recognize their responsibility to provide the means for willing residents to protect their homes from blight, and the methods by which recalcitrant property owners can be induced to forestall this process of gradual deterioration.

EQUAL PROTECTION AND ATTEMPTS TO AVOID "STATE ACTION"

The Iroquois Amphitheatre, built by the city of Louisville, Kentucky, as part of its park system, was leased to the Louisville Park Theatrical Association, a private organization, for the purpose of presenting theatrical productions at a reasonable cost to the citizens of Louisville.[1] The city reserved the right to make rules and regulations to assure good order—among these was the policy of denying admission to Negroes.[2] The city maintained the Amphitheatre in clean condition and received all profits accruing from its operation.[3] The lease also recited that the Theatrical

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It now has about 100 "blocks" organized with 1,000 members paying dues of $5 per year and about 1,200 additional active participants and volunteers including Herbert Thelen, professor of social science at the University of Chicago.

The conference was originally organized in an attempt to do something about living conditions in the area including inadequate housing facilities, increases in crime, overcrowded schools and inadequate playgrounds. It has expanded its operation to include anything that is connected with living conditions and is a worthy opponent of blight. It operates in a strictly democratic manner along the pattern of a town meeting.

Mr. Chase gives five basic ideas upon which the conference operates:

"1. Blighted areas are a growing problem in many American cities, depressing land values, threatening homeowners.

"2. Racial segregation in housing is not legal now that the U. S. Supreme Court has decided that 'restrictive covenants' cannot be enforced. If integration is bound to come, a way must be found whereby the races can live peaceably together.

"3. Urban blight and deterioration cannot be halted by reformers, no matter how consecrated. If the problem is to be solved, the people themselves must do it, *all* the people in the area, working together.

"4. The interest and energy of the people, however, are not enough. Facts must be available instead of rumors, and special techniques are needed to cope with complex conditions. This means some kind of central clearinghouse which can channel facts and skills from experts to people. But the central office should produce tools only when they are called for. Responsibility should remain with the people.

"5. No matter how well equipped to meet local problems the people may be, they are at the mercy of larger forces: population movements, changing industrial patterns, highway and traffic developments, federal and state legislation. Therefore, the people must link themselves with a broader organization which has its eye continually on these greater forces." Readers Digest, May, 1953, pp. 44-45.

1. Sweeney v. City of Louisville, 102 F. Supp. 525, 528 (W.D. Ky. 1951).
2. *Id.* at 528, 529.
3. "It was agreed that the Association would pay the City any profit realized from the operation, less $5,000, which the Association originally contributed to the

Association was to have exclusive use of the Amphitheatre each year from May 1 to September 30, any other use during that time to be obtained through a sublease from the Association.[4] When the exclusionary aspect of this arrangement was challenged as violative of the equal protection clause of the 14th Amendment, a federal district court held that since the lease was for a temporary period and since Negro organizations could lease the facilities during the times they were not used by the lessee, the denial of admission to Negroes was a proper exercise of the rights of the private association.[5] The fact that the city promulgated this regulation was evidently ignored.[6]

The Louisville park situation is illustrative of at least one method being attempted in order to maintain racial discrimination[7] without violating the stricture of the equal protection clause of the 14th Amendment.[8] Basic to such attempts is the utilization of private organizations so that state action within the meaning of the equal protection clause cannot readily be found. Although this device already enjoys considerable popularity, its use is undoubtedly curtailed by the fact that it is often

cost of construction of the Amphitheatre, which amount the Association reserved the right to repay to the individuals who had contributed that fund." *Id.* at 529.

4. From 1947 to 1951 the Louisville Park Theatrical Association had exclusive use of the amphitheatre during the following months: 1947, July 1 to Aug. 10; 1948, July 5 to Aug. 14; 1949, July 11 to Aug. 21; 1950, July 10 to Aug. 6; 1951, July 6 to Aug. 19. *Id.* at 528. The contract also provided: "With respect to the use of the Amphitheatre by persons or organizations other than the Association . . . the City would not lease the Amphitheatre to other persons or organizations between May 1 and September 30, any year for the purpose of permitting to be produced therein, any entertainment for which an admission fee or charge was made or from which it expected to derive a pecuniary profit, *unless the person or organization seeking to so use said Amphitheatre, first apply for a sub-lease from the Association.*" (emphasis added) *Id.* at 529.

5. Sweeney v. City of Louisville, 102 F. Supp. 525 (W.D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), *petition for cert.*, 22 U. S. L. WEEK 3009 (U.S. July 7, 1953). The court said, ". . . where the city did not participate either directly or indirectly in the operation of the private enterprise [Louisville Park Theatrical Association] was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment. . . ."

6. ". . . [P]laintiffs were denied admission . . . solely and only on the ground that they are colored persons of African descent and of Negro blood, pursuant to regulations of the Director of Parks and Recreation which regulations have been in force continuously since May 29, 1928." Sweeney v. City of Louisville, 102 F. Supp. 525, 528 (W.D. Ky. 1951).

7. Much has been written stressing the nonlegal aspects of discrimination in the United States. *E.g.*, FRAZIER, THE NEGRO IN THE UNITED STATES (1949); JOHNSON, PATTERNS OF NEGRO SEGREGATION (1943); KONVITZ, CONSTITUTION AND CIVIL RIGHTS (1947); MYRDAL, AN AMERICAN DILEMMA, vols. 1 and 2 (1944); REPPY, CIVIL RIGHTS IN THE UNITED STATES (1951); STRAUS, TWO-THIRDS OF A NATION (1952).

8. The benefits derived by racial minorities under judicial rulings on equal protection may be giving impetus to private organization discrimination. See N.Y. Times, Jan. 22, 1951, p. 19, col. 8, which reported that a 1951 United Press survey revcaled that "thousands of Negro families have moved into white residential neighborhoods" as a result of recent Supreme Court decisions.

unnecessary so long as the states can act under the separate but equal doctrine.[9] The realization that litigation now pending before the Supreme Court[10] may rule out separate but equal foreshadows possible expansion of the private organization device[11] and highlights the perplexing legal problem of determining what factors will constitute state action violative of the 14th Amendment. Precedent indicates that the vaguely understood and defined term "state action" may turn on many factors which implicate in varying degrees the relationship of governmental units with private organizations. Examination of these factors and of the situations from which they arise will give some insight as to the validity of the use of a private organization to maintain racial discrimination.

Perhaps the major criticism of the cases considering the issue of state action is not that they do not raise points which indicate governmental relationship with the private organization, but that they do not evaluate these factors or make explicit the basis of their decisions. Instances appear where a court has examined a lease of public property to a private organization, coupled it with a showing of various other elements connoting state action which perhaps exist only in a very minute manner, and found that the discrimination violated the equal protection clause.[12] The difficulty presented by such opinions is in discerning how many of these factors must exist and which are the most persuasive of state action.

For example, the court in *Culver v. City of Warren*[13] carelessly intermingles in its discussion several possible legal bases for invalidating

9. Communication to the INDIANA LAW JOURNAL from Mr. Sol Rabkin of the Anti-Defamation League of B'nai B'rith.

10. Davis v. County School Board of Prince Edward County, 103 F. Supp. 337 (E.D. Va. 1952); Briggs v. Elliott, 103 F. Supp. 920 (E.D. S.C. 1952); Brown v. Board of Education of Topeka, 98 F. Supp. 797 (D. Kan. 1951); and Gebhart v. Belton, 91 A.2d 137 (Del. 1952) have all been argued and have been restored to the docket for reargument, 21 U. S. L. WEEK 3307 (U.S. June 9, 1953).

11. The Richmond News Leader in an editorial "Southern Schools III—If the Worst Comes," on May 30, 1951, referred to those who advocate the termination of segregation in the South's public schools as ". . . Northern 'liberals,' and others who do not comprehend the deep-rooted personal desires and traditions of the vast majority of the South's white residents." The following day the News Leader offered its solution if the Court declares segregation to be unconstitutional in an editorial, "Southern Schools IV—If the Best Comes," in these words: "If lawful means can be found to *circumvent* an adverse ruling . . . these means should be reduced to writing for submission to the next General Assembly. If constitutional revision is desirable, appropriate amendments should be drafted. If permissive arrangements are thought desirable, *by which school buildings could be leased to private groups,* these arrangements should be worked out. The best legal minds in the General Assembly—indeed in the State as a whole—should be brought to bear on the complex problems, without thought of political rivalry or partisan advantage. (emphasis added)

12. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

13. 84 Ohio App. 373, 83 N.E.2d 82 (1948)

the city's lease of a swimming pool to a private organization which discriminated, but nowhere attempts to specify one as alone sufficient. The court spoke of the municipality's duty to see that its property is open to all citizens, of the court's inability under *Shelley v. Kraemer*[14] to enforce any contract or lease which would make discrimination possible, and of the private group as being in fact an agency of the city. In *Norris v. Mayor and City Council of Baltimore,*[15] the court admitted the existence of a lease and state aid in several forms. However, because the city had obtained no control, the court held an art school to be private, obviously placing greatest emphasis on the lack of control, while completely failing to consider the effect of state aid or the lease. Two other state courts[16] failed to make explicit whether they based their results on the federal or state constitutions, or on case law. One of these courts utilized a trust theory, holding that the state was a trustee of public property with the duty of seeing that it is used for the benefit of all,[17] while the other imposed the duty upon the state without specifying the ground upon which it relied.[18] Neither court required a showing of state aid or control; the mere lease of government property to a private group was deemed sufficient.

A better understanding of the governmental relationship to unequal treatment may be obtained through classification of factors which may be persuasive of state action. Three common categories are: leasing of property, supplying of aid, and the granting of some power or privilege to private groups. Closely related to these basic elements which establish a governmental relationship is the instance where, because of its size, a private organization assumes functions either ordinarily performed by the government or which affect the rights of a large number of people.[19] Very few situations arise where the factual elements of only

14. 334 U.S. 1 (1948).

15. 78 F. Supp. 451 (D. Md. 1948).

16. Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E.2d 173 (1944); Kern v. Newton, 151 Kan. 565, 100 P.2d 709 (1940).

17. Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E.2d 173 (1944).

18. Kern v. Newton, 151 Kan. 565, 100 P.2d 709 (1940).

19. The court said of a housing project in New York City: "The contract embodied a plan for the rehabilitation of a substandard area comprising eighteen city blocks in the borough of Manhattan by the erection of thirty-five apartment houses capable of accommodating about twenty-five thousand people." Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 529, 87 N.E.2d 541, 547 (1949). These buildings contain 8,755 apartments in the heart of Manhattan and comprise almost 2,500,000 square feet of land 750,000 square feet of which were once city streets. Note, 23 TEMP. L.Q. 209, 211 n.26 (1950). The city of Chickasaw, Alabama, a suburb of Mobile, owned by the Gulf Shipbuilding Corporation, has residential buildings, a system of sewers, a sewerage disposal plant, a business district, and a post office. It was probably not

one category are present; in most cases factors in each classification may appear and their submission to the court as separate considerations will emphasize the governmental link to the activity.

Leasing of Property

An action by the Negro citizens of Warren, Ohio, to enforce their rights to use the Warren Municipal Swimming Pool exemplifies one such instance.[20] The pool was built at public expense with federal and municipal funds; when opened, city authorities imposed no restrictions upon its use. After some white citizens began to patronize a nearby pool at Niles, Ohio, causing a loss of business to the Warren pool, it was leased to the Veterans' Swim Club. This organization, formed for the purpose of operating the pool, paid only a small rental while the city reserved the right to make all necessary repairs.[21] The club invited only persons of the Caucasian race to become members and would not accept applications from Negro veterans nor permit them to swim in the pool. In a similar situation in Montgomery, West Virginia,[22] the city retained all rights of inspection and compelled the private group to use all profits for improvement of the property; these provisions make more manifest the extent of state control. The lease of public land, upon which an amusement park is operated in Atlanta, Georgia, to a private committee composed in part of city officials[23] demonstrates even more forcefully the amount of state participation than does the outright lease; the membership of the committee patently identifies the city with the exclusionary practices. In South Carolina, where preparations have already been made to relinquish the public school system to private individuals should that be deemed necessary,[24] state connection with any dis-

distinguishable from any other small city in this country. Marsh v. Alabama, 326 U.S. 501-503 (1946).

20. Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

21. *Id.* at 378, 83 N.E.2d at 85.

22. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948).

23. Davis v. City of Atlanta, Southeastern Fair Ass'n v. Davis, 84 Ga.App. 572, 66 S.E.2d 188 (1951).

24. On March 16, 1951, Governor James Byrnes of South Carolina said: "Should the Supreme Court decide this case against our position, we will face a serious problem. Of only one thing we can be certain. South Carolina will not now nor for some years to come, mix white and colored children in our schools.

"If the court changes what is now the law of the land, we will, *if it is possible*, live within the law, preserve the public school system, and at the same time maintain segregation. If that is not possible, reluctantly, we will abandon the public school system." (emphasis added)

This statement was reprinted in the editorial "Southern Schools III—If the Worst Comes" in the Richmond News Leader, May 30, 1951. The General Assembly and people of South Carolina have since repealed the section of their constitution

crimination would be evidenced by the lease, the almost certain need of the private schools for financial aid, and a natural tendency of the state to continue to control the curriculum.

Governmental power to lease property to organizations which do not make the facility available to all regardless of race, creed, or color[25] has been limited by recent decisions. The opinions indicated that some courts do not believe that the power to lease embraces the power to discriminate;[26] such action will not remove the city's constitutionally imposed obligation to assure to all citizens the equal protection of the law.[27] Variance exists as to exactly how the responsibility will be imposed. It may be said that the lease includes an "implied provision protecting such constitutional rights,"[28] that the property is leased only temporarily and still belongs to the state and so its use may not be restricted on the basis of color,[29] that the state is a trustee of its property with the public as beneficiary and, therefore, it holds for the benefit of all,[30] or that the state has the duty where the property is built at public expense to make certain that it is available to every citizen.[31] The latter standard appears to be the most clearly stated and the easiest to apply although all impose the same duty. Members of a minority group denied access to publicly constructed swimming pools, amphitheatres, or schools leased to private groups, may attack such ostracism by seeking to invalidate any provision in the lease which might be used to allow such exclusion and to secure judicial recognition of the constitutionally imposed duty of the state to assure that all citizens can enjoy the use of public property.

The theory that temporarily leased property remains subject to the constitutional requirement is opposed by the rationale that since the lease is only temporary it is proper because those barred now will have the

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which required public education for children six to twenty-one years old. S.C. CONST. Art. XI, § 5 *as amended by* Ratification Act No. 24 of the Acts and Joint Resolutions of 1951.

Communication to the INDIANA LAW JOURNAL from the Hon. James F. Byrnes, Governor of the State of South Carolina.

25. Lawrence v. Hancock, 76 F. Supp. 1004 (S.D. W. Va. 1948); Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E.2d 173 (1944); Kern v. Newton, 151 Kan. 565, 100 P.2d 709 (1940); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

26. Lawrence v. Hancock, 76 F. Supp. 1004, 1008 (S.D. W. Va. 1948); *cf.* Easterly v. Dempster, 112 F. Supp. 214 (E. D. Tenn. 1953).

27. *Id.* at 1009.

28. *Ibid.*

29. Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948).

30. Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E.2d 173 (1944).

31. Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W. Va. 1948); Kern v. Newton, 151 Kan. 565, 571, 100 P.2d 709, 713 (1940).

opportunity to lease it later.[32] The latter may be an appropriate, or at least plausible, decision when a picnic area is leased for one or two days,[33] but its application to the leasing of an amphitheatre for most of the summer is highly questionable since only the winter months are left for the excluded group.[34] Refinements and distinctions of the word "temporary" serve only to obscure rather than clarify the main issue: the state's relationship to the exclusionary policy. Although in considering whether the lease is temporary or permanent a court at least tacitly admits that permanent unequal use of the property would be unconstitutional, the litigant's greatest difficulty is that the court may interpret temporary in an almost all inclusive manner.[35]

Possibly the strongest legal attack upon an attempt by a governmental unit to discriminate through the leasing device is proof that the lessee organization is an agency of the state. Clearly a state agency will not be permitted to discriminate. In the leasing situation, retention of control by leasing to a committee of city officials,[36] reservation of rights to inspect,[37] and refusal to allow private profit,[38] are measures which have been employed to evidence an agency relationship.

Granting of Aid

The complexities involved in determining the issue of state action are increased when state aid to a private organization represents the only relationship. It seems clear that the mere receipt of public aid does not transform an otherwise private function into state action.[39]

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32. Sweeney v. City of Louisville, 102 F. Supp. 525 (W.D. Ky. 1951), *aff'd sub nom.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953).

33. See Harris v. City of St. Louis, 233 Mo. App. 911, 111 S.W.2d 995 (1937), distinguished by Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W. Va. 1948), which said that where a city auditorium or pienic ground is made available for rent to white and Negro groups for short periods of time there is no discrimination so long as segregation is not discrimination.

34. See note 4 *supra.*

35. Opponents of governmental evasion of responsibility through the leasing device may bolster their argument by showing the impracticability of contending that a community could build water works, sewerage systems, roads or flood walls under statutory authority and turn them over to private groups without providing for equal use by all. This would be the equivalent of allowing a city to furnish the ways and means for private discrimination. Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W. Va. 1948). In West Virginia the statute that conferred the power for such projects is: W. VA. CODE ANN. §§ 510(2)-510(3) (1949). Similar statutes have been passed in many states. *E.g.,* CAL. GEN. LAWS ACT § 8010 (1945); IND. ANN. STAT. § 48-5305 (Burns Repl. 1950); N.Y. GEN. CITY LAWS § 20(2).

36. See note 23 *supra.*

37. See note 22 *supra.*

38. *Ibid.*

39. No cases were found which held that the mere acceptance of some state

As is true with respect to a lease, the state may give aid to a private group without any desire that its distribution be determined by the recipient's race, creed, or color.[40] Many governmental units, offering varying amounts and kinds of aid to private organizations, intend only to accomplish some worthy public purpose and not to evade any constitutional duty.[41] Nevertheless, if the state by granting assistance achieves a certain amount of control over a private group which pursues exclusionary policies, the relationship between the two becomes more obvious and may be utilized as the basis for legal attack.

A privately operated and controlled art school in Baltimore, Maryland, receiving state assistance through reduced rent and subsidization, refused to permit attendance by Negroes.[42] In return for the subsidy, city council members were permitted to grant scholarships to a limited number of white students. Moreover, as the governmental aid exceeded the value of the scholarships,[43] the state by subsidy made possible reduced tuition costs.

In another Baltimore case the city contributed financially to the Enoch Pratt Free Library, but Negroes were refused admission to its training class for librarians.[44] The library though privately established, now receives annual appropriations from the city and was expanded with municipal funds into a large and modern library to meet the city's needs. Since 1935 library employees have received their salaries directly from the city, have utilized its retirement plan, and in addition the library's budget requires approval by the city council; all are methods by which the municipality may exercise control over the library.

In recent years government has either assumed the function of building homes or attempted to further it by assisting in the construction of low cost public housing.[45] A large part of the new Levittown being erected near Morristown, Pennsylvania, in connection with the establishment of the new U. S. Steel plant in that area, is being financed

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aid made the activity public. Even those cases which extended the concept did not so hold. See note 25 *supra.*

40. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949).

41. *Ibid.*

42. Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

43. *Id.* at 445. Tuition is at the most $190 a year per student and the state scholarships are given to 100 white students, a total value of $19,000. The city appropriates $16,500 annually and rents a building to the school at a saving of $11,500 making a total $28,000 expended by the state. It can be argued that the granting of the scholarships by the council is clearly state action and is discriminatory because Negroes are ineligible to receive them.

44. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945).

45. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 522, 87 N.E.2d 541, 545 (1949); STRAUS, TWO-THIRDS OF A NATION 116, 210-211, 236 (1952).

by federal government low interest loans.[46] The builder, however, refuses to sell or rent the homes he builds to Negroes so that the housing project is being established with discrimination.[47] Consequently, this action will change the previous residential pattern in which the few Negroes residing in the area were not segregated.[48] The denial of medical treatment to Negroes by hospitals receiving state aid[49] and the denial of admission to the classes or auditorium of a large university which accepts state grants[50] are other examples of the varied methods by which governmental units in this country are able indirectly to extend aid solely to members of the Caucasian race.

Aid which practically supports a private enterprise[51] opens the way for the agency theory to again be employed as a basis for an assault upon discriminatory practices. This should obviously follow since the ability to withhold the aid enables the state to end the project at will. If the function performed is ordinarily public, in addition to the receipt of a large amount of state aid, authority exists for enjoining the discriminatory practices.[52] State assistance in exchange for certain controls over the private group appears to be analogous to retention of control through a lease and, therefore, should subject the activity to the same constitutional restraints.[53]

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46. Communication to the INDIANA LAW JOURNAL from Mr. Sol Rabkin of the Anti-Defamation League of B'nai B'rith.

47. *Ibid.*

48. *Ibid.*

49. Negro patients are not admitted to the Cleveland, Mississippi, hospital although public funds are used to support it in part. Negro patients there receive only first aid regardless of their needs and those desiring more must go to larger cities where segregated facilities are provided for them in publicly supported institutions. A Negro seriously injured in an accident in the South may even be refused emergency treatment. Such a refusal in Dalton, Georgia, resulted in the untimely death of Miss Juliette Derricotte, an internationally known educational and social leader. JOHNSON, PATTERNS OF NEGRO SEGREGATION 51 (1943). Christopher, *The Need for a Civil Rights Act in the District of Columbia,* 6 LAW. GUILD REV. 582, 584 (1946). FRAZIER, THE NEGRO IN THE UNITED STATES 546 (1949).

50. Representative Arthur Klein informed the House of Representatives that George Washington University has received federal funds with some of the appropriations specifically prohibiting discrimination in their use and yet the university continues its discriminatory practices against Negroes. No Negroes attend George Washington and its famed Lisner Auditorium constructed with a grant by Abram Lisner, which specifically prohibited discrimination in its use and ordered that the Bill of Rights be inscribed on its walls, does not permit Negroes to enter. 96 CONG. REC. A 1321, A 1330 (1950).

51. Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945).

52. Marsh v. Alabama, 326 U.S. 501 (1946); Smith v. Allwright, 321 U.S. 649 (1944).

53. Less obvious means of providing aid are enforcement of contracts of a private group (which is also a grant of power) or even by granting a corporate charter which gives the corporation legal benefits it could not otherwise have.

When the aid granted is insufficient to permit use of the agency argument, a court may refuse to enjoin the unequal treatment of citizens on the grounds that it is entirely private and the Fourteenth Amendment "erects no shield against merely private conduct however discriminatory or wrongful." [54] Thus a district court, while conceding that a private school was receiving financial aid directly and in the form of a reduced rental and was using property leased from the city, held that the institution could refuse to do anything about the discrimination.[55] If this activity, and therefore the discrimination, can be considered private, then certainly a university or hospital receiving only small amounts of government assistance could also be considered private for purposes of the equal protection clause proscription.

While a state cannot condition the use of its educational, recreational, or medical facilities on one's race, creed, or color[56] it can be maintained that through the various forms of aid the state has accomplished indirectly what cannot be done directly. Thus the states have assisted in providing medical care, education, and recreation for white, but not for Negro citizens. Although perhaps insufficient to treat the private group as a state agency, the fact remains that the aid is state action. the benefits of which some citizens are denied solely because they are not members of the Caucasian race. Since, as the Supreme Court has proclaimed, the Constitution would be worth little if its mandates could be indirectly violated,[57] the way is opened for future challenges aimed not at eliminating the discrimination, but at halting the state aid. Prohibiting public assistance will apply pressure on the private organization to cease the discrimination in order to receive aid again. Relying upon the premise that the state cannot indirectly accomplish what it cannot do directly, the injured party's remedy would be to enjoin the agency or agent representing the state from continuing the assistance to the private group.[58] The aid being furnished was made possible through taxes collected from *all* citizens within the jurisdiction of the governmental unit and the right to enjoy the benefits of the expenditure of them should

54. Shelley v. Kraemer, 334 U.S. 1, 13 (1948), is a recent affirmance of this doctrine which was set out by the Court in the Civil Rights Cases, 109 U.S. 3 (1883).

55. Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948).

56. "Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color." Shelley v. Kraemer, 334 U.S. 1, 23 (1948).

57. Smith v. Allwright, 321 U.S. 649, 664 (1944); Lane v. Wilson, 307 U.S. 268, 275 (1948).

58. 15 U. OF CHI. L. REV. 745, 754 (1948).

not be dependent upon one's race, creed, or color. An advocate of such argument bears the burden of impressing upon the court the fact that the state in making the disbursement has the duty to see that there is no discrimination in its use.

Grant of Power

Receipt by a private organization of a governmental grant of power or privilege is also in a sense a form of aid to the recipient. Nevertheless, separate categorization is justifiable because it lends emphasis to the difference between outright financial assistance, especially when it is only a small percentage of the total income, and what might be termed an actual delegation of governmental power. In the former case difficulty is encountered in connecting the state to the activity, while in the latter situation the use of state power is more apparent. A union enabled by statute to become the sole bargaining agent for a company's employees is thus permitted to attain far more power than would otherwise be possible. Though the record of unions in this area is for the most part good,[59] some have excluded certain races from membership, a practice which often prevents the employment of those individuals.[60] A further example of this category of state action is the Stuyvesant Corporation in New York City[61] which accepted certain powers and benefits from the state[62] in order to facilitate the construction of a housing project from which Negroes were barred.[63]

Although authority and power granted by a state to private organizations have brought their actions within the 14th Amendment prohibition,[64] difficulty arises in ascertaining the amount of power the state must grant before this contention may be advanced successfully. New York City conferred upon the Stuyvesant Corporation the power of eminent domain and also granted permission to arrange the streets within the housing area,[65] yet the New York Court of Appeals chose to label the ex-

59. Northrup, *Unions and Negro Employment,* 244 ANNALS 43, 44 (1946).
60. *Ibid.*
61. Dorsey v. Stuyvesant Town Corp., 229 N.Y. 512, 87 N.E.2d 541 (1949).
62. *Id.* at 535, 87 N.E.2d at 551.
63. *Id.* at 520, 87 N.E.2d at 542. The New York City Council prohibited discrimination in private housing projects which receive financial aid from the city by passing the Brown-Isaacs Bill. New York Times, Feb. 17, 1951, p. 1, col. 6 and March 15, 1951, p. 6, col. 4. The New York Legislature in 1950 passed a law which guarantees equal rights to all in publicly aided housing projects. N.Y. CIVIL RIGHTS LAW § 18-a.
64. Steele v. L. & N. R.R., 323 U.S. 192 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).
65. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 520, 87 N.E.2d 541, 542 (1949).

clusion of Negroes private action.[66] When the government delegates powers, which otherwise it alone exercises, to a private organization, that group acquires some of the functions of government. To effectively prevent the delegation of powers to be used as a means of circumventing the Constitution requires that the ban against treatment be applicable to every exercise of governmental powers. When an individual acting under color of state law discriminates against another, the action can be enjoined even though it was not specifically authorized by state law.[67] In this situation the constitutional guarantee of equal protection is applied to the power however used; the inquiry does not proceed to the question of whether the power was being rightfully used. Similarly, delegations of powers should be exercised in accordance with the 14th and 15th Amendments.[68]

The agency doctrine may be successfully invoked if the power granted by the state is necessary for the private group to act or if it can be proved that the private group is under the state's complete control.[69]

Performance of a Public Function

A private group exercising a governmentally conferred power closely resembles a group which merely because of its size or function

66. Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949).

This opinion received a vigorous and well written dissent, *id.* at 536, 87 N.E.2d at 552 written by Fuld J., Loughran C.J. and Desmond J. of N.Y. Court of Appeals. It has also been the target of sharp criticism. *E.g.*, Notes, 23 TEMP. L.Q. 209 (1950); 11 OHIO ST. L.J. 97 (1950); 25 NOTRE DAME LAW. 146 (1949); 98 U. of PA. L. REV. 247 (1949); *contra* 28 TEXAS L. REV. 976 (1950); 34 VA. L. REV. 345 (1948).

67. The guarantees and prohibitions apply to the states and all who are the repositories of state power. Home Telephone and Telegraph Co. v. City of Los Angeles, 227 U.S. 278, 288 (1912). Closely connected with these cases is the situation where a state official's discriminatory acts are accomplished by virtue of some authority conferred upon him by the state and are thereby declared unconstitutional. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." United States v. Classic, 315 U.S. 299, 326 (1940). For other excellent discussions of "color of state law" see Screws v. United States, 325 U.S. 91 (1944); Valle v. Stengel, 176 F.2d 697 (3d Cir. 1949). In Catlette v. United States, 132 F.2d 902, 906 (4th Cir. 1943), the court said: ". . . [T]he action of a duly qualified officer, acting within the scope of his authority, constitutes State action, even though the particular acts complained of may not be authorized." See also, Notes, 61 HARV. L. REV. 344, 348 (1948); 15 U. OF CHI. L. REV. 745, 750 (1948).

68. "The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power. . . ." *See* Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring opinion).

69. "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy, or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. Steele v. L. & N. R.R., 323 U.S. 192, 198 (1944). *See* also Nixon v. Condon, 286 U.S. 73, 88, 89 (1931); Kerr v. Enoch Pratt Free Library of Baltimore City, 149 F.2d 212 (4th Cir. 1945).

is able to hinder the same rights as a government not restrained by an equal protection clause. Extension of the concept of state action to include judicial enforcement of restrictive covenants[70] has resulted in the formation of land companies or clubs which must approve prospective purchasers of property within a residential area.[71] These innovations are adopted ostensibly to protect the cultural standards of the neighborhood,[72] but in reality they provide a method for the private zoning of a community. One such scheme is effected by a corporation's purchase of a large area which is leased only to individuals with proper qualifications. Another places title in the individual but requires that the sale of the property be with the consent of the board of directors of a nonprofit corporation.[73] A third device is now in operation in the Shaker Heights residential section of Cleveland, Ohio; the plan concerns only the occupancy or use of the property, thereby avoiding laws prohibiting restraints on alienation.[74] Anyone purchasing property within the area must be granted an occupancy or membership permit by the "permit committee" of a nonprofit organization. A person buying without such a permit confronts an ejectment suit or injunction and his grantor is subject to a suit for damages. A requirement that a bond be furnished, to be forfeited if the agreement is broken, makes enforcement more effective.[75] All of these include but a tacit agreement to exclude Negroes, since the deeds contain only nonracial standards upon which to judge applicants.[76]

Ample authority exists for the proposition that individuals and groups performing duties of great public interest which are not of mere private concern may be held subject to the restraint of the Constitution. "The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[77] Further, a relationship "too close in origin and purpose to functions" of government may make impossible the denial of service without good cause;[78] when an organization "takes on . . . attributes of government," constitutional safeguards are drawn into play.[79]

70. Shelley v. Kraemer, 334 U.S. 1 (1948).
71. Note, 37 CALIF. L. REV. 493 (1949).
72. *Id.* at 494.
73. *Id.* at 494 n.10.
74. *Id.* at 495 n.11.
75. *Id.* at 495 n.13.
76. *Id.* at 497.
77. Marsh v. Alabama, 326 U.S. 501, 506 (1946).
78. Nash v. Air Terminal Service, 85 F. Supp. 545, 549 (E.D. Va. 1949).
79. Terry v. Adams, 345 U.S. 461, 484 (1953). The Court in this case was

The land company which assumes the task of zoning a large area of the community receives little or no actual power from the city since its formation and continued existence are dependent upon the members. If a Negro, after being judged of insufficient "culture," buys and occupies property without obtaining the permit he has covenanted to receive, his defense based on the *Shelley* case[80] to a suit for ejectment will encounter difficulty in proving that race, creed, or color was the basis of the decision to withhold the permit.[81] Unless this can be accomplished, the court will enjoin occupancy or grant some other remedy against the prospective purchaser or his grantor;[82] if proof of discrimination can be shown, *Shelley v. Kraemer*[83] is authority for refusing to enjoin. Success of future legal proceedings against these corporations or clubs will depend upon judicial willingness to recognize the absence of one race in an area over a long period of time as evidence of discrimination and to recognize that the function being performed, zoning, is ordinarily done by a municipality. This latter approach corresponds to that used to prevent Negro exclusion from Democratic primaries[84] in the South and impairment of constitutional rights by a privately owned town.[85] In the hospital and school situations similar appreciation by the judiciary that a vital public task is being privately performed will be necessary before any great advances can be made, unless of course, one or more of the three relationships is also present. In such cases the combination of public function and a lease, aid, or grant of power would seem to be a compelling reason for finding the existence of state action.

Conclusion

Reexamination of the doctrine of private and state action reveals that the distinctions have been used not to further the purposes of the 14th and 15th Amendments, but to render them helpless. The court should not determine whether an activity is public or private by any abstract technical rules of law based on whether the private group is a representative of the state in principal and agent sense[86] or dedicated

referring to the Jaybird Party which had assumed the responsibility of choosing candidates for the Democratic primary.

80. 334 U.S. 1 (1948).

81. Note, 37 CALIF. L. REV. 493, 496-497 (1949).

82. Chapman v. Sheridan-Wyoming Coal Co., 338 U.S. 627, 628-629 (1949); for a collection of cases discussing enforcement of restrictive covenants where no racial issue is involved see 89 A.L.R. 812 (1934).

83. 334 U.S. 1 (1948).

84. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

85. Marsh v. Alabama, 326 U.S. 501 (1946).

86. Nixon v. Condon, 286 U.S. 73, 89 (1932).

to a public purpose as elucidated by a state court relying upon the common law.[87] It is essential to determine as a factual matter the degree to which an owner for his own advantage makes his property available for use by the general public or to ascertain the actual relationship of the activity to the state; the greater the degree or relationship the more necessary it becomes to apply constitutional restraints. Clearly at least three types of factual connection exist which may be used to show a relationship between government and discrimination. When facing a situation of private exclusionary practices which is in some way related to the state, the possibility of the existence of each of these should be thoroughly explored.

Every governmental action in the United States in order to comply with the Constitution must not discriminate, and this mandate should be applied with equal care to every state movement large or small, direct or indirect.[88]

87. Marsh v. Alabama, 326 U.S. 501, 510 (1946).

88. Mr. Bill Downs on the program "Edward R. Murrow with the News," C.B.S. Radio Network, Friday, December 26, 1952, 7:45-8:00 P.M., E.S.T., expressed the following hope: ". . . [O]ne by one the men soaked off the black from their faces and hands. The towels revealed that two of those soldiers were Negroes, seven were white, two of the men were brown, one being from Puerto Rico, the other from Guam and the remaining two were yellow, South Koreans. There was no consciousness in that bunker that one man was a different color from the other. It wasn't the camouflage soot that made them the same either. It was something deeper, stemming from the fact that a patrol depends upon the cooperation of each individual member of it for its survival. . . .

"It struck me that the cauldron that is the war in Korea also is a melting pot, just as diplomatically, the United Nations is a melting pot, and before the U. N., the United States was and is a melting pot . . . *[p]erhaps the greatest good that will emerge from this Far Eastern crisis is an awareness that freedom-loving men of all races and nations will have proved that they can and must work and fight together if their freedom is to survive.*" (emphasis added)