Constitutional Law -- Racial Discrimination -- Expansion of State Action

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tional rights. Such an objective standard is held in high regard by
the Supreme Court, as indicated by *Miranda.* Finally, because of
the warning's content and its likely effect upon the individual, the
warning requirement would encourage authorities to seek the ju-
dicially preferred search warrant. The skeptical practice of con-
ducting a warrantless search in reliance upon the individual's un-
informed consent would grow increasingly rare.

It seems fair to say that if courts adopt the *Forney-McCarty*
position, justice will suffer because fourth amendment rights will
be protected by subjective good faith alone. And, as the Supreme
Court said in *Beck v. Ohio:*

> If subjective good faith alone were the test, the protections
> of the Fourth Amendment would evaporate, and the people would
> be "secure in their persons, houses, papers, and effects," only
> in the discretion of the police.

D. S. DUNKLE

### Constitutional Law—Racial Discrimination—Expansion of
**State Action**

Since the *Civil Rights Cases* the Supreme Court has held that
the fourteenth amendment prohibits "state action" and not purely
private action. Subsequent decisions have greatly expanded the
reach of "state action." Indeed the expansion has been so great
that commentators have suggested that the search for "state action"
is a "misleading search," that some sort of state action can always
be found, and that the Supreme Court should be using a different
mode of analysis.

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See United States v. Ventresca, 380 U.S. 102 (1956); Chapman v.
United States, 365 U.S. 610 (1961); Jones v. United States, 362 U.S. 257
(1960); Brinegar v. United States, 338 U.S. 160 (1949); Johnson v. United
States, 333 U.S. 10 (1948); United States v. Lefkowitz, 285 U.S. 452
(1932).


109 U.S. 3 (1883).

*See Horwitz, The Misleading Search for "State Action" Under the
Fourteenth Amendment, 30 S. CAL. L. REV. 208 (1957).*

*St. Antoine, Color Blindness But Not Myopia: A New Look at State
Action and "Private" Racial Discrimination, 59 MICH. L. REV. 993 (1961);
Van Alstyne & Karst, State Action, 14 STAN. L. REV. 3 (1961); Williams,
Twilight of State Action, 41 TEX. L. REV. 347 (1963).* Williams suggests
that the test should be whether the private group has so moved into the
area of public concern that the public's interest in eliminating the particular
Still, in cases involving the application of the proscriptions of the fourteenth amendment to private organizations, the courts continue to look for connections between the private organization and the state. But they have replaced the semantic rigidity of "state action" with a formula which better explains actual case results. To hold a private organization to the standards which the fourteenth amendment sets for the state, the plaintiff must be able to establish that the state has become "involved" in the discriminatory acts of the private organization to a "significant extent." In practice, if the plaintiff can show significant state involvement in a private organization which serves a public function and can also show discrimination by that private organization, he has established his case. He need not show that the state induced or encouraged the discrimination.

The leading case applying this analysis is Burton v. Wilmington Parking Authority. In Burton the Supreme Court decided that a private restaurant located in a publicly owned and operated parking lot could not refuse service to a person because of his race. The action of the restaurant could not be considered, the Court said, "so 'purely private' as to fall without the scope of the Fourteenth Amendment." In the face of criticism that its decision would subject a vast number of private organizations to the sweep of the fourteenth amendment, the Court issued a disclaimer:

discrimination must outweigh the personal right to discriminate. Id. at 389-90.


Id. at 725. Burton extended earlier case law which had subjected the private lessee of government property to the fourteenth amendment's ban on racial discrimination when the purpose of the lease was to provide a service to the public on state property. Burton ignored the distinction. 75 Harv. L. Rev. 144 (1961). See, e.g., Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960).
... [T]he conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths by means of which every state leasing agreement is to be tested. Owing to the very largeness of government a multiple of relationships might appear to some to fall within the Amendment's embrace, but that... can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of high universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law...."9

The purpose of this note is to examine the application of the concept of state action in the recent case of Ethridge v. Rhodes;10 to show that Ethridge differs from other state action cases (particularly the progeny of Burton); and to consider possible implications of this difference.

In Ethridge a federal district court applied the fourteenth amendment to another of the multiple relationships between "private" organizations and government. William Ethridge was not admitted to a Columbus, Ohio, local of the International Brotherhood of Electrical Workers because he was a Negro. When he went directly to construction contractors, he was told that they hired only through the union.11 In this situation a number of circumstances combined to give Ethridge the opportunity for a novel flank attack on union discrimination.12 The State of Ohio was

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8 365 U.S. at 725-26. The Court listed the following factors to support its finding that the public Parking Authority had become involved in the discrimination of the privately owned restaurant to a significant extent. The building in which the restaurant was located was publicly owned; as an entity the building was performing an essential governmental function of providing parking space; the restaurant was physically an integral part of the public building; and the revenue obtained by leasing the space the restaurant occupied was essential to the state's plan to operate the project as a financially self-sustaining unit. 365 U.S. at 723-24.


10 Id. at 85.

11 The legal attack was not entirely novel. See Todd v. Joint Apprenticeship Comm. of Steel Workers, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964). In Todd the federal government was building a courthouse. The sub-contractor in question obtained his labor only from the Steel Workers. The two Negro plaintiffs were accepted by the sub-contractor for work on the project but, in spite of the vigorous efforts of the federal officer in charge of insuring equal employment opportunity, the union refused to indenture the plaintiffs. The district court found the necessary connection between the government and the private organization simply in the "continued erection of the Federal
about to build a new medical school building at Ohio State University. The contractors who were about to be awarded the state building contracts would obtain their labor exclusively from unions. Like the electrical workers, most of the unions discriminated against Negroes. The result was summed up by the court:

Since the contractors will hire only through unions and a majority of craft unions do not have Negro members and will not refer non-member Negroes, the contractors will hire only non-Negroes in a majority of the crafts needed to work on this project.3

The court found that the plaintiffs had stated a cause of action under section 1983 of Title 42, United States Code.4 Finding that the plaintiffs would suffer irreparable injury, the court enjoined officers of the state from entering into contracts for the construction of the Medical Basic Sciences Building with any persons who are bound by agreement, or otherwise, to secure their labor force exclusively or primarily from any organization or source that does not supply or refer laborers and craftsmen without regard to race, color or membership in a labor union.5

Courthouse." By continuing to build the courthouse the federal government was "unwillingly fostering and becoming an integral part of" the union's discrimination. 223 F. Supp. at 20. The court was able to find a sort of "state action" by the federal government by analogy to Bolling v. Sharpe, 347 U.S. 497 (1954). The court also found government action in two other aspects of the fact situation less relevant here. For an unsuccessful attack on union discrimination applying the analogy to Bolling, see Oliphant v. Brotherhood of Locomotive Firemen, 262 F.2d 359 (6th Cir. 1958), cert. denied, 359 U.S. 935 (1959).

Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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 proceedings for redress.

Plaintiffs had several possible remedies. (1) 42 U.S.C. § 2000(d) (1964) prohibits discrimination in programs which receive federal financial assistance. The primary remedy available is the power of the federal department in question to cut off the federal grant, loan, or contract. But under § 2000(d)-(3) the act provides that no action shall be taken by any department or agency with respect to any employment practice except where the primary objective of the federal financial assistance is to provide employment.

(2) 42 U.S.C. §§ 2000(e)-(1) to -(15) (1964) and OHIO REV. CODE
The court found that "[d]efendants’ failure to assure qualified minority workers equal access to job opportunities on public construction projects by acquiescing in the discriminatory practices of contractors and craft unions clearly falls within the proscription of the Fourteenth Amendment . . . ." According to the court, the fourteenth amendment's ban on racial discrimination does not apply to the acts of private persons such as union officials. But here the state was about to become a "joint participant" in racial discrimination by "placing itself in a position of interdependence" with the discriminating unions and contractors. "Where a state . . . undertakes to perform essential governmental functions, . . . with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely

ch. 4112 (Anderson 1965) both contained provisions which the defendants claimed would be adequate to secure plaintiffs’ admission to the unions in question with back pay. The court dealt with this argument in a cryptic sentence: it was apparent that the threatened injury was not fully reparable through the use of these proceedings. Furthermore, the court found that the remedies proposed were not adequate because they did not take a single step toward mending the psychological damage done to the party discriminated against. 268 F. Supp. at 88-89. The court dealt with the problem of a remedy as if the question was simply one of whether the remedy at law was adequate. At least as far as the Ohio statute is concerned a prior question would seem to be whether Section 42 U.S.C. § 1983 (1964) is available regardless of the existence of a state remedy. This approach to the question was not taken by the court. The question is beyond the scope of this note. See Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Educ., 373 U.S. 668 (1963).

268 F. Supp. at 88. The decree in Ethridge enjoined the State of Ohio from dealing with contractors who obtained their labor exclusively from unions which discriminated. It did not take the direct approach of ordering the union to admit the plaintiff. One reason for not doing so is clear. Since the contract had not been signed, the union had not yet become a joint participant with the government. Thus, the fourteenth amendment did not yet apply. From the state action aspect of the problem, there seems to be no basis in logic or authority for drawing the line at enjoining the state from dealing with discriminatory private organizations. Since the restrictions of the fourteenth amendment apply to acts of the state's private partners, the plaintiff (once the project had begun) could sue directly for admission to the union if he were discriminated against. In the case of Todd v. Joint Apprenticeship Comm. of Steelworkers, 223 F. Supp. 12 (N.D. Ill. 1963), vacated as moot, 332 F.2d 243 (7th Cir. 1964), the court ordered just such relief. In other state action cases, the plaintiff has obtained relief directly against the private organization. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964); Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963). Such an approach might raise problems for the plaintiff beyond the state action question. See e.g., Note, Alternative Remedies for Denial of Union Membership: Applicability of Constitutional Relief, 50 CORNELL L.Q. 75 (1964).
ignoring or failing to perform them." To support these propositions the court cited the Burton case.

As the opinion in Ethridge implies, there are important similarities between Ethridge and Burton and the cases which have followed Burton. Both the State of Ohio and the Wilmington Parking Authority found themselves in a position of "interdependence" with private discriminators. The Court's suggestion in Burton that the Parking Authority had a positive duty to see that its lessee did not discriminate indicates a parallel duty on the part of state officials in Ethridge to prevent their contractors from discriminating. In neither case did the state control the private organization.

Furthermore, the possibility of limiting Burton to leases of state property has been ignored. The federal cases which have followed Burton have not limited it to its peculiar facts or even to lease agreements. Instead they seem to interpret Burton as meaning that certain governmental contacts with private organizations serving

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18 Id.
19 See, e.g., cases cited note 10 supra; Wimbish v. Pinellas County 342 F.2d 804 (5th Cir. 1965); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), cert. denied, 371 U.S. 911 (1962).
20 365 U.S. at 725. The Court in Burton said:
[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment. Id.

On the state's duty of control, see Comment, State Action and Private Choice, 50 CORNELL L.Q. 473, 498 (1965).

21 Some authorities suggest that government "control" of the private organization is required before the fourteenth amendment can be applied. E.g., Mitchell v. Boys Club of Metropolitan Police, 157 F. Supp. 101 (D.D.C. 1957). "Governmental control is the decisive factor in the determination of whether a corporation is public or private and governmental control of the club corporation does not exist." Id. at 108. In most recent state action cases of this sort, unusual state controls or regulations of the private organizations have been present. But the controls have not been so extensive as to justify the assertion that the state "controlled" the private organization. See, e.g., Simkins v. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962), cert. denied, 371 U.S. 911 (1962).
a public function are sufficient to subject the private organization to the proscriptions of the fourteenth amendment. In *Simkins v. Moses H. Cone Memorial Hospital*, for example, the Court of Appeals for the Fourth Circuit held that the state and federal government had become so involved in the activities of an otherwise private hospital that it could not discriminate on the basis of race in granting staff privileges. The court found that the necessary degree of state involvement was present as a result of the hospital’s participation in the Hill-Burton program. Just as the Court in *Burton* found Eagle Coffee Shoppe an integral part of a public building devoted to a public service, the court in *Simkins* found the hospital an integral part of a joint state-federal program to effect a proper allocation of available hospital resources.

Despite the similarities, there are also important practical differences between *Ethridge* and earlier state action cases. The differences exist both in the sort of service the private organization provided and in the state contact considered sufficient to apply the proscriptions of the fourteenth amendment. It is difficult to provide any generalized explanation of the sorts of state contacts which will subject a private organization to the standard the fourteenth amendment sets for the state. Indeed, the Supreme Court has implied that it may be “an impossible task.” While no precise formula exists, the cases do seem to fit into broad groups. Although the classification is far from exhaustive, four such groups of cases should be mentioned: (1) those in which the private organization is performing an “exclusive” state function, (2) those in which it is performing a function sufficiently like that of the state to sub-

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22 323 F.2d 959 (4th Cir. 1963). Similarly in Smith v. Holiday Inns, 336 F.2d 630 (6th Cir. 1964), modifying 220 F. Supp. 1 (M.D. Tenn. 1963), the Sixth Circuit found that a motel located in a redevelopment area could not deny service to Negroes. The fact that the Holiday Inn owned the land did not serve to distinguish the case from *Burton*. The court pointed to public design, public financing, and continuing public controls to justify its decision.

23 The Hill-Burton Act, 60 Stat. 1041 (1946), as amended, 42 U.S.C.A. § 291e(f) (1964), provides for federally assisted hospital construction. Funds to assist the hospital’s building program were paid by the United States to the State of North Carolina and in turn by North Carolina to the hospitals. 323 F.2d at 963.

24 323 F.2d at 967.

25 365 U.S. at 722.

ject it to the same standard;\textsuperscript{27} (3) those in which the private organization provides a direct service to the public at large on state property dedicated to public service;\textsuperscript{28} (4) those in which the private organization receives unusual state aid, state powers, or is subject to unusual state control.\textsuperscript{29}

The situation in Ethridge does not fit easily into any of these categories. Constructing buildings is not an exclusive governmental function, such as holding a primary election. Nor is it a function much like that of the state, such as running a public park. Nor is it a case of a public service enterprise conducted on public property. Payment to the contractor is not a sort of state aid ordinarily thought sufficient to apply the fourteenth amendment. Of the four categories, the situation in Ethridge looks least like the first; building buildings is clearly not an exclusive governmental function.

With the exception of the first, each of these groups of cases seem to have one common element. In each the fourteenth amendment was applied to private organizations which had significant state contacts and which provided services directly to the general public. In \textit{Simkins}, for example, the hospital received unusual state aid and control, and it served the public directly. In contrast, the contractors in \textit{Ethridge} were not providing a direct public service. By constructing a medical school building they were supplying an entity which stood between them and the general public—that is, the State of Ohio. In terms of public service their position is analogous to that of a dairy which supplies milk to a public school cafeteria.

Thus, \textit{Ethridge} differs from the other progeny of \textit{Burton} in


that it applied the fourteenth amendment to an organization which was supplying the state, rather than to a state "controlled" or assisted organization serving the public. The case also represents the emergence of a new sort of state contact sufficient to apply the fourteenth amendment's commands to a private organization. The holding in Ethridge seems to be that, in at least some situations, a contract with the state is a sufficient state contact. Of course, cases involving leases of public property have applied the fourteenth amendment to those in contractual relations with the state. But in those cases the state contact was thought to be based more on the nature of the property than on the simple fact of a contractual agreement. These distinctions seem to indicate that Ethridge has moved the law nearer to the doctrine that states and their extensions are constitutionally prevented from having economic relations with private businesses that discriminate.

The rationale of Ethridge seems to be that when the state and a private organization enter a contractual relation, public officials have a duty and a responsibility to see that public funds do not indirectly foster private discrimination. If so, the case represents an application of the fourteenth amendment to a new layer of state-private relations. Thus, a public school could be enjoined from buying milk from a dairy which discriminates; state pencils, furniture, copying machines, and a myriad of other items would have to come from equal-opportunity employers. Furthermore, one passage in the court's opinion indicates that the impact might be even more widespread:

In a venture, such as this one, where the state as a governmental entity becomes a joint participant with private persons, the

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<sup>80</sup> Of course, some of the progeny of Burton have involved contacts other than state assistance or regulations. See, e.g., Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966).

<sup>81</sup> The Court made its decision in Burton assuming that the surplus property distinction of Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), cert. denied, 353 U.S. 924 (1957), would be significant. 365 U.S. at 723. The court in Derrington thought that when there was "no purpose of discrimination," no "joinder in the enterprise" and "no reservation of control" the state could lease property not needed for state purposes to private persons. If all of these conditions were met the lessee's conduct would be purely private. Id. at 925. If a mere contractual relation is enough to hold the lessee to the standard of the fourteenth amendment, the surplus property distinction "assumed" in Burton would be irrelevant. A number of commentators have assumed that the nature of the property rather than the mere fact of a contract was the crucial factor in the lease cases. 75 Harv. L. Rev. 144 (1961); Shanks 221.
restrictions of the Fourteenth Amendment apply not only to the actions of the state but also to the acts of its private partners— the contractors . . . . 32

Arguably, since the state could not deal with a private organization which discriminates, neither could its private partners such as the contractor. His nails, bricks, pipes, and other supplies would all have to come from equal-opportunity employers. The impact of such a decision would be ubiquitous; logically the proscriptions of the fourteenth amendment could be applied to the state's entire chain of supply.

Another practical problem raised by Ethridge should be briefly noted. If the sanctions of the fourteenth amendment were directly applied to private economic organizations in contractual relations with the state, this would raise the question of how the private organization could disengage itself and regain its purely private status. Since the tie with the state would be economic, severing the tie would probably be sufficient.33 Avoiding the reach of the fourteenth amendment might be easy enough for an organization not presently bound by some state contract. But a private organization which had a long-term state contract and which was determined to practice racial discrimination might have difficulty. It could find itself trapped between the rock of equal opportunity and the whirlpool of breach of contract.

It is difficult to find a rationale for Ethridge which will both achieve a desirable result and contain any logical limitation. One is faced with the spectre of the rationale of the case cruising on its own logical power through the net of economic "interdependence" into situations in which the state's contribution to, and responsibility for, discrimination is very small indeed. Two possible limitations should be mentioned.

First it is possible that Ethridge can be given a narrower reading than that suggested here. There is language in the decision which suggests some limitation. At one point in its opinion, the court refers to the situation as one where the state was undertaking to perform essential governmental functions with the aid of private persons.34 But any limitation to those performing essential gov-

32 268 F. Supp. at 88.
34 268 F. Supp. at 87.
ernmental functions seems to be more apparent than real. Even with such a qualification the decision would seem to reach all those in contractual relations with the state. It is difficult to see why the contractor who supplies the state with a hospital building is performing an "essential governmental function," while the company which supplies the hospital beds is not. Without one, the other is useless.

While the "essential governmental functions" test seems to provide no effective limitation, one commentator has suggested a test which might. The question would be whether the state is the "effective source" of the discrimination.\(^{35}\)

In determining whether the state is the effective source of the discrimination, the relationship with the state is all that is important. It is irrelevant that the private party is also responsible for the discrimination; only by showing that the state is not responsible may constitutional restraints be avoided.\(^{36}\)

Of course there are various degrees of state contribution to discrimination. Application of the test to a situation of the Ethridge type seems to require a practical inquiry into the extent of the state's contribution to and, hence, responsibility for, discrimination. In Ethridge, by its decision to build a medical school building, the state created all the construction jobs on the project. Without the state's economic participation these jobs simply would not exist. It is hard to imagine a situation in which a state, by simply awarding a contract to a private discriminator, could do more to contribute to discrimination. When the state is only a very small buyer among a great many (for example, in the purchase of toothpaste for state institutions) the state's contribution to discrimination is less.

Ethridge is in keeping with the current judicial trend toward the expansion of "state action." It reached a desirable result: jobs created by government funds alone should be open to qualified applicants without regard to race. Ethridge clearly differs from earlier state action cases in that it applied the fourteenth amendment to a new layer of state-private relations. An earlier line of cases had applied the fourteenth amendment to private organizations receiving unusual state aid (and often subject to unusual regula-

\(^{35}\) Shanks 231.
\(^{36}\) Id. at 232.
Defamation—Damages—Requirements for Collection of Substantial Damages in Actionable Per Se Defamation

In *R.H. Bouligny, Inc. v. United Steelworkers,* a defamation action arising out of a labor organization campaign, the North Carolina Supreme Court stated the following rule in regard to damages recoverable for a defamatory statement adjudged actionable per se:

1. Defamation considered sufficient to establish a cause of action without proof of specific monetary loss, i.e., special damages, is referred to as actionable per se. Slander is generally not actionable per se unless it imputes commission of a crime, a loathsome disease, unchastity to a woman, or tends to affect the plaintiff in his trade or profession. W. Prosser, Law of Torts 772 (3d ed. 1964). Under the common law, all libel was considered actionable per se. However, confusion has arisen in this country over the division of libel into two types—libel per se and libel per quod. In some states, libel per se—or libel defamatory on its face—maintains its actionable per se character, although libel per quod—that requiring the introduction of extrinsic evidence to establish its defamatory nature—is not considered actionable without proof of special damages. Prosser, *More Libel Per Quod,* 79 Harv. L. Rev. 1629 (1966); Eldridge, *The Spurious Rule of Libel Per Quod,* 79 Harv. L. Rev. 733 (1966). The North Carolina courts have not escaped this confusion. See Kindley v. Privette, 241 N.C. 140, 84 S.E.2d

*Ethridge* seems to extend this line of cases to (at least some) payments made under state contracts. Together *Ethridge* and the earlier line of cases seem to be consistent with a new principle. Substantial state payments to a discriminating private organization make the discriminatory acts of the private organization "state action."