CHAPTER-4

NATURE AND SCOPE OF THE STATE ACTION DOCTRINE IN USA

4.1 Introduction

The Constitution of United States is the Supreme Law of the USA. It consists of the Declaration of Independence and Bill of Rights and is deeply rooted in the noble ideals of liberty and equality. The Constitution is inspired by the social contract theory of Locke as advanced by Hobbes, one of the earliest political thinkers of the 17th century. The original Constitution, the American Declaration of Independence was preceded by the Articles of Confederation and Perpetual Union. Being the shortest Constitution in the world there was nothing in the original Constitution granting fundamental or basic rights to the people of United States. In 1891 the Bill of Rights was incorporated to it through the first ten Amendments and subsequently due to Civil War, 13\textsuperscript{th}, 14\textsuperscript{th} and 15\textsuperscript{th} amendments were added to the Bill of Rights granting several rights to the Blacks of United States.

It was through the Fourteenth Amendment that the concept of State Action emerged and it is one of the basic principles of Constitutional law.\footnote{Per John Bingham, Congressional Globe, 30\textsuperscript{th} Congress, Privileges and Immunities, 1\textsuperscript{st} Session 2542 (1866) Fourteenth Amendment Act was called by Abraham Lincoln as “the electric cord in the Declaration of Independence that links the hearts of patriotic and liberty-loving men together”) BASLER ED., THE COLLECTED WORKS OF ABRAHAM LINCOLN 323 (1953).} According to the State Action doctrine constitutional rights bind only governmental and not private actors with the exception of 13\textsuperscript{th} amendment which prohibits slavery. The doctrine of state action limits the scope of constitutional rights to the public sphere thereby enhancing the autonomy of the individual preserving a heterogeneous private sphere free from the uniform and compulsory regime constructed by the constitutional norms. The doctrine favours the most direct way in which a Constitution might regulate private actors by imposing constitutional duties on them. This concept has justification in the values of liberty, autonomy and privacy, the concept that the constitutions’ most critical and distinctive function is to provide law for the lawmaker and not for the citizen. But that is not the end of the story. There are instances like \textit{Shelly v. Kraemer}\footnote{334 U.S. 1 (1648).} wherein the Supreme Court has applied the doctrine to private
restrictive covenants and as in *Marsh v. Alabama*\(^3\) where the Court has applied the doctrine to private actors.

But despite these practices, the US doctrine of state action stands as a pure example of the vertical application of constitutional rights as compared to UK, Canada, and South Africa etc. According to Murray Hunt “the jurisdiction which is closest to the position favoured by the verticals is the United States and where a constitutional right is relied on in litigation between private parties, the Supreme Court has made clear that Courts must determine whether the activities of the private party alleged to have infringed the protected rights are sufficiently connected to the government to constitute state action to which the Constitution applies.”\(^4\) Even then the US model can be taken as an example in studying the complex ways and means articulated by the judges in linking and delinking private activities as attributes of state action. Present Chapter is an analysis of the case laws and the techniques adopted by the Courts in United States in finding state action in private actions; also the chapter makes an in-depth study of the roots of constitutional history of USA.

### 4.2 Background to the American Civil Rights

The constitution of United States consists of the Declaration of Independence and Bill of Rights. These two documents are the product of a revolution of American colonists in defence of their liberty.\(^5\) As said by Samuel E. Morison “the American revolution was not fought to preserve the freedom but to preserve the liberties that Americans already has as colonials.”\(^6\) The principles underlying the two documents were rooted in the writings of the English philosopher John Locke\(^7\) and also it is

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\(^3\)326 U.S. 501 (1946).


\(^5\) (It is been said that the American democratic tradition that led to the formation of American republican government evolved from the ancient civilizations of Greece and Rome and also due to the impact of Enlightenment movement of the 17\(^{th}\) century) [http://www.ushistory.org/gov/2.asp](http://www.ushistory.org/gov/2.asp) (last visited on Oct. 14, 2015).


\(^7\)BENJAMIN KINSBERG, WE THE PEOPLE: AN INTRODUCTION TO AMERICAN POLITICS (6\(^{th}\) ed. 2007) (Some might theorize that it was Hobbes philosophy which had influenced the making of the US Constitution. According to Hobbes, people are by nature self-centric and the purpose of the government is to keep them in complete control under threat of punishment. This philosophy projected citizens as warmongers incapable of living at peace without threat of punishment and also the theory left space for the retrieval of tyranny which was the last thing which the framers wanted after proclamation of independence from England. Although Locke agreed with Hobbes regarding self-centric nature of human beings, he was much more optimistic about their ability to use reason to avoid...
deeply embedded in the ideologies of the enlightenment era like liberty, equality and justice. In his Social Contract Theory Locke emphasised that the people have God given or natural rights that are inalienable and which cannot be taken away by the government. Locke in his Second Treatise on Government identified the basis of a legitimate government. The approach of the founding fathers to civil rights was presumably both intellectual and moral: government must above all guard the institutions of free press, free association and free churches.

The framers of the US Constitution believed that the real security of rights came not from constitutional prohibitions but from a well-constructed government that lacked the propensity or opportunity to violate the rights and for the same reason framers did not include a list of individual liberties in the Constitution. The creation of such a government was the delegates’ primary concern throughout the convention. They believed that the adoption of the Constitution and thereby creation of a ‘limited government’ adequately safeguarded rights against invasion by the national

tyranny. Apart from Locke the other philosophers who influenced the framers of US Constitution were Voltaire, Rousseau, and Montesquieu).


9 Id. (According to Locke, a ruler gains authority through the consent of the governed. The duty of that government is to protect the natural rights of the people, which Locke believed to include life, liberty and property. If the government failed to protect these rights, its citizens would have the right to overthrow that government. This idea deeply influenced Thomas Jefferson when he drafted the American Declaration of Independence).

10 (The systematic justification of the Glorious Revolution from the standpoint of political theory was provided by none other than Locke through his book ‘Two Treatises of Government.’ Locke’s basic thesis was that politically organized society arose by virtue of a “social contract” entered into by individuals originally in a state of nature, governed by the law of nature and thereby, created a more effective mechanism for enforcing the natural rights of the individuals. He declared that “the first and fundamental law of all commonwealths” is that which establishes “the legislative power”) JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 56, 60 (1689); VI HOLDSWORTH, HISTORY OF ENGLISH LAW 283-90 (1924); DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY, 63-78 (1950).

11 MARIAN D. IRISH & JAMES W. PROTHRO, POLITICS OF AMERICAN DEMOCRACY 217 (1964) (This was also because of the influence of Locke as the philosopher of Puritan Revolution. He believed that the good society is the one that governs least in matters of mind and spirit. When God gave Adam reason, he gave him freedom to choose, for reason is but freedom to choose, “for reason is but choosing-so the great Puritan poet,” John Milton, brought reason and freedom together in Areopagitica when he spoke for liberty of the press before the English Parliament: “Man is born free and rational.” This basic tenet of the Puritan Revolution was also the basic tenet of early American political theory).

12 Id. (Neither the Virginia Plan nor New Jersey Plan, two major plans of government introduced at the Convention included a Bill of Rights. During the latter stages of the Convention the delegates added various rights guarantees to the Constitution on a piecemeal basis. But when George Mason of Virginia proposed a week before the adjournment that a Bill of Rights is to be added to the Constitution, arguing that “it would give a great quiet to the people,” not a single state supported his proposal).

13 Id. at 215 (The doctrine of ‘limited government’ – the idea that the government may not deny the “unalienable rights” of the people –is fundamental in the American approach to civil rights. The first
government. But eventually civil rights and liberties were added to the Constitution by inserting ten amendments to the Constitution which were called as “Bill of Rights.”

The drafting of the American Constitution represents a long period of struggle in the economic, social, political and religious life of the people throughout many ages. Finally when the Constitution was drafted, it has produced a way of life that offers all mankind a new hope in the areas of freedom, individual dignity and the promotion of democratic ideals. The historical background of the US Constitution reveals that the Constitution itself was rooted in a revolution. Notably; the US Constitution was the first of several national constitutions that stemmed from revolution. It was designed to prevent anarchy by forging a Union of States. The historical roots of the Constitution lie in colonial American revolt against British rule and in the failure of the Articles of Confederation that governed US after the Revolution.

4.3 Colonization in America

The discovery of America produced a long struggle among European nations for control of new, profitable trade routes. It opened two continents for exploitation in trade, for the development of a worldwide colonial system of government, and for the

\[\text{article of the American Bill of Rights is clear and unequivocal: “The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for the redress of grievances.”} \]

\[\text{HERMANN PITCHETT, THE AMERICAN CONSTITUTION 167-198 (1959) (The safeguards in the Constitution were (1) Enumerating and limiting the national powers (2) Making government officials accountable to the people (3) Promoting the establishment of an ‘extended republic in which majority factions were unlikely to form and (4) Establishing a system of separation of powers and checks and balances. These features led Alexander Hamilton to conclude that “the Constitution is itself, in every rational sense, and to every useful purpose, a bill of rights.”} \]

\[\text{MILTON R KONVITZ & CLINTON ROSSITER, ASPECTS OF LIBERTY 288 (1958) (The “Bill of Rights” is usually the designation given to the first ten or more technically to the first eight amendments to the United States Constitution).} \]

\[\text{Supra note 6.} \]

\[\text{JANDA, BERRY ED., THE CHALLENGE OF DEMOCRACY: GOVERNMENT IN AMERICA 270 (3rd ed.). (Another constitution is the French Declaration of Rights of Men and of Citizen, 1789. One of the basic precepts of the revolution was adopting constitutionality and establishing soveretignty. To this effect the second provision of the French Declaration read “the end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security and resistance of oppression.”).} \]

\[\text{Unlike India which is a Union of States, US (and even USSR) was formed on the basis of an agreement uniting all free independent sovereign states was for the creation of a federal republic. In fact in 1783, King George III signed peace treaty not with United States government but with each independent state.} \]

\[\text{ARTICLES OF CONFEDERATION AND DECLARATION OF INDEPENDENCE 1776-1780.} \]
establishment of a new system of colony-mother country relations known as the mercantile system. The exploiting nations viz. Spain, France, England, Holland furnished settlers from their own nationalities since US was not an organised group of nations but one of the aboriginal inhabitants. Prompted by the economic, social, political and religious pressures from their homeland countless migrants were eager for a new life in the colonies. When their new found freedoms were threatened by the oppressive measures designed to limit their economic welfare and right of self-government, they began to think of independence, of the creation of a new nation whose government would be of the people, by the people, and for the people.

Although they were British subjects, the American colonists in the 18th century enjoyed a degree of freedom denied to most colonial people in world. They were able to inherit property, to attend church to enter into a trade or profession with few of the restrictions imposed by Europe’s feudal past. The colonies needed protection from the France and their allies during 7years war (1756-1763) which was an expensive undertaking. By 1763, the Britain and the colonies had reached a compromise between imperial control and colonial self-government. America’s foreign affairs and overseas trade were controlled by the king and the parliament and the British legislature; the rest was left to the home rule. But the cost of administration of colonies was substantial. Because America benefitted the most, it was contended by the English countrymen that America should bear that cost. The British believed that taxing the colonies was the obvious way to meet administrative costs. During that period a series of direct taxes was imposed on the colonies by the Crown. 

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21 Id.
22 (Upper Ohio valley was claimed by both governments of France and Britain as part of their territory and they attempted to capture each other’s forts. Skirmishes in this territory ultimately led to the full ledged war between Great Britain and America and many American Indians living in the region especially the Mingoes joined the British allies. The war was grounded during 1763 and began in 1764) https://history.state.gov/milestones/1750-1775/incidents (Oct., 28 2015).
23 (Treaty of Paris, 1763 by Louis XV was one of the cornerstones of Native American Law in the United States and Canada. It has ended French and Indian war/the 7 years’ war between Great Britain and France as well as respective allies. As per the Treaty, France gave up all its territories in Mainland North America to Britain. Also the war has defeated Spain which had entered a Family Compact 1961 with French King Louis XV who was the uncle of Spanish King Charles III. The treaty was a success in terms of the enormous territorial gains acquired by Great Britain in North America, the subsequent frontier policy and paying war expenses led to colonial discontent and ultimately to American Revolution). https://history.state.gov/milestones/1750-1775/treaty-of-paris (Oct., 28 2015).
24 JANDA, BERRY, supra note 17 at 68. (To recover from the post-war debts Prime Minister George Grenville reduced duties on sugar and molasses, and enforced the laws strictly, as these duties were been lax it ultimately increased revenue for the British government. The passing of Currency Act 1764 forbade the colonies from issuing paper currency and demanded repayment of debts in British pounds.
of citizens-merchants, lawyers, prosperous tradesmen created an inter-colonial association called ‘Sons of Liberty.’ This group destroyed taxed items and forced official distributers to resign. On the night of Dec 16, 1773 colonists reacted to a Tea Party. With this taxation issue became secondary and more important was the conflict between British demands for order and American demands for liberty.

4.4 The Declaration of Independence

The Virginia and Massachusetts assemblies summoned a Continental Congress in 1774 which would speak and act for the people of all the colonies. The first Continental Congress which met in Philadelphia had declared that the colonists were entitled to the right to life, liberty and property and a right “peaceably to assemble, consider of their grievances and petition the king.” By 1776, in the Second Continental Congress, Thomas Jefferson prepared the draft of the Declaration of Independence and his impassioned simplicity of statement reverberates to this day with democratic faith.

“We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are life, liberty and the pursuit of Happiness.”

rather than paper currency of colonists. The Stamp Act required the colonists to purchase government issued stamp paper for legal documents and other paper goods. Under pressure from the British merchants and the colonists the British government decided to repeal the Act. Subsequent to this in 1773 the British parliament decided to grant the East India Company a monopoly on tax free transport of tea and the colonial tea traders could not compete against the British traders. Subsequent to this in 1773 the British parliament decided to grant the East India Company a monopoly on tax free transport of tea and the colonial tea traders could not compete against the British traders.)

25 In Boston during 1765 a group of shopkeepers and artisans known as Loyal Nine started agitations against the Stamp Act. When the group grew it came to be called as Sons of Liberty. They existed in every US colony and their main aim was to force stamp distributors throughout the colonies to resign. (http://www.ushistory.org/declaration/related/sons.htm (Oct., 28 2015).

26 (The First Continental Congress met from September 5 to October 26, 1774. The Second, which opened May 10, 1775, continued until it was converted into the permanent organ of a national government by the final adoption of the Articles on March 1, 1781).

27 William F. Swindler, Our First Constitution: The Articles of Confederation, 67 AMERICAN BAR ASSOCIATION JOURNAL 166, 166-169 (1981) (The famous Declaration of Independence, which followed in Oct., was actually the third in a series of declarations by the Continental Congress, which, as the years passed, had moved the 13 colonies slowly and reluctantly toward independence. In 1774 the First Continental Congress had published its Declaration and Resolves, which called on the mother country to ensure to the colonists their rights as Englishmen. When Parliament ignored this representation, the Second Continental Congress in 1775 issued its Declaration on the Reasons for Taking up Arms in defense of the inalienable rights of Englishmen. Thus the Declaration of 1776 was the final step in an inexorable process in order to secure their rights as Englishmen, the English colonists then declared that they had to be independent of England itself).

28 (The Preamble of the American Declaration of Independence 1776 contains three basic ideas of equality in the concept of liberty. These basic ideas are the gift of life, opportunity for all alike under just laws and government by consent of the governed. The American Constitution insists that certain
The major premise of the Declaration of Independence is that the people have a right to revolt when they determine that their government is denying them their legitimate rights. Barely a week after the Declaration of Independence was signed; the Second Continental Congress received a Committee Report on Articles of Confederation on 1777 and took effect on 1787 following approval by 13 states. The Articles jealously regarded state sovereignty; their provisions clearly reflected the delegates fear that a strong central government would be substituted for British rule. The goal of the delegates who drew up the Articles of Confederation was to retain power in the Congress. But once the Revolution ended and independence was a reality, it became clear that the national government had neither economic nor the military power to function. Domestic upheaval toppled the government. Shays Rebellion (1786-1787) led by framers demonstrated the military weakness of the confederation.

29 U.S. CONSTITUTION art. II (Before 12th amendment it read “each State retains its sovereignty, freedom and independence and every power jurisdiction and right which is not by this Confederation expressly delegated to the United States, in Congress assembled.”).

30 (The Articles of Confederation formed an important part to the background to the 1787 constitution. It was the first national Constitution of the United States and as such reflected the American political theory during the revolution. Most of the articles incorporated in the US Constitution and several key changes found in the later document were present in embryonic form in the Articles of Confederation).


32 The United States and the Articles of Confederation: Drifting toward Anarchy or Inching toward Commonwealth? 88 THE YALE LAW JOURNAL 142-166 (1978) (The drafting process of the Confederation reveals that the Congress shared the country’s desire for confederation. The members made the document acceptable to all thirteen states and to avoid centrifugal forces and to attain maximum support, only the State of Delaware showed opposition but subsequently it ratified the articles because of the immediate necessity of acceding to the Confederacy).

33 This was consistent with Republicanism, which viewed the remote power of a national government as a danger to liberty. The Articles contained significant grants of power and authority to the national government. Under the supremacy clause the state was prevented from interfering with the plenary authority granted to the congress over military, diplomatic and commercial affairs (Article VII). It granted significant financial powers to the national government and created basis for a national system. In addition to this Articles sought to create a system of interstate co-operation and comity through privileges and immunities clause and full faith and credit clauses. (Article IX).

34 The reasons for the Rebellion included abusive nature of the local government taxation, unrestricted state laws and collection activities, the need for a strong national government, need for a standardized local currency. The rebellion was led by a group of agriculturalists led by Daniel Shay. They agitated...
Thus the original purpose of government was breaking down under the Articles of Confederation. Thus Constitutional Convention was formed. Although the delegates were authorized only to revise the Articles of Confederation they had worked instead to create an entirely new constitution. In creating the Constitution, the founders relied on four political principles that together established a revolutionary political order. These principles were republicanism, federalism, separation of powers and checks and balances. The preamble of the Constitution contains four elements that form the foundation of the American political tradition i.e. it creates a people, it explains reason for the Constitution, it articulates goals, it fashions a government. In addition to the preamble, the Constitution includes seven articles. The first three establish the internal operation and powers of the separate branches of government. The remaining four defines the relationship among the states.

4.5 The Bill of Rights

The constitutional guarantees for Americans most fundamental rights did not appear in the original Constitution. It was added to the constitution only with the ratification of the Bill of Rights amendments in 1791 and was given express constitutional protection. As a matter of fact the theory of constitutional convention was that the traditional liberties did not heed much in the way of specific constitutional protection since it would come automatically as the by-product of a system of economic opportunity. The drafters of the constitution believed that the broad expanse of the republic would encompass such a variety of interests as to make combination into domineering majority difficult. Thus the makers believed that individual liberty need not be planned for, it would come automatically as the bye

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35 HERMAN PITCHETT, supra note 14.
36 U.S. CONST. I, II and III.
37 U.S. CONST. IV, V, VI and VII.
38 HERMAN PITCHETT, supra note 14, at 367.
39 As said by Madison in No. 10 of The Federalist “The smaller the society the fewer possibility will be the distinct parties and interests composing it…and…the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of the other citizens, http://www.constitution.org/fed/federa10.htm (last visited on Oct., 28, 2015).
product of a system of economic opportunity, social mobility and political responsibility.\textsuperscript{40}

Since the Constitution submitted to the people in the state ratifying convention in 1787 and 1788 contained no Bill of Rights certain members of the state convention as well as considerable bodies of citizens throughout the states were disappointed. The omission of a Bill of Rights was the chief obstacle to the adoption of the Constitution by the states.\textsuperscript{41} In compliance with a tacit but general understanding on the subject, leaders in both houses of the First Congress proceeded with plans to draft appropriate constitutional amendments to submit to the states, which, when adopted would constitute a Bill of Rights in the Constitution.\textsuperscript{42} James Madison in the House was one of the principal draftsmen.\textsuperscript{43} Among the hundred amendments proposed by the states ten of them became part of the Constitution and collectively these ten amendments are known as the Bill of Rights.\textsuperscript{44}

Two aspects of the bill of rights are noteworthy, \textit{firstly}, the addition of the Ninth Amendment to make it sure that the enumeration of certain rights in the

\textsuperscript{40} HERMAN PITCHETT, \textit{supra} note 14, at 367 (Although this appears to be the dominant theory of the Convention, it was departed from in a few instances viz: protection against suspension of the writ of habeas corpus, prohibition of the passage of the bill of attainder or ex post facto laws by either Congress or the state legislature, the ban on religious text as a qualification for public office, the requirement of trial by jury, the restriction on conviction for treason, and the guarantee to citizen of each of all privileges and immunities of citizens in all states).

\textsuperscript{41} It was the Anti-federalists who complained that the new system threatened liberties of the people and opposed the Constitution. With ratification federalist announced willingness to consider adding of the Bill of Rights subsequently and First Congress came into session.

\textsuperscript{42} (Thomas Jefferson who did not attend the Convention in a letter to Madison wrote “A Bill of Rights is what the people are entitled to against every government on earth”. James Madison who was sceptical about the inclusion of Bill of Rights by calling it as a “parchment barrier” also believed in the inclusion of it in due course of time) \url{http://law2.umkc.edu/faculty/projects/ftrials/conlaw/billofrightsintro.html} (Oct., 29, 2015).

\textsuperscript{43} (As the delegates gathered at the Pennsylvania State House in May 1787 to “revise” the Articles of Confederation, Virginia delegate George Mason wrote, “The Eyes of the United States are turned upon this Assembly and their Expectations raised to a very anxious Degree.” Mason had earlier written the ‘Virginia Declaration of Rights’ and it strongly influenced Thomas Jefferson in writing the first part of the Declaration of Independence. Though he left the convention bitterly disappointed, he became one of the Constitution's most vocal opponents. ”It has no declaration of rights,” he stated. Ultimately, George Mason’s views prevailed. When James Madison drafted the amendments to the Constitution that were to become the Bill of Rights, he relied heavily upon the ideas put forth in the Virginia Declaration of Rights). \url{http://www.archives.gov/exhibits/charters/bill_of_rights.html} (Oct., 29 2015).

\textsuperscript{44} HERMAN PITCHETT, \textit{supra} note 14, at 168-169 (These ten amendments can be thought of as falling into four categories. The first and the most famous of all amendments cover freedom of speech, press, assembly and religion. The second and the third deal with the right of the people to keep and bear arms and the quartering of soldiers in private houses. The Fourth till the eighth are concerned primarily with procedural protections in criminal trials, prohibition on taking of private property for public use without just compensation. Finally the Ninth Amendment provides that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people. The Tenth Amendment concerns primarily state powers).
Constitution shall not be construed to deny or disparage others retained by the people. The Tenth Amendment responded to the concern that the national government might derive additional powers from the listing of rights by emphasizing that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”  

Secondly, the Bill of Rights placed restrictions on national governments only. Congress may not have extended the Bill of Rights to the states because it recognized that state declarations of rights already forbade state violations of rights.

4.6 The Civil War Amendments

The thirteenth, fourteenth and fifteenth amendments called as the Civil War Amendments were enacted to defend the Constitution against the institution of slavery which rendered the constitutional guarantee of equality futile. It presented a

45 US CONST. amend. IX. (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”). (The Ninth Amendment impliedly refers to the natural rights. In Griswold v. Connecticut 381 U.S. (1965), Supreme Court has made Ninth Amendment as the justification for giving a broad and liberty protective reading to the specifically enumerated rights) Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 STAN. L. REV., 895-935 (2008); Roe v. Wade 410 U.S. (1973).

46 US CONST. amend. X. (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.”); (This amendment in fact recognizes the sovereignty of the states as independent units. If the Tenth Amendment is properly utilized the federal government would never be able to seize the power of the states e.g. healthcare, mortgage industry, use of commerce clause, education etc. This may not have been the intention of constitution makers as well as George Washington condemned the notion of “living constitution” in his farewell speech. This ideology behind Tenth Amendment is also contrary to the notions of “implied powers” and “general welfare” as it posits federal government without any limits to the exercise of its power and that it makes the Constitution futile) https://waltercoffey.wordpress.com/2012/10/12/the-importance-of-the-tenth-amendment/ (last visited on Oct., 09 2015).

47 RALPH A. ROSSUM, G. ALAN TARR, AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS, 51 (2003) (To them if some provisions of the Bill of Rights were primarily designed to protect state powers from state invasion the concern was federalism and not individual rights).

48 U.S. CONST. amend. XIII (“It mandates that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.” It was passed by the Congress on January 31, 1865, and ratified by the states on December 6, 1865).

49 U.S. CONST. amend. XIV § 1 (It reads:- “All 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

50 U.S. CONST. amend § XV (“It reads that “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, colour, or previous condition of servitude.” Although ratified on February 3, 1870, the promise of the 15th Amendment was not fully realized for almost a century until the passage of the Voting Rights Act of 1965.”).
labour problem as well as a race problem.\textsuperscript{51} Racial discrimination was a great gap in the principles upon which the Republic had been based. Justice Goldberg remarked “the Constitution while heralding liberty, in effect declared all men to be free and equal—except black men, who were to be neither free nor equal. This inconsistency reflected a fundamental departure from the American creed, a departure which it took a civil war to set right.”\textsuperscript{52} Before the Civil War racial segregation was a way of life of Americans especially in the South. Blacks lived and worked separately from the whites. The omission of blacks from equal protection rights was intentional. The southern states acceded to the demands of the New England states for giving Congress broad power to regulate commerce in exchange of the right to continue the slave trade. The economic interest of the regions coalesced.\textsuperscript{53}

Emancipation of slaves was not one of the original war issues and it only gradually became a major issue.\textsuperscript{54} From a constitutional standpoint the Civil War resulted from conflicting doctrines as to the location of sovereignty in the federal union. The Southern states believed that the individual states were sovereign and this doctrine culminated in the attempt of eleven states to secede and form an independent confederacy. The Northern people almost unanimously rose to secession and maintained that the United States constituted an indissoluble union, an indivisible nation and this key issue of the locus of sovereignty was being decided on the battlefield.\textsuperscript{55} The original constitution was designed long before social equality was even thought of as an objective of the government. Madison held that protection of

\textsuperscript{51} During 19\textsuperscript{th} century abolition of slavery question had entered the field of special morality and justice and it was supposed that if labourer were not owned by the capitalist, he was free. History also reveals that the agitation against slavery was one of the movements for liberalism and social righteousness—humanitarianism which were transforming the modern world.

\textsuperscript{52} 1 BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES CIVIL RIGHTS, 6 (1970).

\textsuperscript{53} EPSTEIN, THOMAS G WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA—RIGHTS, LIBERTIES AND JUSTICE, (7\textsuperscript{th} ed., 2000).

\textsuperscript{54} The magnitude and bitterness of war produced drastic changes in the attitude of Northern people towards slavery. More and more people came to believe that slavery was the real cause of secession and disunion and therefore it must be destroyed before a peaceful Union could be re-established. Thus to both the people and the government the abolition of slavery gradually became an integral part of the Northern war programme to preserve the Union.

\textsuperscript{55} ALFRED H. KELLY AND WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 4 (1963) (Together with this there arose constitutional questions as to the legality of war, the power and authority of the Congress, President and the Federal judiciary in the exercise of war powers, constitutional issues regarding the institution of slavery and finally regarding the power of the government to suspend or restrict the civil liberties of the citizens. Many of these questions arose in large part from the fact that the Constitution had been drafted primarily to meet peace-time situations, and accordingly it contained comparatively brief and inadequate provisions for the exigencies of war).
the diversities in the faculties of men from which the rights of the property originates” is “the first object of the government.” Some abolitionists in fact denounced the Constitution because it protected the institution of slavery. Congress’ first serious effort to strike at the heart of slavery-to destroy the institution of slavery in slaveholding states was the emancipation section of the Second Confiscation Act of July 1862. 

Lincoln’s favourite plan for the permanent solution of slavery problem was the gradual emancipation of slaves by voluntary action of the states and in his capacity as the commander in chief he issued a preliminary proclamation of emancipation. He proclaimed that the war would continue to be prosecuted for the restoration of the Union but in all areas where the people were still in rebellion on January 1, 1863; slavery would be abolished immediately and completely. Thus the Opponents of emancipation argued that the federal government had no authority over slavery in the states under any circumstances and condemned the proclamation as a gross usurpation of power on the part of the President. The Emancipation Proclamation was followed by a period of doubt and confusion regarding the legal status of the freed Blacks. To

56 LAWRENCE M. FRIEDMAN, AMERICAN LAW 6 (1910) (The absence of express mention of equality was considered to be the great achievement of Jacksonian democracy and it also advocated the Aristotelian notion of the inherent quality of the person).

57 This provided that all slaves of persons engaged in rebellion or in any way giving aid thereto, which should be captured or escape to the Union lines, “shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves.” The President made no serious effort to enforce this section, largely because he was then developing his own programme of emancipation. (Though he informed his Cabinet that he would issue Proclamation of Emancipation he did not do that till the victory of the Union forces at the Battle of Antietam in September 1862 which was the Preliminary emancipation Proclamation. Lincoln chose to move cautiously in order to assure public support for such a measure).

58 (The Proclamation only freed slaves in territory which was in rebellion on January 1, 1863 leaving slavery untouched in other areas. He promoted the Thirteenth Amendment as a means of avoiding possible infinitesimalities of the Emancipation Proclamation. According to him, “a question might be raised whether the proclamation was legally valid. It might be added that it only aided those who came into our lines and that it was inoperative as to those who did not give themselves up, or that it would have no effect upon the children of the slaves born hereafter. But this amendment is a King's cure for all the evils.”) Roy R Basler et al., eds., The Collected Works of Abraham Lincoln, 1953-1955) as cited in James A. Dueholm, A Bill of Lading Delivers the Goods: The Constitutionality and Effect of the Emancipation Proclamation, 31 JOURNAL OF THE ABRAHAM LINCOLN ASSOCIATION 22, 22-38 (2010).

60 Id. (Opposition came from his own friends Benjamin Curtis, Robert Winthrop, Joel Parker and D.H. Rana. They argued that the president did not have power to make law by decree and that he did not have power to confiscate slave traders of their property. But all these oppositions are unpersuasive. The Proclamation and the perpetual freedom based upon it appeared to be covered by the Supremacy Clause i.e. Article VI Clause 2. Thus the federal government had a way out to protect slaves of the confederate states from re-enslavement of the slaves already emancipated by other states).
make the emancipation uniform throughout the nation and to eliminate all doubts as to its constitutionality the emancipationists proposed Thirteenth Amendment on January 31, 1865 to the Constitution shortly before the close of the Civil War in the 38th Congress.\textsuperscript{61}

Even after passing of Thirteenth Amendment Southern whites intended to make blacks as the slave of society though not as the slaves of individual masters.\textsuperscript{62} The former confederates were unwilling to accept that Civil War had fundamentally altered the racial status quo in the South and that the blacks could no longer be held as chattel slaves. Thus, immediately after the end of the War southern legislatures passed new and extremely discriminatory statutes generally known as “Black Codes.”\textsuperscript{63} These laws astounded northerners. Southerners still believed slavery was the best status for Blacks. The reaction to these laws led to the federal Civil Rights Act of 1866 and later to the Fourteenth Amendment. In 1866, Civil Rights Act was passed which gave the national government some authority over the treatment of blacks by the state Courts. This was a response to the Black Codes.

4.7.1 Judicial Approach towards Slavery

Judicial approach towards slavery is reflected in the famous case of \textit{Dred Scott v. Stanford}.\textsuperscript{64} In this case Dred Scott, a slave lived with his master in Illinois, a free state before returning to the slave state of Missouri. He contended that the times he spent in Free State enabled him to emancipation. The Court held that the Blacks are persons of inferior order and are not constituent members of the US sovereignty and were not intended to be included under the word ‘citizens’ in the Constitution and can therefore claim none of the rights and privileges which that instrument provides for and secures to the citizens of the US. In the words of Taney J, a staunch supporter of slavery “no slave or descendant of a slave could be a U.S. citizen, or ever had been a U.S. citizen. As a non-citizen, the Court stated, Scott had no rights and could not sue

\textsuperscript{61} \textit{Supra} note 47.
\textsuperscript{62} \textit{RICHARD N. CURRANT, RECONSTRUCTION 1865-1877} (1965).
\textsuperscript{63} \textit{Id.} (The authors of the Black Codes of 1865-1866 tried to replicate as much as possible a system of involuntary servitude. Many of the statutes were designed to control black labour in order to ensure that masters had a sufficient, reliable and pliable work force to maintain and operate their plantations. Black Codes set the stage for a new system of forced labour. These laws were attempts to reduce Blacks to the status somewhere between that of slaves and full free people. The labour contract laws tied to the vagrancy laws were designed to create a kind of servitude, tying the former slaves to the land, just as they were tied to their masters. Black Codes were also identified as Jim Crow laws, laws that enforced segregation. Jim Crow is a derogatory term for a black person).
\textsuperscript{64} 60 U.S. 393 (1857)
in a Federal Court and must remain a slave.” The Supreme Court also ruled that Congress could not stop slavery in the newly emerging territories and declared the Missouri Compromise of 1820 to be unconstitutional. The Court declared it violated the Fifth Amendment to the Constitution which prohibits Congress from depriving persons of their property without due process of law.

While Congress was passing laws to protect the civil rights of black citizens, the Supreme Court seemed intent on weakening of those rights. In United States v. Cruishank the Court excluded the application of Bill of Rights guarantees for black citizens by holding that civil war amendments had not changed the relationship between the state and national governments. In United States v. Reese Court denied right to peaceable assembly of blacks and its enforcement on the ground that they were not nationally protected rights and therefore Congress was powerless to punish those violated them. Subsequently in 1883, the Court struck down the public accommodations section of the Civil Rights Act of 1875.

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65 (According to him each state might confer ‘the character of citizen in other states.’ To put a ‘citizen’ of any given state on a plane of perfect equality with the citizen of every other state as to rights of person and property would be in effect to make him a citizen of the US and the Court had started out by saying that persons of Dred Scott class could not be citizens of US). http://www.historyplace.com/lincoln/dred.htm (last visited on Oct. 13, 2015).

66 Before Missouri Compromise there had been 22 states in US equally divided into Slave States and Free states in the Congress. When Missouri which was part of Louisiana demanded for inclusion of it in the Union, it was found that inclusion of the state of Missouri would disrupt that balance and also it will imply acquiescence by Congress in favour of Slavery. To avoid that Missouri Compromise was made as a solution under which the State of Missouri was accepted to the Union as a Slave holding state and the free state of Maine was formed. The Compromise also drew an imaginary line across Louisiana territory establishing boundary between slave states and Free states. It was later negated by the Kansas Nebraska Act, 1854. The Dred Scott case is also a notable one for the reason that judicial review of a law passed by Congress was sought for the second time in the instant case after Marbury v. Madison 5 U.S. 137 (1803).

67 US CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

68 92 U.S. 542 (1876) the case was decided soon after the passing of Fourteenth Amendment. He had violated the Enforcement Act by attacking African Americans. He argued that only states can legislate against individuals and federal government cannot legislate against individuals and this was upheld by the Supreme Court.

69 92 U.S. 214 (1875).

70 Plessey v. Ferguson 163 U.S. 537 (1896).
4.7.2 Separate but Equal Doctrine

'Separate but equal ‘the phrase was derived from Louisiana law of 1890, which actually used the phrase ‘equal but separate.’ As per the doctrine segregation will not amount to discrimination if the facilities provided as part of segregating Blacks are equal to that of whites. The doctrine was confirmed in *Plessey v. Ferguson*\(^71\) and thereby upheld state-imposed racial segregation. It was held that separate facilities for blacks and whites satisfied the Fourteenth Amendment as long as they are equal.\(^72\) The lone dissenter was John Marshall Harlan, who envisioned a “colour-blind Constitution”\(^73\) and his opinion became the underpinning for the decision in *Brown v. Board of Education of Topeka*\(^74\) which overturned the doctrine in 1954.\(^75\) Court held that “Racially segregated schools” are “inherently unequal.” The next year, in *Brown II*,\(^76\) the Court announced a decision outlining its plan for implementing racial desegregation in the schools. The Court took a cautious approach, remanding the cases to district Courts with orders to integrate the schools “with all deliberate speed.”

4.8 Background of Fourteenth Amendment Act

The Southern Black Codes were not the only reason for astonishment at southern behaviour. Even more important was the violence directed towards the blacks after the war. In order to enquire the situation in December 1865, Congress

\(^{71}\)Id. (In this case Homer Plessey, was jailed for sitting in a car meant for only whites of the East Louisiana Railroad. He could easily pass off as a white because of his Creole colour. He deliberately sat there and identified himself as a black. His lawyer argued that Separate Car Act violated Thirteenth and Fourteenth Amendment).

\(^{72}\) (According to the majority legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the existing situation) LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA-RIGHTS, LIBERTIES AND JUSTICE, 588-589 (2010); (Later, the Supreme Court extended the separate-but-equal doctrine to the schools, restaurants, public places etc.).

\(^{73}\)Id. (He stated that “our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights all citizens are equal before law…The present decision it may well apprehended, will not only stimulate aggressions more or less brutal and irritating upon the admitted rights of the colored citizens, but it will encourage the belief that it is possible by means of state enactments to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments to the Constitution”).

\(^{74}\) 347 U.S. 483 (1954) (The case came as a class action suit against Board of Education of the City of Topeka, Kansas by 13 parents for their 20 children. The daughter of the named plaintiff Brown, had to walk 1.6 miles to her school bus top to ride to her segregated Black school. Though there was white school just one mile away she was not allowed to study there. Hence the petition was filed.).

\(^{75}\) (The Court found support for its decision in the Statement of UNESCO titled ’The Race Question’ done by renowned scholars from different countries which indicated that minority students learn better in racially mixed classrooms) [http://law2.umkc.edu/faculty/projects/ltrials/conlaw/sepbutequal.htm](http://law2.umkc.edu/faculty/projects/ltrials/conlaw/sepbutequal.htm) (last visited on Oct. 13, 2015).

\(^{76}\) 349 U.S. 294 (1955).
authorized the fifteen members Joint Committee on Reconstruction to investigate conditions in the South. The Joint Committee consisted of six senators and nine congressmen. Congressmen John Bingham was a key member of this committee. The Committee members interviewed scores of people-former confederate leaders and slave owners, United States Army officers and others in South and it was concluded it would be impossible to “abandon” the former slaves “without securing them their rights as free men and citizens.”

The Committee understood that the task before the Congress and the nation involved three things: preventing former Confederates from reinstating the same type of regime that existed before the war; protecting the liberty of the former slaves and guaranteeing them the power to protect their own rights within the new political regime that needed to be created; and protecting the rights and safety of white Unionists who were threatened by the violence of whites who had not accepted the political or social outcome of war.

John Bingham and others in the majority on the Joint Committee understood that they had to protect the life, liberty, safety, freedom, political viability and property of the former slaves. They had to protect their rights to have meaningful contracts. They had to protect their rights to the Courtroom and the voting booth, as well as in the marketplace. They had to be protected from “Lynching” and other forms of cruel and unusual punishment. They desperately needed the protections of the Bill of Rights - fair trials by fair juries, with legal counsel to represent these largely illiterate former slaves. They needed to be able to express themselves in public and to organize politically. They needed equal schooling. Thus John Bingham drafted the Fourteenth Amendment in the context of Black Codes of 1865-66 and the violence

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77 H.R. Joint Committee on Reconstruction, 39th Congress, Report of the Joint Committee on Reconstruction, Vol. 12, 1st Session 1866, (Hereinafter “Committee Report”).
78 Id. at Part 1, 107-108 (Committee members understood that they were “not safe from the poor whites” without laws to secure their rights. He noted that whites wanted “some kind of legislation” to enact such laws as will enable them to manage the Blacks as they please-to fix the prices to be paid for his labour.”).
79 Randall M. Miller, Lynching in America: Some Context and a Few Comments, 72 PEN. HIST., 275-291 (2005) (The most brutal form of punishment was ‘Lynching’ in order to enforce Jim Crow etiquette which was the way of life of the Blacks of US imposed by the white society. In US lynching was used to refer specially to murder usually by hanging. It is named for Colonel Charles Lynch, who headed an irregular Court to deal with Tories and Crimes. It was used mostly by the Ku Klux Klan as a tool for reversing the social changes brought on by federal occupation).
directed at blacks and white Unionists in the immediate post-war South and it was passed in the 39th Congress.\textsuperscript{80}

\textbf{4.9 Fourteenth Amendment under US Constitution}

The adoption of the Fourteenth Amendment introduced new elements into the constitutional situation. It overrode the effect of \textit{Dred Scott} decision and validated the Civil Rights Act. Secondly, it made applicable the whole federal Bill of Rights effective against the States though not stating specifically. Finally, it has imposed upon the entire apparatus of the national government, executive, legislative and judicial the task of seeing to it that no state deprived any person of life, liberty or property without due process of law or denied any person within its jurisdiction the equal protection of laws or abridged the privileges and immunities of the US. The Fourteenth amendment has been without doubt the most dynamic part of the United States Constitution since the Civil War.\textsuperscript{81}

The Fourteenth Amendment was worked out through a long period of evolution in the joint committee on Reconstruction. The first eight amendments to the constitution, commonly referred as the Bill of Rights, gave broad protection to life, liberty and property against infringement by the federal government. Thus Bingham, the ‘father of the Fourteenth Amendment’ wished by constitutional amendment to extend the protection of what he called “this sacred bill of rights” to people who might be oppressed by the states.\textsuperscript{82} The First section of the amendment dealt with Civil Rights. In its original form it provided that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of US nor shall any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of laws”.

On February 26, 1866 Bingham offered an amendment containing the essence of what later became the first section of the fourteenth amendment. It provided that “the Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of

\textsuperscript{80} Paul Finkelman, \textit{John Bingham and Background to the Fourteenth Amendment}, 36 \textit{AKRON L. REV.} 671 (2003).
life, liberty and property. Also he mentioned that his proposed amendment is not limited to the protection of the rights of Blacks. It is to be noted that in the final draft instead of stating positively that Congress should have the power to enact legislation protecting the rights in question, the amendment was worded merely in the form of prohibiting state action. After the decision of the Court in Dred Scott case Congress deemed it advisable to add at the beginning of the first section the sentence providing, “All persons born in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.” These clauses held forth new promises to litigants who decided to attack state legislation when it injuriously affects their property and civil rights. It had also made substantial changes in the old federal system.

The second section of Fourteenth Amendment provides that representatives should be apportioned as among several states according to their respective populations, counting the whole number of persons in each state, excluding Indians

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83 When the due process clause was incorporated in the Fourteenth Amendment as a limitation on the states, it was intended to have the same content as its prototype in the Fifth Amendment. There is some evidence to the effect that the more extreme Radical Republicans in Congress hoped and expected that the due process clause would serve to bring about the application of all the first eight amendments to the states. John Bingham was rather sceptical about it and he supplemented the due process with the equal protection and the privileges and immunities clause.


85 Pamela Brandwein, A Judicial Abandonment of Blacks? Rethinking the “State Action” Cases of the Waite Court, 41 LAW & SOC’Y REV. 354 (2007) (The Act was originally passed to enforce the thirteenth amendment and it was re-enacted in the Act of 1870, a measure passed to enforce 14th and 15th amendments. Many Republicans at that time, including Justice Bradley believed that access to public accommodations is a civil right, but this view was not a consensus view among the Republicans at that time. Congress passed the Act as a tribute to Senator Sumner, anti-slavery leader who had just died and the provisions were also considered dead on the arrival).

86 U.S. CONST. amend. IV § 1

87 Fourteenth Amendment since the case of Barron v. Baltimore 32 U.S. (7 Pet) 243 (1833) had limited the effect of the Bill of Rights to the federal government. The only provision as it then existed which might cove the Black was the privileges and immunities clause. However the Dred Scott decision eliminated this possibility so new guarantees were needed. The Fourteenth amendment removed those doubts by expanding Congressional authority to secure rights against state violation; and it was designed to constitutionalise the Civil Rights Act of 1866.

88 US CONST. amend. XIV § 1 (All 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
not taxed. The purpose of this section was to compel states to grant universal suffrage or to incur the penalty of loss of representation.

The third section of fourteenth amendment provided that without removal of their disability by a vote of $2/3^{rd}$ of each House of Congress, no person should become a State or federal official who had participated in the rebellion after previously having taken an oath to support the Constitution of the US as State or federal official. The fourth section gave Constitutional sanction to the validity of public debt of the US and provided on the other hand that neither the US nor any State should be responsible for any debts incurred in aid of insurrection or rebellion against the US. The fifth and the last section empowered the Congress to enforce the provisions of the Article by appropriate legislation.

4.10 Concept of State Action under Fourteenth Amendment

The Doctrine of State Action establishes a threshold requirement for judicial construction of judicial claims and congressional enforcement of constitutional rights: absent some action on the part of a state entity, the doctrine holds that there can be no

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89 US CONST. amend. XIV § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male Citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

90 (“The section proved ineffective for which it was adopted, and the fifteenth amendment had to be added later to provide the Blacks with a constitutional guaranty of non-discrimination in matters of suffrage.”) Congressional Globe 2459 as cited in CARL BRENT SWISHER, THE AMERICAN CONSTITUTIONAL DEVELOPMENT 329 (1943).

91 US CONST. amend. XIV § 3 (“No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.”).

92 US CONST. amend. XIV § 4 (“The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.”).

93 US CONST. amend. XIV § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
constitutional violation. The Fourteenth Amendment enforces the claim of due process in case of violation of rights of the citizens in a state action. It is mechanically satisfied where the state itself infringes a constitutional right, either through action of a legislature or a government agency. All problems relating to the existence of government action—local, state or federal—which would subject an individual to constitutional restrictions came under the heading ‘state action.’

4.11.1 Origin of State Action Doctrine

The issues concerning the applicability of constitutional legislation to private conduct did not rise until after the enactment of the Civil War Amendments. At the time of the proposal and ratification of the thirteenth and fourteenth amendments the Congress passed a wide range of civil rights statutes designed to protect blacks against the actions of both state official and private persons. In several cases between 1875 and 1882 the Supreme Court indicated that Congress was not empowered to regulate the conduct of private persons simply because that conduct might disadvantage blacks or other persons. In United States v. Cruishank and in some other case Court held that federal criminal indictments under the Civil Rights Act for participation in lynching of blacks were unconstitutional as applied to persons who had no connection to state governments and who were not interfering with uniquely federal rights such as the petitioning of the Congress. However the issue was not finally settled until 1883 in the Civil Rights Cases. The facts and opinion of the Civil Rights Cases contain, directly or indirectly, the main conceptual issues of the state action doctrine.

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96 JOHN E. NOVAK, RONALD D. ROTUNDA ED., CONSTITUTIONAL LAW 497-525 (2nd ed. 1983).
97 The Civil Rights Act, 1866, 1871 and 1875.
98 (The State Action doctrine has long established that because of the language or history, most provisions of the Constitution that protect individual liberty—including those set forth in Article I section 9 and 10, the Bill of Rights and Fourteenth Amendments—impose restrictions or obligations only on the government). WILLIAM B. LOKHART, YALE KAMISAR, CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS, 280 (1996); NOWAK & ROTUNDA supra note 96, at 499.
100 109 US 3 (1883).
101 G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility, 34 HOUS. L. REV. 333 (1997) (They are the issue of Public Function, the State Nexus issue, the Beyond State Authority issue, the Projection of State Authority issue, the
4.11.2 The Civil Rights Cases

The case concerned four indictments and one civil action under Section 1 of Civil Rights Act, 1875.¹⁰² It is Justice Bradleys’ construction of congressional enforcement power under the Fourteenth Amendment in the Civil Rights Cases¹⁰³ that give rise to the state action doctrine. He 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.”¹⁰⁴ Thus Justice Bradley established the fundamental principle that the prohibiting provisions of Section 1 of the Fourteenth Amendment¹⁰⁵ apply only to offending state action and not to private action.¹⁰⁶ It means that the guarantees of civil liberties contained in the Fourteenth Amendment applied only to governmental or ‘state action’. Thus Justice Bradleys’ formulation of the state action doctrine set in motion an on-going judicial search for governmental responsibility in all cases in which the controlling issue becomes whether government

State Authorization Issue and the State Inaction Issue. Further he has organised these issues into two models characterization model and state authorization model. The characterization model contains the public function and the state nexus and private wrongdoer, the state nexus issue contains, as sub issues, the beyond state authority and projection of state authority issues. The state authorization model obviously and primarily contains the state authorization issue and as a sub-issue the state inaction issue).

¹⁰² Civil Rights Act 18 Stat. 335-337 (1875) § 1 (“Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and colour, regardless of any previous condition of servitude.”) available at [https://chnm.gmu.edu/courses/122/recon/civilrightsact.html](https://chnm.gmu.edu/courses/122/recon/civilrightsact.html) (last visited on Oct 10, 2015); (The Civil Rights Act was the first US Federal Law to define US Citizenship and it affirmed that all citizens were equally protected by the law. It was mainly intended to protect the civil rights of African Americans in the wake of the American Civil War. Congress responded to the Southern intransigence with the Civil Rights Act of 1866 and later through 14th amendment passed by the 39th Congress. The Civil Rights Act guaranteed to Blacks the right to make and enforce contracts, to inherit, purchase, lease, sell, hold and convey real and personal property and to enjoy the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. The constitutional authority of Congress to enact this law however remained questionable) [http://oll.libertyfund.org/title/2282/216253](http://oll.libertyfund.org/title/2282/216253) (last visited on Oct 02, 2015).

¹⁰³ 109 US 3 (1883) (The Civil Rights Act, 1875 prohibited discrimination on the basis of race in public facilities and conveyances and established civil and criminal penalties against anyone who interfered with the “full and equal enjoyment” of public facilities and conveyances by persons because of their race. The five cases were brought against individuals who had excluded Black persons from railroads, hotels and theatres because of their race).

¹⁰⁴ "Id." (He continued by saying "the Fourteenth Amendment Act prohibits the State from depriving any person of life, liberty or property without due process of law; but this adds nothing to the rights of one person as against another.").

¹⁰⁵ Supra note 49.

¹⁰⁶ "Id." (It nullifies and makes void all state legislation and state action of every kind which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law or which denies to any of them the equal protection of laws).
is in some way responsible for the particular harm that one person or entity has inflicted upon another person or entity.\textsuperscript{107}

The opinion in \textit{Civil Rights Cases} also reviewed the possibility of the Civil Rights Acts for the purpose of enforcement of the thirteenth amendment.\textsuperscript{108} The majority opinion of the Congress was that the Congress had the right under the thirteenth amendment to “enact all necessary and proper laws for the obliterating and prevention of slavery with all its badges and incidents.” Against this view it was argued that the Congress could only eliminate legal distinctions based upon slavery and disagreed with the federal regulation of all private discriminations or wrongs against blacks. Thus it was held that the Act exceeded the reach of congressional enforcement power under the Fourteenth Amendment.\textsuperscript{109}

The majority of the Court used the Tenth amendment to interpret the applicability of the Fourteenth amendment and the grant of power to Congress by that amendment. To support this argument it was held by the Court that “if Congress had the power to protect all rights against private deprivation it would allow the federal assumption of the functions of the state in a way which would violate principles inherent in the tenth amendment.”\textsuperscript{110} In \textit{Civil rights cases} also we can see Courts’ disinterest towards government regulation of individual activities regardless of the basis of legislation.\textsuperscript{111}

It was held that the last section of the amendment does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in

\textsuperscript{107} Thomas P. Lewis, \textit{The Meaning of State Action}, 60 COLUMBIA LAW REVIEW 1083-1123, 1083-82, 1960. It is to be noted that the first articulation of the state action doctrine adhered to the formalist reasoning and was premised on the classical conception of powers that are autonomous within its spheres. Duncan Kennedy, The Globalization Of Law And Legal Thought: 1850-2000 in \textit{THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL} 19-73 (David M. Trubek, Alvaro Santos ed., 2006).

\textsuperscript{108} 109 US at 20 (In fact this question does not involve a state action issue. However for the valid enforcement of the amendment it would have to relate to the abolition of the incidence of slavery).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} U.S. CONST. amend. X (“Reserved Powers The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

\textsuperscript{111} It should be noted that the Supreme Court recognized the Congressional power to regulate the activities of private individual when such power was based on specific federal power such as those contained in § 8 of Article I of the Constitution.
the amendment.” According to him the thirteenth amendment eliminated not only the institution of slavery but the continuing distinctions based on race which resulted from the slavery experience. He found that the Congress could enforce the rights of US blacks in relation to public accommodations, facilities and public conveyances since discrimination in those “public” or “quasi-public” functions was a continuing badge of servitude. Additionally he found that the fourteenth amendment authorized Congress to grant full protection to Blacks against discriminations by private person. He noted that the first sentence of the fourteenth amendment created a national citizenship which could be protected by congressional legislation. Thus, he found that protection from racial discrimination was a basic civil right and part of citizenship in the United States which could be protected by Congress.

4.12 The Purpose of the Doctrine of State Action

State Action doctrine is the core of US Constitutional framework. The purpose of State Action Doctrine is not to “preserve an area of individual freedom,” instead...

112 Also Ex Parte Virginia 100 US 310 (In this case the question that arose for consideration in this case was whether the action of a county judge in discriminating against colored person in making sections to the grand jury and petit jury violated the Fourteenth Amendment).

113 It was held that “the State acts through its legislative, executive and judicial authorities and whoever by virtue of public position under the State government…violates the constitutional inhibition…his act is the act of the State”.

114 Id. (“He opined that the Section 1 of Fourteenth Amendment which defines citizenship of the United States and of the several states “is of a distinctly affirmative character” and that the citizenship thus acquired…may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; because the power of Congress is not restricted to the enforcement of prohibitions upon State laws or State action.”).


116 Burke & Reber, State Action, Congressional Power and Creditor’s Rights: An Essay on the Fourteenth Amendment, 46 S. CAL. L. REV. 1003, 1041 (1973). (According to a number of commentators the state action requirement promotes or preserves individual liberty and the “private structuring of relationships.”), Mark Tushnet, Shelly v. Kraemar and Theories of Equality, 33 N.Y.L. SCH.L.REV. 383, 396-397 (1988) (“Because the state action requirement does not preclude government from intruding upon private activities, however, it does not really protect individual liberty in an absolute sense. The state action requirement as distinguished from the Fourteenth Amendment itself does not prevent legislatures or state Courts from intruding upon any private activity.”).
the state action doctrine functions as a limitation upon the operation of the Fourteenth Amendment.\textsuperscript{117} The doctrine is not intended to be used to protect individual rights or states’ rights and also it is not intended to be used to regulate the behaviour of individuals or to guarantee governmental benefits.\textsuperscript{118} Rather the purpose of state action doctrine stands for the proposition that the people have the right to determine for themselves through their state and federal elected representatives how individual are to treat each other and how generous the society will be in the distribution of wealth when it acts collectively.\textsuperscript{119} State action doctrine is the tool with which the Court attempt to balance at least three competing elements i.e. individual autonomy, federalism and constitutional rights.\textsuperscript{120}

State action doctrine also prevents the federal Courts from using the fourteenth amendment to usurp authority that the Constitution guaranteed to the executive and legislative branches. Federal judicial authority to articulate positive law regulating private conduct is extremely limited. To the extent that the federal government has authority to regulate private activities and relationships, that authority is vested mainly in Congress. By limiting the application of the Fourteenth Amendment to governments, the state action requirement prevents federal Courts from directly regulating private activity that the Constitution deemed best governed by the representative branches.\textsuperscript{121}

The state action doctrine has four related applications. First, it focuses in part up on whose actions are subjected to constitutional review, namely actions that are attributable to government. Secondly, it distinguishes two types of governmental

\textsuperscript{118}Id. at 1383 (By stating the purpose of state action doctrine in this way he has said that both liberals and conservatives are in error in their interpretation of the doctrine of state action).
\textsuperscript{119}Id. at 1384 (He continued by saying that the people are sovereign in a nation so the government may serve the people and thus governmental action is to be subjected to judicial review).
\textsuperscript{120}Sidney, supra note 101, at 333 ("Why does the state action doctrine matter, and why does it merit the extensive attention it has received from Courts and scholars? It matters because it is a core doctrine in our nation's constitutional framework. It is the tool with which the Courts attempt to balance at least three competing interests: (1) individual autonomy – the individual’s interest in preserving broad areas of life in which he or she can develop and act without being subjected to the restraints placed by the Constitution on governmental action, (2) federalism – the nation’s interest in preserving the proper balance between state and national power, especially the power of states to determine, within generous limits, the extent to which regulatory power should be applied to private action, and (3) constitutional rights the interest in protecting constitutional rights against invasion by government or by action fairly attributable to government.").
actions, affirmative acts and failure to act i.e. state in action. Thirdly, State action doctrine creates the notion of “constitutional baseline” and it allows the government to return to the constitutional baseline by repealing anti-discrimination laws and through social welfare programmes. Fourthly, state action doctrine is employed to limit the power of congress in the enforcement and protection of our fundamental rights. There are also circumstances where the constitution does not apply or it applies only in a weakened form i.e. in cases of political question doctrine and the doctrine of governmental intent. We can see all the above elements while scrutinizing state action doctrine in order to analyse state action/private action linking and de-linking.

4.13 The Public/Private Divide

The Constitution of United States clearly sets out the distinction between private action and state action through the Fourteenth Amendment and also by virtue of the state action doctrine as enunciated in the Civil Rights cases. The original reasoning of the doctrine in Civil Right cases accord with classical legal thought. This legal thought conceive law as a system with strong structural coherence based on the three traits of exhaustive elaboration of the distinction between public law, individualism and commitment to legal interpretive formalism.

The earliest enunciation of Public/Private divide by the Supreme Court can be seen in Justice Bradleys’ decision in Civil Rights cases. He relied on a distinction between private law and public law derived from a conception of separate spheres for private and public actors, these boundaries served to promote the individualistic goal

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122 Sidney, supra note 101, at 113.
123 Nixon v. United States 506 US 224, 238 (1993) (Court held that the question of procedure to be followed in trial of impeachment is committed to the sole discretion of senate and is therefore a political question).
124 The doctrine of governmental intent is concerned with the motivation of the person or entity whose actions are being reviewed it shields certain categories of conduct from constitutional review. In Ward v. Rock Against Racism. 491 US 781 (1989), the Court upheld the municipal regulation against first amendment challenge on ground that laws which are intended to serve content-neutral purposes are subjected to a lower level of scrutiny than laws intended to regulate content).
125 Id.
126 (Kennedy defines classical legal thought as “a way of thinking about law as a system of spheres of autonomy for private and public actors, with boundaries of spheres defined by legal reasoning understood as a scientific practice.”) Duncan Kennedy, Three globalization of law and legal thought: 1850-2000, 36 SUFFLOK U. L. REV. 631 (2003).
127 Supra note 605, at 1248-1268.
of self-realization and by protecting the sphere of private conduct from judicial inquiry, so long as such conduct is abided by state autonomy and common law.\textsuperscript{128}

Later this view was rejected with the coming of social legal thought.\textsuperscript{129} According to this theory eradicating racism is the most important task which the American law has to confront and secondly, this task requires confrontation of the barrier of the so-called state action doctrine.\textsuperscript{130} In this regard one could analyze \textit{Reitman v. Mulkey}\textsuperscript{131} wherein White Court rejected the distinction between state action and inaction underlying the deductive reasoning in \textit{Civil Rights Cases} by adopting a functionalist perspective.\textsuperscript{132} The decision went against the principle of ‘Classical Liberalism’ and gave an interpretation of state action doctrine in accordance with racial justice.\textsuperscript{133}

By mid-twentieth century, two streams of thought came one defending state action on formalistic grounds and critiques who find state action doctrine as abusive of deduction that ignores competing rights and interests.\textsuperscript{134} By that time there was influx of legal realism which exposed the courts in balancing competing interests which emerged in policy analysis, thereby rejecting the premises of both classical deductive reasoning and social teleological reasoning.\textsuperscript{135} Neo-formalism was the bye product of it and it was welcomed by the defenders of state action doctrine. It was a transformed element of classical legal thought.\textsuperscript{136} In \textit{United States v. Morrison},\textsuperscript{137}

\textsuperscript{128} \textit{Id.} (He proceeded further in a deductive fashion to conclude that section 5 of the 14th amendment confers no authority in congress to regulate individual conduct).
\textsuperscript{129} (Social legal thought emerged from the critiques of classical legal thought that had argued that such thinking employed an 'abuse of deduction.') Duncan Kennedy, \textit{supra} note 107, at 39.
\textsuperscript{130} \textit{Id.} at 10.
\textsuperscript{131} 387 US 369 (1967) (This was a landmark decision wherein the US Supreme Court put forward an important legal precedent that a state can invalidate state’s own constitutional amendment if it violates the provisions of US Constitution. In this case the petitioners were discriminated by Reitman the owner of an apartment when they asked to rent a house. Section 51 and 52 of Californian Civil Code prohibits discrimination in housing business entirely based on racial status. But this section ran contrary to Proposition 14, article 1, section 26 of the Californian Constitution which banned fair housing measures in the state of California. This proposition was also challenged by Mulkey, the petitioners). Duncan Kennedy, \textit{supra} note 10, at 1260.
\textsuperscript{132} (The Court presented an analogy between the constitutional provision which prohibited state enactment on prohibition of racial discrimination which thereby authorizes racial discrimination in the state statute and J. White accepted it). Duncan Kennedy, \textit{supra} note 126 (There was a revival of Classical formalism and thereby a shift in the emphasis from private to public law).
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} 529 US 598 (2000) (In this case the Court invalidated an attempt by Congress to remedy the violations of equal protection-otherwise a permissible exercise of its enforcement power under 14th
writing for the majority Rehnquist J. reaffirmed the state action as articulated in Civil Rights Cases. Thus currently the State Action doctrine attempts to demarcate the public/private distinction upon which it has originally premised. But this position is subjected to challenge by legal scholars.

4.14 Privatisation of Public Services and State Action Doctrine in USA

Privatization as a concept and as a political movement profoundly altered the boundaries of the public sector in United States. In USA the distinctions between public and private sector is blurred in the real world. Even from the outset of the Republic also the Government has relied on the private sector to provide commercial services and utilities but subject to legal restrictions. One of the earliest cases in this regard is McCulloch v. Maryland wherein Court held that a chartered bank as an instrumentality or agency of the US. The Court inter alia held that a sovereign cannot be taxed by a subordinate unit since to do so would permit another body to determine the fate of the sovereign. The decision attracted lot of criticism from the supporters of privatization in US since it took away the privileges which the Bank would have enjoyed as a private Bank in the absence of the decision holding it as an instrumentality of the sovereign.

amendment or under the Civil Rights Cases because it failed to satisfy the formal requirements of state action).

138 (“If there is a single person responsible for current, confining idea of state action it is Rehnquist.”). David J. Barron, Privatising the Constitution: State Action and Beyond in THE REHNQUIST LEGACY 345, 346 (Craig M. Bradley ed. 2006). (Rehnquist way of state action doctrine, judicial power has two implications. First it weakens judge’s power to extend liability private individuals for violations of constitutional rights and to impose constitutional duties on the government. Second, it enhances judicial power to overturn federal legislation. The Rehnquist way reasserts a constitutional baseline of negative rights and limited federal involvement in the vindication of those rights).

139 MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 161-162 (2008) (In the light of this interpretation Prof. Mark Tushnet criticizes state action doctrine as ‘distracting us from paying attention to what truly matters and thus he calls for abandonment of the doctrine. To him once the formal distinction between private and public actors and between state action and inaction collapses under the realistic pressure the Court may require government to remedy de facto burdens on the constitutional rights. This argument is functionalist in nature and construes constitutional rights as serving substantive interests, which when threatened may require action on the part of the government) G. Sidney Buchnan, A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility, 34 HOUS. L. REV. 333 (1997).

140 Ronald C. Moe, supra note 144, at 454.

141 17 US 315 1819 (The second bank of US was chartered by the Act of Congress for a period of 20 years. The State of Maryland attempted to tax the operations of the Baltimore branch of the Bank thereby subjecting it to ‘double taxation’ and the decision was challenged in the Court).

142 Id.

143 Supra note 5, at 454 (The court considered the Bank to be an instrumentality of the sovereign, or agency of the US, notwithstanding the fact that only 20% of the stock subscription was held by the federal government. Thus it was subsequently assumed that if the federal government owned any portion of a corporate body, the entire body acquired the attributes of the sovereign).
In 1980’s privatisation emerged in USA and it was considered to be the single most influential concept of the decade. Privatization which has its intellectual roots in the concept of free market economy profoundly altered public administration as an intellectual field and profession in USA.\footnote{Ronald C. Moe, \textit{supra} note 144.} The Privatization movement in USA was held together by a shared belief that the public sector is too large and that many functions performed by the public sector can be efficiently and economically performed by the private sector.\footnote{Id.} In an attempt to give clarity to the privatization debate, scholars in US have distinguished between privatization of ‘provision of public services’ and ‘privatization of production.’\footnote{EMANUEL S. SAVAS, \textit{Privatizing the Public Sector: How to Shrink Government} (1985); STUART BUTLER, \textit{Privatizing Federal Spending: A Strategy to Eliminate the Budget Deficit} (1985); Steve H. Hanke, \textit{Privatization: Theory, Evidence and Implementation}, 35 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 101-113 (1985).}

Since the private actors were not subject to the same constitutional, statutory and oversight restrictions as the government actors, delegation of public functions outside the bounds of government profoundly challenges traditional notions of accountability, making it all the more difficult.\footnote{Ted Kolderie, \textit{Two Different Concepts of Privatization} 46 PUBL. ADMIN. REV. 286, 285-291(1986) ("Provision of public services” involves determining whether a service shall be provided at all, and if yes, the right to determine who shall have it and how much of it has to be given, whereas ‘privatization of production’ is concerned with delivery of service which includes operating, delivering, running, doing, administering.”)} Legal scholars have argued repeatedly that legislative delegation to private parties is inconsistent with the principle of separation of powers designed to guard against the abuses of government authority.\footnote{Robert S. Gilmour & Laura S. Jensen, \textit{Reinventing Government Accountability: Public Functions, Privatization and the Meaning of State Action}, 58 PUB. ADMIN. L. REV. 248, 249, 247-258 (1998) (In US, the Supreme Court even declared the congressional delegation of governmental authority to private actors to be “unknown to the law and utterly insignificant with the Constitutional prerogatives and duties of Congress. But unlike Supreme Court, federal Courts have routinely sanctioned delegation of federal and state power to private actors. For example private control of occupational licensing and regulation, accreditation of professional schools, industrial rule making and price-fixing, immunity for private police forces etc.).} But this argument was given seldom importance by the judicial decision makers in US. As a drive to privatize the delivery of public services gained momentum too little attention has been focussed on the potential impact of privatisation on rights of the citizens and access to public rights.\footnote{Id.}
Even in US there was a difficulty in making private actors liable for violation of statutory and fundamental rights of the citizens under the existing judicial doctrines and it was felt that if private actors are not subject to the rules set for government action, delegation of authority to private parties may allow the government to do though them what cannot do itself. The US Constitution gives many protections against arbitrary actions of the government and the infringement of individual liberties of the individual, but it does not provide any safeguards against confiscation of individual rights by private parties. Later with the interpretation of Fourteenth Amendment Act private actions/actors were brought under the umbrella of the Doctrine of State Action.

4.15 Tests to Determine State Action

Increasingly from 1960’s the Supreme Court was willing to see the hand of the State in private racially discriminatory conduct. The Civil Rights laws made it unnecessary to raise Fourteenth Amendment challenges to attack most discrimination. Besides, the Court made it possible to challenge only the most overt and direct government involvement in decisions perceived to affect constitutional rights. Thus, in State Action cases, the Courts must determine when an action by a private institution “may fairly be treated as that of the State itself.” Based on this theory, the US Supreme Court has devised a variety of formulas for characterising and evaluating interactions between public and private decision makers.

150Paul Starr, The meaning of Privatization, 6 YALE L. & POL’Y REV. 16, 19, 6-41 (1988). As rightly observed by him, using the terms ‘public’ and ‘private’ is risky because they are fundamental to the language of our law, politics and social life”. The concept of a public government implies an elaborate structure of rules limiting the exercise of the state power. Those who wield power are to be held publicly accountable-that is answerable to the citizens-for their performance).


152 42 U.S.C. § 1983 : US Code - § 1983: (“Civil action for deprivation of rights Every person who, under colour of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”). http://codes.lp.findlaw.com/uscode/42/21/I/1983#sthash.SCCGYD si.dpuf (last visited on Oct. 02, 2015).

At first, the Court will focus on the nature and extent of government involvement with the private decision makers or on the degree of actual government participation in a decision under challenge. Court makes an analysis to find out who is responsible for the action or decision. In the second broad category of cases the focus shifts from the actor to the action itself. If an activity is deemed to be a traditional public function, it may not matter who performs it: its government character subjects even a purely private actor to constitutional restraints on governmental power.\textsuperscript{154} Thus, there is no talismanic solution to the state action question.\textsuperscript{155} The Court has developed a series of theories by which it may be established that a private person is sufficiently tied to the activities of government so that his actions violate certain constitutional provisions and the same are enumerated below.

### a. Public Functions Test

Public functions test focuses on the nature or character of the function that the private actor is performing. It was in Justice Harlan’s dissent in the \textit{Civil Rights Cases} which advanced the public function issue.\textsuperscript{156} It was one of the three main arguments advanced by Justice Harlan to sustain the constitutionality of the Civil Rights Act of 1875. To him the function of serving the general public in the areas of transportation, food and lodging and amusement is characterised as a public function that is governmental in nature. When that function is delegated to private actors, to the extent of delegation, such actors become “agents or instrumentalities of the state.”\textsuperscript{157} The actions of the private actors in performing the function are then regarded as constituting state action, requiring government to do one of the two things: either withdraw the delegation or to compel the private actor to conform its actions to the requirements of the constitutions as they apply to governmental action.\textsuperscript{158} This reasoning by Justice Harlan constituted an express application of public function

\textsuperscript{154}Id. at 121.
\textsuperscript{155}(As the Court acknowledged in \textit{Burton v. Wilmington Parking Authority} 365 U.S. 715 (1961) “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.”).
\textsuperscript{156}The Civil Rights Cases, 109 US 3, 58-59 (1883) (“J. Harlan observed that certain private entities may appropriately be considered agents of the state because of their duties to the public. He also argued that denial of access to places of public accommodation on the basis of race constitutes a badge of slavery that Congress may prohibit under § 2 of the Thirteenth Amendment. The first sentence of the fourteenth amendment constitutes an affirmative grant of United States and state citizenship that Congress, under § 5 of that amendment may protect against racial discrimination in places of public accommodation.”).
\textsuperscript{157}Id. at 58.
\textsuperscript{158}William R. Huhn, \textit{supra} note 117, at 6.
analysis and gave rise to the use of this analysis, in a more constricted form in subsequent decisions.\textsuperscript{159} The rationale for this doctrine was justified by the Court in \textit{Terry v Adams}\textsuperscript{160} and \textit{Marsh v Alabama}.\textsuperscript{161}

Here the focus is on the nature of conduct which the private actor is engaged in rather than the contacts between that conduct and the state. The more the private actors’ conduct is governmental in nature or function, the greater is the chance that, for, constitutional purposes, such conduct will be regarded as action of the state. Moreover, relevant constitutional amendments may be regarded as limitations not merely upon government, but upon governmental powers generally.\textsuperscript{162} But it is only those activities which are traditionally associated with sovereign governments and which are operated almost exclusively by governmental entities which will be deemed as public functions.\textsuperscript{163}

\textbf{i. White Primary Cases}

The first major use of public function analysis occurred in the \textit{White Primary Cases}.\textsuperscript{164} In \textit{Nixon v. Herndon}\textsuperscript{165} the Court held unconstitutional a Texas law which

\textsuperscript{159}Id. (In no subsequent Supreme Court decisions has the Court been willing to apply the public function analysis as liberally as advocated by Justice Harlan in the Civil Rights cases. For instance in \textit{Burton v. Wilmington Parking Authority} 365 US 715, 724-726 (1961). Court held that an aggregate of the activities on the part of the restaurant owner and the state rather than the mere ownership of a public accommodation indicated state participation in the discriminatory action); (In \textit{Heart of Atlanta Motel v. United States} 379 US 241, 243 (1964) it was held that the discriminatory actions of a privately owned public accommodation service constituted statutory, rather than constitutional violation).

\textsuperscript{160}345 U.S. 461 (1953) (In this case a private organization ‘Jay Bird Association’ conducts elections to select candidates for nominations in the official Democratic Primaries for county offices. It practiced discrimination by excluding voters based on their race and color. The Court upheld the relationship between the functions performed by the association and the electoral system of Primaries and declared that the relationship involves delegation of a public function to the association and thus subjected the association to fifteenth amendment.).

\textsuperscript{161}326 U.S. at 475-477 (1946) (In the instant case a Jehova witness was arrested for trespassing after attempting to distribute religious texts in privately owned company town in Alabama. Court held that company town served a public function and therefore its decisions were subjected to constitutional scrutiny under the First and Fourteenth Amendments).

\textsuperscript{162}Private persons who possess power to significantly deprive a general community of rights protected by the Constitution against state infringement possess powers equivalent to those of government. Such private persons and those exercising certain peculiarly governmental functions threaten these rights as effectively as government itself. Thus the purposes were ratified to justify imposing restraints on the parties who wield such powers.

\textsuperscript{163}345 U.S. at 467 (1953) (As in \textit{Jay Bird Association} case “the Court relied on the “state’s traditional control over the electoral process” and the effect the Association’s activities had on that process, basing its decision on the traditional state function doctrine.”).

\textsuperscript{164}White Primaries were bodies established by Democratic Party for conducting Primary elections in the southern State of Texas. In 1932 Texas passed a law which gave delegated authority to political parties to make rules thereby disenfranchising Blacks and other minorities. In the state of Texas Blacks were excluded from participating in the primary election process of the Texas Democratic Party. In
provided that “in no event shall a Negro be eligible to participate in a Democratic Party primary election held in the State of Texas.” Immediately after Herndon a new law was enacted by the State of Texas empowering the executive committee of political parties to prescribe conditions for membership. On the basis of this law the executive Committee of Texas Democratic Party passed a resolution excluding Blacks from membership. This law was challenged in *Nixon v. Condon*.\(^ {166}\) The Court found the state action discriminatory on the ground that the Texas legislation, rather than the State Democratic Party had reposed authority in the party executive committee to prescribe membership qualifications. The Court held that granting political party committees the authority to determine who should be voted in the primary was unconstitutional as these committees constituted the agents of the State.

In *Grovey v. Townsend*\(^ {167}\) the question was regarding finding state action directly in the act of Texas State Democratic Party which had barred Blacks from its membership independently by passing a resolution.\(^ {168}\) The Court held that a state political convention which discriminated on the basis of race was not constitutionally invalid because there is no state action connected to it. Subsequently in *United States v. Classic*\(^ {169}\) Court encountered the question whether the Federal Government had the power to punish fraud in primary elections for national offices. As per Article 1, Section 4 of the Constitution,\(^ {170}\) Congress has the power to regulate the time, place and manner of holding elections for Senators and Representatives.\(^ {171}\) The Court had retained the Federal Government’s power to prosecute default election commissioners on the basis that the electoral system was a unitary process which was entirely subject

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\(^{166}\)286 U.S. 73 (1932) (In this case a Texas statute prevented Blacks from participating from Texas Democratic Primary elections and the validity of the statute was put to challenge).

\(^{167}\)295 U.S. 45 (1935).

\(^{168}\)295 U.S. 45 (1935) This decision was distinguished from Nixon v. Herndon so as to justify the discrimination in the instant case, with respect to the participation in the party primary process, the Court was not willing to extend public function analysis beyond the precise facts in Condon. But this was overruled after nine years later in *Smith case*.

\(^{169}\)313 US 299 (1941).

\(^{170}\)Supra note 170.

\(^{171}\)Supra note 89.
to the regulatory powers of Congress. But this decision was delivered without overruling *Grovey’s* decision.\textsuperscript{172}

Subsequently the *Grovey*’s decision was overruled in *Smith v. Allwright*\textsuperscript{173} wherein the Court challenged the Texas law which limited the choice of the electorate in general elections to those candidates who are chosen in party primaries. Court held that running of elections was an essential state function. The primaries have become a part of the machinery for choosing officials and it could not escape responsibility by casting its electoral process in a manner which permits a private organization to practice racial discrimination in its elections. It was also held that delegation of election function to the political party made it an agent of the state. Following *Smith* in *Elmore v. Rice*\textsuperscript{174} Court ruled that the State Democratic Party’s exclusion of Blacks was unconstitutional state action, notwithstanding the state’s deregulation of the party.

Following this decision various state political parties attempted to retain their racially restrictive practices but those efforts were met with little success. In *Terry v. Adams*\textsuperscript{175} the Court by applying the ratio in *Allwright* held that the action of the Jaybird Association, which composed of voluntary clubs of white democrats in Texas were subject to the restrictions of fifteenth amendment even though there had been a ‘complete absence’ of formal state connection to any of the activities of the political clubs. Here the Court applied public function analysis to pin state action label on the Jaybird election because as per the Court, primaries were tantamount to an election and thus constituted a public function.

Thus it can be seen that the Public Functions test played a significant role in protecting democratic right to vote and plugged all the loopholes created by the legislature in allowing racial discrimination. Here, it is crystal clear that the party primaries exercise a public function, though they are private bodies. Following

\textsuperscript{172} (The Court distinguished Grovey’s case and of course the two cases were distinguishable because of the differences in Louisiana and Texas laws. Louisiana law required the parties to conduct primaries if they wanted their candidates to appear on the general election ballot whereas Texas law did not. Unlike the Texas law, primaries were paid by the State of Louisiana. Besides, in Grovey the question was whether party regulation of primaries constituted state action whereas in Classic the question was whether primaries were ‘election’ under Art. 1 § 4).
\textsuperscript{173} 321 U.S. 649 (1994).
\textsuperscript{174} 72 F.Supp. 516 (1947) (In this case Elmore a Black from South Carolina was prevented by the defendants from voting in the Democratic Party’s Primary elections).
\textsuperscript{175} Terry v Adams 345 U.S. 461 (1953) (“It was held that a private organization that held elections to select candidates to run for nominations in the official Democratic Primaries for county offices violated the Fifteenth Amendment by excluding voters based on their race and color.”).

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situations depict how public functions test was implemented against other kinds of private bodies who are the providers of public utility services.

ii. Company Towns and Shopping Centres

In a time span that overlaps the White Primary cases of the 1940’s and 1950’s, the Court began to apply public function analysis to the speech regulation activities of the company towns and shopping centres. The first of these cases is the well-known “company-town case, Marsh v. Alabama.” The only issue in the case was the applicability of first and fourteenth amendments to a company town which was owned and managed by a private corporation. The Court held that the company town was subjected to the amendments. The Court relied on the fact that the state allowed private ownership of land and property to a degree which allowed the corporation to replace all of the functions and activities which would normally belong to a city. Because the privately served area remained as a community shopping district in a normal city the first amendment would be applicable. This was the strongest case applying public functions test.

The public function test was used to include a wide range of activities in Evans v. Newton the US Supreme Court held that a park could not be operated with racial discrimination even if the trustees of the park has no connections to the city government and even if the city severs all it ties to the operation of the facilities. Court opined that the operation of the park was an essential municipal function which could not be delegated to private persons so as to avoid the restrictions of the Fourteenth Amendment.

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176 326 U.S. 501 (1946) Supra note 128 (The case involved a company town which was privately owned by The Gulf Shipbuilding Corporation and it comprised of both residential and commercial districts. The owners of the town had no formal ties with any state agency or authority. Agents of the Corporation had ordered a Jehova Witness to leave the privately owned business area and to refrain from distributing religious leaflets within the boundaries of the company town).

177 (Noting that the operation of the privately held bridges, ferries, turnpikes and railroads is essentially a public function, the Court held that “whether a corporation or the municipality owns or possess the town, the public in either case has an identical interest in the functioning of the community in such manner that channels of communication remains free.”).

178 Id. at 509 (In determining the existence of public function the Court stated that, it would “balance the constitutional rights of the owners of property against those of the people to enjoy freedom of press and religion.”).

179 382 US 296 (1966) (This case involved the exclusion of members of racial minorities from a park in Macon, Georgia. The park had been established in 1911 by testamentary trust in the will of Senator Bacon which required that the park be used only for white persons. The original trustee and operator of the park was the city and after the decision of the Court in Brown v. Board of Education in 1954, they resigned and requested for the appointment of a private person to take the possession park but subject to implementing racial discrimination. The validity of the testament was challenged in this case).
Twenty two years later in 1968 the Court was asked to extend the public function analysis of Marsh to shopping centres in the case of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*. The case represents the highest water mark of public function analysis. The Court found that the shopping centre was the functional equivalent of the company town involved in the *Marsh* so no further contact between the state and the shopping centre owners was necessary to establish the applicability of the first amendment.

Thus in the above mentioned cases we can see the optimal application of the public functions test to protect the constitutional rights of the individual. It can also be seen that the state action was confirmed in private actions only on the strength of the fact that the function is a public function, despite the absence of any other link between private actor and the state. According to the Court the inquiry should be one of degree and not an all or nothing question of governmental exclusivity. But this kind of approach was restricted in the subsequent decisions.

### iii. Public Functions Test-Restrictive Interpretation

In sharp contrast to the liberal application of public functions test in *Marsh* and *Logan Valley*, in *Lloyd Corp. v. Tanner* Court held that first amendment has no application in the respondents claim to the right to distribute anti-war handbills on the premises of a privately owned shopping centre. In *Hudgens v. NLRB* Court held that the first amendment did not apply to privately owned shopping centres. Further it was held that so long as the state did not aid, command or encourage the suppression of free speech the first amendment would not be violated by the actions of the

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180. 391 U.S. 308 (1968) (In this case a shopping centre owner banned union members from peaceful picketing outside the shopping centre. Union members challenged this claiming that it was a public function. The Court held that striking labourers had a right to enter a private shopping area to picket a store with which they were having a labour dispute).


182. (For First Amendment purposes the majority of the judges held that a modern shopping centre, in regulating speech activities on its premises, may be characterized as a state actor, and that this regulatory function, when delegated by the state to a shopping centre, constitutes public function).

183. 407 U.S. 551 (1972) (The case involved anti-war demonstrators who wished to engage in speech on privately owned property where that speech did not relate to the activities of the store owners of the property. The Court thus distinguished the case from Logan valley).

184. *Id.* at 570.

185. Hudgens v. National Labor Relations Board 424 U.S. 507(1975) (In this case, Hudgens a group of labour union members engaged in primary picketing within the confines of a privately owned shopping center. This was part of a general strike by the warehouse employees of nine retail shops in the shopping mall. The picketing members were threatened by an agent of the shopping centre owner with arrest and criminal trespass. The Court considered the question whether this threat constituted violation of the National Labour Relations Act, 1935).
shopping center owners. Thus, there would have to be some additional state involvement to establish state action.

The scope of public functions doctrine was further narrowed down in *Jackson v. Metropolitan Edison Co.*\(^{186}\) The case involved the activity of a privately owned electric utility and the applicability of the due process clause to its termination of services for individual customers. The Court found no state action involved in the operation of this utility service even though it was given a virtual monopoly status and was licensed by the state. According to the Court there were insufficient contacts between the utility and the state to justify restricting its activities by constitutional limitation. The fact that these types of business might have a peculiar ‘public interest’ was also held to be insufficient. As to the public functions claim it was held that the fact that a state could have operated its own utilities did not make the activity of providing electric service a public function. Only those activities which were traditionally reserved to the state authority or commonly associated with state sovereignty would be considered as public functions.\(^{187}\)

In *Flagg Bros. Inc. v. Brooks*,\(^{188}\) a New York statute authorised a warehouseman’s proposed sale of goods entrusted to him for storage on account of unpaid storage charges. An owner of stored goods argued that such a sale would constitute the exercise of a public function delegated to the warehouseman by the State of New York.\(^{189}\) Rejecting this argument Court held that dispute resolution between debtor and creditors was not a public function so as to subject the debt collection practices of the creditor warehousemen to constitutional restraints. The majority declined to rule that power of sale guaranteed to the warehouseman was a

\(^{186}\) 419 U.S. 345 (1974) (In this case a woman had her electrical service terminated without a final hearing to determine the status of her account with the company).

\(^{187}\) (Thus it would appear that only few public functions will be found beyond those most essential services which are provided by the governments and which have no direct counterpart in the private sector. The electoral system and the operation of towns will constitute such functions while traditional business activities such as the operation of utilities or other regulated industries will not.) NOWAK & ROTUNDA, supra note 96 (In his dissenting opinion in Jacksons case Justice Marshall argued that the Court “reads the public function argument too narrowly and that in his view “utility service is traditionally identified with the State through universal public regulation or ownership to a degree sufficient to render it a ‘public function.’”); Jackson v. Metropolitan Edison Co. 419 US 345 at 371.

\(^{188}\) 436 U.S. 149 (1978) (In this case Flagg Brothers, Inc the warehouse owner threatened to sell Respondent’s property entrusted to him to recover unpaid fee, on the strength of a New York law which permitted such sale and she filed a suit for damages for an injunction against selling her possessions and a declaration that such a sale violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It was also submitted by her that such a sale would constitute the exercise of a public function delegated to the warehouseman by the State of New York

\(^{189}\) 436 U.S. 149 at 151-152.
power “traditionally exclusively reserved to the state.” The Court again cited the White Primary cases and company town cases as examples of fact situations that met the Courts’ constricted public function test, noting that these “two branches of public-function doctrine have in common the feature of exclusivity.” Thus as per the Court in order to apply the state action doctrine through public functions test the alleged activity must have been exclusively within the purview of governmental action.

After applying exclusivity test in Rendell-Baker v. Kohn and Blum v. Yaretsky, the Court had attempted for a partial comeback of the Public Function analysis in Edmonson v. Leesville Concrete Co. and in Georgia v. McCollum. In Edmonson the Court framed public function issue in terms of “whether the actor is performing a traditional governmental function.” Court instead of using public function as an exclusive criterion applied it as one of the three factors leading to the ultimate resolution of the generic state action issue i.e. the state nexus issue, public functions issue and state authorization branches of state action inquiry. The same position was subsequently followed in McCollum. Another importance of the Edmonson Courts’ analysis is the totality approach.

In the above cases, public function analysis more nearly assumes its proper role as a means for determining the existence of state action. When government

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190 Id. at 159 (According to the Court the fact that an activity was traditionally within the province of the government did not make it a public function. Such functions exist only when there is a history of exclusive government activity of the type at issue).

191 Id. at 163-166 (According to Justice Rehnquist, “we would be remiss if we did not note that there are a number of states and municipal functions not covered by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than the function of the so-called “dispute resolution.” Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or state might be free to delegate to private parties the performance of such functions and thereby avoid the structures of the Fourteenth Amendment).

192 457 U.S. 830 (1982) (In this case the question was whether a private school, whose income is derived primarily from public sources which is regulated by public authorities acted under the colour of state law when it discharged its employees. Court held that the education of maladjusted high school students is a public function, “but concluded that the legislative choice to provide such services at public expense “in no way makes these services the exclusive province of the State.”).

193 457 U.S. 991 (1982) (In this case Court held that there is no state action involved in the decision taken by the nursing home to transfer certain patients to a different facility on the ground that the decision was affirmed by the state officials).

194 500 U.S. 614 (1991) (In this case the defendant used peremptory challenges in civil litigation to exclude jurors on account of their race. The Court held that such race based exclusion violates the equal protection rights of the challenged jurors).

195 505 U.S. 42 (1992) (In this case the Court considered the question whether Constitution prohibits a criminal defendant from engaging in purposeful racial discrimination in the exercise of peremptory challenges to exclude jurors in criminal litigation. The Court held that racially discriminatory use of peremptory challenges constituted state action and thus denial of equal protection).

196 Id. at 149 & 159.
permits a private actor to play a significant role in determining the outcome of a process clearly governmental in nature there is an impact of governmental which indicates persuasively that a private actor is performing a public function and that such performance constitutes state action. In such cases the government is responsible for what the private actor does in performing the delegated function.

b. The State Nexus Test

Other than public function test, the determination of state action is also based on the relationship between government and the activities of the alleged wrongdoer. It emerged from Justice Harlan’s discussion of the public function issue in Civil Rights Case$^{197}$ and from the decision in Public Utilities Commission v. Pollak.$^{198}$ There is no formal test for finding the amount of contacts with government which will be subject to private persons’ activities to the restrictions of the constitution. The state nexus issue is quintessentially a question of degree. Usually the Courts will not apply tests on the basis of a pre-determined criterion, rather it will be determined on a case to case basis on the basis of “sifting facts and weighing circumstances.”$^{199}$ The state nexus issue is applied when the contacts between the government and the action of the private actor become so extensive that the action in question may be fairly attributable to the government.$^{200}$

The determination of state action can be based on the relationship between government and the activities of the alleged private wrongdoer.$^{201}$ It have fallen into

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$^{197}$ When Justice Harlan referred to the owners of places of public accommodation as “agents or instrumentalities of the state” he stressed on the links that exists between these owners and government.

$^{198}$ 343 U.S. 451 (1952) (It was in this case that the state nexus issue surfaced. It is a case involving state encouragement or state authorization of the private action. In this case the action of Capital Transit, a privately owned corporation, in operating the radio service was held to be a state action. It was determined on the basis of joint action of the private actor and the state actor i.e. investigation conducted by the Federal Government to determine the validity of the programme and the decision of the Public Utilities Commission in permitting them to continue).

$^{199}$ Burton v. Wilmington Parking Authority 365 US 715 at 725 (Court found state action in holding municipal parking authority responsible for racially discriminatory practices of private restaurant leasing space on its property).

$^{200}$ (Such links may include government ownership of the property on which state action occurs, government funding, regulation or licensing, mutual receipt of economic benefits between government and the private actor, government encouragement or approval etc.). Sidney, supra note 101, at 347.

$^{201}$ (In Civil Rights cases Justice Harlan stated that “law gives (innkeepers) special privileges and they are charged with certain responsibilities to the public. Again as managers of the places of public amusement Justice Harlan stated that such places are established and maintained under the direct license of the law” Here is an express reference to state licensing as a significant contact between the government and purported private action that adumbrates the use of state nexus analysis in subsequent Court decisions). Sidney, supra note 101, at 346.
three general categories First, cases where the private actor is subjected to extensive regulation by the government secondly cases involving a wide range of physical and economic contacts between the actor and the government. Thirdly, where the government has provided some sort of direct aid or subsidy to the private actor there is some kind of state action. Granting of power by the government to the private actor also establishes government nexus to the alleged activity.

i. Government Regulation or Licensing

If the government regulation had directly approved the challenged practise of the alleged wrongdoer there is state action intertwined with that practice. The principle involves the application of the “government encouragement” basis for finding state action. The judicial stand on the area is based on the following four cases. When the government commands, encourages or actively approves a practice, that practice is subject to constitutional limitation. Where the government has not specifically approved the alleged wrongful activity the degree of regulation of the actor is only one factor to consider when assessing the presence of state action in the challenged activity. In the decisions rendered in 1981-1982 term, the Supreme Court continued to employ this method of analysis and refused to impose constitutional limitations on the autonomy of private sector actors when the justices found no specific government encouragement of the activity challenged as violating an individual’s constitutional rights.

In *Public Utilities Commission v. Pollak* Court held that government regulation of a company amounts to state action. The case involved a challenge to the practice of broadcasting radio programme in buses and street cars. The Supreme Court held that government regulation of the company made it subject to

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202 (When the government commands, encourages or actively approves a practice, that practice is subject to constitutional limitation. Where the government has not specifically approved the alleged wrongful activity the degree of regulation of the actor is the only one factor to consider when assessing the presence of the state action in the challenged activity). NOWAK & ROTUNDA, *supra* note 96, at 513-514.

203 *Id.*


205 343 U.S. 451 (1952) (In this case Capital Transit Company was a privately owned public utility that operated street car and bus transit system in the District of Columbia. They installed play radio system under a contract with the district radio operators the question was whether playing of radio violates first or Fifth Amendment of the constitution by virtue of the public convenience, comfort and safety).
constitutional restraints. Twenty years later in *Moose Lodge Inc. v. Irvis*, the Court again considered the question whether government regulation or licensing will give rise to state action. It was held that the activities of a private club were not subjected to constitutional restraint merely because it was given a liquor license by the city government. As per the Courts’ opinion although the granting of the license subjected the club to extensive regulation there was no involvement of the city with the clubs racially discriminatory policies.

In *Columbia Broadcasting System v. Democratic National Committee* Court held that T.V. and radio stations are not subjected to the restraints of the first Amendment because of their licensing and regulation by the federal government. The decision was finally premised on the ground that extensive regulation of a business would not in itself subject all of its activities to constitutional restraint. In *Jackson v. Metropolitan Edison Co.* an electric company terminated the services to a customer without having a final hearing to determine the status of the account or the customers’ willingness to pay new charges. The majority found that the government licensing and regulation of the utility neither commanded, encouraged nor sanctioned the termination practices of the company. Even though it constituted some continuing relationship between the company and the government, that relationship had nothing to do with the challenged activity.

**ii. Multiple Contacts-Symbiotic Relations:**

In many cases an alleged wrongdoer appears to have a variety of physical and economic contacts to the government even though it is not an agent of the government part of a regulated industry. These multiple or joint contacts may so intertwine the

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206 The company was given license by the government to operate buses in Washington DC. Thus government licensing paved the way for government regulation of the activities of the company.  
207 407 U.S. 168 (1972) (In this case, Moose Lodge a local branch of the national fraternal organization located in Pennsylvania refused service to Irvis a black guest because of his race. Lodge rules restricted lodge membership to "white male Caucasians" and argued that the discriminatory action of Moose lodge in refusing to serve him as a guest constituted state action. Irvis relied on the license issued by the Pennsylvania liquor board on Moose lodge a private club license that regularized the sale of liquor in the premises of Moose lodge. Justice Rehnquist stated that "a private entities receipt of state benefit or receipt does not automatically convert that entity into a state actor).  
208 412 U.S. 94 (1973) In this case antiwar groups challenged an individual stations’ refusal to accept editorial advertising, as violation of the first amendment.  
209 There was no majority opinion regarding the presence of government action in the activities of radio and television stations as several of the judges believed that refusal to accept advertising was permissible even if it represented government action. Other three judges opposed this view. Three of them negated the presence of government action since there was no encouragement or approval of the government in the challenged practice.  
private actor and the government that the private actor will be treated as government agent. Thus in *Evans v. Newton*\(^ {211}\) Supreme Court held that the continued existence of a racially segregated park devised by the Senator to the town violated Fourteenth Amendment. This decision was based on a number of factors like the appearance of government approval of restricted practices, the past and present aid given to the running of the park, and the public nature of the land used as a park within the city.

Similarly in *Burton v. Wilmington Parking Authority*,\(^ {212}\) Court held that a privately owned restaurant which leased space in a government parking facility could not refuse service to members of racial minorities. While there was no command or encouragement of its racially restrictive practices by the government, its location and status as a les of the government gave the appearance of government authorization of the practices. In *Reitman v. Mulkey*\(^ {213}\) Court held private actions as state actions. In this case Court held that California Constitution which authorizes racial discrimination in the Housing market and establishes right to discriminate as a basic state policy will encourage and involve state in private discriminations. Thus Court held Article 1 section 26 as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.\(^ {214}\)

### iii. Granting of aid or subsidies:

These are the cases when the government provides some direct subsidy to an entity which impairs fundamental constitutional rights in its action then that government aided program violates the constitution.\(^ {215}\) Aid may take various forms including grant of money,\(^ {216}\) a contribution of materials, a contract award, a tax

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214 California Proposition 14, art. 1 § 26, (“Neither the state nor any agency thereof, shall deny, limit or abridge directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.”).
215 In cases where the government is giving direct aid two separate questions arise First Does the granting of aid to a private party subject that person’ activities to constitutional review? Secondly, even if the private activities are not subjected to constitutional limitation may the government continue to grant the private wrongdoer a subsidy?
216 In Kerr v. Enoch Pratt Free Library 149 F.2d 212 (C.C.A. 4th 1945) (The defendant was a privately endowed library governed by a self-perpetuating board of trustees, appointed by the original donor. The city and the state contributed most of its operating funds. The trustees had barred Blacks from training school for librarians. Here the Board of Trustees of the library is representatives of the state through whom the city of Baltimore exercises control over the activities of the library, which is almost completely dependent on the city’s voluntary appropriations. Therefore the Court held that the library is subjected to the same constitutional restraints as the state itself).
exemption or deduction,\textsuperscript{217} or a grant of power. The central question in determining the permissibility of state subsidies to those whose actions impair constitutionally recognised rights is whether the aid amounts to something more than the generalised services.\textsuperscript{218}

**iv. Granting of power:**

Lastly, if it is found that when the government has allocated powers to private persons, so as to enable or enhance the efficiency of the challenged activity, then it is believed that the government has in effect loaned its legislative powers to the private party.\textsuperscript{219} The government has not granted power unless it has increased the powers or status of private individuals beyond those possessed in some “initial status” of “private rights” which status does not itself involve “state action.” Perhaps there are three basic ways in which that “status” may be altered: firstly, through direct grants of power beyond those existing under the common law or increases of common law rights existing at a certain historical point, secondly, through giving existing rights a protected status e.g. by putting them into state constitutions and thirdly, by decreasing

\textsuperscript{217}Griffin v. County School Board of Prince Edward County 377 U.S. 218 (1964); Walz v. Tax Commission 397 U.S. 664 (1970); In Walz the Supreme Court upheld the validity of tax exemptions applicable to religious as well as other organizations. Whereas in Dorsey v. Stuyvesant Town Corp. 299 N.Y. 512 (N.Y. 1949), the question was whether it is state action to exclude Blacks from renting in Stuyvesant town which is constructed pursuant to a contract with the city under which the city condemned the land and granted Stuyvesant a twenty year partial tax exemption. The lower Court held that the town is not an instrumentality and the Supreme Court denied certiorari. The majority in this case took a stand that an act is private if it is mostly private and governmental if it were mostly governmental. “The fundamental fallacy in the plaintiffs’ argument is that it confuses “public use” and “public purpose” with “public project” and assumes that, because the work of redevelopment and rehabilitation is a public purpose, the project involved is necessarily a public project. But the public use and purpose involved terminates when the work of redevelopment is completed. Ina word, through the purpose involved is a public purpose, the project itself is not now and never was a public project) 74 N.Y.S. 2d 220, 226 (Sup. Ct. N.Y. County 1947).

\textsuperscript{218}In assessing the quantity of aid and whether it provides support for the challenged activity the Court will consider both the worth of the subsidized activity and the harm caused to the constitutionally recognized rights. In Norwood v. Harrison 413 U.S. 455 (1973) the Supreme Court invalidated the granting of books to students who attended the racially discriminatory schools under the state law which provided free books to all students. The Court found the practice as providing an unconstitutional subsidy in so far as it aided racially restricted schools. In Rendell Baker v. Kohn 457 U.S. 830 (1982) the Court held that granting of aid to a private school will not make the act of dismissal of teachers a state action).

\textsuperscript{219}Power can be granted through authorization of activities, statutes or custom granting private bodies power to determine government policies, legislation giving coercive effect to rules of private bodies, federal law superseding state law, state constitutionalisation of common law rights. David S. Elkind, *Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 666, 656-705 (1974).
the powers and rights of others, but not of the challenged party, and so giving him monopoly powers.\textsuperscript{220}

\section*{4.16 Approaches to Various Tests}

There are two general approaches to applying various tests for finding out state action. The conservative wing of the Supreme Court led by the Chief Justice Rehnquist, favours a rule-oriented approach” to the state action analysis, separately invoking and applying the various specific tests for determining whether or not the challenged party is a state actor. In contrast, the liberal wing of the Court employs a “totality of the circumstances” test for making this determination.\textsuperscript{221} The seminal case utilizing the “totality of the circumstances” test is \textit{Burton v. Wilmington Parking Authority}.\textsuperscript{222} In the instant case, the Court found none of the factors like the government ownership of land, financial integration with government factor, symbiotic relationship factor, and government encouragement factor as conclusive to determine the presence of state action, when considered in isolation. Rather it was found that the combined effect of relevant contact factors has moved along the state nexus continuum. In \textit{Evans v. Newton}\textsuperscript{223} the Court reaffirmed the state nexus analysis as employed in \textit{Burton}.\textsuperscript{224}

From the decision in \textit{Moose Lodge}\textsuperscript{225} began the Courts retreat from the totality approach.\textsuperscript{226} In this case Court held that though \textit{Moose Lodge} received a benefit from

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\item \textit{Id.} at 665 (Statutes or state sanctioned customs that grant private bodies the power to determine government policies and legislation giving coercive effect to rules of private bodies clearly constitute power grants. In Linscott v. Miller’s Falls Co. 440 F. 2d14, 16-17 (1\textsuperscript{st} Cir. 1971), the Court held that a statute merely permitting union shop agreement unless contrary to state law constituted “state action”); (Monopoly power is an increase in the powers though not by direct grant but through restrictions placed upon the rights of groups other than those that obtain the monopoly. Government allocated monopoly power has received divided and somewhat confused analysis in the absence of conclusive Supreme Court holding.). Public Utilities Commission v. Pollak 343 U.S. 451, 462 (1952); Columbia Broadcasting System Inc. v. Democratic National Committee412 U.S. 94 (1973); Moose Lodge No. 107 v. Irvis 407 U.S. 163 (1972); Lavoie v. Bigwood 457 F.2d 7 (1\textsuperscript{st} Cir. 1972).
\item \textit{Supra} note 199.
\item \textit{Supra} note 207.
\item Even prior to \textit{Moose Lodge} in Powe v. Miles 407 F.2d 73 (1968) restricted application of totality approach. In this case a private university in New York took disciplinary action against several student demonstrators from the university’s Liberal Arts and Ceramics Colleges. The college was receiving
\end{itemize}
the state in the form of liquor license that by itself does not automatically convert that entity to a state actor and such a holding would emasculate the distinction between private and state conduct set forth in the Civil Rights Cases.” The Court also gave the narrow holding that when the government compels private action that private action may be attributed to the government and accordingly under the state nexus analysis state compulsion becomes a conclusive factor by itself converts private action into state action.227

In Jackson Court rejected efforts to characterize Edison as a state actor through the use the state nexus analysis. In doing so, Court shifted from a totality approach to a sequential approach in which each state nexus factor is consolidated in isolation and discarded completely if, by itself, it lacks sufficient force to convert private action into state action. Jackson Court stressed that in state action cases, “the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be treated as state action.”228 The Court has finally retracted from a totality approach to a sequential approach that considers each nexus factor in isolation without reference to the combined weight of all nexus factors.229 The Jackson Courts approach was followed in Rendell-Baker and Blum.230

some funding from the state and the state exercised some regulatory control over the educational standards of the college. The students argued that these contacts were sufficient to convert colleges’ disciplinary action into state action. Court held that receiving of funding from the state and exercising regulatory control over the educational standards of the college will not make its disciplinary action into state action. The decision of the Court was based on the opinion by Justice Friendly that “the state must be involved not with simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.”).227

In this case it is pertinent to note that in granting liquor licenses the regulations of the Pennsylvania liquor control board required that every club licensee shall adhere to all of the provisions of its Constitution and the bye-laws and it is this administrative regulation which compelled Moose Lodge to adhere to its racially discriminatory membership and guest policies. In a broader view, when government compels private action that action may be attributed to the government.227

Id. at 460 (The Court noted that “the mere fact that a business is subject to state regulation does not by itself convert its action into that of a state, nor does the fact that the regulation is extensive and detailed as in the case of most public utilities, do so. While conceding the existence of extensive governmental regulation, the Court held that regulation is insufficient to convert Edison into private actor. The Court then discarded the “extensive regulation” factor and does not take that in conjunction with other state action factors to determine whether the combined weight of all such factors is sufficient to justify a finding of state action. Here the Court has adopted the position advanced by Justice Friendly in Powe v. Miles 407 F.2d 73 (1968)229

Id. at 366 (Like Justice Douglas, Justice Marshall in dissent objected the Courts retreat from the totality approach. He concluded “taking these factors together I have no difficulty finding state action in the case.”).230

457 U.S. 991 (1982) (In both the cases the majority applied the various tests for state action separately, finding that there was no state action under any particular formula. The majority found that
4.17 Return to the Totality Approach

In *National Collegiate Athletic Association v. Tarkanian* the National Collegiate Athletic Association (NCAA) placed University of Nevada Las Vegas (UNLV) basketball team on two years’ probation and asked to sever all ties with its coach Tarkanian during probation. Tarkanian claimed that both University and Athletic Association had deprived him of liberty and property without due process of law. It was observed that “it would be more appropriate to conclude that UNLV had conducted its athletic programme under colour of the policies adopted by the NCAA, rather than that those policies were developed and enforced under colour of Nevada law.” The dissenting opinion of J. White lead to the conceptualisation of joint action test, to him NCAA was jointly engaged with UNLV officials in the challenged action since the action taken by UNLV was as per its membership agreement with NCAA.

In *United States v. Price* the Court held that private persons jointly engaged with state officials in the prohibited action are acting “under colour” of law for purposes of the statute. To act under the colour of law does not require that the accused be an officer of the state. It is enough that he is a wilful participant in joint activity with the state or its agents. The decision also laid down the proposition that when a private actor jointly acts with the state actor, the private actor becomes a state actor to the extent of that joint action. Subsequently, with *Sniadach* and *Fuentes* the private school and private nursing home in those cases were not engaged in state action because neither the school nor the nursing home was performing a public function.

232 The Nevada State Supreme Court sustained the claims against NCAA and UNLV. NCAA appealed against the decision before the Supreme Court of US and the Court reversed the holding of the State Court holding that the disciplinary action by NCAA against UNLV did not constitute state action. In spite of this finding the decision is significant for two reasons firstly, in the application state nexus analysis both majority and the dissent declined to apply the totality approach applied in Burton. Secondly, the Court has put forward a new test of ‘joint action’ through this decision. Sidney Buchnan, supra note 101, at 410.
233 488 U.S. 179 at 202 (In its dissent Court observed that “it was the NCAA’s findings that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with NCAA, which resulted in Tarkanian’s suspension by UNLV. On these facts, the NCAA was “jointly engaged with UNLV officials in the challenged action,” and therefore was a state actor).
234 383 U.S. 787 (1966) (In this case Price, the Deputy Sheriff of Mississippi detained three civil rights workers and subsequently on the same night they were released and they were murdered by eighteen persons including Price and other three public officials. They were charged under the law which makes it a federal crime for any person, while acting under colour of law, to deprive any person of a right “secured or protected by the Constitution or laws of the United States.”).
235 (It was held that “the monstrous design describe by the indictment” was “a joint activity from start to finish,” the Court concluded that “those who took advantage of participation by state officers in
and ending with *Tulsa Professional Collection Services Inc. v. Pope* the Court dealt with instances dealing with the rights of creditors and debtors and held that administrative participation by state actors became a state contact sufficiently strong to invest the entirety of the challenged action with a state action character.

In *Flagg Bros. Inc. v. Brooks* the Court had encountered a situation wherein administration participation factor was absent. It was held that the absence of administrative participation by the state precluded joint action claim. While conceding that state administrative participation was absent. The dissenting opinion noted the danger of using a formal test for state action and opined that the state action would have been based on the relevance of constitutional value to the ‘private’ activity. While conceding to the fact that state participation was absent, J. Stevens argued stated that such kind of an absence should not immunise the New York statute from

accomplishment of the foul purpose alleged must suffer the consequences of that participation.” In effect, the private defendants were participants in official lawlessness, acting in willful concert with state officers and hence under the colour of law.”). 383 U.S. 787 at 795.

*Sniadach v. Family Finance Corp* 395 U.S. 337 (1969) (In this case, under Wisconsin's garnishment procedure permitted the creditor to “freeze” the debtors wages simply by serving the debtors employees garnishee order before giving notice to the debtor. Petitioner claimed that the garnishment proceedings be dismissed for failure to meet the Fourteenth Amendment's procedural due process requirements, but the Wisconsin Courts approved the procedure).

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“constitutional scrutiny under other state action theories like state authorization theory and public function theory.”

In *Lugar v. Edmondson Oil Co.* the Court announced a “two-part” approach to the question of when conduct allegedly causing the deprivation of a federal right may be fairly attributable to the State. First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This two part test remains the test employed by the current Court in State action cases. The Court in Lugar thus used joint action concept by holding that “invoking the aid of state officials was a sufficient nexus to establish the requisite joint action between Edmondson and the state.

Thus we can see that when a private actor and a state actor engage jointly in a challenged action, the private actor becomes a state actor to the extent of the private actor’s participation in that action. To that extent joint action is a state contact that conclusively converts the private actor into a state actor. Thus, private actors that truly engage in joint action with state actors should bear the constitutional responsibility that attends state action.

In joint factor analysis there are some important factors to determine firstly, the “common goals” factor—are the private and state actors seeking common or opposite goals? Secondly, the “compliance pressure “factor-To what degree is the

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242 436 U.S. 149 at 170, 171
243 457 U.S. 922 (1982) (In this case the appellant Lugar owed Edmondson Oil Co. owed money. In order to prevent the appellant from disposing of his property before paying off his creditors the company filed an ex-parte petition and had the local sheriff exercise a prejudgment attachment on the appellant’s property. The state granted the prejudgment writ for attachment and subsequently Lugar filed petition on the ground that appellant in joint action with the state took his property without due process of law).
244 457 U.S. 922 at 935 (As summarized by the Court petitioner was deprived of his property through state action (Edmondson and its presidents) were, therefore, acting under color of state law in participating in that deprivation); (In Tulsa Professional Collection Services the Court again confronted state action issue in debtor-creditor relationship and it was held that the private use of state-sanctioned private remedies or processes does not rise to the level of state action and that the states’ involvement in the mere running of a general statute of limitation is generally not sufficient to implicate due process).
245 SIDNEY, supra note 101, at 420.
246 This factor was decisive for the majority in National Collegiate Athletic Association v Tarkanian 488 U.S. 179 at 196.
private actor able to exert pressure against the state actor? 248 Thirdly, the “administrative participation” factor- has government officials participated administratively in the challenged action? Fourthly, the “active participation” factor- how active and pervasive is the participation of government officials actively fostered and encouraged the challenged action? 249 Finally, the “no administrative participation” factor-does the state’s participation consist only of permitting the private actor to engage in the challenged action?. 250 These factors and perhaps the other factors considered in combination and weighed judiciously should lead to an intelligent resolution of the joint action issue. 251

With the decision of the Court in Edmondson and McCollum252 and the decision in Tarkanian state nexus analysis became much stronger. The sequential analysis issued by the Court in Jackson, Rendell-Baker and Blum have gone into insignificance and the Courts have returned to the totality approach in Burtons. The Tarkanian (dissent), Edmondson and McCollum opinions display a returning willingness by the Court to consider the combined weight of all state contact factors under the state nexus analysis. The trend in these cases was followed further in the case of Lebron. v. National R.R. Passenger Corp.253 In Lebron by applying the state nexus test Court held that “Government created and controlled corporations are part of the government” and it cannot evade the most solemn obligation imposed in the Constitution by simply resorting to the corporate form. 254 Similarly in Brentwood

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248 488 U.S. 200-03 (White J).
249 488 U.S. 179 at 792, 795
250 This was decisive for the Court majority in Flagg Bros Inc v. Brooks 436 U.S. 149 at 164-66. This factor if present may conclusively negate the existence of joint action, its presence should not preclude finding of state action under state authorization or public function analysis.
251 Sidney, supra note 101, at 423.
252 In both the cases court held that the exclusion of individuals as jurors in criminal trials on the basis of race violated equal protection clause.
253 Lebron v. National R.R. Passenger Corp. 513 U.S. 374 (1995) (In this case Center for Constitutional Rights (CCR) asserted that Amtrak, which managed the leasing of billboards at Penn Station under Transportation Displays, Inc. being a government actor, violated Mr. Lebron’s First Amendment rights by refusing to display his political advertisement at Penn Station).
254 As part of establishing state nexus the Court examined exhaustively the nature and history of National RR Corporation, Amtrack and of the government created corporation in detail. The case is about the ultimate contact between an actor and the state. The ultimate contact occurs when the actor is government in itself not merely private actor who is to some extent entwined with the state. When that actor assumes a non-human, corporate form the actors’ every action constitutes state action.
Academy v. Tennessee Secondary School Athletic Association,\textsuperscript{255} taking into account all of the circumstances into account Court concluded that there was state action.\textsuperscript{256}

4.18 State Action in Judicial Decisions

When judges command private individuals to take specific actions which would violate the Constitution if the act is done by the State, state action will be present in the resulting harm to constitutionally recognized rights.\textsuperscript{257} This was recognised by the US Supreme Court in Shelly v. Kraemar\textsuperscript{258} arose as to whether the judicial enforcement of a racially restrictive covenant constituted ‘state action’ sufficient to invoke the protection of fourteenth amendment. At issue here constituted combined cases from Missouri and Michigan were restrictive covenants written into the deeds of real property that stipulate the owner may not sell the property to African Americans. The judicial enforcement of these restrictive covenants was challenged on grounds of equal protection, deprivation of property without due process, and denial of privileges and immunities due to US citizens. Court held that judicial enforcement of private discrimination is prohibited state action because the state Court order would be judicial command to the current owner (who is willing to sell) to make racial distinction in the sale of property and such a command interfering with a willing seller and a willing buyer and a willing buyer violated the fourteenth amendment.\textsuperscript{259}

\textsuperscript{255}531 US 288 (Here the question was whether a state-wide athletic association, incorporated to regulate competition among public and private secondary schools, engage in state action?)

\textsuperscript{256}531 U.S. 288 (2001) (Court held that a private organization can be considered a state actor if there is sufficient entwinement between the state and the organization, such as here where the majority of members are public schools, and the leadership and governing body is made up of public school officials acting within their official capacity), available at \url{http://www.casebriefs.com/blog/law/constitutional-law/constitutional-law-keyed-to-chemerinsky/the-structure-of-the-constitutions-protection-of-civil-rights-and-civil-liberties/brentwood-academy-v-tennes-secondary-school-athletic-assn/} (last visited on Oct. 14, 2015).

\textsuperscript{257}ROTUNDA, supra note 93, at 509 (After World War II there was considerable racial discrimination in residential matters along with shortage of housing. When discriminatory zoning ordinances were declared unconstitutional restrictive covenant become the substitute. Until Shelly the constitutional validity of the covenants were firmly established by the Court). Donald M. Cahen, supra note 243, at 723.

\textsuperscript{258}334 U.S. 1 (1948) (In this case a white property owner attempted to sell his property to a member of a racial minority. The land was subject to a covenant which forbade sales to racial minorities. Those persons with an interest in the racially restrictive covenant sued to restrain the current owner from violating the covenant (by selling to a Black).

\textsuperscript{259}Id. (The Court also clarified that the restrictive covenants standing alone cannot be regarded as violation of any rights so long as the purposes of those agreements are affected by voluntary adherence, there is no state action but enforcement of these covenants in Courts would result in violation. It was the view of the Court that judicial action is state action and that common law rules as well as statutes
4.19 Position after Shelly v. Kraemar

The case is a landmark one but the Courts have showed continues reluctance to apply the doctrine in its widest sense and its scope was cut short in the subsequent decisions barring a few. In Barrows v. Jackson\textsuperscript{260} Court accepted the dictum in Shelly as a defence in suits for damages for the breach of restrictive covenant and it was held that a white property owner who sold land to a member of a minority race could not be subjected to monetary damages for the breach of a racially restrictive covenant. While this damage suit would not involve a formal judicial order to discriminate on the basis of race it would be a state imposed penalty for refusal to discriminate and such a penalty is a functional equivalent of a command or encouragement to refuse to sell property to members of minority races.\textsuperscript{261} Subsequently in Rice v. Sioux City Memorial Park Cemetery\textsuperscript{262} an equally divided Court has struck down the judgement of the Iowa Court which stated that the right of freedom of contract contains the freedom to discriminate against a race but stood neutral to deny the enforcement on grounds of Fourteenth Amendment clause.

In Black v. Cutter Labs\textsuperscript{263} a discharged employee sought an enforcement action for reinstatement under an arbitration award. She was permitted to discharge only for "just cause". The California Supreme Court held that "just cause" embraced Communist Party membership as the basis for her discharge and held the case as involving only the construction of a local contract under local law. In Evans v. Abney\textsuperscript{264} the Supreme Court declined to enforce the rule to the enforcement of discriminatory wills. The Court also declined to apply the principle of Shelly to orders enforcing a racially motivated ban on trespass as well.

\textsuperscript{260}346 US 249 (1953) (The owners of residential estates in the same neighbourhood in Los Angeles entered into a covenant running with the land restricting the use and occupancy of persons of the white or Caucasian race and obligating this to the signatories to incorporate this restriction in all transfers of land. For breaching this covenant in both respects an action at law for damages was brought against the defendants but no action was taken against non-Caucasian occupants. The state court decided in favour of defendants by applying Shelly decision).
\textsuperscript{261}NOWAK & ROTUNDA, supra note 96, at 510.
\textsuperscript{262}349 U.S. 70 (1955) (In this case the plaintiff filed an action for damages for the mental agony suffered by her at the instance of the cemetery owner, the defendant who refused to bury her husband. There was a contract between both under which he promised 'Right of Sepulture' in a specified lot of the ceremony. There was also a provision in the contract saying that burial services accrue only for members of Caucasian race. The plaintiff asserted on the invalidity of this provision).
\textsuperscript{263}351 U.S. 292 (1956).
\textsuperscript{264}396 US 435 (1970).
Thus it can be seen that the Shelly decision was a seminal one having far reaching consequences. The decision was viewed with considerable interest as all private action ultimately rests on the state’s willingness to enforce the civil and criminal rules that facilitate that action. But the decision had not been put to use much to expand the scope of State Action doctrine in USA. On the contrary, there have been attempts to reconcile Shelly with other parts of state action doctrine saying that Fourteenth Amendment Act applied because restrictive covenants performed the public function of zoning. Attempts had also been made to show that the decision was either an ‘anomaly’ or contains a broader principle, or it was poorly articulated by the Court.

4.20 Conclusion

The American Declaration of Independence is clear and unequivocal on the point that the individuals are granted unalienable natural rights, as the Preamble reads “all men are created equal, and are endowed by their Creator with certain unalienable Rights among these are Life, Liberty and the pursuit of happiness.” As per the American concept, fundamental rights are not matters to be drawn into the vortex of political controversy or to be placed at the mercy of legislative majorities instead they are to be definitely recognized in the constitution and protected against any violation either by the Legislature through an independent or impartial judiciary. The doctrine of limited government – the idea that government may not deny the “unalienable rights “of the people – is thus fundamental in the American approach to civil rights.
In US though the original constitution had not included in it a Bill of Rights in the very first Congress Madison proposed amendments to the text of Constitution which ultimately led to the Bill of Rights incorporated in the First Ten Amendments of the Constitution in 1791. Further Civil War Amendments have been added to the Bill of Rights viz. Thirteen, Fourteenth and Fifteenth Amendments in 1865, 1868, 1870 respectively. Thirteenth Amendment struck down the institution of slavery and prevented the imposition of any burdens or disabilities that constitutes badges of slavery. When this amendment was found to be inadequate to protect the rights of slaves Fourteenth Amendment was passed and eventually it was made the basis for applying Bill of Rights to the States. Finally and to the end that no citizen shall be denied the privilege of participating in the political control of the country on account of his race Fifteenth Amendment was passed.

It is through Fourteenth Amendment that the concept of State Action ushered into the constitutional sphere. It is one of most important principles of US Constitutional Law and it makes clear demarcation between state action and private action. The main reason is the phraseology adopted in the Amendment. The amendment is addressed to the State. In the interpretation of State Action doctrine Court made distinction between private and state action in the beginning making it applicable against legislature, executive and judiciary. Since most of the welfare functions were delegated to the private bodies. In the subsequent decisions Court found it difficult to apply the distinction as it will be at the cost of the rights of the people and it became a necessity to apply state action doctrine to private action.

Privatization was a phenomenon which existed in US even prior to the emergence of Globalization. For linking private action to state action the Court laid down various tests the important ones being Public Functions Test and State Nexus Test. According to public functions test if the functions performed by the body in question is a public function involving larger public interest then the activity though

272 (Although most of the original thirteen States already had Bills of Rights in their State constitutions it was the original demand of the States that a comprehensive Bill of Rights be included in the federal Constitution and that caused the addition of the first ten amendments. In the words of Madison; “If they (Bill of Rights) are incorporated into a constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights, they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive, they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”) West Virginia State Board v. Barnette (1934) 319 U.S. 624 (638); (With the incorporation of Bill of Rights Judicial Review became an inseparable concomitant of Fundamental Rights in the U.S through the judgment through the decision in Marbury v. Madison).
performed by a private actor will fall under the domain of state action. Later the doctrine was confined to cases in which the alleged function was one which was traditionally under the exclusive realm of the government. Under State Nexus test there are multiple criterions like regulation, licensing, granting of aid or subsidy, government encouragement etc. As per the Court presence of all the criteria is not at all necessary to constitute State Action like in India. The tests are also not applied mechanically but only after taking into account each fact situations.

Because of the peculiar interpretation of State Action doctrine the US Courts have successfully applied the doctrine to prevent the vices of private actors against the racial minority groups which was a growing threat challenging the Constitutional principles. This shows the effort of the judiciary to make the Constitution to a living document and the role of the judges as ‘social engineers.’ In India the State Action doctrine is implicit in Article 12 which itself defines State. Thus to be a ‘State’ is the first precondition to claim fundamental rights. The application of the doctrine against private bodies in the era LPG when most of the rights are the disposal of private actors raises similar questions regarding the efficacy of fundamental rights in India. The succeeding chapter is an analysis of the same.