whether the corporation has refused to lease to them on their request.

73. It is certain that any policy against a multiplicity of suits would not override constitutional issues. If, of course, it was thought that the instrumentality theory should be used to avoid a multiplicity of suits, under many state procedures the causes of action could be joined, or stated in the alternative. Modern liberal provisions for amending petitions should avoid the necessity of beginning a suit again because of dismissal on failure to state a cause of action under the instrumentality theory. Any requirement that the suits be tried separately, with the instrumentality theory cause of action being first tried, would not only raise the question of multiplicity of suits, but more importantly constitutional questions of state action to deprive a person of his rights, and action might lie against the judge himself.

> be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[74]

And the great majority of the opinion continued on from this statement to find the presence of state action. So, certainly the Court had no apparent intent of destroying the vitality of the doctrine.

But when we find that a doctrine of limitation has expanded in two ways, and expansion seems to be, in effect, complete in both of them, we can well ask what is left of the original limitation. Purely private action is certainly still beyond the scope of the Amendment but what is the actual effect of that statement? If a person deprived of rights by the private action of another can sue to enjoin, or for damages, and the courts of the states cannot take any action supporting discrimination, it would seem that the area of purely private action is a very limited one. Whether an action will remain private, and not through a judicial suit become that of the state, seems to depend primarily on the aggrieved party.

One other field that might be covered by the concept of state action is where a state fails to act to prevent the private deprivation of a right, particularly if there is a pattern of such deprivation within the state.[75] Up to the time of *Shelley v. Kraemer* the theory that state inaction is a part of the concept of state action had never been accepted by the Supreme Court. And the Court did not consider this possible contention in the *Shelley* case. But certain language used, although it was used as a statement of premises rather than of conclusion, can give little satisfaction to those who favor the addition of state inaction to the concept of state action. The Court, in addition to its remarks about "full panoply of state power"[76] and "full coercive power of government,"[77] stated:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit.[78]

74. 334 U. S. at 13.
75. Barnett, *What is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments?*, 24 OREG. L. REV. 223, 232-3 (1945), points out that some inaction by the state is clearly covered by the Amendments now. This may be illustrated by omission to give proper notice, or of proper instructions by a trial judge to a jury. The courts look upon this omission not as the offense itself, but as the basis for a finding that the state did not give a fair and impartial trial. The state failed, by omission, to do its affirmative duty. Where there is no such affirmative duty on the state, the state may still remain aloof.
76. 334 U. S. at 19.
77. *Ibid.*
78. *Ibid.*

Thus, the Court expressly negatived any decision on the basis of the theory of state inaction, although it would appear that if that theory had been accepted, the case could have been readily decided. Even if state inaction had been accepted in its limited sense of applying only to failure of the state to stop a very marked pattern of discrimination, still such a pattern existed both in Missouri and Michigan.

To return to our initial question, does the concept of state action still have any real meaning after *Shelley v. Kraemer?* While undoubtedly the effect of the case was to include as state action much that up to that time had been excluded, the inclusion was done under the traditional interpretation of the Fourteenth Amendment, *i. e.,* that action of the state was necessary to bring the Amendment into play. But, as we have seen, the only actions under the language of the case now remaining private actions are those where there is not any action, direct or indirect, by any agency of the state which might effectively support private discrimination. This leaves only a very narrow area which is not included within the Amendment. Where discrimination is private and the aggrieved party seeks no relief, the Fourteenth Amendment cannot apply. If the Court eventually accepts a theory of state inaction as part of the concept of state action, even purely private discrimination could be stopped, at least if a pattern of such discrimination existed in the state. But, at present, there is still this one area where private discrimination can exist, as long as the party aggrieved will not take the action into court. Generally, in fields of private law, we would say that if a person had a "right" to obtain court relief, he was certainly fully protected. In constitutional law the problem is not quite the same. Rights can still be denied by intimidation, or even much milder social pressure. Thus, the party aggrieved, although realizing that he has been deprived of certain of his rights, may not act to pursue his remedies. If he does not sue, the Federal government or no other party has, at present, the right to sue for him. Since the concept of state action limits protection in this small area, the doctrine must be said to have some remaining vitality. Unquestionably, however, the concept of state action has been so expanded by the language of *Shelley v. Kraemer* that its meaning has been lost as soon as cases arise in state courts; once into court, the state will be acting.

We have, of course, analyzed *Shelley v. Kraemer* largely from its own language. When a concept, such as state action, is so expanded in one court opinion that it appears to be largely destroyed as a

limitation, we may well inquire, first, if the Court realized this possible effect of its language, and, second, even if it did, did it mean to apply this language to all or only to certain situations. A quick answer, if possibly a superficial one, to the first question is that Mr. Chief Justice Vinson dissented very vigorously in *Barrows v. Jackson*,[79] which is not the most extreme case which could arise under the *Shelley* doctrine, as we have developed it from its own language. It is also obvious that this *Shelley* doctrine can be limited to the actual type of fact situation presented in the case. The actual effect of the case is to prevent a state court's forcing a private individual to discriminate.[80] Therefore, we cannot be certain that the Court meant also to include situations where the private person desires to discriminate. Thus these twin possibilities, that the Court said more than it meant to say and that it meant the language to apply only to a limited number of situations which might come before it, are still very real. Past constitutional history would suggest, however, that even if the *Shelley* doctrine should be limited in the near future, and not be extended as far as we have determined it logically could be, the more distant future holds the promise, or threat, that the more extreme view will be accepted. We have seen that the Court has continually expanded its concept of what constitutes state action. While it may have used language in the *Shelley* case which took it rather further than it expected, any limiting of the effect of the case is likely to be temporary and, in time, we can expect the broader interpretation of its language to determine what constitutes state action.

79. 73 SUP. CT. 1031, 1037 (1953). The Chief Justice, of course, wrote the Shelley opinion.

80. See Hyman, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 569 (1951).