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*665 A CONCEPTUAL HISTORY OF THE **STATE ACTION DOCTRINE**: THE SEARCH FOR GOVERNMENTAL RESPONSIBILITY [PART II OF II]

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This Article is the second of a two part treatise containing an historical analysis of the state action doctrine. It has been adapted to the format of the Houston Law Review for publication purposes. The first half of this treatise appeared in the Summer 1997 issue of the Houston Law Review, 34 Hous. L. Rev. 333 (1997). Any references in this Article to Parts I-IV are contained in the first Part of this treatise.

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A. Historical Summary

This Part discusses both the beyond state authority and the projection of state authority issues. As before described, [FN1] both of these issues are subsections of the broader state nexus issue in that both issues are concerned with the degree of contact (or lack of contact) between alleged wrongdoers and the state. The beyond state authority issue asks this question: Do state actors cease to be state actors when acting beyond the scope of their governmental authority? Or, stated another way, does acting beyond the scope of governmental authority transform a state actor into a private actor through "loss of contact" with the state? Here, the "bad sheriff" hypothetical is the paradigm. [FN2] As a general proposition, state law does not authorize sheriffs to brutalize prisoners. [FN3] If a sheriff brutalizes a prisoner, the sheriff is ***668** clearly acting beyond the scope of the state authority vested in the office of sheriff. Does the sheriff, for that reason, cease to be a state actor?

Somewhat surprisingly, the Supreme Court at first answered this question in the affirmative. In its 1904 decision in Barney v. City of New York, [FN4] the Court held that a state actor ceases to be a state actor when committing an act forbidden by state law. [FN5] The Court distinguished Barney from cases in which a state actor "proceeded in excess of its powers but not in violation of them." [FN6] By mid-century, however, the Court had in substance reversed its Barney position. In cases such as Screws v. United States [FN7] and Williams v. United States, [FN8] the Court stated that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." [FN9] In later cases, the Court has adhered to the Screws and Williams position. [FN10] Thus, the Barney Court's elusive distinction between acting in violation of state law rather than in excess of state-granted authority no longer has substantive vitality. [FN11]

While eliminating the Barney Court's distinction, the Court has always recognized that public officials have a private life and that, in some instances, public officials act in a private capacity. In Screws, for example, the Court stated that "acts of officers in the ambit of their personal pursuits are plainly excluded" from the coverage of "under color of law" statutes. [FN12] Of course, this recognition by the Court leaves open the following question: when are public officials acting in a private capacity, i.e., within "the ambit of their personal pursuits" ? If a sheriff hosts a private dinner at home, the sheriff is surely acting in a private capacity ***669** in determining his or her dinner guests. [FN13] As discussed later in this Part, [FN14] other fact situations may present a closer "private capacity" question. Here, the Court has yet to supply definitive factors for distinguishing private capacity from official capacity, almost certainly because history has not required the Court to do so.

With respect to the projection of state authority issue, Supreme Court history is sparse. The Court has never confronted a "pure" projection of state authority case in which a private actor, completely without state support or approval, projects an aura or semblance of state authority in dealing with third parties. Such a case would require the Court to determine whether a private actor who thus projects state authority must live with the consequences of that projection and be treated as a state actor.

In its 1951 decision in Williams v. United States, [FN15] the Court approached this issue but did not squarely meet it. [FN16] In Williams, the wrongdoer, the owner of a private detective agency, "held a special police officer's card issued by the City of Miami, Florida." [FN17] Also, an individual named "Ford, a policeman, was sent by his superior to lend authority to the proceedings" that resulted in the wrongful action.

[FN18] Thus, the Williams facts involved some degree of state assistance to and participation in the wrongful actions and did not present the Court with a pure projection of state authority issue. Because conceptual history is virtually nonexistent in relation to the projection of state authority issue, scholars have the luxury of writing on a clean slate, influenced by emanations from related Court decisions such as Williams. Exercising that freedom, a later subsection of this Part explores the conceptual nuances of the projection of state authority issue in a largely theoretical manner. [FN19] The issue, in its pure form, may never reach the Supreme Court. As in Williams, private actors projecting state authority will nearly always have some actual tie to the state in one or more of its manifestations.

***670** B. State Action and Under Color of Law: Almost Identical Twins

A number of United States statutes punish crimes and provide for civil relief only if the wrongdoer is acting "under color of" state law. [FN20] For example, 42 U.S.C. § 1983 provides civil relief for an injured party who is deprived of a right secured by the Constitution or laws of the United States by any "person" acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia." [FN21] This subsection explores the relationship between the concept of state action as defined in Court opinions interpreting the Constitution and the concept of "under color of" state law as used in United States statutes such as 42 U.S.C. § 1983. For ease of discussion, the phrase "under color of state law" will be constricted to "under color of law."

Simply stated, the concepts of state action and under color of law are almost identical twins. In its 1991 decision in Hafer v. Melo, [FN22] the Court stated that "we have held that in § 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement." [FN23] Similar statements appear in other Court opinions. [FN24] These Court statements fairly support the proposition that the concepts of "state action" under the Fourteenth Amendment and "under color of law" under Section 1983 are identical in meaning and scope for all purposes. Why, then, the hedge evidenced in the "almost identical twins" part of the title to this subsection?

In Polk County v. Dodson, [FN25] the Court considered the question of "whether a public defender acts 'under color of state law' when representing an indigent defendant in a state criminal proceeding." [FN26] In Dodson, the public defender, Martha Shepard, "had been assigned to represent Dodson in the appeal of a conviction ***671** for robbery." [FN27] After investigating the case, however, Shepard "moved for permission to withdraw as counsel on the ground that Dodson's claims were wholly frivolous." [FN28] The Iowa Supreme Court granted Shepard's motion. [FN29] Thereafter, Dodson sued Shepard under Section 1983, claiming that her withdrawal from the case had deprived him of his right to counsel and other constitutional rights. [FN30] The United States Supreme Court rejected Dodson's claim, holding "that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." [FN31]

In reaching its conclusion, the Dodson Court stressed that, in relation to the state, the normal representational decisions made by a public defender on behalf of a client are "adversarial functions." [FN32] The Court noted that "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." [FN33] To refute this argument, Dodson, "[r]elying on such cases as Burton v. Wilmington Parking Authority and Moose Lodge No. 107 v. Irvis, [claimed] that the State's funding of criminal defenses makes it a 'joint participant' in that enterprise, locked in a 'symbiotic relationship' with individual public defenders." [FN34] Discounting Dodson's reliance on Burton and Moose Lodge, the Court stated in footnote twelve:

> In both Burton and Moose Lodge the question was whether "state action" was present. In this case the question is whether a public defender--who is concededly an employee of the county--acted "under color of state law" in her representation of Russell Dodson. Although this Court has sometimes treated the questions as if they were identical, we need not consider their relationship in order to decide this case. Our factual inquiry into the professional obligations and functions of a public defender persuades us that Shepard was not a "joint participant" with ***672** the State and that, when representing

[Dodson], she was not acting under color of state law. [FN35]

It is this somewhat elliptical footnote in Dodson that prevents a categorical statement that state action and under color of law are identical concepts for all purposes. While the Court has repeatedly held that the two concepts have the same meaning for purposes of the particular case before it, [FN36] Dodson's footnote twelve represents a hedge that gives the Court some "wiggle" room to depart from that position should special facts make that course of action desirable. [FN37]

While the Court in Dodson reserved theoretically the right to make a distinction between the concepts of state action and under color of law, it has not yet done so in concrete fact situations. Accordingly, this article will treat the two concepts as having the same meaning in relation to state action issues. For purposes of this article, therefore, a person acting under color of state law for statutory purposes is a state actor for constitutional purposes. As stressed in Hafer v. Melo, [FN38] this fusion of meaning recognizes "that Congress enacted § 1983 'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."' [FN39]

Before leaving this subsection, a final disclaimer is in order. Apart from questions of state action, Section 1983 cases have spawned a wide array of related constitutional and statutory construction issues. These issues include: (1) To what extent may public officials claim absolute or qualified immunity from liability for their actions? (2) To what extent does "good faith" exonerate public officials from liability for their actions? (3) To what extent are cities, counties, and other municipalities liable for the wrongful acts of their employees? (4) To what extent does the Eleventh Amendment shield states and state actors from liability for their actions? (5) What is the impact of the doctrine of sovereign immunity on all of the preceding questions? [FN40] These and still other related issues are beyond the scope of this treatise. To ***673** the extent that emanations from the above issues affect resolution of state action issues, those emanations will be noted. [FN41]

C. The Beyond State Authority Issue

1. The Rise of the Barney Distinction. Of the six state action issues discussed in this treatise, the beyond state authority issue was the first state action issue confronted by the Court after its seminal decision in the Civil Rights Cases. [FN42] In 1904, the Court decided the case of Barney v. City of New York. [FN43] In Barney, the Board of Rapid Transit Commissioners for the City of New York [hereinafter "the Board"] secured approval, as prescribed by state law, for the construction of a rapid transit railroad. [FN44] This approval provided for a tunnel to be built under Park Avenue at a fixed location. [FN45] Instead, the Board informally approved construction of a tunnel twenty-seven feet nearer to the premises of complainant Barney, a Park Avenue resident, than was authorized by the officially approved plan. [FN46] A Board-hired contractor began construction of the tunnel at the informally-approved location. [FN47] Barney sought to enjoin the Board and the City of New York from proceeding with construction of the tunnel at the "wrong" location, arguing that such construction would deprive him of property without due process of law. [FN48] The Supreme Court affirmed the lower federal court's dismissal of Barney's action, holding in substance that Barney's complaint did not raise a federal question. [FN49]

The Barney Court's "no federal question" holding was based on its conclusion that no state action had affected Barney's property interests because the construction of the tunnel at the wrong location was unauthorized by state law. [FN50] The Court reasoned that Barney's complaint

> proceeded on the theory that the construction of the [wrong location] tunnel section was not only not ***674** authorized, but was forbidden by the legislation [that officially approved the tunnel], and hence was not action by the State of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction. [FN51]

The Court noted further that "it is for the state courts to remedy acts of state officers done without the authority of or contrary to state law." [FN52]

Perhaps recognizing the potential breadth of its holding, the Barney Court distinguished an earlier case in which "a public board was given power to improve streets, and proceeded in excess of its powers but not in violation of them." [FN53] In Barney, however, the Court stressed that the Board was "proceeding, not only in violation of the provisions of the state law, but in opposition to plain prohibitions." [FN54] Thus, the "Barney distinction": if a state actor acts "in excess of its powers but not in violation of them," the actor remains a state actor. [FN55] If, however, the state actor acts "in violation of provisions of the state law," especially "in opposition to plain prohibitions," the state actor ceases to be a state actor and becomes a private actor. [FN56]

The Barney distinction is a mystical, even pernicious, abstraction and, as a practical matter, is unworkable. Within the framework of state law, every unauthorized act by a state actor is a violation of state law. [FN57] By definition, state law always prohibits state actors from engaging in acts unauthorized by state law. Conceptually, there is no discernible dividing line between acts in excess of granted authority and acts in violation of state ***675** law; if the act exceeds state-granted authority, it violates state law. From a policy viewpoint, it makes little sense to permit state actors to shed their state action mantle by performing acts unauthorized by state law. It is precisely this category of acts that should generate the most constitutional concern. To permit a state actor to become a private actor through the simple expedient of acting in violation of state law is to disable federal power from acting in a broad category of cases where federal intervention is often urgently needed.

As later cases recognize, in dealing with the beyond state authority issue, the proper constitutional distinction is between "official-capacity" acts and "private-capacity" acts, between acts taken by a state actor in the actor's official capacity and acts taken by a state actor in the actor's private capacity. [FN58] Later portions of this Part explore this distinction more fully. [FN59] For present purposes, it is enough to stress that a state actor who acts in violation of state law is still acting in an official capacity as long as the offending action is materially facilitated by his or her state actor status. That should be the inquiry, not the pursuit of a nonexistent distinction between acts in excess of state authority and those in violation of state law.

The bankruptcy of the Barney distinction was illustrated three years later in the Court's 1907 decision in Raymond v. Chicago Union Traction Co. [FN60] In Raymond, the Chicago Union Traction Company [hereinafter "the Company"] claimed that a state board of equalization [hereinafter "the Board"] had assessed property taxes in a discriminatory manner in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. [FN61] The Court sustained that claim. [FN62] After first noting that the Board was an instrumentality of the state and, therefore, a state actor, [FN63] the Court concluded that the Board remained a state actor when it assessed taxes in a discriminatory manner. [FN64] Conceding that the Board's action was contrary to a ***676** provision of the state constitution requiring that all property taxes be assessed in proportion to the value of a taxpayer's property, [FN65] the Court stressed that the Board "was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board." [FN66]

What, then, of Barney? The Raymond Court distinguished Barney because Barney held that "where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here." [FN67] This distinction makes no practical sense. The offending acts in Barney and Raymond were both forbidden by state law. Indeed, the Raymond Court conceded that the tax board's action "ignored" the requirements of the state constitution. [FN68] Small wonder that the Raymond Court dismissed Barney so tersely. Further discussion would have revealed the gaping weakness of the Barney distinction.

In its 1913 decision in Home Telephone & Telegraph Co. v. City of Los Angeles, [FN69] the Supreme Court approached repudiation of the Barney distinction but failed to overrule Barney expressly. In Home Telephone, the City of Los Angeles [hereinafter "the City"] fixed telephone rates pursuant to power granted by state law. [FN70] The Home Telephone and Telegraph Company [[[hereinafter "the Company"] alleged that the rates fixed by the

City were confiscatory and, therefore, constituted a taking of property without due process of law in violation of the Fourteenth Amendment. [FN71] The City claimed that, if the Company's allegations were true, the City would no longer be a state actor because it would then be acting beyond the authority granted to the City by state law. [FN72] The Supreme Court rejected that claim, holding that state action is present when

> one who is in possession of state power uses that power to the doing of the wrongs which the [Fourteenth] ***677** Amendment forbids even although the consummation of the wrong may not be within the power possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. [FN73]

Expressly noting Barney, the Home Telephone Court stated that if Barney was read to prevent a finding of state action under the facts of Home Telephone, then, intervening cases have caused Barney to be "so distinguished or qualified as not to be here authoritative or even persuasive." [FN74] The Court added that the Barney decision "proceeded upon the hypothesis that the facts presented took [that] case out of the established rule" that abuse of state-granted authority by a state actor does not remove the actor's state action taint. [FN75] Accordingly, there was "no ground for saying that [[[Barney] is authority for overruling the settled doctrine which, abstractly at least, it recognized." [FN76]

While Home Telephone clearly limited Barney as precedent, the Court's opinion did not expressly repudiate the Barney distinction between acts in excess of state-granted authority and acts forbidden by state law. Stated otherwise, the Home Telephone Court did not expressly acknowledge that, in a substantive, practical sense, all acts that exceed state-granted authority are, for that very reason, forbidden by state law. At least theoretically, therefore, the ghost of Barney survived Home Telephone, albeit in weakened form.

2. The Ultimate Fall of the Barney Distinction. For several decades, the Barney distinction slumbered and did not play a significant role in state action analysis. Then, in the 1940s, the issues raised by the Barney distinction returned in a more dramatic and tragic form. In its 1945 decision in Screws v. United States, [FN77] the Court confronted what it described as "a shocking and revolting episode in law enforcement." [FN78] Sheriff Screws of Baker County, Georgia, and two other public officials arrested Robert Hall, a black citizen of the United States and of Georgia. [FN79] After arresting Hall, Screws and his two cohorts ***678** brutally beat and murdered him. [FN80] Screws and his cohorts were charged under federal law with a violation of Section 20 of the Criminal Code, [FN81] which made it a crime, while acting "under color of" state law, to "willfully" deprive "any inhabitant of any State, Territory, or District . . . of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States." [FN82] After a trial by jury in federal district court, the defendants were found guilty of violating Section 20, and the verdict was affirmed by the Circuit Court of Appeals. [FN83] For complex conceptual reasons, the Supreme Court reversed the conviction and remanded the case for a new trial. [FN84]

For the Supreme Court, the main issue in Screws related to the question of vagueness: does Section 20 provide an "ascertainable standard of guilt?" [FN85] In his plurality opinion announcing the judgment of the Court, Justice Douglas considered the vagueness issue at length [FN86] and concluded that Section 20 could be saved by construing the word "willfully" in the statute to require a specific intent on the part of the accused "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." [FN87] Because the jury had not been instructed properly on this point, Douglas concluded that the case should be remanded for a new trial in accordance with proper instructions on the meaning of the word "willfully." [FN88]

***679** Having disposed of the vagueness issue, Douglas next focused on the beyond state authority issue and, for all practical purposes, obliterated the Barney distinction. Screws argued that because his murder of Hall violated state law, he should not be regarded as acting under color of state law within the meaning of Section 20. [FN89] Douglas rejected this contention. [FN90] Citing with approval United States v. Classic, [FN91] the Court stated "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken

'under color of state law."' [FN92] Douglas noted that the "Classic case recognized, without dissent, that the contrary view would defeat the great purpose which § 20 was designed to serve." [FN93]

Douglas then used language which, at first glance, echoes the Barney distinction. Noting that Hall's murder followed his arrest by Screws, he continued:

> We are not dealing here with a case where an officer not authorized to act nevertheless takes action. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. [FN94]

This language might suggest that Douglas is adhering to the Barney distinction between acts in "excess" of granted authority, viz., use of excessive force after an initially lawful arrest, and acts totally prohibited by state law, viz., random arrests without cause. However, Douglas clarifies his position with the passage immediately following:

> It is clear that under "color" of law means under "pretense" of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. Acts of officers who under ***680** take to perform their official duties are included whether they hew to the line of their authority or overstep it. If, as suggested, the statute was designed to embrace only action which the State in fact authorized, the words "under color of any law" were hardly apt words to express the idea. [FN95]

Here, Douglas moved to the critical and proper distinction between "official capacity" acts and "private capacity" acts, or, in other words, between acts materially facilitated by the actor's status as a public official and "acts of officers in the ambit of their personal pursuits." [FN96] Clearly, Georgia law prohibited Screws from murdering Hall after arresting him. Should the reach of "under color of law" and, with it, "state action" turn upon the fact that the unauthorized act followed an authorized act, instead of being the initial act itself? Suppose that Screws, while on duty, had simply shot Hall after telling onlookers that Hall was a troublemaker who needed to be eliminated for the good of law and order in the community? Surely the meaning of under color of law and state action should not turn on the question of whether Screws murdered Hall after the performance of an initially state-authorized act, i.e., lawful arrest. Again, the right question to ask is whether the murder of Hall was materially facilitated by Screws' status as sheriff. [FN97]

In his movement away from Barney, Douglas reached back into history to a case that predates even the Civil Rights Cases, namely the Court's 1880 decision in Ex parte Virginia. [FN98] In Ex parte Virginia, a judge, in violation of state law, discriminated against blacks in the selection of jurors. [FN99] As noted by Douglas, "in deciding what was state action within the meaning of the Fourteenth Amendment [the Ex parte Virginia Court] held that it was immaterial that the state officer exceeded the limits of his authority." [FN100] In language quoted by Douglas in his Screws opinion, [FN101] the Ex parte Virginia Court explained its position as follows:

> [a]s [the state judge] acts in the name and for the State, and is clothed with the State's power, his act is that of the ***681** State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it. [FN102]

Because Ex parte Virginia was a pure "state action" case, its language supports the proposition that, in relation to the "beyond state authority issue," the same meaning attaches to the concepts of "state action" and "under color of law."

Later cases have eliminated whatever ambiguity may inhere in the Screws case analysis of the beyond state authority issue. In its 1951 decision in Williams v. United States, [FN103] the Court faced facts substantially similar to those in Screws and reached the same conclusion in relation to the beyond state authority issue. In Williams, "[p]etitioner [Williams] and others over a period of three days took four men to a paint shack on [a lumber] company's premises and used brutal methods to obtain a confession from each of them." [FN104] Noting several indications that Williams and his cohorts had "acted under authority of Florida law," [FN105] the Court reiterated that "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." [FN106] Significantly, in describing Williams' conduct, the Court stated that "the manner

of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person." [FN107] Here, the Court recognized the distinction between official capacity acts and private capacity acts and concluded that the offending action of Williams and his cohorts was materially facilitated by the state action status that they occupied while conducting their investigation. [FN108]

Again, in its 1966 decision in United States v. Price, [FN109] the Court assumed, almost without discussion, that the brutal murders committed by Sheriff Price and his cohorts constituted action ***682** taken under color of law. [FN110] Deputy Sheriff Price along with the sheriff of Neshoba County, Mississippi, a patrolman, and sixteen others engaged in a conspiracy to kill three individuals. [FN111] Price and his cohorts did not cease to be state actors when they acted beyond the authority of Mississippi law and, indeed, in direct violation of that law. [FN112] Their action was materially facilitated by Price's status as sheriff because Price had previously detained his victims and then released them pursuant to a conspiracy that the victims would be later met and murdered by Price and other persons. [FN113]

The Court made a similar under color of law assumption in the companion decision to Price in United States v. Guest. [FN114] In Guest, six private actors were charged with conspiring to deprive black citizens of a number of rights protected by the Constitution and federal law. [FN115] Among other things, the indictment alleged that part of the conspiracy was to be achieved "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." [FN116] The Court held that this "allegation is broad enough to cover a charge of active connivance by agents of the State in the making of the 'false reports,' or other conduct amounting to official discrimination clearly sufficient to constitute denial of rights protected by the Equal Protection Clause." [FN117] Clearly, such action, if engaged in by "agents of the State," was not authorized by state law. Without discussion, the Court assumed for purposes of the indictment that such agents would remain state actors even though they acted in violation of state law. [FN118]

Still more recent Supreme Court decisions have eliminated whatever lingering life the Barney distinction may have had after the Court's decisions in Screws, Williams, Price, and Guest. ***683** In its 1988 decision in West v. Atkins, [FN119] the Court held that Atkins, "a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating" the injury of Quincy West, a prison inmate. [FN120] Distinguishing Dodson, the public defender case, [FN121] the Court concluded that

> [i]n the State's employ, [Atkins] worked as a physician at the prison hospital fully vested with state authority to fulfill essential aspects of the duty, placed on the State by the Eighth Amendment and state law, to provide essential medical care to those the State had incarcerated. Doctor Atkins must be considered a state actor. [FN122]

Completing the conceptual circle, the Court concluded further that Atkins' "delivery of medical treatment to West was state action fairly attributable to the State, and that [Atkins] therefore acted under color of state law for purposes of § 1983." [FN123]

Clearly, North Carolina law prohibits prison doctors from being deliberately indifferent to the medical needs of prison inmates. [FN124] And, as in previous cases, the Atkins Court made clear that Atkins could not shed his state actor status by acting in violation of state law. As explained by the Atkins Court:

> If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state action inquiry, by the State's exercise of its right ***684** to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care. [FN125]

Admittedly, a Barney enthusiast could argue that a deliberately indifferent Doctor Atkins was merely acting (or not acting) in excess of his state granted authority. It is equally clear, however, that such action (or inaction) by Doctor Atkins violates state law. There is simply no defensible way to distinguish certain acts unauthorized by state law from other such acts by attempting to argue that some of the unauthorized acts merely exceed state granted authority while others violate state law. As stressed before, if

the act is unauthorized by state law, it violates state law in the practical sense previously described in this Part. [FN126]

In its 1991 decision in Hafer v. Melo, [FN127] the Supreme Court drove the final nail into the coffin of the Barney distinction. In Hafer, Barbara Hafer was elected auditor general of Pennsylvania. [FN128] After becoming general auditor, she dismissed eighteen employees, including James Melo, Jr., on the basis that they had "secured their jobs through payments to a former employee of the office." [FN129] Melo and seven other terminated employees sued Hafer, asserting "state and federal claims, including a claim [for monetary damages] under § 1983." [FN130] Hafer argued that "she could not be held liable [under Section 1983] for employment decisions made in her official capacity as auditor general." [FN131] The Supreme Court rejected Hafer's argument, holding "that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983" [FN132] and may be held personally liable for damages under Section 1983 based upon "actions taken in their official capacities." [FN133]

In its earlier decision in Will v. Michigan Department of State Police, [FN134] the Court held that state officials, sued for monetary relief in their official capacities, are not persons under Section 1983. [FN135] Conceding that state officials "literally are persons," the Will Court stated that "a suit against a state official in his or ***685** her official capacity is not a suit against the official but rather is a suit against the official's office." [FN136] Distinguishing Will, the Hafer Court stated that the action against Hafer was an action against her in her "personal capacity" as opposed to an action against her in her "official capacity." [FN137] In a "personal capacity" action, the Court held that the state officials are "persons" under Section 1983 and that they may "be held liable in their personal capacity for actions they take in their official capacity." [FN138] As applied to Hafer, the Court reasoned that

> [t]he [Section 1983] requirement of action under color of state law means that Hafer may be liable for discharging respondents precisely because of her authority as auditor general. We cannot accept the novel proposition that this same official authority insulates Hafer from suit. [FN139]

The Hafer Court expressly rejected Hafer's effort to divide unauthorized acts into acts "outside the official's authority or not essential to the operation of state government, and those both within the official's authority and necessary to the performance of governmental functions." [FN140] The Court concluded that the

> distinction Hafer urges finds no support in the broad language of § 1983. To the contrary, it ignores our holding that Congress enacted § 1983 "'to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some ***686** capacity, whether they act in accordance with their authority or misuse it."' [FN141]

While the Hafer Court does not expressly discuss the Barney distinction, that distinction cannot survive the general proposition that public officials "may be held personally liable for damages under § 1983 based upon actions taken in their official capacities." [FN142] The Hafer holding is simply another way of saying that state actors acting in their official capacities do not cease to be state actors when acting beyond their state-granted authority. The Hafer Court did not attempt to make a false distinction between acts in excess of state-granted authority and those that violate state law. Thus, the Court recognized, at least implicitly, that every act unauthorized by state law violates state law. Had the Hafer Court intended to resurrect the Barney distinction, it might have accepted Hafer's invitation to divide acts taken under color of law into two categories. Its rejection of that opportunity is tantamount to a rejection of the Barney distinction. Finally, and perhaps most conclusively, from the Screws case forward, no Supreme Court decision has applied the Barney distinction or cited Barney with approval. Indeed, in Screws, the Court rejected any effort "to emasculate an Act of Congress designed to secure individuals their constitutional rights by finely spun distinctions concerning the precise scope of the authority of officers of the law." [FN143]

The death of the Barney distinction is a good thing. Conceptually, it is difficult, if not impossible, to make "finely spun distinctions" between acts in excess of state granted authority and those that violate state law. From a policy perspective, constitutional safeguards may be most urgently needed precisely when public officials misuse their authority. If a person's state actor status materially facilitates the

commission of a particular act, the courts should hold that such a person remains a state actor for purposes of that act. [FN144] This finding is the position to which the Supreme Court has come in its journey from Screws to Hafer. The Court has recognized correctly that protection of constitutional rights should not turn upon abstruse distinctions concerning the extent to which a state actor has exceeded state-***687** granted authority. A just concept of governmental responsibility requires that recognition and serves as a spur to government to confine its agents within proper constitutional bounds.

3. Private Capacity Acts: When Is a State Actor Not a State Actor? Suppose a sheriff returns home from work, takes a shower, dons casual garb, and then gets into a fist fight with his neighbor in a backyard dispute over the proper location of a fence. Does the sheriff remain a state actor as he exchanges blows with his neighbor? Common sense dictates that state actors sometimes act in a private capacity and that they cease to be state actors when they are so acting. Like the rest of us, state actors have a private life, and, when acting in a private capacity, they lose their state action taint. While this is not a difficult concept to grasp, an obvious question arises: How do we determine when a state actor is acting in a private capacity? [FN145]

In Screws, Justice Douglas recognized that "acts of officers in the ambit of their personal pursuits are plainly excluded" from the reach of under color of law statutes and, inferentially, from the reach of the state action concept. [FN146] In determining when certain acts occur under color of law, Douglas spoke of the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." [FN147] In the same case, Justice Rutledge stated that "[i]t is too late now, . . . to question that in these matters abuse binds the state and is its act, when done by one to whom it has given power to make the abuse effective to achieve the forbidden ends." [FN148] More recently, in Hafer v. Melo, [FN149] the Court spoke of "'those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."' [FN150]

All of these statements focus on the fact that, in the case before the Court, the state had materially assisted the wrongdoer in performing the challenged act; or, stated another way, had ***688** materially facilitated the performance of the challenged act. By giving the wrongdoer a "badge" of state authority or by "clothing" the wrongdoer with state authority, the state had enhanced the wrongdoer's ability to perform the challenged act and had provided the wrongdoer with greater power and leverage in relation to the victim of the challenged act. When, therefore, the state materially facilitates a state actor's performance of the challenged act, it is fair to conclude that the state actor remains a state actor in relation to that act. Admittedly, this "materially facilitates" test does not provide a talismanic answer to all questions concerning the distinction between a state actor's official capacity acts and that same actor's private capacity acts, but it at least places these questions within the proper conceptual framework. Tough borderline fact situations may still arise. If, however, the materially facilitates test is thoughtfully applied, most fact situations in this area of the law should yield to ready resolution.

In the backyard fist fight hypothetical, it seems clear that the sheriff is acting in a private capacity as he exchanges blows with his neighbor. It would not take much, however, to bring these facts closer to state action territory. Suppose, for example, that the sheriff, while raining blows on his neighbor, had said to his antagonist: "If you don't move your damn fence, I will get the county to move it for you." In such borderline fact situations, the materially facilitates test should resolve doubts in favor of a finding of state action. The power possessed by government officials in relation to private citizens is, in many cases, an awesome power that can cause great harm if wielded unjustly. [FN151] It is important, therefore, for the legal system to create every incentive for government officials to exercise their powers lawfully. A generous construction of the materially facilitates test serves this purpose well, leaving room for a "private capacity" finding in those cases where the facilitating force of the state is minimal or nonexistent. As long as government remains a significant enabling force in relation to the challenged act, a private capacity finding is not justified.

4. Municipal Liability Under Section 1983: The Beyond State Authority Issue in Reverse. In its 1961 decision in Monroe v. Pape, [FN152] the Court held that municipalities are not "persons" for ***689** purposes of Section 1983.

[FN153] Seventeen years later, the Court, in Monell v. Department of Social Services, [FN154] reversed Monroe and held "that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." [FN155] Carefully limiting its holding, the Monell Court concluded

> that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor--or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory. [FN156]

Instead, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that government as an entity is responsible under § 1983." [FN157]

Within the context of this "causation" test, municipalities may be held liable under Section 1983 if municipal policymakers are "deliberately indifferent" to the violation of municipal policy by municipal agents or employees; [FN158] it is then that deliberate indifference that inflicts, i.e., causes, the injury. [FN159]

It is beyond the scope of this article to explore the multiple ramifications of the Monroe holding. [FN160] For purposes of the beyond state authority issue, it is sufficient to note that, in general, municipal liability under Section 1983 turns upon injury caused by municipal employees who act within the bounds of municipal ***690** authority, not beyond the bounds of that authority. [FN161] For municipalities, Section 1983 liability attaches precisely when employees harm others by executing municipal policy rather than by violating that policy. [FN162] This standard is the beyond state authority issue in reverse. To avoid liability under Section 1983, municipalities will always be seeking to show that employees who harm others are acting outside the bounds of municipal authority, i.e., that such employees are engaging in unauthorized acts. Such a showing, in the absence of deliberate indifference on the part of the municipality, breaks the chain of causation between the municipality and the action inflicting the injury, thereby absolving the municipality of Section 1983 responsibility for harm caused by the employee's unauthorized act.

It is unclear whether the Constitution requires the limitation that Monell placed upon municipal liability under Section 1983, i.e., does the Constitution preclude municipal liability for harm caused by the unauthorized acts of its agents and employees? In Monell, the Court made clear that it was engaging in statutory, not constitutional, interpretation and that "Congress can correct our mistakes through legislation." [FN163] The Monell Court, however, did recognize that

> creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose [on municipalities] because it thought imposition of such an obligation unconstitutional. To this day, there is disagreement about the basis for imposing liability on an employer for the torts of an employee when the sole nexus between the employer and the tort is the fact of the employer-employee relationship. [FN164]

This language suggests that the Court would likely hold unconstitutional any congressional statute attempting to hold municipalities liable for the unauthorized acts of their agents or employees. With its strong penchant for protecting state autonomy and the general values of federalism, [FN165] the current Court would almost surely resist such a statutory expansion of municipal ***691** liability. That expansion would press the boundaries of governmental responsibility to the constitutional breaking point. In state action terms, it is simply a case in which no municipal "state action" has caused the harm in question.

The Court's 1980 decision in Martinez v. California [FN166] illustrates that the Court will indeed create a "causation limitation" in relation to harm allegedly caused by state action. In Martinez, "one Thomas, was convicted [[[under California law] of attempted rape in December 1969." [FN167] After being sentenced to state prison for one to twenty years, Thomas was paroled five years later. [FN168] Five months after his release Thomas tortured and killed a 15-year-old girl. [FN169] The Supreme Court rejected a Section 1983 claim brought against Thomas by the victim's survivors. [FN170]

In rejecting the claim of the victim's survivors, the Court stated that while "the decision to release Thomas from prison was action by the State, the action of Thomas five months later cannot be fairly characterized as state action." [FN171] The Court held that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute. [FN172]

Thus, for purposes of state action, the scope of governmental responsibility is limited by the dictates of causation. In constitutional terms, it is an easy and persuasive step from Martinez to a refusal to permit municipalities to be held liable for the unauthorized acts of their agents and employees.

***692** D. The Projection of State Authority Issue: Myth or Reality?

As previously discussed, in Williams v. United States, [FN173] "[Williams] and others over a period of three days took four men to a paint shack on [a lumber] company's premises and used brutal methods to obtain a confession from each of them." [FN174] The Company had hired Williams, who operated a detective agency, to investigate lumber thefts. [FN175] In Williams, the state action issue was made easier by the fact that Williams "held a special police officer's card issued by the City of Miami, Florida," [FN176] and "[o]ne Ford, a policeman, was sent by his superior to lend authority to the proceedings." [FN177] Moreover, Williams, "who committed the assaults, went about flashing his badge." [FN178] Based on these indications of state facilitation, the Court held that Williams "was no mere interloper but had a semblance of policeman's power from Florida" and that "the manner of his conduct of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person." [FN179]

Suppose that Williams and his cohorts had conducted their brutal investigation without any state authorization or facilitation and without the knowledge of state officials. Suppose further that Williams, while flashing a fake but authentic-looking "police" badge, had informed his victims that he had been "deputized" by the Miami police department in order to conduct the ensuing investigation. Such facts would present the projection of state authority issue in its "pure" form: If, without governmental assistance or knowledge, a person purports to be a state actor in relation to certain action, should he or she be treated as a state actor in performing that action? Should the person's false projection of state authority require him or her to live with the consequences of that projection?

No Supreme Court decision has confronted the projection of state authority issue in its pure form. The reason for this seems clear. A person projecting state authority will nearly always be a person who has, in fact, been facilitated in that projection by the state, at least to some degree. [FN180] Rarely will a person project state authority without some actual tie to the state. Thus, in this area ***693** of the law, the Williams case is more the paradigm than the projection of state authority issue in its pure form.

The issue in its pure form is, nonetheless, worth consideration. Under the pure form Williams hypothetical previously posited, Williams should be held to be a state actor if two conditions are met: (1) Williams subjectively intended that his victims should regard him as a state actor; and (2) a person in the position of the victims could reasonably believe that Williams was a state actor. If these two conditions are met, a constitutional basis should exist for classifying Williams as a state actor. In the Williams hypothetical, Williams has projected the aura or semblance of state authority; he has used the name of the state to enhance his power and leverage over his victims. Having "taken the state's name in vain," Williams should be required constitutionally to live with the consequences of his action.

The requirement of subjective intent ensures that private actors who in fact act without the knowledge or assistance of the state will not be labeled state actors when they had no intent to project themselves as such. They will not be forced into a status that they did not intend to occupy. The requirement of reasonable belief ensures that complainants cannot enmesh such actors in constitutional litigation unless they have reasonable cause to believe that the private wrongdoers are clothed with state authority. It must always

be remembered that in the pure form of the projection of state authority issue, the private actor is in fact acting without the knowledge or assistance of the state. In that context, the state action label should be applied with caution.

The preceding pure-form analysis does have relevance to fact situations which, as in the actual Williams case, do involve some degree of state facilitation. As before mentioned, [FN181] borderline situations may arise in which it is difficult to determine whether the state has materially facilitated a particular action. This problem is true not only when the controlling question is whether an admitted state actor is acting in a private capacity; it is also true when the controlling question is whether an ostensibly private actor has become a state actor through various contacts with the state. In this latter situation, the pure form analysis of the projection of state authority issue may tip the scales. In the actual Williams case, for example, the private wrongdoers clearly intended to project themselves as state actors, and it was reasonable for their victims to believe that they were state ***694** actors. [FN182] In such situations, it becomes easier to conclude that the state's actual assistance is sufficiently material to transform the wrongdoers into state actors. That is what the wrongdoers subjectively intended, and that is what their victims reasonably believed. In the broader context of state nexus analysis, the subjective intent of the wrongdoers and the reasonable belief of their victims thus become additional contact points between the wrongdoers and the state.

E. Concluding Observations: A Short Essay on Governmental Responsibility

The underlying theme of governmental responsibility permeates the issues discussed in this Part. When a person seeks and accepts a state actor status, that person also accepts the added power, prestige, and leverage that accompany that status. Accordingly, when such a person thereafter engages in an "official capacity" act that exceeds his or her state granted authority, that person should be compelled to accept constitutional responsibility for the status choice that he or she has voluntarily made. The state actor cannot be allowed to reap the "state action" advantages of the chosen status without incurring the "state action" liabilities that accompany that status. When engaged in an official capacity act unauthorized by state law, the state actor remains a state actor; he or she continues to be "the government."

The preceding proposition also has important governmental responsibility ramifications for the state actor's governmental employer, whether that employer be the national government, the state government, or some political subdivision thereof. When a state actor conducts an unauthorized act, the actor's governmental employer assumes a constitutional responsibility both to disengage and to engage. Clearly, the employer must disengage itself unequivocally from any kind of support or approval for the unauthorized act. But, the employer's governmental responsibility extends further. The employer must affirmatively engage the offending state actor (and, indeed, all of its employees) in such a way as to block, to the fullest extent possible, a repetition of similar unauthorized acts in the future. Failure to make this affirmative effort, especially if repeated in relation to other unauthorized acts of a similar nature, may result eventually in a holding that the employer's own "policy" has caused the harm flowing from the state actor's unauthorized act. It is in that sense that the state actor's employer assumes a governmental ***695** responsibility both to disengage and to engage in relation to the state actor's unauthorized act. [FN183]

The theme of governmental responsibility extends finally into the projection of state authority issue in its pure form. If a private actor subjectively intends to project himself or herself as a state actor and does so in a reasonably believable manner, the actor should accept constitutional responsibility for the effect he or she intends to create. In that context, the private actor becomes "the government" and is thus governmentally responsible for his or her actions. And, as in the case of the state actor who engages in unauthorized acts, government, when it becomes aware of the private actor's projection of state authority, should assume a constitutional responsibility both to disengage and to engage in relation to the private actor. Because the government, in this pure form model, has not employed the private actor, governmental responsibility would normally consist of disavowing all connection with the private actor's conduct and, in relation to that conduct, providing effective legal avenues for civil relief and, if applicable, criminal prosecution.

Viewed in totality, therefore, the modern Court has acted wisely in relation both to the beyond state authority and the projection of state authority issues. In relation to the beyond state authority issue, the Court has properly eliminated the Barney distinction and has held repeatedly that state actors remain state actors when they engage in "official capacity" acts in excess of their state-granted authority. [FN184] In this same area of the law, new fact situations may enable the Court to define with greater precision the distinction between "official capacity" and "private capacity" acts. In relation to the projection of state authority issue, the Court still awaits the appearance of this issue in its pure form. While that wait continues, the Court, building upon its Williams decision, should make clear its willingness to use the "pure form" factors of subjective intent and reasonable belief in the broader context of state nexus analysis.

***696** VI. The State Authorization Issue

A. An Introductory "Brute Force" Hypothetical

Assume that the State of Texas has enacted a statute providing that "title to personal property in the State of Texas shall be decided by brute force." Assume further that, on a sunny morning, Ann Adams leaves her house carrying her purse on her arm. She is immediately accosted by Bull Bigger, a huge man, who wrestles the purse from Ann by brute force. Ann later seeks to replevy her purse in the local state district court. Applying the Texas "brute force" statute, the district court rejects Ann's claim and holds that Bull Bigger has gained good title to the purse and its contents. On appeal through the Texas court system, the district court's judgment is ultimately affirmed by the Texas Supreme Court. [FN185]

This "brute force" hypothetical forms the basis for all that follows in this part. It is presented in its extreme form to support a fundamental proposition: There are constitutional limitations on what a state's legal system may authorize [FN186] one private person to do to another private person. That proposition is the heart of the state authorization issue, which, stated in question form, asks: under the Constitution, to what extent may government authorize, i.e., permit, one person or entity to harm another person or entity with legal impunity? It is a central thesis of this part that, in the context of the state authorization model previously described, [FN187] the Supreme Court has failed to confront the state authorization issue openly and directly and, in relation to that issue, may fairly be said to have adopted a stance of "deliberate obfuscation."

***697** B. Historical Summary

Through the first 70 years of the 20th century, the Supreme Court met the state authorization issue almost exclusively in cases involving class discrimination by private actors on the basis of race. In the three cases of Buchanan v. Warley, [FN188] Corrigan v. Buckley, [FN189] and Shelley v. Kraemer, [FN190] the Court considered the constitutionality of various governmental and private actions restricting the sale of land on the basis of race, first, in Buchanan, where the restriction was mandated by a city ordinance, [FN191] and later, in Corrigan and Shelley, where the restriction took the form of racially restrictive deed covenants entered into voluntarily by private parties. [FN192] In Shelley, a classic state authorization case, the Court held that state court enforcement of such private covenants constitutes a denial of equal protection on the merits. [FN193] The Shelley Court, however, did not expressly recognize the state authorization aspects of the case before it.

In 1967 and 1970, the Court, moving beyond the narrow field of racially restrictive deed covenants, decided two conceptually fascinating cases involving private racial discrimination in other contexts. In its 1967 decision in Reitman v. Mulkey, [FN194] the Court considered the constitutional validity of "Proposition 14," a then recently adopted amendment to the California State Constitution. [FN195] In effect, Proposition 14 both repealed all existing California legislation prohibiting racial discrimination in the sale or rental of housing and blocked the passage of any such legislation in the future. [FN196] The Reitman Court held that Proposition 14 "was ***698** intended to authorize, and does authorize, racial discrimination in the housing market," [FN197] and, therefore, constituted a denial of equal protection under the Fourteenth Amendment. [FN198] The Reitman decision is noteworthy as the case in which the Court comes closest to an express

recognition of the state authorization issue and of the type of "on the merits" analysis that the state authorization issue requires.

Equally intriguing was the Court's 1970 decision in Evans v. Abney. [FN199] Here, the Court majority largely ignored the state authorization issue and held that no denial of equal protection or other "constitutionally protected rights" had occurred. [FN200] A complex case, Abney involved the same Macon, Georgia, park considered in Evans v. Newton. [FN201] Pursuant to a charitable trust created under the will of United States Senator A. O. Bacon, the park had been established as a "public park for the exclusive use of the white people" of Macon. [FN202] After the Court in Newton held that the park could not continue to be operated on a racially discriminatory basis, [FN203] "the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator." [FN204] The Abney Court held that the Georgia Supreme Court's construction of Senator Bacon's will did not violate the United States Constitution, even though that construction "effectively denies everyone, whites as well as Negroes, the benefits of [Senator Bacon's] trust." [FN205] The Court described the Georgia Supreme Court's construction as involving the application of "neutral and nondiscriminatory state trust laws" to "determine the testator's true intent in establishing a charitable trust." [FN206]

Abney is noteworthy for two reasons discussed later in greater detail: [FN207] (1) The Court majority did not consider the full implications of the state authorization issue; and (2) Justice ***699** Brennan's dissent expressly urged the application of state authorization analysis. [FN208] After Abney, the state authorization issue fell off the conceptual map. In a remarkable "conspiracy of silence," the Court, for two decades after Abney, simply ignored the state authorization issue and proceeded as if the issue did not exist. [FN209] In the three shopping center cases decided in the eight year span from 1968 to 1976, [FN210] the Court did not seize the opportunity to view private policing of shopping centers from a state authorization perspective. And, again, in the critical cases of Jackson v. Metropolitan Edison Co. [FN211] and Flagg Bros., Inc. v. Brooks, [FN212] decided in 1974 and 1978 respectively, the majority opinions of then Justice Rehnquist studiously avoided any recognition of the state authorization issue in the context of the state authorization model. [FN213] In these two opinions, Rehnquist considered state authorization in the context of state nexus analysis but rejected the state authorization present in Jackson and Flagg Bros. as a contact insufficient in strength to support a finding of state action. [FN214] For the Court in Jackson and Flagg Bros., however, the state authorization model merited no judicial attention.

In the 1980s, the Court's failure to recognize the state authorization model continued unabated, due primarily to the absence of cases inviting an application of that model. Not until the 1990s did a reference to state authorization analysis reappear and then only in an indirect form. In its 1991 decision in ***700** Edmonson v. Leesville Concrete Co., [FN215] the Court stated that

> in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits [[[citing Burton]; whether the actor is performing a traditional governmental function [citing Terry and Marsh]; and whether the injury caused is aggravated in a unique way by the incidents of governmental authority [citing Shelley]. [FN216]

The Edmonson Court's citation of Shelley is, at best, a dubious bow in the direction of the state authorization model. Instead, the Edmonson Court appears to be using its "aggravation of injury" factor (and its citation of Shelley) in the context of the state characterization model, as an additional contact that supports a finding of state action under state nexus analysis. If that is so, the state authorization model remains in the conceptual wilderness, with its full implications for state action analysis still unaddressed by the Court. A later section of this Part suggests possible reasons for this curious stance of "deliberate obfuscation" in relation to the state authorization model. [FN217]

C. The Race Covenant [FN218] Saga: From Buchanan to Shelley

For purposes of perpetuating racial segregation in society, race covenants were an ideal tool. [FN219] Throughout the 20th century, many white owners of residential property in predominantly white areas have not wanted to sell their property to purchasers (especially black purchasers) of a different racial group. [FN220] Before the Shelley decision in 1948, this unwillingness ***701** found ready support in race covenants. [FN221] Because race covenants typically took the form of reciprocally enforceable contractual provisions in deeds or other instruments, sellers not wanting to sell to purchasers of a different race could take "moral" refuge in the contractual obligations to which they were subject. [FN222] After all, whatever their personal predilections might be on matters of race, they were "honor bound" to comply with their contractual obligations. Moreover, before the Shelley decision, white owners of property subject to race covenants faced the inhibiting danger of lawsuits and ensuing liability for damages if they breached their race covenants. [FN223] As stated, therefore, race covenants served perfectly the purpose of preserving racial segregation in the residential living patterns of American society. [FN224]

Because of the pervasive presence of race covenants and related restrictions throughout the nation, it is not surprising that issues concerning their constitutional validity should come before the Supreme Court in the first half of the 20th century. For American citizens, the choice of where to live is a fundamental choice. [FN225] Race covenants and related restrictions crucially affected that choice for nonwhite citizens, creating for them a network of exclusion from much of America's most desirable residential property. [FN226] Accordingly, it was inevitable that those excluded should begin to challenge the validity of the network thus created.

***702** The first challenge came in the Supreme Court's 1917 decision in Buchanan v. Warley. [FN227] Viewed accurately, Buchanan was not a state authorization case but rather a state prohibition case. Buchanan involved the constitutional validity of an ordinance passed by the city of Louisville, Kentucky. [FN228] Among other things, the ordinance prohibited any black person from purchasing as a residence any lot on any city block in which the majority of lots were owned by white persons, and vice versa. [FN229] Warley, a black purchaser, had entered into a contract to purchase a residential lot from Buchanan, a white seller; the lot was situated on a Louisville city block in which the majority of lot owners were white. [FN230] When Buchanan sought specific enforcement of the contract, Warley, somewhat paradoxically, defended on the ground that such enforcement would violate the Louisville ordinance. [FN231] The Court rejected Warley's argument, holding that the Louisville ordinance violated the Due Process Clause of the Fourteenth Amendment. [FN232]

Buchanan was an easy case. It stands for the proposition that the state, on the basis of race, may not prohibit a willing seller from entering into enforceable contracts with a willing buyer. [FN233] Such a prohibition, held the Court, deprives the willing parties of important property rights without due process of law. [FN234] Thus, when Warley entered into a contract to buy real property from Buchanan, Warley could not later use the city ordinance as an escape hatch or as a means for evading the contract to which he had already agreed. [FN235] As stated by the Court:

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state ***703** interference with property rights except by due process of law. That being the case the ordinance cannot stand. [FN236]

If Buchanan stands for the proposition that the state itself may not wield a racially restrictive sword to block or destroy a contract of sale between a willing seller and a willing buyer, what happens when the sword is wielded, not by the state, but by private parties?

This issue confronted the Court in its 1926 decision in Corrigan v. Buckley [FN237] in relation to land situated in the District of Columbia. Corrigan is a study in blatant evasiveness. In substance, the case involved the same issue ultimately decided by the Court in Shelley v. Kraemer. [FN238] In Corrigan, Buckley, Corrigan, and other land owners, all whites, "mutually covenanted and agreed that [for twenty-one years] no part of [their] properties should ever be . . . sold, leased or given to, any person of the negro race or blood." [FN239] In violation of this race covenant, Corrigan entered into a contract

to sell her land to Helen Curtis, a black woman. [FN240] Buckley sought to enjoin the sale. [FN241] The trial court of the District of Columbia granted the injunction sought by Buckley, the District appellate court affirmed, [FN242] and the United States Supreme Court dismissed Corrigan's appeal for want of jurisdiction. [FN243]

The Supreme Court's dismissal was based on the Court's holding that Corrigan's appeal did not raise a substantial federal question. [FN244] The Court first considered Corrigan's argument that the execution of the race covenant by the private parties was, without more, a violation of the Constitution. [FN245] The Court rejected this claim as "entirely lacking in substance or color of merit," [FN246] stressing that the execution of the race covenant by the private parties involved no governmental action that Corrigan could challenge. [FN247] In passing, the Court also rejected Corrigan's ***704** Thirteenth Amendment claim, stating that the execution of race covenants by private parties involves no imposition on individuals of "slavery and involuntary servitude." [FN248] Finally, the Court noted Corrigan's contention, apparently made for the first time in oral argument before the Supreme Court, "that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments." [FN249]

Here was the state authorization issue in plain form before the Court: Under the Constitution, may government, through court action, authorize, i.e., permit, private persons to enter into and enforce race covenants? From a legal perspective, government does not authorize the private covenants unless government enforces them when the covenants are challenged. However, instead of meeting and deciding the state authorization issue that Corrigan belatedly presented, the Supreme Court evaded that issue in the following words:

> Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal . . ., it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. [FN250]

This evasive action postponed resolution of the race covenant issue until another day. By "ducking" the state authorization issue that Corrigan advanced, the Court, for 22 more years, condemned minority group purchasers to the baleful effects of private race covenants.

In 1948, the Supreme Court rendered its landmark decision in Shelley v. Kraemer. [FN251] Shelley involved restrictive race covenants in a residential area of St. Louis, Missouri. [FN252] For a term of ***705** fifty years, the applicable covenants restricted "use and occupancy" of the area to Caucasians. [FN253] Fitzgerald, a white owner of real property within the restricted area, sold his property to black purchasers, the Shelleys. [FN254] Soon thereafter, the Kraemers, white owners of neighboring real property within the restricted area

> brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property [[[sold to them by Fitzgerald] and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. [FN255]

The state trial court denied the requested relief on the basis that the race covenants were not operative under state law because the agreement containing the race covenants had never been signed by all of the property owners in the residential area embraced by the agreement. [FN256] The Supreme Court of Missouri "reversed and directed the trial court to grant the relief for which [the Kraemers] had prayed." [FN257] In so doing, the Missouri court "held the [restrictive] agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to [the Shelleys] by the Federal Constitution." [FN258] The United States Supreme Court granted certiorari, reviewed the case on the merits, and held that "in granting judicial enforcement of the restrictive [agreement in this case, the state has] denied petitioners the equal protection of the laws and that, therefore, the action of the state court[ ] cannot stand." [FN259] Shelley, when correctly perceived, must be viewed as a state authorization case in a common law setting. [FN260] Under the facts of Shelley, the common law of Missouri authorized private persons to enter into race covenants in relation to real property. [FN261] It was precisely that common law rule that the Shelleys successfully challenged on the merits. Shelley

***706** involved no claim that the persons entering into the race covenants were themselves state actors; no attempt was made to pin the state action label on the property owners who were parties to the covenants. [FN262] Instead, the constitutional attack in Shelley focused solely on the common law rule that authorized the making of the covenants in the first place. [FN263]

Admittedly, Shelley involved the enforcement of a common law rule in specific state court proceedings. [FN264] But, that is true of any state act of authorization that is the subject of litigation. Whether the state rule, i.e., the state's act of authorization, is expressed in the state's common law, a state statute, or a provision of the state's constitution, the rule has the force of law in specific court proceedings only if the courts are willing to enforce the rule. [FN265] Absent that willingness, the "rule" in question ceases to be a rule of law and, from the legal system's perspective, becomes merely an unenforceable exhortation to be followed or ignored at an actor's discretion. [FN266] Thus, the underlying constitutional issue does not vary with the form in which a state act of authorization is cast. Whatever that form, the constitutional question remains the same: does the state act of authorization violate the United States Constitution? And, the state court's resolution of that question clearly constitutes an act of the state. [FN267] Therefore, ***707** the state court proceeding becomes the forum in which the state authorization issue is reified and resolved on the merits. [FN268]

On the merits, Shelley would support at least the limited proposition that a race restriction, in whatever form it may appear, may not be used in legal proceedings to impair any contractual agreement which, under state or federal law, would be legally enforceable in the absence of the race restriction. [FN269] This is a "but for" test: If, but for the race restriction, a contract is legally enforceable, then it remains enforceable despite the race restriction. Put in state authorization terms, a state's legal system may not authorize private actors to enter into racially restrictive contractual agreements. [FN270] And again, the final test of whether the state is authorizing such agreements is the willingness of the state's judiciary to enforce the agreements in specific court proceedings. [FN271]

Within the confines of its narrow holding in Shelley, the Supreme Court, in two post-Shelley cases, clarified the extent of the Shelley holding. In Hurd v. Hodge, [FN272] a companion case to Shelley, the Court applied the Shelley holding to land situated in the District of Columbia. [FN273] And, in Barrows v. Jackson, [FN274] the Court held that, in the Shelley context, race covenants may not be used as a basis for recovering monetary damages from land owners who sell their land in violation of the covenants. [FN275] The Barrows ***708** Court stated that "[t]his Court will not permit or require California to coerce respondent [the land owner] to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity." [FN276]

D. Reitman and Abney: The State Authorization Model (Almost) Recognized and Then Ignored

After the Supreme Court's decision in Shelley and the related "mopping up" operation in Hurd and Barrows, the challenging question arose: does Shelley extend beyond the prohibition of court enforcement of racially restrictive contractual agreements? [FN277] Or, more generally, would the Supreme Court, ***709** whether expressly or implicitly (as in Shelley), use state authorization analysis in other contexts? In a different factual context, the Court's 1967 decision in Reitman v. Mulkey [FN278] indicated the Court's willingness to use state authorization analysis more clearly and expansively, [FN279] but the hopes generated by Reitman were dashed shortly thereafter by the Court's 1970 decision in Evans v. Abney, [FN280] which tightly confined Shelley to its most narrow application. [FN281] From that contraction, the state authorization model has never really recovered.

Reitman and Abney are both conceptually intriguing cases, and both lend themselves readily to a state authorization analysis. For that reason, this subsection describes and explores these two cases in some detail. Although both cases involved private racial discrimination, it is probable that their holdings would apply with equal force to other forms of private class discrimination, especially class discrimination based on such suspect or quasi-suspect characteristics as national origin, gender, illegitimacy, and resident alienage. [FN282] Accordingly, in discussing Reitman and Abney, this subsection

will refer generally to private class discrimination rather than private racial discrimination, with primary focus on class discrimination geared to suspect or quasi-suspect characteristics.

***710** 1. Reitman v. Mulkey: The State Authorization Model (Almost) Recognized

a. The Facts and Holding. The Supreme Court's 1967 decision in Reitman v. Mulkey [FN283] illustrates one narrow area in which state authorization of private class discrimination will be held to constitute a denial of equal protection under the Fourteenth Amendment. [FN284] In Reitman, the Court held that Proposition 14, an amendment to the California constitution, violated the Equal Protection Clause of the United States Constitution. [FN285] Adopted by a statewide referendum in the 1964 general election, Proposition 14 prohibited any interference by the State of California or "any subdivision or agency thereof" with the right of any private owner of real property "to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses." [FN286] The immediate purpose of Proposition 14 was to negate open housing legislation previously enacted by the California legislature and, more generally, to prohibit all future open housing legislation. [FN287] In sustaining the challenge to Proposition 14, the Supreme Court affirmed the California Supreme Court's conclusion that adoption of Proposition 14 had unconstitutionally involved the state in private class (here, racial) discrimination. [FN288]

b. Clearly a State Authorization Case. It is important first to stress the procedural posture of the Reitman case in relation to the state authorization model. In Reitman, "the Mulkeys, who are husband and wife . . ., sued [in a California trial court] under § 51 and § 52 of the California Civil Code alleging that [Reitman] had refused to rent them an apartment solely on account of their race." [FN289] Reitman answered by alleging that the statutory provisions relied on by the Mulkeys "had been rendered null and void by the adoption of Proposition 14 after ***711** the filing of the [Mulkeys'] complaint." [FN290] Accordingly, Reitman moved for summary judgment on the pleadings, which was granted by the California trial court. [FN291] The Mulkeys then appealed to the California Supreme Court, contending that Proposition 14 itself was invalid because it denied equal protection of the laws under the United States Constitution. [FN292] The California Supreme Court reversed the judgment of the state trial court and sustained the Mulkeys' contention concerning Proposition 14. [FN293] As noted above, the United States Supreme Court affirmed that ruling. [FN294]

From a procedural perspective, therefore, the state authorization model operated effectively in the Reitman setting. Proposition 14 was state action [FN295] that authorized a particular type of conduct, i.e., racial discrimination in the sale or rental of housing. It is precisely that state act of authorization that the Mulkeys were able to challenge successfully on the merits. Reitman was thus resolved solely within the framework of the state authorization model. [FN296] There was no claim in Reitman that Reitman himself was a state actor. [FN297] Indeed, at several points in its opinion, the Reitman Court stressed that Proposition 14 operated in relation to private racial discrimination. [FN298] It is clear beyond any doubt that the Court did not regard Reitman as a state actor and made no effort to pin the state action label on him. [FN299] Accordingly, there is no escape from the proposition that the Reitman Court operated almost exclusively within the framework of the state authorization model and without significant reliance on either the public function or state nexus strands of the characterization model. There is no other plausible way to explain the Court's analysis. In the context of Reitman's particular facts, the Court plainly held that, under the Constitution, Proposition 14 could not authorize Reitman, a private actor, to discriminate on the basis of race in renting his property, that Proposition 14 could not authorize Reitman to thus gouge the Mulkeys with legal impunity. [FN300]

c. On the Merits: Herein of Procedurally Biased Repeals and One Way Freezes. Limited to its precise facts, Justice White's majority opinion in Reitman supports the proposition that once state action has prohibited class discrimination in a given area, state repeal of that prohibition must be

"procedurally neutral," i.e., the repeal action may not impose a greater procedural burden on subsequent attempts to eliminate class discrimination than existed before the repeal. [FN301] Consider more closely the facts of Reitman. Before passage of Proposition 14, the California legislature could and did pass statutes prohibiting private class discrimination in the sale and rental of housing. [FN302] After passage of Proposition 14, such discrimination could be reached under state law only by a subsequent amendment to the state constitution. [FN303] Before passage of Proposition 14, proponents and opponents of open housing legislation could wage their battle on equal procedural terms in the state legislature. [FN304] After passage of Proposition 14, this battle would be waged in the state legislature on unequal terms, as opponents of open housing legislation could now bask in the security of Proposition 14's ban against state legislation in this area. [FN305] Therefore, Proposition 14 ***713** constituted a procedurally biased repeal of a prior legislative advance in the elimination of private class discrimination. [FN306]

Proposition 14 was clearly an act of the state. [FN307] By repealing existing open housing legislation, Proposition 14 authorized private class discrimination in those situations where such discrimination had been previously prohibited by statute. [FN308] Because this state act of repeal was not procedurally neutral, and since it "raised the procedural ante" for advocates of open housing legislation, the Reitman Court held that Proposition 14 constituted a prohibited encouragement of private class discrimination in violation of the Equal Protection Clause. [FN309]

If Reitman stands solely for a "procedurally neutral repeal" requirement, its holding, while theoretically intriguing, will have little practical impact. Most battles over regulation of class discrimination will continue to be waged in the state and national legislatures by a statutory procession of enactments, repeals, and counter-repeals. Rarely will statutory repeal of prior legislation regulating class discrimination be coupled with an attempt to make it procedurally more difficult to pass similar legislation in the future. Thus, the precise facts of Reitman will not occur frequently. [FN310]

***714** Does Reitman extend more broadly? Does it support a "one way freeze" theory under which a state would be frozen into each advance it makes in the elimination of private class discrimination? This theory would prohibit procedurally neutral repeals as well as procedurally biased repeals. If, for example, a state passes open housing legislation, then, under the "one way freeze" theory, the state could not later repeal or modify that legislation in the direction of permitting private class discrimination. Such action would constitute a prohibited encouragement of private class discrimination. The state could move only in the direction of regulating class discrimination more stringently.

There is a serious policy objection to the "one way freeze" theory. Experimentation is the essence of legislation. When reasonable minds may differ on social issues, a legislature must feel its way cautiously. It must be in a position to correct past mistakes when existing legislation proves unworkable. [FN311] The passage of time and the changing circumstances of society may indicate that once beneficial legislation is now in need of important modifications. [FN312] And yet, the power of a legislature to experiment operates as a spur to progress in controversial areas. If a legislature knows that it cannot retreat from any advance it may make in regulating class discrimination, it will be less likely to make any advance at all. [FN313] The prohibition against state encouragement ***715** of private class discrimination should not be used to place legislatures in a straightjacket that deters legislative experimentation on one of the era's most vital social issues.

Justice White's reasoning in Reitman carefully avoids endorsement of the "one way freeze" theory. In reviewing the California Supreme Court's opinion, White stated:

> [A]s we understand the California court, it did not posit a constitutional violation on the mere repeal of the Unruh and Rumford Acts. It did not read either our cases or the Fourteenth Amendment as establishing an automatic constitutional barrier to the repeal of an existing law prohibiting racial discrimination[ ] in housing . . . . [FN314]

Both the holding and reasoning of White's opinion would still permit a state to repeal, in a procedurally neutral manner, prior advances made by the state in the elimination of private class discrimination. Typically, such a repeal would take the form of a later

statute repealing an earlier statute without further statutory comment on the motive or purpose of the repeal. [FN315] While clearly authorizing private class discrimination in situations where it was previously prohibited, such a repeal would not, under the holding in Reitman, constitute a denial of equal protection.

2. Evans v. Abney: The State Authorization Model Ignored

a. The Facts and Holding. As before noted, [FN316] the Supreme Court's 1970 decision in Evans v. Abney [FN317] continued the legal saga of the same Georgia park that was the subject of litigation ***716** in the Court's 1966 decision in Evans v. Newton. [FN318] No hypothetical case springing from the fertile minds of academia could illustrate better than Abney the problems raised when the legal system is asked to support private class discrimination. While the facts and holding of Abney have been previously summarized, [FN319] it is worth restating the facts and holding in greater detail.

By a will executed in 1911, United States Senator Augustus O. Bacon devised land in trust to the city of Macon for use as a park by white persons only. [FN320] After the Supreme Court's 1954 decision in Brown v. Board of Education, [FN321] the city resigned as trustee of the park and was replaced by private trustees. [FN322] On these facts, the Newton Court found that this replacement action did not terminate city operation of the park. [FN323] Accordingly, the Newton Court concluded that the park was still a public facility being operated by the city on a racially segregated basis in violation of the Equal Protection Clause of the Fourteenth Amendment. [FN324]

Abney, the sequel to Newton, involved the testamentary intent of Senator Bacon. [FN325] After the Newton holding, the Georgia trial court considered

> the motion of Guyton G. Abney and others, successor trustees of Senator Bacon's estate, for a ruling that the trust had become unenforceable and that accordingly the trust property had reverted to the Bacon estate and to certain named heirs of the Senator. The motion was opposed by petitioners and by the Attorney General of Georgia, both of whom argued that the trust should be saved ***717** by applying the cy pres doctrine to amend the terms of the will by striking the racial restrictions and opening Baconsfield to all the citizens of Macon without regard to race or color. The trial court, however, refused to apply cy pres. It held that the doctrine was inapplicable because the park's segregated, whites-only character was an essential and inseparable part of the testator's plan. Since the "sole purpose" of the trust was thus in irreconcilable conflict with the constitutional mandate expressed in our opinion in Evans v. Newton, the trial court ruled that the Baconsfield trust had failed and that the trust property had by operation of law reverted to the heirs of Senator Bacon. On appeal, the Supreme Court of Georgia affirmed. [FN326]

In upholding the decision of the Georgia Supreme Court, Justice Black's majority opinion in Abney stressed that the Georgia courts were reviewing Senator Bacon's will to determine only whether cy pres doctrine should apply. The Supreme Court stated:

> The construction of wills is essentially a state-law question, and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs. [FN327]

Justice Brennan's dissent in Abney found discriminatory state action on three separate grounds. [FN328] His first argument was that the city's acceptance of the park land and the attendant obligation to operate the park on a segregated basis was an attempt to create in the heirs of Senator Bacon a private right to compel a reversion if the park became integrated. [FN329] Accordingly, the city's acceptance of the park under these conditions ***718** implicated the state in the creation of a private right based on racial discrimination. [FN330] Brennan's second ground emanated from the fact that the white users of the park were willing to share their use with blacks. [FN331] Moreover, the state attorney general, in his capacity as protector of the interests of charitable trust beneficiaries, urged the application of cy pres. [FN332] By analogy to the holding in Shelley, Brennan argued that the Bacon heirs were using the race restriction of Bacon's will as a sword to break up a transaction between a willing "seller" (the white users of the park and the attorney

general) and a willing "buyer" (the prospective black users of the park). [FN333] Brennan concluded that state judicial machinery cannot be used to implement such a purpose. [FN334] Brennan's final ground related to the fact that the decision of Senator Bacon to devise the park land on a segregated basis had been encouraged by a Georgia statute authorizing racially restrictive gifts. [FN335] Before the state statute's enactment, Georgia law on this point was arguably unclear. Brennan concluded that by clarifying state law and thereby singling out "racial discrimination for particular encouragement," [FN336] the state had involved itself unconstitutionally in Senator Bacon's private decision to devise the land on a segregated basis. [FN337] Therefore, Brennan argued, state action had impregnated the race restriction placed on Senator Bacon's testamentary gift. [FN338]

***719** The rationale of Brennan's dissent may be viewed in two lights: first, Brennan may be saying that by reason of extensive state involvement and encouragement, Senator Bacon's act in creating racially restrictive property interests under his will should itself be regarded as an act of the state (a state nexus argument); or, second, Brennan may simply be viewing Senator Bacon's testamentary act as a private act authorized by the state through its legal system. [FN339] It is this latter perspective that generates the state authorization issue as described in this Article.

b. Abney, State Authorization, and the Institutionalization of Private Class Discrimination. Considered from a state authorization perspective, Abney raises the following issue: should Shelley be construed as a general prohibition against the institutionalization of private racial discrimination? [FN340] Institutionalization of private racial discrimination occurs whenever the legal system, in regard to a particular transaction, imposes upon a person a legal detriment by reason of such person's refusal to adhere to a race restriction created by a third party to the transaction. [FN341] This definition includes a race restriction in whatever form this odious chameleon may appear, e.g., as deed covenant, contract obligation, possibility of reverter, right of entry upon a condition subsequent, or executory limitation. "Person," of course, would embrace, in addition to individuals, all other legal entities such as private and public ***720** corporations, associations, trust estates, and partnerships.

Applying this definition to a specific example, assume that Tom Testator, a white male, wills Greenacre to his daughter, Mary, a white female, on the condition that should she ever marry a nonwhite person, title to Greenacre shall shift to X, also a white male. After Tom dies, Mary accepts and occupies Greenacre and later marries Bill, a black male. X now seeks a court decree transferring to him title to Greenacre. The decree should be denied. If Mary loses Greenacre, the legal system is clearly subjecting her to a legal detriment, and the detriment is imposed by reason of her refusal to adhere to the race restriction created by Tom, a third party to the marriage transaction between Mary and Bill. It is specious to attribute Mary's loss solely to the condition contained in Tom's will. Without the aid of the legal system, the condition operates only as a voluntary restraint having no legal efficacy. The condition is not "authorized" by the legal system unless that system is willing to enforce it in specific court proceedings. To prevent the institutionalization of Tom's racial discrimination, the legal system should regard the race restriction as nonexistent, a mere precatory statement without legal consequences. Mary, therefore, should be allowed to keep Greenacre free of the race restriction. [FN342]

Admittedly, the above result throws Tom upon the mercy of Mary's discretion. But, in the area of race restrictions, this is precisely what the legal system should do. Institutionalization of a race restriction impresses the racial discrimination of one generation upon succeeding generations. [FN343] Fear of incurring a legal detriment warps the attitudes and shapes the conduct of those within the race restriction's reach. [FN344] As to transactions affected ***721** by the race restriction, persons subject to its restraint are not truly free to make unencumbered decisions on questions of race. Thus, the moral cost of institutionalizing private racial discrimination is indeed high, and the Shelley holding should be expanded to prevent that cost. [FN345]

Returning to Abney, Justice Black's majority opinion, under this analysis, institutionalizes the private racial discrimination of Senator Bacon. The City of Macon and the beneficiaries of the park trust incur a substantial legal detriment in the loss

of the park. As in the will hypothetical just analyzed, the loss occurs because of the legal system's enforcement of a reverter triggered solely by a violation of Senator Bacon's race restriction. Finally, the race restriction was created by Senator Bacon, a third party to the transaction between the white users (the "willing sellers") and its prospective black users (the "willing buyers"). The application of the cy pres doctrine, at the behest of the state attorney general and the white users of the park, should be constitutionally mandatory and the park continued on an integrated basis. As to race restrictions in this setting, our legal system should be "color blind." [FN346]

c. The Impact of Abney on Shelley: State Authorization Analysis Arrested. Taken together, the holdings in Abney and Shelley create a dubious distinction between race restrictions that operate as conditions and race restrictions that operate as contracts. Under Abney, a state's legal system may authorize racially restrictive conditions, [FN347] while under Shelley, the same legal system may not authorize racially restrictive contracts. [FN348] In terms of policy, such a distinction makes little sense. The constitutional principle should be uniform: one ***722** private actor (or group of private actors) should not be permitted to use the legal system's enforcement power to compel or encourage another private actor (or group of private actors) to discriminate on the basis of race in making associational decisions. Here, the Constitution should be read to require a kind of legal atomization for private decision makers. A person should be able to make associational decisions free from the pressure exerted by enticements that are conditioned upon adherence to racially discriminatory conduct. For this purpose, only a rule that prohibits both racially restrictive contracts and racially restrictive conditions provides adequate protection for private actors who make these decisions. [FN349]

The extension of Shelley to the Abney fact situation would yield a number of positive policy results. For example, a private school created by will to be operated on a racially segregated basis could, at its option, avoid the race restriction. Thus, costly suits by school trustees to obtain a court decree permitting a deviation from the terms of the creating instrument would be unnecessary. [FN350] The same would also be true with respect to other entities such as private parks, libraries, or hospitals. In these and similar settings, each generation would then be free to apply its best moral judgment in resolving questions of race. [FN351]

***723** The Supreme Court, however, has not extended Shelley in the manner urged in the preceding paragraphs. Instead, the Court majority in Abney narrowly confined Shelley to its precise facts. [FN352] The Abney majority rejected Justice Brennan's dissenting invitation to use state authorization analysis as a means for blocking the institutionalization of private class discrimination. [FN353] That rejection, in turn, had an important and negative impact on state authorization analysis in the post-Abney decades, dashing the hopes generated by Shelley and furthered by Reitman.

E. The 1970s and 1980s: State Authorization in the Doldrums

In the two decades following the Abney decision in 1970, a strange thing happened to state authorization analysis. In what I have already described as a "conspiracy of silence," the Supreme Court, for more than twenty years after Abney, simply ignored the state authorization model as described in this study. The Court acted as if the state authorization model did not exist. Consequently, in the post-Abney period, state authorization analysis disappeared from the conceptual scene, and state action cases were decided almost exclusively within the framework of the characterization model. [FN354]

What accounts for this deliberate indifference to state authorization analysis? Perhaps the main contributing factor was a significant shift in the subject matter of the state action cases that came before the Court in the post-Abney period. In the White Primary cases in the first half of the 20th century, and from Shelley to Abney, the state action cases reaching the Supreme Court were, with few exceptions, racial discrimination cases. [FN355] After the Court's 1970 Abney decision, the Court's state action cases involved primarily matters other than racial discrimination. In general, the post-1970 cases involved free ***724** speech [FN356] and procedural due process claims [FN357] having nothing to do with racial discrimination. [FN358]

This shift in the subject matter of state action cases may have alerted the Court to

the expansive nature of the state authorization model. As noted at several points in this study, every action engaged in by a private person is either compelled, prohibited, or permitted, i.e., authorized, by the legal system within which that person lives. And, almost certainly, a very high percentage of the acts in which a person so engages are acts that the legal system permits. Moreover, those state acts of permission, whether in the form of the common law, state statutes, state constitutional provisions, or administrative regulations, clearly constitute state action; in all instances, such acts of permission, when enforced in specific court proceedings, clearly ***725** "authorize" one private person to affect the interests of another private person with legal impunity. The comprehensive scope of this conceptual reality may have disturbed the Court and may thereby have contributed to the Court's unwillingness to deal with the state authorization model in a more open manner. [FN359]

For whatever reason, it is clear that, in the two decades after Abney, the Supreme Court did not utilize state authorization analysis in any significant way in state action cases. For example, in the two shopping center cases of the 1970s, Lloyd Corp. v. Tanner, [FN360] and Hudgens v. NLRB, [FN361] the Court, in its state action analysis, concentrated almost exclusively on the question of whether the owners of the shopping centers engaged in a public function when they regulated speech activities on their respective centers. In each case, the Court held that the challenged speech regulation activities did not constitute a public function and, therefore, could not be characterized as state action. [FN362] In Lloyd Corp., Justice Powell's opinion for the Court did approach the verge of state authorization concerns when he conceded that "differences may exist with respect to government regulation or rights of citizens arising by virtue of the size and diversity of ***726** activities carried on within a privately owned facility serving the public." [FN363] In other words, the degree to which government may authorize private owners of business property to control speech activities on that property may vary with "the size and diversity of activities carried on within a privately owned facility serving the public." [FN364] This concession, however, is as close as the Court came to state authorization analysis in the Lloyd Corp. and Hudgens decisions.

The Court came no closer in its 1974 and 1978 decisions in Jackson v. Metropolitan Edison Co. [FN365] and Flagg Bros., Inc. v. Brooks. [FN366] In both cases, the Court did consider the question of state "authorization" but solely in the context of the characterization model. [FN367] In both cases, the Court rejected the characterization argument, finding that state approval or permission, standing alone, is not a contact sufficiently strong to convert private action into state action. [FN368] In Jackson, the Court distinguished its earlier decision in Public Utilities Commission v. Pollak, [FN369] noting that in Pollak the utilities commission involved in that case had "commenced an investigation" of the challenged private conduct and "after a full hearing" had approved the conduct. [FN370]

Under the characterization model, it is probably wise to hold that government permission, standing alone, does not convert private action into state action. Such a conversion principle sweeps too far. Some greater degree of governmental participation or encouragement should be required, perhaps something approaching, in Justice Harlan's words, governmental action that is "affirmative and purposeful, actively fostering [the challenged private action]." [FN371] However that may be, analysis under the characterization model does not meet the demands of the state authorization model.

***727** Under the state authorization model, it is precisely the state's act of authorization, its act of permission standing alone, that is the subject of constitutional inquiry: Under the Constitution, to what extent may government authorize, i.e., permit, one private party to harm another private party with legal impunity? It is that question that the Court did not address in its Jackson and Flagg Bros. decisions. Indeed, the Court proceeded as if such a constitutional question did not exist. Even as then Justice Rehnquist in Flagg Bros. approached the verge of state authorization analysis, he talked in terms of converting private acts into public acts (a characterization model mode of thought) and not in terms of reviewing state acts of authorization on the merits (a state authorization model mode of thought). [FN372]

The Court's silence on the state authorization issue continued unabated through the 1980s. It is unnecessary to trace this path of silence in detail. In four state action cases in the 1980s, the Court did not consider state authorization analysis. Rather, the

Court limited itself to a resolution of the state action issue under the characterization model. [FN373] Thus, for reasons never ***728** articulated by the Court, state authorization analysis continued to meet a "not welcome" sign in the Court's state action decisions of the 1980s. [FN374] Even the dissenters in these cases did not buttress their position with state authorization analysis. [FN375]

F. State Authorization in the 1990s: A Partial Revival?

As discussed previously, [FN376] the Court in the 1990s confronted the state action issue in two cases in which private litigants exercised peremptory challenges to exclude jurors on the basis of race. [FN377] In both cases, the Court held that this exclusionary action constituted state action. [FN378] In its 1991 decision in Edmonson v. Leesville Concrete Co., [FN379] the Court listed three factors that are "relevant" in "determining whether a particular action or course of conduct is governmental in character [[[:] . . . the extent to which the [private] actor relies on governmental assistance and benefits[;] whether the [private] actor is performing a traditional governmental function[;] and whether the injury caused is aggravated in a unique way by the incidents of governmental authority." [FN380] The Edmonson Court held that all three factors strongly supported a conclusion that, in civil litigation, a private litigant's exercise of a peremptory challenge on the basis of race constitutes state action. [FN381]

***729** For purposes of state authorization analysis, the significant aspect of the Edmonson opinion is that the Court cited Shelley v. Kraemer, [FN382] a classic state authorization case, in support of the third "relevant" state action factor: "[W]hether the injury caused is aggravated in a unique way by the incidents of governmental ***730** authority." [FN383] In discussing this "aggravation" factor in relation to the exercise of race-based peremptory challenges, the Court noted "that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." [FN384] Further, the Court stressed that "[t]o permit racial exclusion [of jurors] in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." [FN385]

With its accent on government action that permits racial discrimination to occur in an "official forum," the Edmonson Court is talking in state authorization terms, i.e., may government permit private litigants to exclude jurors with legal impunity. This discussion, however, occurs in the broader context of the Court's use of all three of its factors as a basis for converting private action (the race-based exclusion of jurors) into state action. [FN386] The Court stated its ultimate holding in these terms:

> Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action. [FN387]

This passage clearly contains characterization model language. The Court uses the three listed factors as a basis for characterizing the race-based exclusion of jurors as state action.

For state authorization analysis, therefore, the Edmonson opinion creates an intriguing ambiguity. Without recognizing state authorization analysis expressly, is the Edmonson Court using governmental authorization of private conduct as a basis for transforming private conduct into state action? The answer appears to be "yes," if the injury caused by private conduct "is aggravated in a unique way by the incidents of governmental authority." [FN388] And, what constitutes such aggravation? Such aggravation is most likely to occur when government permits the injury to occur in an "official forum." [FN389] Additional examples of requisite aggravation await future court decisions.

The Edmonson Court's aggravation factor thus constitutes a curious and conceptually undeveloped amalgamation of characterization and state authorization analysis. It is too soon to herald the return of state authorization analysis in its pure form. The aggravation factor may well represent the current Court's way of recognizing the reality of state authorization without having to grapple with its more comprehensive conceptual challenges. More precisely, the Court is treating the fact of state authorization in an "aggravated form" as a contact point under the nexus strand of the characterization model. [FN390] Whether state authorization analysis can or should be so cabined is a serious policy question that this study will confront in its final Part. [FN391] Even in its constricted

Edmonson form, state authorization analysis has at least been lifted from the position of invisibility that it occupied in the two decades following Abney.

G.Jackson v. Metropolitan Edison Co. and Private Class Discrimination in the Furnishing of Essential Public Services: How the State Authorization Model Might Work in This Context

Assume that, in the case of Jackson v. Metropolitan Edison Co., [FN392] Metropolitan had decided not to furnish electricity to black customers in the region that it serves. Assume further that the Pennsylvania Public Utility Commission [hereinafter "the Commission"] permitted that discrimination to occur without making any effort to prohibit it. This scenario is the hypothetical presented by Justice Marshall in his Jackson dissent. [FN393] As urged by ***731** Marshall, it is beyond belief that the Court would not find a way to deal with that problem even though Metropolitan is not labeled a state actor under the characterization model. [FN394] Here, gastronomical jurisprudence tells us that something must be done. As noted earlier, then Justice Rehnquist's majority opinion in Jackson did not employ state authorization analysis within the context of the state authorization model. [FN395] His opinion was limited to the question of whether Metropolitan's termination procedure constituted state action under the characterization model. [FN396] The broader state authorization question would ask: under the Constitution, what decisions may the state authorize a Metropolitan-type entity to make? More specifically, in the context of the above hypothetical, may the state permit Metropolitan to so gouge black customers with legal impunity?

The answer to this question may lie in three factors stressed by Justice Marshall's dissenting opinion in Jackson: (1) Metropolitan was subject to extensive governmental regulation; [FN397] (2) Metropolitan enjoyed a state-protected monopoly status in the area it served; [FN398] and (3) Metropolitan provided an "essential public service to the people of York, Pa." [FN399] While Marshall advanced these factors as a basis for holding Metropolitan itself to be a state actor, the factors are perhaps more pertinent to the state authorization question: what decisions may the state's legal system authorize a Metropolitan-type entity to make?

Working in combination, Justice Marshall's three Jackson factors [[[hereinafter "the Jackson factors"] provide a conceptual basis for imposing an affirmative constitutional obligation on the state to prohibit private class discrimination in the context of the above hypothetical. [FN400] In state authorization terms, the proposition can be stated that if the Jackson factors coalesce in relation to the activities of a private actor, the state may not permit the ***732** private actor to engage in acts of class discrimination in the provision of services to the community. Stated conversely, the Constitution imposes on the state an affirmative obligation to prevent such acts of class discrimination from occurring. Under this rule, therefore, it would be unconstitutional for Pennsylvania to permit Metropolitan to discriminate on the basis of race in serving its customers.

Admittedly, each of the Jackson factors presents a difficult question of degree. For example, it is unclear how comprehensive and penetrating governmental regulation must be before it becomes "extensive." In addition, how much competition must be present before a company ceases to be monopolistic in terms of the geographical area served and the type of service provided? Also, it is not clear what kinds of services merit the adjective "essential." In a roughhewn way, however, the Jackson factors could be used by the courts to impose an affirmative obligation on government to prohibit private class discrimination in the narrow category of cases in which failure to meet that obligation would produce a result absurdly at variance with public policy and common sense. The Jackson factors could also be used by the courts to keep the imposition of such an affirmative obligation within reasonable bounds. [FN401]

To some extent, the suggested rule concerning the Jackson factors does permit an "end run" around the characterization model. The rule takes factors traditionally used in public function and state nexus analysis and uses them in addressing the broader state authorization question. This combination is an advance in conceptual integrity. Instead of straining to transform private action into state action in Jackson-type situations, it may be intellectually more forthright to move directly to the merits inquiry of what decisions government may permit private actors ***733** such as Metropolitan to make. In the hypothetical in which Metropolitan discriminates on the basis of race in serving its customers, the merits inquiry approach would avoid the conceptual problems of "variable

state action" in which Metropolitan is held to be a state actor for one purpose and a private actor for other purposes. In a class discrimination context, Metropolitan is simply a "special" type of private actor that may not be permitted by government to make class discrimination decisions.

While the hypothetical discussed in this subsection focuses on private class discrimination, the state authorization model is not limited to that subject-matter area. As the facts in Jackson and Flagg Bros. indicate, the state authorization question extends beyond the area of private class discrimination and into procedural and substantive due process. [FN402] From the procedural or substantive due process perspective, it may be arbitrary for government to authorize certain types of private action, or for a state to remit to the private sector certain types of decision making authority. In an era when governmental regulatory power, viewed nationally, is pervasive, it is vital to know what decisions government may constitutionally permit private actors to make across the whole range of human endeavor. It is the state authorization model that enables the courts to construct a conceptual framework for addressing this larger task, a task that in its fullest dimensions, requires "a decision about the substantive reach of specific constitutional commands." [FN403]

VII. The State Inaction Issue

A. Introduction

As before noted, the state inaction issue is concerned with fact situations in which government has failed to prevent harm from occurring. [FN404] Typically, though not always, these fact situations ***734** will involve harm inflicted by one private actor (or actors) upon another private actor (or actors). [FN405] In this context, the state inaction issue asks: Under what circumstances may government be held constitutionally responsible for failing to prevent a harm from occurring? Phrased differently, when will government's inaction be held to constitute a type of "state authorization" that deprives the injured victim of a right protected by the Constitution?

Thus viewed, the state inaction issue is a subset of the broader state authorization issue but with a special conceptual twist. In the usual state authorization setting, the private actor inflicting the alleged harm is engaging in conduct that is authorized or permitted by the state's legal system in the sense that the legal system permits this "gouging" to occur with legal impunity. When challenged by the victim in specific court proceedings, the harm inflicter "wins." [FN406] In the usual state inaction setting, the private actor inflicting the harm is engaging in conduct, such as child abuse, that clearly violates state law, and, when challenged by the victim in specific court proceedings, the harm inflicter loses. Accordingly, the state inaction issue is limited to that relatively narrow category of cases in which government may be held constitutionally responsible for failing to prevent conduct that its legal system clearly prohibits.

This Part, then, focuses on the question of when government's failure to prevent harm from occurring constitutes in constitutional terms a prohibited "authorization" of that harm. Here, there is no attempt to convert the private harm inflicter's conduct into state action. Instead, courts focus directly on the state's inaction to determine whether that very inaction is itself a prohibited authorization of the harm inflicted. In exploring the state inaction issue, this Part will confine itself primarily to two recent cases: the United State Supreme Court's 1989 decision in DeShaney v. Winnebago County Department of Social Services. [FN407] and the Seventh Circuit Court of Appeal's 1990 decision in Ross ***735** v. United States [FN408] These two cases provide an excellent springboard for discussing the various facets of the state inaction issue.

B. Some Preliminary Matters: Is There a Constitutional "Right to Safety?"

Simply and bluntly stated, the Constitution creates no general right to safety. Absent special circumstances, to be discussed later, [FN409] the Constitution imposes no affirmative obligation on government to provide its citizenry with any minimal level of safety against harms inflicted by other private actors. As expressed by Chief Justice Rehnquist in DeShaney: "As a general matter, . . . we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation

of the Due Process Clause" [FN410] or, inferentially, a violation of any other clause of the Constitution. In broader terms, Chief Justice Rehnquist stated that

> our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. [FN411]

Finally, and of particular relevance to the facts of DeShaney, Chief Justice Rehnquist reasoned that "[i]f the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." [FN412]

While the Constitution contains no general "guarantee of certain minimal levels of safety and security," [FN413] the Court recognized ***736** the argument that a governmental duty to provide "adequate protective services . . . may arise out of certain 'special relationships' created or assumed by the State with respect to particular individuals." [FN414] Describing as "limited" the circumstances in which the Constitution imposes on government "affirmative duties of care and protection," [FN415] the DeShaney Court confined such circumstances to those in which "the State takes a person into its custody and holds him there against his will." [FN416] As examples of such physical custody situations, the Court cited the incarceration of prisoners [FN417] and the involuntary commitment of mental patients. [FN418] When government thus acts to take a person involuntarily into physical custody, "the Constitution imposes upon [government] a corresponding duty to assume some responsibility for his safety and general well-being." [FN419]

In discussing the "physical custody" cases, the DeShaney Court stressed that

> [i]n the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf--through incarceration, institutionalization, or other similar restraint of personal liberty--which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means. [FN420]

It is clear that the DeShaney majority intended to confine quite narrowly the scope of government's affirmative obligation to provide private individuals with any minimal level of safety and protection against harms inflicted by other private actors. Even within that narrow scope, however, the physical custody cases contain two important elements: (1) government has acted; ***737** and (2) government's action has "monopolized" the avenues of preventive action available to the person held in custody, i.e., the person held in custody can look only to government to take any future action that might prevent subsequent harm inflicted by private (or state) [FN421] actors. [FN422] As expressed by Chief Justice Rehnquist in DeShaney, "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." [FN423]

While the "affirmative obligation" statements of the DeShaney Court make sense as abstract propositions, their persuasive force decreases sharply if government's affirmative obligations are limited to the physical custody cases. It is a central thesis of this Part that fact situations beyond the physical custody cases may contain the two main elements that trigger the government's constitutional duty to provide some level of protection to private actors against harmed caused by other private actors, viz., government has, at least to some degree, acted, and that action, for all practical purposes, has monopolized the avenues of preventive action available to the private person who is later harmed. [FN424] Surely there are fact situations other than physical custody in which admitted governmental action has substantially reduced, if not eliminated, a private person's "freedom to act on his own behalf." [FN425] This Part contends that DeShaney itself presents such a fact situation.

Moreover, the DeShaney Court dismisses too rapidly the additional weight factors of governmental awareness of specific ***738** danger and governmental expressions of intent to help. [FN426] While these factors are not conclusive and must be applied judiciously,

they may contribute to the ultimate conclusion that government has monopolized the avenues of preventive action available to the private victim. And again, I believe that these additional factors were important in the context of DeShaney.

C. DeShaney: A Tragic Case of Unconstitutional State Inaction

1. The Facts and Holding. As stated by the DeShaney Court, "[t]he facts of this case are undeniably tragic." [FN427] Joshua DeShaney was born in 1979. [FN428] In 1980, his parents were divorced in Wyoming, and the divorce court awarded custody of Joshua to his father, Randy DeShaney. [FN429] Shortly thereafter, Randy and his son moved to Winnebago County, Wisconsin; in Wisconsin, Randy entered into a second marriage, which also ended in divorce in 1982. [FN430]

At the time of Randy's second divorce, his "second wife complained to the police . . . that [Randy] had previously hit [Joshua,] causing marks[,] and [[[that it was] a prime case for child abuse." [FN431] After the police had notified the Winnebago County Department of Social Services [hereinafter "DSS"] of this complaint, DSS interviewed Randy; "[Randy] denied the accusations, and DSS did not pursue them further." [FN432] In January 1983, "Joshua was admitted to a local hospital with multiple bruises and abrasions." [FN433] Suspecting child abuse, the examining physician notified DSS, "which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital." [FN434] Three days later, a "Child Protection Team" composed of various medical and child care professionals and DSS personnel "decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court." [FN435] The "Child Protection Team," however, did recommend that Joshua be enrolled in a preschool program, that his father be provided with counseling services, and that his father's newest girlfriend ***739** be encouraged to move out of the house. [FN436] Randy DeShaney "entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals." [FN437]

Based on the above recommendations of the Child Protection Team, the juvenile court returned custody of Joshua to his father. [FN438] A month later, "emergency room personnel called the DSS caseworker handling Joshua's case to report that he had once again been treated for suspicious injuries." [FN439] The DSS caseworker "concluded that there was no basis for action." [FN440] What followed thereafter strains credulity and is best described in the Court's own words:

> For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on Joshua's head; she also noticed that [Joshua] had not been enrolled in school, and that [Randy's] girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action. [FN441]

Predictably, the final event in this tragedy unfolded: "In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma." [FN442] Again, as described by the Court:

> Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse. [FN443] Joshua and his mother then brought an action under 42 U.S.C. § 1983 against "Winnebago County, DSS, and various individual employees of DSS." [FN444] The complaint alleged that the respondents [[[hereafter referred to collectively as "DSS"] "had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." [FN445] The lower federal courts [FN446] rejected the claim of Joshua and his mother under Section 1983, and the United States Supreme Court affirmed that rejection. [FN447]

2. Unconstitutional State Inaction: If Not Here, Then When? As discussed

> previously, the DeShaney Court confined quite narrowly the scope of government's affirmative obligation to protect private actors against harm inflicted by other private actors. [FN448] As stressed by the Court, the "[Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." [FN449] Under the Court's analysis, the Constitution imposes on government an affirmative obligation to provide some level of safety for private persons only in those cases in which government takes a person into its custody and holds him against his will. [FN450] Outside of this physical custody setting, a private person, in relation to harm inflicted by other private actors, proceeds through society at his or her own risk. As long as government provides appropriate avenues for civil relief and criminal sanctions against the private wrongdoer, government has discharged its constitutional obligations; in that context, in the basic state authorization sense, government has not "permitted" the offending action to occur. [FN451]

The DeShaney Court constricts the scope of government's affirmative obligations far too tightly. In fact situations outside of the physical custody setting, government's action may have the ***741** practical effect of monopolizing the avenues of preventive action available to a private person who is later harmed. In DeShaney, for example, Justice Brennan's dissent stressed the control exercised by DSS "over the decision whether to take steps to protect a particular child from suspected abuse." [FN452] Brennan noted that "[w]hile many different people contributed information and advice to this decision [concerning the custodial status of Joshua], it was up to the people at DSS to make the ultimate decision . . . whether to disturb the [DeShaney] family's current arrangements." [FN453] Justice Brennan continued:

> In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had reported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the [DSS] of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. [FN454]

Under Justice Brennan's analysis, therefore, the state did more than stand by and do nothing. Through its child-protection program, Brennan argued, "the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger." [FN455] For Justice Brennan, DeShaney thus represents a classic case in which "a State's prior actions may be decisive in analyzing the constitutional significance of its inaction." [FN456] Rather than limiting government's affirmative obligation to provide safety to the physical custody setting, Justice Brennan would "read [the physical custody cases] to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction." [FN457] Finally, in summarizing his dissenting opinion, Justice Brennan stated:

> My disagreement with the Court arises from its failure to ***742** see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent. [FN458]

Clearly, in DeShaney, the State, through the DSS, actively intervened in Joshua's life. At various points in time, the DSS investigated Joshua's home environment, secured a court order placing Joshua in the temporary custody of a hospital, and, after custody over Joshua was returned to his father, entered into a voluntary agreement with Joshua's father designed to accomplish certain goals in relation to Joshua. [FN459] Moreover, when governmental agencies and personnel other than the DSS and its personnel became aware of facts indicating that Joshua was a probable victim of child abuse, they immediately notified DSS of those facts. [FN460] Under Wisconsin law, responsibility for further preventive action then rested on DSS. [FN461] Under these circumstances, the State, through the DSS, had, for all practical purposes, monopolized the avenues of preventive

action available to Joshua.

This monopolization effect was exacerbated by the two factors of governmental awareness of specific danger and governmental expressions of intent to help. With respect to the awareness factor, the DSS was abundantly aware of the specific danger to Joshua. [FN462] Indeed, it passes belief that DSS was not ***743** acutely aware of that danger. With respect to the expressions of intent to help factor, the DSS communicated with Joshua in the only way that such communication can effectively occur with a young child: through the child's father and, in relation to other state agencies and personnel, by assuming ultimate and exclusive responsibility for the decision of whether and when to intervene in Joshua's behalf. [FN463] This posture by the DSS may be read as a statement to Joshua and others that the DSS would take the steps necessary to protect Joshua from future harm. Other state agencies and personnel could reasonably assume that the DSS had the situation "well in hand."

In light of the fact that the DSS initiated actions that monopolized the avenues of preventive action available to Joshua, and in light of the exacerbating impact of the awareness and expressions of intent to help factors, a compelling case exists for concluding that the later inaction of the DSS materially contributed to the harm inflicted on Joshua by his father. That causal connection should suffice to support an action under Section 1983 alleging that state inaction has resulted in a deprivation of liberty in violation of the due process clause of the Fourteenth Amendment. As noted by Justice Brennan, a trial on the merits would then reveal whether the failure of the DSS to help Joshua "arose, not out of the sound exercise of professional judgment that we recognized in Youngberg as sufficient to preclude liability, but from the kind of arbitrariness that we have in the past condemned." [FN464]

Before discussing the conceptual and policy ramifications of pushing the government's affirmative obligation responsibilities ***744** beyond the fairly well marked boundaries of the physical custody cases, it is instructive to consider the facts and holding in Ross v. United States, [FN465] a 1990 decision of the Seventh Circuit Court of Appeals.

D.Ross: A Different Case?

> 1. The Facts and Holding. Prior to the events of this case, the City of Waukegan, Illinois [hereinafter "the City"], and Lake County, Illinois [[[hereinafter "the County"], "entered into an intergovernmental agreement that required the [C]ounty to provide all police services in the [two] entities' concurrent jurisdiction on Lake Michigan." [FN466] Pursuant to this agreement, the County and its sheriff "promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the [City's] Fire Department could carry out such a rescue." [FN467]

On August 11, 1985, twelve year old William Ross [hereinafter "Ross"] attended the City's "Waukegan Lakefront Festival on the shores of Lake Michigan." [FN468] While attending the festival, Ross and a friend took a stroll "on a breakwater that extended out into the lake. At the tip of the breakwater, [Ross] fell into the water and sank. Immediately, [his] friend ran for help." [FN469] "Within ten minutes" of Ross's entry into the lake, various public officials and civilians had assembled on the scene "with equipment to effect a rescue." [FN470] None of these persons, however, were "official" divers from the city's fire department. [FN471]

Before any rescue attempt could begin, "Lake County Deputy Sheriff Gordon Johnson arrived in a marine patrol boat." [FN472] Pursuant to the rescue policy promulgated by the County and its sheriff,

> Deputy Johnson ordered all of the persons then on the scene to cease their rescue efforts. When the civilian ***745** scuba divers stated that they would attempt the rescue at their own risk, Johnson responded that he would arrest them upon their entry into the water and even positioned his boat so as to prevent their dive. A Waukegan police officer agreed that Johnson had authority over the scene and advised his fellow city employees that they should heed Johnson's instructions. [FN473]

While the Court's opinion does not state when "authorized" divers from the City's fire

department finally arrived on the scene, the Court continued its description of the facts as follows:

> A full twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after [Ross] had fallen into the water, the officially authorized divers finally retrieved [Ross's] body. Although [Ross] showed clinical signs of life after being pulled from the water, he was declared dead the following morning. For purposes of our decision, we must assume that [Ross] would have survived had Deputy Johnson not stopped the initial rescuers. [FN474]

Based on the above statement of facts, Ross's mother, Ollie Belle Ross, initiated a Section 1983 action "in her individual capacity and in her capacity as administrator for [Ross's] estate." [FN475] In her Section 1983 action, Ross's mother included as defendants Lake County Deputy Sheriff Johnson, Lake County Sheriff Clinton Grinnell, and the City of Waukegan, among others. [FN476] Ross's mother also brought an action against the United States under the Federal Tort Claims Act. [FN477] The Ross Court dismissed the Federal Tort Claims action against the United States [FN478] and the Section 1983 action against the City. [FN479] The Court sustained the Section 1983 action against Lake County, Sheriff Grinnell in Grinnell's official capacity, [FN480] and against Deputy Sheriff Johnson in Johnson's individual capacity. [FN481]

> 2. Unconstitutional State Inaction: Is DeShaney Distinguishable? As to the County and Sheriff Grinnell, the Ross court stated that "[w]e must accept as true the plaintiff's allegations that the county had a policy that required Deputy Johnson to prevent any unauthorized person from attempting to rescue another person in danger of drowning." [FN482] The court noted further that "[a]s the complaint frames the facts, unauthorized persons on the scene could have saved [Ross's] life, making the policy a direct cause of his death." [FN483] While conceding that "[c]ausation alone . . . is not enough [[[,]" [FN484] the court concluded that "the plaintiff has sufficiently alleged that the county arbitrarily denied [Ross] his fourteenth amendment right to life." [FN485] The court stressed that Ross's mother need not show that the County's policy required Deputy Johnson to prevent unauthorized persons from attempting to rescue Ross; it was sufficient to show that the County's policy clearly authorized Johnson to prevent rescue efforts by unauthorized persons. [FN486]

In characterizing the County's policy as arbitrary, the Ross court emphasized that, accepting plaintiff's allegations as true, the County had adopted "a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative." [FN487] By implementing that policy, the County had monopolized the avenues of preventive action available to Ross without itself offering effective relief. Moreover, this monopolization, as in DeShaney, [FN488] was exacerbated by the governmental awareness factor: Deputy Johnson was acutely aware of the danger faced by Ross. [FN489] More generally, the court described the County's policy as demonstrating "a disregard for the value of the lives lost because of its enactment." [FN490] Here, the court is saying that the County, as a matter of law, had to be aware that its policy, if implemented in the manner chosen by Deputy Johnson, would result, sooner or later, in the needless loss of life. [FN491]

What, then, of DeShaney? The Ross court attempted to distinguish DeShaney in these words:

> This is not a case like DeShaney . . . . In [DeShaney], the government's failure to provide services that would have saved a person from injury was held not to be a constitutionally cognizable claim. The plaintiff complains of a much different type of constitutional wrong. The plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, the wrong suffered by the plaintiff and her decedent is the county's forced imposition of services that [Ross] did not want or need; the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative. [FN492]

The Ross court's effort at distinguishing DeShaney is not convincing. In substance, both DeShaney and Ross contain the following four elements: (1) Government acted; [FN493] (2) Government's action effectively monopolized all avenues of preventive action available to the person harmed; [FN494] (3) Government, through one or more of its officials, was acutely aware of the specific danger that threatened the person later

harmed; [FN495] and (4) Government itself provided no effective protection against that ***748** later harm. [FN496] It was precisely the problem in DeShaney that government's action "[cut] off private [and non-DSS governmental] sources of rescue without providing a meaningful alternative." [FN497] Surely the different results in DeShaney and Ross should not turn upon the fact that the danger in Ross ripened in a more compressed period of time than in DeShaney. [FN498] In both cases, the specific danger was abundantly apparent to the governmental actors who had the power to prevent it. [FN499]

With respect to the action against Deputy Johnson in his individual capacity, the Ross court summarized its position in these words:

> In our discussion of Lake County's liability, we held that [Ross] was illegally deprived of his life within the meaning of the fourteenth amendment. Because Deputy Johnson acted under the color of state law to cause this deprivation, he is liable unless he is entitled to qualified immunity on the grounds that the law was not clearly established at the time of the accident. [FN500]

On this point, the court found that at the time of Ross's drowning, the law had clearly established "that a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative." [FN501] With respect to Johnson's state of mind, the Court first noted that "recklessness" may serve "as a proxy for actual intent." [FN502] The Court then concluded that "[u]sing the facts alleged in the plaintiff's complaint, it is clear that Johnson knew there was a substantial risk of death yet consciously chose a course of action that ignored the risk. Such conduct is reckless." [FN503] In summation, the Court held that the "plaintiff has stated a cause of action against Johnson, and ***749** Johnson has failed to establish that he is qualifiedly immune." [FN504]

E. A Proposed Model for Determining the Existence of Unconstitutional State Inaction

All can agree that, in general, the Constitution imposes on government no affirmative obligation to protect private actors against harm inflicted by other private actors. [FN505] In that sense, there is no general constitutional right to some minimal level of government guaranteed safety. At the same time, all can agree that in certain limited situations involving "special relationships" that are "created or assumed by the State with respect to particular individuals[,]" [FN506] the Constitution does impose on the government "affirmative duties of care and protection" in relation to those individuals. [FN507] The "physical custody" cases are examples of fact situations in which such an affirmative obligation has been imposed. [FN508] As before noted, however, the DeShaney Court was unwilling to extend this affirmative obligation beyond the physical custody setting. [FN509]

It is a central thesis of this Part that the government's affirmative obligation to protect private persons against harm inflicted by private actors should be extended beyond the physical custody setting. Admittedly, the affirmative obligation net should not be cast too broadly; government should not be transformed constitutionally into a comprehensive guarantor of the safety of its citizenry. Generally speaking, each of us strides through society at our own risk. When we are harmed by others, if government provides us with appropriate legal avenues for securing relief, government will normally have discharged its constitutional obligations to us.

There are, however, certain fact patterns not limited to the physical custody setting that yet create a compelling case for imposing on government "affirmative duties of care and protection with respect to particular individuals." [FN510] These fact patterns ***750** generally include four related elements: (1) Government has acted; (2) Government's action has effectively monopolized all avenues of preventive action available to the person harmed; (3) Government, through one of more of its officials, was acutely aware of the specific danger that threatened the person later harmed; and (4) Government itself provided no effective protection against that later harm. [FN511] If these four elements coalesce, as I believe they did in both DeShaney and Ross, then, Government's failure to prevent the later harm from occurring should be held to constitute a form of state inaction that violates the Constitution. [FN512] Here, as urged by Justice Brennan in DeShaney, "a State's prior actions may be decisive in analyzing the constitutional significance of its inaction." [FN513]

Each of the four elements listed in the preceding paragraph may be analyzed in greater detail:

Element One: Government has acted. This element ensures that government will not be subjected to an affirmative obligation in situations where government has taken no significant prior action in relation to the specific harm that later occurs. In both DeShaney and Ross, for example, government took significant prior action in relation to the specific harm that later occurred. [FN514] That action, in turn, contributed materially to the likelihood that the later harm would in fact occur. [FN515] The proposed model does not embrace a fact situation in which government remains quiescent throughout the time period that precedes the harm's occurrence.

***751** Element Two: Government's action has effectively monopolized all avenues of preventive action available to the person harmed. This element is probably the conceptual linchpin of the proposed model. In both DeShaney and Ross, a governmental entity (the DSS and its personnel in DeShaney; Lake County and Deputy Johnson in Ross) acted to cut off all other sources of private and governmental aid. [FN516] The victim's fate was tied solely to the monopolizing entity's willingness and ability to take effective preventive action. [FN517] For all practical purposes, aid could not reach the victim from any other source. This scenario is not the usual situation as a citizen moves through his or her daily life. In that context, many sources of aid may be available to a person who is threatened with harm or has already incurred harm, and government has not acted to preclude those alternative sources of aid. [FN518]

Element Three: Government, through one or more of its officials, was acutely aware of the specific danger that threatened the person later harmed. This element contemplates that the government has clear awareness of the specific danger that threatens the victim and that no reasonable person or entity in the government's position would have to speculate or guess concerning the nature of the threatened harm. [FN519] This standard ensures that the government will not be subjected to an affirmative obligation simply because of its general awareness that all citizens are exposed daily to the risk of crime and other harm. Under this element, the focus is on governmental awareness of the danger of harm in a concrete form (child abuse in DeShaney; drowning in Ross) to a particular individual (Joshua DeShaney in DeShaney; William Ross in Ross).

Element Four: Government itself provided no effective protection against the later harm that in fact occurred. This element serves as the conceptual safety valve for my proposed model. ***752** This element contemplates that government will not be subjected to an affirmative obligation unless its preventive action (or the absence thereof) may be fairly described as arbitrarily deficient. The phrase "arbitrarily deficient" accurately describes the almost total absence of effective preventive action in both DeShaney and Ross. [FN520] If the government takes some preventive action that rises above the level of being arbitrarily deficient, it should not be held constitutionally liable simply because its preventive action failed to prevent the harm. Government is not an insurer of the efficacy of preventive action that may not reasonably be described as arbitrarily deficient.

In the words of Justice Cardozo, drawn from another context, my proposed model for state inaction represents "no seismic innovation." [FN521] It expands the scope of the government's affirmative obligation modestly beyond the physical custody cases. It would permit courts to impose an affirmative obligation on the government in that narrow category of cases in which governmental inaction, in non-physical custody settings, reaches the level of egregiousness. A compelling argument can be made that that level was reached and passed in DeShaney and Ross. If applied judiciously, the proposed model would not impose comprehensive affirmative obligations on the government but, when the four factors of the model coalesce in non-physical custody settings, would sever the talismanic tie that the DeShaney Court has created between affirmative obligations and physical custody cases. [FN522]

In a broader policy sense, the proposed state inaction model facilitates the search for governmental responsibility, a search that is at the core of all state action issues. It provides a flexible conceptual framework for determining when government should be constitutionally responsible for failing to prevent harm inflicted by one private person (or persons) on another private person (or persons). [FN523] It also draws policy and

analytical support ***753** from a related group of scenarios in which a claimant argues that government is constitutionally obligated to provide the financial assistance that is necessary for the effective exercise of a legally protected right.

In general, the Supreme Court has held that government is under no constitutional obligation to fund the exercise of legally protected rights. In Harris v. McRae, [FN524] for example, the Court held that government has no constitutional obligation to "fund" a woman's decision to terminate her pregnancy. [FN525] In his opinion for the Harris Court, Justice Stewart conceded that "the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions" [FN526] but stressed that the same liberty "does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." [FN527] In other factual contexts, the Court has reiterated its position that, in general, government is under no affirmative obligation to redress inequalities flowing from a difference in economic condition. [FN528]

***754** While advancing the proposition that, in general, the Constitution imposes on government no affirmative obligation to fund the exercise of legally protected rights, the Supreme Court has held that certain rights are so vital or "precious" to the individual that government is under a constitutional obligation to "fund" those rights if the right possessor lacks the financial resources to exercise the right without governmental aid. Clearly the seminal decision in this area of the law is the Court's 1963 decision in Gideon v. Wainwright [FN529] in which the Court held that, in all felony cases, a criminal defendant has an absolute right to counsel and that counsel must be provided at government expense for indigent defendants. [FN530] Gideon, therefore, is the analogue to the physical custody cases. [FN531] In their respective areas of financial assistance and preventing harm, Gideon and the physical custody cases represent the core areas in which it is easy to conclude that the Constitution imposes affirmative obligations on government.

In the financial assistance area, the Supreme Court has extended government's affirmative obligation into certain civil proceedings. In its 1971 decision in Boddie v. Connecticut, [FN532] the Court held that "due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." [FN533] Again, in its 1981 decision in Little v. Streater, [FN534] the Court held that, with respect to a male defendant in a state court paternity proceeding, "to deny [the defendant] blood grouping tests because of his lack of financial resources violate[s] the due process guarantee of the Fourteenth Amendment." [FN535] Still more recently, in its 1996 ***755** decision in M.L.B. v. S.L.J., [FN536] the Court held that in a termination of parental rights proceeding, "Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent." [FN537]

In Boddie, Little, and M.L.B., the Court stressed that government had "monopolized" the avenues of relief available to the indigent party. In these three cases, the state's legal machinery was the exclusive means by which the indigent parties could, respectively, secure a termination of a status (marriage in Boddie), [FN538] prevent the imposition of a status (parenthood in Little), [FN539] or prevent the termination of a status (parenthood in M.L.B.). [FN540] Given that reality, the Court, in the financial assistance area, was willing to extend the reach of affirmative obligations beyond the criminal defendant setting. [FN541] In a similar manner, this Part urges the Court to make an analogous extension of government's affirmative obligations in the prevention of harm setting. Here, the DeShaney and Ross cases should be regarded as policy and conceptual analogues to the Court's decisions in Boddie, Little, and M.L.B. In both groups of cases, a modest extension of affirmative obligation beyond its core areas is required to make government constitutionally responsible for inaction (failure to prevent harm or failure to fund) that may fairly be described as arbitrary. [FN542]

***756** VIII. State Action and the Search for Governmental Responsibility In the 21st Century [FN543]

A. The 1990s Launching Pad: The Edmonson Factors

As previously noted, in the Supreme Court's 1991 Edmonson decision, [FN544] the Court stated:

> Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits [citing Burton v. Wilmington Parking Authority]; [FN545] whether the actor is performing a traditional governmental function [citing Terry v. Adams [FN546] and Marsh v. Alabama]; [FN547] and whether the injury caused is aggravated in a unique way by the incidents of governmental authority [citing Shelley v. Kraemer]. [FN548]

These three factors may be called the "Edmonson factors" and represent collectively a conceptual launching pad for the state action doctrine as it enters the 21st Century. The first factor clearly involves a state nexus inquiry under the characterization model, and, with equal clarity, the second factor involves a public function inquiry under the characterization model. The third factor is more ambiguous in nature: While citing Shelley, a ***757** classic state authorization case, the third factor purports to be an additional analytical tool for determining whether private action may be described fairly as state action, the core inquiry of the characterization model. The third factor, then, is a somewhat confusing hybrid of the characterization and state authorization models; the implications of that confusion will be discussed later in this Part.

If the Edmonson factors provide the current conceptual framework for state action analysis, it becomes important to relate that framework to the characterization and state authorization models. For the characterization model, the implications are positive; for the state authorization model, the implications are uncertain and, to some extent, negative. In this connection, it should be stressed that the Edmonson facts [FN549] presented a compelling case, under both models, for a finding of governmental responsibility. That reality makes it more difficult to predict how the Court will use the Edmonson factors in more borderline fact situations.

1. Implications of the Edmonson Factors for the Characterization Model. For the characterization model, the implications of the Edmonson factors are, as stated, positive. The Court's application of these factors in Edmonson itself holds forth the promise that the Court has returned to a more probing, comprehensive, and balanced approach in determining when private action may be fairly characterized as state action. This new approach is especially valid with respect to the first two Edmonson factors, which relate respectively to the state nexus and public function prongs of characterization analysis.

a. State Nexus Analysis. The first Edmonson factor asks: To what extent has "the [private] actor relie[d] on governmental assistance and benefits [[[.]" [FN550] This factor is the quintessential state nexus question, focusing on the "assistance" and "benefits" contacts between government and the challenged private action. In Edmonson, the Court discussed these contacts in detail and viewed them cumulatively and not sequentially. [FN551] In particular, the Court stressed "the overt, significant participation of the government [in] the peremptory challenge system, as well as the ***758** jury trial system of which it is a part," [FN552] the trial judge's "substantial control exercised over voir dire in the federal system," [FN553] and the fact that "government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." [FN554] In summary, the Court stated that "[w]ithout the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose." [FN555]

The significance of the above analysis is that it evidences a return to the totality approach used by the Court in Burton v. Wilmington Parking Authority. [FN556] Under the Burton totality approach, the Court considers the cumulative weight of all contact factors in determining whether challenged private action has been transformed into state action. [FN557] The Court does not consider each contact factor in isolation and then discard that factor if, by itself, it lacks sufficient force to support a state action finding. [FN558] Clearly, the state nexus issue is a question of degree, and the totality approach contributes to a wiser resolution of that question than the more sequential approach adopted by the Court in the 1970s and 1980s. [FN559] In this connection, the Court's

more thoughtful and probing opinion in its 1988 Tarkanian decision [FN560] (although a "no state action" holding) [FN561] may have marked a turning point in the Court's return to the totality approach in Edmonson.

The totality approach permits the Court to weigh carefully the significance of each contact between government and the challenged private action and then to assess with equal care the significance of the total mix. There is a connection here between the totality approach and the "specific tie" requirement, the requirement that government contacts must be "tied" to the specific private action that is challenged, not merely to the private entity that is engaging in the challenged action. [FN562] As the cumulative force of the contacts between government and the private ***759** actor increase, the specific tie requirement may and should be applied with less severity. As urged by Justice Marshall in his Jackson dissent, "where the State has so thoroughly insinuated itself into the operations of [a private] enterprise, it should not be fatal if the State has not affirmatively sanctioned the particular practice in question." [FN563]

Edmonson was a relatively easy case for the Court. The Court had little difficulty in discerning numerous and weighty contacts between government and the challenged private action, the litigant's exercise of a race-based peremptory challenge. [FN564] The challenge will come when the Court is faced anew with cases similar to Jackson, Rendell-Baker, [FN565] and Blum. [FN566] Such cases, when and if they arrive, will indicate whether Edmonson is a minor blip on the state action screen or whether Edmonson and the Court's related McCollum [FN567] decision [FN568] mark a genuine return to the Burton totality approach. [FN569] The scope of governmental responsibility under the Constitution will be delimited more wisely if such a return has in fact occurred. [FN570]

b. Public Function Analysis. The second Edmonson factor examines "whether the [[[private] actor is performing a traditional governmental function." [FN571] This factor is the classic public ***760** function question. In the 1970s and 1980s, the Supreme Court had severely limited the application of public function analysis to cases involving "the exercise by a private entity of powers traditionally exclusively reserved to the State." [FN572] This test of exclusivity, first announced by the Court in its 1974 Jackson decision, continued as the Court's stated test through its 1987 decision in San Francisco Arts and Athletics, Inc. v. United States Olympic Committee. [FN573] Accordingly, the Edmonson Court's elimination of the word exclusive from its description of the public function issue is a significant and, I believe, positive conceptual development.

Clearly, exclusivity is a legitimate factor in determining whether private action should be labeled a public function for state action purposes. The more the challenged action is uniquely governmental in nature, the more readily should it be labeled a public function. Governmental exclusivity should not, however, be a sine qua non test for determining whether private action constitutes a public function. In its new description of the public function issue, the Edmonson Court has liberated itself from the bondage of the exclusivity test as applied by the Court in such decisions as Jackson, Flagg Bros., Rendell-Baker, and Blum.

In Edmonson, the Court stressed that the "peremptory challenge is used in selecting an entity ['a jury'] that is a quintessential governmental body, having no attributes of a private actor." [FN574] The Court noted further that "[t]hough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body." [FN575] The Court analogized the peremptory challenge system to the "whites-only" elections conducted by the Jaybird Democratic Association in Terry v. Adams. [FN576] In both situations, government authorized a private selection process that materially affected the composition of a governmental body. [FN577] In the Edmonson Court's view, that was ***761** sufficient to transform the peremptory challenge selection process into state action. [FN578]

More generally, public function analysis needs to be informed by a robust common sense. Like obscenity, we generally know a "traditional governmental function" when we see it, but, again like obscenity, it is difficult to define the concept without being over or under inclusive. Terry, Marsh, and Edmonson are relatively easy cases; Logan Valley, Jackson, Flagg Bros., Rendell-Baker, and Blum are more difficult cases. In all these cases,

however, public function analysis requires a probing, fact specific inquiry that is not hobbled by the rigid confines of the exclusivity test. Indeed, viewed factually, there is a self defeating circularity to the exclusivity test: if a particular activity is literally the exclusive function of government, observation should reveal no private actor engaging in that activity. Of course, those Justices applying the exclusivity test do not mean it in that literal sense. What they really mean is that the activity in question is so uniquely governmental in nature that even in the "rare" instances in which the activity is delegated to a private actor, it is still, for constitutional purposes, being performed by government. [FN579]

Freed by Edmonson from the narrow confines of the exclusivity test, the Court, in its public function analysis, may now consider factors such as the following: [FN580] (1) Is the challenged activity uniquely governmental in nature, i.e., how closely do we approach "pure" governmental exclusivity? [FN581] (2) Viewed both ***762** historically and currently, is the challenged activity one that is generally performed by government? [FN582] (3) With respect to the specific activity that is challenged, does government perform a significant role in enabling that very activity to occur? [FN583] (4) To what extent does government limit private choice with respect to participation or involvement in the challenged activity? [FN584] (5) How essential is the challenged activity to the general health, safety, and welfare of the community? [FN585] Underlying all these factors is the fundamental inquiry: Viewed in the light of all relevant factors, is the challenged activity of such a nature that no private person or entity should be permitted to perform it free of the constraints of the Constitution?

Somewhere along the continuum of public function analysis, a point is reached at which the challenged activity may not fairly be described as a public function. Typically, this point will encompass the wide range of private activities that the legal system permits to occur but with respect to which government participation does not extend significantly beyond the "mere" act of permission. [FN586] Such activities would normally include the making of contracts, engaging in business, professional, and recreational activities, choosing dinner guests, and, at least at common law, choosing customers in places of public accommodation. Across ***763** this wide range of human endeavor, it makes practical sense for public function analysis to give way to the state authorization model. It is within the framework of the state authorization model that the courts may determine, for constitutional purposes, the extent to which government may permit one private person to "gouge" another private person with legal impunity.

2. Implications of the Edmonson Factors for the State Authorization Model. The third and final Edmonson factor examines "whether the injury caused is aggravated in a unique way by the incidents of governmental authority." [FN587] As noted before, this "aggravation" factor is an ambiguous fusion of characterization and state authorization analysis. [FN588] While the Court cites Shelley, a classic state authorization case, in support of this factor, the Court appears to use the factor within the framework of the characterization model. [FN589] If "the injury caused is aggravated in a unique way by the incidents of governmental authority," this constitutes an additional contact between government and the challenged private activity. [FN590] So viewed, the aggravation factor becomes a part of state nexus analysis; it becomes a vehicle for pinning the state action label on the challenged private activity.

This development does not bode well for the future of state authorization analysis. Rather than confronting state authorization analysis openly and directly, the Court is evading the implications of that analysis by subsuming it under the characterization model. In Edmonson, the Court stated "that the injury caused by the discrimination [in the exercise of peremptory challenges] is made more severe because the government permits it to occur within the courthouse itself." [FN591] Moreover, the Court stressed that "[t]o permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin." [FN592] If the injury occurs outside an "official forum," it remains to be seen what other fact patterns will ring the Court's "aggravation" bell under the third Edmonson factor. [FN593]

***764** As applied by the Edmonson Court, the aggravation factor does not specifically address the question of the limits placed by the Constitution on government's authorizing power. The factor is not presented in terms of determining when government may

constitutionally permit one private person to harm another private person with legal impunity. As long as this "deliberate obfuscation" continues, certain acts of state authorization that should be challenged will "fall through the crack" because there is no realistic way to pin the state action label on the private action that is causing the harm. The next subsection will discuss in some detail why this significant conceptual deficiency should be redressed in future Court decisions.

B. A Plea for a Forthright Recognition of the State Authorization Model

1. When Private Actors Are Clearly Private Actors. In Shelley, no one contended that private actors became state actors when they entered into racially restrictive deed covenants with each other. Indeed, the Shelley Court concluded that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. [FN594]

This private action became "authorized" by the state when the validity of the race covenants was sustained in specific state court proceedings, and it is that act of state authorization that the Shelley Court held to constitute a denial of equal protection on the merits. [FN595]

Similarly, in Reitman, no one contended that Reitman engaged in state action when he refused, on the basis of race, to rent an apartment to the Mulkeys. [FN596] The Reitman Court focused its entire attention on Proposition 14, the amendment to the California Constitution that "authorized" this discrimination to occur with legal impunity. [FN597] Both the California Supreme Court and the United States Supreme Court concluded that Proposition ***765** 14, if permitted to stand when challenged in specific court proceedings, would constitute a denial of equal protection on the merits. [FN598]

Shelley and Reitman indicate that fact situations may occur in which there is no realistic way to pin the state action label on the private action that has caused the harm. These are situations in which it would stretch the characterization model to the breaking point to hold that the challenged private action has been transformed into state action. In some of these situations, admittedly few in number, the state's very act of authorization may itself constitute a denial of due process, equal protection, or some other constitutional guarantee. And again, the litmus test for determining when the state has authorized private action is to ask: is the legality of the private action sustained when that action is challenged in specific court proceedings?

The Supreme Court should openly acknowledge that the Constitution does place limits on the extent to which government may authorize one private actor to gouge another private actor with legal impunity. In the period from Jackson and Flagg Bros. to Edmonson, the Court completely ignored the state authorization model. [FN599] In Flagg Bros., [FN600] for example, why was it not competent for Shirley Brooks to allege that the New York Uniform Commercial Code had unconstitutionally authorized the sale of her stored goods? [FN601] That the Court ignored this state authorization issue completely is evidenced by its statement that "the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York." [FN602] Here, the Court clearly confined itself to the characterization model. In relation to the state authorization model, the third Edmonson factor does constitute an improvement over the "conspiracy of silence" that prevailed during the 1970s and 1980s, but the factor ***766** is still expressed in characterization model terms. Further improvement is required.

Without an open use of the state authorization model, the Court limps into the 21st century as an amputee. The state authorization model enables the Court to deal with governmental permission cases in which the state action label may not realistically be pinned on private action that causes harm to other private persons. In some of those cases, government's very act of authorization may itself be fairly described as arbitrary and, therefore, as constituting a violation of constitutional guarantees. In such situations, state authorization analysis offers the Court an effective tool for providing relief for injured private persons outside the context of the characterization model. If the Court continues to "hide" the state authorization model from public view, it is depriving

litigants and itself of a means for establishing governmental responsibility in an important category of cases. [FN603]

2. The State Authorization Model: A Limitless Concept? Most of the acts in which private actors engage are acts that government authorizes, i.e., government's legal system, in whatever form (state constitutional provisions, federal or state statutes or administrative regulations, or the common law), permits the private acts to occur. If government prohibits a private act, government is clearly not authorizing what it prohibits. [FN604] If government compels the private act, the Court has held that, under the characterization model, the government's act of compulsion transforms the private act into state action. [FN605] What, then, do we do with the vast array of private acts that government "merely" permits?

Theoretically, the state authorization model would permit private litigants to challenge the constitutional validity of every "harm-causing" private act permitted by government. This possibility may be the root cause for the Court's reluctance to embrace the state authorization model more openly. The possibility, ***767** however, is indeed more theoretical than real. Several legal and practical realities combine to lessen substantially the risk of "open season" on governmental acts of authorization, even assuming an open and vigorous utilization of state authorization analysis. A description of some of these realities follows.

a. The "Case or Controversy" Requirement. Under Article III, Section 2, of the Constitution, the judicial power of the United States extends only to "Cases" and "Controversies." [FN606] Standing and ripeness are the two main ingredients of the case-or-controversy requirement. [FN607] Standing and ripeness have been labeled respectively the "who" and "when" of constitutional adjudication. [FN608] Standing focuses on the relationship of the litigant to the subject matter of the dispute. It raises the question of whether the litigant is the proper party to seek resolution of the dispute. [FN609] Ripeness, on the other hand, focuses on the question of timing. The inquiry is whether the dispute has evolved to a stage that is appropriate for judicial resolution. [FN610] In more general terms, the standing and ripeness inquiries express the federal judiciary's desire "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [FN611]

The case-or-controversy requirement means that federal courts will dismiss an action by a litigant who has merely "made a search of state statutes [or other state acts authorizing private action] . . . with a view to picking out certain ones that [he or she believes] might possibly be used" [FN612] by others to the litigant's detriment at some indefinite time in the future. Contrast with such a litigant the position of Shirley Brooks in Flagg Bros. Brooks faced an imminent sale of her stored goods by a creditor acting ***768** under the authority of the state statute that she sought to challenge. [FN613] From a standing viewpoint, she is the person who, above all others, would have been uniquely affected by the threatened sale. From a ripeness viewpoint, the threatened sale was both imminent and real; in the ripeness continuum of dispute resolution, there remained little, if any, uncertainty in the creditor's proposed course of conduct. Through the requirements of standing and ripeness, the federal courts retain ample doctrinal tools to dismiss the claims of litigants who, unlike Brooks, want nothing more than to test the validity of state acts of authorization with which they disagree. [FN614]

b. The "Frivolous Claim" Concern. As we have already seen, every private act within the legal framework of a given state is either prohibited, compelled, or authorized by state law. Moreover, it is admittedly true that private conduct authorized by state law often affects us in very concrete and adverse ways. If, for example, a person breaches a contract or commits a tort, the injured party is authorized by state law to seek legal redress for the injury. It is, therefore, theoretically possible that the malfeasor, under the state authorization model, might seek to challenge the constitutional validity of the state act that authorizes the injured party to seek legal redress. Concededly, such a claim would possess concrete adverseness even though it clearly lacks substance on the merits.

The chance that the state authorization model will encourage a host of frivolous

constitutional claims is a danger that, again, is more theoretical than real. As Professor Scott has written, the "idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." [FN615] For reasons of financial self-interest, if no other, ***769** litigants and lawyers are not in the habit of pressing constitutional claims that are clearly without merit. If such claims are pressed, techniques are available for prompt resolution and dismissal on the merits [FN616] or for prompt dismissal for want of jurisdiction. [FN617]

c. The Rarity of Constitutional Invalidity. In relation to private acts authorized by government, probably 98% of state acts of authorization are constitutionally valid acts. [FN618] If one considers the almost infinite array of private acts authorized by government, the instances are rare in which such governmental authorization may be successfully challenged on the grounds that it violates the Constitution. Typically, government "wins" constitutionally if its act of authorization may be perceived as a rational means of advancing a rational goal. [FN619] Accordingly, a person challenging a governmental act of authorization stands little chance of success unless: (1) the challenger can convince the court that the act of authorization is irrational; or (2) the challenger can convince the court that the act of authorization should be reviewed under some form of elevated scrutiny. [FN620] Since ***770** neither of these two options will occur frequently, there is little likelihood that an open use of the state authorization model will result in a decimation of governmental acts of authorization. Instead, the model serves primarily as a vehicle for protecting private victims against the infrequent instances in which a governmental act of authorization may be fairly described as egregious in its consequences.

Under the state authorization model, it must always be remembered that the final act causing the harm is an act engaged in by a private actor. By definition, the state authorization model assumes that the state action label cannot be pinned on the private action that causes the harm. The state has not compelled the act to occur; it has permitted the act to occur with legal impunity. Accordingly, it is appropriate to proceed cautiously in holding government constitutionally responsible for harm caused by the private acts that government has authorized. Caution, however, does not mean abdication. In some instances, albeit few in number, government should be held constitutionally responsible for the consequences of what it has authorized. Within the totality of state action doctrine, the state authorization model serves that important policing function.

d. State Authorization and the Common Law: Power to Prohibit Does Not Impose an Obligation to Prohibit. In the absence of statutory or administrative regulation, a state's controlling regime of law is the common law. The common law permits two categories of private acts to occur: (1) private acts that the state is constitutionally obligated to permit; and (2) private acts that the state may constitutionally prohibit but which the state has chosen not to prohibit. Examples of private acts in the first category would be choice of spouse, [FN621] choice of ***771** dinner guests, [FN622] and a woman's decision to terminate her pregnancy before fetal viability. [FN623] These acts are constitutionally protected against state interference by an "inner circle" right of associational privacy in relation to the choice of spouse or dinner guests and by a privacy-related liberty right to make the pre-viability abortion decision free of undue burdens imposed by the state. [FN624] With respect to such private acts, the state has no option; constitutionally, the state must permit such acts to occur.

The second category of private acts encompasses a much wider range of private acts. At common law, the state may permit many private acts to occur which the state has the constitutional power to prohibit. A prime example of such acts are acts of private class discrimination, e.g., a refusal to sell, rent, or employ on the basis of race or to admit into a place of public accommodation on the basis of race. Under current constitutional theory, the federal and state governments possess ample power to prohibit such acts of private racial discrimination. [FN625] Does government violate the Constitution by leaving such acts untouched, thus permitting them to continue under the common law?

If the answer to that question is "yes," a state, through legislative action or judicial revision of the common law, would be required to eliminate private class discrimination in every situation ***772** where the state possesses the constitutional power to do so. No

Supreme Court holding has ever imposed such an obligation on the states. [FN626] Conceptually, such a holding would conflict with the Court's dicta in Reitman "that the State [is] permitted a neutral position with respect to private racial discriminations and that the State [is] not bound by the Federal Constitution to forbid them." [FN627] Such a holding would conflict even more strongly with the Reitman dictum that the Fourteenth Amendment does not establish "an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing." [FN628] If a state, by a procedurally neutral repeal, may "reauthorize" private discrimination in situations where such discrimination was previously prohibited by state statute, then surely the state may adopt a position of ongoing neutrality toward private discrimination that was never prohibited in the first place. [FN629]

Earlier in this study, I argued that the policy of encouraging legislative experimentation requires the rejection of the "one way freeze" theory that would prohibit a state from repealing, in a procedurally neutral way, any prior advance in the elimination of private class discrimination. [FN630] That same policy of experimentation militates against a state obligation to prohibit private class discrimination in all instances where it possesses the constitutional power to do so. Beyond the legislative experimentation rationale looms the practical problem of determining when such an obligation, if imposed, would be satisfied. To meet the obligation, a state would be required to press its regulatory power to the point at which individual associational decisions are protected by the right of privacy and other constitutional guarantees. As the state approached the penumbras of that point, it would be subject to litigious pressure from opposite directions: from those claiming that the state has gone too far and from those claiming that the state has not gone far enough. Given the heartening revival of civil rights legislation that has occurred at both the state and national levels in recent decades, [FN631] there is no ***773** strong policy reason for subjecting the states to an obligation bristling with definitional difficulties and of limited practical utility in eliminating private class discrimination. [FN632]

Within the framework of the common law, the preceding analysis could be applied to other substantive areas. For example, a state's common law may permit private economic or speech activity that the state has the power to prohibit but which the state may choose to leave to the "permissive mercies" of the common law. As in the area of private class discrimination, it would not be wise to require the state to prohibit all private conduct that it has the power to prohibit. The common law provides a skeletal legal framework that tilts in favor of individual autonomy in decision-making across the entire range of human endeavors. Constitutionally, states should enjoy a generous discretion in determining the extent to which that legal framework should be modified. By rejecting the "power equals obligation to prohibit" principle, the courts can preserve the state authorization model for its more limited but vital function: protecting private victims against state acts of authorization, in whatever form expressed, that may be fairly described as arbitrary (Justice Stevens' brute force hypothetical in Flagg Bros.), or as constituting a denial of equal protection (Shelley and Reitman) or a violation of some other constitutional guarantee (such as free speech in New York Times Co. v. Sullivan [FN633]).

In the light of the four preceding factors, it is time to bring the state authorization model into open view. The judicial sky will not fall in if this is done. A wise and selective use of the state authorization model will enable the Court to determine more effectively the limits placed by the Constitution on state acts of authorization. Such acts should not be immunized from judicial review simply because, under the characterization model, the state action label cannot realistically be attached to the private action that causes the harm. The Court knows this, as its decisions in Shelley and Reitman at least implicitly indicate, ***774** and judicial integrity is enhanced when the Court's analysis matches the underlying conceptual reality of the situation that the Court is addressing. Assessing the scope of governmental responsibility under the Constitution requires a judicious and open use of both the characterization and state authorization models.

C. The State Action Doctrine and Governmental Responsibility

As stated at various points in this study, the state action doctrine constitutes the conceptual framework within which the courts seek to determine the scope of governmental responsibility under the Constitution, a document whose self-executing force is limited

primarily to governmental action. Few doctrines, if any, have greater importance for our constitutional system in preserving the proper balance among the competing values of individual autonomy, federalism, and the protection of constitutional rights against governmental intrusion. The state action doctrine offers the characterization and state authorization models as the main conceptual tools for preserving that proper balance.

The Supreme Court's recent decisions in Edmonson, McCollum, and Lebron point generally in a positive direction, especially with respect to the characterization model. Under that model, the Court now seems more willing to engage in a totality approach in determining whether the challenged private action has been transformed into state action. This approach requires the Court to assess the cumulative weight of all relevant factors in answering the state action question, and the three Edmonson factors, discussed earlier in this Part, [FN634] are well-suited for that purpose. In characterization cases that are closer to the borderline than Edmonson, McCollum, and Lebron, the Court needs to continue the probing, fact-specific inquiry that those cases exemplify.

With respect to the state authorization model, the Supreme Court must expressly confront the state authorization issue as the opportunity arises in future cases. Deliberate obfuscation must give way to deliberate explication. Unless this happens, the Court will be leaving unused one of its main conceptual tools for assessing the scope of governmental responsibility under the Constitution. There are constitutional limits on the extent to which government may authorize private actors to harm other private actors with legal impunity. Defining these limits may be a difficult task, but that difficulty does not justify a failure to use ***775** openly the very model that is designed for the task at hand. One hopes that court decisions in the coming century will bring the state authorization model to its rightful place as a vital part of the state action doctrine.

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[FN1]. Refer to Part II.B.3. & 4. supra.

[FN2]. Tragically, as we shall see, the bad sheriff hypothetical became reality in Screws v. United States, 325 U.S. 91, 92-93 (1945) (finding that state action existed when a sheriff and two public officials arrested a black man and then beat him to death).

[FN3]. See, e.g., Farmer v. Rutherford, 15 P.2d 474, 478 (Kan. 1932) (stating that "[t]he abusing and beating of one suspected of [a] crime, to wring from him a confession, is contrary to every principle of our criminal jurisprudence"); Bowman v. Hayward, 262 P.2d 957, 957-60 (Utah 1953) (holding that a deputy sheriff and a sheriff were liable for assault and battery after the deputy sheriff abused, attacked, and dragged a prisoner down an alley).

[FN4]. 193 U.S. 430 (1904).

[FN5]. See id. at 437-41 (holding that, as the New York Rapid Transit Board was acting beyond its authority in violation of state law, plaintiffs could not bring a Fourteenth Amendment action against the Board).

[FN6]. Id. at 441.

[FN7]. 325 U.S. 91 (1945).

[FN8]. 341 U.S. 97 (1951).

[FN9]. Williams, 341 U.S. at 99; Screws, 325 U.S. at 109 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). The next subsection of this chapter discusses the relationship between the concepts of state action and acting under color of state law.

[FN10]. See, e.g., Hafer v. Melo, 502 U.S. 21, 27-29 (1991); United States v. Price, 383 U.S. 787, 793 (1966).

[FN11]. Refer to Part V.C.2. infra. I will elaborate on the point in the text and argue further that the Barney distinction is, as a practical matter, unworkable.

[FN12]. Screws, 325 U.S. at 111.

[FN13]. Refer to Part V.C.3. infra.

[FN14]. Id.

[FN15]. 341 U.S. 97 (1951).

[FN16]. See id. at 100 (stating that the wrongdoer, who operated a private detective agency, "was no mere interloper but had a semblance of policeman's power from Florida").

[FN17]. Id. at 98.

[FN18]. Id. at 99.

[FN19]. Refer to Part V.D. infra.

[FN20]. See, e.g., 18 U.S.C. § 242 (1994) (providing criminal penalties); 42 U.S.C. § 1983 (1994) (providing civil penalties).

[FN21]. 42 U.S.C. § 1983.

[FN22]. 502 U.S. 21 (1991).

[FN23]. Id. at 28 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 929 (1982)).

[FN24]. See West v. Atkins, 487 U.S. 42, 49 (1988) (stating that "the Court [has] made [it] clear that if a defendant's conduct satisfies the state-action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983"') (quoting Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 (1982)) (third alteration in original); see also United States v. Price, 383 U.S. 787, 794 n.7 (1966) (explaining that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment").

[FN25]. 454 U.S. 312 (1981).

[FN26]. Id. at 314.

[FN27]. Id.

[FN28]. Id.

[FN29]. See id. at 315.

[FN30]. See id. (stating that Dodson's complaint alleged deprivation of right to counsel, subjection to cruel and unusual punishment, and denial of due process).

[FN31]. Id. at 325.

[FN32]. See id. at 320 (listing as examples of "adversarial functions": entering "not guilty" pleas, suppressing the state's evidence, objecting to evidence, cross-examining the State's witnesses, and making closing arguments). The Court rejected Dodson's contention "that a public defender's employment relationship with the State, rather than his function, should determine whether he acts under color of state law." Id. at 319.

[FN33]. Id. at 321.

[FN34]. Id. at 322 n.12 (citations omitted).

[FN35]. Id. (citation omitted).

[FN36]. Refer to notes 23-24 supra and accompanying text.

[FN37]. Dodson, itself, did not require that departure because the Court, in footnote 12, concluded that, in her representational function, Shepard was neither a state actor nor acting under color of state law. See 454 U.S. at 322 n.12. The distinction, if any, between the two concepts thus remains elusive.

[FN38]. 502 U.S. 21 (1991).

[FN39]. Id. at 28 (quoting Scheuer v. Rhodes, 416 U.S. 232, 243 (1974)).

[FN40]. See generally Peter W. Low & John C. Jeffries, Jr., Civil Rights Actions: Section 1983 and Related Statutes 1-186 (2d ed. 1994).

[FN41]. For example, the question of a municipality's liability for the actions of its employees interrelates with the beyond state authority issue discussed, infra, in the next subsection of this Part.

[FN42]. 109 U.S. 3, 11 (1883).

[FN43]. 193 U.S. 430 (1904).

[FN44]. See id. at 431.

[FN45]. See id. at 430-31.

[FN46]. See id at 431-32.

[FN47]. See id. at 432 (adding that the Board may not have known that the construction had begun).

[FN48]. See id. at 433.

[FN49]. See id. at 441.

[FN50]. See id. at 437 (pointing out that Barney's complaint stated on its face that the construction of the tunnel was not action by the State of New York).

[FN51]. Id. at 437.

[FN52]. Id. at 438.

[FN53]. Id. at 441 (pointing to Pacific Gas Imp. Co. v. Ellert, 64 F. 421 (C.C.N.D. Cal. 1894)).

[FN54]. Id.

[FN55]. Id.

[FN56]. Id.

[FN57]. For purposes of this Part, "authorized" means "permitted." Therefore, an act unauthorized by state law is an act that the state's legal system, in whatever form it manifests itself, does not permit. Accordingly, an act unauthorized by state law violates state law in the practical sense that the act renders the actor vulnerable to some form of sanction by the state's legal system. In some instances, that sanction may take the form of a civil action for damages, for an injunction, or, perhaps, for nothing more than a declaration of rights. Cf. Polk County v. Dodson, 454 U.S. 312, 315 (1981) (describing how a criminal defendant sought damages and an injunction in relation to the actions of his public defender). In other instances, the sanction may also include criminal prosecution. See, e.g., Bryson v. State, 807 S.W.2d 742, 743 (Tex. Crim. App. 1991) (reversing the judgment of the court of appeals and affirming the conviction of John D. Bryson, the police chief of La Feria, Texas, under the state "official oppression" statute). In some form, the person engaging in the unauthorized act can be made to suffer a legal detriment by the state's legal system.

[FN58]. See, e.g., Screws v. United States, 325 U.S. 91, 111 (1945) (distinguishing between personal pursuits and acting beyond state authority).

[FN59]. Refer to Part V.C.3. infra.

[FN60]. 207 U.S. 20 (1907).

[FN61]. See id. at 35 (outlining the issues of the case). In reviewing the facts of the case, the Court said that "[i]t is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year." Id. at 36-37.

[FN62]. See id. at 40 (forbidding collection of the tax).

[FN63]. See id. at 35-36.

[FN64]. See id. at 36 (explaining that the board acted under the constitution and laws of the state and represented the state).

[FN65]. See id. at 37.

[FN66]. Id.

[FN67]. Id.

[FN68]. See id. (explaining that the board was constitutionally required to levy a tax in proportion to the property's value).

[FN69]. 227 U.S. 278 (1913).

[FN70]. See id. at 280-81.

[FN71]. See id. at 281 (describing the Company's complaint that the rates were unreasonably low).

[FN72]. See id. at 282 (restating the state's argument that the federal courts did not have jurisdiction because there would be no state action until a state court declared the City's acts to be constitutional under the state constitution).

[FN73]. Id. at 287. Here, the Court articulates, in substance, the "materially facilitates" test that this Part advances for distinguishing the "official-capacity" acts of state actors from their "private-capacity" acts.

[FN74]. See id. at 294 (citing to Ex parte Young, 209 U.S. 123 (1908) and Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907)).

[FN75]. See id..

[FN76]. Id.

[FN77]. 325 U.S. 91 (1945).

[FN78]. Id. at 92.

[FN79]. See id.

[FN80]. See id. at 93. As the Court described in detail:
> [A]fter Hall, still handcuffed, had been knocked to the ground, they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour

without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.
Id.

[FN81]. At the time, § 20 was codified as 18 U.S.C. § 52. Presently it is codified as 18 U.S.C. § 242 (1994).

[FN82]. Screws, 325 U.S. at 93.

[FN83]. See id. at 94.

[FN84]. See id. at 107, 112-13 (considering the definition of the term "willfully" used in the jury instruction).

[FN85]. See id. at 95.

[FN86]. See id. at 94-100 (explaining the notice problems that inhere in federal statutes that, in general terms, make it a crime to deprive persons of rights protected by the Constitution).

[FN87]. Id. at 104.

[FN88]. See id. at 107, 113. Douglas stated that for the jury to "convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal." Id. at 107. Justice Rutledge concurred in the Court's judgment of reversal. See id. at 113 (Rutledge, J., concurring). In dissent, Justice Murphy argued that it was unnecessary to give new instructions on the issue of vagueness and that the conviction of Screws and his cohorts should stand: "Knowledge of a comprehensive law library is unnecessary for officers of the law to know that the right to murder individuals in the course of their duties is unrecognized in this nation." Id. at 136-37 (Murphy, J., dissenting).

[FN89]. See id. at 94 n.1.

[FN90]. See id. at 107. On this point, the Douglas opinion was supported expressly by Justice Rutledge, See id. at 114-17 (Rutledge, J., concurring), and inferentially by Justice Murphy, See id. at 135 (Murphy, J., dissenting). Thus, on the beyond state authority issue, six justices supported the Douglas position.

[FN91]. 313 U.S. 299 (1941).

[FN92]. Screws, 325 U.S. at 109 (quoting Classic, 313 U.S. at 326).

[FN93]. Id. at 111.

[FN94]. Id.

[FN95]. Id.

[FN96]. See id.

[FN97]. In the "murder without arrest" hypothetical, there would still remain the question of whether Screws had the specific intent to deprive Hall of a right protected by the Constitution or federal law. A persuasive argument could be made that, as in the actual Screws case, Screws did have the specific intent to deprive Hall of life without a judicial trial. Refer to notes 103-08 infra and accompanying text.

[FN98]. 100 U.S. 339 (1880).

[FN99]. See id. at 340.

[FN100]. Screws, 325 U.S. at 110.

[FN101]. See id.

[FN102]. Ex parte Virginia, 100 U.S. at 347.

[FN103]. 341 U.S. 97 (1951).

[FN104]. Id. at 98. The lumber company, after suffering numerous thefts, had hired Williams and his private detective agency to conduct an investigation into the thefts. See id.

[FN105]. Id. at 100. Specifically Williams "held a special police officer's card issued by the City of Miami, Florida," id. at 98, and "[o]ne Ford, a policeman, was sent by his superior to lend authority to the proceedings." Id. at 99.

[FN106]. Id. at 99 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

[FN107]. Id. at 100.

[FN108]. See id. at 99-100 (noting that private detectives often have policemen's powers, and that an actual police officer was assigned to the investigation).

[FN109]. 383 U.S. 787 (1966).

[FN110]. See id. at 793 & n.5 (finding the issue settled in part by the Screws decision). As discussed previously, one of the main issues in Price concerned the question of joint action. The Court held that private persons who participated willfully with Price in the murder of three civil rights workers were also acting under color of law. See id. at 794-95.

[FN111]. See id. at 790.

[FN112]. See id. at 799 (explaining in the indictment that the sheriff, deputy sheriff, and a patrolman participated in a conspiracy in violation of the Fourteenth Amendment).

[FN113]. See id. at 790.

[FN114]. 383 U.S. 745 (1966).

[FN115]. See id. at 747 n.1 (quoting the indictment).

[FN116]. Id. at 748 n.1.

[FN117]. Id. at 756-57.

[FN118]. See id. (holding that the indictment contained an express allegation of state involvement which required the denial of a motion to dismiss).

[FN119]. 487 U.S. 42 (1988).

[FN120]. Id. at 54. West alleged that after he had torn his left Achilles tendon, "Atkins was deliberately indifferent to his serious medical needs, by failing to provide adequate treatment." Id. at 43, 45. The Court noted that "[t]he adequacy of West's allegation and the sufficiency of his showing on this element of his § 1983 cause of action are not contested here." Id. at 48.

[FN121]. The Court stressed that in "contrast to the public defender [in Dodson], Doctor Atkins' professional and ethical obligation to make independent medical judgments did not set him in conflict with the State and other prison authorities. Indeed, his relationship with other prison authorities was cooperative." Id. at 51. For a detailed discussion of Dodson, refer to notes 25-37 supra and accompanying text.

[FN122]. West, 487 U.S. at 56-57.

[FN123]. Id. at 57. The quote in the text illustrates once again the modern Court's equating of the concepts of "state action" and "under color of law."

[FN124]. See Medley v. North Carolina Dept. of Correction, 412 S.E.2d 654, 659 (N.C. 1992) (holding that North Carolina case law, statutes, the federal Constitution, the North Carolina Constitution, and other authorities all support the conclusion that the Department of Correction has a non-delegable duty to provide adequate medical care to prison inmates).

[FN125]. West, 487 U.S. at 55. The quote in the text also has relevance in relation to the state inaction issue, as discussed in Part VII infra.

[FN126]. Refer to note 57 supra.

[FN127]. 502 U.S. 21 (1991).

[FN128]. See id. at 23.

[FN129]. Id.

[FN130]. Id.

[FN131]. Id.

[FN132]. Id. at 31.

[FN133]. Id. at 24.

[FN134]. 491 U.S. 58 (1989).

[FN135]. See id. at 71.

[FN136]. Id.

[FN137]. See Hafer, 502 U.S. at 27. The Hafer Court's distinction between "official-capacity suits" and "personal-capacity suits" should not be confused with the distinction that the Court has also made between acts taken by a state actor in his or her official capacity and acts taken by a public official in his or her private capacity. See id. at 26. When a state actor acts in a clearly private capacity, he or she ceases to be a state actor for purposes of that "private-capacity" action. See Screws v. United States, 325 U.S. 91, 111 (1945) (stating that "acts of officers in the ambit of their personal pursuits are plainly excluded" from the state action concept). But, acts taken by a state actor in excess of his or her state-granted authority retain their state action character if they are materially facilitated by the actor's status as a state actor. See Hafer, 502 U.S. at 28 (postulating that a State badge of authority could facilitate an actor's chosen course of action).

[FN138]. Hafer, 502 U.S. at 27.

[FN139]. Id. at 27-28.

[FN140]. Id. at 28. Quixotically, Hafer was arguing for a "reverse" Barney distinction: If she acted "outside her official authority," she could be held liable as a "person" under § 1983, but if she acted "within her official authority," she could not be held liable as a "person" under § 1983. See id. at 27-28 (discussing and rejecting the distinction urged by Hafer). The second category of acts, Hafer argued, included her employment decisions and "should be considered acts of the State that cannot give rise to a personal-capacity action" under § 1983. Id. at 28.

[FN141]. Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (quoting Monroe v. Pape, 365 U.S. 167, 171-72 (1961)).

[FN142]. Id. at 24.

[FN143]. Screws v. United States, 325 U.S. 91, 112 (1945).

[FN144]. On this point, the Hafer Court reiterated the frequently-stated proposition that

"in § 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement." Hafer, 502 U.S. at 28.

[FN145]. Again, it is important not to confuse the distinction between private-capacity and official-capacity acts with the Hafer Court's distinction between official-capacity and personal-capacity suits. See id. at 27 (holding that state officers sued in their official capacity assume the identity of the government that employs them while state officers sued in their personal capacity come to court as individuals). The Hafer Court's distinction relates to the capacity in which the state actor is sued; the distinction of this subsection relates to the capacity in which the state actor acts.

[FN146]. Screws, 325 U.S. at 111.

[FN147]. Id. at 109 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

[FN148]. Id. at 115-16 (Rutledge, J., concurring).

[FN149]. 502 U.S. 21 (1991).

[FN150]. Id. at 28 (quoting Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (quoting Monroe v. Pape, 365 U.S. 167, 171-72 (1961)).

[FN151]. As stated by Justice Harlan in a different context: "There is a difference in power between States and private groups so great that analogies between the two tend to be misleading." United States v. Guest, 383 U.S. 745, 772 (1966) (Harlan, J., concurring in part and dissenting in part).

[FN152]. 365 U.S. 167 (1961).

[FN153]. See id. at 191-92. The Court stated that
> [t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871 (currently § 1983), was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.

Id. at 191.

[FN154]. 436 U.S. 658 (1978).

[FN155]. Id. at 690.

[FN156]. Id. at 691.

[FN157]. Id. at 694.

[FN158]. See City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact").

[FN159]. See id. at 391 (stating that the plaintiff needs to prove that deficient training of police created the indifference that caused the injury).

[FN160]. See Low & Jeffries, supra note 40, at 112-187, for a comprehensive discussion of municipal liability under § 1983.

[FN161]. See Monell, 436 U.S. at 694.

[FN162]. See id.

[FN163]. Id. at 695.

[FN164]. Id. at 693.

[FN165]. See, e.g., United States v. Lopez, 514 U.S. 549, 552 (1995) (invalidating, for the first time in almost 60 years, a congressional statute on the grounds that it exceeded the power granted to Congress under the Commerce Clause); New York v. United States, 505 U.S. 144, 149 (1992) (concluding that the federal government cannot compel the states to pass specific legislation because this would invade the state's autonomous legislative process).

[FN166]. 444 U.S. 277 (1980).

[FN167]. Id. at 279.

[FN168]. See id. at 279 (noting that the original sentence included a recommendation that Thomas not be paroled).

[FN169]. See id. at 279-80.

[FN170]. See id. at 284 (finding that the plaintiff had not been deprived of a right secured by the Constitution or the laws of the United States).

[FN171]. Id. at 284-85.

[FN172]. Id. at 285 (citation omitted). Reserving room for a closer case, the Court did note that "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." Id.

[FN173]. 341 U.S. 97 (1951).

[FN174]. Id. at 98.

[FN175]. See id.

[FN176]. Id.

[FN177]. Id. at 99.

[FN178]. Id.

[FN179]. Id. at 100.

[FN180]. See, e.g., id. at 98-100.

[FN181]. Refer to Part V.C.3. supra.

[FN182]. Refer to notes 176-79 supra and accompanying text.

[FN183]. Because of the prohibitions of the Eleventh Amendment and the related doctrine of sovereign immunity, the practical degree of the governmental employer's responsibility will vary, depending upon whether the employer is the national or state government or a political subdivision thereof, such as a city, county, or other municipal entity. On the question of a municipality's liability under § 1983 for the acts of its employees, see the line of cases beginning with Monell v. Department of Social Services, 436 U.S. 658, 690-94 (1978) (holding that municipalities are "persons" for the purposes of § 1983 actions). Also, refer to Part V.C.4. supra.

[FN184]. Refer to Part V.C.2. supra.

[FN185]. The "brute force" hypothetical is drawn from the dissent of Justice Stevens in Flagg Bros, Inc. v. Brooks, 436 U.S. 149, 168-69 (1978) (Stevens, J., dissenting) (holding that a warehouseman's proposed private sale of goods was not an action properly attributable to the state and thus was not "state action"). In arguing that there are limits on what a state's legal system may authorize one private person to do to another, Stevens states that, without such limits,

> [a] state statute could authorize the warehouseman to retain all proceeds of the lien

sale...; it could authorize finance companies to enter private homes to repossess merchandise; or indeed, it could authorize "any person with sufficient physical power" to acquire and sell the property of his weaker neighbor.
Id. at 170 (Stevens, J., dissenting) (citation omitted).

[FN186]. As in previous Parts, the word "authorize" means "permit." If the state's legal system, when challenged, permits an act to occur, the state has authorized the act in the sense in which this chapter uses the word "authorize."

[FN187]. Refer to Part II.C.3. supra. As previously noted, unless expressly stated otherwise, references in this treatise to the "state authorization issue" are to that issue in the context of the state authorization model as described in Part VI.

[FN188]. 245 U.S. 60, 61-62 (1917) (holding invalid a city ordinance that forbade blacks to occupy houses in blocks where the greater number of houses were occupied by white persons).

[FN189]. 271 U.S. 323, 325-26 (1926) (considering and evading a constitutional challenge to a covenant that prohibited the sale, conveyance, lease, or gift of land to African-Americans).

[FN190]. 334 U.S. 1, 4 (1948) (holding that enforcement of racial covenants had violated the petitioners' rights to equal protection of the laws). For direct offshoots of Shelley, see, Barrows v. Jackson, 346 U.S. 249, 251 (1953) (holding that award by state court of damages against covenantor for breach of racial covenants constituted invalid state action); Hurd v. Hodge, 334 U.S. 24, 26 (1948) (reversing court of appeal's decision that granted injunctive relief to enforce the terms of racial covenants).

[FN191]. See Buchanan, 245 U.S. at 73. The Buchanan Court held that the city ordinance violated the due process clause of the Fourteenth Amendment. See id. at 82.

[FN192]. See Corrigan, 271 U.S. at 324; Shelley, 334 U.S. at 4.

[FN193]. See Shelley, 334 U.S. at 23 (reversing the Supreme Courts of Missouri and Michigan, which had held that enforcement of the covenants did not violate the Fourteenth Amendment).

[FN194]. 387 U.S. 369 (1967).

[FN195]. See id. at 370.

[FN196]. See id. at 370-71.

[FN197]. Id. at 381.

[FN198]. See id. at 373 (affirming the judgment of the California Supreme Court).

[FN199]. 396 U.S. 435 (1970).

[FN200]. See id. at 444.

[FN201]. 382 U.S. 296 (1966). Refer to Part IV.B. supra.

[FN202]. Abney, 396 U.S. at 436.

[FN203]. See Newton, 382 U.S. at 301-02 (holding that the continued city management of the park after formal resignation of the city trustees required that the park continue to be treated as a state actor).

[FN204]. Abney, 396 U.S. at 436.

[FN205]. Id. at 446.

[FN206]. Id.

[FN207]. Refer to Part VI.D. infra.

[FN208]. See Abney, 396 U.S. at 456-57 (Brennan, J., dissenting) (referring to the state authorization aspects of Shelley as a basis for invalidating the Georgia Supreme Court's construction of Senator Bacon's will).

[FN209]. Again, general references to the "state authorization issue" are to that issue in the context of the state authorization model and not to state authorization as a part of state nexus analysis.

[FN210]. See Hudgens v. NLRB, 424 U.S. 507, 508 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 552 (1972); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 309 (1968). Logan Valley was decided two years before Abney. While the Court in Logan Valley held state action to be present, the Court rested its holding primarily on a public function analysis. See Logan Valley, 391 U.S. at 319-20. For a further discussion of these cases, refer to Part III.C. supra.

[FN211]. 419 U.S. 345 (1974).

[FN212]. 436 U.S. 149 (1978).

[FN213]. See id. at 164-66 (concluding that a warehouseman's proposed private sale of goods as permitted by self-help provision of New York Uniform Commercial Code was not state action); Jackson, 419 U.S. at 354-57 (affirming the district court's decision that utility company's conduct was not state action merely because it was heavily regulated, provided an essential service, and enjoyed a virtual monopoly).

[FN214]. See Flagg Bros., 436 U.S. at 164-66; Jackson, 419 U.S. at 354-57. In Flagg Bros., Rehnquist did concede that "[o]ur cases state 'that a State is responsible for the...act of a private party when the State, by its law, has compelled the act."' Flagg Bros., 436 U.S. at 164 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)).

[FN215]. 500 U.S. 614 (1991).

[FN216]. Id. at 621-22. The Court listed the same three factors in Georgia v. McCollum, 505 U.S. 42, 51 (1992) (determining whether a criminal defendant can be characterized as a state actor when exercising peremptory challenges).

[FN217]. Refer to Part VIII.A.2. infra.

[FN218]. For purposes of this and subsequent Parts, the term "race covenant" means a racially restrictive provision in a deed or other instrument that restricts the sale or rental of real property on the basis of race.

[FN219]. See John F. Kain & John M. Quigley, Housing Markets and Racial Discrimination: A Microeconomic Analysis 61 (1975); Tom C. Clark & Philip B. Perlman, Prejudice and Property 11 (1969).

[FN220]. Racial prejudice, of course, is not limited to whites and manifests itself in all racial groups. In the context of American history, however, it is primarily non-white purchasers who have wanted to buy the residential property of unwilling white sellers rather than the reverse. See Clark & Perlman, supra note 219, at 14-15. As stated by the Shelley Court, "[t]he parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color." Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

[FN221]. Since the 1960s, of course, federal and state "open housing" legislation, see, e.g., 42 U.S.C. § 3604 (1996), has, subject to minor statutory exceptions, prohibited racial discrimination in the sale or rental of housing. Even without the Shelley decision, this development would have largely eliminated the race covenant issue by making such covenants legally unenforceable in relation to transactions within the coverage of open housing legislation.

[FN222]. See Clark & Perlman, supra note 219, at 11-12.

[FN223]. Indeed, it was not until the Court's 1953 decision in Barrows v. Jackson, 346 U.S. 249 (1953), that the danger of incurring damages for breaching a race covenant was finally eliminated. See id. at 258-60 (holding that a state court's action in awarding damages against covenantor for breach of a race covenant violated the Fourteenth Amendment to the Federal Constitution).

[FN224]. As described by Justice Stewart in his opinion for the Court in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968),

> [j]ust as the Black Codes, enacted after the Civil War to restrict the free exercise of [the right to acquire property], were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-43.

[FN225]. See id. at 441 (stating that the right to inherit, purchase, lease, sell, and convey property is a fundamental right and part of the essence of freedom).

[FN226]. See Clark & Perlman, supra note 219, at 11-21.

[FN227]. 245 U.S. 60 (1917).

[FN228]. See id. at 71-72.

[FN229]. See id. at 70-71.

[FN230]. See id. at 69-70.

[FN231]. See id. at 70.

[FN232]. See id. at 82.

[FN233]. See id. at 78-79.

[FN234]. See id. at 82. As explained by the Court, the "right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." Id. at 81.

[FN235]. See id. at 69-73 (recounting the history of the land transaction between Buchanan and Warley).

[FN236]. Id. at 82.

[FN237]. 271 U.S. 323 (1926).

[FN238]. 334 U.S. 1 (1948).

[FN239]. Corrigan, 271 U.S. at 327.

[FN240]. See id. at 327-28.

[FN241]. See id. at 327.

[FN242]. See id. at 329.

[FN243]. See id. at 332.

[FN244]. See id. at 330-32 (rejecting Corrigan's Fifth, Thirteenth, and Fourteenth Amendment arguments).

[FN245]. See id. at 329.

[FN246]. Id. at 330.

[FN247]. See id. at 330-31. The Court repeated the often-stated proposition that the limitations of the Fifth and Fourteenth Amendments operate only against government and not "against the action of individuals." Id. at 330. It is important here to note that the Court clearly regarded the action of executing the race covenant as private action and not state action. See id. at 330-31. The Shelley Court later took the same position. See Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (concluding that enforcement of racial covenants violated the Fourteenth Amendment). This position supports an application of state authorization analysis to the facts both of Corrigan and Shelley, an analysis tersely dismissed in Corrigan and obfuscated in Shelley.

[FN248]. Corrigan, 271 U.S. at 330. The Court described privately executed race covenants as involving no "condition of enforced compulsory service of one to another." Id.

[FN249]. Id. at 331.

[FN250]. Id. Had the Court been ready to decide the state authorization issue, it surely could have fashioned a procedural mechanism for doing so by postponing the final disposition of the case and giving the parties time to brief and to argue the issue at a later court hearing.

[FN251]. 334 U.S. 1 (1948).

[FN252]. See id. at 4-5.

[FN253]. Id. (quoting the actual covenant).

[FN254]. See id. at 5.

[FN255]. Id. at 6.

[FN256]. See id.

[FN257]. Id.

[FN258]. Id.

[FN259]. Id. at 20. The Court's holding applied also to identical facts involving land situated in Detroit, Michigan, and likewise subject to race covenants. See id. at 6-7, 20.

[FN260]. See G. Sidney Buchanan, Challenging State Acts of Authorization Under the Fourteenth Amendment: Suggested Answers to an Uncertain Quest, 57 Wash. L. Rev. 245, 257-58 (1982) [hereinafter Buchanan, Challenging State Acts of Authorization] (emphasizing that state court enforcement of the common law constitutes a form of state action).

[FN261]. See Shelley, 334 U.S. at 6.

[FN262]. In Shelley, the Court stated:
> We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

Id. at 13.

[FN263]. In relation to the procedural aspects of the state authorization issue, Shelley is analogous to Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (Douglas, J., concurring), discussed in Part VI.D infra. In both cases the plaintiffs did not plead the federal question in their original complaint. The Kraemers' initial claim arose solely under state

law and was rejected by the state trial court on the basis of state law. See Shelley, 334 U.S. at 6, 19-20. The federal question entered the case at the level of the state supreme court when that court, after first holding that the race covenants were enforceable under state law, concluded that state judicial enforcement of the covenants "violated no rights guaranteed to [the Shelleys] by the Federal Constitution." See id. at 6. Once raised, the federal question encountered no procedural barriers.

[FN264]. See Buchanan, Challenging State Acts of Authorization, supra note 260, at 258.

[FN265]. See id.

[FN266]. See id.

[FN267]. See Shelley, 334 U.S. at 14 (stating "that the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court"). In the common law setting, analysis of the state authorization issue is complicated by the fact that the state courts are performing two roles, legislative and judicial. In the same judicial proceeding, a state court both formulates and enforces a rule of law. This blending of functions should not obscure the fact that, from the perspective of the state authorization issue, a state court decision upholding the legality of a private act authorized by the common law is no different from a state court decision upholding the legality of a private act authorized by state statute. See id. at 20. In both instances, the merits inquiry is directed to the constitutional validity of the state act of authorization.

[FN268]. See Buchanan, Challenging State Acts of Authorization, supra note 260, at 259 (noting that any judicial action in any court proceeding constitutes state action).

[FN269]. The decision in Shelley has stimulated much scholarly speculation. See, e.g., Louis Henkin, Shelley v. Kraemer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473, 490 (1962); Gerald Gunther, Constitutional Law 902-06 (12th ed. 1991).

[FN270]. See Henkin, supra note 269, at 485 (explaining that the state would be encouraging discrimination).

[FN271]. See id. at 486-87.

[FN272]. 334 U.S. 24 (1948).

[FN273]. The Court stated that
> we have held that the Fourteenth Amendment also forbids [racial] discrimination where imposed by state courts in the enforcement of restrictive covenants. That holding is clearly indicative of the construction to be given to the relevant provisions of the Civil Rights Act [of 1866] in their application to the Courts of the District of Columbia.

Id. at 33.

[FN274]. 346 U.S. 249 (1953).

[FN275]. See id. at 258-60 (stressing that the award of monetary damages would give vitality to the restrictive covenant).

[FN276]. Id. at 258. In an interesting sidenote, the United States Supreme Court affirmed and then vacated a 1953 decision of the Iowa Supreme Court in which the Iowa Court sustained the refusal of a private cemetery to bury a non-Caucasian soldier killed while on active duty in the Korean War. See Rice v. Sioux City Mem'l Park Cemetery, Inc., 60 N.W.2d 110, 114-116 (Iowa 1953), aff'd 348 U.S. 880 (1954), vacated 349 U.S. 70, 79-80 (1955). The contract between the cemetery and cemetery lot owners contained a clause limiting burial privileges to "members of the Caucasian race." Id. at 112. The Iowa Supreme Court distinguished Shelley as involving "the exertion of governmental power directly to aid in discrimination," id. at 115, and refused to "extend" Shelley to cases permitting private race covenants "even though no active aid is given their enforcement." Id. In effect, the Iowa Supreme Court decision "authorized" the private cemetery to use a race covenant as a defensive shield against a cemetery lot purchaser attempting to force the

cemetery to deviate from the covenant. The cemetery was not simply in the position of an unwilling seller uninfluenced by a race covenant. The cemetery had, in fact, previously entered into a burial contract with the family of the deceased Korean War veteran. See id. at 112. Accordingly, the race covenant contained in that contract exerted pressure on the cemetery to adhere to the terms of the contract, a pressure not present in the absence of the covenant. In the spirit of Shelley and Barrows, when a contract already exists between the "seller" and the "buyer," state courts should not be allowed to permit race covenants to exert that kind of restraining pressure on sellers of property. Because the United States Supreme Court eventually vacated its earlier affirmance of the Iowa Supreme Court's decision, the "race covenant as shield" issue remains undecided.

[FN277]. In the narrow form of the Shelley rule, courts should have little difficulty in applying Shelley to restrictive agreements based on other forms of suspect or quasi-suspect classifications, such as national origin, gender, illegitimacy, and resident alienage. Agreements restricting the ownership of land by nonresident aliens (absent a United States treaty to the contrary) would probably be sustained if challenged on a constitutional basis. In three decisions in the 1970s, state supreme courts rejected attacks by nonresident aliens against state laws restricting the ownership rights of such aliens in United States land. See In re Estate of Horman v. State, 485 P.2d 785, 797 (Cal. 1971) (holding that the state did not deny equal protection when it created a shorter statute of limitations for non-resident alien land title claims); In re Estate of James v. State, 223 N.W.2d 481, 482-84 (Neb. 1974) (upholding the escheat of a non-resident alien's land to the state of Nebraska after a period of five years); Lehndorff Geneva, Inc. v. Warren, 246 N.W.2d 815, 824-25 (Wis. 1976) (holding that a Wisconsin statute limiting non-resident alien land ownership was constitutional). In support of these decisions, the United States Supreme Court, by negative implication, has indicated that constitutional guarantees of individual rights do not extend to aliens who are outside the jurisdiction of the United States. See Mathews v. Diaz, 426 U.S. 67, 77-81 (1976) (stating that the legal classification of aliens versus citizens for purposes of awarding certain state benefits is allowable); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (positing that individual rights and equal protection are guaranteed only for those within territory of the United States).

[FN278]. 387 U.S. 369 (1967).

[FN279]. See id. at 379-81 (acknowledging expressly that there are constitutional limits on what a state may authorize). On the point made in the text, Reitman differs sharply from Shelley in which the Court worked within the framework of the state authorization model without acknowledging or, perhaps, even recognizing that it was doing so.

[FN280]. 396 U.S. 435 (1970).

[FN281]. See id. at 445.

[FN282]. The Court's recent decision in Romer v. Evans, 116 S. Ct. 1620 (1996), raises the possibility that sexual orientation, although not yet defined as a suspect or quasi-suspect classification, might well be added to the classifications listed in the text for purposes of discussing at least some aspects of the Reitman and Abney decisions. See id. at 1627-29. In Romer, the Court, under rational basis scrutiny, invalidated governmental action directed against homosexuals as a class. See id. at 1629. The Court concluded that the governmental action in question "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." Id. See also G. Sidney Buchanan, Sexual Orientation Classifications and the Ravages of Bowers v. Hardwick, __ Wayne L. Rev. __, __ (1997) (publication forthcoming, original on file with the Houston Law Review).

[FN283]. 387 U.S. 369 (1967).

[FN284]. See id. at 381 (holding that the procedurally biased repeal of previous non-discrimination statutes establishes discrimination as a policy of the state).

[FN285]. See id. at 373 (affirming the holding of the California Supreme Court).

[FN286]. See id. at 371.

[FN287]. See id. at 374 (referring to the Unruh and Rumford Acts which prohibited racial and other forms of class discrimination in the sale or rental of housing).

[FN288]. See id. at 381 (stating that Proposition 14 was intended to authorize racial discrimination). Although the precise facts of Reitman involved private racial discrimination, the Court's holding seems equally applicable to other forms of private class discrimination, especially those forms of class discrimination geared to suspect or quasi-suspect characteristics. Refer to note 282 supra and accompanying text.

[FN289]. Reitman, 387 U.S. at 372 (footnote omitted).

[FN290]. Id.

[FN291]. See id.

[FN292]. See id. at 372-73.

[FN293]. See id. at 373.

[FN294]. See id.

[FN295]. In his dissenting opinion in Reitman, Justice Harlan conceded this point without reservation: "There is no question that the adoption of [[[Proposition 14], repealing the former state antidiscrimination laws and prohibiting the enactment of such state laws in the future, constituted 'state action' within the meaning of the Fourteenth Amendment." Id. at 392 (Harlan, J., dissenting). For Harlan, the "only issue [was] whether this provision impermissibly deprives any person of equal protection of the laws." Id. (Harlan, J., dissenting). The issue defined by Harlan is precisely the "merits" issue addressed by the state authorization model: within the factual context of Reitman, does the United States Constitution permit Proposition 14 to "authorize" private racial discrimination in the sale or rental of housing?

[FN296]. See Buchanan, Challenging State Acts of Authorization, supra note 260, at 256-57.

[FN297]. See id.

[FN298]. See Reitman, 387 U.S. at 375-77, 380-81 (stating that Proposition 14 authorized and constitutionalized private discrimination). As stressed by Justice White's opinion for the Court: "Here we are dealing with a provision (Proposition 14) which does not just repeal an existing law forbidding private racial discriminations. [Proposition 14] was intended to authorize, and does authorize, racial discrimination in the housing market." Id. at 380-81.

[FN299]. See id. at 376-79 (making clear that the question before the court concerned the constitutionality of Proposition 14, not the question of whether Reitman had been transformed into a state actor).

[FN300]. In the concluding paragraph of its opinion, the Reitman Court stated: "The California Supreme Court believes that [Proposition 14] will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned." Id. at 381. And, this conclusion was based on the Reitman Court's finding that "[Proposition 14] was intended to authorize, and does authorize, racial discrimination in the housing market." Id.

[FN301]. See id. at 374-77 (agreeing with the California Supreme Court that Proposition 14 was not a procedurally neutral repeal and constituted state involvement in discrimination).

[FN302]. See id. at 374 (referring to the Unruh and Rumford Acts which banned discrimination in public and private housing).

[FN303]. See id. at 377 (emphasizing that the "right to discriminate... was now embodied

in the State's basic charter").

[FN304]. See id.

[FN305]. See id.

[FN306]. As described by the Reitman Court,
> [t]he California [Supreme Court] could very reasonably conclude that [[[Proposition 14] would and did have wider impact than a mere repeal of existing statutes. [Proposition 14] mentioned neither the Unruh nor Rumford Act in so many words. Instead, it announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease. Unruh and Rumford were thereby pro tanto repealed. But [Proposition 14] struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government.

Id. at 376-77.

[FN307]. On this point, Justice Harlan in his dissent agreed with the majority: "There is no question that the adoption of [Proposition 14], repealing the former state antidiscrimination laws and prohibiting the enactment of such state laws in the future, constituted 'state action' within the meaning of the Fourteenth Amendment." Id. at 392 (Harlan, J., dissenting).

[FN308]. See id. at 376-77 (citing to the Unruh and Rumford fair housing statutes).

[FN309]. See id. at 375-77, 381 (accepting the reasoning of the California Supreme Court).

[FN310]. But see Colo. Const. art. II, § 306. Adopted by Colorado voters in 1992, Amendment 2 prohibited any level of state government from enacting any law or regulation that protects persons against governmental or private action that discriminates on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Id. See Romer v. Evans, 116 S. Ct. 1620, 1623 (1996). Applying rational basis scrutiny, the Romer Court invalidated Amendment 2, holding that "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." Id. at 1629. In substance, Amendment 2 constituted a procedurally biased repeal of prior legislative advances in the elimination of governmental and private discrimination against persons of same-sex orientation.

[FN311]. See Reitman, 387 U.S. at 395-96 (Harlan, J., dissenting) (stating that legislatures can deal more effectively than courts with the sensitive problems created by private class discrimination).

[FN312]. In the labor law area, for example, employee rights created by the Wagner Act, 29 U.S.C. § § 151-69 (1994 and Supp. I 1996), were later modified in a "pro-management" direction by the Taft-Hartley Act, 29 U.S.C. § 141 (1994 and Supp. I 1996). Moreover, it may not always be easy to discern in what direction a legislative enactment is moving.

[FN313]. On this point, Justice Harlan, in his dissent in Reitman, speaks persuasively against adoption of the "one way freeze" theory:
> The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum.

Reitman, 387 U.S. at 395-96 (Harlan, J., dissenting). As applied to governmental regulation of private class discrimination, I support Harlan's argument against adoption of the one way freeze theory, but I reject his argument in relation to procedurally biased repeals of prior advances in the elimination of private class discrimination.

[FN314]. Id. at 376. Reinforcing this position in a later part of his opinion, White stated:
> The California [Supreme Court] could very reasonably conclude that [[[Proposition 14] would and did have [a] wider impact than a mere repeal of existing statutes.... The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government.

Id. at 376-77.

[FN315]. At the constitutional level, the repeal of the prohibition amendment is a classic example of a procedurally neutral repeal. § 1 of amendment XXI states, "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. Const. amend. XXI, § 1. Without compromising the procedural neutrality of its repeal action, a state may in some instances choose to explain the reason for such action, e.g., the state's determination that the act repealed had, as a practical matter, become unenforceable.

[FN316]. Refer to text accompanying note 202 supra.

[FN317]. 396 U.S. 435 (1970).

[FN318]. 382 U.S. 296 (1966).

[FN319]. Refer to notes 201-06 supra and accompanying text and Part IV.B. supra.

[FN320]. See Newton, 382 U.S. at 297.

[FN321]. 347 U.S. 483, 495 (1954) (holding that racial segregation in state public schools constitutes a denial of equal protection under the Fourteenth Amendment).

[FN322]. See Newton, 382 U.S. at 298 (stating that the city resigned as trustee after suit was brought).

[FN323]. See id. at 301 (stating that the record showed continued municipal maintenance and control by the city). In his majority opinion for the Newton Court, Justice Douglas stated:
> The momentum [the city park] acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility.... If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment.

Id.

[FN324]. See id. at 302.

[FN325]. See Evans v. Abney, 396 U.S. 435, 439 (1970) (indicating that the racial restriction was an essential part of the testator's plan).

[FN326]. Id.

[FN327]. Id. at 444 (citation omitted). Justice Black added:
> Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Id. at 446.

[FN328]. See id. at 455-58 (Brennan, J., dissenting).

[FN329]. See id. at 455 (Brennan, J., dissenting).

[FN330]. See id. at 455-56 (Brennan, J., dissenting). As stated by Justice Brennan, "there

is state action whenever a State enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility." Id. at 455.

[FN331]. See id. at 456-57 (Brennan, J., dissenting) (arguing that a state court should not be permitted to enforce a race restriction that prevents willing parties of different races from dealing with each other).

[FN332]. See id. at 439 (emphasizing the Georgia Attorney General's position that the charitable trust could still operate effectively without the racial restriction imposed by Senator Bacon).

[FN333]. See id. at 457 (Brennan, J., dissenting).

[FN334]. See id. at 456-57 (Brennan, J., dissenting). As explained by Justice Brennan, "so far as the record shows, this is a case of a state court's enforcement of a racial restriction to prevent willing parties from dealing with one another." Id. at 457 (Brennan, J., dissenting). This argument is pure state authorization analysis. Brennan is arguing that the Georgia Supreme Court's decision "authorizes" Senator Bacon's heirs to gouge the would-be white and black users of the park with legal impunity.

[FN335]. See id. at 457-58 (Brennan, J., dissenting) (referring to Georgia § § 69-504 and 69-505 which expressly permitted the dedication of land for public purposes based on racial restrictions).

[FN336]. Id. at 457 (Brennan, J., dissenting).

[FN337]. See id. at 458 (Brennan, J., dissenting). Brennan stated that "Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction[s] on access to a public park." Id. (Brennan, J., dissenting). Seen another way, this passage exemplifies an "encouragement-contact" argument under the state nexus prong of the characterization model.

[FN338]. See id. at 458-59 (Brennan, J., dissenting) (pointing to Senator Bacon's reliance on Georgia § § 69-504 and 69-505 when drawing up his will in 1911).

[FN339]. Under either conceptual approach, Brennan's reasoning would hold that a denial of equal protection has occurred. See id. at 455-59 (Brennan, J., dissenting). Under the characterization model, this holding would flow from a conclusion that various contacts between the state and Senator Bacon's race-restrictive will provision had transformed the act of creating that provision into prohibited state action. Under the state authorization model, the same ultimate holding on the merits would flow from a conclusion that state court enforcement of the will provision unconstitutionally "authorized" Bacon's heirs to gouge the would-be white and black users of the park with legal impunity.

[FN340]. In this subsection, I will focus on private racial discrimination because I believe that the analysis advanced in this subsection is on strongest ground in that area. However, there is no persuasive reason why the analysis could not be extended generally to other suspect or quasi-suspect classifications such as national origin, gender, illegitimacy, and resident alienage. For example, the holding in Abney should not turn upon whether Senator Bacon's will excluded women instead of blacks from the city park. See In re Estate of Wilson, 452 N.E.2d 1228, 1236-37 (N.Y. 1983) (citing Abney with approval and sustaining the validity of a will provision limiting certain charitable gifts to men).

[FN341]. The definitions and analysis of this subsection represent solely my own personal statements concerning what I believe constitutional law "ought" to require in Abney-type fact situations. As I make clear later in the text, the Supreme Court has not adopted the analysis that I advocate in this subsection.

[FN342]. A statement that captures the spirit of the position advocated in the text appeared in a 1957 decision of the Colorado Supreme Court in Capitol Federal Savings & Loan Association v. Smith, 316 P.2d 252 (Colo. 1957):

> No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment

to the Federal Constitution.... High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Issac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.
Id. at 255. While Smith involved facts clearly controlled by the narrow holdings in Shelley and Barrows, See id., the opinion's colorful language suggests the broader applications urged in the text. For further discussion of Shelley and Barrows, refer to Part VI.C. supra.

[FN343]. See Plessy v. Ferguson, 163 U.S. 537, 559-60 (Harlan, J., dissenting) (stating that the Court's decision to allow racial segregation in public places will stimulate racial distrust and hatred).

[FN344]. See id. at 560 (Harlan, J., dissenting) (stating that the Plessy decision will perpetuate distrust and hate among the races).

[FN345]. Under a generous construction of the reasoning employed in Barrows v. Jackson, 346 U.S. 249 (1953), and Shelley v. Kraemer, 334 U.S. 1 (1948), state action that institutionalizes private racial discrimination should be held to constitute a denial of equal protection on the merits under the Fourteenth Amendment. See Barrows, 346 U.S. at 258-59; Shelley, 334 U.S. at 18-23. For a decision "institutionalizing" a testamentary religious restriction, see Gordon v. Gordon, 124 N.E.2d 228, 234-35 (Mass. 1955) (holding that testamentary restrictions requiring devisee to marry "within faith" were not unconstitutional). Since the First Amendment protects the free exercise of religion, it might be constitutionally permissible for a legal system to authorize private religious restrictions in situations where it would not be permissible to authorize private restrictions based on race, national origin, gender, or other forms of class discrimination.

[FN346]. See Justice Harlan's famous dissent in Plessy, 163 U.S. at 552- 64 (Harlan, J., dissenting).

[FN347]. Refer to notes 327-28 supra and accompanying text.

[FN348]. Refer to notes 253-64 supra and accompanying text.

[FN349]. To refine this point still further, it is one thing for a person to make an associational decision unencumbered by fear of a legal detriment flowing from a condition created by a third party to the transaction that the decisionmaker is contemplating. It is another thing to make that same decision knowing that such a legal detriment will be incurred if the decisionmaker decides to enter into the proposed transaction. Thus, the Shelley rule should be expanded to prohibit court enforcement of racially restrictive conditions as well as racially restrictive contracts. In the will hypothetical discussed supra, Mary should not be penalized legally for her willingness to enter into a marriage transaction in a racially nondiscriminatory manner. The legal system should encourage, not discourage, such unbiased action.

[FN350]. For a thorough discussion of the problem of racially restrictive trust provisions in educational trusts, see Stephen J. Leacock, Racial Preferences in Educational Trusts: An Overview of the United States Experience, 28 How. L.J. 725-38 (1985). Pressed to its outer limits, the argument advanced in this subsection might jeopardize the constitutionality of funds, e.g., scholarship funds, given by private donors for the benefit of designated racial or national origin groups. Typically, however, donors do not condition access to such funds upon the recipient's nonassociation with members of other racial or national origin groups. Such funds, therefore, do not introduce a class discrimination incentive into society. To the contrary, such funds operate as instruments enhancing the range of associational choices available to fund recipients. Receipt of a college scholarship, for example, increases the number of college choices available to the recipient; this, in turn, promotes racial and ethnic pluralism, not racial and ethnic exclusivity. Accordingly, the institutionalization of class discrimination argument should not be pressed this far; unlike the white users of the park in Abney, the actual and potential fund recipients of the favored racial and ethnic groups are not likely to be "willing sellers" in relation to the non-favored racial and ethnic groups.

[FN351]. Admittedly, in the case of private schools, libraries, hospitals, and other private entities, some difficulty may be experienced in determining the "willing seller or sellers" for purposes of applying the rule advocated in the text. However that may be, there will be cases, as in Abney, in which the "willing sellers," the white users of the park, have clearly spoken and can be determined with relative ease. See Evans v. Abney, 396 U.S. 435, 439 (1970). In such cases, if in no others, the courts should prevent the institutionalization of private racial discrimination.

[FN352]. See Abney, 396 U.S. at 445 (explaining that the facts in Abney were different from those in Shelley).

[FN353]. See id. at 454-55 (Brennan, J., dissenting) (listing various forms of state action involved in the closing of the park, including the state court's enforcement of Senator Bacon's racial restriction).

[FN354]. Refer to Part II.C.2. supra.

[FN355]. The major exceptions to the statement in the text were the Court's decisions in Marsh v. Alabama, 326 U.S. 501 (1946), the "company town" case, and Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), the first of the three "shopping center" cases. These two cases involved assertions of free speech rights under the First and Fourteenth Amendments.

[FN356]. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 524-28 (1987) (deciding free speech issues surrounding the use of the word "Olympic" to promote a sporting event); Hudgens v. NLRB, 424 U.S. 507, 508-12 (1976) (addressing labor picketing in a privately owned shopping center); Lloyd Corp. v. Tanner, 407 U.S. 551, 552-56 (1972) (determining the power of a private shopping center to prevent the distribution of hand bills that are not related to shopping center business).

[FN357]. See NCAA v. Tarkanian, 488 U.S. 179, 181 (1988) (determining a due process claim brought by a college basketball coach against the National Collegiate Athletic Association); Blum v. Yaretsky, 457 U.S. 991, 995-96 (1982) (deciding Medicaid program recipients' due process claim against the New York Department of Social Services and the Department of Health); Lugar v. Edmonson Oil Co., 457 U.S. 922, 924-25 (1982) (analyzing a due process claim in a case concerning the attachment of property); Rendell-Baker v. Kohn, 457 U.S. 830, 834-35 (1982) (determining the due process rights of a teacher who was discharged from a private school that received public funding); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 153 (1978) (addressing due process claims in relation to the private enforcement of a warehouseman's lien); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 347-48 (1974) (considering a due process claim in relation to the cancellation of utility services); Fuentes v. Shevin, 407 U.S. 67, 70 (1972) (analyzing the due process implications of state involvement in the enforcement of writs of replevin).

[FN358]. Two exceptions to the statement in text were the Court's decisions in Gilmore v. City of Montgomery, 417 U.S. 556, 558 (1974) (determining the validity of a segregated private school's use of public facilities), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 164-65 (1972) (sustaining a private club's refusal to serve racial minorities). As noted by Professor Gerald Gunther, the 1960s and 1970s saw a proliferation of civil rights statutes that prohibited racial and other forms of class discrimination by private actors in a wide array of human endeavors, e.g., employment, sale or rental of housing, and places of public accommodation. See Gunther, supra note 269, at 882-83. Moreover, the Supreme Court, in this same period, sustained the constitutional validity of congressional statutes regulating private class (particularly racial) discrimination in these areas. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (private racial discrimination in the sale or rental of housing); Katzenbach v. McClung, 379 U.S 294, 297-98 (1964) (private racial discrimination in places of public accommodation). Accordingly, and again as noted by Gunther, "the Court's unwillingness to intrude further into the private sphere under § 1 of the 14th Amendment may well be related to the increasing scope and exercise of congressional power to reach private activities under § 5 of that Amendment" and under the Thirteenth Amendment, § 2. Gunther, supra note 269, at 915.

[FN359]. In his opinion for the Court in Flagg Bros., Inc., then Justice Rehnquist comes close to conceding the truth of the statement in the text:

It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. A judicial decision to deny relief would be no less an "authorization" or "encouragement" of that sale than the legislature's decision embodied in this statute. It was recognized in the earliest interpretations of the Fourteenth Amendment "that a State may act through different agencies,--either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State" infringing rights protected thereby. Virginia v. Rives, 100 U.S. 313, 318 (1880). If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.
Flagg Bros., 436 U.S. at 165. The mistake that Rehnquist makes in his analysis is that the state authorization model is not geared to transforming private action into state action but rather to a "merits" determination of what one private party may be legally permitted to do to another private party.

[FN360]. 407 U.S. 551 (1972).

[FN361]. 424 U.S. 507 (1976).

[FN362]. See Lloyd Corp., 407 U.S. at 567-70 (holding that there was no dedication of a privately owned shopping center to public use and, therefore, that the owner could prevent the distribution of handbills unrelated in subject matter to activities of the shopping center); Hudgens, 424 U.S. at 514-21 (extending Lloyd Corp. and holding that the First and Fourteenth Amendments do not prohibit a shopping center owner from preventing picketing by labor directly related to the business activities of the shopping center).

[FN363]. Lloyd Corp., 407 U.S. at 569-70.

[FN364]. Id. at 570. Such variables would include the scope of the authority granted by government to the business property owner, the size and nature of the geographical area controlled by the property owner, and the scope of the property owner's invitation to the general public. At some point in the authorization continuum, the government's act of authorization could itself be held to constitute, on the merits, a denial of free speech rights to private persons affected by the property owner's speech regulation activities. See id. at 569-70.

[FN365]. 419 U.S. 345 (1974).

[FN366]. 436 U.S. 149 (1978).

[FN367]. See Jackson, 419 U.S. at 354-59 (describing the character and nature of a public utility and rejecting the argument that the utility's termination procedure was state action simply because the State had authorized the procedure); Flagg Bros., 436 U.S. at 164-66 (rejecting the notion that state permission is a sufficient contact to transform private action into state action).

[FN368]. In Jackson, the Court stated:
Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."
Jackson, 419 U.S. at 357. Similarly, in Flagg Bros., the Court stated that "the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State [by statute] permits but does not compel, to threaten to sell these respondents' belongings." Flagg Bros., 436 U.S. at 165. The Court did concede that "[o]ur cases state 'that a State is responsible for the...act of a private party when the State, by its law, has compelled the act."' Id. at 164 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)).

[FN369]. 343 U.S. 451 (1952).

[FN370]. Jackson, 419 U.S. at 356. The Jackson Court noted further that "[h] ere, on the other hand, there was no such imprimatur placed on the practice of Metropolitan about which petitioner complains." Id. at 357.

[FN371]. Reitman v. Mulkey, 387 U.S. 369, 395 (1967) (Harlan, J., dissenting).

[FN372]. In Flagg Bros., then Justice Rehnquist stated that "[i]f the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner." Flagg Bros., 436 U.S. at 165. While conceding that most state-authorized private deprivations of property are constitutionally valid, state authorization analysis invites the courts to consider whether certain deprivations so authorized violate constitutional prohibitions on the merits. This is the invitation that Rehnquist declined in both Jackson and Flagg Bros.

[FN373]. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 542-47 (1987) (analyzing whether the United States Olympic Committee's actions constitute state action under the characterization model); Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982) (applying the characterization model and finding insufficient state contacts to transform the challenged action of a private nursing home into state action); Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982) (noting that action by a private party pursuant to a statute, without more, is not sufficient to characterize that party as a state actor); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982) (analyzing various state relationships with a private school to determine whether the private school is a state actor). Only in Lugar did the Court conclude that the challenged private action had been converted into state action under the characterization model. See Lugar, 457 U.S. at 939-42. In the remaining three cases, the use of state authorization analysis was certainly a conceptual possibility after the Court's failure to find state action under the characterization model; the Court, however, did not pursue that option. Refer to Part III.D. and Part IV.E. supra for a detailed discussion of the cases cited in this note.

[FN374]. Refer to Part VI.D.2. supra. The reader will understand that when the Court has decided not to discuss an issue at all, or even to set forth its reasons for not discussing the issue, it is difficult to cite to a "non-statement."

[FN375]. See San Francisco Arts & Athletics, Inc., 483 U.S. at 548-49 (Brennan, J., dissenting) (relying exclusively on the public function and state nexus strands of the characterization model).

[FN376]. Refer to Part III.E. and Part IV.E. supra.

[FN377]. Georgia v. McCollum, 505 U.S. 42, 44-45 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991).

[FN378]. See McCollum, 505 U.S. at 50-55 (involving the exercise of a peremptory challenge by a defendant in criminal proceedings); Edmonson, 500 U.S. at 621-22 (involving the exercise of a peremptory challenge by a private litigant in civil litigation).

[FN379]. 500 U.S. 614 (1991).

[FN380]. Id. at 621-22 (citations omitted).

[FN381]. See id. at 621-28. In McCollum, the Court used the three Edmonson factors and reached the same state action conclusion with respect to a criminal defendant's exercise of a peremptory challenge on the basis of race. See McCollum, 505 U.S. at 52-53.

[FN382]. 334 U.S. 1 (1948).

[FN383]. Edmonson, 500 U.S. at 622 (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

[FN384]. Id. at 628.

[FN385]. Id.

[FN386]. Refer to notes 380-81 supra and accompanying text.

[FN387]. Edmonson, 500 U.S. at 622.

[FN388]. Id.

[FN389]. See id. at 628 (stating that the selection of jurors clearly occurs in an official forum, here, the courthouse).

[FN390]. Refer to Part IV.E. supra.

[FN391]. Refer to Part VIII. infra.

[FN392]. 419 U.S. 345 (1974).

[FN393]. See id. at 373-74 (Marshall, J., dissenting). As described by Justice Marshall:
> The Court has not adopted the notion...that different standards should apply to state-action analysis when different constitutional claims are presented. Thus, the majority's analysis would seemingly apply as well to a company that refused to extend service to Negroes, welfare recipients, or any other group that the company preferred, for its own reasons, not to serve.

Id. (Marshall J., dissenting) (citations omitted).

[FN394]. See id. at 374 (Marshall, J., dissenting).

[FN395]. Refer to notes 365-70 supra and accompanying text.

[FN396]. See Jackson, 419 U.S. at 349-59 (rejecting arguments concerning symbiotic relationship, monopoly status and essential public service). The majority opinion concluded that "the State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." Id. at 358-59. This passage is characterization model analysis.

[FN397]. See id. at 366-68 (Marshall, J., dissenting).

[FN398]. See id. (Marshall, J., dissenting) (rejecting the majority's argument concerning natural monopolies).

[FN399]. Id. at 366 (Marshall, J., dissenting).

[FN400]. The classes protected should arguably include any class whose identifying characteristic does not bear rationally on a person's fitness to receive the service provided by Metropolitan. A class composed of persons who do not pay their electricity bills would not be so included.

[FN401]. For example, no Supreme Court decision has ever imposed on government an obligation to prohibit private class discrimination in every situation where government possesses the constitutional power to do so. Such a holding would conflict with the Court's dicta in Reitman "that the State [[[is] permitted a neutral position with respect to private racial discriminations and that the State [is] not bound by the Federal Constitution to forbid them." Reitman v. Mulkey, 387 U.S. 369, 374-75 (1967). Such a holding would conflict even more strongly with the Reitman dictum that the Fourteenth Amendment does not establish "an automatic constitutional barrier to the repeal of an existing law prohibiting racial discriminations in housing." Id. at 376. If a state, by a procedurally neutral repeal, may "reauthorize" private discrimination in situations where such discrimination was previously prohibited by state law, refer to notes 295-300 supra and accompanying text, then surely the state may adopt, in general, a position of ongoing neutrality toward private discrimination that was never prohibited in the first place. The Jackson factors, if present, simply create a situation in which the general "merits" rule should, under state authorization analysis, give way to a specific "merits" rule that imposes on the state an affirmative obligation to prohibit the private

discrimination in question.

[FN402]. Considering this point, it is interesting to note that after the Supreme Court's decision in Flagg Bros., the New York Court of Appeals affirmed the decision of a lower New York court which had invalidated, on the merits, the provision of the New York Uniform Commercial Code challenged in Flagg Bros. See Svendsen v. Smith's Moving & Trucking Co., 429 N.E.2d 411, 412, (N.Y. 1981) (mem.) (Jasen, J., concurring). The New York courts found that the challenged provision constituted a denial of due process of law under the New York constitution. See id. (Jasen, J., concurring). In effect, therefore, the New York courts held that the New York state legal system could not authorize the private conduct permitted by the statutory provision in question.

[FN403]. Laurence H. Tribe, American Constitutional Law 1720 (2d ed. 1988). Thus, the subject matter scope of the state authorization model is as broad as the entire range of rights protected by the Constitution.

[FN404]. Refer to Part II.B.6. supra.

[FN405]. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191-93 (1989) (involving a father who beat his 4-year-old son, causing severe and permanent brain damage); see also Ross v. United States, 910 F.2d 1422, 1424-25 (7th Cir. 1990) (deputy sheriff prevented "unauthorized" private and governmental personnel from rescuing drowning 12-year-old boy before the delayed arrival of "authorized" personnel). In DeShaney, plaintiffs brought an action under 42 U.S.C. § 1983, claiming that the Winnebago County Department of Social Services failed to prevent the father from harming his son. See DeShaney, 489 U.S. at 193. In Ross, there was no private actor causing harm; the deputy sheriff simply prevented unauthorized personnel from rescuing the drowning boy at a point in time when such rescue efforts might have saved the boy's life. See Ross, 910 F.2d at 1425.

[FN406]. Refer to Part VI.A. supra for a discussion of the "brute-force" hypothetical.

[FN407]. 489 U.S. 189 (1989).

[FN408]. 910 F.2d 1422 (7th Cir. 1990).

[FN409]. Refer to notes 416-19 infra and accompanying text.

[FN410]. DeShaney, 489 U.S. at 197.

[FN411]. Id. at 196. To support the quoted statement in the text, Chief Justice Rehnquist cited Harris v. McRae, 448 U.S. 297, 317-18 (1980) (holding that the Due Process Clause of the Fifth Amendment imposes no obligation on government to fund abortions or other medical services), Lindsey v. Normet, 405 U.S. 56, 74 (1972) (holding that the Due Process Clause of the Fourteenth Amendment imposes no obligation on government to provide adequate housing), and Youngberg v. Romeo, 457 U.S. 307, 317 (1982) (stating "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border"). See DeShaney, 489 U.S. at 196.

[FN412]. DeShaney, 489 U.S. at 196-97. Chief Justice Rehnquist did concede that "[t]he State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." Id. at 197 n.3 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

[FN413]. Id. at 195.

[FN414]. Id. at 197.

[FN415]. Id. at 198.

[FN416]. Id. at 199-200.

[FN417]. See id. at 198. In relation to prisoners, the DeShaney Court cited Estelle v. Gamble, 429 U.S. 97, 103-4 (1976), in which, as described in DeShaney, the Court held

"that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause requires the State to provide adequate medical care to incarcerated prisoners." DeShaney, 489 U.S. at 198 (citation omitted).

[FN418]. See DeShaney, 489 U.S. at 199 (citing Youngberg v. Romeo, 457 U.S. 307 (1982)). In relation to involuntarily committed mental patients, the DeShaney Court stated "that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others." Id. (citing Youngberg, 457 U.S. at 314-25).

[FN419]. Id. at 200.

[FN420]. Id.

[FN421]. With respect to harm inflicted by state actors, state actors acting in their official capacities do not cease to be state actors when acting beyond their state granted authority. See Hafer v. Melo, 502 U.S. 21, 24 (1991). If a person's state-actor status materially facilitates the commission of a particular act, that person remains a state actor for purposes of that act. Refer to Part V.C. supra for a general discussion of this matter. In a similar vein, if a municipal employee causes harm when executing governmental policy, the municipality may be held liable in damages for the harm inflicted. See Monell v. Department of Soc. Servs., 436 U.S. 658, 690-94 (1978). Moreover, municipal liability may accrue if municipal policymakers are "deliberately indifferent" to the violation of municipal policy by municipal agents or employees. See City of Canton v. Harris, 489 U.S. 378, 388-92 (1989). Refer to Part VII.D. supra for a general discussion of this matter. In any event, the focus of this Part is on the obligation of government to prevent harm caused by one private actor (or actors) to another private actor (or actors); harm caused by state actors obviously has the capacity to implicate government more readily.

[FN422]. See DeShaney, 489 U.S. at 199-200 (discussing Youngberg and Estelle).

[FN423]. Id. at 200.

[FN424]. See id. at 206-07 (Brennan, J., dissenting) (arguing that the government's affirmative obligation to act extends beyond physical custody cases).

[FN425]. Id. at 200.

[FN426]. As noted previously, the DeShaney Court stated that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him." Id.

[FN427]. Id. at 191.

[FN428]. See id.

[FN429]. See id.

[FN430]. See id.

[FN431]. Id. at 192.

[FN432]. Id.

[FN433]. Id.

[FN434]. Id.

[FN435]. Id.

[FN436]. See id.

[FN437]. Id.

[FN438]. See id.

[FN439]. Id.

[FN440]. Id.

[FN441]. Id. at 192-93.

[FN442]. Id. at 193.

[FN443]. Id.

[FN444]. Id.

[FN445]. Id.

[FN446]. The lower federal courts were the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit. See id.

[FN447]. See id. at 193-94.

[FN448]. Refer to Part II.B.6. supra.

[FN449]. DeShaney, 489 U.S. at 195.

[FN450]. See id. at 198-200 (reviewing cases where the Due Process Clause requires adequate care in prisons and mental institutions).

[FN451]. See DeShaney, 489 U.S. at 195 (clarifying that, in relation to due process claims, the extent of government's obligation under the Fourteenth Amendment is not to deprive any person of life, liberty or property without due process of law).

[FN452]. Id. at 209 (Brennan, J., dissenting).

[FN453]. Id. (Brennan, J., dissenting).

[FN454]. Id. at 209-10 (Brennan, J., dissenting).

[FN455]. Id. at 210 (Brennan, J., dissenting).

[FN456]. Id. at 208 (Brennan, J., dissenting).

[FN457]. Id. at 207 (Brennan, J., dissenting).

[FN458]. Id. at 212 (Brennan, J., dissenting). Compare Justice Brennan's concluding statement with the more restrictive concluding remarks in the majority opinion of Chief Justice Rehnquist:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.

Id. at 202-03.

[FN459]. See id. at 192-93.

[FN460]. See id. at 208-09 (Brennan, J., dissenting) (describing how the police, the hospital, and the DSS investigator reported abuse to the DSS and describing the failure of the DSS to act).

[FN461]. See id. at 208 (Brennan, J., dissenting) (referring to Wis. Stat. § 48.98(3) (1987-88)).

[FN462]. As described in Justice Brennan's dissent:
> [W]hen respondent Kemmeter [the DSS caseworker], through these reports [of Joshua's suspicious injuries] and through her own observations in the course of nearly 20 visits to the DeShaney home, compiled growing evidence that Joshua was being abused, that information stayed within the Department-- chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it.

Id. at 209 (Brennan, J., dissenting) (citation omitted). In his majority opinion for the Court, Chief Justice Rehnquist acknowledged that DSS's failure to take protective action was "calamitous in hindsight" and that "the state functionaries...stood by and did nothing when suspicious circumstances dictated a more active role for them." Id. at 202-03.

[FN463]. See id. at 192-93; see also id. at 209-10 (Brennan, J., dissenting).

[FN464]. Id. at 211 (Brennan, J., dissenting) (citation omitted). As Justice Brennan noted further, "I would allow Joshua and his mother the opportunity" to make that showing. Id. (Brennan, J., dissenting). Professor Laura Oren has written two comprehensive and extremely thoughtful and penetrating articles concerning DeShaney and its ramifications. See Laura Oren, The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context, 68 N.C. L. Rev. 659 (1990); Laura Oren, DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety, 69 N.C. L. Rev. 113 (1990).

[FN465]. 910 F.2d 1422 (7th Cir. 1990).

[FN466]. Ross, 910 F.2d at 1424-25.

[FN467]. Id. at 1425.

[FN468]. Id. at 1424.

[FN469]. Id.

[FN470]. Id. The potential rescuers included "two lifeguards, two fire-fighters,...one police officer...[and] two nearby scuba-diving civilians[, who] offered the assistance of themselves, their boat, and their equipment." Id.

[FN471]. See id. at 1425 (noting that the policy developed pursuant to the intergovernmental agreement contemplated that only the Waukegan Fire Department was authorized to proceed in a rescue attempt).

[FN472]. Id. at 1424.

[FN473]. Id. at 1425.

[FN474]. Id.

[FN475]. Id.

[FN476]. See id. at 1425 n.2 (stating that other defendants included the Waukegan Fire Department, the Waukegan Fire Department Paramedics, and Waukegan Lifeguards).

[FN477]. See id. at 1426.

[FN478]. See id. at 1428. The Court reasoned that
> [r]ecognizing a legal duty on the part of the United States to protect [Ross] from harm on the breakwater would be akin to imposing a rule of absolute liability. Because Illinois law only imposes liability on landowners for those harms that are foreseeable, the United States was properly dismissed as a defendant from the suit.

Id.

[FN479]. See id. at 1429 (concluding that under its agreement with the County, the City

"had no authority to influence the county's procedures, and imposing liability on the city for the county's policies would effectively be the respondeat superior liability that the Supreme Court has soundly condemned").

[FN480]. See id. at 1431.

[FN481]. See id. at 1433 (concluding that Johnson had failed to show that he was qualifiedly immune from liability under § 1983). In summary, the Court stated:
Underlying the defendants' arguments is the belief that the plaintiff will be unable at trial to prove any of the allegations in her complaint. That may be, but we have to accept those allegations as true, and the plaintiff has stated a § 1983 cause of action against the county defendants.
Id. at 1433-34.

[FN482]. Id. at 1429.

[FN483]. Id.

[FN484]. Id. at 1430.

[FN485]. Id.

[FN486]. See id. On the point made in the text, the court stated "where a particular course of action is authorized by a municipality's authorized decisionmakers, it represents a policy rightly attributed to the governmental entity, and in such a case, there is no need to resort to proof of the policy's multiple applications to attribute its existence to the municipality." Id.

[FN487]. Id. at 1431. Here, the Ross court distinguished its earlier decision in Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (en banc), in which the Court "rejected a section 1983 plaintiff's claim that a municipality's failure to dispatch an ambulance to a dying woman was an unconstitutional deprivation of life." Ross, 910 F.2d at 1431 (citing Archie, 847 F.2d at 1223). In Archie, the court did note that "[w]hen a state cuts off sources of private aid, it must provide replacement protection." Archie, 847 F.2d at 1223.

[FN488]. Refer to note 461-63 supra and accompanying text.

[FN489]. See Ross, 910 F.2d at 1433 (stating "it is clear that Johnson knew there was a substantial risk of death").

[FN490]. Id. at 1431 (stressing that "[p]rotecting the lives of private rescuers rather than the lives of those drowning in the lake is an arbitrary choice").

[FN491]. See id. (noting that Lake County's policy contemplated that some persons would die as a result of the policy's implementation).

[FN492]. Id.

[FN493]. Refer to notes 431-37 and 468-69 supra and accompanying text.

[FN494]. Refer to notes 463 and 473 supra and accompanying text.

[FN495]. Refer to notes 441 and 491 supra and accompanying text.

[FN496]. Refer to notes 440-41 and 473-74 supra and accompanying text.

[FN497]. Ross, 910 F.2d at 1431 (7th Cir. 1990). Also, refer to note 473- 74 supra and accompanying text.

[FN498]. Compare Ross, 910 F.2d at 1425 (noting the twenty minute delay in rescue), with Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 192-93 (1989) (indicating that the harm occurred more than two years after the governmental actors became aware of the risk).

[FN499]. Refer to notes 441 and 473 supra and accompanying text.

[FN500]. Ross, 910 F.2d at 1432.

[FN501]. Id.

[FN502]. Id. at 1433. The Court added that for recklessness in the constitutional sense to exist, "the state actor must ignore a known and significant risk of death." Id.

[FN503]. Id. Again, it is hard to ignore the parallel to the state actors in DeShaney, who, in the DeShaney Court's own understated words, "stood by and did nothing when suspicious circumstances dictated a more active role for them." DeShaney, 489 U.S. at 203.

[FN504]. Ross, 910 F.2d at 1433.

[FN505]. See DeShaney, 489 U.S. at 195 (stating that "[t]he [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security").

[FN506]. Id. at 197 (discussing petitioner DeShaney's argument).

[FN507]. Id. at 198.

[FN508]. See id. at 198-200 (discussing Estelle v. Gamble, 429 U.S. 97, 103-04 (1976); Youngberg v. Romeo, 457 U.S. 307, 318-19, 324 (1982).

[FN509]. See DeShaney, 489 U.S. at 199-200 (stating that the physical custody cases "stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being").

[FN510]. Id. at 198. In DeShaney, the Court limited the quoted statement to the physical custody cases. See id. at 199-200.

[FN511]. Refer to text accompanying notes 493-96 supra.

[FN512]. Typically, the individual right violated would be a person's Fifth or Fourteenth Amendment right not to be deprived of life, liberty, or property without due process of law. See DeShaney, 489 U.S. at 191 (noting that petitioner's claim was based on an alleged deprivation of liberty in violation of the Due Process Clause of the Fourteenth Amendment); Ross v. United States, 910 F.2d 1422, 1432 (7th Cir. 1990) (holding that the complaint had sufficiently alleged that Ross was illegally deprived of his life within the meaning of the Fourteenth Amendment).

[FN513]. DeShaney, 489 U.S. at 208 (Brennan, J., dissenting). Of course, as indicated in Ross, the complainant at trial would have to prove the existence of the four elements listed in the text by a preponderance of the evidence. See Ross, 910 F.2d at 1431. Moreover, in § 1983 actions, related issues pertaining to qualified immunity and the governmental actor's state of mind would confront the Court. See id. at 1432-33 (addressing the Deputy's state of mind and the defense of qualified immunity); DeShaney, 489 U.S. at 211 (Brennan, J., dissenting) (noting "that the Due Process Clause is not violated by mere negligent conduct"). However, non-frivolous allegation of the four elements listed in the text would, under my proposed model, defeat a summary motion to dismiss on the merits.

[FN514]. Refer to notes 430-37 and 472-74 supra and accompanying text.

[FN515]. Refer to notes 435-37 and 473-74 supra and accompanying text.

[FN516]. Refer to notes 441 and 467 supra and accompanying text.

[FN517]. Refer to notes 441 and 474 supra and accompanying text.

[FN518]. See Ross, 910 F.2d at 1431 (citing Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1989) (en banc)) (stating that the Archie Court rejected "a section 1983 plaintiff's claim that a municipality's failure to dispatch an ambulance to a dying woman was an unconstitutional deprivation of life"). Although the facts of Archie may approach the verge of my proposed model, it may be that the city had not acted to prevent other sources of aid from reaching the dying woman, e.g., a private ambulance or, simply, a car driven by a neighbor. See Archie v. City of Racine, 847 F.2d 1211, 1223 (7th Cir. 1989) (en banc) (noting that the State would have a duty to furnish ambulance services if the state suppressed private ambulance services).

[FN519]. In DeShaney, for example, the caseworker assigned to Joshua reacted to the news of Joshua's final brain-damaging injury in these words: "I just knew the phone would ring some day and Joshua would be dead." DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 209 (1989) (Brennan, J., dissenting). This statement evidences vivid awareness of the concrete danger that threatened Joshua.

[FN520]. Refer to notes 441 and 467 supra and accompanying text.

[FN521]. Palko v. Connecticut, 302 U.S. 319, 328 (1937).

[FN522]. Refer to note 414-19 supra and accompanying text.

[FN523]. In Collins v. Hardyman, 341 U.S. 651 (1951), Justice Jackson's opinion for the Court notes an historical factual setting in which state inaction analysis might well have been applied: the activities of the post-Civil War Ku Klux Klan. As described by Jackson:

> It is estimated [that the Klan] had a membership of around 550,000, and thus to have included "nearly the entire adult male white population of the South." It may well be that a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the "carpetbag" and "scalawag" governments of the day, was able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication, in view of the then disparity of position, education and opportunity between them and those who made up the Ku Klux Klan.

Id. at 662 (footnote omitted). State inaction in the face of a private conspiracy of such vast proportions would seem to contain the four crucial elements of my proposed model for determining the existence of unconstitutional state inaction.

[FN524]. 448 U.S. 297 (1980).

[FN525]. See id. at 326 (holding that "a State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment").

[FN526]. Id. at 317-18.

[FN527]. Id. at 318.

[FN528]. See Ortwein v. Schwab, 410 U.S. 656, 658-60 (1973) (per curiam) (holding that the state is not obligated to pay the $25 appellate court filing fee of indigents seeking appellate review of agency determinations resulting in their receiving reduced welfare payments); United States v. Kras, 409 U.S. 434, 443-50 (1973) (holding that the federal government is not obligated to pay the filing fee required of an indigent who is voluntarily seeking discharge in bankruptcy); see also Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (rejecting the claim that the Constitution creates a right or fundamental interest in "decent shelter" that government is obligated to provide for those who cannot afford such shelter). The Lindsey Court stated that

> [w]e are unable to perceive in [the Constitution] any...guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.

Id. at 74. Similarly, it has been stated that "the suggestion that government has an affirmative duty to raise everyone to a minimum acceptable standard of living has not yet assumed the dignity of a constitutional proposition." Comment, Developments in the Law-Equal Protection, 82 Harv. L. Rev. 1065, 1192 (1969).

[FN529]. 372 U.S. 335 (1963).

[FN530]. See id. at 344-45 (stressing that not only prior precedents "but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

[FN531]. Refer to notes 414-19 infra and accompanying text.

[FN532]. 401 U.S. 371 (1971).

[FN533]. Id. at 374. The Court stressed that "we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery." Id. at 376. Here, the court is underscoring that, in the divorce setting, the state has monopolized the avenues by which a change in marriage status may be secured.

[FN534]. 452 U.S. 1 (1981).

[FN535]. Id. at 17. The Court first noted that under Connecticut law, "the defendant in a paternity suit is placed at a distinct disadvantage in that his testimony alone is insufficient to overcome the plaintiff's prima facie case." Id. at 12. Accordingly, the state's refusal to bear the costs of the blood grouping tests requested by the indigent defendant "forecloses what is potentially a conclusive means for an indigent defendant to surmount that [[[evidentiary] disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause." Id.

[FN536]. 117 S. Ct. 555 (1996).

[FN537]. Id. at 559. The Court stated that "we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice."' Id. at 568 (quoting Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)). Here, the Court found that the state has an affirmative obligation to fund the indigent mother's appellate court costs.

[FN538]. See Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (observing that the state had monopolized the means of terminating a marriage).

[FN539]. See Little, 452 U.S. at 3 (noting that a decree establishing paternity would create a status from which the father could escape only by later court action).

[FN540]. See M.L.B., 117 S. Ct. at 559 (stating that by court order M.L.B.'s parental rights were forever terminated).

[FN541]. See Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (guaranteeing to indigent defendants in criminal proceedings the right to counsel at government expense).

[FN542]. Cases may occur in which the "causation link" between government's initial action and the later harm becomes so attenuated that government's subsequent inaction may not fairly be described as "causing" the harm. In Martinez v. California, 444 U.S. 277 (1980), a state prisoner was released on parole and, five months after his release, "tortured and killed" a 15-year old girl. See id. at 279-80. The Court held that "at least under the particular circumstances of this parole decision, [the girl's murder] is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." Id. at 285. Here, the state acted initially by releasing the prisoner and did not act later to prevent the victim's murder. The intervening five-month period was held by the Court to break the causation link between the state's initial action and the later harm. See id. The Martinez Court did hedge by noting that "[w]e need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole." Id.

[FN543]. In this concluding Part, I will indulge in the luxury of using footnotes sparingly,

limiting that use primarily to direct quotes and citations for full case names. This concluding Part is in the nature of an essay that, in the light of the history described in the preceding seven Parts, reflects on the probable course of the state action doctrine in the century that lies ahead. This Part also contains my own thoughts concerning what that course should be.

[FN544]. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[FN545]. 365 U.S. 715 (1961).

[FN546]. 345 U.S. 461 (1953).

[FN547]. 326 U.S. 501 (1946).

[FN548]. Edmonson, 500 U.S. at 621-22 (other citations omitted). Before considering the three factors cited in the text, the Edmonson Court stated that "[we must first ask] whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority." Id. at 620 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-41 (1982)). For reasons stated previously, I believe that this first inquiry is a statement of the obvious that does not significantly advance analysis. With respect to private actors, if government compels or authorizes the act in question, the right to engage in the act has its source in governmental authority; if government prohibits the act in question and provides appropriate relief for harm caused by the act, the "right" to engage in the act does not have its source in governmental authority but is simply a lawless act engaged in by a private actor.

[FN549]. See id. at 616 (stating that the defendant being sued for negligence used three of its peremptory challenges to remove African Americans from the prospective jury).

[FN550]. Id. at 621.

[FN551]. See id. at 622-24 (describing the process of jury selection and concluding that the government has "create[d] the legal framework governing the [challenged] conduct").

[FN552]. Id. at 622.

[FN553]. Id. at 623.

[FN554]. Id. at 624.

[FN555]. Id.

[FN556]. 365 U.S. 715 (1961).

[FN557]. See id. at 724 (concluding that all relevant factors must be considered in combination to determine fairly the degree of state participation and involvement in the challenged conduct).

[FN558]. See id.

[FN559]. Refer to Part IV.E. supra.

[FN560]. NCAA v. Tarkanian, 488 U.S. 179 (1988).

[FN561]. See id. at 199 (holding that the imposition of sanctions by the NCAA against a public institution is not state action).

[FN562]. Refer to Part IV.E.

[FN563]. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 370 (1974) (Marshall, J., dissenting).

[FN564]. See Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622-24 (1991) (describing the state involvement in the administration of the jury system, the creation of jury

qualification forms, and in voir dire).

[FN565]. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[FN566]. Blum v. Yaretsky, 457 U.S. 991 (1982).

[FN567]. Georgia v. McCollum, 505 U.S. 42 (1992) (involving the exercise of a peremptory challenge by a defendant in a criminal proceeding).

[FN568]. Refer to notes 378-79 supra and accompanying text.

[FN569]. Under state nexus analysis, Jackson, Rendell-Baker, and Blum were close cases, and a decision against state action is at least defensible. Refer to Part IV.C. supra. It is the Court's methodology to which I object, the Court's almost cavalier dismissal of state nexus arguments under the sequential approach employed by the Court in those cases.

[FN570]. Under state nexus analysis, the totality approach can also work in tandem with a sensitive application of the joint-action concept. In some instances, government approval of private action may take the form of extensive investigation of the private action in question, including significant consultation with the private actor whose action is subsequently approved by government. In such instances, the private actor may be described fairly as acting jointly with government in relation to the action that government later approves. In Public Utilities Commission v. Pollak, 343 U.S. 451 (1952), the Supreme Court may have used precisely that analysis in assuming the presence of state action for purposes of argument. See id. at 462 (finding that a governmental agency was sufficiently involved with a private entity to require consideration of the constitutional implications of the private entity's activity).

[FN571]. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991).

[FN572]. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[FN573]. 483 U.S. 522, 544 (1987).

[FN574]. Edmonson, 500 U.S. at 624.

[FN575]. Id. at 626.

[FN576]. See id. at 625 (citing Terry v. Adams, 345 U.S. 461, 481 (1953)).

[FN577]. In Terry, the operation of the Jaybird election process should not be confused with the action of individual voters who voted in the Jaybird election; it is the operation of the process by the Jaybird "officials" that constituted state action, not the specific act of voting by each individual voter. See Terry v. Adams, 345 U.S. 461, 469-70 (1953) (describing the Jaybird Primaries as an integral part of the electoral process). In Edmonson, there is a fusion of the "operation" and "selection" functions; the litigant's very exercise of a peremptory challenge, supported by state authority, constitutes the "operation" of the peremptory challenge system and also results in a "selection" (here, exclusion) of otherwise qualified jurors. See Edmonson, 500 U.S. at 627-28.

[FN578]. See Edmonson, 500 U.S. at 628 (emphasizing that "when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance").

[FN579]. In Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), the author of the exclusivity test (then Justice Rehnquist) recognized that "there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution.' Among these are such functions as education, fire and police protection, and tax collection." Id. at 163. Rehnquist's use of the phrase "with a greater degree of exclusivity" indicates that he would not insist that the activity be literally the exclusive function of government.

[FN580]. None of the factors listed in the text should be regarded as conclusive by itself; it is the cumulative weight of all the listed factors that should be decisive. See id.

[FN581]. In practical terms, the white primary and jury selection cases come as close to "pure" governmental exclusivity as we are likely to get in the real world. See generally Terry v. Adams, 345 U.S. 461 (1953); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991). It is difficult to conceive of these functions as not being uniquely governmental in nature.

[FN582]. The company town case is a good example of this factor in operation. While company towns are a part of the American historical experience, we normally attribute to government the function of "running" cities. There would be something anomalous in permitting a private entity to discharge the entire range of municipal functions free of constitutional restraints.

[FN583]. Here, again, the white primary and jury selection cases are a paradigmatic example of this factor in operation. In both sets of cases, government plays a dominant and active role in enabling the challenged activity to occur, a role that goes far beyond a posture of passive permission.

[FN584]. Assume, for example, that government decides to "privatize" the operation of a prison system. The prisoners then confined in those "private" prisons have no choice concerning their confinement, and it is clearly government that deprives them of that choice. It passes belief that a court would permit such private prisons to be operated free of constitutional restraints.

[FN585]. This factor is perhaps the most elastic and least conclusive of the factors listed in the text. Many services offered by both government and private entities may be fairly regarded as essential, e.g., the provision of electricity as in Jackson. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (holding that a utility company that delivers electricity is not a state actor merely because the delivery of electricity is an essential public service). While this factor should be applied with caution, in extreme cases it could be decisive. Assume, for example, that a vaccine that prevents AIDS is developed and is ready for distribution to the general public. Would a "private" distributing entity be permitted to choose vaccine recipients free of constitutional restraints?

[FN586]. For example, in Reitman v. Mulkey, 387 U.S. 369 (1967), the Court stated in dicta "that the State [is] permitted a neutral position with respect to private racial discriminations and that the State [is] not bound by the Federal Constitution to forbid them." Id. at 374-75.

[FN587]. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

[FN588]. Refer to notes 216-17 supra and accompanying text.

[FN589]. Refer to notes 217 supra and accompanying text.

[FN590]. Edmonson, 500 U.S. at 622.

[FN591]. Id. at 628.

[FN592]. Id.

[FN593]. For example, in the "brute-force" hypothetical discussed, refer to Part VI.A. supra, should it matter materially that the brute snatched the purse from his victim outside an "official forum?" Is it not the substantive arbitrariness of the state's act of authorization that is at the heart of the problem?

[FN594]. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

[FN595]. See id. at 20.

[FN596]. See Reitman v. Mulkey, 387 U.S. 369 (1967).

[FN597]. See id. at 370-71 (stating that the issue was whether Proposition 14 authorizes racial discrimination in housing and therefore constitutes a denial of equal protection under the Fourteenth Amendment).

[FN598]. See id. at 381.

[FN599]. Refer to notes 213-16 supra and accompanying text.

[FN600]. Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

[FN601]. In fact, after the Flagg Bros. decision, the New York Court of Appeals later held that the provision of the New York UCC challenged in Flagg Bros. constituted a denial of due process of law under the New York Constitution. See Svendsen v. Smith's Moving & Trucking Co., 429 N.E.2d 411, 411-12 (N.Y. 1981) (mem.). In effect, therefore, the New York Court of Appeals held that under the New York Constitution, the New York legal system could not authorize the private conduct authorized by the statutory provision in question.

[FN602]. Flagg Bros., 436 U.S. at 157. Again, the state authorization issue within the framework of the state authorization model should not be confused with state authorization as a "contact" point under state nexus analysis. The Flagg Bros. Court did consider the state nexus issue and found the state's act of authorization to be insufficient in force to transform the challenged private action into state action. See id. at 164-66 (reviewing and agreeing with the Jackson and Moose Lodge decisions on this point).

[FN603]. Even in Evans v. Abney, 396 U.S. 435 (1970), the Court, while holding against the challenger, was willing to consider the question of whether the Georgia Supreme Court's construction of Senator Bacon's will constituted, on the merits, a denial of equal protection. See id. at 445-46. Abney was the last decision before Edmonson to even approach the borderline of state authorization analysis.

[FN604]. Here, I am assuming that government provides effective avenues of relief for the harm caused by the prohibited act. I am also assuming the absence of a DeShaney fact situation in which government may be under an affirmative obligation to prevent the prohibited act from occurring. Refer to notes 413-19 supra and accompanying text.

[FN605]. See Flagg Bros.,, 436 U.S. at 164 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)).

[FN606]. U.S. Const. art. III, § 2.

[FN607]. See Gunther, supra note 269, at 1598-1639, for a general discussion of standing and ripeness and for a presentation and analysis of the leading cases in these two areas. A detailed discussion of standing and ripeness is beyond the scope of this study.

[FN608]. See Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1363-64 (1973); see also William B. Lockhart et al., Constitutional Law 1581 (7th ed. 1991) (stating that standing addresses who may be a litigant and ripeness addresses when the litigant's claim may be adjudicated).

[FN609]. See Gunther, supra note 269, at 1599 (asserting that standing involves the question of whether a litigant "has a sufficient personal interest" in the dispute).

[FN610]. See id. at 1630 (describing how the ripeness problem flows from concerns about when a dispute is sufficiently specific to be adjudicated).

[FN611]. Baker v. Carr, 369 U.S. 186, 204 (1962).

[FN612]. Boyle v. Landry, 401 U.S. 77, 81 (1971). In Boyle, the Court noted that the challenged statute had not affected any of the litigants directly and intimated that the statute was chosen speculatively. See id.

[FN613]. See Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 153 (1978).

[FN614]. For example, the federal courts may, in appropriate cases, use the "generalized grievance" rationale of Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221 (1974), and United States v. Richardson, 418 U.S. 166, 176-77 (1974), to find a lack of standing or the "remote threat of injury" rationale of Rizzo v. Goode, 423 U.S. 362, 371-73 (1976), O'Shea v. Littleton, 414 U.S. 488, 497-98 (1974), Laird v. Tatum, 408 U.S. 1, 13- 14 (1972), and Boyle v. Landry, 401 U.S. 77, 80-81 (1971), to find a lack of ripeness. See Buchanan, Challenging State Acts of Authorization, supra note 260, at 266-73 for a more detailed discussion of procedural barriers to the authorization model in federal courts, including a discussion of the well-pleaded complaint rule and the question of proper defendants in federal court actions involving a challenge to state acts of authorization.

[FN615]. Kenneth F. Scott, Standing in the Supreme Court-A Functional Analysis, 86 Harv. L. Rev. 645, 674 (1973). Elsewhere in his article, Professor Scott comments on the "floodgates of litigation" argument:

> When the "floodgates" of litigation are opened to some new class of controversy by a decision, it is notable how rarely one can discern the flood that the dissenters feared. The plaintiff...must feel strongly enough about the issue in question to pay the bills, and that both cuts down the flood and gives us at least a partial measure of his "stake" in the outcome.

Id. at 673-74.

[FN616]. See Bell v. Hood, 327 U.S. 678, 682 (1946) (stating that "it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction").

[FN617]. See id. at 682-83. In Bell, Justice Black noted that "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." Id.

[FN618]. Of course, there is no actual survey that supports this statement. The figure "98%" is used graphically to suggest that state acts of authorization are rarely invalid.

[FN619]. For example, in Heller v. Doe, 509 U.S. 312 (1993), the Court stated that, under rational-basis review, a governmental "classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Id. at 320. Moreover, "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification'....Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."' Id. (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) and FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)) (citations omitted). In the area of economic substantive due process, the modern Court has applied rational-basis review with the same degree of highly deferential leniency. Indeed, since 1937, no governmental regulation of economic rights has been invalidated on substantive due process grounds. See Gunther, supra note 269, at 462.

[FN620]. A court will apply elevated scrutiny if the governmental act of authorization is based on a suspect or quasi-suspect classification or if it significantly affects a fundamental right or interest (or, perhaps, an important, non-economic liberty interest). See generally Gunther, supra note 269, at 432-33, 601-08, and G. Sidney Buchanan, A Very Rational Court, 30 Hous. L. Rev. 1509, 1575-95 (1993) [hereafter Buchanan, Rational Court], for a general discussion of when governmental action does (and should) trigger some form of elevated scrutiny.

[FN621]. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978); Loving v. Virginia, 388 U.S. 1, 12 (1967). In Zablocki, the Court stated that "[m]ore recent decisions have established that the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." Zablocki, 434 U.S. at 384 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)). Unfortunately for those seeking access to same-sex marriage, when the Zablocki Court referred to the right to marry, it characterized the right as involving the "decision to marry and raise [[[children] in a traditional family setting." Id. at 386.

[FN622]. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court sustained, as applied to the United States Jaycees, a Minnesota statute that prohibits discrimination on the basis of sex in places of public accommodation. See id. at 612. In sustaining the statute, however, Justice Brennan's opinion for the Court did concede that certain associational choices are protected against governmental regulation:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Id. at 617-18.

[FN623]. See Planned Parenthood v. Casey, 505 U.S. 833 (1992). While Casey involved a complex commingling of opinions, when the conceptual dust had settled, a majority of the Court supported at least an "undue burden" test in relation to the abortion decision. See id. at 838. As stated in Justice O'Connor's plurality opinion, "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Id. at 878. For a fuller discussion of Casey, see, Buchanan, Rational Court, supra note 620, at 1569-71.

[FN624]. Refer to notes 621-23 supra.

[FN625]. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-39 (1968) (holding that Congress has the power under § 2 of the Thirteenth Amendment to prohibit private racial discrimination in the sale or rental of real and personal property); see also Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (sustaining the power of Congress under the commerce clause to prohibit racial discrimination in places of public accommodation).

[FN626]. In Bell v. Maryland, 378 U.S. 226 (1964), the Supreme Court had an opportunity to confront the "obligation" issue described in the text but avoided the issue by disposing of the case on other grounds. Id. at 228.

[FN627]. Reitman v. Mulkey, 387 U.S. 369, 374-75 (1967). It should be stressed that California clearly had the power, under the United States Constitution, to prohibit the private racial discrimination (racially motivated refusal to rent real property) involved in Reitman. The Reitman dicta indicates, therefore, that California was not constitutionally obligated to exercise the power it possessed.

[FN628]. Id. at 376.

[FN629]. Refer to note 299-300 supra and accompanying text. Because of the importance of the analysis, it is restated and elaborated upon in the text of this Part.

[FN630]. Refer to Part VI.D.1. supra.

[FN631]. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[FN632]. See G. Sidney Buchanan, State Authorization, Class Discrimination, and the Fourteenth Amendment, 21 Hous. L. Rev. 1, 19-28 (1984), for a fuller discussion of state authorization and the common law.

[FN633]. 376 U.S. 254 (1964). In Sullivan, the Supreme Court reviewed on the merits the application in state court proceedings of Alabama's common law libel rule. See id. at 262-64. In substance, the Court held that Alabama's common law libel rule violated the Constitution because it authorized damage actions by plaintiffs under circumstances that abridged the free speech rights of persons or entities charged with making libelous statements. See id. at 264. Thus, as in Shelley, the Sullivan Court invalidated a state act of authorization expressed in the state's common law.

[FN634]. Refer to Part VIII.A supra.

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Note

*133 COERCION THEORY AND THE **STATE ACTION DOCTRINE** AS APPLIED IN NCAA V. TARKANIAN AND NCAA V. MILLER

Betty Chang [FNa]

INTRODUCTION

When the University of Nevada, Las Vegas (UNLV) informed head basketball coach Jerry Tarkanian of the University's 1977 decision to suspend him because he allegedly violated National Collegiate Athletic Association (NCAA) rules, Coach Tarkanian brought a Section 1983 [FN1] action in Nevada state court against both UNLV and the NCAA for deprivation of property and liberty interests without due process of law. [FN2] Both the Nevada trial court and the Nevada Supreme Court ruled for Tarkanian. [FN3] The NCAA sought and was granted certiorari by the United States Supreme Court. The Court, in a 5-4 decision, held that the NCAA had not been a state actor, and thus, could not be implicated in a Section 1983 action. [FN4] Notwithstanding UNLV's contractual relationship with the NCAA, the NCAA's economic power, and the NCAA's threat of further sanctions against UNLV unless it suspended Tarkanian, the Supreme Court held that the NCAA had neither coerced UNLV nor become a state actor by pressing UNLV, a state-funded and state-operated university, into suspending Tarkanian without due process. [FN5]

In 1991, again facing an NCAA infractions investigation against him, Coach Tarkanian sought application of a 1991 Nevada statute that required certain specified procedural protections in any national collegiate athletic association enforcement proceeding. [FN6] The NCAA sued for injunctive and declaratory relief on constitutional grounds. [FN7] The United States District Court for the District of Nevada held that the ***134** statute violated both the Commerce Clause [FN8] and the Contract Clause [FN9] of the federal constitution. [FN10] On appeal from the judgment for the NCAA, the Court of Appeals for the Ninth Circuit held that because of an NCAA objective to apply its legislation even-handedly among its members, the Nevada statute, if enforced, would coerce the NCAA into applying Nevada's rules to NCAA proceedings in all other states. Consequently, the court held that the Nevada statute violated the Commerce Clause. [FN11] Having thus found a Commerce Clause violation, the court did not rule on the alleged Contract Clause violation. [FN12]

This note explores the holdings of Tarkanian and Miller II, and the role that coercion played in both cases. Part I describes the facts in Tarkanian and Miller II; Part II explores the state action doctrine and its application to NCAA cases; Part III analyzes

the coercion theory and its application to Tarkanian and Miller II; and Part IV critiques the courts' applications of the state action doctrine and coercion theory.

I. FACTS OF TARKANIAN AND MILLER II

A. NCAA v. Tarkanian

When UNLV hired Jerry Tarkanian to be the head coach of its men's basketball team in 1973, the team had just posted a 14-14 record for the preceding season. [FN13] By 1977, Coach Tarkanian's team was 29-3, and placed third in the NCAA Championship Tournament. [FN14] In September of 1977, however, UNLV informed Tarkanian that the University was suspending him, [FN15] not because of UNLV's displeasure with him, but because of an NCAA report detailing thirty-eight alleged NCAA rules violations by UNLV personnel, including ten directly involving Tarkanian. [FN16]

***135** Upon joining the NCAA, each member institution agrees to abide by and enforce NCAA "legislation." [FN17] Between annual conventions, at which NCAA members determine NCAA legislation, the NCAA is governed by its Council, which appoints various committees to implement specific programs. [FN18] NCAA bylaws expressly authorize the Committee on Infractions (Committee) to administer its enforcement program, which the Committee does by imposing penalties on a member institution found to be in violation, or by recommending to the Council the suspension or termination of an institution's membership. [FN19] "In particular, the Committee may order a member institution to show cause why that member should not suffer further penalties unless it imposes a prescribed discipline on an employee; it is not authorized, however, to sanction a member institution's employees directly." [FN20] The bylaws also provide that representatives of member institutions such as UNLV are "expected to cooperate fully" with the NCAA's administration of its enforcement programs. [FN21]

Between 1972 and 1976, the Committee conducted a preliminary inquiry into alleged NCAA violations occurring at UNLV between 1971 and 1975. [FN22] On February 25, 1976, the Committee began an "Official Inquiry" into the alleged violations, including some involving Tarkanian. [FN23] The Committee requested that UNLV investigate the allegations and provide details about each alleged infraction. [FN24] After a thorough investigation conducted with the assistance of the Nevada Attorney General and private counsel, UNLV filed a comprehensive response denying all of the charges and concluding specifically that Coach Tarkanian was "completely innocent" of any violation. [FN25] Nevertheless, at the end of a four-day NCAA Committee hearing, at which counsel for UNLV and Tarkanian were present, the Committee found thirty-eight violations, including ten directly involving Tarkanian. [FN26]

The Committee's proposed sanctions against UNLV included a two-year probation, during which the basketball team would be prohibited from participating in NCAA-sanctioned championship games and television appearances, and an order to show cause why additional penalties should not be imposed if the school did not discipline Tarkanian by removing him from UNLV's intercollegiate athletics program during the probation period. [FN27] UNLV appealed most of the Committee's findings ***136** and proposed sanctions to the NCAA Council, which, after hearing arguments from counsel representing UNLV and Tarkanian, adopted all of the Committee's recommendations. [FN28]

UNLV's vice president advised UNLV's president of three options regarding the NCAA report. UNLV could: (1) reject the sanction that required disassociating Coach Tarkanian from the athletic program and risk an NCAA sanction consisting of extra years of probation; (2) recognize the University's delegation of power to the NCAA in "these matters," and thus reassign Tarkanian--"though tenured and without adequate notice" [FN29]--while believing that the NCAA was wrong; or (3) withdraw from the NCAA completely, based on "its unjust judgments." [FN30] The president chose the second option. [FN31] On the day before his suspension was to become effective, Tarkanian filed a Section 1983 [FN32] suit in Nevada state court for declarative and injunctive relief against UNLV and a number of its officers, alleging deprivation of his right to due process. [FN33]

After a trial on the merits, the state trial court permanently enjoined Tarkanian's suspension on the basis that Tarkanian had been deprived of his substantive and procedural

due process rights. UNLV appealed. [FN34] The NCAA, which had not been joined as a party, filed an amicus curiae brief arguing that because no actual controversy existed between Tarkanian and UNLV, the case should have been dismissed. In the alternative, the NCAA argued that the trial court exceeded its jurisdiction by invalidating NCAA enforcement proceedings without the NCAA being a party to the suit. The NCAA argued that if an actual controversy existed, it was a necessary party. Finding that an actual controversy existed to which the NCAA was a necessary party, the Nevada Supreme Court reversed the trial court's judgment in favor of Tarkanian and remanded the case for joinder of the NCAA. [FN35]

On remand, the state trial court again held for Tarkanian, finding the NCAA to be a state actor. [FN36] The trial court found that the NCAA acted arbitrarily and capriciously, and the court reaffirmed its injunction prohibiting UNLV from suspending Tarkanian, and enjoined the NCAA ***137** from conducting "any further proceedings against the University." [FN37] Two weeks later, Tarkanian filed a Section 1988 [FN38] petition for attorney's fees. [FN39] The state court awarded him fees of almost $196,000, ninety percent of which was to be paid by the NCAA. [FN40] The NCAA appealed both the injunction and the fee award; UNLV did not appeal either judgment. [FN41]

On appeal, the Nevada Supreme Court affirmed the injunction, but narrowed its scope to apply only to Tarkanian's suspension and UNLV's adoption of that penalty. [FN42] The Nevada Supreme Court also reduced the attorney's fees awarded by the trial court. [FN43]

"As a predicate for its disposition, the State Supreme Court held that the NCAA had engaged in state action." [FN44] The Nevada Supreme Court noted the requirements to find state action as stated in Lugar v. Edmondson Oil Co.: [FN45] a private entity acts as a state actor when its conduct results from a state-created rule, and the party charged may fairly be said to be a state actor. The Nevada Supreme Court stated:

> The first prong [of Lugar] is met because no third party could impose disciplinary sanctions upon a state university employee unless the third party received the right or privilege from the university. Thus, the deprivation which Tarkanian alleges is caused by the exercise of a right or privilege created by the state. Also, in the instant case, both UNLV and NCAA must be considered state actors. By delegating authority to the NCAA over athletic personnel decisions and by imposing the NCAA sanctions against Tarkanian, UNLV acted jointly with the NCAA. [FN46]

The NCAA sought certiorari from the United States Supreme Court, which ultimately reversed the Nevada Supreme Court's decision. [FN47] The Court first explained the fundamental requirements for a Section 1983 violation:

> When Congress enacted § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability ***138** attaches only to those wrongdoers "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." [FN48]

The Court then distinguished Tarkanian from traditional state-action cases. In the usual state-action case, the Court is called upon to decide whether a private party's conduct was so influenced by the state that the conduct should be construed as state action. "Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor." [FN49] Tarkanian, however, was different, "uniquely mirror ing the traditional state-action case." [FN50] The final actor in Tarkanian was UNLV, ". . . without question , . . . a state actor." [FN51] UNLV, however, acted under the influence of the NCAA, a private organization. "Thus the question is . . . whether UNLV's actions in compliance with NCAA rules and recommendations turned the NCAA's conduct into state action." [FN52]

The Court recognized that, as an NCAA member, UNLV had some impact on NCAA legislation. [FN53] Because UNLV is a state actor, UNLV's impact on NCAA legislation would have occurred under color of Nevada law. However, other NCAA members, both public and private institutions, also influenced NCAA legislation, and the vast majority of these institutions were located in states other than Nevada. In affecting NCAA legislation, these other members could not have acted "under color of Nevada law." [FN54] Thus, the Court decided that NCAA legislation is that of an organization, and is independent of any state. [FN55]

Pursuant to Lugar, however, the Court acknowledged, "State action nonetheless might lie if UNLV, by embracing the NCAA's rules, transformed them into state rules[, and thus, transformed] the NCAA into a state actor." [FN56] The Court then analogized Tarkanian to Bates v. Arizona State Bar, [FN57] in which the Court held that a state supreme court's enforcement of attorney disciplinary rules was state action, but that the American Bar Association's (ABA) formulation of the rules, although adopted in their entirety by the State Bar of Arizona, did not turn the ABA into a state actor. [FN58] The Bates Court reasoned that the state supreme court had the power to reject the ABA rules and promulgate its own rules. [FN59] Similarly, the Court stated, UNLV either could have rejected ***139** the NCAA's proposed sanctions against Tarkanian or could have withdrawn from NCAA membership. [FN60] The Court noted, "Neither UNLV's decision to adopt the NCAA's standards nor its minor role in their formulation is a sufficient reason for concluding that the NCAA was acting under color of Nevada law . . . ." [FN61] UNLV, however, acted under color of Nevada law [FN62] in deciding to suspend Tarkanian.

Tarkanian also argued that by delegating power over personnel decisions, which is an exclusive state function UNLV transformed the NCAA into a state actor. The Court rejected this argument, however, by noting that UNLV did not delegate any power to the NCAA that allowed the NCAA to discipline any UNLV employee directly. [FN63] The NCAA's sole enforcement power consisted of sanctions against member institutions. [FN64] Therefore, UNLV did not delegate a state function to the NCAA, and thus, the NCAA did not become a state actor.

The Court also rejected any joint-action argument by pointing out that UNLV and the NCAA "acted much more like adversaries than like partners for the truth [, so that the] NCAA cannot be regarded as an agent of UNLV for purposes of that proceeding." [FN65] The Court distinguished Tarkanian from Burton v. Wilmington Parking Authority, [FN66] stating that in Burton the private restaurant and public parking facility were interdependent with each other, but in Tarkanian, the relevant interests of UNLV and the NCAA did not coincide; rather, they were "antagonists, not joint participants." [FN67]

The Court noted that the NCAA had no governmental powers, and that its greatest power was its ability to sanction member institutions, with the most severe sanction being expulsion from membership. [FN68] The NCAA could not sanction directly any state employee. Moreover, the NCAA did not make the final decision to suspend Tarkanian. [FN69] Instead, the NCAA offered UNLV the option of either suspending Tarkanian or suffering additional sanctions, and UNLV made the final decision to suspend Tarkanian. [FN70]

Tarkanian argued that the NCAA had so much power that UNLV "had no practical alternative to compliance with its demands." [FN71] Although the Court recognized, "The university's desire to remain a ***140** powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal," the Court nevertheless found that UNLV had a real choice--either to withdraw from the NCAA altogether or to reject the NCAA's disciplinary proposals. [FN72]

The Court's holding effectively dissolved the injunction that Tarkanian won in the Nevada state courts. Without a finding of state action against the NCAA, the NCAA was free to impose additional sanctions against UNLV if the University did not suspend Tarkanian. UNLV, however, was a state actor that could violate the Due Process Clause by suspending Tarkanian without due process. The Supreme Court said, "In performing their official functions, the executives of UNLV unquestionably act under color of state law." [FN73] Because UNLV's own investigation found no wrongdoing by Tarkanian, [FN74] to suspend him after that investigation would not meet due process requirements.

Justice White, for the dissent, argued that the NCAA engaged in state action because it "jointly engaged with state officials in the challenged action," [FN75] Justice White found the necessary joint action in the following factors:

> First, Tarkanian was suspended for violations of NCAA rules, which UNLV embraced in its agreement with the NCAA . . . . Second, the NCAA and UNLV also agreed that the NCAA would conduct the hearings concerning violations of its rules . . . . Third, the NCAA and UNLV agreed that the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV . . . . By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body, and it was for

that reason that UNLV suspended Tarkanian . . . . [FN76]

Essentially, the dissent argued that the membership agreement between the NCAA and UNLV established a nexus between them sufficient to impute state action to the NCAA. The dissent enumerated several points in support of its belief that the NCAA acted under color of Nevada law.

***141** First, the dissent found that, like the private defendants in Dennis v. Sparks [FN77] and Adickes v. S.H. Kress, [FN78] the NCAA was "jointly engaged with state officials in the challenged action." [FN79] While the private defendants in Dennis conspired with the state judge, and the private restaurant in Adickes "reached an understanding" [FN80] with the police officer, UNLV contractually agreed with the NCAA to administer its athletic program according to NCAA legislation. [FN81] Since the decision to suspend Tarkanian occurred because he violated NCAA rules, which UNLV "embraced" [FN82] in its NCAA membership agreement, the NCAA was a "willful participant in joint action with the state or its agents." [FN83]

The dissent argued further that in the membership agreement the NCAA and UNLV agreed that the NCAA would conduct infractions hearings, [FN84] and that the NCAA Infractions Committee would determine the facts related to any alleged infractions. [FN85] This agreement enabled the NCAA to conduct the hearing that found Tarkanian in violation of NCAA rules. [FN86] The dissent then argued that the membership agreement also made the NCAA's findings of fact binding on UNLV. [FN87] It was pursuant to the NCAA's findings of fact that UNLV decided to suspend Tarkanian. [FN88] The dissent argued, therefore, that UNLV's contract with the NCAA made the NCAA a joint actor in UNLV's decision to suspend Tarkanian, [FN89] while the majority found that because UNLV could have withdrawn from the NCAA, the NCAA was relieved of state action liability.

The dissent believed that the withdrawal option was irrelevant, and thus, that UNLV had no choice but to comply with the NCAA's suspension recommendation. The dissent noted that, similarly, the state judge in Dennis could have withdrawn from the conspiracy to issue the corrupt injunction. However, "[t]hat he had that option is simply irrelevant to finding that he had entered into an agreement. What mattered was not that he could have withdrawn, but rather that he did not do so." [FN90] The dissent also relied on Dennis to respond to the majority's finding that because the NCAA and UNLV acted as adversaries, the NCAA could not have been found to be a state actor. The ***142** dissent stated that the NCAA membership agreement allowed UNLV to oppose impositions of sanctions, and that the Court would not have held differently in Dennis had the private conspirators allowed the judge to try to persuade them otherwise before forcing the judge to issue the injunction. [FN91]

In summary, the dissent acknowledged that UNLV, not the NCAA, actually decided to suspend Tarkanian. [FN92] But, since UNLV "did so because it embraced the NCAA rules governing conduct of its athletic program and adopted the results of the hearings conducted by the NCAA concerning Tarkanian, as it had agreed that it would," [FN93] the NCAA acted jointly with UNLV as a state actor. [FN94]

Nevertheless, the Tarkanian majority held that, although the NCAA influenced the conduct of UNLV, as a private association it was not sufficiently linked with UNLV to be deemed a state actor. The Court found that NCAA legislation results from the NCAA's collective membership, not from the State of Nevada's unique initiative, [FN95] and " w hatever de facto authority the NCAA enjoys, no official authority has been conferred on it by any government . . . ." [FN96] The Court found that although the NCAA's threat of additional sanctions influenced UNLV's conduct, the NCAA "did not demand Tarkanian's suspension unconditionally." [FN97] The Court further found that the NCAA did not leave UNLV without options other than to suspend Tarkanian, and therefore, the NCAA neither acted jointly with UNLV nor assumed its duty of making personnel decisions.

B. NCAA v. Miller

In 1990, Jerry Tarkanian again became the target of an NCAA rules violation investigation. [FN98] Between December of 1990 and April of 1991, the NCAA and UNLV conducted separate investigations of the UNLV basketball program. [FN99] A pre-hearing conference and official hearings were set for September of 1991. [FN100] Tarkanian

demanded that the NCAA conduct its investigation and hearings in compliance with a Nevada statute enacted on April 8, 1991, [FN101] a statute that required the NCAA ***143** to conduct its proceedings with certain due process protections. [FN102] The NCAA filed suit to enjoin the application of the Nevada statute as a violation of both the Commerce Clause and the Contract Clause of the United States Constitution. [FN103]

To address the Commerce Clause issue, the United States District Court for the District of Nevada first found that the NCAA engaged in interstate commerce. NCAA-scheduled games and tournaments involve the transportation of teams across state lines, the NCAA controls bids involving millions of dollars for the rights to interstate broadcasts of NCAA sports events, and the NCAA regulates its members' athlete recruitment processes, which occur on national and international levels. [FN104]

The district court then determined that the statute violated the Commerce Clause. [FN105] In adjudicating the Commerce Clause issue, the district court applied the two-tiered approach fashioned in Brown-Forman Distillers Corp. v. New York Liquor Authority. [FN106] Brown-Forman held that when a state statute "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the statute is invalid per se. [FN107] However, when a statute affects interstate commerce only indirectly and regulates conduct even-handedly, courts should ascertain whether the goals sought to be furthered by the statute are legitimate, and if so, whether the burden put on interstate commerce outweighs the benefits gained. [FN108]

The district court held that the Nevada statute was not invalid per se because it "d[id] not overtly thwart or block the NCAA's relationship with the Nevada member institutions or its relationship with member ***144** institutions in other states." [FN109] The District Court then applied the Brown-Forman balancing test. The court found legitimate Nevada's interest in affording "basic due process safeguards to the careers, livelihoods, and reputations of all Nevadans." [FN110] However, the district court also found that the statute unduly burdened the NCAA, because the NCAA's ability to achieve its goals of "scholarship, sportsmanship, and amateurism depends to a substantial degree on the creation of nationally uniform rules under which teams can compete on an equal basis." [FN111] The court found that "to satisfactorily achieve these goals, the NCAA's enforcement procedures must be applied even-handedly and uniformly on a national basis." [FN112] However, the Nevada statute required the NCAA, when acting in Nevada, to use procedures not provided for by existing NCAA rules. [FN113]

Moreover, the court found the statute to have substantial extraterritorial effects. Because of the NCAA's goal of uniform administration of its rules among all member institutions located in all fifty states, the likely practical effect of the statute would be to "compel the NCAA to adopt the procedures enacted by the Nevada Legislature, thereby allowing the Nevada Legislature to effectively dictate enforcement proceedings in states other than Nevada." [FN114] Also, the strong possibility of the adoption of similar, but inconsistent, statutes by other states would prevent the NCAA from having uniform rules and procedural bases. [FN115] Thus, the district court found that the state interest in affording due process protection to Nevada residents was outweighed both by the general harm to the NCAA's objective of uniform enforcement of regulations and by the harm to NCAA members throughout the country, and held the Nevada statute unconstitutional as a Commerce Clause violation. [FN116]

Tarkanian appealed the district court's decision. [FN117] On appeal, the Ninth Circuit found that the statute clearly was directed at interstate commerce because it expressly applied only to national collegiate athletic ***145** associations with member institutions in forty or more states. [FN118] The court also observed that, as a practical matter, the NCAA would be the only organization regulated by the statute, [FN119] and that the NCAA previously had been found to engage in interstate commerce for other purposes. [FN120] The appellate court agreed with the district court's finding that in order for the NCAA to accomplish its goals, its "enforcement procedures must be applied even-handedly and uniformly on a national basis." [FN121] The appellate court concluded that complying with the statute would subvert the NCAA's objective of having uniform enforcement procedures throughout the country.

In order to avoid liability under the Statute, the NCAA would be forced to adopt Nevada's procedural rules for Nevada schools. Therefore, if the NCAA wished to have the

uniform enforcement procedures that it needs to accomplish its fundamental goals and to simultaneously avoid liability under the Statute, it would have to apply Nevada's procedures to enforcement proceedings throughout the country. [FN122]

Thus, the appellate court affirmed the district court's holding that the Nevada due process statute violated the Commerce Clause, because application of the Nevada statute would coerce the NCAA into complying with the statute's requirements even for NCAA proceedings outside of Nevada.

II. THE PENDULUM-LIKE SWING OF THE STATE ACTION DOCTRINE

In Tarkanian, Coach Tarkanian alleged that the NCAA deprived him of his Fourteenth Amendment due process rights. Due process deprivation could be imputed to the NCAA, however, only if the Association engaged in state action. Justice Stevens, writing for the Tarkanian majority, stated, "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny ***146** under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be . . . ." [FN123] As a general matter, the protections of the Fourteenth Amendment do not extend to "private conduct abridging individual rights." [FN124] Therefore, to prevail, Tarkanian had to show that the NCAA engaged in state action.

A. State Action Theory

The Civil Rights Cases [FN125] established the state action requirement for Fourteenth Amendment causes of action. The Civil Rights Cases consolidated five cases involving the Civil Rights Act of 1875. [FN126] In two of the consolidated cases, defendants refused to accommodate blacks in the defendants' inn or hotel; in two other cases, defendants denied patrons accommodations in their theaters (one case involved a black patron, but the race of the patron involved in the other case was not stated); and the last case involved a train conductor's refusal to allow a black woman to be seated in the train's ladies' car. In those cases, the Supreme Court held that the 1875 Act, passed pursuant to the Fourteenth Amendment, was unconstitutional because it violated the Fourteenth Amendment. [FN127] The Court held, " Under the Fourteenth ***147** Amendment, it is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment . . . ." [FN128]

In these early cases, the Court's distinction between state action and private action was simple. The Court held that the public accommodations involved in The Civil Rights Cases were owned and operated by private parties, and therefore, their conduct constituted private acts unreachable by the Fourteenth Amendment. In the twentieth century, however, the Court developed two less clear and more complex theories of state action: the public function theory and the nexus theory. Each is discussed in the sections that follow.

B. The Public Function Theory Evolves from "Traditional Public Function" to "Functions Traditionally Exclusively Reserved to the State"

Until 1984, when the Court of Appeals for the Fourth Circuit decided Arlosoroff v. National Collegiate Athletic Association, [FN129] all federal circuits that had considered the state action question had found the NCAA to be a state actor when enforcing its legislation. [FN130] Up until that time, what has come to be known as the "public function theory" required that to find state action in the conduct of a non-state actor, the court had to determine that a private party performed a traditional government function. This standard had developed over three decades, beginning with Smith v. Allwright, [FN131] in which the Supreme Court had held that the Democratic Party acted as a state actor when it conducted primary elections in the state of Texas and denied blacks the right to vote in the primaries. The Court reasoned that primaries constituted an integral part of the election process, which was a "traditional public function." [FN132] However, this public function test began to evolve in Marsh v. Alabama, [FN133] in which the Court held that a company town acted as a state actor when it restricted the right of persons to distribute religious literature on the company town's sidewalks, reasoning that such restriction of First Amendment rights constituted a power "traditionally exclusively reserved to the state." [FN134]

In 1974, the Court further defined "traditionally exclusive state function" in Jackson

v. Metropolitan Edison. [FN135] In Jackson, the Court held ***148** that a private utility company operating under a state-granted monopoly was not a state actor, because the provision of utility services is not a power "which is traditionally associated with sovereignty, such as eminent domain." [FN136] The fact that the utility service was "affected with the public interest" [FN137] did not render the private provider a state actor.

In 1976, the Court narrowed its public function theory definition. In Hudgens v. National Labor Relations Board, [FN138] the Court held that the owner of a private shopping center could prohibit picketing by a shoe company's employees. [FN139] The Court noted that the First Amendment restrictions that applied to the company town in Marsh did not apply in Hudgens. Even though the shopping center may have been the equivalent of the business section of a company town, [FN140] it was not the functional equivalent of a municipality. [FN141]

In Flagg Brothers, Inc. v. Brooks, [FN142] the Court reiterated that a traditionally exclusive state function was a function that only the state could perform. In Flagg Brothers, the Court held that a warehouseman, who had threatened to sell the stored furniture of the plaintiff who had not paid the rent for storage, was not a state actor. The Court reasoned that such a sale, although allowed by state statute, did not constitute state action because "a State's mere acquiescence in a private action does not convert that action into that of the state." [FN143] The Court said that by enacting the statute, the state performed no overt action. The legislation merely allowed the warehouseman's sale of the plaintiff's furniture. Furthermore, the statutorily allowed sale was a form of civil dispute resolution, and the parties could have resorted to other means for resolving their dispute. Since a function "exclusively reserved to the state" can be performed only by the state, and since the parties had a variety of other dispute resolution options, the sale did not constitute an exclusive state function. [FN144]

Thus, by the early 1980s, to win a finding of state action based on the public function theory, a litigant had to show that the private party performed a function traditionally associated with the sovereign, that it performed the full range of that function, and that the function could not have been performed by any entity other than the government. ***149** Therefore, to show that the NCAA engaged in state action under the public function theory, Tarkanian would have to show that regulating intercollegiate athletics is a traditional government function that could not have been performed by a private party.

C. The Nexus Theory Evolves from "Mere State Involvement" to "Action Ordered or Coerced by the State"

The Supreme Court's requirements under the "nexus theory" also evolved to become more stringent in the past half-century. Initially, the Court allowed findings of state action when the state was involved in a relationship of interdependence with a private actor. Later, the Court required that the state have mandated the private conduct that caused a deprivation of rights.

In Shelley v. Kraemer, [FN145] the Circuit Court of the City of St. Louis, Missouri, refused to enforce a restrictive covenant prohibiting the sale of a home to black buyers on the ground that the agreement had not been signed by all parties, and therefore, was not yet final. [FN146] The Supreme Court of Missouri held the agreement effective and enforced the covenant. The United States Supreme Court held that state court enforcement of discriminatory contract terms was sufficient entanglement with private discriminatory schemes to impute state action to the private contracting parties. [FN147] The Court indicated that if state involvement was required for the success of a private scheme, the private conduct would be converted into state conduct.

In Burton v. Wilmington Parking Authority, [FN148] the Supreme Court held that a restaurant that leased its space from a municipal parking authority acted as a state actor when it refused to serve black patrons. The Court found that the restaurant received tax benefits from leasing the space, and that the municipality received revenues generated by the lease. This amounted to a "symbiotic" relationship and interdependence between the state and the restaurant, and therefore, the restaurant engaged in state action. [FN149]

While Shelley and Burton involved final actors who were private parties, Adickes v. S.H. Kress [FN150] and Dennis v. Sparks [FN151] involved final actors who were state agents, as was the case in Tarkanian.

***150** In Adickes, a private restaurant refused to serve a white school teacher accompanied by six black students. [FN152] The local police officer, who was already in the restaurant, arrested the teacher for vagrancy when she tried to leave the restaurant. The teacher then sued the restaurant, alleging that had it violated her due process rights. [FN153] The district court directed a verdict for the restaurant, and the court of appeals affirmed. [FN154] The Supreme Court reversed, however, finding that the private party acted pursuant to a racially discriminatory state custom, and held that a state custom having the force of law compels private conduct in the same way that an enacted statute does. [FN155] Thus, a private party acting under such compulsion and relying on a state official, in this case the arresting officer, to effect a deprivation of rights, engages in state action.

In Dennis, the defendants bribed a Texas county district court judge to issue an injunction enjoining oil production by the plaintiffs, who owned certain oil leases. [FN156] An appellate court dissolved the injunction for having been illegally issued. [FN157] The plaintiffs then filed a Section 1983 action in the United States District Court against the defendants, alleging that their conspiracy with the judge caused a deprivation of two years' worth of oil production without due process of law. [FN158] The Supreme Court found that the private defendants had engaged in an official judicial act, [FN159] and that " p rivate parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of S ection 1983. . . ." [FN160]

Thus, by the early 1980s, the nexus theory had developed to require that a private actor depend on a relationship with the state, as in Burton, or had relied on the act of a state agent to effect a deprivation, as in Shelley or Adickes. Therefore, to show that an organization like the NCAA engaged in state action under the nexus theory, as that theory was applied as recently as 1980, Tarkanian would have had to show that the NCAA was in a relationship with the state such that the parties mutually benefitted from the relationship, or that the NCAA relied on the conduct of the state to affect the challenged deprivation.

D. Application of the Public Function Theory and the Nexus Theory to the NCAA

In the cases from the 1970s, the courts used both the public function theory and the nexus theory to find state action when the NCAA ***151** imposed sanctions against a member school. [FN161] In National Collegiate Athletic Association v. Parish, [FN162] for example, basketball players of Centenary College, a small private college in Shreveport, Louisiana, challenged one of the NCAA's freshman eligibility rules as a violation of their due process and equal protection rights. The Fifth Circuit found regulation of intercollegiate athletics to be state action because college athletics was a significant part of public education, and the regulation of public education was a traditional public function. [FN163]

> [O]rganized athletics play a large role in higher education, and improved means of transportation have made it possible for any college . . . to compete athletically with other colleges throughout the country. Hence, meaningful regulation of education is now beyond the effective reach of any one state. In a real sense, then, the NCAA by taking upon itself the role of coordinator and overseer of college athletics . . . is performing a traditional governmental function. [FN164]

Acknowledging that no single state or governmental body "controls or directs the NCAA," the Fifth Circuit seemed to be fortifying its public function theory holding when it stated.

> [N]evertheless, it would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or support a "private" organization to which they have relinquished some portion of their power . . . . We have little doubt . . . that were the NCAA to disappear tomorrow government would soon step in to fill the void. [FN165]

In further supporting its finding of state action under the nexus theory, the court

continued, "[S]uffice it to say that state-supported educational institutions and their members and officers play a substantial, although admittedly not pervasive, role in the NCAA's program. State participation in or support of nominally private activity is a well recognized basis for a finding of state action." [FN166]

In the same year that the Fifth Circuit decided Parish, the Court of Appeals for the District of Columbia Circuit, in Howard University v. National Collegiate Athletic Association, [FN167] found that since the NCAA ***152** received more than half of its operating capital from public institutions, and since representation from public institutions made up a majority of the NCAA governing council, a sufficient nexus and a "mutually beneficial" or "symbiotic relationship" existed between the NCAA and the states for a finding of state action. [FN168] Thus, the federal courts were able to find state action on the part of the NCAA either because of a "substantial, although . . . not pervasive" [FN169] involvement by state institutions in NCAA activities or because of substantial funding of the NCAA by public institutions of various states, or public institutions' majority presence on the NCAA's governing body. [FN170]

E. The 1982 Cases Combined the Two Theories and Restricted Findings of State Action

In 1982, the United States Supreme Court decided three cases that changed the way in which federal courts ruled on the state action question concerning the NCAA. [FN171] Lugar v. Edmondson Oil Co. [FN172] was similar to, but distinguished from, Flagg Brothers; Rendell-Baker v. Kohn [FN173] further defined the public function theory; and Blum v. Yaretsky [FN174] further defined the nexus theory.

1. Lugar v. Edmondson Oil

In Lugar, Edmondson Oil sued Lugar for an unpaid debt. Falsely asserting to the court that Lugar wrongfully might dispose of its assets, Edmondson employed a state procedure that used the sheriff to attach and place a levy on Lugar's assets. When Edmondson won the suit, some of Lugar's assets were sold to satisfy the judgment. Lugar sued under Section 1983, alleging that Edmondson had deprived Lugar of due process rights. The District Court for the Western District of Virginia dismissed the case, and the Fourth Circuit affirmed the dismissal. [FN175] Lugar then sought and was granted certiorari by the United States Supreme Court. [FN176]

The Lugar Court distinguished the case from Flagg Brothers. In Flagg Brothers, the creditor acted according to state statutory procedures and the state "merely acquiesced," but in Lugar, the sheriff aided in the ***153** attachment of the debtor's property. Therefore, the Court found that Edmondson "jointly engaged with state officials in the prohibited action . . .," [FN177] and acted as a state actor. The Lugar Court fashioned a two-part test to determine when private conduct could be attributed to the state. First, the conduct at issue must have been enabled by a right or privilege created by the state, or by a rule of conduct imposed by the state. Second, the actor must be someone who fairly could be said to be a state actor. [FN178] In Lugar, the attachment and levy were enabled by a state statute, satisfying the first prong; and a sheriff, a state actor, carried out the attachment and levy, satisfying the second prong.

2. Rendell-Baker v. Kohn

In Rendell-Baker, a private-school vocational counselor alleged unjust termination in a Section 1983 suit. Rendell-Baker was fired after voicing her opposition to the school's hiring policies. [FN179] Five teachers at the school were fired after they protested Rendell-Baker's termination and informed the president of the school's board of directors that they intended to form a union. [FN180] The District Court for the District of Massachusetts granted the school's petition for summary judgment against Rendell-Baker after finding no state action by the school. [FN181] Nine days before the district court issued this judgment, a different judge in the same district court found state action in the suit brought by the five teachers. [FN182] The First Circuit consolidated the two cases, [FN183] and held that the school had not engaged in state action when it fired the counselor and teachers. [FN184]

The Supreme Court affirmed, saying that although the school for troubled students received ninety-nine percent of its funding from the state and was regulated heavily by

the state, the firing was not state action because the state did not regulate the school's personnel matters. The Court reasoned that the school was not unlike private contractors whose businesses depend primarily or exclusively on the government. [FN185] "Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." [FN186] The Court also found that state regulations had little to do with the school's personnel matters. [FN187] The regulations ***154** intruded into personnel matters only by requiring state approval of persons hired as vocational counselors. [FN188] As such, the regulations were not intrusive enough to make termination decisions state action. [FN189]

3. Blum v. Yaretsky

In Blum, a class of Medicaid patients challenged several New York nursing homes' decisions to transfer or discharge patients without either notice to the patients or an opportunity for a hearing, alleging that those decisions violated their due process rights. The district court permanently enjoined the nursing homes' autonomous transfer and discharge decisions, and the Second Circuit affirmed. [FN190]

Reversing the Second Circuit's decision, the Supreme Court said that long-term nursing care is not a function that has been "traditionally the exclusive prerogative of the state," although the federal Medicaid statute and the New York Constitution make the State responsible for providing every Medicaid patient with nursing home services. [FN191] The Court also denied that state subsidization of nursing home expenses, state payment of medical expenses for more than ninety percent of nursing home patients, and state licensing of nursing homes constituted a sufficient nexus to impute state action to the nursing homes. [FN192] The Court also noted, " A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." [FN193]

4. Summary of the Effects of the 1982 Cases

After the 1982 cases, therefore, courts deciding whether a private party engaged in state action have had to decide whether the private party's relationship with the state consisted of more than financing, regulation, and licensing, and whether the private party's conduct was coerced or significantly encouraged by the state. Thus, the public function and nexus theories seemed to blend together, and the "symbiotic relationship" and "dependence" requirements of Burton and Adickes seemed to give way to the "state granted right or privilege" and "coercive power or significant encouragement" requirements of the 1982 cases.

In the years that followed the Lugar trilogy, the Fourth Circuit was the first to rule that the NCAA did not engage in state action. In Arlosoroff v. National Collegiate Athletic Association, [FN194] the plaintiff ***155** sued to enjoin Duke University and the NCAA from enforcing an NCAA bylaw that would make him ineligible to compete on Duke's tennis team beyond his freshman year. [FN195] The district court found state action by the NCAA and issued a preliminary injunction against Duke's application of NCAA eligibility rules. [FN196]

On appeal, the Fourth Circuit first addressed the earlier NCAA cases finding state action: "These earlier cases rested upon the notion that indirect involvement of state governments could convert what otherwise would be considered private conduct into state action. That notion has now been rejected by the Supreme Court, however, and its decisions require a different conclusion." [FN197] The court also recognized that " a pproximately one-half of NCAA members are public institutions, and those institutions provide more than one-half of the NCAA's revenues," [FN198] but " i t is not enough that an institution is highly regulated and subsidized by a state. If the state in its regulatory or subsidizing function does not order or cause the action complained of, and the function is not one traditionally reserved to the state, there is no state action." [FN199]

In Graham v. National Collegiate Athletic Association, [FN200] the Sixth Circuit stated that the Supreme Court decisions in Rendell-Baker and Blum required a different conclusion from Parish, [FN201] in which the Supreme Court had held that the NCAA's freshman eligibility rules violated students' due process rights. The circuit court said, "The

earlier cases like Parish were premised on the theory that indirect involvement by state governments could make conduct normally considered to be private action into state action. The Supreme Court rejected that theory, however, in Rendell-Baker and Blum." [FN202] The Sixth Circuit then explained that the NCAA's function in regulating intercollegiate athletics "may be considered a public service . . . but it . . . is not a function 'traditionally exclusively reserved to the state."' [FN203] Furthermore, the Graham court stated that just because NCAA rules are followed by state institutions does not mean that the decision to promulgate the rules was made by the state. [FN204] The court cited Rendell-Baker and Blum to support its assertion that state regulation and subsidization were insufficient to transform a private actor into a public ***156** actor, [FN205] and stated that such showing could be made only if the state "caused or procured the adoption" of the NCAA rules. [FN206]

Thus, after 1982, substantial involvement in, and funding of, the NCAA by state institutions, as well as a majority presence by state institutions on the NCAA's governing council no longer were sufficient for a court to find state action on the part of the NCAA. The Supreme Court's 1982 holdings required that a state have ordered, coerced, or otherwise significantly encouraged the NCAA to act, and that the NCAA, in the conduct at issue, fairly could be characterized as a state actor.

III. COERCION

In Tarkanian, the Supreme Court held that the NCAA did not coerce UNLV into suspending Tarkanian. [FN207] In Miller II, the Ninth Circuit held that the Nevada due process statute, if enforced, would have coerced the NCAa into complying with the statute when acting outside Nevada in proceedings not involving Nevada institutions. [FN208] However, neither party alleging coercion literally was deprived of options. Yet, the courts' treatment of the coercion issue in the two cases was inconsistent. In Tarkanian, the Supreme Court found no coercion by the NCAA because UNLV either could have withdrawn from the Association or could have tried to amend the rules as an NCAA member. [FN209] In Miller II, in contrast, the Ninth Circuit held that the Nevada statute was coercive, even though the NCAA had the option of conducting its proceedings according to the laws of the states in which its proceedings are to be held. Apparently, therefore, at least one of these courts erred in its coercion analysis. This part argues that both courts erred in their coercion analyses.

The NCAA membership contract, when made with a state institution, grants the NCAA rights and privileges that satisfy the first prong of the Lugar test, [FN210] and NCAA conduct in exercising those rights and privileges satisfies the second prong of Lugar. [FN211] Furthermore, the grant of rights and privileges involved in NCAA membership agreements amounts to an overt grant of power by the state, which satisfies the requirement of Blum. [FN212] Finally, the NCAA membership contract gave the NCAA coercive power over UNLV, which the NCAA used to effect UNLV's decision to suspend Tarkanian.

***157** A. Coercion Involves Wrongful Proposals and Unreasonable Choices

Even in an obvious case of coercion, a party is not deprived completely of options. When someone puts a gun to another's head and says, "Your money or your life," the person given these "choices" is coerced into handing over the money even though the victim literally is free to refuse to give the mugger the money. Furthermore, when the gunman says to his victim, "You don't have enough money, but I'll spare you if you sign this contract to pay me $1000 next week," [FN213] the victim is coerced into making a contract which no court would enforce. [FN214]

Coercion involves voluntariness and choice. Even an authority as eminent as Thomas Hobbes believed that a person acts involuntarily only when he acts against his own will, and one wills (or intends) whatever he does intentionally. "Fear and liberty are consistent; as when a man throweth his goods into the sea for FEAR the ship should sink, he doth it nevertheless very willingly, and may refuse to do it if he will." [FN215] Therefore, for Hobbes, the promise of cash made to the gunman in the above hypothetical is made willingly, without coercion. [FN216] Hobbes would say that neither UNLV nor the NCAA were coerced, because they each intentionally chose their own conduct. But the law does not take as rigid an approach to coercion as Hobbes did.

B. Contract Law Broadens its Reading of Coercion

Eighteenth-century contract law allowed a contract to be avoided on coercion grounds only if the contract was caused by an actual imprisonment or a fear of the loss of life or limb. [FN217] A mere threat of imprisonment was insufficient, as was economic duress. [FN218] William Blackstone explained that fear of battery, fear of having one's house burned, or fear of having goods taken or destroyed all were insufficient grounds for voiding a contract on grounds of coercion, because one may recover in damages for these injuries, but no equivalent recovery can be had for actual imprisonment, loss of life, or loss of limb. [FN219] Contract law, then, allowed a contract to be voided if the coerced person entered a contract because he had no choice other than to suffer imprisonment, death or loss of limb.

After the eighteenth century, contract law's definition of coercion broadened. The Restatement (Second) of Contracts defines coercion as ***158** including a proposal prong and a choice prong. [FN220] The proposal must be "wrongful" in order to find coercion. [FN221] A proposal is wrongful if what it proposes to do is "independently illegal." [FN222] As a corollary to the "independently illegal" principle, a proposal to exercise a legal right is not wrongful. [FN223] A proposal also is wrongful if it causes the coercive dilemma, but a proposal is not wrongful if it merely takes advantage of existing circumstances. [FN224] In Hackley v. Headley, [FN225] for example, Headley claimed that he was coerced by Hackley to accept as payment in full less than what Hackley owed because Headley was in financial straits and needed the money immediately. [FN226] The court held that Hackley had not coerced Headley because Hackley had not caused "the condition which made this money so important . . . ." [FN227]

Moreover, the exercise of a legal right to create a dilemma is not wrongful. [FN228] In DuPuy v. United States, [FN229] the plaintiff alleged that although he had agreed to pay the amount indicated in the settlement agreement proposed by the Internal Revenue Service, he should not be held liable for that amount because the agreement was procured under the IRS's threat to sue. [FN230] The Court of Claims found that the plaintiff was not coerced because the government's threat to sue was made in good faith, and that an inducement to avoid the trouble and expense of a lawsuit is an ordinary purpose of a settlement. In Business Incentives Co. v. Sony Corp., [FN231] Sony contracted to pay B.I.C. a commission for securing customers to use Sony products. The contract was terminable by either party. Sony threatened to terminate the relationship if B.I.C. did not agree to new terms. B.I.C. agreed to the terms, then claimed that it agreed under duress. The court held that Sony had not coerced B.I.C. because Sony merely was exercising an existing legal right. [FN232]

The choice prong is essential because some proposals--bribery, for example-- are wrongful whether or not they are coercive. [FN233] Also, a ***159** person is not coerced if that person has reasonable alternatives but fails to choose one of them. [FN234] The Supreme Court consistently has defined the choice prong as requiring that no reasonable choice was available to the claimant, including a judicial remedy that would not have been adequate. In Hartsville Old Mill v. United States, [FN235] a cotton processing company contracted to supply the federal government with cotton linters during World War I. [FN236] The contract allowed the government to cancel the contract upon termination of the war. [FN237] After the Armistice, the government notified the company of its intention to cancel. [FN238] The government allowed the company one hour to accept the terms offered for settlement of its obligations, which the company did. [FN239] Five years later, Congress passed a law that required the federal government to honor its obligations cancelled at the end of the war. [FN240] The company sued to recover under the original contract, and alleged that the settlement agreement was entered into under coercive conditions. [FN241] The Supreme Court stated, "Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate." [FN242] Because the government's threats to dishonor its obligations were not believed by the company's negotiators, and because the company must have believed that it could have recovered on the original contract in court, the Court held that the company was not coerced into agreeing with the settlement. [FN243]

In Union Pacific Railroad Co. v. Public Service Commission of Missouri, [FN244] the railroad company challenged a Missouri statute requiring that bonds issued by the railroad company be certified by the Public Service Commission. [FN245] The Commission charged

$10,962.25 for issuance of bonds in the amount of $31,848,900. [FN246] The railroad paid the fee, then sued the Commission for recovery. The railroad claimed that the charge interfered with interstate commerce, and that it paid the charge under duress. The Commission claimed that the fee was not coercive because the railroad had the choice of not paying it and instead incurring the statutory penalties. Justice Holmes, writing for the Court, rejected this argument, stating, "It is always in the interest ***160** of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." [FN247]

In Caivano v. Brill Contracting Corp., [FN248] Brill, a plumbing subcontractor, conditioned its job offer to Caivano on the term that he pay $25.00 of his $61.25 weekly wages back to Brill for the duration of his employment. Caivano accepted the job. When his employment ended, he sued Brill for the amount of the kickback. The court held that the employee was under duress because the fear of economic distress during the Great Depression and the superior bargaining power of the employer destroyed the employee's free agency. [FN249]

In contract law, therefore, to preclude the claim of coercion, at least one alternative must have been reasonable. Applying this theory to Tarkanian, whether the NCAA coerced UNLV into its decision to suspend Tarkanian depends on whether the proposal to suspend Tarkanian was wrongful, and whether either of UNLV's alternatives (withdrawing from the NCAA or incurring additional sanctions) was reasonable. Applying this same theory to Miller II, whether the State of Nevada coerced the NCAA into complying with Nevada's due process statute outside of Nevada depends on whether the State's proposal of adhering to the procedures specified in its statute was wrongful, and whether the alternative of adhering to applicable state laws was reasonable. Contract law, however, does not give a clear indication of what is a reasonable alternative. Criminal law, however, gives a clearer definition.

C. Criminal Law Limits the Defense of Coercion

The wrongful proposal and unreasonable choice elements also are present in coercion in the criminal context. An English court, in D.P.P. v. Lynch, described duress as "compulsion resulting from a threat or threats express or implied, of grave consequences." [FN250] In that case, Lynch alleged that he was coerced under a threat of death to drive the getaway car for members of the Irish Republican Army. The House of Lords explained that, in adjudicating a claim of duress, a court considers whether the threat was sufficiently serious (wrongfulness of the proposal), whether the person threatened had a "safe avenue of escape" (reasonableness of choices), and whether the person was under duress only because he voluntarily associated with those "whom he knew would require some course of action." [FN251] In Lynch, the court decided that the defense of duress was available to the defendant who drove ***161** the getaway car in a murder and who was charged as an aider and abetter. [FN252] But, the defense would not have been available to a defendant who claimed to have committed murder under duress, "for he ought rather to die himself, than kill an innocent." [FN253]

In Abbot v. The Queen, [FN254] the defendant Abbot was convicted of murder in the first degree. Abbot claimed that the founder of the commune in which he lived threatened to kill him and his mother unless he participated in the murder of the mistress of a fellow commune member. Abbot also alleged that the founder was known to be dangerously violent, and that Abbot feared for his and his mother's lives. The House of Lords upheld Abbot's conviction. The court quoted the English case, S. v. Goliath:

> . . . if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent . . . . [FN255]

A synthesis of Lynch and Abbot, therefore, shows that death to oneself is not a reasonable alternative when the proposal is to facilitate a murder; but death to oneself is a reasonable alternative when the proposal is to kill another directly. The reason for the dichotomy is as follows: in the former, "[t]he final and fatal moment of decision has not arrived[; h]e saves his own life at a time when the loss of another life is not

a certainty" [FN256]; but in the latter, "the deliberate killing by one's own hand of another human being may be something that no pressure or threat even to one's own life . . . can justify . . . ." [FN257]

In North Carolina v. Alford, [FN258] Alford was indicted for first degree murder. [FN259] Alford's court-appointed attorney interviewed all the witnesses Alford claimed would support his alleged innocence, [FN260] but the witnesses gave strong indications of Alford's guilt. [FN261] Alford's attorney recommended, therefore, that Alford plead guilty to a lesser charge, but left the final decision to Alford. [FN262] Alford pleaded guilty to second degree murder, but claimed that he gave the plea under duress because ***162** the prosecution convinced him that he would incur the death penalty if he were convicted at trial of first degree murder. [FN263] The Court upheld the confession because Alford had full representation of counsel, and because facing trial and allowing the judicial system to work would have been a reasonable alternative to his guilty plea. [FN264] Therefore, a judicial remedy would be a reasonable alternative to a threat of death.

In United States v. Bailey, [FN265] three prisoners who escaped from the District of Columbia jail claimed that they were coerced by the conditions of their confinement into escaping. The allegedly coercive conditions included frequent trash fires, beatings by guards, threats of death, and inadequate medical attention. The Court held that the escapees had not been coerced because once they were outside the jail, the jail's conditions ceased to be a coercive factor. At that point, the escapees could have chosen to contact the authorities instead of remaining illegal fugitives. Therefore, the Court refused to allow the defendants to use the coercion defense. " I f there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense will fail." [FN266] To be afforded the coercion defense, the escapees had to show that to escape and to remain away "was their only reasonable alternative." [FN267] By this language, the court acknowledged that the existence of alternatives from which to choose does not necessarily preclude a claim of coercion.

The Ninth Circuit has adopted the same "no reasonable alternative" requirement for the choice prong as the United States Supreme Court has adopted. In United States v. Atencio, [FN268] the defendant was aware of a trial date set for drug charges against him, but he failed to appear. Atencio claimed that he did not appear because he had fled to Mexico in fear of his own life and his family's welfare after someone told him that a contract had been put out on his life. The court held that Atencio had not been coerced into not appearing at trial because " o f crucial importance in any attempt to raise duress as a defense are the elements of immediacy and opportunity to avoid the act." [FN269]

> Given the great concern which one should attach to a solemn vow to appear in court on a given trial date, one must be expected to seek alternative means of protection before fleeing the country to avoid a perceived danger. Atencio's failure to contact the police, the court, or even his attorney about the threats against his life ***163** underlines the inapplicability of a defense of duress . . . . [FN270]

A review of these contract and criminal coercion cases reveals that coercion involves a proposal that threatens unreasonable consequences and requires the recipient to choose from alternatives none of which furthers the recipient's own interests. The threatened consequences are unreasonable if they are illegal or result in substantial injury to the recipient. The threat in Lynch was coercive because the options from which Lynch had to choose were to help the murderers kill or to be killed himself. In Abbot, the defendant may have been coerced, but policy urged against allowing someone who actually committed a murder to be freed. The threat of "your money or your life" does not subject the recipient to illegal conduct, but nevertheless is coercive because both choices are against the recipient's interest. But in Atencio, the defendant was not coerced, because to seek police protection from a murderer is a choice that did not require Atencio to perform an illegal act and did not threaten his interests.

For coercion to be found in Tarkanian or Miller II, then, a court must find both a wrongful proposal and a lack of a reasonable choice. In Tarkanian, the NCAA proposed that UNLV suspend Tarkanian or face added sanctions. This would be coercive only if the proposal to suspend Tarkanian is illegal independently, and if UNLV had no reasonable alternative, including a judicial remedy, to accepting the proposal. In Miller II, the NCAA perceived

the State of Nevada as proposing that the NCAA follow a set of statutory procedures in conducting its infractions proceedings everywhere. This would be coercive if the perception was accurate, if the Nevada legislature illegally exercised its lawmaking authority in enacting the due process statute, and if the NCAA had no reasonable alternative, including a judicial remedy, to following the statute outside of Nevada. The next part of this essay applies the proposal-choice test to determine whether coercion occurred in Tarkanian and Miller II.

IV. APPLICATION AND CRITIQUE OF THE PROPOSAL-CHOICE TEST

A. Tarkanian: The NCAA Offered UNLV "Unpalatable" Choices

In Tarkanian, the NCAA's proposal to UNLV was either "suspend Tarkanian and suffer only two years of sanctions including preclusion from NCAA post-season tournaments and preclusion from television appearances, or risk additional sanctions." [FN271] UNLV's decision to suspended Tarkanian was made as a state actor. The Court found, "In performing their official functions, the executives of UNLV unquestionably ***164** act under color of state law. [FN272] Also, a tenured professor has a property right in his professorship, [FN273] and Tarkanian was a tenured professor. [FN274] So, because UNLV found no wrongdoing by Tarkanian, [FN275] suspending him violated Tarkanian's due process rights. Therefore, the NCAA's proposal to UNLV was wrongful for requesting UNLV to engage in conduct that unconstitutionally deprived Tarkanian of his property interest in his continued employment.

UNLV's choices in response to the NCAA's proposal were (1) to suspend Tarkanian, (2) to retain Tarkanian, or (3) to withdraw from the NCAA. If UNLV had selected option (1) and suspended Tarkanian (as it actually attempted to do), Tarkanian would have sued for civil rights violation (as he actually did). Between Tarkanian and UNLV alone, a finding of due process violation would have been unavoidable. Given that finding, a court would have been sure to grant Tarkanian an injunction requiring UNLV to reinstate him. Then, because UNLV would not have successfully removed Tarkanian from UNLV's intercollegiate athletics program, the NCAA would have imposed additional sanctions against UNLV. [FN276] Selecting option (2), retaining Tarkanian outright, would have resulted in the same sanctions by the NCAA. Choice (3) would "thwart" UNLV's goal of remaining a basketball powerhouse. [FN277]

When the United States Supreme Court reviewed the case, it did not address whether UNLV's choices were reasonable, just whether they were palatable. [FN278] In Bailey, the case involving the three jail escapees, the Court defined a reasonable choice as one that allowed the claimant to avoid both the illegal act and the threatened harm. [FN279] In Tarkanian, choice (1) would have violated the Due Process Clause (illegality), choice (2) would have subjected UNLV to additional sanctions (the threatened harm), and choice (3) would have required UNLV to forgo an institutional objective. By deciding that the NCAA had not coerced UNLV into suspending Tarkanian, the Court implied that forgoing UNLV's objective of remaining a basketball powerhouse was a reasonable choice.

***165** B. Miller II: The NCAA Limited Its Own Choices

In Miller II, the Ninth Circuit did not identify the NCAA's choices, perhaps implying that the NCAA had no choices. The federal court of appeals struck down the Nevada due process statute on the grounds that it would have coerced the NCAA into abandoning its objective of evenhanded application of enforcement procedures. [FN280] The proposal in Miller II was for the NCAA to comply with Nevada's due process statute when dealing with Nevada institutions, employees, student-athletes or boosters, or be subjected to civil suit by the State of Nevada.

This proposal could be said to be illegal independently as a violation of the Commerce Clause only if the statutory requirements were said to apply outside of Nevada. Otherwise, the statute is a legitimate exercise of the state's legislative powers. The statute's requirements would apply to the NCAA outside of Nevada only if the NCAA obligates itself to conduct infractions proceedings with the same procedures everywhere. The proposal is illegal independently, therefore, only if the law protects the NCAA's objectives more than it protects a state's legitimate exercise of its legislative powers.

The State of Nevada did not cause the NCAA's "evenhanded application" dilemma. The NCAA had imposed on itself its goal of evenhanded regulation by including it in its bylaws. This is similar to the circumstances in which UNLV found itself in Tarkanian by having imposed on itself the goal of remaining a basketball powerhouse and then having to consider the choice of withdrawing from the NCAA. The State of Nevada, moreover, was exercising a preexisting legal right when it enacted the due process statute to protect the state's schools, employees, and student-athletes. The exercise of a legislative right does not make the proposal wrongful.

The NCAA's choices were (1) to comply with the statute in Nevada and elsewhere, (2) to comply with the statute in Nevada only, or (3) not to comply with the statute at all. Choice (3) was not a reasonable choice because it would have subjected the NCAA to the threatened harm of a civil lawsuit. Choice (1) also was not a reasonable choice because it would have made the NCAA's proceedings illegal in states with due process statutes different from the Nevada statute. Choice (2) would have allowed the NCAA to escape litigation in Nevada and elsewhere, but it would have required the NCAA to forgo its objective of evenhanded enforcement.

In finding the due process statute to be coercive, the Ninth Circuit stated, "The statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules," [FN281] because "in order for the NCAA to accomplish its goals, the 'enforcement procedures must be applied even-handedly and uniformly on a ***166** national basis."' [FN282] This finding differs from Tarkanian because Tarkanian implied that UNLV's withdrawal from the NCAA was a reasonable choice, even though such withdrawal would thwart UNLV's self-imposed goal of prominence in intercollegiate basketball. In contrast, in Miller II, the appellate court did not require the NCAA to thwart its self-imposed goal of administering its procedures the same in every state.

C. UNLV was Coerced, but the NCAA was Not

Should a choice that requires forgoing an institutional objective be held to be reasonable? On policy grounds, the answer should be: sometimes "yes" and sometimes "no." The more essential an objective is to the underlying character of an institution, the more the answer should lean toward "no," because altering an institutional objective can alter the underlying character of the institution. In Miller II, the court said that applying different procedures to enforcement proceedings in different states would destroy the "integrity" of the NCAA's product of intercollegiate athletics. [FN283] In Tarkanian, however, UNLV's withdrawing from the NCAA, and consequently, thwarting its objective of remaining a basketball powerhouse, would have eliminated a source of revenue and visibility for UNLV. The diminished visibility would have been detrimental to the school's recruiting ability for basketball and non-basketball athletes, as well as to its recruiting ability for non-athlete students. The quality of UNLV's basketball program, obviously, would have diminished, and that could have had a negative effect on the general student body. Altering an objective that changes the recruiting practice of UNLV and substantially diminishes the quality of a high-visibility athletic program significantly affects the underlying character of the institution.

Given a significant impact on the underlying character of an affected institution, an alternative that would subvert a party's character-defining objectives should not be held to be reasonable. An alternative that would result in the rejection of such an objective is not a reasonable choice. Thus, when all other choices also are unreasonable, a wrongful proposal that requires its recipient to forgo one of its character-defining objectives is coercive.

Given that forgoing a character-defining objective is not a reasonable choice, UNLV was coerced by the NCAA in Tarkanian. The three choices available to UNLV would have subjected UNLV either to illegality or to otherwise substantial injury. If UNLV suspended Tarkanian, it would have violated the Fourteenth Amendment. If UNLV retained Tarkanian, it would have suffered additional NCAA sanctions. If UNLV withdrew from the NCAA, UNLV would have rejected its objective of ***167** prominence in college basketball. In contrast, in Miller II, although the choices among which the NCAA was required to choose seemed coercive, the proposal the State of Nevada made was not wrongful, and therefore, was not

coercive.

D. In Tarkanian, the NCAA Engaged in State Action

The current understanding of state action is embodied in the three 1982 cases: Lugar, Rendell-Baker, and Blum. [FN284] Lugar requires that a private party act under a right or privilege created by the state, and that the actor fairly be characterized as a state actor before a court can find state action. The Court found state action in Lugar not only because the creditor proceeded pursuant to state statute, but also because he relied on a sheriff to attach and levy the debtor's property. In contrast, the Court in Tarkanian found that the NCAA had not acted under color of Nevada law because " t he vast majority of NCAA member institutions were located in states other than Nevada . . .," [FN285] and because the NCAA is an "organization that is independent of any particular state." [FN286] Furthermore, the Court observed, "UNLV delegated no power to the NCAA to take specific action against any university employee. The commitment by UNLV to adhere to NCAA enforcement procedures was enforceable only by sanctions that the NCAA might impose on UNLV itself." [FN287]

Under coercion by the NCAA, UNLV had no reasonable choice except to suspend Tarkanian. Thus, the NCAA substituted its decision for that of UNLV. Having agreed to the terms of the NCAA membership agreement, [FN288] UNLV gave the NCAA the ability to coerce UNLV. That grant of power should have been construed by the Court as meeting the first prong of Lugar. By exercising this coercive power, the NCAA effected a state employment decision, a function traditionally exclusively reserved to the state. In doing so, the NCAA fairly could be characterized as a state actor, thus meeting the second prong of Lugar.

In Lugar, furthermore, the creditor misused a state procedure involving a state agent to deprive the debtor of his property rights. By threatening illegality or additional sanctions, thus coercing UNLV to suspend Tarkanian, the NCAA wrongfully used its economic and contractual ***168** power to entice UNLV, a state agent, into depriving Tarkanian of his property right in state employment.

In Blum, the Court held that New York nursing homes were not state actors. Although the homes were regulated heavily and were subsidized by the state, their operation was not ordered by the state. The Court required a showing that the state coerced or otherwise significantly encouraged the conduct so that the decision must be deemed in law to be one of the state. [FN289] Conversely, in Tarkanian, the NCAA (a private party) had coerced UNLV (a state agency), so that in suspending Tarkanian, UNLV was not implementing the state agency's own decision, but rather, that of the NCAA, even though the Court acknowledged that UNLV and the NCAA actually acted as adversaries throughout the investigation process. [FN290] When a state agency enters into a relationship with a private party so that the latter is in a position to coerce the former into implementing a decision other than its own, the state has provided such encouragement that the private party should be construed to be a state actor under Blum. NCAA membership is such a relationship. When implemented by the state, a private decision injures no less than had it truly been a decision of the state.

In Rendell-Baker, the Court held that because private employment decisions are not exclusively a state function, a private school did not act as a state actor when it fired its counselor. The Court held that if the conduct at issue was not reserved to the state exclusively, state regulation and subsidization would not be enough to impute state action to a private party. Tarkanian can be distinguished from Rendell-Baker. First, Tarkanian was a tenured professor employed by a state school, whereas Rendell-Baker involved an employee of a private school. UNLV's contract with the NCAA gave UNLV a more direct involvement with the NCAA than would mere funding and regulation. By contracting with the NCAA, UNLV allowed the NCAA to regulate UNLV's conduct of its intercollegiate athletics. Moreover, UNLV's implementation of the NCAA's desire to suspend Tarkanian showed UNLV's delegation to the NCAA of employee decisions, an exclusively public function.

Analyzed against the requirements of Lugar, Blum, and Rendell-Baker, the cases that the Court acknowledges as having changed the circuit courts' holdings on the NCAA-state action question, [FN291] the coercion factor enhanced the NCAA's relationship with UNLV such that it made the NCAA a state actor in Tarkanian.

E. In Miller II, the Nevada Statute Did Not Violate the Commerce Clause

In Miller II, the Ninth Circuit held that because the "[s]tatute would force the NCAA to regulate the integrity of its product in every state ***169** according to Nevada's procedural rules," [FN292] the statute violated the Commerce Clause per se. The Nevada statute applied only to proceedings against Nevada members of the NCAA. The NCAA could have adopted in its bylaws the practice of conducting its enforcement proceedings according to the law of the state in which the proceeding was to take place. This would not have placed a heavier burden on interstate commerce than differences in state laws regulating the lengths of tractor trailers allowed on a state's highways. [FN293] A balancing test should have been applied to weigh the state's interest in protecting state employees' property and liberty interests against the NCAA's objectives. [FN294]

In Brown-Forman, [FN295] the Court said that a statute that regulates only interstate commerce is invalid per se, but a statute that regulates both intra- and interstate commerce is subject to a balancing test. The test balances the legitimate interest of the state in enacting the statute at issue against the burden the statute places on interstate commerce. In Brown-Forman, for example, the Supreme Court found that New York's asserted interest in assuring the lowest possible liquor price to its residents was legitimate. [FN296] However, after balancing that interest against the interests protected by the Commerce Clause, the Court held the statute unconstitutional. [FN297]

Given that due process is an express right granted in the United States Constitution, [FN298] and that state employment is a property interest protected by the Fourteenth Amendment, [FN299] relative to the state interest at stake in Brown-Forman, Nevada's interest in protecting public employees' due process rights must be legitimate. [FN300] The Ninth Circuit acknowledged this legitimacy by saying, "We appreciate Nevada's ***170** interest in assuring that its citizens and institutions will be treated fairly." [FN301]

At issue in Brown-Forman was a New York statute that required liquor distillers and their agents to affirm that prices charged in New York would be no higher than the prices charged in any other state. Since twenty other states also had similar statutes, [FN302] a seller had to consider what prices to charge in New York when setting prices in other states. Furthermore, sellers could not lower prices in those states to a price lower than the New York prices once the price report was filed in New York. In holding the statute unconstitutional, the Brown-Forman Court stated, "The mere fact that the effects of the New York statute are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state." [FN303]

The Ninth Circuit believed that the Nevada due process law would have a similar interstate effect. "The Statute would force the NCAA to regulate the integrity of its product in every state according to Nevada's procedural rules." [FN304] The appellate court agreed with the trial court that "in order for the NCAA to accomplish its goals, the 'enforcement procedures must be applied even-handedly and uniformly on a national basis."' [FN305]

The Miller II court pointed out that three other states had adopted due process statutes similar to the Nevada statute. [FN306] However, none of these statutes apply to the NCAA's conduct outside of the state of enactment. They propose to regulate only infractions hearings involving schools within their jurisdictions. The NCAA made no showing that Nevada, or any other state, would have asserted an interest in whether its rules were used outside of its borders. Any obligation to conduct a proceeding outside of Nevada using Nevada rules would have been imposed by the NCAA on itself via its self-imposed objectives, not by the State of Nevada.

The Brown-Forman Court noted "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." [FN307] Like the statute at issue in Brown-Forman, the Nevada due process statute also sought to protect the due process rights of Nevada ***171** citizens and schools. Unlike Brown-Forman, however, the Nevada statute did not require its use in proceedings outside of Nevada, and did not change the marketability or attractiveness of non-Nevada NCAA member institutions to potential

student-athletes or employees. Therefore, the Nevada statute did not have the express extraterritorial reach of the New York statute in Brown-Forman, nor did it affect the effectiveness of UNLV's interstate competitors. Thus, the Nevada statute is wholly different in its effects from the New York statute.

The Brown-Forman Court found:

> Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce . . . . While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not project its legislation into [other states] by regulating the price to be paid for liquor in those States. [FN308]

In contrast, the Nevada due process statute did not make reference to conduct outside Nevada, as did the New York statute in Brown-Forman. The Nevada statute also did not impose a mode of conduct upon the NCAA when conducting its activities elsewhere, nor did it require the NCAA to "seek regulatory approval in one State before undertaking a transaction in another." [FN309] Any compulsion to use uniform procedures among the states was imposed on the NCAA by itself, not by legislation of Nevada or any other state.

The Brown-Forman Court said, "It is undisputed that once a distiller's posted price is in effect in New York, it must seek the approval of the New York State Liquor Authority before it may lower its price for the same item in other states." [FN310] No analogous requirement was made by the Nevada statute. Thus, the Nevada due process statute is distinguishable from the New York affirmation statute. Although both statutes sought to regulate conduct within their respective enacting states, the New York statute expressly referred to distillers' conduct in other states, [FN311] but the Nevada statute applied only to enforcement proceedings involving "a Nevada institution, employee, student-athlete, or ***172** booster." [FN312] While the New York statute required merchants to tailor their conduct outside of New York, the NCAA itself required that it change its own conduct outside of Nevada according to the Nevada statute. Therefore, the Nevada statute did not violate the Commerce Clause.

The Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state. The Nevada due process statute did not dictate the NCAA's conduct outside of Nevada. Nor did the State of Nevada require that the NCAA comply with Nevada's procedures elsewhere as a condition of the NCAA's activities inside Nevada. Moreover, the Nevada statute did not render it impossible for the NCAA to operate in other states in compliance with the laws of those states or in response to the "market conditions" of those states. The Nevada statute makes no reference whatsoever to the NCAA's conduct anywhere outside of Nevada.

The Nevada statute would have required the NCAA to change the way it conducted its enforcement proceedings in the State of Nevada, but nowhere else. Understandably, the NCAA wanted to preserve its own objective of even-handed administration of enforcement procedures. However, the fact that the NCAA's objectives render compliance with the statutes of one or more states difficult does not render any of the statutes a violation of the Commerce Clause.

CONCLUSION: THE HOLDINGS THREATEN MORE THAN DUE PROCESS IN INTERCOLLEGIATE ATHLETICS

Neither the Supreme Court nor the Ninth Circuit gave due analysis to the coercion claims in Tarkanian and Miller II. The Tarkanian majority summarily dismissed Tarkanian's coercion claim in one sentence near the end of the opinion. [FN313] The Miller II court concluded that the Nevada statute "regulates NCAA infractions proceedings in interstate commerce beyond Nevada's state boundaries" [FN314] without either addressing the reasonableness of the NCAA's choices or weighing Nevada's interest against that of the NCAA. This failure to analyzes fully the coercion claims resulted in holdings that gave the NCAA enormous power over member institutions and their employees. Tarkanian held that the NCAA, as a private association, owed no responsibility to provide due process to a state employee. Miller II held that a state cannot protect its citizens' due process rights through legislation when one of its citizens is subjected to an NCAA infractions proceeding, because such legislation violated the Commerce Clause.

The holdings of these two cases may be applied to other arenas in which public institutions are subject to regulation by private organizations.***173** Public and private law schools depend on accreditation by the private American Bar Association (ABA), and public and private hospitals depend on accreditation by the private American Hospital Association (AHA). To the extent that Tarkanian and Miller II are applicable to these relationships, coercion exerted by the ABA could force public law schools to deprive teachers and administrators of legally protected property rights, and coercion exerted by the AHA could force public hospitals to deprive their doctors, nurses, or other employees of their rights.

More generally, the federal courts seem to have given the message that other public and private institutions may organize as private associations to regulate their fields without concern for the constitutional rights of the members' employees. To avoid this type of situation, the courts should have heeded the warning of the Fifth Circuit in Parish: "[I]t would be strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or support a 'private' organization to which they have relinquished some portion of their power . . . ." [FN315]

[FNa]. J.D. Notre Dame Law School, 1995.

[FN1]. 42 U.S.C. § 1983 (1988).

[FN2]. Tarkanian initially sued only UNLV and a number of its officers in Nevada state court. On appeal from the final judgment enjoining UNLV from disciplining Tarkanian, the Nevada Supreme Court found the NCAA to be a necessary party. On remand, Tarkanian joined the NCAA as a defendant. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 188, 109 S. Ct. 454, 456 (1988) [hereinafter Tarkanian], citing University of Nev. v. Tarkanian, 594 P.2d 1159 (Nev. 1979).

[FN3]. 488 U.S. at 188-89, 109 S. Ct. at 460.

[FN4]. Id. at 179, 109 S. Ct. at 454. Justice Stevens wrote for the Majority. Justice White dissented, joined by Justices Marshall, Brennan, and O'Connor.

[FN5]. Since UNLV did not appeal the judgment of the Nevada Supreme Court, the issue of whether UNLV violated Tarkanian's due process rights was not before the United States Supreme Court. Id. at 189, 109 S. Ct. at 460.

[FN6]. National Collegiate Athletic Ass'n v. Miller, 795 F. Supp. 1476, 1480 (D. Nev. 1992) [hereinafter Miller I]; NEV. REV. STAT. § § 398.055-398.255 (1993).

[FN7]. Miller 1, 795 F. Supp. at 1481.

[FN8]. U.S. CONST. art. I, § 8, cl. 3.

[FN9]. Id. art. I, § 10, cl. 1.

[FN10]. Miller I, 795 F. Supp. at 1485, 1488.

[FN11]. National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 639 (9th Cir. 1992) [hereinafter Miller II].

[FN12]. Id. at 637. In November of 1994, the United States District Court for the Northern District of Florida relied on the trial court's opinion in Miller I to rule that a similar Florida due process statute violated both the Commerce Clause and the Contract Clause. National Collegiate Athletic Ass'n v. Roberts, No. 94-40413-WS (N.D. Fla. Nov. 8, 1994) (unpublished opinion, on file with The Journal of College and University Law).

For a more detailed discussion of the question whether any state legislation regarding due process in proceedings by organizations like the NCAA could both pass Constitutional scrutiny under the Commerce Clause as well as serve legitimate state interests, see Ronald J. Thompson, Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?, 41 UCLA L. REV. 1657 (1994).

[FN13]. Tarkanian, 488 U.S. at 180, 109 S. Ct. at 456.

[FN14]. Id.

[FN15]. Id. at 180-81, 109 S. Ct. at 456.

[FN16]. Id.

[FN17]. NCAA "legislation" consists of rules determined by members at annual conventions. Id. at 183, 109 S. Ct. at 457.

[FN18]. Id.

[FN19]. Id., 109 S. Ct. at 458.

[FN20]. Id. at 183-84, 109 S. Ct. at 458.

[FN21]. Id. at 184, 109 S. Ct. at 458.

[FN22]. Id. at 185, 109 S. Ct. at 458.

[FN23]. Id.

[FN24]. Id.

[FN25]. Id. at 185, 109 S. Ct. at 459.

[FN26]. Id. at 185-86, 109 S. Ct. at 459.

[FN27]. Id. at 186, 109 S. Ct. at 459.

[FN28]. Id.

[FN29]. Id.

[FN30]. Id.

[FN31]. Id.

[FN32]. 42 U.S.C. § 1983 (1988) provides in relevant part:

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

[FN33]. Tarkanian, 488 U.S. at 187, 109 S. Ct. at 460.

[FN34]. Id. at 188, 109 S. Ct. at 460.

[FN35]. Id., citing University of Nev. v. Tarkanian, 594 P.2d 1159 (Nev. 1979).

[FN36]. Id.

[FN37]. Id. at 188-89, 109 S. Ct. at 460.

[FN38]. 42 U.S.C. § 1988 (1988). This statute allows a court in its discretion to award the prevailing party of a § 1983 case a reasonable attorney's fee as a part of the costs.

[FN39]. Tarkanian, 488 U.S. at 189, 109 S. Ct. at 460.

[FN40]. Id.

[FN41]. Id.

[FN42]. Id., citing 741 P.2d at 1353.

[FN43]. Id. at 189 n.10. 109 S. Ct. at 461 n.10.

[FN44]. Id. at 190, 109 S. Ct. at 461.

[FN45]. 457 U.S. 922, 102 S. Ct. 2744 (1982).

[FN46]. Tarkanian, 488 U.S. at 189-90, 109 S. Ct. at 461, citing 741 P.2d at 1349.

[FN47]. Id. at 182, 109 S. Ct. at 457.

[FN48]. Id. at 191, 109 S. Ct. at 461-62, citing Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 476 (1961).

[FN49]. Id. at 192, 109 S. Ct. at 462.

[FN50]. Id.

[FN51]. Id.

[FN52]. Id. at 193, 109 S. Ct. at 462.

[FN53]. Id.

[FN54]. Id., 109 S. Ct. at 462-63.

[FN55]. Id.

[FN56]. Id. at 194, 109 S. Ct. at 463.

[FN57]. 433 U.S. 350, 97 S. Ct. 2691 (1977).

[FN58]. Tarkanian, 488 U.S. at 194, 109 S. Ct. at 463.

[FN59]. Id., citing Bates, 433 U.S. at 362, 97 S. Ct. at 2698.

[FN60]. Id. at 194-95, 109 S. Ct. at 463.

[FN61]. Id. at 195, 109 S. Ct. at 463-64.

[FN62]. See id. at 192, 109 S. Ct. at 462. "A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause . . . ."

[FN63]. Id. at 195-96, 109 S. Ct. at 464.

[FN64]. Id.

[FN65]. Id. at 196, 109 S. Ct. at 464.

[FN66]. 365 U.S. 715, 81 S. Ct. 856 (1961). See infra text accompanying notes 148-149.

[FN67]. Tarkanian, 488 U.S. at 196 n.16, 109 S. Ct. at 464 n.16.

[FN68]. Id. at 197, 109 S. Ct. at 465.

[FN69]. Id. at 192, 109 S. Ct. at 462.

[FN70]. Id. at 186, 109 S. Ct. at 459.

[FN71]. Id. at 198, 109 S. Ct. at 465.

[FN72]. Id. at 198 n.19, 109 S. Ct. at 465 n.19 (emphasis added).

[FN73]. Id. at 183, 109 S. Ct. at 457.

[FN74]. Id. at 185, 109 S. Ct. at 458. Despite the fact that UNLV found no wrongdoing by Tarkanian, Tarkanian agreed, amid all of the controversy, to resign at the end of the 1991-92 basketball season. Douglas Lederman, Peace at Last in Las Vegas?, CHRON. HIGHER EDUC., May 4, 1994, at A42.

[FN75]. Id. at 200, 109 S. Ct. at 466 (White, J. dissenting, citing Dennis v. Sparks, 449 U.S. 24, 27-28, 101 S. Ct. 183, 186 (1980)).

[FN76]. Id. at 200-01, 109 S. Ct. at 466-67.

[FN77]. 449 U.S. 24, 101 S. Ct. 183 (1980).

[FN78]. 398 U.S. 144, 90 S. Ct. 1598 (1970).

[FN79]. Tarkanian, 488 U.S. at 200, 109 S. Ct. at 466 (White, J., dissenting), quoting Dennis, 449 U.S. at 27-28, 101 S. Ct. at 186-87.

[FN80]. Id., quoting Adickes, 398 U.S. at 152, 90 S. Ct. at 1605.

[FN81]. Id.

[FN82]. Id.

[FN83]. Id., quoting Dennis, 449 U.S. at 27, 101 S. Ct. at 186.

[FN84]. Id. at 201, 109 S. Ct. at 467.

[FN85]. Id.

[FN86]. Id.

[FN87]. Id.

[FN88]. Id.

[FN89]. Id. at 202, 109 S. Ct. at 467.

[FN90]. Id. at 202-03, 109 S. Ct. at 467.

[FN91]. Id. at 203, 109 S. Ct. at 468.

[FN92]. Id.

[FN93]. Id.

[FN94]. Id.

[FN95]. Id. at 193, 109 S. Ct. at 463.

[FN96]. Id. at 194, 109 S. Ct. at 463 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501, 108 S. Ct. 1931, 1937 (1988)).

[FN97]. Id. at 197-98, 109 S. Ct. at 465.

[FN98]. Miller I, 795 F. Supp. at 1480.

[FN99]. Id.

[FN100]. Id.

[FN101]. NEV. REV. STAT. § § 398.055 - 398.255 (1993). Specifically, the Statute requires an intercollegiate athletic association to provide an accused with certain procedural rights: to a hearing after reasonable notice of the nature of the proceeding, governing rules, and the factual basis for each alleged violation, id. § 298.155(1); to be represented by counsel, id. § 398.155(2); to confront and respond to all witnesses and evidence, id.; to the exchange of all evidence 30 days before any proceeding, id. § 398.155(3); to have all written statements signed under oath and notarized, id. § 398.155(4); to have an official record kept of all proceedings, id. § 398.165; to receive transcriptions of all oral statements upon request, id. § 398.175; to exclude irrelevant evidence, id. § 398.185; to have an impartial person presiding over the proceeding, id. § 398.195; to have a decision rendered within a reasonable time, with findings of fact based upon substantial evidence in the record and supported by a preponderance of such evidence, id. § 398.205; and to a judicial review under the Nevada Administrative Procedures Act, id. § 398.215. Miller II, 10 F.3d at 637, n.4.

[FN102]. Miller I, 795 F. Supp. at 1480.

[FN103]. Id. The district court dismissed from the action named defendant Robert Miller, Governor of Nevada, and ordered the joinder of a number of the University of Nevada Board of Regents. Defendants Tarkanian, Tim Grgurich, Ronald Ganulin, and Shelly Fischer were all then-current or former employees of UNLV.

[FN104]. Id. at 1482.

[FN105]. Id. at 1485. The district court also found a Contract Clause violation, which was not considered by the Ninth Circuit, Miller II, 10 F.3d at 638.

[FN106]. 476 U.S. 573, 106 S. Ct. 2080 (1986).

[FN107]. Miller I, 795 F. Supp. at 1483 (citing Brown-Forman, 476 U.S. at 579, 106 S. Ct. at 2084).

[FN108]. Id.

[FN109]. Id.

[FN110]. Id.

[FN111]. Id. at 1484.

[FN112]. Id.

[FN113]. Id.

[FN114]. Id. at 1484-85.

[FN115]. Id. at 1485. States that already have enacted similar statutes are Florida (FLA. STAT. ANN. § § 240.5339 - 240.5349 (West Supp. 1994)), Illinois (110 I.L.C.S. 25/1 - 25/13 (1995)), and Nebraska (NEB. REV. STAT. § § 85-1201 to 85-1210 (1994)). States that have introduced similar legislation include Kansas, Kentucky, Missouri, Ohio, and South Carolina, Miller II, 10 F.3d at 639, nn.6,7. The Florida statute was found unconstitutional in NCAA v. Roberts, No. 94-40413-WS (N.D. Fla. Nov. 8, 1994). See supra note 12.

[FN116]. Miller I, 795 F. Supp. at 1485.

[FN117]. Three other defendants, all then present and former employees of UNLV accused of NCAA rule violations, also appealed. Defendant Robert Miller, Governor of Nevada, had already been dismissed by the district court. Id. at 1479.

[FN118]. Miller II, 10 F.3d at 638, citing NEV. REV. STAT. § 398.055 (1993). "National collegiate athletic association" defined. "National collegiate athletic association" means a group of institutions in 40 or more states who are governed by the rules of the

association relating to athletic competition.

[FN119]. Id.

[FN120]. Id., citing National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101-02, 104 S. Ct. 2948, 2960 (1984) (NCAA scheduling of events requiring interstate transportation of athletes, governing of nationwide athlete recruitment, and controlling of bids for national and regional television broadcasting of NCAA events are engagement in interstate commerce, which subjects the National Collegiate Athletic Ass'n to antitrust regulation). Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356, 378 (D. Ariz. 1983); accord Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1150 (5th Cir. 1977).

[FN121]. Miller II, 10 F.3d at 638, citing Miller I, 795 F. Supp. at 1484.

[FN122]. Id. at 639.

[FN123]. Tarkanian, 488 U.S. at 191, 109 S. Ct. at 461, citing Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948) (internal footnote references omitted).

[FN124]. Id., citing Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S. Ct. 850, 860 (1961).

[FN125]. 109 U.S. 3, 3 S. Ct. 18 (1883).

[FN126]. Relevant portions of the 1875 Act stated:
Sec. 1: That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.
Sec. 2: That any person who shall violate the foregoing section . . . shall for every such offence forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year . . . .
Id. at 9, 3 S. Ct. at 20.

[FN127]. The Fourteenth Amendment provides:
Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of which the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
* * *
Sec. 5: The Congress shall have power to enforce by appropriate legislation, the provisions of this article.
U.S. CONST., amend. XIV, § § 1,5 (emphasis added).

[FN128]. 109 U.S. at 11, 3 S. Ct. at 21 (emphasis added).

[FN129]. 746 F.2d 1019 (4th Cir. 1984). This case is discussed infra, at text accompanying notes 194-199.

[FN130]. Kelly W. Bhirdo et al., Comment, McCormack v. National Collegiate Athletic Association: College Athletics Sanctions from an Antitrust and Civil Rights Perspective, 15 J.C. & U.L. 459, 467-68 (1989).

[FN131]. 321 U.S. 649, 64 S. Ct. 757 (1944).

[FN132]. Id. at 660-64, 64 S. Ct. at 763-65.

[FN133]. 326 U.S. 501, 66 S. Ct. 276 (1946).

[FN134]. Id. at 507-08, 66 S. Ct. at 279.

[FN135]. 419 U.S. 345, 95 S. Ct. 449 (1974).

[FN136]. Id. at 359, 95 S. Ct. at 454.

[FN137]. Id. at 358, 95 S. Ct. at 455.

[FN138]. 424 U.S. 507, 96 S. Ct. 1029 (1976).

[FN139]. Id. at 512, 96 S. Ct. at 1032-33.

[FN140]. See Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S. Ct. 1601 (1968).

[FN141]. Hudgens, 424 U.S. at 520, 96 S. Ct. at 1036. Prior to Hudgens, the Logan Valley Court decided that a private shopping mall was the equivalent of the business section of a company town, and therefore, was a state actor subject to First Amendment limitations. 391 U.S. at 318, 88 S. Ct. at 1608. Hudgens effectively overruled Logan Valley.

[FN142]. 436 U.S. 149, 98 S. Ct. 1729 (1978).

[FN143]. Id. at 164, 98 S. Ct. at 1737.

[FN144]. Id. at 161, 98 S. Ct. at 1735-36.

[FN145]. 334 U.S. 1, 68 S. Ct. 836 (1948). Arguably, Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077 (1991) and J.E.B. v. Alabama, 114 S. Ct. 1419 (1993), have revived Shelley's loose interpretation of the nexus theory. However, Edmonson and J.E.B. can be distinguished by the fact that these cases involve the use of the peremptory strike, a function to be performed by attorneys as officers of the court, who, in that capacity, act as state actors; or by the policy that in performing a litigation function litigants must be treated identically regardless of their status as state actors.

[FN146]. 334 U.S. at 6, 68 S. Ct. at 838.

[FN147]. Id. at 19, 68 S. Ct. at 845.

[FN148]. 365 U.S. 715, 81 S. Ct. 856 (1961).

[FN149]. Id. at 724-25, 81 S. Ct. at 861-62.

[FN150]. 398 U.S. 144, 90 S. Ct. 1598 (1970).

[FN151]. 449 U.S. 24, 101 S. Ct. 183 (1980).

[FN152]. 398 U.S. at 146, 90 S. Ct. at 1602.

[FN153]. Id.

[FN154]. Id. at 148, 90 S. Ct. 1603.

[FN155]. Id. at 171, 90 S. Ct. 1615.

[FN156]. 449 U.S. at 25-26, 101 S. Ct. at 185.

[FN157]. Id. at 25, 101 S. Ct. at 185.

[FN158]. Id. at 25-26, 101 S. Ct. at 185.

[FN159]. Id. at 27, 101 S. Ct. at 186.

[FN160]. Id. at 29, 101 S. Ct. at 187.

[FN161]. See Bhirdo, supra note 130, for a collection of those cases.

[FN162]. 506 F.2d 1028 (5th Cir. 1975).

[FN163]. Id. at 1032-33.

[FN164]. Id. at 1032.

[FN165]. Id. at 1033.

[FN166]. Id. at 1032, citing Burton, 365 U.S. 715, 81 S. Ct. 856 (1961).

[FN167]. 510 F.2d 213 (D.C. Cir. 1975).

[FN168]. Bhirdo, supra note 130, at 469 (citing Howard, 510 F.2d at 219- 20).

[FN169]. Parish, 506 F.2d at 1032.

[FN170]. Bhirdo, supra note 130, at 469 (citing Howard, 510 F.2d at 219- 20).

[FN171]. Id. at 470-474; see also Stephen R. Van Camp, Comment, National Collegiate Athletic Ass'n v. Tarkanian: Viewing State Action Through the Analytical Looking Glass, 92 W. VA. L. REV. 761, 775-79 (1990); Arlosoroff v. NCAA, 746 F.2d 1019, 1021 (4th Cir. 1984); Graham v. NCAA, 904 F.2d 953, 957 (6th Cir. 1986).

[FN172]. 457 U.S. 922, 102 S. Ct. 2744 (1982).

[FN173]. 457 U.S. 830, 102 S. Ct. 2764 (1982).

[FN174]. 457 U.S. 991, 102 S. Ct. 2777 (1982).

[FN175]. Lugar, 457 U.S. at 925-26, 102 S. Ct. at 2747-48.

[FN176]. Id.

[FN177]. Id. at 941, 102 S. Ct. at 2756.

[FN178]. Id. at 939, 102 S. Ct. at 2755.

[FN179]. 457 U.S. at 834, 102 S. Ct. at 2767.

[FN180]. Id. at 835, 102 S. Ct. at 2768.

[FN181]. Id. at 835-36, 102 S. Ct. at 2768.

[FN182]. Id. at 836, 102 S. Ct. at 2768.

[FN183]. Id.

[FN184]. Id. at 836-37, 102 S. Ct. at 2769.

[FN185]. Id. at 840-41, 102 S. Ct. at 2771.

[FN186]. Id. at 841, 102 S. Ct. at 2771.

[FN187]. Id.

[FN188]. Id. at 841-42, 102 S. Ct. at 2771.

[FN189]. Id. at 842, 102 S. Ct. at 2771-72.

[FN190]. 457 U.S. at 992, 102 S. Ct. at 2779.

[FN191]. Id. at 1011, 102 S. Ct. at 2789.

[FN192]. Id.

[FN193]. Id. at 1004, 102 S. Ct. at 2786 (citations omitted).

[FN194]. 746 F.2d 1019 (4th Cir. 1984).

[FN195]. Id. at 1020.

[FN196]. Id. at 1019.

[FN197]. Id. at 1021 (citing Rendell-Baker, 457 U.S. 130, 102 S. Ct. 2764, and Blum, 457 U.S. 991, 102 S. Ct. 2764).

[FN198]. Id.

[FN199]. Id. at 1022.

[FN200]. 804 F.2d 953 (6th Cir. 1986).

[FN201]. Id. at 957-58.

[FN202]. Id.

[FN203]. Id. (quoting Arlosoroff, 746 F.2d at 1021) (emphasis added).

[FN204]. Id.

[FN205]. Id.

[FN206]. Id.

[FN207]. Tarkanian, 488 U.S. at 198, 109 S. Ct. at 465.

[FN208]. Miller II, 10 F.3d at 639.

[FN209]. 488 U.S. at 194-95, 109 S. Ct. at 463.

[FN210]. That prong is that the NCAA acted pursuant to a right or privilege created by the state.

[FN211]. That prong is that the NCAA fairly can be characterized as a state actor.

[FN212]. Blum required that the relationship between the NCAA and the state amount to more than financing and regulation. 174 U.S. at 1011, 102 S. Ct. at 2789.

[FN213]. ALAN WERTHEIMER, COERCION, 6 (1987).

[FN214]. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1979).

[FN215]. WERTHEIMER, supra note 213, at 22 (citing THOMAS HOBBES, LEVIATHAN, ch. 21 (emphasis in original)).

[FN216]. Id. at 23, citing LEVIATHAN ch. 14.

[FN217]. Id. at 23, citing JOHN CALAMERI & JOSEPH PERILLO, CONTRACTS 261 (1977).

[FN218]. Id.

[FN219]. Id., citing WILLIAM BLACKSTONE, COMMENTARIES 131.

[FN220]. RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979): When duress by Threat Makes a Contract Voidable. (1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

[FN221]. WERTHEIMER, supra note 213, at 38.

[FN222]. Id. at 39.

[FN223]. Id. and n. 65: "Ellis v. First Nat. Bank, 260 S.W. 714, 715 (1924). Or, 'A lawful assertion of a legal right is not duress no matter how harsh that may be in its effects.' Molloy v. Bemis Bag Co., 174 F. Supp. 785, 791 ([D. N.H.] 1959)."

[FN224]. WERTHEIMER, supra note 213, at 39.

[FN225]. Hackley v. Headley, 8 N.W. 511 (1881).

[FN226]. WERTHEIMER, supra note 213, at 24 (describing Hackley, 8 N.W. 511 (1981)).

[FN227]. Id. (citing Hackley, 8 N.W. at 512, 514).

[FN228]. Id. at 41.

[FN229]. 35 F.2d 990 (Ct. Cl. 1929).

[FN230]. WERTHEIMER, supra note 213, at 24.

[FN231]. 387 F. Supp. 63 (D.D.C. 1975).

[FN232]. WERTHEIMER, supra note 213, at 41.

[FN233]. Id. at 32.

[FN234]. RESTATEMENT (SECOND) OF CONTRACTS § 175 comment b.

[FN235]. 271 U.S. 43, 46 S. Ct. 389 (1926).

[FN236]. Id. at 45, 46 S. Ct. at 390.

[FN237]. Id.

[FN238]. Id. at 46, 46 S. Ct. at 391.

[FN239]. Id.

[FN240]. Id. at 44, 46 S. Ct. at 390.

[FN241]. Id. at 47, 46 S. Ct. at 391.

[FN242]. WERTHEIMER, supra note 213, at 36, (quoting Hartsville, 271 U.S. at 49, 46 S. Ct. at 391).

[FN243]. 271 U.S. at 48-49, 46 S. Ct. at 391.

[FN244]. 248 U.S. 67, 39 S. Ct. 24 (1931).

[FN245]. Id. at 68, 39 S. Ct. at 24.

[FN246]. Id.

[FN247]. WERTHEIMER, supra note 213, at 35 n.55 (citing Union Pacific, 248 U.S. at 70, 39 S. Ct. at 25).

[FN248]. 171 Misc. 298, 11 N.Y.S.2d 498 (1939).

[FN249]. WERTHEIMER, supra note 213, at 25.

[FN250]. D.P.P. v. Lynch, 1975 App. Cas. 653 (appeal taken from N. Ire.).

[FN251]. Id. at 668.

[FN252]. Id. at 677.

[FN253]. Id. at 671-72, (citing Hale's Pleas of the Crown, vol. 1, p. 51).

[FN254]. 1977 App. Cas. 755 (appeal taken from Trinidad and Tobago).

[FN255]. Id. at 765, quoting 1972 (3) S.A. 1.

[FN256]. Id. at 763, quoting Lynch, 1975 App. Cas. at 671.

[FN257]. Id. at 764, quoting Lynch, 1975 App. Cas. at 680-81.

[FN258]. 400 U.S. 25, 91 S. Ct. 160 (1970).

[FN259]. Id. at 26, 91 S. Ct. at 162.

[FN260]. Id. at 27, 91 S. Ct. at 162.

[FN261]. Id.

[FN262]. Id.

[FN263]. WERTHEIMER, supra note 213, at 12.

[FN264]. 400 U.S. at 31-36, 91 S. Ct. at 164-67.

[FN265]. 444 U.S. 394, 100 S. Ct. 624 (1980).

[FN266]. Id. at 410, 100 S. Ct. at 635, citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 379 (1972) (emphasis added).

[FN267]. Id. at 411, 100 S. Ct. at 635.

[FN268]. 586 F.2d 744 (9th Cir. 1978).

[FN269]. Id. at 745.

[FN270]. Id. at 747.

[FN271]. Tarkanian, 488 U.S. at 186, 109 S. Ct. at 459.

[FN272]. Id. at 183, 109 S. Ct. at 457.

[FN273]. See Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694 (1972).

[FN274]. Tarkanian, 488 U.S. at 182 n.1, 109 S. Ct. at 456 n.1.

[FN275]. Id. at 185, 109 S. Ct. at 459.

[FN276]. The NCAA requested UNLV to "show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the [initial two-year] probation period." Id. at 186, 109 S. Ct. at 459. It is unclear whether a court-ordered reinstatement would have been adequate cause.

[FN277]. Id. at 198 n.19, 109 S. Ct. at 465 n.19.

[FN278]. See id.

[FN279]. Note, however, that Bailey was a criminal case, while both Tarkanian and Miller II were civil cases. "Courts are more lenient in civil settings than criminal settings in adjudicating the choice prong." WERTHEIMER, supra note 213, at 172.

[FN280]. Miller II, 10 F.3d at 639.

[FN281]. Id.

[FN282]. Id. at 638.

[FN283]. Id. at 638-39.

[FN284]. See supra text accompanying notes 171-206.

[FN285]. Tarkanian, 488 U.S. at 193, 109 S. Ct. at 463.

[FN286]. Id.

[FN287]. Id. at 195-96, 109 S. Ct. at 464.

[FN288]. The terms included:
> . . . [that] the NCAA would conduct the hearings concerning violations of its rules . . . . [and] the findings of fact made by the NCAA at the hearings it conducted would be binding on UNLV . . . . By the terms of UNLV's membership in the NCAA, the NCAA's findings were final and not subject to further review by any other body. . . .

Id. at 200-01, 109 S. Ct. at 466-67 (White, J. dissenting).

[FN289]. 457 U.S. at 1003-05, 102 S. Ct. at 2785-86.

[FN290]. Tarkanian, 488 U.S. at 196, 109 S. Ct. at 464.

[FN291]. Id. at 182 n.5, 109 S. Ct. at 457 n.5.

[FN292]. Miller II, 10 F.3d at 639.

[FN293]. Kassel v. Consolidated Freightways Corporation of Delaware, 450 U.S. 662, 101 S. Ct. 1309 (1981) (state may regulate the lengths of trailers towed by tractors driven on highways within the state's borders). But see Miller II, 10 F.3d at 640 ("Consistency among members must exist if an organization of this type is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad."), id., citing Southern Pac. Co. v. Arizona, 325 U.S. 761, 65 S. Ct. 1515 (1945).

[FN294]. See Miller II, 10 F.3d at 640 n.8.
> If balancing were necessary or appropriate, the balance struck by the learned trial judge was exactly right. See Miller I, 795 F. Supp. at 1483- 85. If the NCAA is suffering from a procedural disease, Nevada's attempted cure is as likely to destroy the patient as it is to banish the disease. It is not an example of permissible praxis.

[FN295]. 476 U.S. 573, 106 S. Ct. 2080 (1986).

[FN296]. Id. at 579, 106 S. Ct. at 2084.

[FN297]. Id. at 585, 106 S. Ct. at 2088.

[FN298]. U.S. CONST., amend. V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." See also id., amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[FN299]. Perry v. Sinderman, 480 U.S. 593, 92 S. Ct. 2694 (1972).

[FN300]. See Miller I, 795 F. Supp. at 1483.

[FN301]. Miller II, 10 F.3d at 640.

[FN302]. 476 U.S. at 576, 106 S. Ct. at 2082.

[FN303]. Id. at 580, 106 S. Ct. at 2085.

[FN304]. Miller II, 10 F.3d at 639.

[FN305]. Id. at 638, citing Miller I, 795 F. Supp., at 1484.

[FN306]. Id. at 639; FLA. STAT. ANN. § § 240.5339-240.5349 (Florida's Collegiate Athletic Association Compliance Enforcement Procedures Act); 110 I.L.C.S. 21/1-25/13 (Illinois' Collegiate Athletic Association Compliance Enforcement Procedures Act); NEB. REV. STAT. § § 85-1201 to 85- 1210 (1990) (Nebraska Collegiate Athletic Association Procedures Act) 10 F.3d at 639 n.6.

[FN307]. 476 U.S. at 580, 106 S. Ct. at 2085.

[FN308]. Id. at 582-83, 106 S. Ct. at 2085 (internal quotes and cites omitted).

[FN309]. Id. at 582, 106 S. Ct. at 2086.

[FN310]. Id. at 583, 106 S. Ct. at 2086.

[FN311]. Alcoholic Beverages Control Laws § 101-b(3)(d) requires an affirmation that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to state (or state agency) which owns and operates retail liquor stores . . . ." 476 U.S. at 576, 106 S. Ct. at 2082.

[FN312]. Miller II, 10 F.3d at 637.

[FN313]. Tarkanian, 488 U.S. at 198, 109 S. Ct. at 465.

[FN314]. Miller II, 10 F.3d at 640.

[FN315]. Parish, 506 F.2d at 1033.

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