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I. INTRODUCTION

After reading the cases dealt with in this Article, I am reminded of the story of the old lady who lived on a hammock in the Everglades. Two census takers rowed out to her abode one day to obtain her statistics. When she asked them why they were there, they answered that they were trying to find out how many people live in the United States. "You've come to the wrong place," she declared. "Why do you say that?" they asked. "Cause I don't know," was her response. If one is reading this article to find out the meaning of "under color of" you have come to the wrong place; *Cause I don't know.*

Perhaps that statement is not quite correct, for I do know the meaning of "under color of" as that phrase is used in the Civil Rights Acts. The phrase "under color of" means the same thing as "state action" of

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Fourteenth Amendment[1] lineage.[2] But that begs the question: What does "state action" mean?[3] This Article explores both questions.

The Article searches for the meaning of "under color of" as that phrase is used in the statutes (specifically, 42 U.S.C. § 1983 and 18 U.S.C. § 242),[4] which impose civil and criminal penalties, respectively, for those who act "under color of"[5] authority of the sovereign and for "state action" as that term is used in the cases applying Fourteenth Amendment protections. Some courts proclaim that "under color of" is a term of art used by Congress to differentiate those statutes that proscribe

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1. 18 U.S.C. § 242 (2000); 42 U.S.C. § 1983 (2000).

2. The Supreme Court has said many times that the two have the same meaning. Georgia v. McCollum, 505 U.S. 42, 53 n.9 (1992); Hafer v. Melo, 502 U.S. 21, 28 (1991); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 182 n.4 (1988); Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); Gilmore v. City of Montgomery, 417 U.S. 556, 562 (1974); United States v. Price, 383 U.S. 787, 794 n.7 (1966); and United States v. Classic, 313 U.S. 299, 326 (1941). See also Justice Brennan's dissent in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 210 (1970), but in which he later qualified his observation by saying that "the statutory term 'under color of any statute has a narrower meaning than the constitutional concept of "state action."'" *Id.* at 211. On balance Justice Brennan recognized the identity. In his dissent in *Blum v. Yaretsky*, 457 U.S. 991, 1012-13 (1982), he referred to "state action" being present in a suit under 42 U.S.C. § 1983.

3. Because the Fourteenth Amendment "is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar*, 457 U.S. at 924. The Supreme Court, as early as 1880, said that the action of a state official who exceeds the limits of his authority constitutes state action contemplated by the Fourteenth Amendment. *See Ex parte* Virginia, 100 U.S. 339, 346-47 (1880). The Civil Rights Acts, 18 U.S.C. § 242 and 42 U.S.C. § 1983, however, deal with infringement of federal rights by other than private persons except when those private persons act "under color of" or engage in "state action." *See infra* note 5.

4. *See infra* text accompanying notes 158-276 for a discussion of 42 U.S.C. § 1983 and 18 U.S.C. § 242.

5. There is considerable variety in the phrasing of the term "under color of" in the statutes and cases. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 739-40 (2002) ("under color of law"); Gonzaga Univ. v. Doe, 536 U.S. 273, 277 n.1 (2002) ("under color of state law"); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 62 (2001) ("under color of federal law"); United States v. Morrison, 529 U.S. 598, 605 (2000) ("under color of any statute"); United States v. Lanier, 520 U.S. 259, 265 n.3 (1997) ("under color of any law"); Morse v. Republican Party of Virginia, 517 U.S. 186, 265 (1996) ("under authority of the state"); Brower v. County of Inyo, 489 U.S. 593, 593 (1989); Parratt v. Taylor, 451 U.S. 527, 535 (1981); Maine v. Thiboutot, 448 U.S. 1, 1 (1980) ("under color of state statute"); Flagg Bros. v. Brooks, 436 U.S. 149, 155 (1978) ("under color of statute"); *Adickes*, 398 U.S. at 145 ("under color of custom"); *Adickes*, 398 U.S. at 161 ("under color of any custom"); *Classic*, 313 U.S. at 326 (the wrongdoer is "clothed with authority of state law"); Jackson v. Hartford Accident & Indem. Co., 484 S.W.2d 315, 316 (1972) ("under color of law and custom"). Justice Thomas dissented saying that "[s]ection 1983's coverage reasonably extends beyond official enactments of the State, since it expressly provides for coverage of persons who act under authority of the State." *Morse*, 517 U.S. at 265 (Thomas, J., dissenting).

unconstitutional behavior by entities other than private persons. The concomitant principle to this jurisprudence is that the "private" person has a constitutional right to discriminate to the full extent of a person's will.[6] As the United States Supreme Court stated in *Edmonson v. Leesville Concrete Co.*,[7] "[w]ith a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities."[8] Therefore, the purpose of 42 U.S.C. § 1983,[9] 18 U.S.C. § 242,[10] and the Fourteenth Amendment,[11] is to prevent the sovereign from depriving persons of their rights. The statutes and the constitutional amendment are "no shield against merely private conduct . . . ."[12] The purpose of the statutory term "under color of" and the phrase "state action," as used by the courts, is to prevent private deprivation from going uninhibited by tying the person who does the depriving, the "state actor," to the sovereign.

This Article does not consider the intriguing question of what is the "law" of "under color of law."[13] Nor does the Article examine why some statutes proscribing unconstitutional behavior do not contain the "under color of" legend.[14] In addition, the Article does not consider statutes

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6. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Nixon v. Condon, 286 U.S. 73, 83 (1932) (reaffirming the distinction between private and state action brought out in the Civil Rights Cases, 109 U.S. 3 (1883)).

7. 500 U.S. 614 (1991).

8. *Id.* at 619. *See also* NCAA v. Tarkanian, 488 U.S. 179, 191 (1988); *Flagg Bros.*, 436 U.S. at 156; *Gilmore*, 417 U.S. at 575.

9. 42 U.S.C. § 1983.

10. 18 U.S.C. § 242.

11. U.S. CONST. amend. XIV.

12. *Kraemer*, 334 U.S. at 13. *See also* United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876).

13. That could be the subject of another paper. Examples of such intriguing questions: United States v. Nixon, 418 U.S. 683 (1974) (considering whether President Nixon was required to comply with a subpoena, commanding him to produce tape recordings of his conversations with aides); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (determining whether President Truman exceeded his constitutional authority when he issued an order directing the Secretary of Commerce to take possession of and operate most of the nation's steel mills in order to avert a national catastrophe); United States v. Burr, 25 F. Cas. 30 (C.C. Va. 1807) (No. 14, 692d) (considering whether the "President of the United States" could be served with a subpeona duces tecum in the treason trial of Aaron Burr).

14. *See, e.g.*, 42 U.S.C. § 1982. *See infra* text accompanying note 35 (dealing with Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968)).

other than 42 U.S.C. § 1983 and 18 U.S.C. § 242, which contain the phrase "under color of."[15]

The Article is not primarily concerned with cases in which the person accused of discrimination is a police officer or some other employee of a public body[16] acting in the course of their official duties.[17] Such cases are discussed,[18] of course, as they form part of the great, but unheralded debate in the law as to whether there are two meanings of "under color of," i.e., acts performed by persons in their official capacity or acts performed by persons acting in "pretense of the law."[19]

In Part II the genesis of the subject civil rights statutes is reviewed.[20] Part III examines the anatomy of those statutes. Part IV presents the United States Supreme Court's recent decisions concerning "under color of" and "state action." The Conclusion attempts to summarize the work of this lexology.

II. THE GENESIS OF 42 U.S.C. § 1983 AND 18 U.S.C. § 242

On April 9, 1865, a tall general officer of the Army of Northern Virginia, in full dress uniform with sash and jeweled sword, met a short general officer of the United States Army, dressed in private's blouse and trousers tucked into muddy boots. The meeting occurred in the home of Wilmer McLean at Appomattox Courthouse, Virginia. General Robert E. Lee surrendered his forces to General Ulysses S. Grant.[21] What now? Well, now the war of rebellion[22] was virtually over,[23] but

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15. *See* 42 U.S.C. § 1971; 42 U.S.C. § 1973(i); 42 U.S.C. § 13981; Hobbs Act, 18 U.S.C. § 1951(b)(2); The Judiciary Act of 1789, sec. 14, 1 Stat. 82; sec. 20, 35 Stat. 1092 ("under color of official right"). Nor is the Article concerned with statutes, i.e., 35 Stat. 1092, no longer in existence that contained the phrase.

16. Such cases may be considered, but only tangentially, i.e., for some principle other than the meaning of "under color of." In 1994 Congress enacted 42 U.S.C. § 13981, which contained the phrase "under color of," but in 2000 the Supreme Court declared it unconstitutional because it exceeded congressional power under the Commerce Clause. *Morrison*, 529 U.S. at 619. The statute was not saved by Section 5 of the Fourteenth Amendment. *Id.* at 626.

17. *See* Belcher v. Stengel, 429 U.S. 118, 119 (1976) (concerning this distinction).

18. Principally in Part II of the Article.

19. *See infra* Part III.A of the Article in which Justice Frankfurter's participation in this debate is recognized.

20. The history of the origin of the Civil Rights Acts is important because the opinions of the Supreme Court cases analyzed herein often discuss it.

21. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 849 (Oxford University Press 1988).

22. *See* Slaughter-House Cases, 83 U.S. 36, 68 (1872). The opinion was actually delivered on April 14, 1873. Justice William O. Douglas referred to it as "the Nation's most critical internal conflict." United States v. Williams, 341 U.S. 70, 87 (1951) (Douglas, J.,

at that moment, there were four million people[24] living in the southeastern part of the United States who had a new status. What were they to do with it? One author described what they did with it in these words:

> When the enslaved Negroes were informed by their masters or by Federal agents or by rumor that they were free, their most general and immediate response to the news was to pick up and leave the home place to go somewhere else. Thus to the Negro just released from slavery,[25] freedom meant, first of all, the right to move. He changed his name and wandered away from the plantation.[26]

Because the President who led his nation to victory was assassinated just seven days after the surrender at Appomattox,[27] and the presence of twenty million still hostile former "rebels" led to confrontations, the new freedom granted to four million men, women, and children who were on the move was far less than what might have been hoped for. The United States Supreme Court stated the plight of the "freedmen" in the following words:

> They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.[28]

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dissenting).

23. It did not end, in fact, until seventeen days later when Confederate General Joseph E. Johnston surrendered his force to General William T. Sherman at Durham Station, North Carolina. ROY T. NICHOLS, THE STAKES OF POWER 156 (Hill & Wang 1961).

24. *Slaughter-House Cases*, 83 U.S. at 68 (establishing the former slave population at four million persons). *See also Price*, 383 U.S. at 808.

25. President Lincoln's Emancipation Proclamation of January 1, 1863, freed them in name only.

26. HENDERSON H. DONALD, THE NEGRO FREEDMAN 1 (Henry Schuman 1952). The author continues:

> [n]ot a few of the freedmen were prompted to take to the road because they feared they might be re-enslaved if they remained where they were. This was particularly true of the elderly Negroes, who appeared to be somewhat dazed by their freedom and were at a loss to determine its full scope.

Id. at 2.

27. President Lincoln was mortally wounded by Booth's weaponry on the evening of April 14, 1865, and lingered unconscious until 7:25 a.m. the following morning when he expired.

28. *Slaughter-House Cases*, 83 U.S. at 70.

On March 3, 1865, President Lincoln signed the Freedmen's Bureau Act of 1865 creating a Bureau of Freedmen, Refugees, and Abandoned Lands.[29] The Bureau was "designed to see to it that the ex-slaves were established in their freedom so that they would have a real chance to care for themselves and learn social and economic independence."[30] This was a tall order because the United States Supreme Court in the *Dred Scott* decision[31] had "delineated the constitutional community as more narrowly drawn than the territorial community."[32]

The Thirteenth Amendment to the Constitution of the United States[33] was proposed to the legislatures of the thirty-six states by the Thirty-Eighth Congress on January 31, 1865. Ratification was completed on December 6, 1865, and on December 18, 1865, the Secretary of State reported in a proclamation that twenty-seven of the thirty-six states had ratified the proposed amendment.[34] The Thirteenth Amendment declared that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place . . ." under their jurisdiction, except as punishment for a crime.[35]

Soon after the ratification of the Thirteenth Amendment and exactly one year after Appomattox, Congress passed the first of several Civil Rights bills to come before the legislature, known as the Civil Rights Act of April 9, 1866.[36] Section 2 of the Act, the first of the Civil Rights Acts

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29. 44 U.S.C. § 2910 (2000).

30. NICHOLS, *supra* note 23, at 163.

31. Scott v. Sanford, 60 U.S. 393 (1857).

32. *See* Annie M. Chan, *Community and the Constitution: A Reassessment of the Roots of Immigration Law*, 21 VT. L. REV. 491, 494 (Winter 1996). Professor Chan writes: "Native Americans and African Americans existed in a perpetual state of 'noncitizenship,' that is, a constitutional vacuum." *Id.* at 494-95. In *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), perhaps jurisprudentially more important than the *Dred Scott* case (see Paul Finkelman, *Prigg v. Pennsylvania Understanding Justice Story's Proslavery Nationalism*, 2 J. SUPREME CT. HIST. 51, 54 (1997)), the Court, upholding the constitutionality of the 1793 Fugitive Slave Law, held that Pennsylvania's personal liberty law was unconstitutional and recognized a federal common law of an owner's right to recapture "runaway" slaves. *Prigg*, 41 U.S. at 540-41.

33. U.S. CONST. amend. XIII.

34. U.S.CONST. amend. XIII, Historical Notes (1987).

35. U.S. CONST. amend. XIII, § 1. *See also* 42 U.S.C. § 1982 (preventing discrimination against people in the purchase or rental of property because of their race or color, passed by Congress under the authority of the Thirteenth Amendment). *See Jones*, 392 U.S. at 438-39.

36. Civil Rights Act, 14 Stat. 27 (1866). On March 15, 1866, the bill was sent to President Johnson, who vetoed the bill after holding it for ten days. On April 6, 1866, the Senate overrode the veto 33 to 15, and on April 9, 1866, the House overrode it 122 to 41; The Civil Rights Act of 1866 became law. *See* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 719 (1989). It has been opined that this statute was passed under the "sanction" of

to contain "under color of,"[37] was a criminal statute, and hence, the precursor to the present 18 U.S.C. § 242. Section 2 of the Civil Rights Act of 1866 provided that:

> [A]ny person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor . . . .[38]

The Supreme Court in *Blyew v. United States*,[39] explained the *raison d'etre* of the Act. Justice William Strong wrote:

> We cannot be expected to be ignorant of the condition of things which existed when the statute was enacted, or of the evils which it was intended to remedy. It is well known that in many of the States, laws existed which subjected colored men convicted of criminal offences to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offenses. The modes of trial were also different, and the right of trial by jury was sometimes denied them. It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of the race was a party accused. These were evils doubtless which the act of Congress had in view, and which it intended to remove. And so far as it reaches, it extends to both races the same rights, and the same means of vindicating them.[40]

The Civil Rights Act of April 9, 1866,[41] was re-enacted on May 31, 1870.[42] On April 20, 1871, Congress added civil penalties by enacting the Ku Klux Klan Act.[43]

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the Thirteenth Amendment. *See* Jackson v. State, 103 A. 910, 910 (Md. 1918).

37. Civil Rights Act, ch. 31, § 2.

38. *Id.* (reenacted as act on May 31, 1870, ch. 114, § 18, 16 Stat. 140).

39. 80 U.S. 581 (1871).

40. *Id.* at 593. For another of Justice Strong's histories of the amendment, see *Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879).

41. Civil Rights Act, 14 Stat. 27 (1866).

42. 16 Stat. 140. For a history of the Act, see MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION § 1.1 (3d ed. 1997); SHELDON H. NAHMOD, CIVIL RIGHTS LIBERTIES LITIGATION 1.03 (3d ed. 1991).

43. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871). *See also infra* text accompanying notes 65-72.

The Fourteenth Amendment to the Constitution of the United States was proposed to the legislatures of the thirty-seven states by the same session of the Thirty-Ninth Congress that passed the Civil Rights Bill of 1866.[44] Ratification was completed on July 9, 1868, and on July 28, 1868, the Secretary of State reported in a certificate that twenty-eight of the thirty-seven states had ratified the amendment.[45] The first section of the amendment declared that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside [and] [n]o State shall make or enforce any law"[46] which abridges their privileges or immunities,[47] their due process rights,[48] or equal protection of the laws.[49] This first section made certain that the Civil Rights Act of 1866 was constitutionally sound and that even if some future Congress were to repeal it, those basic rights of citizenship, privileges and immunities, due process, and equal protection would be constitutionally protected.[50]

On March 2, 1867, the Anti-Peonage Act[51] was enacted into law by Congress. It sought to eliminate a form of peonage prevailing in the territory of New Mexico as a result of Spanish rule, but the Act was also used to prevent anyone from holding another in involuntary servitude throughout the United States.[52]

Despite a congressional drumbeat strengthening federal protection against discrimination, the United States Supreme Court, in several decisions, began to weaken this protection. The first sign of such an

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44. *See supra* text accompanying notes 35-42.

45. Act of July 28, 1868, 15 Stat. 708.

46. U.S. CONST. amend. XIV, § 1. This constituted an overruling of *Scott v. Sanford*, 60 U.S. 393 (1856). *See supra* text accompanying notes 28-32.

47. U.S. CONST. amend. XIV, § 1.

48. *See* U.S. CONST. amend. V.

49. U.S. CONST. amend. XIV, § 1. The Constitution as originally drafted and ratified had no equal protection provision. "This, of course, is not surprising for a document written for a society where blacks were enslaved and where women were routinely discriminated against." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 9.1.1 (1997).

50. *See* Perkins v. ELG, 307 U.S. 325, 328-29 (1939). Shortly after the enactment of the Civil Rights Act of 1866, Congress, "evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent [C]ongress, framed the Fourteenth Amendment of the Constitution." United States v. Wong Kim Ark, 169 U.S. 649, 675 (1898). *See also* Hague v. C.I.O., 307 U.S. 496, 507 (1939); Eugene Gressman, *The History of the Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1331 (1952).

51. 14 Stat. 546 (1867).

52. Gressman, *supra* note 50, at 1328.

attack on federal dominance, though perhaps not recognized at the time, was the 1868 decision in *Paul v. Virginia*[53] in which the Court declared a Virginia statute, which required licensing for out-of-state insurance carriers, constitutional.[54] The rationale was that corporations were not "citizens" within the meaning of the Privileges and Immunities Clause of the Federal Constitution.[55] In dictum,[56] almost as an appendage to the opinion, the Court by implication stated that any protection against discrimination was to originate with the states rather than the federal government.[57]

The Fifteenth Amendment to the Constitution of the United States[58] was proposed to the legislatures of the thirty-seven states by the Fortieth Congress on February 26, 1869.[59] Ratification was completed on February 3, 1870,[60] and on March 30, 1870, the Secretary of State reported in a proclamation that twenty-nine of the thirty-seven states had ratified the amendment.[61] The Fifteenth Amendment declared that the right of citizens to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.[62]

On May 31, 1870, shortly after the ratification of the Fifteenth Amendment, the Forty-First Congress passed an act to enforce citizens' right to vote; hence the "Enforcement Act"[63] provided, *inter alia*, that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections "without distinction of race, color, or previous . . . servitude." The sixth section provided:

> If two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress,

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53. 75 U.S. 168 (1868).

54. Act of Virginia Legislature, passed on Feb. 3, 1866.

55. *Paul*, 75 U.S. at 181.

56. The primary purpose of the clause was to help fuse into one nation a collection of independent sovereign states. It was designed to insure to a citizen of State A who ventures into State B the same privileges that the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. *Id.* at 180.

57. *Id.* at 181.

58. U.S. CONST. amend. XV.

59. No. 10, 16 Stat. 1131, 1131-32 (1870).

60. Titles 1-5, U.S.C. §§ 64, 64-65 (2000).

61. 16 Stat. at 1131–32.

62. U.S. CONST. amend. XV.

63. Ch. 114, 16 Stat. 140, 140-46 (1870) (amended slightly by the Act of February 28, 1871, ch. 99, 16 Stat. 433).

> threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .

[Sections 16, 17, and 18 of the Enforcement Act reenacted the Civil Rights Act of April 9, 1866.[64]]

On April 20, 1871, the Forty-Second Congress enacted the third Civil Rights Act known as the Ku Klux Klan Act.[65] The primary purpose of the Act was to enforce the provisions of the Fourteenth Amendment.[66] Section 1 of the Act added civil remedies to the criminal sanctions contained in the Civil Rights Act of 1866[67] for the deprivation of rights by an officer "under color of law."[68] Thus, Section 1 of the Ku Klux Klan Act was the precursor of the present day 42 U.S.C. § 1983. The President was given power to suppress violence by "a provision which was specifically directed against lynching and other forms of mob violence."[69]

On June 22, 1874, the statute became § 1979 of Title 24 of the Revised Statutes of the United States,[70] and upon adoption of the United States Code on June 30, 1926, the statute became § 43 of Title 8 of the United States Code.[71] In 1952 the statute was transferred to § 1983 of Title 42 of the United States Code, where it remains today.[72]

On April 14, 1873, the United States Supreme Court deftly continued the weakening of federal protection against discrimination, which could

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64. *Id.* at 141. *See supra* note 36. Hurd v. Hodge, 334 U.S. 24, 31 n.7 (1948). The Act was amended on February 28, 1871 by a number of procedural and substantive changes, the most noteworthy of which was to permanently stay all proceedings in state courts under the Act. *Id.* at 439.

65. Ch. 22, § 1, 17 Stat. 13 (1871). It became positive law of the United States as part of the Revised Statutes Act of 1874.

66. For a history of the Act see the excellent article by David Achtenberg, *A Milder Measure of Villany: The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1 (1999).

67. 17 Stat. at 13. *See supra* note 43.

68. The Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'" 17 Stat. at 13. It was entitled "An Act to Enforce the Provisions of the Fourteenth amendment to the constitution of the United States and for other Purposes." *Id. See Jett*, 491 U.S. at 722; Lynch v. Household Fin. Corp., 405 U.S. 538, 545 (1972).

69. Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952).

70. 18, Part 1 Stat. 347 (1874).

71. Codifications, 8 U.S.C. § 43 (1926). *See* Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943); Lane v. Wilson, 307 U.S. 268, 273 n.4 (1939).

72. 42 U.S.C. § 1983 (2000).

have been predicted by its decision in *Paul v. Virginia*.[73] A majority opinion of five Justices, written by Justice Miller in the *Slaughter-House Cases*,[74] proclaimed that a Louisiana statute of March 8, 1864, creating a corporate monopoly for the purpose of slaughtering animals in New Orleans, passed constitutional muster.[75] From the facts it is difficult to discern civil rights implications. The Court singled out the police power as its reason for finding the Louisiana statute valid.[76] Beneath this rationale lies the case's impact upon civil rights. The Court had to contend, *inter alia*,[77] with the argument supported by almost fifty years of precedent[78] that the monopoly offended the privileges and immunities of the New Orleans butchers who were not a part of the monopoly.[79] Justice Miller, however, stated that even though the Fourteenth Amendment gave national citizenship to Louisiana citizens, and even though Article IV, Section 2 of the United States Constitution[80] assured those citizens that fundamental privileges and immunities could not be taken away by the states, national citizenship did not confer such fundamental privileges and immunities.[81] Except for a few restrictions upon the States (for example, the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts), "the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government."[82] Though the case had no direct civil rights implications, Justice Miller's opinion described these fundamental privileges and immunities as "civil

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73. *Paul*, 75 U.S. at 168. *See supra* text accompanying note 56.

74. 83 U.S. 36 (1873).

75. *Id.* at 66.

76. *Id.* at 62.

77. The other constitutional arguments were involuntary servitude, equal protection, and due process. *Id.* at 66.

78. Supreme Court Justice Bushrod Washington, forty-nine years earlier sitting in circuit in *Corfield v. Coryell*, 6 F. Cas. 546 (E.D. Pa. 1823), wrote that the right "to acquire and possess property of every kind" was a fundamental privilege and immunity, *id.* at 551, a subject of the Articles of Confederation and later incorporated into article IV, section 2 of the Constitution. *See Slaughter-House Cases*, 83 U.S. at 75-76.

79. *Slaughter-House Cases*, 83 U.S. at 77-78.

80. U.S. CONST. art. IV, § 2.

81. *Slaughter-House Cases*, 83 U.S. at 78-79. Sixty-six years later in *Hague*, Justice Harlan Fiske Stone described this fact in the following words, "[t]he privileges and immunities of citizens of the United States, it was pointed out, are confined to that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws." 307 U.S. at 520 n.1.

82. *Slaughter-House Cases*, 83 U.S. at 77.

rights."[83] Hence, from April 14, 1873 forward, the power to protect such civil rights as the privilege and immunity "to acquire and possess property of every kind" had to be found in state law because they were not protected under federal law.[84] This rule of law has never been changed.

On March 1, 1875, Congress enacted a "Civil Rights Act."[85] Section 1 of the statute provided that:

> [A]ll persons within the jurisdiction of the United States shall be entitled to the full and equal and enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, 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.[86]

Section 2 provided penalties for the breach of Section 1.[87] Section 3 gave the district and circuit courts of the United States, exclusive of the courts of the individual states, cognizance of all violations of the Act.[88] Section 4 declared that:

> [N]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall . . . be deemed guilty of a misdemeanor . . . .[89]

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83. *Id.* at 77-78.

84. *Id.* at 76. So as to leave no doubt that some privileges and immunities were protected by federal law, the Court specifically mentioned: the right to travel to the seat of government to assert claims, free access to the seaports and courts of justice in the several states, the right of peaceful assembly and petition for redress of grievances, the privilege of habeas corpus, the right to become a citizen of any state by mere residence and to have the same rights as citizens thereof, the rights of the Thirteenth and Fifteenth Amendments, and the Due Process and equal protection clauses of the Fourteenth Amendment. *Id.* at 79-80. Whether these privileges and immunities were singled out because they had greater weight than the "civil rights" the Court did not say.

85. Ch. 114, 18 Stat. 335 (1875).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

Section 5 gave the United States Supreme Court the power of review over all cases arising under the Act without regard to the amount involved.[90]

During its October 1875 term, the Supreme Court made a ruling that explicitly chipped away at Congress's attempt to protect against discrimination.[91] In *United States v. Reese*,[92] a federal criminal prosecution involved two Kentucky municipal election inspectors who were charged with violation of the Enforcement Act of 1870[93] for failing to permit a black man to vote.[94] The Court held that the Enforcement Act unconstitutionally exceeded Congress's power under the Fifteenth Amendment because it was too broad; under the Act's provisions, an election official could be prosecuted for disenfranchising "free white citizens," whereas the Fifteenth Amendment was meant to protect against only disenfranchisement of "colored" citizens.[95]

Also during the October 1875 term, the Court in *United States v. Cruikshank*[96] severely restricted the right of peaceful assembly. The conviction of two men under the sixth section of the Enforcement Act[97] was reversed because the indictment failed to allege that defendants sought to prevent men of African descent from assembling for "a redress of grievances, or for any thing else connected with the powers or the duties of the national government."[98] Even though the Court in the

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90. *Id.*

91. United States v. Reese, 92 U.S. 214 (1875).

92. 92 U.S. 214 (1875).

93. *See supra* text accompanying note 64.

94. Under the third and fourth sections of the Enforcement Act (at the time of the decision, Revised Statutes 2007, 2008, and 5506), it was an offense for any judge, inspector, or other officer of election whose duty it was, under the circumstances therein stated, to receive and count the vote of any citizen or to wrongfully refuse to receive and count the same. It was also an offense for any person, by force, bribery, or other offense, to hinder or delay any citizen from doing any act required to be done to qualify them to vote or from voting in any election. Section 3-4, 16 Stat. at 140-41.

95. *Reese*, 92 U.S. at 221-22.

96. 92 U.S. 542 (1875).

97. Section 6, 16 Stat. at 141. The section provided that:

> [I]f two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony . . . .

Id.

98. *Cruikshank*, 92 U.S. at 552-53.

Slaughter-House Cases stated by dictum that interference with the right of assembly was an indictable offense,[99] the Court in *Cruikshank* established that unless the assembly is for the limited purpose of redressing a grievance, it is not protected.[100]

During the October 1877 term, the United States Supreme Court considered a Louisiana statute, enacted on February 23, 1869, which required that all engaged in interstate commerce give "equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color."[101] In *Hall v. Decuir*,[102] the Supreme Court struck down the statute that violated the Commerce Clause of the Constitution.[103] "A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."[104] This, the Court concluded, would "be productive of great inconvenience and unnecessary hardship."[105]

During the October 1879 term, the Supreme Court in *Virginia v. Rives*[106] held that while the Fourteenth Amendment guarantees that members of the "colored" race may not be excluded from a jury to pass upon a "colored" person's life, liberty, or property, it does not guarantee that their jury will consist, at least in part, of "colored" people, i.e., that

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99. *Slaughter-House Cases*, 83 U.S. at 79-80.

100. *Cruikshank*, 92 U.S. at 552-53. In words which leave no doubt as to their import:

> The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the [Fourteenth] [A]mendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

Id. at 555.

101. Hall v. Decuir, 95 U.S. 485, 487 (1877).

102. *Id.* at 485.

103. *Id.* at 490.

104. *Id.* at 489. The Court continuing:

> The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of a national concern. If such State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not be productive of great inconvenience and unnecessary hardship.

Id.

105. *Id.*

106. 100 U.S. 313 (1879).

there will be at least one person of his own race on the trial jury of an accused.[107]

During that same October 1879 term, the Supreme Court in *Ex parte Virginia*[108] appears to have turned the corner in its prior weakening of civil rights protection. It approved the indictment of a state judge for restricting jury service to members of the Caucasian race even though the state had no statute containing such restriction.[109] The basis of the conviction was the fourth section of the Civil Rights Act of March 1, 1875,[110] which provided that no person shall be disqualified as a grand or petit juror because of race, color, or previous condition of servitude.[111] In referring to the Thirteenth and Fourteenth Amendments, the Court added gratuitously that "[t]hey were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congres[s]."[112]

The Court stated that the actions of state officers who exceed the limits of their authority constitute the Fourteenth Amendment's "state action" requirement,[113] making it clear that "state action" is not restricted to acts of the legislature.[114] The decision also echoed a ring

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107. *Id.* at 322-23.

> It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State court, viz. a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any Federal statute. It is not, therefore, guaranteed by the Fourteenth Amendment . . . .

Id.

108. 100 U.S. 339 (1879).

109. *Id.* at 349.

110. 18 Stat. 335.

111. *Id.* Whether or not the state laid down any rule of disqualification did not matter when the disqualification resulted from the acts of a state officer or agent. *Ex parte Virginia*, 100 U.S. at 346.

112. *Ex parte Virginia*, 100 U.S. at 345.

113. *Id.* at 346-47.

114. This point was made clear by Justice Brandeis in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930), when he wrote that "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."

of the pretense definition of the term "under color of."[115] This pronouncement was a prediction of rulings to follow.[116]

On January 22, 1883, the Supreme Court in *United States v. Harris*[117] returned to its restrictive mode. The Court declared part of the Ku Klux Klan Act,[118] Section 5519 of the Revised Statutes, unconstitutional.[119] Under this section, a lynch mob was indicted for seizing prisoners being held by a state deputy sheriff.[120] The Court immediately rejected the Fifteenth Amendment because that Amendment "merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude."[121] The Thirteenth Amendment simply prohibited slavery and involuntary servitude.[122] As to the Fourteenth Amendment, the Court reiterated its position that the amendment prohibited state action but did not touch the actions of private persons.[123] Justice William B. Woods, writing for the Court, stated:

> [T]he section of the law under consideration is directed exclusively against the action of private persons, without reference to the laws of the states, or their administration by the officers of the state, we are clear in the opinion that it is not warranted by any clause in the fourteenth amendment to the constitution.[124]

On October 15, 1883, in the *Civil Rights Cases*,[125] the Supreme Court declared Sections 1 and 2 of the Civil Rights Act of March 1, 1875

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115. *See supra* text accompanying note 19 and *infra* text accompanying notes 404-06, 413, 432, and 738.

116. In *Shelley* the Court defined "state action" as "exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." 334 U.S. at 20.

117. 106 U.S. 629 (1883).

118. Section 5519 of the Revised Statutes was originally a part of Section 2 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. at 13-14. *See Harris*, 106 U.S. 629. *See supra* notes 65-72 regarding the Ku Klux Klan Act.

119. *Harris*, 106 U.S. at 632-33.

120. *Id.* at 644.

121. *Id.* at 637 (citing *Reese*, 92 U.S. at 218).

122. *Id.* at 641.

123. *Id.* at 640.

124. *Id.*

125. 109 U.S. 3 (1883). Though designated "The Civil Rights Cases" by the Court, the decision involved an action by the United States against four individuals for violation of the Civil Rights Act of March 1, 1875, and an action by one married couple against the Memphis & Charleston Railroad for refusing the wife, who was of African descent, to ride in its ladies' car.

unconstitutional.[126] Ostensibly, it was the state-action principle of the *Slaughter-House Cases*[127] that carried the day even though that case was not mentioned by the majority.[128] Referring to the Fourteenth Amendment, Justice Bradley stated that: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[129] Because the questioned statute "does not profess to be corrective of any constitutional wrong committed by the states,"[130] it did not pass constitutional muster.[131] The original Civil Rights Bill of 1866[132] was analyzed and determined to be constitutional because it was corrective legislation.[133] The Thirteenth and Fourteenth Amendments were compared, and both amendments were determined to be "self-executing without any ancillary legislation."[134] However, if there was legislation under the Thirteenth Amendment, it may be "direct and primary,"[135] but "[t]he fourteenth amendment extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."[136] This is the *Slaughter-House* doctrine.

As to what might have been the real reason for the decision, and certainly its *coup de grace* to any chance of concluding that the disputed sections were constitutional, the Court stated:

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.[137]

As reason for those words the majority approved of the following statement:

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126. *Id.* at 25. *See supra* note 85.

127. *See supra* text accompanying notes 74-84.

128. Curiously, the majority opinion referred to *Cruikshank*, 92 U.S. 542, *Rives*, 100 U.S. 313, and *Ex parte Virginia*, 100 U.S. 339, but only the dissenting Justices mentioned *Slaughter-House Cases*, 83 U.S. 36.

129. *The Civil Rights Cases*, 109 U.S. at 11.

130. *Id.* at 14.

131. *Id.* at 11.

132. *See supra* text accompanying note 36.

133. *The Civil Rights Cases*, 109 U.S. at 16-18.

134. *Id.* at 20.

135. *Id.* at 23.

136. *Id.* at 24.

137. *Id.* at 24-25.

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[138]

That rather deprecating statement prompted Justice Harlan to write in dissent:

> It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. What the nation, through congress, has sought to accomplish in reference to that race is, what had already been done in every state in the Union for the white race, to secure and protect rights belonging to them as freemen and citizens; nothing more.[139]

Thus, eighteen years after the end of the Civil War, it was apparent that the Supreme Court was not in agreement on the proper method of protecting people against discrimination.

In *Plessy v. Ferguson*[140] on May 18, 1896, the United States Supreme Court held constitutional an 1890 Louisiana statute mandating separate but equal accommodations in railroad cars.[141] Reflecting some of the impatience found in the *Civil Rights Cases*[142] with plaintiff's argument to the effect that forcing blacks into separate areas stigmatized them, the majority opinion,[143] authored by Justice Henry B. Brown, stated:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.[144]

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138. *Id.* at 25.
139. *Id.* at 61 (Harlan, J., dissenting).
140. 163 U.S. 537 (1896).
141. *Plessy*, 163 U.S. at 550-51.
142. *See supra* note 124.
143. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).
144. *Id.* at 551.

To summarize, Section 2 of the Civil Rights Act of April 9, 1866,[145] a criminal statute,[146] was reenacted by the Enforcement Act of May 31, 1870,[147] making it applicable to "any inhabitant of any State or Territory." Section 1 of the Ku Klux Klan Act of April 20, 1871,[148] reenacted the original Civil Rights Act of 1866 and authorized civil suits for the redress of any wrongs.[149] When the Revised Statutes were adopted in 1874-1878,[150] the criminal statute became R.S. 5510 but was repealed by the Act of March 4, 1909,[151] and replaced by Section 20 thereof,[152] which was later codified as 18 U.S.C. § 52[153] and ultimately renumbered to its present 18 U.S.C. § 242.[154] The civil statute became Section 1979 of the Revised Statutes;[155] then on June 30, 1926,

145. Ch. 31, § 2, 14 Stat. 27 (1866).

146. It provided that the perpetrator shall be "guilty of a misdemeanor, and on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment, not exceeding one year, in the discretion of the court." *Id.* In addition to prohibiting deprivation of rights, the Act abrogated any:

> different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as punishment for crimes whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons.

Id.

147. Ch. 114, § 17, 16 Stat. 144 (1870).

148. Ch. 22, § 1, 17 Stat. 13 (1871).

149. It incorporated the civil remedies portion of the 1866 Act into a new section that contained the words "shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding . . .," all of which was eliminated by 8 U.S.C. § 43. *See* Screws v. United States, 325 U.S. 91, 98-100 (1945). *See infra* note 396.

150. "On June 22, 1874, the First Session of the Forty-Third Congress (1873-74) caused to be published all federal statutes that were in force on December 1, 1873, as the revised statutes of the United States, general and permanent in their nature." 18 Rev. Stat. title page (2d ed. 1875). It did not contain private or temporary acts or laws otherwise not thought to be of general permanent interest. *See* MORRIS L. COHEN, ROBERT C. HERRING & KENT C. OLSON, HOW TO FIND THE LAW, ch. 5, C.4.a. (9th ed. 1989); 14 Stat. 27, as reenacted by 17 Stat. 13, was renumbered as Section 1979 of Title 24 of the Revised Statutes. On March 2, 1877, a second edition of the Revised Statutes, 19 Stat. 268 appeared. Revised Statute 1979 was not affected by the revision. *Hurd*, 334 U.S. at 30 is incorrect when it refers to § 1979 as § "1978" of the Revised Statutes.

151. Ch. 321, § 341, 35 Stat. 1153-54 (1909).

152. Ch. 321, § 20, 35 Stat. 1092 (1909).

153. 18 U.S.C. § 52 (1940).

154. 18 U.S.C. § 242 (2000).

155. Rev. Stat. § 1979 (1978).

it was codified as 8 U.S.C. § 43[156] and in 1952 was renumbered as 42 U.S.C. § 1983, its present designation.[157]

III. THE ANATOMY OF 42 U.S.C. § 1983 AND 18 U.S.C. § 242

A. *The Civil Statute—42 U.S.C. § 1983*

Section 1983,[158] which provides civil remedies for the deprivation of civil rights, contains the following language:

> Every person[159] who, under color of[160] any statute, ordinance, regulation, custom, or usage,[161] of any State or Territory or the District of Columbia,[162] subjects, or causes to be subjected,[163] any citizen of the United States or other person within the jurisdiction thereof[164] to the deprivation[165] of any rights, privileges, or immunities[166] secured by the Constitution and laws,[167] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[168] . . . .[169]

Section 1983 contains ten parts: (A) it imposes liability "in an action at law, suit in equity or other proceeding," (B) upon "every person," (C) who "under color of," (D) "any statute, ordinance, regulation, custom, or usage," (E) "of any State or Territory or the District of Columbia," (F) "subjects or causes to be subjected," (G) "any citizen of the United States or other person within the jurisdiction thereof," (H) "to the deprivation

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156. On June 30, 1926, the United States Code was enacted into law by the Sixty-ninth Congress. Revised Statute 1979 became Section 43 of Title 8 of the United States Code. In 1934 and 1940, Congress effected certain amendments to the United States Code, but 8 U.S.C. § 43 remained unchanged.

157. *See Screws*, 325 U.S. at 98-100 (giving a partial history of the Act).

158. 42 U.S.C. § 1983 (2000).

159. *See infra* text accompanying notes 175-88.

160. *See infra* text accompanying notes 189-212.

161. *See infra* text accompanying notes 213-22. The distinction between "any statute, ordinance, regulation" and "custom, usage" would make a fascinating subject of another paper.

162. *See infra* text accompanying note 223.

163. *See infra* text accompanying notes 224-30.

164. *See infra* text accompanying notes 231-37.

165. *See infra* text accompanying notes 238-41.

166. *See infra* text accompanying notes 242-53.

167. *See infra* text accompanying notes 254-74.

168. *See infra* text accompanying notes 275-76.

169. 42 U.S.C. § 1983.

of," (I) "any rights, privileges, or immunities," and (J) "secured by the Constitution and laws."[170]

1. "In an Action at Law, Suit in Equity or Other Proceeding"[171]

Equitable relief, in the form of a mandatory injunction to register people of African descent as voters, was denied on the ground that "[t]he traditional limits of proceedings in equity have not embraced a remedy for political wrongs."[172] Section 1983 cannot be used to enjoin certain objectionable operations of a municipal police force when no allegation of deprivation of constitutional rights exists.[173] An injunction seeking the cancellation of a private club's liquor license was denied when the petitioner failed to prove "state action."[174]

2. "Upon 'Every Person'"

a. The United States is not a "person" within the statute,[175] but persons employed by the federal government as "federal officers" may be sued for violation of another's constitutional rights.[176] Private entities which employ people to act "under color of" federal law may not be sued.[177]

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170. *Id.*

171. Professor Tracy A. Thomas has pointed out that in permitting an action at law, suit in equity, or other proceeding Congress has created a "narrow statutory exception to [an] absolute ban" against federal equitable intervention in a pending state court proceeding "regardless of how extraordinary the particular circumstances may be." *See* Tracy A. Thomas, *Understanding Prophylactic Remedies Through the Looking Glass of Bush v. Gore*, 2 WM. & MARY BILL RTS. J. 343 (2002).

172. Giles v. Harris, 189 U.S. 475, 486 (1903) (citing Green v. Mills, 69 F. 852 (1895)).

173. Rizzo v. Goode, 423 U.S. 362, 378-79 (1976). But cf. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 556 (1972), in which the Supreme Court approved of injunctive relief. The unique nature of the Connecticut attachment/garnishment statute permitted that remedy without judicial intervention. Because of that, neither § 1983 nor 28 U.S.C. § 2283 (prohibiting federal courts from granting injunctions to stay state court proceedings unless specifically authorized by an Act of Congress) prohibited an injunction in that case.

174. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179 (1972).

175. Cannon v. Univ. of Chicago, 441 U.S. 677, 701 n.27 (1979).

176. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391 n.4 (1971). In *Hafer v. Melo*, 502 U.S. 21, 27, 32 (1991), it was said that "[a] government official in the role of personal-capacity defendant . . . fits comfortably within the statutory term 'person.'"

177. *See* Correctional Servs. Corp. v. Malesko, 536 U.S. 61, 61 (2001).

b. A state is not a "person" within § 1983,[178] nor do its officials act in their official capacities when the suit is brought as an "official capacity" action.[179] Such officials are "persons" when the suit is brought as a "personal liability" action.[180]

c. In 1961 the Supreme Court stated that a municipality was not a "person" under 42 U.S.C. § 1983.[181] In 1978 the Supreme Court reversed itself and decided that a municipality is a "person"[182] within § 1983, and hence, can be sued.[183] Before a municipality may be held liable under § 1983, however, one must prove not only that the agent of the municipality was untrained or improperly trained, but that the

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178. Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989).

179. *Id.* at 71.

180. Hafer v. Melo, 502 U.S. 21, 27 (1991).

181. Monroe v. Pape, 365 U.S. 167, 187-91 (1961).

182. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 (1978). *See infra* note 423. The Court did not overrule its earlier pronouncement, to the effect that a municipality is not a person that can be liable under the statute, but that:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. 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 the government as an entity is responsible under § 1983.

Id. at 694.

In other words, a municipality's § 1983 liability cannot be based upon *respondeat superior*. *See also* Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 734-35 (1989); Board of County Comm'rs v. Brown, 520 U.S. 397, 404 (1997), in which it was stated that:

> [I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Punitive damages are not recoverable against a municipality. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

183. Six members of the Court in *Monroe* had been replaced, and this time the Court voted seven to two that municipalities were "persons" under § 1983. *Monell*, 436 U.S. at 690. Justice Brennan, switching his position from 1961, wrote the majority opinion. Justice Brennan determined that the mistake of the 1961 Court in *Monroe* was its analysis of the legislative history of the 1871 Act. *Id.* at 669. According to the Court in *Monroe*, Congress in 1871 thought that it did not have the power to impose any obligation upon county and town organizations. *Id.* at 674-75. Upon an exhaustive analysis of the legislative history, the Court in *Monell* held that "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." *Id.* at 690. The Court again made it clear, however, that municipal liability could not be based on *respondeat superior*. *Id.* at 694.

deficiencies in training rose to the level of a policy.[184] This does not require an overt policy of training improperly but a training program, if one exists, which is so faulty that it reflects a "deliberately indifferent" attitude toward the proper preparation of the municipality's employees or agents.[185]

d. Guam is not a "person." The Court stated that Congress was not concerned with territories when it enacted the Civil Rights Act of 1871.[186]

e. A Native American tribe is not a "person" within § 1983.[187] The "every person" wording of the statute was not intended to include those with common law immunities.[188]

3. "Who Under Color Of"

"Under color of law" is only a shibboleth[189] for the longer recitation of "under color of any law, statute, ordinance, regulation, or custom" contained in the present criminal statute against discrimination, 18 U.S.C. § 242, and the "under color of any statute, ordinance, regulation, custom, or usage" contained in the present statute affording civil penalties for discrimination, 42 U.S.C. § 1983.[190] Section 1983 of the United States Code title 42 and § 242 of title 18, United States Code, trace their origin to the Civil Rights Act of 1866,[191] in which "under color of" was used, but that statute was not the first to use the phrase.

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184. *Id.* at 692. Municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986). The identification of policy-making decisions is a matter of state law. City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988). The Court in *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) explained that "[o]bviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any . . . harm inflicted by a municipal official."

185. City of Canton v. Harris, 489 U.S. 378, 387-94 (1989).

186. Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990).

187. Inyo County Calif. v. Paiute Shoshone Indians, 538 U.S. 701 (2003).

188. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967); Tenney v. Brandhove, 341 U.S. 367, 373-74 (1951).

189. Chief Justice Warren Burger once referred to its use as "figurative." *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 943 (1982) (Burger, J., dissenting).

190. When 14 Stat. 27, the precusor of both statutes, was renumbered as a Revised Statute (Rev. Stat. 5510 for the criminal statute and Rev. Stat. 1979 for the civil statute), "any law" was unexplainedly omitted from its original version.

191. *See supra text* accompanying note 36.

"Under color of" had been used previously in a variety of legal ways[192] and as a figure of speech.[193] An English statute enacted in 1444 used "under color of their office."[194] The seventeenth-century jurist, Sir Edward Coke, in 1628 wrote:[195] "If a lieutenant, or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by color of martial law, this is murder."[196] In 1670 the English case of *Posterne v. Hanson & Hooker*[197] spoke of officers and ministers' "colour of their office."[198] In 1788 "under color of law" was used in *Zane's Exors v. Cowperthwaite*.[199] The Judiciary Act of 1789 used "under or by color of the authority of the United States."[200] In 1803 Chief Justice Marshall, in *Marbury v. Madison*,[201] wrote:

> If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law.[202]

Congress used the term in 1833 when it enacted the third section of 4 Statutes at Large 632,[203] in 1863 when it enacted the fourth section of

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192. As an example of "colour of title," see *Cherry v. Legh*, 1 Bligh NS PC 306, 311, 4 ER 886 (1827).

193. As an example, "a very unfavourable color is thrown upon it," see *Dohnan v. Nokes*, 22 Beavan 402, 52 ER 1163 (1855).

194. *See* Steven L. Winter, *The Meaning of Under Color of Law*, 91 MICH. L. REV. 323, 342-43 n.82 (1992) (referring to 3 Statutes at Large 266, 271-72).

195. SIR EDWARD COKE, 3 INSTITUTES 52 (1628).

196. Luther v. Borden, 48 U.S. 1, 64 (1848).

197. 2 WMS Saunders 51, 54, 85 ER 652 (1670).

198. *Id.* at 655.

199. 1 U.S. 312, 313 (Pa. S. Ct. 1788). *See* Ligeart v. Wiseham, 3 Dyer 323b, 73 ER 732 (1794) ("the said plaintiff by color of his aforesaid once").

200. Sec. 14, 1 Stat. 82 (providing that writs of habeas corpus shall in no case extend to prisoners in jail unless they are in custody "under or by color of the authority of the United States"). *See Ex parte* McCardle, 73 U.S. 318, 319 n.1 (1867).

201. 5 U.S. 137 (1803). In *United States v. More*, 7 U.S. 159, 160 (1805), an indictment against a Justice of the Peace was returned for taking fees "under color of . . . office."

202. *Marbury*, 5 U.S. at 170. This was neither the first nor the last time that the term appears in Supreme Court decisions. *See* Downs v. Bidwell, 182 U.S. 244, 248 (1901) (referring to the "force bill," which was intended to include all actions against customs officers acting under color of their office); Lionberger v. Rouse, 76 U.S. 468, 471 (1869) (used in the Synopsis); Webster v. Reid, 52 U.S. 437, 452 (1850) (used in the Synopsis); Miller v. Stewart, 22 U.S. 680, 697 (1824) (the attorney's argument being quoted).

203. Sec. 3, 4 Stat. 632, 633 (1833) provides that "in any case where suit or prosecution shall be commenced in a court of any state, against any officer . . . or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof . . . ." This same language was substantially copied into section 16 of the Act of

12 Statutes at Large 755,[204] and when it enacted the seventh section of 12 Statute at Large 357.[205] The phrase was used in the twelfth clause of Revised Statutes 563[206] and the sixteenth clause of Revised Statutes 629,[207] which dealt with the jurisdiction of courts to hear requests for the redress of the deprivation of rights.[208]

The Supreme Court has stated many times that the phrase "under color of" in 42 U.S.C. § 1983 and 18 U.S.C. § 242[209] is treated identically by the courts.[210] Also identical are the meanings of the Civil

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February 28, 1871. 16 Stat. 438, 438-39. *See* Gaughan v. Northwestern Fertilizing Co., 10 F. Cas. 91 (Cir. Ct. N.D. Ill. 1873).

204. The statute provided a defense to a civil or criminal action against one who was simply carrying out an order of the President or "under color of" any law of Congress. Sec. 4, 12 Stat. 755, 756 (1863). Section 5 of the Act provided for removal of such an action for an offense carried out "under color of" any authority. *Id. See* Bigelow v. Forrest, 76 U.S. 339, 344 (1869).

205. The statute forbade the maintenance or prosecution of any suit, civil or criminal, for any arrest or imprisonment made during the "rebellion" by virtue of or "under color of" any authority derived from or exercised by or under the President of the United States. 12 Stat. 756 (1863). *See* Cutler v. Kouns, 110 U.S. 720, 724 (1884).

206. 12 § 563 Rev. Stat. 563 (1861).

207. 6 § 1979, 1 Rev. Stat. 347 (1874).

208. *See* Holt v. Indiana Mfg. Co., 176 U.S. 68, 71 (1900).

209. 42, § 1973I provides as follows:

> No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of subchapters I-A to I-C of this chapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

In 1994 Congress enacted 42 U.S.C. § 13981, which contained the "under color of" wording, but on May 15, 2000, the Supreme Court declared it unconstitutional because it exceeded Congressional power under the Commerce Clause; the statute was not saved by section 5 of the Fourteenth Amendment. *See* United States v. Morrison, 529 U.S. 598, 626 (2000). Singularly enough, what prompted the enactment of that statute was the same impetus that prompted the enactment of the reconstruction statutes.

> [T]he Congresses that enacted the Civil Rights Acts of 1871 and 1875 had a purpose similar to that of Congress in enacting § 13981. There were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination against newly freed slaves. The statements of Representative Garfield in the House and that of Senator Sumner in the Senate are representative: "[T]he chief complaint is not that the laws of the States are unequal, but that even where the laws are just and equal on their face, yet by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them."

Id. at 624-25.

210. *See* Dennis v. Sparks, 449 U.S. 24, 29 n.5 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 153 n.7 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966); Monroe v. Pape, 365 U.S. 167, 185 (1961).

Rights Acts' "under color of" and the Fourteenth Amendment's "state action,"[211] the resolution of which is a question of law.[212]

4. "Any Statute, Ordinance, Regulation, Custom, or Usage"

The Civil Rights Act of 1871, the Ku Klux Klan Act,[213] added "usage" to "law, statute, ordinance, regulation, or custom,"[214] but the Revised Statutes of 1874 and 1875 omitted "law" from the recitation of authority.[215] The Supreme Court made it clear in *Adickes v. S.H. Kress & Co.*[216] that for a "custom or usage" to be actionable under § 1983 there must be state involvement and "not simply a practice that reflects longstanding social habits, generally observed by the people in a locality."[217] Two strong dissents in the case[218] took the position that a custom or usage can simply be "a widespread and longstanding practice, commonly regarded as prescribing norms for conduct, and backed by sanctions,"[219] and "'[t]he custom . . . of any State' . . . includes the unwritten commitment, stronger than ordinances, statutes, and regulations, by which men live and arrange their lives."[220]

In *Monell v. Department of Social Services*,[221] the Court further opined that "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 the government as an entity is responsible under § 1983."[222]

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211. Hafer v. Melo, 502 U.S. 21, 28 (1991) ("just as broad"); *Monroe*, 365 U.S. at 184; *Price*, 383 U.S. at 794 n.7. *See Lugar*, 457 U.S. at 929 (discussing the Supreme Court's exposition of the difference between "under color of" and "state action"). *See infra* note 670.

212. Blum v. Yaretsky, 457 U.S. 991, 996-98 (1982); Cuyler v. Sullivan, 446 U.S. 335, 342 n.6 (1980).

213. Ch. 22, 17 Stat. 13 (1871). *See supra* note 66.

214. *Id.*

215. *See* Revisor's Draft (1872) (containing no explanation); *Monroe*, 365 U.S. at 213 n.18 (Frankfurter, J., dissenting).

216. 398 U.S. 144 (1970).

217. *Id.* at 166-67. The Court added, "[T]he statute . . . expressly requires that the 'custom, or usage' be that 'of any *State*,' not simply of the people living in a state." *Id.* at 167.

218. *See id.* at 179-234 (Brennan and Douglas, JJ., dissenting).

219. *Id.* at 224 (Brennan and Douglas, JJ., dissenting).

220. *Id.* at 181 (Brennan and Douglas, JJ., dissenting). Nine years prior the Court had an opportunity to explore the meaning of "custom" but sidestepped it, determining no evidence existed to convict on grounds of breach of the peace. *See* Garner v. Louisiana, 368 U.S. 157, 163-64 (1961).

221. 436 U.S. 658 (1978).

222. *Id.* at 694.

5. "Of any State or Territory or the District of Columbia"

The District of Columbia was added when the statute was renumbered from 8 U.S.C. § 43 to 42 U.S.C. § 1983 in 1952.[223]

6. "Subjects or Causes to be Subjected"

The Court has not expounded upon the phrase "subjects or causes to be subjected," but from its cases, a rule and five exceptions can be discerned.[224] It appears the mere presence of the state is usually sufficient to establish "state action," which has subjected a person to a deprivation of his or her rights. The state may prove, however, that its presence had nothing to do with the deprivation because the state did not coerce anyone to deprive another of his or her rights.[225] There may be situations when the effect of the state's presence is primed by another presence.[226] Voluntarily acting in concert with the state seems to excuse proof of coercion.[227] Instances exist in which there is really no coercion on the part of the state, but "under color of" or "state action" is found because the state permitted the "state actor"[228] to receive a benefit that should not have been received,[229] or because the state is permitting the "state actor" to perform one or more of its traditional "public functions."[230]

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223. See *supra* text accompanying notes 156-57.

224. 42 U.S.C. § 1983.

225. *See* Am. Mfgrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (stating that "[t]he State's decision to allow insurer to withhold payments . . . can . . . be seen as state inaction . . ." *Id.* at 53; NCAA v. Tarkanian, 488 U.S. 179 (1988); *Blum*, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (stating that "the crux of the respondent's complaint is not that the State *has* acted, but that it has *refused* to act." *Id.* at 166); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

226. In *Polk County v. Dodson*, 454 U.S. 312 (1981), a public defender was paid by the state, but the employer-employee relationship was primed by the attorney-client relationship. This exception to the rule is to be distinguished from the exception found in *Parratt v. Taylor*, 451 U.S. 527 (1981), when state action was established, but recovery denied because negligence of the "state actor" did not equate with lack of due process.

227. Dennis v. Sparks, 449 U.S. 24 (1980).

228. The Supreme Court has defined a "state actor" as a "state official," or one who "has acted together with a state official," or one whose "conduct is otherwise chargeable to the State." *See Lugar*, 457 U.S. at 937.

229. *See* Norwood v. Harrison, 413 U.S. 455 (1973).

230. Georgia v. McCollom, 505 U.S. 42 (1992); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

7. "Any Citizen of the United States or Other Person Within the Jurisdiction Thereof"

The Civil Rights Act of 1866[231] declared that the protected persons were "inhabitants of any State or Territory." The Ku Klux Klan Act of 1871[232] changed that designation to "any person within the jurisdiction of the United States."[233] The present wording was incorporated by 8 U.S.C. § 43: "any citizen of the United States or other person within the jurisdiction thereof" who is deprived of rights secured by the Constitution and laws is furnished a cause of action for that deprivation.[234] Apparently, no interpretation of that wording in § 1983 exists, but the Supreme Court in *New York Transit Authority v. Beazer*[235] wrote about similar wording in the Equal Protection Clause of the Fourteenth Amendment,[236] stating that the amendment announces a fundamental principle: "the State must govern impartially. General rules that apply evenhandedly . . . comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise."[237]

8. "To the Deprivation of"

The Fourth Amendment[238] (applicable to the states by the Fourteenth Amendment) protects against a person being intentionally deprived of that person's property by seizure.[239] It has been opined that prohibited Eighth Amendment "cruel and unusual punishment" is evidenced by a "deliberate indifference to serious medical needs," whereas simple negligence gives rise to merely a malpractice action[240] and not a deprivation of constitutional rights.[241]

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231. 14 Stat. 27 (*See supra* text accompanying notes 36-43).

232. *Id.* (*See supra* text accompanying notes 65-73).

233. Sec. 1, 17 Stat. 13.

234. 8 U.S.C. § 43 (1926).

235. 440 U.S. 568 (1979).

236. U.S. CONST. amend. XIV, § 1 (providing: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws").

237. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88 (1979).

238. U.S. CONST. amend. IV.

239. *See Soldal v. Cook County*, 506 U.S. 56, 72 (1992), in which the Court held that one deprives an owner of his mobile home under color of state law by "physically tearing it from its foundation and towing it to another lot."

240. Estelle v. Gamble, 429 U.S. 97, 106-07 (1976).

241. Daniels v. Williams, 474 U.S. 327, 330 (1986).

9. "Any Rights, Privileges or Immunities Secured by the Constitution and Laws"

a. "Any Rights." The wording of the statute has been modified from "any right secured or protected by this act"[242] to "any rights, privileges, or immunities secured by the Constitution of the United States"[243] to "any rights, privileges, or immunities secured by the Constitution and laws of the United States."[244] In 1884 United States Supreme Court Justice Stanley Matthews opined that "[i]t might be difficult to enumerate the several descriptions of rights secured to individuals by the constitution, the deprivation of which, by any person, would subject the latter to an action for redress under section 1979, Rev. St."[245] The Supreme Court has said that "[§] 1983 merely provides a mechanism for enforcing individual rights 'secured' elsewhere, i.e., rights independently 'secured by the Constitution and laws' of the United States."[246]

> Standing alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all. To be sure, it may be argued that § 1983 does in some sense "provid[e] for the protection of civil rights" when it authorizes a cause of action based on the deprivation of civil rights guaranteed by other Acts of Congress.[247]

The Court has made several other similar pronouncements, for example, "[i]n order to seek redress through § 1983 . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[248] Also, "the express cause of action for damages created by

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242. The Civil Rights Act of 1866, 14 Stat. 27.

243. The Ku Klux Klan Act, 17 Stat. 13.

244. Rev. Stat. § 1979 (1874). *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 608 (1979).

245. Carter v. Greenhow, 114 U.S. 317, 323 (1884).

246. Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2003) (holding that the Federal Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2000), which prohibits the federal funding of educational institutions that have a policy or practice of releasing educational records to unauthorized persons, does not create a right of the aggrieved person to sue under § 1983). "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman*, 441 U.S. at 617. In that regard the discharged teachers in *Rendell-Baker*, 457 U.S. at 837, were incorrect; the Court said that "they allege that respondents [employers] violated 42 U.S.C. § 1983." Perhaps a more accurate statement of the procedural aspects is found in *NCAA*, 488 U.S. at 181, where the Court said the appellee alleged that "he had been deprived of his Fourteenth Amendment . . . rights in violation of 42 U.S.C. § 1983." *Id.*

247. *Chapman*, 441 U.S. at 618.

248. Blessing v. Freestone, 520 U.S. 329, 340 (1997). In 1909 Justice Oliver Wendell Holmes, writing for the Court in *Moyer v. Peabody*, 212 U.S. 78, 85 (1909), said that a

§ 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981[249] by state governmental units . . . ."[250] Thus, the actionable rights must not be vague and amorphous.[251]

b. "Any . . . privileges or immunities." Section 2 of Article IV of the Constitution provides that "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[252] It has been opined that this constitutional provision does not import that a citizen of one state carries with him into another state fundamental privileges and immunities that come to him necessarily by the mere fact of his citizenship in his state. If a citizen of state A enters state B, then state B may not deprive the citizen of state A of those privileges and immunities enjoyed by the citizens of state B.[253]

10. "Secured by the Constitution and Laws"

a. The Due Process Clause. It has been opined that the most familiar office of the Due Process Clause is to provide a guarantee of fair procedure in connection with the deprivation of life, liberty, or property

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person held in custody upon orders of the Governor of a state during an insurrection, was not deprived of a constitutional right because

> [s]o long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief.

Id. See also *Baker v. McCollan*, 443 U.S. 137, 140 (1979), in which a man was arrested under a valid warrant (and hence "under color of" law), but later released due to mistaken identity. The Court held that he had no cause of action under § 1983 because he was not deprived of his constitutional rights without due process of law. *Id.* at 140. He was subjected to a false arrest not due to lack of due process, but a mistaken identity. At the time of his arrest, he was in possession of the driver's license issued to his brother who was a fugitive from justice. *Id.*

249. 42 U.S.C. § 1981(a) (2000) (providing, *inter alia*, that

> All persons within the jurisdiction of the United States shall have the same right to every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The rights so protected, are, *inter alia*, protected against impairment "under color of law.").

250. *Jett*, 491 U.S. at 733.

251. *See* Livadas v. Bradshaw, 512 U.S. 107, 133 (1994); *Blessing*, 520 U.S. at 340.

252. U.S. CONST. art. IV, § 2.

253. Hague v. C.I.O., 307 U.S. 496, 511 (1939).

by a state.[254] The Court has often proclaimed the substantive rights the Clause does not protect, such as private rights of contract obtained under a state statute.[255] Nor does the Clause, under certain conditions, prevent a person from being held in custody upon orders of the governor of a state in insurrection.[256] A man arrested, but later released due to a mistaken identity, was not deprived of his due process rights because that type of tort does not give rise to an action under § 1983, and the state had provided the prisoner with means of redressing his deprivation.[257]

"Liberty," deprivation of which the Due Process Clause prevents, has given rise to "liberty interests," defined by the Supreme Court as confinement, without more, of "a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[258] "Liberty interests," however, include more than the right not to be unnecessarily confined.[259] The Fourteenth Amendment's right to practice one's calling is a "liberty interest" but is subject to some governmental regulation.[260] The Supreme Court has proclaimed that damages to one's reputation is not

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254. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). A United States district judge recently opined that "unnecessary stress, confusion, and wasted time," even if caused by one acting under color of law, is not compensable under § 1983 because freedom from such harassment is not guaranteed by the Due Process Clause. *See* Wright v. Onembo, No. Civ. A. 99-4778, 2000 WL 1521567 at **4, 5 (E.D. Pa. Oct. 4, 2000).

255. *Collins*, 503 U.S. at 125.

256. *See Moyer*, 212 U.S. at 85. ("So long as arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief."). Justice Oliver Wendell Holmes made it clear that the duration of the detention might make a difference on whether constitutional rights were involved. *Id.*

257. *Parratt*, 451 U.S. 527. That case was overruled to the extent that it said that one may be "deprived" of property by the negligence of the state. *Id.* at 531. *See Daniels*, 474 U.S. at 330. *See supra* text accompanying note 248 and *infra* text accompanying note 268.

258. O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). The Court added that, "[t]here can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *Id.* at 580. A patient who was admitted to a state mental health treatment facility as a result of his "voluntary" admission forms signed while he was heavily sedated is deprived of his liberty interest despite post-deprivation damage remedies available to him. *See* Zinermon v. Burch, 494 U.S. 113, 138 (1990).

259. *See Pub. Utils.*, 343 U.S. at 468 (Douglas, J., dissenting).

260. Conn v. Gabbert, 526 U.S. 286, 293 (1999) (holding the Constitution is not violated by the execution of a search warrant, "whether calculated to annoy or even to prevent [an attorney's] consultation with a grand jury witness"). *Id.* at 293.

a "liberty interest."[261] An unlawful denial of a state right to hold a state political office is not a right to property or liberty secured by the Due Process Clause.[262]

b. The Commerce Clause. A Commerce Clause right is enforceable in a § 1983 action.[263]

c. The Equal Protection Clause. The Supreme Court has held that state courts that upheld restrictive covenants as to the use of land constituted "state action" in violation of the Equal Protection Clause of the Fourteenth Amendment.[264]

d. The Eighth Amendment. Depriving a prisoner of proper medical treatment may constitute "cruel and unusual punishment" under the Eighth Amendment when such deprivation evinces a "deliberate indifference to serious medical needs;" mere negligence (e.g., failure to order an x-ray), rather than being the subject of an Eighth Amendment-based § 1983 action, is the proper subject of a malpractice action in state court.[265] The Court has said that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."[266]

B. The Criminal Statute—18 U.S.C. § 242

Section 242, which provides criminal penalties for the perpetration of discrimination, contains the following language:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully[267] subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights,

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261. *See Paul v. Davis*, 424 U.S. 693, 699, 708-09 (1976) (where recovery was denied when a city police chief circulated a flyer with a person's name and photograph appearing under a caption proclaiming "Active Shoplifters"). Also, one who lost his job because of a letter written by a former supervisor to a prospective employer had not lost a "liberty" interest that could be the subject of a § 1983 action. Siegert v. Gilley, 500 U.S. 226, 233 (1991).

262. Snowden v. Hughes, 321 U.S. 1, 7 (1944).

263. Dennis v. Higgins, 498 U.S. 439, 451 (1991).

264. Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

265. *See* Estelle v. Gamble, 429 U.S. 97, 106-07 (1976).

266. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

267. The state-of-the-mind requirement mandated by use of the word "willfully" does not appear in the civil counterpart of § 242. Daniels v. Williams, 44 U.S. 327, 329-30 (1986).

> privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisonment not more than one year, or both . . . .[268]

There are slight, superficial differences between the two statutes. The authority provision of § 1983 contains the wording "any statute, ordinance, regulation, custom or usage,"[269] whereas the authority provision of § 242 contains the wording "any statute, ordinance, regulation, or custom."[270] The protected rights provisions of § 1983 contain the words "rights, privileges, or immunities secured by the Constitution and laws,"[271] whereas the protected rights provision of § 242 contains the words "rights, privileges, or immunities secured or protected by the Constitution or laws."[272]

Section 1983 of title 42 and § 242 of title 18 are mechanisms of enforcement. They do not forbid deprivation of constitutional or other rights. They simply offer one who has been deprived of such rights a mechanism by which that deprivation may be addressed—§ 1983 by civil action and § 242 by criminal prosecution.[273] It has been opined that

> a section 1983 claim may be brought directly to federal court even though an adequate state remedy exists and . . . state remedies need not first be exhausted . . . . [S]ection 1983 does not, in and of itself, provide any substantive basis for a claim or for relief. Rather, it is a procedural device by which a plaintiff may bring a claim for relief based on the deprivation of, or infringement on, a federal constitutional right or statutory right.[274]

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268. 18 U.S.C. § 242. Originally, Civil Rights Act of 1866, § 2, 14 Stat. 27; incorporated by Enforcement Act of May 31, 1870, 16 Stat. 141, 144; the statute became § 5510, Rev. Stat. of 1874-1878. § 5510 Rev. Stat. (1909 Criminal Code reenacted as § 20, 35 Stat. 1092. § 52, 44 Stat. 462 became part of the U.S. Code in 1926, and in 1948 it was renumbered as 18 U.S.C. § 242. *See* the Appendix to the plurality opinion of Justice Frankfurter in United States v. Williams, 341 U.S. 70, 83 (1945).

269. 42 U.S.C. § 1983.

270. 18 U.S.C. § 242.

271. 42 U.S.C. § 1983.

272. 18 U.S.C. § 242.

273. "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman*, 441 U.S. at 617.

274. Parker v. Grand Hyatt Hotel, 124 F. Supp. 2d 79, 86 (D.D.C. 2000). The Court in *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) said that § 1983 "creates a species of tort liability that on its face admits of no immunities."

There are other mechanisms that offer redress for deprivation, for example, ordinary complaints, answers, motions in limine, even appellate briefs. When a deprived person uses § 1983, it must be alleged and proved that the wrongdoer acted "under color of any statute, ordinance, regulation, custom, or usage."[275] When the sovereign uses § 242, it must be alleged and proved that the wrongdoer willfully acted "under color of any law, statute, ordinance, regulation, or custom."[276] If § 1983 or § 242 are not used, it must be alleged and proved that the wrongdoer's acts of deprivation constituted "state action."

IV. THE SUPREME COURT'S ANALYSIS OF "UNDER COLOR OF" OR "STATE ACTION"

It was not until 1915 that the United States Supreme Court in *Myers v. Anderson*[277] considered the term "under color of" in connection with a deprivation of rights case. Prior to that time, the Court referred to the term only in passing and not in connection with deprivation of rights. In five cases, the Court indicated that if an act was performed "under color of" some authority it was performed under the auspices of a sovereign.[278] A 1932 case came to the same conclusion.[279] These are the so-called "official capacity" suits.[280] In eight cases, however, the court indicated that if an act was performed "under color of" some authority it was performed without the auspices of a sovereign.[281]

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275. 42 U.S.C. § 1983.

276. 18 U.S.C. § 242.

277. 238 U.S. 368 (1915).

278. *See* Lockhart v. Johnson, 181 U.S. 516, 529 (1901) (observing that one's title by "a prior possession under color of law or title being sufficient as against an ouster by a mere trespasser"); McCain v. City of Des Moines, 174 U.S. 168, 179 (1899) (discussing the effect of "overturning an authority that had lasted four years, and which had been initiated under color and by reason of an act of the legislature"); Lanahan v. Sears, 102 U.S. 318, 321-22 (1880) (a constitutional homestead protects "the domestic sanctuary from every species of intrusion which, under color of law, would subject the property, by any disposition whatever, to the payment of debts"); Tweed's Case, 83 U.S. 504, 518 (1872) (the defense was to the effect that property sought to be sequestered was being held by defendant "under color of the acts of Congress"); Baltimore v. Baltimore R.R., 77 U.S. 543, 553 (1870) (the subject "tax was enacted under color of law").

279. Sterling v. Constantine, 287 U.S. 378, 393 (1932) (enjoining a state governor and other state officials from enforcing their military or executive orders regulating or restricting production of oil).

280. *See infra* text accompanying note 288.

281. *See* Williams v. United States, 168 U.S. 382, 387 (1897) (dealing with a statute which prohibited "any extortion or willful oppression under color of law" in connection with the collection of taxes); D. M. Osborne v. Missouri Pac. Ry. Co., 147 U.S. 248, 258 (1893) (referring to the "appropriation of private property to public use, under color of law, but in

These are the so-called "personal capacity" suits.[282] Between 1915 and March 2004, the United States Supreme Court considered forty cases in which either "under color of" or "state action" were discussed. Thirty-three of those cases mentioned (and many of them discussed) "state action" as well as "under color of;" seven of them restricted their discussion to "under color of."[283]

Two major types of cases have emerged.[284] One in which the wrongdoer is the state and the other in which the wrongdoer is a private party, often referred to by the Court as the "state actor."[285] The Court has referred to the first type of case as the "official capacity" case.[286] This Article refers to them as such and also as the "use of authority" cases. The Court has referred to the second type of case as the "personal

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fact without authority"); Poindexter v. Greenhow, 114 U.S. 270, 281 (1885) (referring to "the wrongdoer, who under color of law, but without law, disturbs or dispossesses him"); Liverpool, New York & Philadelphia S.S. Co. v. Comm'r of Immigration, 113 U.S. 33, 38 (1885) (referring to money paid by plaintiff "and received by defendant under color of law, and paid by plaintiff in ignorance of its rights"); Mitchell v. Clark, 110 U.S. 633, 640 (1884) (referring to "acts, performed or omitted under orders of officers of the government, even when there was only color of authority"); Read v. Plattsmouth, 107 U.S. 568, 580 (1883) (referring to bonds that were issued "under color of law, whether general or special, but without actual authority"); Voorhees v. Jackson, 35 U.S. 449, 474 (1836) (the Court opining that:

> [i]f not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under colour of law, which can properly be deemed to have been done *coram non judice*; that is, by persons assuming the judicial function in the given case without lawful authority);

Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518, 559 (1819) ("The illegal proceedings in the reign of Charles II were under color of law").

282. *See infra* text accompanying note 288.

283. Kentucky v. Graham, 473 U.S. 159 (1985); Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971); *Pub. Utils.*, 343 U.S. at 451; Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915).

284. The Fourth Circuit Court of Appeals in *Lugar v. Edmondson Oil Co.*, 639 F.2d 1058, 1063 (4th Cir. 1981), saw three types. In the first type of case the deprivation was the result of some official act of the state. In the second, "private actors alone are alleged to have engaged in what could be called the operational or enforcement level, in conduct that deprived of a secured right" i.e., no state official is involved. *Id.* The third type involves "the conduct of a private defendant . . . alleged to have combined with the acts of state officials at the enforcement or operational level to cause deprivation of a secured right," i.e., the involvement of a state official provides the state action. *Id.*

285. *Lugar*, 457 U.S. at 937 (defining "state actor" as "a state official" or one who "has acted together with or has obtained significant aid from state officials" or "his conduct is otherwise chargeable to the State").

286. Hafer v. Melo, 502 U.S. 21, 27 (1991).

capacity" cases.[287] This Article refers to them as such and also as the "abuse of authority" cases.

The second type of case has five sub-types. In sub-type II-A the state actor is an employee or agent of the state with complete authority to take certain action, but the state actor intentionally or negligently misuses that authority. In sub-type II-B the state actor is merely following some dictate of the state. In sub-type II-C the state actor, whether or not an employee or agent of the state, conspires with an employee of the state who is either guilty of the deprivation or has a "symbiotic" relationship with the state. In sub-type II-D the state actor is usually not an employee or agent of the state but is guilty of the deprivation while receiving some benefit from the state.[288] In sub-type II-E the state actor is usually not an employee or agent of the state but is guilty of the deprivation, having been delegated some authority by the state that is historically an "exclusive prerogative of the sovereign"[289] or a "public function."[290]

There follows synopses of the forty, aforementioned, Supreme Court decisions.

A. Type I—The "Official Capacity" or "Use of Authority" Cases

From 1915 to 1991, the Supreme Court dealt with "under color of" or "state action" in nine "official capacity or use of authority" (Type I) cases. In *Myers v. Anderson*,[291] *Nixon v. Condon*,[292] and *Lane v. Wilson*,[293] the Court permitted money damages to be recovered against state

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287. *Id.* at 25.

288. This type of case, involving a state actor who discriminates while operating "under color of," is to be distinguished from the case in which the state itself violates the Constitution by giving benefit to a private party who is assisted in its discrimination by the benefit it receives from the State. *See Norwood*, 413 U.S. at 467 (proclaiming in dictum that traditional state monopolies such as electricity, water, police, and fire protection do not in and of themselves establish state involvement in invidious discrimination). *Id.* at 465. *Cf.* Evans v. Newton, 382 U.S. 296, 302 (1966) (extending that pronouncement to municipal recreational facilities).

289. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 160 (1978).

290. The "public function" principle had its origin in *Marsh v. Alabama*, 326 U.S. 501, 507 (1946), where a Jehovah's Witness was convicted of criminal trespass for distributing literature without a license on a sidewalk in Chickasaw, Alabama, a so-called "company town," i.e., a municipality wholly owned by a private corporation. The Supreme Court reversed the conviction because the performance of a "public function" by a private entity deprived the Witness of her First and Fourteenth Amendment rights. *Id.* at 510.

291. 238 U.S. 368, 382-83 (1915).

292. 286 U.S. 73, 105-06 (1932).

293. 307 U.S. 268 (1939).

officials who simply followed their state law governing elections.[294] In *Shelley v. Kraemer*,[295] all six Justices considering the matter[296] agreed that in a case to enforce restrictive covenants, which deprived citizens of their Fourteenth Amendment rights, the state's supreme court rulings approving the covenants constituted "state action."[297] In *O'Connor v. Donaldson*,[298] all nine Justices agreed that when a state committed a "nondangerous" person to a state mental hospital, damages could be recovered against the state because of "state action."[299] Eight Justices[300] agreed that "under color of law" had been established in *Parratt v. Taylor*,[301] when a state prisoner's personal property was lost due to the negligence of prison guards, but the state prisoner could not recover the value of his lost property because negligence does not establish lack of due process.[302] In *Hafer v. Melo*,[303] all eight Justices[304] agreed that the discharge of state employees entailed "state action."[305]

Only in *Reitman v. Mulkey*,[306] when the Court decided that an amendment to a state constitution gave state citizens complete discretion on the use and alienation of their property, was there a five to four split.[307] The four dissenters agreed with the five-member majority that the process of amending the constitution was "state action;"[308] their disagreement with the majority was over the fact that they considered the impact of the amendment to be a manifestation of "governmental neutrality" rather than constitutionally prohibited "state cooperation or partnership."[309] In *Kentucky v. Graham*,[310] all nine

294. *Id.* at 275-77.
295. 334 U.S. 1, 10 (1948).
296. Justices Reed, Jackson, and Rutledge did not participate.
297. 334 U.S. at 20.
298. 422 U.S. 563 (1975).
299. *Id.* at 577. The court also ruled that damages could be imposed against state officials in the case. *Id.*
300. Justice Marshall dissented in part. *See infra* note 350.
301. 451 U.S. 527 (1981).
302. *Id.* at 543-44.
303. 502 U.S. 21 (1991).
304. Justice Thomas did not participate.
305. 502 U.S. at 27.
306. 387 U.S. 369 (1967).
307. *Id.* at 387.
308. *Id.* at 392.
309. *Id.* at 394.
310. 473 U.S. 159 (1985).

Justices agreed that in "personal capacity" cases, costs are not taxed to the employer of the "state actor."[311]

The first deprivation case decided by the Supreme Court under the precursor to 42 U.S.C. § 1983, Revised Statute § 1979, [312] was *Myers v. Anderson*.[313] Three persons of African descent brought an action for damages against two election officials who refused to register them due to their race.[314] The Court, matter-of-factly, affirmed an award of an unspecified amount of damages without discussion of the term "under color of" contained in the revised statute.[315]

In *Nixon v. Condon*,[316] a person of African descent brought an action against judges of Texas elections to recover damages for their refusal to permit him to vote in a Democratic primary due to his race.[317] The district court dismissed the suit because a state statute had permitted political parties to determine the qualification of its members.[318] The Fifth Circuit affirmed, and the Supreme Court reversed.[319] Justice Benjamin Cardozo, writing for the five-member majority, left no doubt that this was an "official capacity" action:

> Indeed, adherence to the statute leads to the conclusion that a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the state had not conferred it, there would be hardly color of right to give a basis for its exercise.[320]

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311. *Id.* at 165.

312. *See supra* text accompanying note 70.

313. 238 U.S. 368 (1915).

314. *Id.* at 377.

315. *Id.* at 383. There were no dissenting votes. Justice McReynolds did not participate in the consideration or decision of the case. *Id.*

316. 286 U.S. 73 (1932).

317. *Id.*

318. *Id.* at 81.

319. *Id.* at 89.

320. *Id.* at 85. Five years prior to this case, the Supreme Court held invalid the Texas statute which provided that "'in no event shall a negro be eligible to participate in a Democratic party primary election.'" Nixon v. Herndon, 273 U.S. 536, 540 (1927). Justice Oliver Wendell Holmes wrote the majority opinion in which he said that "[s]tates may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." *Id.* at 541.

In *Lane v. Wilson*,[321] persons of African descent sued three county election officials for $5000 damages under 8 U.S.C. § 43[322] because the county election officials, following a state statute, denied them registration in the Oklahoma general election due to their race, in violation of the Fifteenth Amendment.[323] The Supreme Court, concluding that the state statute decreed the discrimination and that the officials acted "under color of" the statute, held that plaintiffs were entitled to relief.[324] Justice Frankfurter, writing the majority opinion, stated: "The basis of this action is inequality of treatment though under color of law, not denial of the right to vote."[325] The Court, however, did not specify whether the money judgment, which was to be entered on remand, would be against the election officials personally, as named defendants, or against the State of Oklahoma.[326] Two Justices dissented (though without writing an opinion) because they thought the lower court was correct.[327]

In *Shelley v. Kraemer*,[328] there were restrictive covenants in recorded instruments based on a common law policy of denying people of African and Mongolian descent the right to own property in a certain subdivision containing property owned by people of the Caucasian race. Certain Caucasians sued a person of African descent for injunctive relief to enforce the covenants. The Fourteenth Amendment was asserted as a defense.[329] The highest courts of Michigan and Missouri upheld the covenants.[330] The United States Supreme Court reversed,[331] determining that the action of the state's supreme court was "state action," which violated the Equal Protection Clause of the Fourteenth Amendment.[332] Chief Justice Vinson wrote: "The judicial act of the highest

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321. 307 U.S. 268 (1939).

322. *Id.* at 268. The precursor to 42 U.S.C. § 1983 (*see supra* text accompanying notes 70-72).

323. U.S. CONST. amend. XV.

324. *Lane*, 307 U.S. at 274.

325. *Id.*

326. *Id.* at 277. From recent pronouncements of the Supreme Court (*see infra* text accompanying notes 344-61), the judgment should be against the state and not against the state agents personally.

327. *Lane*, 307 U.S. at 277. Justices McReynolds and Butler dissented without opinion. Justice Douglas did not participate.

328. 334 U.S. 1 (1948).

329. *Id.* at 12.

330. *Id.* at 4.

331. Thurgood Marshall represented one of the Petitioners.

332. *Shelley*, 334 U.S. at 19. Determining that both the buyer and seller were willing and able sellers and purchasers, Chief Justice Vinson wrote: "[I]t is clear that but for the active intervention of the state courts, supported by the full panoply of state power,

court of the state, in authoritatively construing and enforcing its laws, is the act of the state."[333] The vote to reverse was six to zero.[334]

In *Reitman v. Mulkey*,[335] a provision of the California Constitution provided that neither the state nor any subdivision or agency shall deny the right of an owner of property to decline to sell or lease on the basis of the owner's absolute discretion.[336] Alleged victims of "absolute discretion" sought an injunction and damages against the private parties who discriminated against them because of their race in violation of the Fourteenth Amendment.[337] The Court affirmed the California Supreme Court, which held that the state constitutional provision in question was "state action" in violation of the Fourteenth Amendment.[338]

Justice Byron White wrote:

> Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. [The Constitutional provision in question] was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State.[339]

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petitioners would have been free to occupy the properties in question without restraint." *Id.*

333. *Id.* at 15 (quoting Twining v. New Jersey, 211 U.S. 78, 90-91 (1908)).

334. Justices Reed, Jackson, and Rutledge did not participate. *Id.* at 23.

335. 387 U.S. 369 (1967) (Thurgood Marshall was involved as Solicitor General of the United States).

336. *Id.* at 370.

337. *Id.* at 371.

338. *Id.* at 392. The California constitutional provision in question, Art I, Sec. 26, was the result of the famous California "Proposition 14," an attempt in 1964 to counteract a series of enactments by the California legislature to restrict the rights of private landowners to discriminate on the basis of race. The California electorate approved Proposition 14 by a two-to-one margin in the popular referendum resulting in the amendment in question.

Justice Harlan wrote a dissenting opinion in which Justices Black, Clark, and Stewart joined. They thought that a state's decision to remain "neutral" cannot be "state action." *Id.* at 387-95 (Harlan, J., dissenting). Harlan stated that the only evidence that the California Supreme Court had before it indicating that the amendment was discriminatory was that many of the proponents of Proposition 14 had voiced strong opposition to the aforementioned series of anti-discrimination enacted by the California legislature. *Id.* at 390-91 (Harlan, J., dissenting). Justice Harlan opined that

> [a] state enactment, particularly one that is simply permissive of private decision-making rather than coercive and one that has been adopted in this most democratic of processes, should not be struck down by the judiciary under the Equal Protection Clause without persuasive evidence of an invidious purpose or effect.

Id. at 391 (Harlan, J., dissenting).

339. *Id.* at 380-81.

Four Justices dissented.[340]

In *O'Connor v. Donaldson*,[341] one who had been committed to a state mental hospital brought a § 1983 action seeking damages against the hospital's superintendent and several staff members, alleging that he had been maliciously deprived of his Fourteenth Amendment right to liberty.[342] The Supreme Court unanimously held that he could maintain the action based upon the reason explained by Justice Stewart in the Court's opinion: "[A] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[343]

Another issue considered by the Court was whether a money judgment could be entered against the Superintendent because he claimed he was merely following the dictates of his office.[344] The Court made it clear that upon remand the circuit court of appeals was to consider only the issue of whether the superintendent was to be held personally liable for damages; if it answered that question in the affirmative, it was to remand the case to the district court for a determination of whether the superintendent had an immunity from damages.[345]

Parratt v. Taylor[346] dealt with a § 1983 action filed by a prisoner against prison officials (guards), seeking to recover the value of his hobby kit, which was lost through the negligence of the officials in deprivation of his Fourteenth Amendment rights.[347] The Court lost no time in concluding that this deprivation occurred "under color of state law" because defendants were "state employees in positions of considerable authority."[348] The prisoner's action was deficient, however, and recovery was denied because his deprivation was not of a constitutional

340. *Id.* at 391 (Harlan, J., dissenting). Justices Black, Clark, and Stewart joined Justice Harlan in his dissent, which acknowledged that the act of the state legislature in enacting the new statute was "state action." *Id.* (Harlan, J., dissenting).

341. 422 U.S. 563 (1975).

342. *Id.* at 565.

343. *Id.* at 576.

344. It must be noted that while this was a § 1983 case, no mention was made of the term "under color of" and while "state actors" were named rather than the state itself, this was an "official capacity"/"use of authority" case and not a "personal capacity" case.

345. *O'Connor*, 422 U.S. at 577.

346. 451 U.S. 527 (1981).

347. *Id.* at 529.

348. *Id.* at 535-36.

right. Therefore, the negligence did not equate with lack of due process of law.[349] One Justice partially dissented.[350]

In *Kentucky v. Graham*,[351] a § 1983 action, seeking money damages for a raid and subsequent arrest[352] made without a warrant, was brought against the Commissioner of the Kentucky State Police, individually and as an official of the state, under the Fourth, Fifth, Sixth, Eleventh, and Fourteenth Amendments. The State was not sued for damages, but an assessment of attorney fees was sought should plaintiffs eventually prevail.[353] Based upon the precedent of *Brandon v. Holt*,[354] which made clear the distinction between "official capacity" and "personal liability" actions, the Supreme Court held that it was error to award fees against the governmental entity that employed the "state actor" because this was a "personal liability" and not an "official capacity" action.[355] When one seeks recovery against a sovereign, there is a greater burden than when one seeks recovery merely against an official of the sovereign. Writing the unanimous opinion, Justice Thurgood Marshall stated:

> [T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation.[356]

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349. *Id.* at 543.

350. Though Justice Thurgood Marshall agreed with practically everything in the majority opinion, he could not agree with the judgment of the Court because there was nothing in the record establishing that the prisoner had been informed by the officials that he had alternative means of redress. *Id.* at 555 (Marshall, J., dissenting).

351. 473 U.S. 159 (1985).

352. Plaintiffs alleged that they were "severely beaten, terrorized, illegally searched, and falsely arrested." *Id.* at 161.

353. *Id.*

354. 469 U.S. 464 (1985), which was decided just six months earlier. For an earlier case to the same effect, see *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 50 (1944).

355. *Graham*, 473 U.S. at 162. While this statement of the rule is correct, it may have been made inappropriately here because this appears to be an "official capacity" case rather than a "personal liability" one. The reason for naming the Commissioner of Police individually as well as in his official capacity is not elucidated. *Id.*

356. *Id.* at 166 (citations omitted). It was also said that

> [p]ersonal-capacity suits seek to impose personal liability upon a governmental official for actions he takes under color of state law . . . . Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." . . . As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all

In *Hafer v. Melo*,[357] the Supreme Court permitted discharged employees of the Commonwealth of Pennsylvania to bring a § 1983 action for damages against the State's Auditor General in her personal capacity.[358] Justice O'Connor, writing the Court's unanimous opinion[359] and expanding on *Graham*, made it clear that in an "official capacity" case the real party in interest is the governmental unit, even if it is not made a party defendant.[360] Even though a suit against a state for official acts performed by state officials is an action against the state itself, the Court held that damages may be recovered in a § 1983 action against those officials who deprived others of their federal rights simply because those officials performed their duties as authorized by the governmental entity that employed them.[361] The rationale for that proposition was that when it was said in *Will v. Department of State Police*[362] that those officials were not "persons" within § 1983, what was intended was that such officials were not covered by § 1983 in an "official capacity" action; they "fit comfortably," however, within the statutory term "person" when named in a "personal liability" action.[363] The second reason for the Court's decision is that "[s]tate executive officials are not entitled to absolute immunity for their official actions."[364] Hence, it appears that when there is no deviation from the official dictates of the authority, both the state official and the state may be sued under § 1983.[365]

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respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

Id. at 159 (citations omitted).

357. 502 U.S. 21 (1991).

358. *Id.* at 23.

359. Justice Thomas took no part in the consideration or opinion of the case. *Id.* at 31.

360. *Id.* at 25.

361. *Id.* at 25, 31. "[F]ulfilling governmental responsibilities" as the Court expressed the concept. *Id.* at 28.

362. 491 U.S. 58, 70 (1989).

363. *Hafer*, 502 U.S. at 27. Because Justice Thomas did not participate in the case, that explains why he did not object to the Court's reference to "personal capacity" actions. It is curious, however, that Justice Scalia, who along with Justice Thomas thought that *Monroe*, 365 U.S. 167 (1961), was incorrectly decided, failed to object.

364. *Hafer*, 502 U.S. at 29. *See infra* note 556 regarding the Supreme Court's ruling in *Wyatt v. Cole*, 504 U.S. 158, 159 (1992), regarding immunities.

365. It would appear that under the liberal Rules of Civil Procedure a "personal liability" count may be joined with an "official capacity" count.

B. *Type II—The "Personal Capacity" Cases*

1. Sub-type II-A–Misuse or abuse of authority, i.e., the "pretense" or "pretext" meaning of "under color of"

The cases that fall into sub-type II-A are those involving an "abuse" or "misuse" of authority possessed by an official.[366] Perhaps the question that has perplexed more legal minds than any other in this quest for the meaning of "under color of" is whether the term is broad enough to include acts of officials that are performed outside the scope of their authority. For example, are the acts of a police officer, who, pursuant to a valid warrant of arrest, uses excessive force to effect the arrest "under color of" the authority of his office, or is the term limited to official acts of the sovereign that would give rise to an "official capacity" type of action?

United States v. Classic[367] and *Screws v. United States* [368] indicate that "under color of" contained in the statutes providing a remedy for deprivation of rights includes the intentional excessiveness to warrant conviction.[369] The first split of opinion about the breadth of the term appeared in *Screws*.[370] Justice William O. Douglas, in his plurality opinion, made it clear that the term was broad enough to include abuse of authority by officials.[371] If officials exceeded their authority, they were not acting "under law," but "under color of law" or in "pretense" of the law.[372] Justice Wiley B. Rutledge, in a concurring opinion slightly longer than the plurality opinion, stated that he would have voted to affirm the conviction of the state officials who had exceeded their authority but for his position that Congress, in enacting the precursor to 18 U.S.C. § 242, lacked the power to pass a statute making a state official guilty of a crime which was, in fact, an offense of the state.[373] Justice Roberts, joined by Justices Frankfurter and Jackson, dissented on the same ground.[374]

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366. *See, e.g., Screws*, 325 U.S. 91.

367. 313 U.S. 299 (1941).

368. 325 U.S. 91 (1945).

369. In *Williams v. United States*, 168 U.S. 382, 387 (1897), the Supreme Court dealt with a statute that used the term "under color of law" to prohibit acts in excess of authority for the purpose of extorting and oppressing in connection with the collection of taxes.

370. *Screws*, 325 U.S. at 91.

371. *Id.* at 111.

372. *Id.*

373. *Id.* at 133 (Rutledge, J., concurring).

374. *See infra* note 415.

Williams v. United States[375] continued the "pretence" meaning of "under color of," with Justices Frankfurter and Jackson dissenting on the same ground as their dissent in *Screws*;[376] this time they were joined by Justice Minton.[377] The Court in *Monroe v. Pape*[378] extended the "pretence" basis to an action for damages under § 1983.[379] Justice Frankfurter registered a strong dissent.[380] The Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[381] extended the "pretence" basis to personal libility actions involving federal agents, but in *Correctional Services Corp. v. Malesko*,[382] the Court refused to extend this basis to the federal agency employing them.[383]

In 1988 the Court in *West v. Atkins*[384] extended the "pretence" basis to a § 1983 action for cruel and unusual punishment, in violation of the Eighth Amendment, against a private physician employed by a state prison.[385] Just seven years prior, in *Polk County v. Dodson*,[386] the Court denied a similar right of action against a public defender.[387]

In *United States v. Classic*,[388] state election officials were indicted for violation of Section 20 of the Criminal Code of the United States,[389] which made it a penal offense for anyone "acting under color of any law" to willfully subject or cause any citizen of the United States to be subjected to deprivation of rights, privileges, and immunities secured by the laws and Constitution of the United States. Specifically, state election officials were charged with failure to count the votes actually cast in a state election, alteration of the ballots, and false certification of the number of votes actually cast for the candidates, a violation of the applicable Louisiana statutes.[390] The Supreme Court held that those acts "were committed in the course of their performance of duties under

375. 341 U.S. 70 (1951).
376. *Screws*, 325 U.S. at 134 (Frankfurter and Jackson, JJ., dissenting).
377. *Williams*, 341 U.S. at 104 (Frankfurter, Jackson, and Minton, JJ., dissenting).
378. 365 U.S. 167 (1961).
379. *Id.* at 167.
380. *Id.* at 138 (Frankfurter, J., dissenting). *See infra* text accompanying notes 433-36.
381. 403 U.S. 388 (1971).
382. 534 U.S. 61 (2001).
383. *Id.* at 66.
384. 487 U.S. 42 (1988).
385. *West*, 487 U.S. at 57.
386. 454 U.S. 312 (1981).
387. *Dodson*, 454 U.S. at 324-25.
388. 313 U.S. 299 (1941).
389. 18 U.S.C. §§ 51, 52 (presently 18 U.S.C. § 242).
390. *Classic*, 313 U.S. at 307.

the Louisiana statute," and hence,[391] were "willfully inflicted by those acting under color of any law, statute and the like."[392] Justice Harlan Fiske Stone, writing for the five member majority,[393] said:

> The alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election. Misuse 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.[394]

Three Justices dissented.[395]

In *Screws* the Court reversed the conviction of state police officers under the same Section 20 of the Criminal Code of the United States[396] because the jury was improperly instructed on the issue of defendants' intent.[397] Specifically, they were charged with savagely beating a man of African descent[398]—using excessive force in making an otherwise lawful arrest. The Court first clarified something that was not made clear in *Classic*:[399] "[h]e who acts under 'color' of law may be a federal officer or a state officer, he may act under 'color' of federal law or of state law," the actor may be subject to criminal penalties,[400] predating by twenty-six years a similar ruling in connection with civil penalties.[401] In deciding that the police officers acted "under color of" state law, the Court emphasized that "[h]ere the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective.[402] They acted without authority only in the sense that they

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391. *Id.* at 325-26.

392. *Id.* at 329.

393. Chief Justice Charles Evans Hughes took no part in the consideration or decision of the case. *Id.* at 328.

394. *Id.* at 325-26.

395. *Id.* at 329 (Douglas, Black, and Murphy, JJ., dissenting). Justice Douglas, joined by Justices Hugo Black and Frank Murphy (who on Feb. 3, 1939, as Attorney General, created the Civil Rights Division of the Justice Department), wrote a dissenting opinion in which he thought that Congress should not, and could not, specify crimes in the field of state "primary elections." *Id.* at 326, 341.

396. 18 U.S.C. § 88 (presently 18 U.S.C. § 242).

397. *Screws*, 325 U.S. at 112-13.

398. Described by Justice Douglas as a "shocking and revolting episode in law enforcement." *Screws*, 325 U.S. at 92.

399. 313 U.S. 299 (1941).

400. *Screws*, 325 U.S. at 108.

401. *See infra* text accompanying notes 437-42 dealing with *Bivens*, 403 U.S. 388 (1971).

402. *Screws*, 325 U.S. at 111.

used excessive force in making the arrest effective."[403] The case marked the beginning of the debate, which continues to this day,[404] on whether the phrase "under color of" applies to the issue of the "state actor's" guilt solely by virtue of their abuse or misuse of otherwise valid authority from the sovereign.[405]

Justice William O. Douglas announced the judgment of the Court reversing defendants' conviction and remanding the case for a new trial.[406] He wrote a plurality opinion[407] in which he categorized this type of behavior as acting under "pretense" of law. He said:

> 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 undertake 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.[408]

Justice Rutledge, in a concurring opinion slightly longer than the plurality opinion,[409] took the position that Congress lacked the power to pass a statute denouncing as a federal crime

> the intentional and wrongful taking of an individual's life or liberty by a state official acting in abuse of his official function and applying to the deed all the power of his office. This is the ultimate purport of the notions that state action is not involved and that the crime is against the state alone.[410]

But for that conclusion, he would have voted to affirm the judgment.[411] Justice Murphy dissented because he believed that the judgment of conviction should be affirmed.[412] Justice Roberts, joined by Justices Frankfurter and Jackson, wrote a dissenting opinion.[413] They thought

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403. *Id.*
404. *See supra* note 350.
405. *Screws*, 325 U.S. at 111.
406. *Id.* at 91.
407. He was joined by Chief Justice Stone, and Justices Black and Reed. *Id.* at 92.
408. *Id.* at 111. This is an apparent conflict with Justice Potter Stewart's opinion in *United States v. Guest*, 383 U.S. 745, 755 (1966), an 18 U.S.C. § 241 case ("rights under the Equal Protection Clause itself arise only where there has been involvement of the State *or* of one acting under the color of its authority." *Id.* (emphasis added)).
409. Screws, 325 U.S. at 113-34.
410. *Id.* at 133.
411. *Id.* at 138-60.
412. *Id.* at 134 (Murphy, J., dissenting).
413. *Id.* at 138 (Roberts, Frankfurter, and Jackson, JJ., dissenting).

that the judgment should have been reversed absolutely rather than sending the case back for a new trial.[414] In their view "under color of" does not cover the situation of a deprivation of rights by police officers who misuse or abuse their authority.[415]

In *Williams v. United States*,[416] a private detective, who held a special police officer's card issued by the Miami, Florida Police Department, was prosecuted under Section 20 of the Federal Criminal Code.[417] He, along with a police officer, obtained a confession from a suspected thief by beating, threats, and "unmerciful" punishment for several hours.[418] Based primarily on *Classic*[419] and *Screws*,[420] the Court determined that defendant was acting "under color of state law."[421] Justice William O. Douglas, writing for a five-member majority,[422] said:

> this was an investigation conducted under the aegis of the State, as evidenced by the fact that a regular police officer was detailed to attend it . . . . [P]etitioner was no mere interloper but had a semblance of policeman's power from Florida. There was, therefore, evidence that he acted under authority of Florida law; and the manner of his conduct

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414. *Id.*

415. *Id.* at 138-61. Justice Roberts wrote that

> [w]e are asked to construe legislation which was intended to effectuate prohibitions against the States for defiance of the Constitution, to be equally applicable where a State duly obeys the Constitution, but an officer flouts State law and is unquestionably subject to punishment by the State for his disobedience . . . Such a distortion of federal power devised against recalcitrant State authority never entered the minds of the proponents of the legislation.

Id. at 142 (Roberts, Frankfurter, and Jackson, JJ., dissenting). Sixteen years later Justice Frankfurter wrote his monumental dissent in *Monroe v. Pape*, 365 U.S. 167 (1961) (*see infra* text accompanying notes 432-36) taking the same position.

416. 341 U.S. 97 (1951).

417. 18 U.S.C. § 52 (1940) (presently 18 U.S.C. § 242 (2000)).

418. *Williams*, 341 U.S. at 99.

419. 313 U.S. 299 (1941).

420. 325 U.S. 91 (1945).

421. *Williams*, 341 U.S. at 127.

422. The majority consisted of Chief Justice Stone and Justices Douglas, Reed, Burton, and Clark. Justices Black, Jackson, and Minton dissented. In a case decided the same day, Justice Frankfurter wrote a plurality opinion (Chief Justice Stone, and Justices Frankfurter, Jackson, and Minton were in the plurality; Black concurred only) stating that despite an allegation that defendants acted "under color of state law," an indictment under 18 U.S.C. § 241 against a member of a city police force and employees of a private corporation for extorting confessions against fellow employees was insufficient to charge an offense under that statute since it does not extend protection to rights which the federal Constitution merely guarantees against abridgement by the states. *See* United States v. Williams, 341 U.S. 97 (1951).

> of the interrogations makes clear that he was asserting the authority granted him and not acting in the role of a private person.[423]

The private police officer, being a "state actor," was convicted under the criminal statute 18 U.S.C. § 242, and the conviction was affirmed by five members of the Court.[424]

In *Monroe v. Pape*,[425] at 5:45 on the morning of October 29, 1958, thirteen members of the Chicago police force, without a search warrant, broke into the Monroes' apartment, subjected them to a series of racial indignities because of their African descent, ransacked their residence, and took Mr. Monroe into custody for several hours. He sued under § 1983.[426] The Supreme Court held that the officers violated Mr. Monroe's Fourth Amendment rights based upon the law proclaimed by the Court in the *Classic*,[427] *Screws*,[428] and *Williams*[429] cases.[430] Echoing his opinion in *Screws*, Justice Douglas wrote for the majority:

> There can be no doubt at least since Ex parte Virginia, that Congress has the power 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 .... The question with which we now deal is the narrower one of whether Congress, in enacting [the precursor to § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position .... We conclude that it did so intend.[431]

The case is particularly significant[432] for the dissent of Justice Frankfurter in which he took the position that "under color of" referred

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423. *Id.* at 99-100.

424. Justice Felix Frankfurter (along with Justices Jackson and Minton) dissented for the reasons that caused him to join Justice Roberts's dissent in the *Screws* opinion. *Id.* at 104.

In a companion case decided the same day, the Court held that a conviction of the same defendant under 18 U.S.C. § 241 must be reversed even though he was acting "under color of State law" because the statute applies only to interference with rights that arise from the relationship between the victim and the federal government. *See Williams*, 341 U.S. at 82 (Douglas, Reed, Burton, and Clark, JJ., dissenting).

425. 365 U.S. 167 (1961).

426. *Id.* at 168. The opinion of the Court does not mention the remedy sought; it was presumably damages.

427. 313 U.S. 299.

428. 325 U.S. 91.

429. 341 U.S. 97.

430. *Monroe*, 365 U.S. at 187-88.

431. *Id.* at 171-72 (citations omitted).

432. Justice Powell, concurring in *Monell*, 436 U.S. at 704, wrote that "[f]ew cases in the history of the Court have been cited more frequently than *Monroe v. Pape* . . . ." *Id.*

only to "official capacity" and not to personal liability actions.[433] He wrote that legislative history establishes that Congress did not intend for the term "under color of" to be applied to activities conducted under "pretense of [state] authority."[434] He has some supporters,[435] and his apostasy lingers.[436]

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[437] agents of the Federal Bureau of Narcotics "acting under color of [federal] authority"[438] entered Mr. Bivens's apartment, mangled him in front of his wife and children, arrested him, and threatened to arrest his family; he was taken to a federal courthouse and strip-searched. Bivens sued the agents in federal court, seeking $15,000 damages under the Fourth Amendment, and alleging that the arrest was effected without a warrant or probable cause and by the use of unreasonable force.[439] The Supreme Court, in review of the case, held for the first time that there was an implied private action[440] for damages

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433. *Monroe*, 365 U.S. at 238-39.

434. *Id.*

435. Notable academic commentators have taken the position that *Monroe* was wrong. *See* David Achtenberg, *A Milder Measure of Villany: The Unknown History of 42 U.S.C. § 1983 and the Meaning of 'Under Color of' Law*, 1 UTAH L. REV. 1, 53 n.401 (1999). It would seem that five Justices of the Supreme Court (Blackmun, Brennan, Marshall, Stevens, and White), in *Lugar*, 457 U.S. 922, took that position, at least as to prejudgment attachment cases. *See infra* text accompanying notes 673-82.

436. In 1998 the Supreme Court decided *Crawford-El v. Britton*, 523 U.S. 574 (1998), a § 1983 case, though one having nothing to do with the meaning of "under color of" or "state action;" the issue in *Crawford-El* was whether § 1983 plaintiffs are required to prove elements of their case by clear and convincing evidence, which the Court decided in the negative. The case is significant to this Article, however, because of the dissent of Justice Scalia, joined in by Justice Thomas, in which he said that *Monroe v. Pape* was incorrectly decided. *Crawford-El*, 523 U.S. at 611 (Scalia and Thomas, JJ., dissenting). He wrote that the case converted

> an 1871 statute concerning constitutional violations committed "*under color of* any statute, ordinance, regulation, custom, or usage of any State . . . into a statute covering constitutional violations committed *without* the authority of any statute, ordinance, regulation, custom or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law."

Id. at 611 (Scalia and Thomas, JJ., dissenting). Though his only mention of Frankfurter's dissent in *Monroe* was a citation acknowledgment, it would appear that two sitting Justices of the Supreme Court, Scalia and Thomas, agree with Frankfurter to the effect that "under color of" is applicable only to "official capacity" and not "personal capacity" cases.

437. 403 U.S. 388 (1971).

438. *Id.* at 389.

439. *Id.* at 390.

440. The Court in *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67 (2001), opined that it was "implied" because the Fourth Amendment (the constitutional provision involved in the case) does not expressly provide for the remedy. The Court in *Bivens* acknowledged

against a federal officer alleged to have violated a citizen's constitutional rights while acting "under color of federal law."[441]

Justice Brennan, in the Court's opinion, stated:

> The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well . . . . In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights w[h]ich have been invaded by the officers of the government, professing to act in its name.[442]

Three Justices dissented.[443]

In *Polk County v. Dodson*,[444] a prisoner in the State of Iowa brought a § 1983 action in federal court against Polk County, Iowa, a public defender assigned to his case, and several other defendants. The allegations against the public defender were that she failed to properly represent the prisoner in his appeal to the Iowa Supreme Court.[445] The Supreme Court granted certiorari to answer the question of whether a public defender acts "under color of state law" when providing legal representation to an indigent client.[446] The Court was faced with the issue *vel non* of whether the functions of a public defender constitute acting under color of law.[447] The Court answered the question before it in the negative based on the following factors: (1) a public defender

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that "the Fourth Amendment does not in so many words provide for the enforcement by an award of money damages for the consequence of its violation." *Bivens*, 403 U.S. at 396.

441. *Bivens*, 403 U.S. at 398. Though the courts have not acknowledged it, this ruling must have changed the appellation "state actor" to "sovereign actor."

442. *Id.* at 394-95.

443. *Id.* at 411 (Burger, C.J., Black and Blackmun, JJ., dissenting). Chief Justice Burger dissented primarily on separation of powers principles. He said that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." *Id.* at 422. Justice Black wrote that "[a]lthough congress has created . . . a cause of action against state officials acting under color of state law, it has never created such a cause of action against federal officials." *Id.* at 427. Justice Blackmun foresaw a plethora of suits against federal officers. *Id.* at 430.

444. 454 U.S. 312 (1981).

445. *Id.* at 314.

446. *Id.* at 317.

447. In *Georgia v. McCollum*, 505 U.S. 42, 54 (1992), Justice Blackmun stated that in *Branti v. Finkel*, 445 U.S. 507 (1980), the Court held that a public defender, in making personnel decisions on behalf of the state, is a state actor. *McCollum*, 505 U.S. at 54. That does not appear to be the holding of the *Branti* case.

is an officer of the court;[448] (2) though paid by the State, "a public defender is not amenable to administrative direction in the same sense as other state employees;"[449] (3) the State is obligated to respect the professional independence of the public defenders whom it engages;[450] and (4) "[a]lthough a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy."[451]

Justice Lewis F. Powell, Jr. emphasized the Court's narrow holding with the following words: "[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."[452] One Justice dissented.[453]

In *West v. Atkins*[454] an inmate at a North Carolina state prison-hospital sued a private physician who was under contract with the state to provide part-time orthopedic services to prisoners because they were prohibited from using physicians of their choice. The suit was brought in federal district court, presumably for damages[455] pursuant to § 1983, alleging that plaintiff's Eighth Amendment rights to be free from cruel and unusual treatment had been violated.[456] The case was brought under the Eighth Amendment, but because the Fourteenth Amendment was another ground for relief plaintiff had to prove that the "state actor" (doctor) acted "under color of state law."[457] The Court was unanimous in concluding that such requirement was met.[458]

Justice Blackmun,[459] writing for the Court, stated:

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448. *Polk County*, 454 U.S. at 318.

449. *Id.* at 321.

450. *Id.* at 321-22.

451. *Id.* at 323.

452. *Id.* at 325.

453. *Id.* at 328 (Blackmun, J., dissenting). Justice Blackmun dissented because he thought that the Court had ignored its prior decisions on "under color of," which are discussed in this paper. *Id.* (Blackmun, J., dissenting).

454. 487 U.S. 42 (1988).

455. The opinion does not reveal the remedy sought.

456. *West*, 487 U.S. at 45.

457. *Id.* at 48-49.

458. *Id.* at 57-58. The Court distinguished the doctor here from the lawyer in *Polk County,* 454 U.S. 312 (1981), in that the relationship between the state employer and the employee lawyer representing his client in *Dodson* was adversarial; whereas the relationship between the state employer and the employee doctor caring for his patient here was one of "'close cooperation and coordination' in a 'joint effort.'" *Id.* at 51.

459. Justice Blackmun was the lone dissenter in *Polk County v. Dodson* (holding that a public defender representing an indigent client was not acting "under color of"). 454 U.S. 312, 328.

> The fact that the State employed respondent pursuant to a contractual arrangement that did not generate the same benefits or obligations applicable to other "state employees" does not alter the analysis. It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State. Whether a physician is on the State payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner. Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.[460]

In *Correctional Services Corp. v. Malesko*,[461] the most recent case the Supreme Court has decided concerning "under color of," a federal offender, who was serving time in a privately operated "halfway house" under contract with the Federal Bureau of Prisons, and therefore, "acting under color of federal law," was injured by the negligence of one of its personnel. The offender sued the operator of the "halfway house" in federal court and sought damages.[462] The Supreme Court considered the suit as one requesting an extension of the "implied damages action first recognized in *Bivens* . . . to allow recovery against a private corporation . . .," which the Court refused to do.[463] The rationale of the Court's judgment was that "the purpose of *Bivens* is to deter *the officer*, not the agency," and "to allow a *Bivens* claim against federal agencies 'would mean the evisceration of the *Bivens* remedy, rather than its extension.'"[464] Four Justices dissented.[465]

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460. *West*, 487 U.S. at 55-56.

461. 534 U.S. 61 (2001).

462. *Id.* at 65.

463. *Id.* at 63.

464. *Id.* at 69.

465. *Id.* at 75 (Stevens, Souter, Ginsburg, and Bryer, JJ., dissenting). Justice Stevens, with whom Justices Souter, Ginsburg and Breyer joined, dissented primarily on the ground that the Court extended *Bivens* in *Carlson v. Green*, 446 U.S. 14, 18 (1980), to a violation of Eighth Amendment rights by prison officials despite the absence of a federal statute. There was no reason here not to further the extension to a corporation, which although privately owned, was employed by the Federal Bureau of Prisons. Particularly because the Court in *FDIC v. Meyer*, 510 U.S. 471, 473-76 (1994), drew a distinction between "federal agents" and "federal agencies."

2. Sub-Type II-B—State Actor merely follows edict of the Sovereign[466]

There has been little controversy among the Justices in the Court's rulings concerning "under color of" or "state action" in sub-type II-B cases in which the "state actor" merely follows some directive of the sovereign. In one year[467] the Court considered three cases involving attempts by people of African descent to be served in public eating establishments.[468] All nine Justices were in agreement in determining "state action" in *Peterson v. City of Greenville*[469] in which the "state actor" was following a city ordinance prohibiting integration of races in places of public accommodation. In *Lombard v. State of Louisiana*,[470] eight Justices discovered "state action" by virtue of a statement proclaiming segregation prepared by the Mayor of New Orleans. One Justice dissented.[471] In *Robinson v. State of Florida*,[472] all nine Justices held that state action was present in a state statute which gave a restaurant manager the right to remove any person he thought to be "detrimental."[473] Six years after *Robinson*, seven Justices in *Adickes v. S.H. Kress & Co.*[474] noted that a custom[475] of non-integration of races at a public lunch counter was sufficient to establish "state action."[476] Two Justices dissented.[477]

In *Blum v. Yaretsky*,[478] seven Justices concluded that no "state action" had been established in a case involving reduction of care furnished to Medicaid patients because, even though the State regulated

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466. Actually, in these cases the state actor is not pretending to use the authority of the state in an abusive manner, i.e., misusing it, he is merely following an edict of the state.

467. Between May 20, 1963, (on which the Court decided two of the cases) and June 22, 1964.

468. *Garner v. Louisiana*, 368 U.S. 157, 163 (1961) predated these cases by two years, but in *Garner* the Court was not required to determine the "broader" constitutional question of "state action," *vel non*, as it determined that the conviction of people of African descent for disturbing the peace without any evidence to support it violated their due process rights under the Fourteenth Amendment. *Id.* at 163-64.

469. 373 U.S. 244 (1963).

470. 373 U.S. 267 (1963).

471. *Lombard*, 373 U.S. at 248 (Harlan, J., dissenting).

472. 378 U.S. 153 (1964).

473. *Id.* at 154.

474. 398 U.S. 144 (1970).

475. *See supra* notes 213-22.

476. *Adickes*, 398 U.S. at 213.

477. *Id.* at 213, 234.

478. 457 U.S. 991 (1982).

the care facility in which plaintiff was located, none of those regulations dictated the alleged deprivation.[479]

In *Peterson v. City of Greenville,*[480] boys and girls of African descent seated themselves at a public lunch counter in a store in Greeneville, South Carolina, expecting to be served. When the store manager called the police and announced that the lunch counter was closed, the boys and girls remained and were arrested for trespass. They were convicted under an ordinance that followed the local custom of segregating races at lunch counters. The boys and girls brought an action against the city alleging that they were denied their First Amendment right of free speech and their equal protection of laws secured to them against "state action" by the Fourteenth Amendment.[481] The Supreme Court unanimously held that even though the prosecution originated with the restaurant's proprietor, a private person, the local ordinance requiring the segregation of races in such places as the restaurant was tantamount to the state having "commanded a particular result."[482]

Chief Justice Warren's unanimous opinion stated:

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice. It has thus effectively determined that a person owning, managing or controlling an eating place is left with no choice of his own but must segregate his white and Negro patrons. The [operator of the lunch counter], in deciding to exclude Negroes, did precisely what the city law required.[483]

Lombard v. State of Louisiana[484] is remarkably similar to *Peterson v. City of Greenville,*[485] decided the same day, except that the City of New Orleans, in which the event occurred, had no ordinance prohibiting the segregation of races in public restaurants, as existed in *Peterson*, but rather a public statement of the Mayor to that effect.[486] Chief Justice Warren's opinion[487] stated:

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479. *Id.* at 1012.

480. 373 U.S. 244 (1963). This case was decided the same day as *Lombard v. Louisiana*, 373 U.S. 267, *see infra* text accompanying notes 484-89.

481. *Peterson,* 373 U.S. at 247.

482. *Id.* at 248.

483. *Id.*

484. 373 U.S. 267.

485. *Peterson*, 373 U.S. at 248.

486. *Lombard*, 373 U.S. at 268.

487. Justice Douglas concurred in an opinion in which he stressed the "interdependence" of *Burton* (*see* infra text accompanying notes 518-20, 524-30), which he referred to as being "involved to a 'significant extent.'" *Lombard*, 373 U.S. at 274-83.

> Equally the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance. The official command here was to direct continuance of segregated service in restaurants, and to prohibit any conduct directed toward its discontinuance; it was not restricted solely to preserve the public peace in a nondiscriminatory fashion in a situation where violence was present or imminent by reason of public demonstrations. Therefore, here, as in Peterson, these convictions, commanded as they were by the voice of the State directing segregated service at the restaurant, cannot stand.[488]

One Justice dissented.[489]

In *Robinson v. State of Florida*,[490] the conviction of eighteen persons of African descent was reversed by the Supreme Court because a state statute, which gave managers of restaurants the "right to remove or cause to be removed any person 'who, in the opinion of the management, is a person whom it would be detrimental' to the restaurant to serve" constituted "state action."[491] Justice Black wrote in the unanimous opinion that: "[T]he State through its regulations has become involved to such a significant extent in bringing about restaurant segregation that appellants' trespass convictions must be said to reflect that state policy and therefore to violate the Fourteenth amendment."[492]

In *Adickes v. S.H. Kress & Co.*,[493] a Caucasian teacher, who was denied service by a restaurant and arrested for vagrancy because she was in the company of her students of African descent, sued the operator of the restaurant under § 1983, alleging that she had been deprived of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.[494] The Supreme Court, in reversing a summary judgment for defendants, based its decision on the principle that even though there may not have been a state statute forbidding Caucasians and people of African descent to eat together in public restaurants,[495] such was the custom in the State of Mississippi at the time of the incident in question.[496] The custom or usage, moreover, was not just

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488. *Id.* at 273-74.

489. *Id.* at 255 (Harlan, J., dissenting). While Justice Harlan agreed with the majority in *Peterson* (*see supra* note 480), he would have reversed this case so that "the issue of state action may be properly explored." *Id.*

490. 378 U.S. 153 (1964).

491. *Id.* at 154 n.1.

492. *Id.* at 156-57.

493. 398 U.S. 144.

494. *Id.* at 146.

495. As there was in *Peterson*. *See supra* note 480.

496. *Adickes*, 398 U.S. at 173.

that of some Mississippi residents; it had become so recognized and widespread that it might as well have been the law of the state.[497]

Justice John Marshall Harlan wrote: "The involvement of a state official . . . plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized or lawful."[498] In quoting from Justice Frankfurter, written in another context,[499] Harlan said:

> It would be a narrow conception of jurisprudence to confine the notion of "laws" to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice . . . can establish what is state law. The equal protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text.[500]
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> . . . .
>
> [A] State is responsible for the . . . act of a private party when the State, by its law, has compelled the act . . . .[501]
>
> For state action purposes it makes no difference of course whether the racially discriminatory act by the private party is compelled by a statutory provision or by a custom having the force of law—in either case it is the State that has commanded the result by its law. Without deciding whether less substantial involvement of a State might satisfy the state action requirement of the Fourteenth Amendment, we conclude that petitioner would show an abridgement of her equal protection right, if she proves that [the restaurant] refused her service

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497. *Id.* at 167.

> Congress included customs and usages within its definition of law in § 1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

Id. at 167-68. It must be shown that the state actor was aware of the custom or law *Id.* at 162 n.23. It was said in *Board of County Commissioners v. Brown*, 520 U.S. 397, 404 (1997), that "an act performed pursuant to a 'custom' that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."

498. *Adickes*, 398 U.S. at 152. There was a police officer in the restaurant at the time of the refusal to serve the teacher, and he was the one who arrested her. *Id.* at 156-57.

499. *See* Nashville, C. & St. L. R. Co. v. Browning, 310 U.S. 362 (1940).

500. *Adickes*, 398 U.S. at 168.

501. *Id.* at 170.

> because of a state-enforced custom of segregating the races in public restaurants . . . .[502]
>
> Because the core of congressional concern in enacting § 1983 was to provide a remedy for violations of the Equal Protection Clause arising from racial discrimination, we think that a private person who discriminates on the basis of race with the knowledge of and pursuant to a state-enforced custom requiring such discrimination is a participant in joint activity with the State and is acting "under color of" that custom for purposes of § 1983.[503]

Two Justices dissented.[504]

In *Blum v. Yaretsky*,[505] nursing home residents, who were recipients of Medicaid assistance, brought an action under the Fourteenth Amendment against state officials responsible for administering the Medicaid program of the State of New York. The residents claimed that the nursing home's decision to transfer them to a lower level of care without notice deprived them of their rights to due process.[506] The Supreme Court held that plaintiffs had failed to establish "state action."[507] Despite extensive regulations by the state, the regulations do not "dictate the decision to discharge or transfer in a particular case,"[508] and the decision in question was made not by state officials but by physicians and nursing home administrators, all private

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502. *Id.* at 171.

503. *Id.* at 174 n.44.

504. *Id.* at 188 (Brennan and Douglas, JJ., dissenting). Justices Brennan and Douglas dissented in part to voice their disagreement with the Court's interpretation of what is meant by "custom or usage" as it is used in § 1983. Justice Brennan wrote that "[t]he Court has never held or even intimated, that 'custom or usage' means 'law.'" *Id.* at 213-14. Justice Douglas thought that the "custom" of a State includes its "unwritten commitment, stronger than ordinances, statutes and regulations, by which men live and arrange their lives." *Id.* at 181. Justice Douglas wrote that "[i]t is time we stopped being niggardly in construing civil rights legislation. It is time we kept up with Congress and construed its laws in the full amplitude needed to rid their enforcement of the lingering tolerance for racial discrimination that we sanction today." *Id.* at 188. *See supra* the discussion of "custom or usage" in text accompanying notes 161, 213-22.

505. 457 U.S. 991 (1982) (decided the same day as *Rendell-Baker* and *Lugar*).

506. *Id.* at 993.

507. *Id.* at 992, 997-98. The Court reiterated the position taken in *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980), to the effect that the question of what is "state action" is one of law.

508. *Blum*, 457 U.S. at 1010.

persons.[509] There was no "state action" because there was no exercise of "coercive power" by the state.

Justice Rehnquist wrote: "We conclude that respondents have failed to establish 'state action' in the nursing homes' decision to discharge or transfer Medicaid patients to lower levels of care. Consequently, they have failed to prove that petitioners have violated rights secured by the Fourteenth Amendment."[510] Two Justices dissented.[511]

3. Sub-Type II-C—State actor conspires or has a "symbiotic" relationship with those in authority[512]

Before deprivation can be found in these cases, a close relationship must be established. This relationship is referred to as "interdependence" or "symbiosis" between the state and the "state actor."[513] The Court has been unanimous in two such cases. In *United States v. Price*,[514] some private citizens joined police officers in brutalizing the deprived persons.[515] In *Dennis v. Sparks*,[516] those who willingly conspired with a state judge did so "under color of" state law.[517]

In *Burton v. Wilmington Parking Authority*,[518] six Justices concluded there was "state action" because of a condition of "interdependence"

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509. *Id.* at 1006, 1009. The Court stated that "there is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits to conformity with charges in the cost of medically necessary care." *Id.* at 1005. *Polk County v. Dodson*, 454 U.S. 312 (*see supra* text accompanying notes 340-47).

510. *Blum*, 457 U.S. at 1012.

511. *Id.* (Brennan and Marshall, JJ., dissenting). Justice Brennan, with whom Justice Marshall agreed, thought that the State of New York had delegated a "public function." He wrote that

> [t]he State has set forth precisely the standards upon which the level-of-care determinations are to be made, and has delegated administration of the program to the nursing home operators, rather than assume the burden of administering the program itself. Thus, not only does the program implement the State's fiscal goals, but, to paraphrase the Court, '[t]hese requirements . . . make the State responsible for actual decisions to discharge or transfer particular patients . . .' Where, as here, a private party acts on behalf of the State to implement state policy, his action is state action.

Id. at 1027.

512. In these cases it is immaterial whether the state actor is misusing or abusing the authority of the state. Liability is imposed because of the close relationship with the state.

513. *See, e.g.*, United States v. Price, 383 U.S. 787, 795 n.7 (1966).

514. 383 U.S. 787 (1966).

515. *Id.* at 790.

516. 449 U.S. 24 (1980).

517. *Id.* at 27-28.

518. 365 U.S. 715 (1961).

between the "state actor" and an entity of the state from which it rented space.[519] Three Justices thought the conclusion of "state action" was premature until the basis of the state supreme court's reversal of plaintiff's case was revealed.[520] In another case, *Moose Lodge No. 107 v. Irvis*,[521] six Justices held that there was no "state action" when a private club refused service on the basis of race to an invitee of one of its members.[522] Three Justices dissented.[523]

In *Burton* a man of African descent brought an action in state court against the operator of a restaurant and the Wilmington Delaware Parking Authority ("Parking Authority"), which leased space in its off-street parking building to the operator of the restaurant. The action sought declaratory and injunctive relief for termination for deprivation of plaintiff's equal protection rights under the Fourteenth Amendment by refusing to serve him solely because of his race. It was undisputed that the Parking Authority was a "public body corporate and politic" and that the restaurant was operated by a private entity.[524] The Supreme Court, while recognizing the dichotomy between State discriminatory action and private discriminatory action,[525] held that the "interdependence"[526] between the private restaurant operator and the public Parking Authority caused the private operator's discrimination to be state action that violated the Fourteenth Amendment.[527] While the Court acknowledged that the factual record was incomplete, the following examples of the "interdependence" through benefits received were revealed: the lease was beneficial to the city in order to attain revenue to meet construction costs of the building; the restaurant, to some extent, enjoyed the Authority's tax exemption; the Authority furnished heat, gas service, and extensive repair service; and the Authority had the right to adopt regulations for the operation of the restaurant, among others.[528]

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519. *Id.* at 725.

520. The dissenters, Justices Harlan, Frankfurter, and Whittaker apparently did not consider it necessary to voice their position about the meaning of "state action" until the state supreme court had clarified its ruling.

521. 407 U.S. 163 (1972).

522. *Id.* at 177.

523. *Id.* at 179. *See infra* note 551.

524. *Burton*, 365 U.S. at 717.

525. To the effect that private discrimination is tolerated while public discrimination is not. *See supra* text accompanying notes 5-12.

526. That "interdependence" was labeled "symbiotic" by Justice Rehnquist in *Moose Lodge*, 407 U.S. at 175, and in *Jackson*, 419 U.S. at 357.

527. *Burton*, 365 U.S. at 718-25.

528. *Id.* at 723.

Justice Tom Clark wrote that the Parking Authority had so far "insinuated itself into a position of interdependence with [the restaurant owner] 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."[529] Three Justices dissented.[530]

In *United States v. Price*,[531] fifteen men, along with a sheriff, a deputy sheriff, and a patrolman, were the subject of federal indictments under 18 U.S.C. § 242 for the murder of three men. The victims had been released from jail by defendants so that they could be apprehended again and brutalized, willfully depriving them of their Fourteenth Amendment rights, privileges, and immunities.[532] The defense of the fifteen men, to the effect that they were not acting "under color of law," was discredited by the Court, noting that the "state action" required by the Fourteenth Amendment was identical to the "under color of law" of § 1983 and that "under color of law means the same thing in § 242 that it does in its civil counterpart, 42 U.S.C. § 1983."[533] Justice Abe Fortas wrote the unanimous opinion of the Court:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[534]
>
> Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequenc-

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529. *Id.* at 725. Chief Justice Rehnquist in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 57 (1999), said "*Burton* was one of our early cases dealing with 'state action' under the Fourteenth Amendment, and later cases have refined the vague 'joint participation' test embodied in that case." He was referring particularly to *Blum*, 457 U.S. 991 (1982), and *Jackson*, 419 U.S. 345.

530. *Id.* at 728 (Harlan and Whittaker, JJ., dissenting). Justice Harlan thought that the Court's ruling was premature, in that there should have been a determination of the Delaware Supreme Court's ruling before the U.S. Supreme Court determined "state action" vel non. *Id.* at 728-39 (Harlan and Whittaker, JJ., dissenting). If that court interpreted the state statute as authorizing discrimination based exclusively on race it was constitutionally infirm; if its interpretation was to the effect that, as at common law, the restaurant was free to serve whomever it pleased, there was no constitutional problem. *Id.* at 728-29. Justice Whitaker specifically agreed. Justice Frankfurter was basically in agreement that the Court's ruling on "state action" was premature. *Id.* at 727.

531. 383 U.S. 787 (1966).

532. The offense presumably was racially motivated although the Court's opinion does not explicitly state.

533. *Price*, 383 U.S. at 794 n.7.

534. *Id.* at 794.

> es of that participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law.[535]
>
> In the present case, the participation by law enforcement officers, as alleged in the indictment, is clearly state action . . . and it is therefore within the scope of the Fourteenth Amendment.[536]

In *Moose Lodge No. 107 v. Irvis*,[537] a person of African descent, who was refused service at a private club[538] in Pennsylvania while a guest of a member, brought a § 1983 action seeking to have the state liquor license of the club revoked because its refusal to serve him constituted "state action," depriving him of his Fourteenth Amendment equal rights protection.[539] The Court held that the actions of the club did not constitute "state action."[540] The Court distinguished *Burton* on the basis that there was no evidence of a "symbiotic" relationship.[541] Though the State Liquor Control Board made several regulations concerning the sale of alcoholic beverages, those rules had nothing to do with the membership or guest policies of the club;[542] the club conducts all of its activities in a building owned by the club itself.[543]

Deemphasizing the effect of any benefit received from the State by the "state actor"[544] or any regulations made by the state, Justice Rehnquist wrote for six members of the Court[545] that: "The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatsoever."[546] The Court, having eschewed

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535. *Id.* at 795.

536. *Id.* at 799-800.

537. 407 U.S. 163 (1972).

538. A local branch of a national fraternal organization.

539. *Moose Lodge,* 407 U.S. at 179.

540. *Id.* at 177.

541. *Id.* at 175.

542. *Id.* For similar pronouncements of the Court see *Blum*, 457 U.S. 991, and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). State regulation, however, was an element considered by the Court in *Robinson*, 378 U.S. 153.

543. *Moose Lodge*, 407 U.S. at 171. In *Burton*, 365 U.S. 715, the restaurant where the deprivation occurred was operated in leased premises.

544. The Court pointed out that the "private entity" receives such "state-furnished services" as "electricity, water, and police and fire protection . . ." *Moose Lodge*, 407 U.S. at 173.

545. *Id.* at 179-90 (Douglas, Brennan, and Marshall, JJ., dissenting).

546. *Id.* at 173. He described the situation in *Burton* as "the private lessee obtained the benefit of locating in a building owned by the state-created parking authority . . . ." *Id.* at 175. *See infra* text accompanying notes 557-77 concerning benefit received by the

both state-benefit and regulated bases, attempted to discover an involvement between the state and the club (as in *Burton*[547]) and concluding no involvement existed, ruled that there was no actionable deprivation of rights on the part of the club (i.e., "state action") because the state had not "significantly involved itself" with the club.[548]

Quoting *Reitman v. Mulkey*,[549] Justice Rehnquist wrote that "[w]here the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'"[550] Three Justices dissented.[551]

Dennis v. Sparks[552] was a § 1983 action seeking damages against a state court judge and others for having conspired to bribe the judge in order to obtain an injunction.[553] The Supreme Court held that dismissal of the charges against the judge on absolute immunity grounds[554] would not prevent a finding that those who cooperated with the judge did so "under color of" law.[555] Justice Byron White, writing

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state actor from the state.

547. 365 U.S. 715.

548. *Moose Lodge*, 407 U.S. at 173. Justices Douglas, Brennan, and Marshall, in dissent, saw the liquor license as the instrument by which the state became the "active participant" with the "state actor" at least in the operation of the bar, which in a state where the dispensation of liquor is strictly enforced is of considerable weight. *Id.* at 179-90 (Douglas, Brennan, and Marshall, JJ., dissenting).

549. 387 U.S. 369, 380 (1967).

550. *Moose Lodge*, 407 U.S. at 173 (adding that if such "necessities of life" as electricity, water, police, and fire protection were to trigger a finding of state action, the distinction between "private" and "state conduct" would be emasculated. *Id.* Justice Rehnquist stated that with one irrelevant exception "there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended either overtly or covertly to encourage discrimination. *Id.* at 176.

551. *Id.* at 179 (Douglas, Brennan, and Marshall, JJ., dissenting). Justices Douglas, Brennan, and Marshall, determined that in a state such as Pennsylvania, which has a "state store" system of alcohol distribution and liquor can be obtained under highly regulated conditions, the issuance of a liquor license to a private club makes the state its active participant in connection with any form of discrimination. *Id.* at 179-90, particularly 183.

552. 449 U.S. 24 (1980).

553. *Id.* at 25-26.

554. This doctrine dates back to 1872. *See* Bradley v. Fisher, 13 Wall. 335 (1872); Pierson v. Ray, 386 U.S. 547, 553 (1967). In *Clinton v. Jones*, 520 U.S. 681, 707 (1997), a § 1983 case, it was decided that even the President of the United States is not automatically granted an immunity from civil lawsuits based upon his private conduct. Twelve years after *Dennis v. Sparks*, in *Wyatt v. Cole*, 504 U.S. 158, 159 (1992), the Court held that private defendants charged with 42 U.S.C. § 1983 liability for invoking state pre-judgment replevin, garnishment, and attachment statutes, later declared unconstitutional, are not entitled to qualified immunity from suit. *Wyatt*, 504 U.S. at 168-69.

555. *Dennis*, 449 U.S. at 27.

for the unanimous Court, dealt mostly with judicial immunity, but regarding "under color of" he said:

> [T]o act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting [ ] "under color" of law for purposes of § 1983 actions . . . . Private parties who corruptly conspire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases.[556]

4. Sub-Type II-D—State actor received some "benefit" from the sovereign[557]

In these cases, before deprivation is found, it must be established that the "state actor" received some benefit from the state. The Justices were unanimous in their determination of "state action" in *Norwood v. Harrison*,[558] in which a state furnished the use of textbooks to private schools without any check on whether the school had a policy of racial discrimination.

Six Justices in *Public Utilities Commission v. Pollak*[559] thought that a transit company's being a governmentally protected monopoly did not constitute grounds to enjoin, under the First or Fifth Amendments, its broadcasting of paid advertisements in its buses.[560] Two Justices dissented.[561] In like vein, six Justices determined that extensive regulations by the state and the allowance of a privately owned public utility company to be a monopoly did not cause it to become a "state actor" in *Jackson v. Metropolitan Edison Co.*[562] Three Justices dissented.[563]

In *Pollak* bus passengers claimed that the privately owned but federally regulated public utility company, Capital Transit Company, violated the First and Fifth Amendment rights of bus riders by playing

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556. *Id.* at 27–29.

557. In these cases it is immaterial whether or not the state actor misuses or abuses the authority of the state. Liability is imposed because of the benefit received from the state by the state actor.

558. 413 U.S. 455 (1973).

559. 343 U.S. 451 (1952).

560. *Id.* at 463.

561. *Id.* at 467 (Black and Douglas, JJ., dissenting). *See infra* note 567.

562. 419 U.S. 345, 353 (1974).

563. *Id.* at 359 (Douglas, Brennan, and Marshall, JJ., dissenting). *See infra* note 577.

piped-in music, speeches, "propaganda," and "news" on its buses.[564] They sought an injunction against the continuation of the practice.[565] The Court, in denying relief to plaintiffs, made it clear that the mere fact that the transit company had received the benefit of being a governmentally protected monopoly, franchised by Congress, was not sufficient to constitute "Federal Government action" to invoke the First and Fifth Amendments.[566] Two Justices dissented.[567]

Norwood v. Harrison[568] is a case applicable to the Fourteenth Amendment rather than to the Civil Rights Acts because it deals with what is impermissible "state action." Parents of some school children in Mississippi filed a class action to enjoin the continuance of a state program that loaned textbooks to both public and private schools without regard as to whether the schools had racially discriminatory policies in violation of their "constitutional rights."[569] The Supreme Court observed that there are traditional services furnished by a state (e.g., electricity, water, and police protection) that do not constitute a showing of state involvement with invidious discrimination.[570] It unanimously found "state action" existed in this case, however, and struck the program down for violating the Equal Protection Clause of the Fourteenth Amendment by "significantly aid[ing] the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire."[571]

In *Jackson v. Metropolitan Edison Co.*,[572] a customer brought a § 1983 action against a privately owned and operated public utility, which held a Certificate of Public Convenience from the State of Pennsylvania, alleging damages due to discriminatory termination of her

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564. *Pollak*, 343 U.S. at 466-67. Justice Frankfurter feeling that he had become a "victim" of the practice, recused himself from consideration of the case. *Id.*

565. *Id.* at 458.

566. *Id.* at 463. *See infra* note 461 for another monopoly case.

567. *Id.* at 467 (Black and Douglass, JJ., dissenting). Justice Black thought that the broadcasting of speeches and the like would infringe bus passengers' First Amendment rights. *Id.* at 466. Justice Douglas, who dissented in *Moose Lodge*, 407 U.S. 163, dissented in this case on the ground that by the commission's forcing a captive audience to listen, it deprived the members of that audience of their liberty interests under the Fourth Amendment. *See supra* text accompanying notes 537-38.

568. 413 U.S. 455 (1973).

569. *Id.* at 457.

570. *Id.* at 465. The Court in *Moose Lodge*, 407 U.S. at 173, made the same observations and, in *Evans v. Newton*, 382 U.S. 296, 302 (1966) (observing that such services as, e.g., parks, playgrounds, athletic facilities, amphitheaters, museums, and zoos are furnished by the state).

571. *Norwood*, 413 U.S. at 467.

572. 419 U.S. 345 (1974).

electric services.[573] The Supreme Court held that the state did not have a sufficient "connection" with the utility to require a determination that the termination constituted a "governmentally protected monopoly," despite the fact that the utility was extensively regulated.[574] Justice Rehnquist, writing for the majority, stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment . . . .[575] Approval by a state utility commission of . . . 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."[576]

Three Justices dissented.[577]

5. Sub-Type II-E—State Actor has been delegated a "public function" by the Sovereign[578]

In Sub-type II-E cases, before the court will find a prohibited deprivation of rights, it must conclude that the state delegated some power that is traditionally reserved to the sovereign, a "public function." This is the area of the law in which most of the cases are litigated, and

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573. *Id.* at 346.

574. *Id.* at 350-52. Writing for the Court, Justice Rehnquist, by way of dictum, said that if the state had delegated to the utility some power traditionally associated with sovereignty, such as eminent domain, the result might be different. *Id.* at 353. The three Justices who dissented in *Moose Lodge*, 407 U.S. 163, Douglas, Brennan, and Marshall took the position that giving a privately owned utility the status of monopoly was the very factor making the utility a "state actor" and the state actor's action "state action." *See id.* at 359-374 (Douglas, Brennan, and Marshall, JJ., dissenting).

575. *Id.* at 350.

576. *Id.* at 357.

577. *Id.* at 359 (Douglas, Brennan, and Marshall, JJ., dissenting). Justice Douglas thought that regulation of such necessities as electricity fits § 1983 "like a glove." *Id.* at 364. Justice Brennan voiced no opinion on whether "state action" existed in the case. He agreed that the customer had no claim against the utility company but not for the reasons espoused by the Court. *Id.* at 364-65 (Brennan, J., dissenting). He saw no adjudicable controversy between the parties. *Id.* (Brennan, J., dissenting). Justice Marshall agreed with Justice Brennan on the lack of controversy in the case but took the occasion to espouse upon "state action." *Id.* at 365 (Marshall, J., dissenting). Somewhat in line with Justice Douglas's opinion, Justice Marshall emphasized the government's regulation of such an important utility as evincing "state action." *Id.* at 366-79 (Marshall, J., dissenting).

578. Actually, in these cases the state actor may or may not misuse or abuse the authority given him by the state. Liability is imposed because the state actor is performing some function that is traditionally performed by the state.

complete unanimity among the Justices deciding them has never existed.[579]

In *Terry v. Adams*,[580] the state delegated the handling of an election to a "state actor," yet there was one dissenting vote based on a perception of no "state action."[581]

In *Gilmore v. City of Montgomery*,[582] the Court did not determine whether the alleged "state actor" (the Y.M.C.A.) was delegated a "public function" but remanded the case for the district court to do so.[583] Six Justices ruled in *Flagg Bros. v. Brooks*[584] that a state does not delegate a "public function" to an alleged "state actor" by proving a "self-help" provision in its commercial code.[585] Three Justices dissented.[586]

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[587] six Justices concluded that a land-use authority created by the state acted "under color of" when it issued its regulations.[588] Three Justices wrote partial dissents.[589]

In *Rendell-Baker v. Kohn*,[590] seven Justices narrowed the Court's interpretation of the "public function" test determining that when the "public function" (in that case the education of maladjusted students) has nothing to do with the deprivation of rights, "state action" is missing.[591] Two Justices registered dissents.[592]

On the same day that the Court decided *Rendell-Baker*, five Justices in *Lugar v. Edmondson Oil Co.*[593] held that the constitutionality of a prejudgment attachment statute can be challenged under § 1983 because it permits a "state actor" to act "under color of" state law in depriving people of their rights, but a § 1983 action would not lie for "only misuse or abuse of the statute."[594] Four Justices dissented.[595]

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579. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953).
580. 345 U.S. 461 (1953).
581. *Id.* at 485.
582. 417 U.S. 556 (1974).
583. *Id.* at 575-76.
584. 436 U.S. 149 (1978).
585. *Id.* at 166.
586. *Id.* at 166 (Marshall, Stevens, and White, JJ., dissenting).
587. 440 U.S. 391 (1979).
588. *Id.* at 399-400.
589. *Id.* at 406 (Brennan, Marshall, and Blackmun, JJ., dissenting). *See infra* text accompanying note 669.
590. 457 U.S. 830 (1982).
591. *Id.* at 843.
592. *Id.* at 844 (Marshall and Brennan, JJ., dissenting). *See infra* note 679.
593. 457 U.S. 922 (1982).
594. *Id.* at 942.

Five Justices in *National Collegiate Athletic Ass'n v. Tarkanian*[596] decided that the National Collegiate Athletic Association ("NCAA") did not act "under color of" state law when it disciplined a basketball coach employed by a state university because the state was free to reject those recommendations.[597] Four Justices dissented.[598]

In the span of just over a year, the Court, in two cases, considered whether the use of peremptory challenges constituted "state action." In *Edmonson v. Leesville Concrete Co.*,[599] six members of the Court held that the exercise of peremptory challenges in a federal discriminatory case is an unconstitutional violation of a defendant's rights.[600] Three Justices dissented.[601] In *Georgia v. McCollum*,[602] the Court extended the *Leesville Concrete* principle to the improper use of peremptory challenges by a defendant in a criminal trial.[603] Two Justices dissented.[604]

The Court achieved almost complete unanimity in *American Manufacturers Mutual Insurance Co. v. Sullivan*[605] holding that no "state action" existed in a state permitting insurers to suspend payments under certain circumstances because the insurers were under no compulsion from the state on their manner of handling the claims.[606] Justice Stevens, though generally agreeing with the majority opinion, dissented from the judgment on a technical point.[607]

In one of the last cases dealing with the meaning of "under color of" to come before the Court, the now familiar five-four split made its appearance. In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,[608] five Justices held that a not-for-profit athletic association, which regulated interscholastic sports among Tennessee public and

595. *Id.* at 943 (Burger, C.J., Powell, Rehnquist, and O'Connor, JJ., dissenting). *See* infra note 692.

596. 488 U.S. 179 (1988).

597. *Id.* at 198-99.

598. *Id.* at 199 (White, Brennan, Marshall, and O'Connor, JJ., dissenting). *See infra* note 699.

599. 500 U.S. 614 (1991).

600. *Id.* at 631.

601. *Id.* at 631 (O'Connor, Rehnquist, and Scalia, JJ., dissenting). *See infra* note 699.

602. 505 U.S. 42 (1992).

603. *Id.* at 57.

604. *Id.* at 62 (O'Connor and Scalia, JJ., dissenting). *See infra* note 707.

605. 526 U.S. 40 (1999).

606. *Id.* at 57-58.

607. *Id.* at 63 (Stevens, J., dissenting). *See infra* note 715.

608. 531 U.S. 288 (2001).

private schools, operated "under color of" state law because it was "entertwined" with state government.[609] Four Justices dissented.[610]

In *Terry v. Adams*,[611] the Jaybird Democratic Association was an entity[612] that controlled elections in the state of Texas by arranging that only their members were allowed to run for elective office, and their membership was restricted to Caucasian registered voters. Everyone was permitted to vote in the general election, but since only those who prevailed in the primaries would be on the ballot, people of African descent had a "Hobson's choice," the right to vote for only Caucasians.[613] In a suit claiming infringement of Fifteenth Amendment rights, the Supreme Court's judgment abrogated the Jaybird's arrangement but for no definitive reason.[614] Justice Black's opinion, announcing the judgment of the Court, did not mention "state action" but got very close. He wrote:

> For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment . . . .[615]
>
> It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election . . . .[616]
>
> It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.[617]

Justice Frankfurter, though acknowledging that there was no "state action" present in the case,[618] voted with the majority because he

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609. *Id.* at 302.

610. *Id.* at 305 (Thomas, Rehnquist, Kennedy, and Scalia, JJ., dissenting). *See infra* note 728.

611. 345 U.S. 461 (1953).

612. Though they proclaimed themselves a "self-governing voluntary club," *id.* at 463, the district court found that they were a "political organization," and the Supreme Court affirmed. *Id.* at 470.

613. *Id.* at 470.

614. There was no majority opinion. The judgment of the Court was announced by Justice Black joined by Justices Douglas and Burton. Justice Frankfurter wrote a separate concurring opinion. Justice Clark wrote a concurring opinion in which Chief Justice Vinson and Justices Reed and Jackson joined. Justice Minton dissented.

615. *Terry*, 345 U.S. at 469.

616. *Id.*

617. *Id.*

618. He said that "formal State action, either by way of legislative recognition or official authorization is wholly wanting." *Id.* at 471. The state involvement he found in this case

wanted to overturn the "vice" that he thought the state exhibited.[619] The four-member concurring opinion, drafted by Justice Clark, did not expound on "state action,"[620] but their vote to reverse was based on what they conceived as the Fifth Circuit's misapplication of precedent,[621] which established that political parties are prohibited by the Fifteenth Amendment from conducting a racially discriminatory primary election.[622] Justice Minton dissented because, like Justice Frankfurter, he saw no "state action" in this case.[623]

In *Gilmore v. City of Montgomery*,[624] a city ordinance and parks desegregation order made it a misdemeanor "for white and colored persons to enter upon, visit, use or in any way occupy public parks or other public houses or public places . . . except those assigned to their respective races."[625] Petitioners, seeking declaratory relief, alleged this order violated their Fourteenth Amendment due process and equal protection rights. The petitioners further claimed that the city was permitting racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities under the auspices of the Y.M.C.A. to which the city had delegated a considerable amount of "public function."[626] The district court granted an injunction, finding that plaintiffs had established "state action," which satisfied the "under color of" requirement of § 1983.[627] The court of appeals reversed in part, holding that the injunction "impermissibly intruded

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was rather "state responsibility," which he described as "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." This was eight years before his dissent in *Monroe*, 313 U.S. 299 (*see supra* note 419), and he admitted that the case was not an easy one for him. *Terry*, 345 U.S. at 472.

619. "The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary." *Terry*, 345 U.S. at 477.

620. At one point he alluded to it in passing. *See id.* at 481.

621. Notably, *Smith v. Allwright*, 321 U.S. 649 (1944).

622. *Terry*, 345 U.S. at 481.

623. *Id.* at 484-94 (Minton, J., dissenting). At one point he referred to Frankfurter's position, *Id.* at 485, but misread it. He thought that Frankfurter would say that "state action" is present if a state official participates in the Jaybird primary. This was not Frankfurter's opinion, who emphatically gainsaid the presence of "state action" in this case. *Id.* at 471.

624. 417 U.S. 556 (1974).

625. *Id.* at 559.

626. *Id.* at 560.

627. Plaintiffs had brought a § 1983 suit as a separate action. *See* Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970).

upon the freedom of association of citizens who were members of private groups."[628]

In review of the court of appeals reversal, the Supreme Court decided that it must determine whether the "city's involvement in the alleged discriminatory activity of segregated private schools and other private groups, through its providing recreational facilities, constitutes 'state action' subject to constitutional limitation."[629] The Court could not make that determination.[630] Justice Blackmun, writing for the Court, did not attempt to formulate an infallible test for determining "'whether the State . . . has become significantly involved in private discriminations' so as to constitute state action."[631] Instead, quoting *Reitman v. Mulkey*,[632] he said that it was the task of the district court upon remand to make that determination by "sifting facts and weighing circumstances (on a case-by-case basis) . . . ."[633] One Justice dissented.[634]

In *Flagg Bros. v. Brooks*,[635] New York State, by the "self-help" provision of its Uniform Commercial Code, gave warehouse-people the right to sell property belonging to persons who utilized their services. Aggrieved persons, naming the warehouse-person, but not public officials, filed a class action under § 1983 seeking damages, an injunction, and a declaration that such sale would violate the class's due process and equal protection rights under the Fourteenth Amendment.[636] After analyzing many of the principles upon which the Supreme Court has decided "state action" cases and a few others,[637]

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628. *Gilmore*, 417 U.S. at 565. The court said that "the portion of the District Court's order prohibiting the mere use of such facilities by *any* segregated 'private group, club or organization' is invalid because it was not predicated upon a proper finding of state action." *Id.* at 574.

629. *Id.* at 565-66.

630. *Id.* at 574. Like *Moose Lodge*, 407 U.S. 163, the Court recited those "generalized governmental services" which "do not by their mere provision constitute a showing of state involvement in invidious discrimination." *Gilmore*, 417 U.S. at 574.

631. *Id.*

632. 238 U.S. 368 (1915).

633. *Gilmore*, 417 U.S. at 574.

634. *Id.* at 576 (Marshall, J., dissenting). Justice Marshall registered a partial dissent on the basis that the Court merely rendered an advisory opinion on matters not present. *Id.* at 576 (Marshall, J., dissenting).

635. 436 U.S. 149 (1978).

636. *Id.* at 153.

637. To wit: "[T]hat the settlement of disputes between debtors and creditors is not traditionally an exclusive public function," *id.* at 161, and that "creditors . . . have available to them historically a far wider number of choices than has one who would be an elected public official." *Id.* at 162.

the Court held that there was no "state action" in this case.[638] It is only when the state delegates to a private person something that is historically an exclusive prerogative of the sovereign[639] that action by the private party pursuant to the delegation becomes "state action."[640] The Commercial Code provision provides the debtor with rights and remedies for the redress of wrongs committed by the creditor.[641] This "system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to [the warehouse-person] an exclusive prerogative of the sovereign."[642] The Court added that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."[643] Justice Rehnquist, writing for the majority,[644] said that:

> This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State . . . .[645]
>
> Here the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which the courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act.[646]

The Court specifically noted that its holding in no way impaired the precedential value of *Norwood* and *Gilmore*.[647] Three Justices dissented.[648]

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638. *Id.* at 166.

639. As an example, an election. *See id.* at 158.

640. *Id.* at 161.

641. *Id.* at 160.

642. *Id.*

643. *Id.* at 161.

644. Chief Justice Burger, Justices Powell, Blackmun, Brennan, Rehnquist, and Stewart.

645. *Flagg*, 436 U.S. at 164.

646. *Id.* at 166.

> Self-help of the type involved in this case is not significantly different from creditor remedies generally, whether created by common law or enacted by legislatures. New York's statute has done nothing more than authorize (and indeed limit)—without participation by any public official—what [the warehouseman] would tend to do, even in the absence of such authorization, i.e., dispose of [its customer's] property in order to free up its valuable storage space.

Id. at 163 n.12.

647. *Id.* at 163.

648. *Id.* at 166 (Marshall, Stevens, and White, JJ., dissenting). Justice Marshall dissented on the basis that the Court, in considering that executing on one's property is not a function of the State, "demonstrates, not for the first time, . . . callous indifference to the

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,[649] a compact entered into between the states of California and Nevada created the Tahoe Regional Planning Authority (the "Authority") to regulate the use of land in the Lake Tahoe region.[650] Property owners sued the Authority under, inter alia, § 1983 seeking monetary and "equitable" relief and alleging that a land use ordinance promulgated by the Authority deprived them of the beneficial use of their land.[651] "The actual implementation of [the Authority], after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions[652] and upon mandatory financing secured, by the terms of the Compact, from the counties."[653] Those conclusions that the regulation of land use being traditionally a function performed by local governments[654] and that § 1983 is to be given a liberal construction,[655] furnished the Court's reasons for finding that the Authority acted "under color of" state law despite the fact that federal approval was required of the interstate compact.[656] Three Justices partially dissented on the basis of the immunity issues in the case rather than on the substantive issue of acting "under color of."[657]

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realities of life for the poor." *Id.* at 166 (Marshall, J., dissenting). Justice Stevens, with whom Justices White and Marshall joined, wrote that

> [w]hether termed "traditional," "exclusive," or "significant," the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny.

Id. at 176.

649. 440 U.S. 391 (1979).

650. The court described its function as "to coordinate and regulate development in the Basin and to conserve its natural resources." *Id.* at 394.

651. *Id.*

652. The actual operation by state appointees being a factor in whether a "state actor" acts "under color of" was determined again in *Brentwood Academy*, 531 U.S. 288 (2001).

653. *Lake Country Estates*, 440 U.S. at 399.

654. *Id.* at 402.

655. *Id.* at 400.

656. *Id.* at 402. While the Court did not specifically mention the delegation of state functions, as did the lower court, *see id.* at 400, this was obviously a delegation of state functions case.

657. *Id.* at 406-09 (Brennan, Marshall, and Blackmun, JJ., dissenting).

In *Rendell-Baker v. Kohn*,[658] former teachers and a vocational counselor brought a § 1983 action against a private,[659] nonprofit high school for violation of their First, Fifth, and Fourteenth Amendment rights in connection with their discharge from employment. The teachers presumably sought reinstatement.[660] Though located on privately owned property, virtually all of the institution's income was derived from government funding, it was extensively regulated, had a contract with a state agency, and it performed a "public function" in providing education to maladjusted students.[661] Despite these factors, plaintiffs' discharge was not "state action."[662] Just because one of its activities was a public function did not make the school a "state actor" when the public function was not a function that could be provided only by the state.[663] In this case the state could have provided a school for maladjusted students, but it did not because it found that the private institution did a better job.[664] The decisions to discharge its employees, moreover, "were not compelled or even influenced by any state regulation."[665] In short, "[n]o symbiotic relationship such as existed in *Burton*, exists here . . . ."[666] Chief Justice Burger's words emphasize the Court's rationale:

> Here the decisions to discharge the petitioners were not compelled or even influenced by any state regulation.[667] Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters. The most intrusive personnel regulation promulgated by the various governmental agencies was the requirement that the Committee on Criminal Justice had the power to approve persons hired as vocational

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658. 457 U.S. 830, 831 (1982) (decided the same day as *Lugar*, 457 U.S. 922, and *Blum*, 457 U.S. 991).

659. The school is operated by a board of directors, none of whom are public officials or are chosen by public officials. *Id.* at 832.

660. The Court's opinion does not reveal the relief sought.

661. *Rendell-Baker*, 457 U.S. at 840-42. The Court almost summarily rejected the argument that there was a "symbiotic relationship" between the state and the institution. *Id.* at 842-43.

662. *Id.*

663. *Id.*

664. A rather difficult concept to grasp without elucidation, which is lacking in Burger's opinion. *West*, 457 U.S. 42, is a good example of a "public function," i.e., a physician hired by a state on a part-time basis to furnish medical services to state prisoners.

665. *Rendell-Baker*, 457 U.S. at 841.

666. *Id.* at 843.

667. This is similar to the holdings in *Blum*, 457 U.S. 991, and *Rendell-Baker*, 457 U.S. 830.

> counselors. Such a regulation is not sufficient to make a decision to discharge, made by private management, state action.[668]

Two Justices dissented.[669]

In *Lugar v. Edmondson Oil Co.*,[670] though the Supreme Court had previously said that the "state action" requirement of a Fourteenth Amendment violation and the "under color of" requirement of 42 U.S.C. § 1983 were virtually the same,[671] this was the Supreme Court's first in-depth discussion of that relationship.[672]

Respondent had caused petitioner's property to be attached prejudgment pursuant to a Virginia statute. Petitioner filed a § 1983 complaint seeking damages against the respondent, alleging that the respondent acted jointly with the state to deprive him of his property without due process of law.[673] Respondent defended on the basis of lack of "state action" and asserted *Flagg Bros. v. Brooks*[674] as his authority. The Fourth Circuit Court of Appeals agreed.[675] The Supreme Court disagreed and distinguished *Flagg Bros.*, resulting in a disquisition concerning the relationship between "state action" and "under color of."[676] Without specifically mentioning Justice Frankfurter's dissent in *Monroe*,[677] Justice White, in a rather tautologous majority opin-

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668. *Rendell-Baker*, 457 U.S. at 841-42.

669. *Id.* at 844 (Marshall and Brennan, JJ., dissenting). Justice Marshall, with whom Justice Brennan agreed, dissented mainly on his conclusion that the following elements establish: (1) heavy regulation by the State, (2) the school is providing a substitute for public education, and (3) the school is funded almost entirely by governmental agencies. *Id.* at 844-52.

670. 457 U.S. 922 (decided the same day as *Rendell-Baker*, 457 U.S. 830, and *Blum*, 457 U.S. 991).

671. *See supra* note 2.

672. *Lugar*, 457 U.S. at 924. Of course in 1966, Justice William O. Douglas, writing for the Court in *Evans*, 383 U.S. at 299, said:

> What is "private" action and what is "state" action is not always easy to determine . . . Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon states . . . When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

673. The State of Virginia was not made a party to the action. *See Lugar*, 457 U.S. at 946.

674. 436 U.S. 149 (1978).

675. *Flagg*, 457 U.S. 926.

676. *Id.* at 926-27.

677. *See supra* text accompanying notes 432-36.

ion,[678] agreed with Frankfurter's position announced therein to the effect that there can be no "under color of" (and presumably no "state action") when the authority of the state is being misused or abused. Limiting the Court's holding to the "particular context of prejudgment attachment,"[679] Justice White, writing the majority opinion,[680] stated that "petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute."[681] Four Justices dissented.[682]

In *National Collegiate Athletic Ass'n v. Tarkanian*,[683] Jerry Tarkanian, a very successful college basketball coach, facing discipline by his school upon the recommendation of the NCAA, brought a § 1983 action against the NCAA for an injunction and damages sustained by him due to alleged deprivation of Fourteenth Amendment rights.[684] The Supreme Court, six months after deciding *West v. Atkins*,[685] held that the NCAA, a private entity, did not act under color of state law when it recommended discipline of Coach Tarkanian; hence it could discriminate

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678. The majority consisted of, in addition to Justice White, Justices Brennan, Marshall, Blackmun, and Stevens.

679. *Lugar*, 457 U.S. at 939 n.21.

680. The majority consisted of Justices Blackmun, Brennan, Stevens, Marshall, and White.

681. *Lugar*, 457 U.S. at 942. In his dissent Justice Powell, though grateful, thought it was "unclear why a private party engages in state action when filing papers seeking an attachment of property, but not when seeking other relief (e.g., an injunction), or when summoning police to investigate a suspected crime." *See id.* at 951 n.8 (Powell, J., dissenting).

682. *Id.* at 943-56 (Burger, C.J., Powell, Rehnquist, and O'Connor, JJ., dissenting). Chief Justice Burger wrote a dissenting opinion that "invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into action of the State." *Id.* at 943 (Burger, C.J., dissenting). Justice Powell wrote a lengthy, stinging dissent. Like Chief Justice Burger, Justice Powell took umbrage with the majority for its holding that any private person can create "state action." *Id.* at 945 (Powell, J., dissenting). He acknowledged that the Sheriff who sequestered petitioner's property engaged in "state action," but "it does not follow that respondent became a 'state actor' simply because the Sheriff was." *Id.* at 949 (Powell, J., dissenting).

In another part of his opinion he said that "our cases have *not* established that private 'joint participants' with state officials themselves necessarily become state actors." *Id.* at 948 (Powell, J., dissenting). Powell added that "where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered 'state action' within the meaning of our cases." *Id.* at 949 (Powell, J., dissenting). Justices Rehnquist and O'Connor joined Justice Powell in his dissent.

683. 488 U.S. 179 (1988).

684. *Id.* at 181.

685. 487 U.S. 42 (1988).

against him with impunity.[686] When the University of Nevada at Las Vegas ("UNLV"), a state institution, notified Tarkanian that he was being suspended, it did so "under color of" state law.[687] The NCAA, on the other hand, had no governmental powers to facilitate its investigation and could make only recommendations, which could be rejected by the State.[688]

Justice Stevens, writing for the Court,[689] said that "decisive conduct" may be "state action," which may occur "if the State creates the legal framework governing the conduct . . . if it delegates its authority to the private actor . . . or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior."[690] He added that "even if we assume that a private monopolist can impose its will on a state agency by threatened refusal to deal with it, it does not follow that such a private party is therefore acting under color of state law."[691] Four Justices dissented.[692]

In *Edmonson v. Leesville Concrete Co.*,[693] a construction worker of African descent sued a construction company in a Louisiana federal district court for negligently permitting one of the company trucks to proximately cause his injuries. During jury selection, peremptory challenges eliminated two persons of African descent, and the final jury was composed of eleven Caucasians and one person of African descent. Plaintiff, complaining that defendant's use of peremptory challenges deprived him of his Fifth Amendment rights and defendant should have been required to articulate a race-neutral explanation for its two

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686. *Tarkanian*, 488 U.S. at 198.

687. *Id.* at 193.

688. *Id.* at 193-94.

689. The majority consisted of, in addition to Stevens, Chief Justice Rehnquist, and Justices Kennedy, Scalia, and Blackman. Justice White wrote a dissenting opinion in which Justices Brennan, Marshall, and O'Connor joined.

690. *Tarkanian*, 488 U.S. at 192.

691. *Id.* at 198-99.

692. *Id.* at 199 (White, Brennan, Marshall, and O'Connor, JJ., dissenting). Justice White, the author of *Lugar*, 457 U.S. 922, wrote a dissenting opinion, joined by Justices Brennan, Marshall, and O'Connor. Justice White thought that *Dennis*, 449 U.S. 24, governed because there as here the "state actor" had no real power to take the action which deprived plaintiff of his rights. It should be observed that *Dennis* was decided on an entirely different rationale than this case. In *Dennis* the rationale was that the "state actor" conspired with an employee of the state whereas in this case the rationale is that the state did not delegate an enforceable "public function." *Tarkanian*, 488 U.S. at 202. We also wonder whether Justice White's knowledge of the power of the NCAA in the real world of college athletics had something to do with his position. It should be remembered that he was an All-American and professional football player before being appointed to the Bench.

693. 500 U.S. 614 (1991).

peremptories, sought a reversal of his judgment.[694] The Supreme Court, on certiorari, held that the exercise of peremptory challenges in a discriminatory manner during the trial of a federal case is unconstitutional "state action" under the equal protection component of the Fifth Amendment's Due Process Clause.[695] The Court pointed out that private litigants, in general, do not act pursuant to any contractual relationship with the government, but when they participate in the selection of juries, they "serve an important function within the government and act with its substantial assistance."[696] Justice Kennedy wrote:

> A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction.[697]
>
> [G]overnmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints.[698]

Three Justices dissented.[699]

In *Georgia v. McCollum*,[700] the Supreme Court granted certiorari so that it might answer a question left open in *Edmonson v. Leesville Concrete Co.*:[701] whether the Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise

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694. *Id.* at 616-17.

695. *Id.* at 616.

696. *Id.* at 627-28. Curiously the Court nowhere in its opinion determined the defense attorney to be a "state actor."

697. *Id.* at 624.

698. *Id.* at 620. The Court ascribed three inquiries as to whether one is a "state actor": (1) "the extent to which the actor relies on governmental assistance and benefits," (2) "whether the actor is performing a traditional governmental function," and (3) "whether the injury is aggravated in a unique way by the incidents of governmental authority." *Id.* at 621-22. Justice Byron White in *Lugar*, 457 U.S. at 941, said that "we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment."

699. *Id.* at 631 (Rehnquist, C.J., O'Connor and Scalia, JJ., dissenting). Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Scalia. After a review of several of the cases referred to in this Article, Justice O'Connor equated this case with *Dodson*, 454 U.S. 312, in seeing the role of an attorney using peremptory challenges not unlike the role of a public defender representing a client. *Edmonson*, 500 U.S. at 642.

700. 505 U.S. 42 (1992).

701. 500 U.S. 614 (1991).

of peremptory challenges.[702] Two Caucasians were being tried in Georgia for aggravated assault upon a person of African descent.

The trial judge denied the State's motion for a ruling prohibiting defendants from exercising peremptory challenges in a racially discriminatory manner in violation of the Sixth Amendment and the Georgia Constitution. The soundness of the trial judge's ruling turned on whether the criminal defendant's exercise of a peremptory challenge constituted "state action" for the purpose of the Equal Protection Clause. The Court accepted the precedent of *Leesville Concrete*[703] to the effect that "the private party's exercise of peremptory challenges constituted state action, even though the motive underlying the exercise of the peremptory challenge may have been to protect a private interest"[704] and extended it to the use of peremptory challenges by a defendant in a criminal trial.

Using words similar to those of Justice Kennedy in *Leesville Concrete,* Justice Blackmun wrote that "a criminal defendant is wielding the power to choose a quintessential governmental body—indeed, the institution of government on which our judicial system depends."[705] Two Justices dissented.[706]

In *American Manufacturers Mutual Insurance Co. v. Sullivan*,[707] a § 1983 action was brought by employees of a school district against Pennsylvania state officials, the Pennsylvania State Workers' Insurance Fund, private insurers, self-insured employers, and school districts alleging that their Fourteenth Amendment due process rights were being violated by defendants' being permitted by state statute to suspend, without notice, benefits due to disputes about medical treatment received. Plaintiffs sought declaratory and injunctive relief as well as damages.[708] The Supreme Court held that the action was improperly brought against the private insurers since they were not "state actors."[709]

The Court made it clear that there are two prerequisites to recovery in a § 1983 case: First, the deprivation must be a "constitutional deprivation," that is, one that is caused by the exercise of some right or

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702. *McCollum*, 505 U.S. at 46.

703. *Id.* at 48.

704. *Id.* at 54-55.

705. *Id.* (referring to a jury).

706. *Id.* at 62 (Scalia and O'Connor, JJ., dissenting). Chief Justice Rehnquist switched to the majority; Justices O'Connor and Scalia were the two dissenters. They again argued that the aegis of *Polk*, 454 U.S. 312, should control. *McCollum*, 505 U.S. at 62-70.

707. 526 U.S. 40 (1999).

708. *Id.* at 48.

709. *Id.* at 58.

privilege created by (1) the State, (2) a rule of conduct imposed by the State, or (3) a person for whom the State is responsible. Second, the offender must be a "state actor."[710] In this case, because the private insurers were aware of the state statute, the first prerequisite was met. The "state actor" requirement, however, was not met. The state statute in question did not mandate action on the part of the private parties. It merely gave them the option of withholding benefits in the event of a dispute rather than having the state make the decision to withhold.[711]

Chief Justice Rehnquist wrote in Part II of the opinion[712] that "[t]he State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary."[713] One Justice dissented.[714]

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,*[715] the Tennessee Secondary School Athletic Association ("TSSAA"), a nonprofit corporation, was recognized by the state as "'providing standards, rules and regulations for interscholastic competition in the public schools of Tennessee'" since its incorporation in 1925. Private schools represented sixteen percent of the TSSAA's membership. Due to a recruiting violation, the TSSAA suspended Brentwood for two years and imposed a $3,000 fine upon the school. Brentwood sued TSSAA under § 1983 for violation of its First and Fourteenth Amendment rights, presumably to undo the suspension and fine.[716] The Supreme Court determined that the TSSAA was a "state actor" based, inter alia, upon the following facts: (1) eighty-four percent of the TSSAA's membership was public schools, (2) public school officials, for the most part, control

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710. *Id.* at 50.

711. The court did not explicitly refute what could have been argued, i.e., that when the state transferred to the private parties its decision-making powers, it made the transferee a "state actor." It was content to rule that such form of "inaction" (i.e., in connection with the withholding of benefits) on the part of the state does not make the transferee a "state actor." *Id.* at 53.

712. Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined the Chief Justice in Part II of the opinion.

713. *Sullivan,* 526 U.S. at 53.

714. *Id.* at 63 (Stevens, J., dissenting). Justice Stevens, though he agreed with most of what was written in the majority opinion, dissented from the Court's judgment because he thought that the question as to whether the insurer was a "state actor" was irrelevant since the state-appointed decision-makers were the real "state actors." *Id.* at 64-65 (Stevens, J., dissenting).

715. 531 U.S. 288 (2001).

716. The opinion does not reveal what relief was sought.

the TSSAA,[717] (3) half of the TSSAA's meetings were held during school hours, and (4) public schools "largely" provide the TSSAA's support.[718]

The Court distinguished *Tarkanian*[719] on the basis that the wide diversity of membership relegated the NCAA's relationship to the State of Nevada as "too insubstantial to ground a state-action claim,"[720] whereas here the TSSAA was composed exclusively of Tennessee schools.[721] Justice Souter, writing for the majority,[722] stated that "[t]here would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely administerial acts by which the Association exists and functions in practical terms."[723] Perhaps wanting to replace the "interdependence" of *Burton*[724] and the "symbiotic relationship" of *Moose Lodge*,[725] Justice Souter wrote of "entwinement" when he said that the Court has treated a nominally private entity as a "state actor when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'"[726] Four Justices dissented.[727]

V. CONCLUSION

From reading the forty Supreme Court decisions analyzed in this Article one may gain the impression that litigation involving the Civil Rights Acts is concerned primarily with racially motivated deprivation of rights in southern states. While a considerable number of the cases evolved out of deprivation of rights based on race,[728] almost half of those were from states other than the South.[729] Only two of the

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717. This factor is reminiscent of the activities by state-appointed officials concluded in *Lake Country Estates*, 440 U.S. 391.

718. *Brentwood Academy*, 531 U.S. at 291.

719. 498 U.S. 179 (1988).

720. *Brentwood Academy*, 531 U.S. at 297.

721. *Id.* at 298.

722. In addition to Justice Souter, the majority consisted of Justices Stevens, O'Connor, Ginsburg, and Breyer.

723. *Brentwood Academy*, 531 U.S. at 300.

724. 365 U.S. 706 (1961).

725. 407 U.S. 163 (1972).

726. *Brentwood Academy*, 531 U.S. at 296.

727. *Id.* at 305 (Thomas, Rehnquist, Scalia, and Kennedy, JJ., dissenting).

728. Actually nineteen of the forty cases, i.e., forty-eight percent.

729. *Lane* (Oklahoma); *Shelley* (the midwest); *Monroe* (the midwest); *Burton* (Delaware); *Reitman*; (California); and *Moose Lodge* (Pennsylvania).

racially motivated cases, moreover, have reached the Court in the past twenty-nine years.[730]

Perhaps we can validly observe that while racial discrimination has not been completely eradicated in this country, its maledictions are becoming less pronounced.[731] We have come, if the Supreme Court decisions are any indication, from the days when almost all of the modern Civil Rights cases under § 242 and § 1983 were racially involved to cases concerning the termination of electric services,[732] medical problems,[733] the treatment of prisoners,[734] and the disciplining of basketball coaches;[735] all important though not heinous as were the racially motivated cases.

As to the meaning of "under color of," however, we end where we began. All we know is that it means the same as "state action," but we do not have a precise definition of either term from our highest court.

In addition to the lack of clarity in this area of the law, we have a debate among the Supreme Court Justices on whether "under color of" is a term reserved for those acts performed by an official of the sovereign or may it be applied to acts performed by private (non-official) individuals. Justice William O. Douglas, in *Screws v. United States*,[736] thought that "under color of" meant in "pretense" of law and that it would cover acts performed by officials who were acting outside the scope of their authority and to private (non-official) individuals.[737] Justices Owen J. Roberts, Felix Frankfurter, and Robert H. Jackson disagreed with Justice Douglas in that case.[738] They thought that "under color of" was intended to cover only acts performed by officials of the sovereign acting within their official capacity.[739]

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730. *Edmonson*, 500 U.S. 614 (1991); *McCollom*, 505 U.S. 42 (1992).

731. Anyone who reads *Bell v. State of Maryland*, 378 U.S. 226 (1964), however, will sadly admit that for almost a hundred years after Appomattox our nation had not been completely "reconstructed." Hopefully, given time and knowledge, it will be some day; whether we, the living, will ever see it is open to question.

732. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

733. American Mfrs. Ins. Co. v. Sullivan, 526 U.S. 40 (1999); O'Connor v. Donaldson, 422 U.S. 563 (1975).

734. Corr. Serv. Corp. v. Malesko, 534 U.S. 61 (2001); Parratt v. Taylor, 451 U.S. 527 (1981).

735. NCAA v. Tarkanian, 480 U.S. 179 (1987); Brentwood Academy v. T.S.S.A.A., 325 U.S. 91 (1945).

736. 325 U.S. 91 (1945).

737. *Id.* at 111.

738. *Id.* at 138-39.

739. *Id.* at 143-44.

Justices Frankfurter and Jackson expounded further upon their theory in *Williams v. United States*.[740] In *Monroe v. Pape*,[741] Justice Frankfurter wrote a virtual treatise on his position. In 1999 five members of the Court in *Lugar v. Edmondson Oil Co.*,[742] (including Justice Stevens who is presently on the Court) agreed that "under color of" cannot be applied to "pretense" use of authority.[743] Rather recently, in *Crawford-El v. Britton*[744] two sitting members of the Court, Justices Scalia and Thomas, have voiced the same position. This divergence of opinion as to the meaning of "under color of" is far too profound to be left in limbo.

In an attempt to bring some certainty into the meaning of "under color of," this Article has separated the cases into those that involve acts of an official of the sovereign (the "Official Capacity" cases), and those that involve acts of a non-official (the "Personal Capacity" cases). In the "Official Capacity" cases it is the sovereign that will be found guilty or liable.[745] In the "Personal Capacity" cases, either an official or a non-official may be the participant and have personal liability for his or her actions.[746]

The second category divides into five sub-types of cases. In the first sub-type, if the officials misuse their authority they can be found to have acted "under color of" law because "under color of" law can be interpreted to mean that one is acting not under the law but under a pretense of law. In the second sub-type, personal liability is imposed simply because the defendant was merely following an edict of the sovereign. In the third sub-type, there is a conspiratorial or "symbiotic" relationship between the defendant and the sovereign. In the fourth sub-type, the defendant has received some benefit from the sovereign. In the fifth sub-type, the defendant has been delegated a "public function," which it uses to deprive another of a protected right.

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740. 341 U.S. 97 (1951). *See supra* note 424 for reference to the dissent.

741. 365 U.S. 167 (1961). *See supra* text accompanying note 436 for reference to the dissent.

742. 457 U.S. 922 (1982).

743. *Id.* at 928.

744. 523 U.S. 574 (1998).

745. When the sovereign is sued for its deprivation of rights it is a relatively easy matter for the court to find "under color of" and "state action," but as was pointed out in one case considered, *Parratt v. Taylor*, 451 U.S. 527, the plaintiff must be prepared to prove lack of due process of law. In these Type I cases, the "state actor" might also be personally liable. *See* Hafer v. Melo, 502 U.S. 21 (1991).

746. Overall, most of the "personal liability" cases are brought under a sub-type II-A ("Abuse/misuse" of authority) or sub-type II-E (the state delegates a "public function" to the "state actor") basis though eighty percent of the sub-type II-B (state actor merely follows an edict of the state) cases were racially motivated, whereas none of the sub-type II-D (the state actor receives a benefit from the State) cases had race as their animus.

These "personal capacity" catalytic tests are more than just theories that jurists emote about. They furnish a bridge with which to connect the individual to the sovereign in order to impose penal or civil penalties upon the one accused of deprivation of rights. This connection with the sovereign is necessitated by the fact that there is no constitutional prohibition against an individual depriving another of his or her rights, and if the statutes are to be enforced against an individual, the individual must be found connected to the sovereign in some fashion.[747]

Though the cases can be categorized, there can be no clear definition emanating from these fact-specific decisions. Justice Tom Clark has opined that "[o]nly by sifting facts and weighing circumstances [on a case-by-case basis] can the nonobvious involvement of the State in private conduct be attributed its true significance."[748] Justice Byron White has said that it would be an "impossible task" to formulate an "infallible test for determining whether the State 'in any of its manifestations' has become significantly involved in private discriminations."[749] The Supreme Court has recognized that various tests have been devised for making that determination[750] but has indicated that these tests will not replace the "fact-bound" inquiry required.[751] Hopefully that task will be easier as deprivations of rights decrease.[752]

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747. *See supra* text accompanying note 6.

748. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722. Justice Blackmun used similar wording in *Gilmore*, 417 U.S. 556, 574.

749. Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

750. They are the "public function," "state compulsion," "nexus," and "joint action" tests. *See Lugar*, 457 U.S. 933, 939.

751. *Id.*

752. On June 13, 1994, Justice Souter, writing for a unanimous Court (Chief Justice Rehnquist, and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg) thought that there was nothing "vague or amorphous" about the obligation of the California State Labor Commission and others acting "under color of law" to respect the rights of an employee under the National Labor Relations Act. *See* Livadas v. Bradshaw, 512 U.S. 107, 133 (1994). Hopefully his words were prophetic.