

# University of Pennsylvania Law Review

FOUNDED 1852

Formerly  
American Law Register

---

---

VOLUME 130

JUNE 1982

No. 6

---

---

## THE PUBLIC-PRIVATE PENUMBRA— FOURTEEN YEARS LATER

HENRY J. FRIENDLY †

I assume I was asked to join these discussions because fourteen years ago, when I delivered at Dartmouth College the annual lecture on the Holmes devise, I took as my title "The Dartmouth College Case and the Public-Private Penumbra."<sup>1</sup> I wonder how the organizers of this symposium ever came to know about that lecture. It was printed by the University of Texas in a handsome, slender, green volume—the green, incidentally, having no relation to Dartmouth—which is almost unobtainable; later Holmes lecturers have had the good sense to insist on publication in the law review of the school where the lecture was delivered. That leads to the next wonderment. Why was a lecture on law delivered at a "college"<sup>2</sup> which has no law school? The answer, if you can call it one, is that Dartmouth sought the Holmes lecture in 1968 because that was the 150th anniversary of Daniel Webster's argument of the *Dartmouth College Case*.<sup>3</sup> Finally, what on earth did the *Dartmouth College Case* have to do with the public/private distinction? In accepting the invitation to lecture at Dartmouth, I

---

† Senior Judge, United States Court of Appeals for the Second Circuit; Presiding Judge, Special Court under the Regional Rail Reorganization Act. A.B. 1923, LL.B. 1927, Harvard University.

<sup>1</sup> H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1968).

<sup>2</sup> Dartmouth ceased long ago to be a "small college" and became a large university. Presumably it would proudly claim that title if it were anything but Dartmouth. However, the whole point of the *Dartmouth College Case* was the successful resistance to an act that would have replaced the Trustees of Dartmouth College with the Trustees of Dartmouth University. Hence I suppose Dartmouth will remain a "college" to the end of time.

<sup>3</sup> *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

had made clear that I would not feel bound to discuss the *Dartmouth College Case*; this was nearly a decade before the rekindling of interest in the contracts clause as a result of *United States Trust Co. v. New Jersey*.<sup>4</sup> My reservation led to a visit from President Dickey of Dartmouth. Couldn't I find some way to insinuate the *Dartmouth College Case* into whatever subject I chose? I promised I would at least reread the opinion, and there it was: Dartmouth, Chief Justice Marshall explained, was not like a municipal corporation, the charter of which the legislature could amend at will. In language that has a contemporary ring, Dartmouth and similar institutions "do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature."<sup>5</sup> To the question, "[a]re the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?"<sup>6</sup> Marshall responded with a resounding "No." Here is the "public function" doctrine of today,<sup>7</sup> although developed in the context of the contracts clause rather than of "state action."

When I spoke at Dartmouth, Professor Charles Black had written only recently that the state action cases were "a conceptual disaster area."<sup>8</sup> His statement would appear even more apt today. Although we now have a dozen more Supreme Court decisions,<sup>9</sup>

---

<sup>4</sup> 431 U.S. 1 (1977).

<sup>5</sup> 17 U.S. (4 Wheat.) at 647. Chief Justice Marshall overstated the extent to which the funding of Dartmouth was purely private. The jury had found that, in addition to the receipt of private contributions, Dartmouth had been endowed by New Hampshire and Vermont with lands "of great value." 17 U.S. (4 Wheat.) at 538. Also he was surely wrong in predicting that, absent private benefactors, higher education would remain "vacant," as the great public universities of the middle and far west were to prove within a few decades. President Conant of Harvard, who happened to be in Hanover on the day of my lecture, believed that the impetus to private benefactors afforded by the *Dartmouth College Case* did postpone the development of public universities in the northeast until recent times.

<sup>6</sup> *Id.* 634.

<sup>7</sup> The phrase is said to have originated in Justice Black's opinion in *Marsh v. Alabama*, 326 U.S. 501, 506 (1946), see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1165 (1978), although Professor Tribe does not consider *Marsh* to have been "a true 'public function' decision." *Id.*

<sup>8</sup> Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967).

<sup>9</sup> The most notable are *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (distinguishing—or at least attempting to distinguish—*North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975)); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968));

which seem less ready to find state action than did those of earlier years, most of the opinions have been perfunctory and conclusory. If we now know more about the location of the border between public and private action, this is rather because the Court has pricked out more reference points than because it has elaborated any satisfying theory. Perhaps, as Professor Brest will suggest, no one can. Largely we still must navigate with the aid of the wavering beacon furnished by Justice Clark's statement in *Burton v. Wilmington Parking Authority*<sup>10</sup>: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."<sup>11</sup>

I must confess that I have not kept up with the stream of state action decisions by the lower federal courts since my Dartmouth lecture.<sup>12</sup> Many of these have presented problems I had posed there as hypotheticals.<sup>13</sup> Still less have I kept abreast of the ballooning literature. There are only two points, both at least suggested in my lecture,<sup>14</sup> that I would like to mention briefly.

One is that more state involvement will be required to produce a holding of unconstitutionality when the constitutional claim is lack of procedural due process, or even infringement of asserted first amendment rights, than when the claim is of racial discrimination. Surely the result in *Jackson v. Metropolitan Edison Co.*<sup>15</sup> would have been different if the company had refused to serve blacks.<sup>16</sup>

---

*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Evans v. Abney*, 396 U.S. 435 (1970).

<sup>10</sup> 365 U.S. 715 (1961).

<sup>11</sup> *Id.* 722. This was preceded by a statement that "to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.'" *Id.*, quoting *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552, 556 (1947), certainly one of the blindest decisions in the state action field.

<sup>12</sup> A useful collection of the cases, along with searching questions about them, can be found in W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW; CASES—COMMENTS—QUESTIONS* 1511-73 (5th ed. 1980).

<sup>13</sup> I became an early victim in *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), and unsurprisingly followed my own preachings. Other state action cases in which I have written are *Coleman v. Wagner College*, 429 F.2d 1120, 1126-27 (2d Cir. 1970) (concurring opinion); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974); and *Jackson v. Statler Found.*, 496 F.2d 623, 636-41 (2d Cir. 1974) (dissenting from denial, by an equally divided court, of reconsideration en banc), *cert. denied*, 420 U.S. 927 (1975).

<sup>14</sup> See H. FRIENDLY, *supra* note 1, at 16-18, 23.

<sup>15</sup> 419 U.S. 345 (1974).

<sup>16</sup> Generally such a refusal would have violated state laws against discrimination by public utilities and the federal constitutional issue would not have had to be reached.

This differentiation seems to me to be entirely justified. In the *Wilmington Parking Authority* case it was degrading that black citizens should not be allowed to eat in a restaurant in a public building. Justice Clark was quite right in emphasizing that the Authority "flew from mastheads on the roof both the state and national flags."<sup>17</sup> The equal protection clause does not allow a state or a city to institutionalize Jim Crow. The state's failure to have taken the easy step needed to insure that the Eagle Coffee Shoppe would be open to black citizens was properly viewed as sufficient state action to trigger the equal protection clause. Again, whatever the true explanation of *Shelley v. Kraemer*,<sup>18</sup> revised opinions for which have been written by two professors then or later connected with this law school and published in its law review,<sup>19</sup> most people would say of it, as Paul Freund is reputed to have said of *Brown v. Board of Education*,<sup>20</sup> "can you imagine it having been decided the other way?" Even in this most sensitive area, however, not every state contact should suffice to bring down the constitutional axe. I would go along with *Moose Lodge No. 107 v. Irviss*,<sup>21</sup> although Professor Tribe may be right in saying that the proper ground for decision would have been a denial not of state action but of unconstitutional state action.<sup>22</sup>

In my Dartmouth lecture I skipped very lightly over the now-engrossing subject of tax exemption, saying in a footnote: "It has been assumed, although without much explication, that tax exemption creates no special constitutional problem."<sup>23</sup> That statement would hardly be made today. What I did discuss was the constitutionality of a state's tolerating discriminatory action by a founder or donor,<sup>24</sup> as, to take an example particularly appropriate here in Philadelphia, in the Girard College cases, where the Supreme Court, with splendid impartiality, refused to review both a decision of the Supreme Court of Pennsylvania that the substitution of private trustees cured any defect in Stephen Girard's original disposition

---

<sup>17</sup> 365 U.S. at 720.

<sup>18</sup> 334 U.S. 1 (1948).

<sup>19</sup> See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

<sup>20</sup> 347 U.S. 483 (1954).

<sup>21</sup> 407 U.S. 163 (1972).

<sup>22</sup> L. TRIBE, *supra* note 7, at 1172-74.

One wonders how the case would have been decided if the plaintiff had been a nondiscriminatory lodge alleging that it had been unable to obtain a liquor license.

<sup>23</sup> H. FRIENDLY, *supra* note 1, at 19 n.66.

<sup>24</sup> See *id.* 18-24.

and the Third Circuit's later decision that it did not.<sup>25</sup> I also discussed the constitutionality of the making of government grants to institutions practicing some form of discrimination.<sup>26</sup> So far as concerns the more blatant forms of racial discrimination, such as the case of an institution welcoming all comers except blacks, the effect of tax exemption now is of only academic interest in light of *Runyon v. McCrary*,<sup>27</sup> which held that 42 U.S.C. § 1981 did not require a showing of state action.<sup>28</sup> However, a good many questions remain. The *Runyon* Court noted that the case did not "present any question of the right of a private school to limit its student body to boys, girls, or to adherents of a particular religious faith" or "even present the application of § 1981 to private sectarian schools that practice racial exclusion on religious grounds."<sup>29</sup> The Court did not mention limitations to a particular ethnic group but I should suppose that too would not fall within § 1981. It would also seem very hard to read that section as applying to alleged racial discrimination in the making of grants to foundations.

There is thus still a substantial area in which tax benefits may be important. I have read of a case in Massachusetts where a nearby township is challenging the property tax exemption of Smith College because it discriminates against men.<sup>30</sup> When the suit is against the grantor of the exemption, it is indeed hard to say there is no state action; however, one should not leap to the conclusion that the action is unconstitutional.<sup>31</sup> Even less should courts adopt the conclusion that receipt of tax benefits subjects the recipient to the same rigorous standards as the state itself. Here we encounter the positive values of private choice.<sup>32</sup>

---

<sup>25</sup> *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, *appeal dismissed and cert. denied*, 357 U.S. 570 (1958); *Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.) (en banc), *cert. denied*, 391 U.S. 921 (1968). See also *Pennsylvania v. Board of Directors of City Trusts (Girard Will Case)*, 353 U.S. 230 (1957).

<sup>26</sup> See H. FRIENDLY, *supra* note 1, at 24-29.

<sup>27</sup> 427 U.S. 160 (1976).

<sup>28</sup> This result was thought to be an ineluctable consequence of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), which made a similar holding with respect to 42 U.S.C. § 1982 (1976)—a construction of that statute which, as said by Justice Stevens in *Runyon*, 427 U.S. at 189 (concurring opinion), "would have amazed the legislators who voted for it." See C. FAIRMAN, *RECONSTRUCTION AND REUNION, 1864-88 (VI HISTORY OF THE SUPREME COURT OF THE UNITED STATES) 1257 (1971)*.

<sup>29</sup> 427 U.S. at 167 (footnote omitted) (emphasis added).

<sup>30</sup> The action was later dismissed for want of standing. *Trustees of Smith College v. Board of Assessors*, 385 Mass. 767, 434 N.E.2d 182 (1982) (affirming decision of Appellate Tax Board).

<sup>31</sup> See L. TRIBE, *supra* note 7, at 1148 n.7.

<sup>32</sup> See H. FRIENDLY, *supra* note 1, at 29-31, and my opinion dissenting from the denial of reconsideration en banc in *Jackson v. The Statler Found.*, 496 F.2d at 636-41.

In contrast to the racial discrimination against customers at issue in the *Wilmington Parking Authority* case, an assertion by employees of the Eagle Coffee Shoppe that they were entitled to the same procedural due process with respect to discipline and discharge as must be accorded to some public employees seems, even on mere statement, to rest differently. Why should the state be any more bound to guarantee due process to persons working for private employers who have leased state-owned property than to private workers generally? I can see no sufficient reason, and I am not aware that any has been asserted.

The other question, on which I have come to learn rather than to teach, is whether the state action requirement demands some identifiable action or is satisfied by a showing that the state's whole body of law works an unconstitutional denial or deprivation. You will receive much instruction on this from Professor Brest's critique of *Flagg Brothers v. Brooks*<sup>33</sup> and the discussion it will elicit. We now have it on the authority of a majority of the Supreme Court, speaking through Justice Rehnquist in a footnote, that

[i]t would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.<sup>34</sup>

Something in this is deeply appealing to the judicial mind. One feels intuitively that a plaintiff must show the state to have done something tangible, however little, before a federal court must confront the task of evaluating his constitutional claim. Most of the Supreme Court's cases have proceeded on that assumption. Yet I wonder whether the ghost has in fact been, or ever can be, laid to rest.

Its lineage can be traced back to the century-old language in the *Civil Rights Cases*<sup>35</sup> where Justice Bradley condemned the federal Civil Rights Act in part because "[i]t applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have

---

<sup>33</sup> 436 U.S. 149 (1978).

<sup>34</sup> *Id.* 160 n.10.

<sup>35</sup> 109 U.S. 3 (1883).

violated the prohibition of the amendment.”<sup>36</sup> In the *Wilmington Parking Authority* case the trouble was not in what the Parking Authority had done, namely, making a perfectly ordinary lease, but in not inserting an antidiscrimination clause. Justice Stevens’ powerful dissent in *Flagg Brothers* deserved a better answer than it received, mostly in footnotes. Justice Rehnquist did not vouchsafe, save in a cryptic footnote reference,<sup>37</sup> his explanation of *Shelley v. Kraemer*; I find it hard to accept the notion that the decision hung simply on the entry by a state judge of a judgment the judge was bound to render under state law.<sup>38</sup> Somehow I cannot escape the conclusion that it was Missouri’s maintenance of a rule of common law permitting the enforcement of racially restrictive covenants, not the action of its courts in enforcing that rule, that was the unconstitutional state action in *Shelley*. One must regret that the Court did not hold *Flagg Brothers* over to the next term for a more fully developed dialogue rather than dispatch it in the May rush.

On the other hand, advocates of the position that almost everything represents state action, although not necessarily unconstitutional state action, have an obligation to complete the sentence. They seem to agree that when the state has acted in only a minor way, as in *Moose Lodge*, the state may tolerate private conduct that would be forbidden to the state itself. If the standard thus is lower, how much lower? Those who consider it sufficient for a holding of state action that the state could have prevented the allegedly unconstitutional conduct should not be allowed the comfort of belief that once they have established this proposition, they are home free; they must tell us how the case should be decided.

The Law Review is to be congratulated for having assembled such an array of speakers and the speakers for the brilliant papers they have written. Thank you for inviting me to participate in this discussion of a problem which is as fascinating as it seems to be intractable.

---

<sup>36</sup> *Id.* 14.

<sup>37</sup> 436 U.S. at 160 n.10.

<sup>38</sup> See H. FRIENDLY, *supra* note 1, at 14-15, 16-17; Henkin, *supra* note 19; L. TRIBE, *supra* note 7, at 1156.