

THE DOCTRINE OF STATE ACTION - POLITICS OF LAW MAKING - A COMPARISON OF US & INDIAN CONSTITUTIONAL LAW

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Abstract

With the debate of the public/private distinction touching its autumn, the author puts it in perspective by contextualizing it with the expansion of the doctrine of state action. She compares the constitutional developments in the United States and India and plots the changing roles and attitudes in the judiciary from a referee to an active political participant. It has prompted a rethink in understanding the liabilities of state officers and private entities in light of the relative advancement of public capacity and public authority principles particularly when their conduct has been found in violation of Constitutional Rights. She compares this with the Indian scenario where the expansive interpretation was primarily motivated from the governments' relegation of its Constitutional obligations unlike in the United States where concerns of racial discrimination and federalism were far more pressing. She demonstrates that whenever the doctrine has been expanded to its breaking point the enquiry in its substance has turned to whether a political choice in subjecting that domain of individual action to Constitutional protections is desirable in the worldview of a judge or bench deciding a matter in a given set of socio-political circumstances. Drawing lines between public and private terrains is too presumptuous as the boundaries will continually change since distinctions between governments acting privately and private entities acting governmentally, continually erode.

I. INTRODUCTION

Debate on the public/private distinction has somewhat seen a decline in the recent years, mostly as it is largely accepted that the decisional force seems to be exercised by independent policies and principles strong enough to bend the public-private divide.

The present paper seeks to examine the trends in judicial exposition on the State Action doctrine in the United States and India. The thrust of the paper is to demonstrate that the Courts have adjusted their doctrinal responses to the concept with changing socio-political environments, and that has in turn colored their response to the interplay of various conflicting rights. The paper, in part, also seeks to demonstrate the willingness of the judiciary to act as active political participants, when the other Government organs have tactically tried to avoid their Constitutional

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obligations by the mechanism of the private organization. The theme of this Paper is not to advocate a broad Horizontal Theory of Constitutional Rights¹ however, the researcher contends that whenever covert State Actions amount to abdication of Constitutional responsibility, the Courts should not (and mostly do not) confine themselves to the technicalities of an otherwise amorphous doctrine. Section II of the paper examines the traditional justifications for the doctrine of state action and seeks to expose their fallibility. Section III examines the judicial interpretations of the doctrine in the United States and examines the role of the State as enunciated by the Fourteenth Amendment- is it merely prohibitive or does it cast a greater positive obligation on the State?² Section IV deals with the doctrine of State Action as understood in India and presents a case for the expansion of the doctrine based on the functional test. In conclusion, the researcher seeks to demonstrate the difficulty in delineating the distinction between truly public and private spheres and in using the same to judge the expanse of Constitutional protection.

II. JUSTIFICATIONS OF THE STATE ACTION REQUIREMENT

On analyzing the historical and philosophical setting in which the Constitution of the United States of America was framed, one is easily drawn to the conclusion that the framers insisted on the State Action doctrine as it was believed that the remedy for any similar private infringements lay in the common law of the time, as it was believed that the common law embodied natural law principles.³

In the Civil Rights Cases⁴, Bradley J. observed that:
"the wrongful act of an individual unsupported by any such (State) authority is simply a private wrong...and presumably by vindicated by resort to the laws of the State for redress."⁵

It is often argued that the State Action doctrine promotes individual liberty as it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."⁶ However, in advancing such a suggestion, one is prioritizing the rights of the violator over those of the victim.⁷ Moreover, in a contest of competing rights, the judgment is made solely on the basis of the identity of the actors and not on the merit of the claims.⁸

1 If such were the case, there would be varied repercussions in the two jurisdictions. While in the United States, one of the biggest concerns would be the balance of State-Federal Powers, in India, it would confer great amount of power in the hands of an already powerful Judiciary.

2 Erwin Chemerinsky, "Rethinking State Action", (1985) 80 Nw. U. L. Rev. 502 at 511; Corwin, "The "Higher" Law Background of American Constitutional Law", (1928) 42 Harv. L. Rev. 149 at 179.

3 The Majority in this case held that in the absence of hostile state law or state proceedings, Congress could not enact a law providing for positive rights under the Fourteenth Amendment.

4 *Lugar v. Edmondson Oil Co.*, 457 US 992 (1982).

5 Louis Henkin, "Shelley v. Kraemer: Notes for a Revised Opinion", (1962) 110 U Pa L Rev 473.

6 Louis L.J. 983.

Additionally, it has been argued that if private action were made subject to Constitutional Law, it would concern every tort or crime - which inevitably involve the deprivation of life and liberty, or property.⁷ However, this claim ignores that if the criminal laws or the law of tort provides for adequate remedies, then there is no denial of due process.⁸

One is often exposed to the rather unconvincing argument that removing the State Action Doctrine would open the flood gates of litigation in the various Constitutional Courts.⁹ Responding to the flood gates argument, Beloff observes "it is an argument which intellectually has little to commend it, and pragmatically is usually shown to be ill-founded. For it is often the case that, once the courts have shown the willingness to intervene, the standards of the bodies at risk of their intervention tend to improve."¹⁰ Interestingly, the Indian Supreme Court, one of the most litigation burdened Courts in the world,¹¹ has scoffed this argument, observing that the Courts cannot shun their responsibility in anticipation of likely repercussions.¹²

At the institutional level, one may posit that the removal of the State Action doctrine would vest tremendous power in the judiciary. Though the response to such an argument would require an political inquiry beyond the scope of this paper, however, suffice to say that apprehensions of a distorted balance of powers between the various organs of the State may be allayed by the response of an active legislature. Concerned that the judges may wield enormous power, the legislature may enforce legislative mechanisms to prevent the private violations of Constitutional Rights.¹³

III. THE AMERICAN EXPERIENCE - STATE ACTION AND THE FOURTEENTH AMENDMENT

The State Action doctrine was first enunciated in the *Civil Rights Cases*,¹⁴ wherein the majority laid down that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however

7 Goodman, "Prof. Brest on State Action and Liberal Theory-A Postscript to Prof. Stone", (1982) 130 U. Pa. L. Rev. 1331.

8 *Ibid.*

9 Erwin Chemerinsky, "Rethinking State Action", (1985) 80 Nw. U. L. Rev. 502.

10 Michael J Beloff, "Pitch, Pool, Rink, Court? Judicial Review in the Sporting World" (1989) Public Law 95; See Also *Finnigan v. New Zealand Rugby Football Union Inc.* [1985] 2 NZLR 159.

11 As per the records of the Supreme Court of India, as of August 2008, there were 48,838 matters pending with the Supreme Court, <http://www.supremecourtsofIndia.nic.in/new_s/pendingstat.htm> last visited on 20.01.09

12 *Sinha J. in Zee Telefilms v. Union of India*, AIR 2005 SC 2677.

13 *Bush v. Lucas*, 462 US 367, wherein the Court held that adequate administrative machinery for the enforcement of rights, made the common law right to sue obsolete

14 (109) US 3 (1883).

discriminatory or wrongful."¹³ The assertion is such a broad generalization that its "textual form can remain virtually intact while being interpreted by judges or commentators whose viewpoints are as different as those embodied in the majority and dissenting opinion".¹⁶ The foregoing analysis demonstrates that the US Supreme Court has ingeniously applied a handful of principles to diverse situations; in the process expanding the State Action doctrine to its breaking point, culminating into the decision in *Shelley v. Kraemer*.¹⁷

A. STATE OFFICERS

The earliest interpretation to the concept of state in the fourteenth amendment was given in *Ex Parte Virginia*,¹⁸ wherein it was observed that the State acts through its legislative, executive and judicial authorities¹⁹ and whoever by virtue of public position under State government...violates the constitutional inhibition ...his act is the act of the State. This has been interpreted to mean that (a) discriminatory law would be clearly violative of Constitutional protections;²⁰ (b) executive agents carrying out legislative command would also fall foul of the Constitutional protection;²¹ (c) when the judiciary, either fails to afford due process or when the judges lay down common-law; its action can be violative of the Constitutional protection.²² The discriminatory actions of state agents under a valid State law created a constitutional conundrum as in the absence of state authorization to act in a particular manner, the use of state power could not be, logically, termed as "state action."²³ Subsequently, in the case of *Arrowsmith v. Harmoning*²⁴, it was observed that;

"certainly a State cannot be deemed guilty of violation of this Constitutional obligation simply because one of its Courts, acting within its jurisdiction, has made any erroneous decision. The legislature of a

15 The Majority opinion delivered by Bradley, J. has been seen as a validity the Compromise of 1877 ending the Reconstruction. Interestingly, Bradley, J. was one of the five judges of the Electoral Commission that had secured the Compromise by casting the votes in favor of the Republican Candidate Hayes John Silard, "A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee", (1966) 66 Colum L. Rev. 855.

16 Thomas P. Lewis, "The Meaning of State Action", (1960) Colum. L. Rev. 1083

17 68 S.Ct. 836.

18 100 US 310. The question that arose for consideration in this case was whether the action of a county judge in discriminating against colored persons in making selections to the grand and petit jury was violated the Fourteenth Amendment. Also See, *Virginia v. Rives*, 100 US 313, the case involved the constitutionality of a murder conviction of a black person in a Virginia county Court by an all-white jury.

19 *Lee v. Mississippi*, 332 US 742 (1948); *Cafeteria Union v. Angelos*, 320 US 293 (1943); *Bridges v. California*, 314 US 252 (1941); *American Federation of Labor v. Swing*, 312 US 321 (1941); *Cantwell v. Connecticut*, 310 US 296 (1940)

20 *Strauder v. West Virginia*, 100 US 303 (1879), this was the first case declaring a statute unconstitutional as being violative of the Fourteenth Amendment; *Ginn v. United States*, 238 US 347

21 *Hamilton v. University of California Regents*, 293 US 245 (1934).

22 *American Federation of Labor v. Swing*, 312 v. 321 (1941); *Truax v. Corrigan*, 257 US 312 (1921).

23 "The Disintegration of a Concept-State Action under the 14th and 15th Amendments" (1947) 96 U. Pa. L. Rev. 402.

24 118 US 194 (1886) [*Arrowsmith*].

State performs its whole duty under the Constitution, in this particular, when it provides a law for the Government of its Courts while exercising their respective jurisdictions, which if followed will furnish the parties the necessary Constitutional protection."

Thus, in contradiction to the *Ex Parte Virginia case*, wherein the legislature had enacted a statute that provided for non-discrimination in the matter of selection of jurors, the Court in this case found that the requirement of State Action is not met when the 'legislature' had provided for a constitutional law. Subsequent Courts have however, not followed the ratio laid down in *Arrowsmith case*.²⁵ Thus, in *Scott v. McNeal*,²⁶ the Supreme Court held that though a State Law properly construed did not violate the due process clause, its misapplication by State Courts did. Similarly, in *Raegan v. Farmer's Loan & Trust Company*,²⁷ the Court held that officers responsible for the administration of a valid tax law can still illegally trespass on valid property rights of an individual.²⁸ The abuse of discretion by State Authorities within the grant of their powers was considered State Action in *San Francisco Gas and Electric Company v. City and County of San Francisco*.²⁹

In *Barney v. City of New York*³⁰ the authority of a city board was heavily regulated by a state statute. The Court observed that the actions of the board in contravention of the provisions of the State statute, could not be characterized as "State Action".³¹ Legal scholars and judges alike have confused the doctrines laid down in the *Arrowsmith case* and *the Barney case*. While the former refers to improper application of valid state laws, the latter refers to unauthorized actions of State officials.

The confusion persisted in *Raymond v. Chicago Union Traction Company*³² wherein the Court refused to assume jurisdiction in case where an act forbidden by a state

25 James D. Barnett, "What is "State" Action under the Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution", (1944) 24 Or. L. Rev. 227 The rule laid down in *Arrowsmith* was however construed to mean that Federal Jurisdiction would not be assumed if only a State Law was involved.

26 154 US 34 (1894).

27 154 US 362 (1894)

28 The same principle was followed in *In Re Converse*, 137 US 624, wherein the Court observed that the invalid conviction of a person under a valid Federal law would amount to a violation of his Constitutional Rights, much the same as a valid conviction under an unconstitutional law; *Holden v. Hardy*, 169 US 366; *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 US 226 (1897); *American Express Railway Company v. Kentucky*, 273 US 269; *Hodgson v. Vermont*, 168 US 262; *Greene v. Louis & Interurban R.R.*, 244 US 449 (1917).

29 189 Fed. 943, wherein the Court observed that "when a State has conferred power upon some of its agencies to perform a certain function involving the exercise of discretionary power, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the State, is nonetheless, the act of the State within the Constitutional guarantee here invoked"

30 193 US 430 (1904) [*Barney*].

31 This was then followed in *Savannah & Thunderbolt, Isle of Hope Railway v. Savannah*, 196 US 392. (1905).

32 207 US 20 (1907). Justice Holmes and Harlan dissented and observed that the ratification of the conduct of the Board of Equalization by the State's highest Court amounted to State Action.

statute as the same could not be characterized as "State Action."³³

The *Arrowsmith* doctrine was finally repudiated in *Home Telephone & Telegraphic Co. v. Los Angeles*,³⁴ wherein the Court relying on the principal-agent doctrine, observed that a state officer exercising authority is estopped from denying the validity of that authority. The Court also observed that the provisions of the Fourteenth Amendment have been addressed to every person, whether natural or juridical, who is repository of State Power.³⁵

This culminated into the decision laid down in *Iowa-Des Moines National Bank v. Bennett*,³⁶ wherein the Court held that:

"when a State official, acting under the color of State Authority, invades in the course of his duties, a private right secured by the Constitution, that right is violated, even if the State officer not exceeded his duties but disregarded special commands of the law."³⁷

In *Catlette v. United States*,³⁸ the actions of a sheriff who had participated in the abuse of the members of the Jehovah's witness, while admittedly not acting in the name law, were, nonetheless held to be State Action on the premise that a state official may not lightly shuffle of his official duties. Though the ratio in this case may be seen as obliterating the distinction between the acts of an official done in his private and public capacity,³⁹ in the opinion of the researcher the opinion in this case largely depended on the facts of the case- the members of the Jehovah's witness group were detained by the sheriff in the Mayor's office, and thereafter, the sheriff removed his badge and claimed that he was not acting in the name of law. The Court in this case clearly opined that:

"it was certainly within the lawful authority of Catlette as a Deputy Sheriff to detain a person in his office just ... the misguided officers went beyond their lawful powers while acting as duly constituted officers and the commission of the respective wrongs was 'effectively aided by the State authority lodged in the wrong-doer'."

33 See Also, *Slater v. Louisville & Nashville Railroad*, 213 US 175, *Memphis v. Cumberland Telephone & Telegraph Co.*, 218 US 624.

34 277 US 278 (1913).

35 See Also, *Standard Computing Scale Co. v. Farrell*, 249 US 571; *Fidelity Deposit Company of Maryland v. Tafoya*, 270 US 426.

36 52 S. Ct. 133 (1931). See Also, *Sterling v. Constantin*, 278 US 378; *Snooden v. Hughes*, 321 US 1.

37 This proposition of law is commonly referred to the 'color of law' theory.

38 132 F.2d. 902 (1943).

39 See Thomas P. Lewis, "The Meaning of State Action", (1960) 60 Colum L. Rev. 1083.

This doctrine was further expanded in *Screws v. United States*,⁴⁰ wherein the US Supreme Court held that police officials who had arrested and assaulted an individual due to personal malice were nonetheless acting under the "color of law."

B. STATE AGENCIES & INSTRUMENTALITIES

The next level of inquiry is whether purely private activities could come under the definition of "State Action." A major criticism of the variety of cases that have dealt with this situation is that they did not clearly explicate the basis of their decision.⁴¹ However, the cases which recorded a finding of State Action may be classified into three categories - (a) leasing of property; (b) supplying of aid; (c) granting of some power or privilege by the Government.⁴²

In *Harris v. City of St. Louis*,⁴³ it was held that that temporary leasing of a Municipal auditorium would not be sufficient to justify a finding of State Action. The Missouri Court of Appeals observed that the City had not discriminated in the matter of leasing out the property, and it is within the legal rights of the lessee as to what he may do with the place he has rented for the night or the week, then those admitted only on his terms cannot say they have been legally hurt. They have no ground for legal complaint because of such action. In *Kern v. City Commissioners of City of Newton*,⁴⁴ the Supreme Court of Kansas, however, held that the leasing of a municipal pool did not exonerate the State from its obligations under the State and Federal Constitutions. Similarly in *Culver et al. v. City of Warren et al*,⁴⁵ it was observed that when a Municipal swimming pool was leased to a private corporation, "the corporation, not for profit, was a mere agent or instrumentality through which the City of Warren operated the swimming pool, atleast to the extent that the rights of its citizens to use the pool were affected." Importantly, in this case, it was observed that the fact that the property was dedicated to public use or not was immaterial.

The doctrine was further expanded in the case of *William H. Burton v. Willmington Parking Authority*,⁴⁶ wherein the US Supreme Court found that when a

40 325 US 91 (1941).

41 29 Ind. L. J 128 (1955).

42 *Ibid.* Donald M. Cahen, "The Impact of *Shelley v. Kraemer* on the State Action Doctrine", (1956) 44 Cal. L. Rev. 718.

43 111 S. W. 2d. 995 (1938).

44 100 P. 2d. 709 (1940).

45 83 N. E. 2d. 82 (1948). See Also, *Lincoln Park Traps v. Chicago Park District*, 55 N. E. 2d. 173 (1944), wherein it was observed that the City was a trustee of public property with a duty to see that it was being used for the benefit of all; *Lawrence v. Hancock*, 76 F. Supp 1004 (1948) wherein the Court found that since the City retained the right of inspection and compelled the group to use all the profits for the improvement of the property; there was a greater degree of State Control; *Davis v. City of Atlanta*, the lease of a public property to a private committee comprising of City officials was seen as an indicator of State Participation.

46 81 S. Ct 856 (1961). In this case, a restaurant named "Eagle Coffee Shop Inc." located in a parking building owned by the Willmington Parking Authority, had refused to serve food to a black individual.

public authority had leased its premises to a private restaurant, the latter is susceptible to a challenge under the Fourteenth Amendment. Fortifying the presumption that State inaction amounted to State ratification of discriminatory conduct, the Court observed that "by its inaction, the Authority and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."⁴⁷

Thus, the Courts limited governmental power to lease public property as a means to forgo of Constitutional obligations.⁴⁸ The foundational premises of the various decisions have largely varied - the lease contains an implied provision protecting Constitutional rights;⁴⁹ the power to lease does not incorporate the power to discriminate;⁵⁰ the property has been leased temporarily and still belongs to the State and hence its use cannot be discriminatory,⁵¹ or that the State has a duty when the property has been built with public money to make certain that its use is open for all;⁵² the primary intent in making the lease was to discriminate.⁵³ Thus, in ultimate analysis, in determining State Action, the enquiry turns to the character of the leasehold right.⁵⁴

Conversion of private activity into Governmental Action by grant of State authority was demonstrated in *Betts v. Easley*⁵⁵ wherein the Railway Labor Act required the formation of a sole collective bargaining agent on behalf of Railway employees. The Supreme Court of Kansas observed, "in performing its functions as such statutory bargaining agent, a labor organization is not to be regarded as a wholly private association of individuals free from all Constitutional or statutory restraints to which public agencies are subjected."

The greatest advancement of the public authority doctrine has been through the primary election cases as the continuing attempts of the Southern Democratic Parties to prevent black individuals from participating in the primary elections by

47 The Court interestingly distinguished the responsibilities of a restaurant owner from those of an inn-keeper stating that while the latter performs a public function, the latter is not compelled by law to provide his services to all those who demand them. In making the distinction, the Court has signaled a cautioned departure from the Public Function requirement *Ibid* at p 857

48 "Equal Protection and Attempts to Avoid State Action", (1953) 29 *Ind. L. J.* 125.

49 *Lorraine v. Hancock*, 76 F. Supp. 1004 (1948)

50 *Ibid*; *Easterly v. Dempster*, 112 F. Supp 214 (1953).

51 *Calber v. City of Warren*, 83 N. E. 2d. 82 (1948).

52 *Kern v. Newton*, 100 P. 2d. 709, (1940).

53 *Tate v. Department of Conservation and Development*, 133 F. Supp 53 (1955). Compare with *Easterly v. Dempster*, 112 F. Supp. 215 (1953), where the City had, to relieve itself of the burdensome obligation of maintaining a profitless enterprise, leased a golf course to a private entity, the subsequent discrimination by the owners will not amount to State Action

54 Donald M. Cohen, "The Impact of *Shelley v. Kraemer* on the State Action Concept", (1956) 44 *Cal. L. Rev.* 719.

55 160 P. 2d. 831 (1946).

inducing a step-by-step withdrawal of State participation, were thwarted by the Courts by an incremental expansion of the instrumentality theory.⁵⁶ In the earliest case in the string of decisions pertaining to the primary elections, it was held that a state statute restricting participating in primary elections to only whites was violative of the Fourteenth Amendment.⁵⁷ It was contended, unsuccessfully, that the statute concerned only political rights and hence could not be challenged in Court. The US Supreme Court observed that, "if the defendant's conduct was a wrong to the plaintiff, the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result." To overcome the effect of the said decision, Texas amended its law to transfer the responsibility to determine qualifications of party membership to the party State Executive Committee. The State Executive Committee passed a resolution barring black individuals from participating the State primaries. This was challenged in *Nixon v. Condon*.⁵⁸ The US Supreme Court observed that

"when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself...they are then governmental instruments whereby parties are organized and regulated to the end that the Government itself is established or continued."

Thereafter, the state of Texas deleted even this requirement from its statute book, leaving all regulation of primaries to the parties. In *Smith v. Allwright*,⁵⁹ the US Supreme Court held that a political party which is statutorily required to conduct primaries for the selection of party nominees to the general election ballot becomes an agency of the State in so far as it determines the qualifications of the participants in the primary election. In order to overcome the mandate of this decision, the state of South Carolina then repealed all laws relating to primary elections with the tacit purpose to continue the discrimination of blacks. This was challenged in *Rice v. Elmore*,⁶⁰ wherein the Court of Appeals observed that

"when these officials participate in what is part of a state's election machinery, they are election officers of the State de facto if not de jure and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental

56 Donald M. Caben, "The Impact of *Shelley v. Kraemer* on the State Action Concept", (1956) 44 Cal. L. Rev. 719.

57 *Nixon v. Herndon*, 273 US 536 (1927).

58 236 US 73 (1931).

59 321 US 649 (1944).

60 165 F. 2d. 387 (1947). The US Supreme Court in *Elmore v. Rice*, 333 US 875 (1948) denied a writ of certiorari against the decision of the Court of Appeals, Fourth Circuit.

principles laid down in the Constitution for its exercise.”

Subsequently, the Democratic party resolved itself into clubs that endorsed the social and educational separation of races. This was also disallowed in *Baskin v. Brown*.⁶¹ The final case which confirmed the rationale underlying the previous ones was *Terry v. Adams*⁶² in which discrimination at the pre-primary elections held by the Jaybird Association was held violative of the Constitutional obligations. Three judges of the Supreme Court relied on the duty of the State to prevent discrimination when an election process, however private, is instrumental in determining public issues or selection of public officials.⁶³ Clark, J. opined that a political organization that made the uncontested choice of public officials was imbued with “governmental attributes”. It has been suggested that as the doctrine laid in these cases was largely premised on the right of blacks to vote secured by the Fifteenth Amendment, any other form of discriminatory conduct –such as religious or political inclination, would not have attracted the same result.⁶⁴ However, it is the opinion of the researcher that the controlling factor in these decisions was not the right to vote; but the entrenchment of the primary election process in the electoral process, making the *act of conducting* primaries a governmental function. Viewed as such, the actions of a religious party which bases its membership largely on religious beliefs may still be held to be State Action.⁶⁵ However, the interplay of the First and Fourteenth Amendment in such a case would be interesting,⁶⁶ and the Court’s choice of the more “fundamental” liberty, would be influenced in large part by the socio-political settings of the time.⁶⁷

The origin of the Public Function doctrine may be traced to the case of *Munn v. Illinois*,⁶⁸ wherein Hale, C.J laid down the proposition that “when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created.” In *Olcott v. Sup’rs*,⁶⁹ it was observed that “railroads are public highways...that they are none the less public

61 174 F. 2d. 391 (1949).

62 345 US 461 (1953).

63 Black, Douglas and Burton, JJ.

64 Thomas P. Lewis, “The Meaning of State Action”, (1960) Colum. L. Rev. 1083.

65 Wechsler, “Towards Neutral Principles of Constitutional Law”, (1959) 73 Harv. L. Rev. 1.

66 See for instance, Erwin Chemerinsky, “Rethinking State Action”, (1985) 80 Nw. U. L. Rev. 502; Louis Henkin, “Shelley v. Kraemer. Notes for a Revised Opinion”, (1962) 110 U. Pa. L. Rev. 473.

67 As the primary election cases illustrate, the Courts had to balance the freedom of association with the right against discrimination. Politically, the Courts were asked to declare unlawful the activities of Southern States, who had by ingenious tactics, separated themselves from the primary process to allow for discrimination. The Court’s unwillingness to allow this thus lead to the weight given to the right against discrimination.

68 94 US 123.

69 16 Wall. 694. See Also *Township of Pine Grove v. Talcott*, 19 Wall. 676.

highways because controlled and owned by private corporations; that it is a part of the function of the Government to make and maintain highways for the conveyance of the public; that no matter who is the agent, and what is the agency, the function performed is that of the State."

Harlan, J. dissenting in the *Civil Rights Cases*,⁷⁰ observed that railroad carriers and inn keepers performed important public functions and were akin to public servants. Therefore, the protection afforded by the Thirteenth Amendment would be applicable against them. Interestingly, in analyzing the case of places of public amusement, Harlan J. observed that these places operated under the license of the Government and a license from the public to establish a place of amusement, imports in law, equality of right, at such places.⁷¹

The US Courts thus evolved a doctrine that subjected owners of private property who opened their property to public use subject to Constitutional standards. In the case of *Marsh v. Alabama*,⁷² the question arose that a private township could prevent a person from distributing religious literature. The majority opinion delivered by Black, J. was premised on the notion that the more an owner opens up his property for use by the public in general for his advantage, the more do his rights become circumscribed by the statutory and Constitutional rights of those who use it. Interestingly, the Court opined that even in cases where the State had merely acquiesced to an entity performing an important public function, the entity would be subject to Constitutional standards.⁷³

Thus, the US Courts had expanded the State Action doctrine to include the (a) actions of State officials who has acted either in excess of or in violation of their authority;⁷⁴ (b) actions of certain private entities when they had acted as instrumentalities of the State.

70 *Ibid.* The Majority in this case invalidated a federal law titled "The Civil Rights Act" preventing discrimination by inn keepers, rail roads and places of public amusement, as it was observed that the said law could not have been passed by the Federal Government under the Thirteenth or Fourteenth Amendment. See Also, *United States v. Cruikshank*, 92 US 542 (1875).

71 *Id.* at p. 43. This observation lends itself as an exemplification to the critique of the State Action doctrine on the basis of the Positive Law Theory. See Erwin Chemerinsky, "Rethinking State Action", (1985) 80 Nw. U. L. Rev. 502; James D. Barnett, "What is "State" Action under the Fourteenth, Fifteenth and Nineteenth Amendments of the Constitution", (1944) 24 Or. L. Rev. 227. Erwin Chemerinsky argues that under the Positivist construct State is assumed to authorize every conduct it does not proscribe. In the opinion of the researcher this claim does not lend support to a claim that constitutional rights may be enforced against a private entity, as though the objectionable activity stems from a private entity, the remedy is available against the State and not the private entity *per se*.

72 66 S. Ct. 276 (1945).

73 *Ibid.* at p. 279.

74 As discussed earlier.

C. PRIVATE CONDUCT

In *Shelley v. Kraemer*,⁷⁵ the question that arose for consideration was whether private restrictive covenants of the nature that prevented members of certain races from acquiring certain property were violative of the Constitution. Overruling the decision in *Corrigan v. Buckley*,⁷⁶ wherein it was held that the Constitution applied only against Governmental actions, the US Supreme Court observed, "in granting judicial enforcement of the restrictive agreements...the States have denied the petitioners equal protection of laws."⁷⁷ Taken to its logical conclusion, the ratio in the *Shelley case* would imply that Constitutional protections are available against private action, as when the Court would ratify any unconstitutional private action, the same would amount to State Action violative of Constitutional protections.⁷⁸ However, despite the enthusiasm generated by the case, some jurists consider that the case enunciated a principle of rights without remedies- as the covenant itself was not declared unlawful.⁷⁹ In *Barrows et al v. Jackson*,⁸⁰ the doctrine laid down in *Shelley's case* was further extended to deny a claim of damages against a violator of a restrictive covenant, the violator herself not being a person of the colored race; and hence not having any claim to discrimination.

The preceding analysis demonstrates that the "State Action" doctrine has received an incremental extension in response to the varied political atmospheres existing when the Courts were called upon to make a judgment. Central to the analysis has been the question whether the Fourteenth Amendment requires "affirmative" State Action in the form of State Protection. The affirmative State Action hypothesis is supported by a resort to the legislative history of the Fourteenth

75 68 S.Ct. 836 [*Shelley*].

76 271 US 323 (1926). Before the decision in the *Shelley case*, in all but one of the 21 jurisdictions in which racially colored restrictive covenants were challenged, the highest Courts of these States had upheld the validity of such covenants: Isaac N. Groner & David M. Helfeld, "Race Discrimination in Housing", 57 Yale LJ 426.

77 Earlier in *Buchanan v. Warley*, 245 US 60, the US Supreme Court held that racial segregation enforced by legislative action fell foul of the guarantee of the Fourteenth Amendment. Moreover, in *Harmon v. Tyler*, 273 US 668, the Supreme Court invalidated a city ordinance requiring the consent of a majority of the residents of an area before the purchase of any house by a member of another race.

78 Erwin Chemerinsky, "Rethinking State Action", (1985) 80 Nw U. L. Rev. 502.

79 John Silard, "A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Guarantee", (1966) 66 Colum. L. Rev. 855. See Also, *Barrows et al v. Jackson*, 73 S. Ct. 1031, wherein the Court opined that the law applicable in that case (*Shelley's case*) did not make the covenant itself invalid...no one's constitutional rights were violated by the covenantor's voluntary adherence thereto.

80 73 S. Ct. 1031. The Minority in the case opined that the award of damages must be made, as the occupancy of the non-Caucasians could not be interfered with, but the defendant could not deny that she had voluntarily breached the restrictive covenant voluntarily. She could not invoke the Constitutional Rights of prospective vendees of her property. Interestingly, the Minority opinion was delivered by Vinson, CJ who had delivered the Court's opinion in the *Shelley's case*.

Amendment.⁸¹ Passed merely two months before the Fourteenth Amendment, the Civil Rights Act, 1866 sought to give equal protection to blacks in all matters of public and private life.⁸² Wood, J. in *United States v. Hall*⁸³ observed that “denying includes inaction as well as action, and deriving the equal protection of laws, includes the omission to protect.” One is therefore drawn to the conclusion that the words “deny” and “deprive” in the Fourteenth Amendment connote a greater responsibility on the Government—the duty to prevent deprivations and denials of the rights guaranteed under the Constitution.⁸⁴

Extending the logic in the *Shelley case*, it is arguable that the State's action of allowing a violation of Constitutional protections amounts to a denial of those protections,⁸⁵ however, problematic to such an assumption, is the extent to which one is ready to accept the invasion of public law into the sphere of private action. Prof. Wechsler,⁸⁶ contends that decision in *Shelley's case* was too amorphous, and does not indicate the crucial step at which the neutral implementation by the State of an otherwise discriminatory action would amount to a violation of the due process clause. In response, the researcher submits that crucial to this question is the interplay of various conflicting rights - the rights of the black individuals and the property rights of Kraemer. In making the choice between the rights, the State's (and the Courts) choice will be seen as 'neutral' and hence not discriminatory, if the choice represents an acceptable invasion of “equality” into an individual's liberty⁸⁷ - the “acceptance” one would accord to such a decision would be necessarily tied into the political landscapes of the time.

V. THE INDIAN EXPERIENCE: STORIES OF HALTED ACTIVISM

The Indian Bill of Rights is found enumerated in Part III of the Indian Constitution.⁸⁸ Imperative to any understanding of the operation of Part III is Article

81 Erwin Chemerinsky, “Rethinking State Action”, (1985) 80 Nw. U. L. Rev. 502 ; John Sillard, “A Constitutional Forecast: Demise of the State Action Limit on the Equal Protection Guarantee”, (1966) 66 Colum. L. Rev. 855.

82 The Act provided, “[C]itizens of every race and color, without regard to any previous condition of slavery or involuntary servitude ... shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property, as is enjoyed by white citizens”. 14 Stat. 27 (1866) See Also, Gressman, “The Unhappy History of Civil Rights Legislation”, (1952) 50 Mich L. Rev. 1323.

83 26 Fed. Cas. 79. (1 (1871).

84 Thomas P. Lewis, “The Meaning of State Action”, (1960) 60 Colum. L. Rev. 1803; Erwin Chemerinsky, “Rethinking State Action”, (1985) 80 Nw. U. L. Rev. 502.

85 Louis Henkin, “*Shelley v. Kraemer*: Notes for a Revised Opinion” (1962) 110 U. Pa. L. Rev. 473.

86 Wechsler, “Towards Neutral Principles of Constitutional Law” (1959) 73 Harv. L. Rev. 1.

87 Erwin Chemerinsky, “Rethinking State Action”, (1985) 80 Nw. U. L. Rev. 502.

88 Commonly referred to as the Fundamental Rights, the rights enumerated in Part III of the Indian Constitution include among others, the right to equal protection of laws, and equal treatment before law (Article 14), the

12 of the Indian Constitution which reads as follows, "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."⁸⁹ Thus, Article 12 lays down the State Action requirement under the Indian Constitution.

A perusal of the Constituent Assembly Debates suggests that the intention of the framers in using the expression "other authorities" was to denote bodies which have been created by law and which have the power to create rules and regulations.⁹⁰

A. SOVEREIGN FUNCTION TEST

*The University of Madras v. Shantha Bai*⁹¹ is the first case dealing with the scope of Article 12. The High Court of Madras in construing the words of Article 12, gave a narrow meaning to the words "other authority" and opined "these words must be construed 'ejusdem generis' with Government or Legislature, and, so construed, can only mean authorities exercising governmental functions. They would not include persons natural or juristic who cannot be regarded as instrumentalities of the Government... It (Madras University) is not charged with the execution of any governmental functions; its purpose is purely to promote education." This was followed in the case of *B. W. Denadas v. The Selection Committee for Admission of Students to the Karnatak Engineering College*,⁹² wherein the Court observed that:

"there is an essential difference between a political association of persons called 'the State' giving rise to political power connoted by the well-

right to freedom from discrimination (Articles 15 and 16), the right against untouchability (Article 17); the freedom to speech and expression (Article 19(1)(a)); the freedom to assemble peacefully (Article 19(1)(b)); the freedom to association (Article 19(1)(c)); the right to move freely throughout the territory of India (Article 19(1)(d)); the right to reside in any part of India (Article 19(1)(e)); the right to practice any profession (Article 19(1)(g)); the right against ex-post-facto criminal laws (Article 20(1)); right against double jeopardy (Article 20(2)); right against self-incrimination (Article 20(3)); right to personal liberty and life (Article 21); right to freedom of religion (Article 25). The Rights mentioned in Articles 17, 23 (right against forced labor) and 24 (right against child labor) are specifically enforceable against private entities.

⁸⁹ The definition of State as stated in Article 12 has been interpreted to be an inclusive definition, with the word "or" appearing after the expression "territory of India" being a disjunctive and not a conjunctive. See *Telefilms v. Union of India*, AIR 2005 SC 2677 at ¶ 68. See Also *K.S. Ramamurthi Reddiar v. The Chief Commissioner, Pondicherry*. Therefore, the latter part of Article 12 should read as including all authorities created by law functioning within the territory of India or under the control of the Government: *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 at ¶ 72.

⁹⁰ 1948 (Vol. VII) Constituent Assembly Debates 610. One may possibly argue in interest of the "original intent" theory of interpretation that the "and" used here is disjunctive and not conjunctive. Thus, a body which has been either been created by law or which has a power to make rules and regulations will fall within the definition of "other authorities".

⁹¹ AIR 1954 Mad. 67.

⁹² AIR 1964 Mysore 6.

known expression 'imperative law' and a non-political association of persons for other purposes by contract, consent or similar type of mutual understanding related to the common object of persons so associating themselves together giving rise to a power which operates not in the manner in which imperative law operates, but by virtue of its acceptance by such associating persons."

B. SOVEREIGN POWER TEST

The *ejusdem generis* rule was overruled by the Supreme Court in the case of *Rajasthan State Electricity Board v. Mohan Lal*⁹³ and observed that the *ejusdem generis* was not applicable to the construction of "other authorities" as the expressions preceding it did not constitute a genus.⁹⁴ The Court observed that the "word 'authority' is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions." The Court observed that the nature of the functions performed by the entity would be immaterial in determining the character of the entity.

In *Sabhajit Tewary v. Union of India*,⁹⁵ the Supreme Court held that the definitive test in determining whether an entity would fall within the ambit of Article 12 is the manner in which the entity is created - only statutory bodies would therefore, satisfy the requirements of Article 12. On the same day as the decision in *Sabhajit Tewary's* case, a five judge Bench of the Supreme Court in *Sukhdev Singh v. Bhagat Ram*,⁹⁶ relying on the decision in *Rajasthan State Electricity Board v. Mohan Lal*,⁹⁷ observed that the a body which has the sovereign power under law to frame directions, the disobedience of which is a criminal offence would satisfy the test of Article 12.

Mathew, J. in a concurring opinion in the *Sukhdev Singh* case observed "if Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations." He opined that the test to determine whether an entity would satisfy the requirements of Article 12 can be stated as thus - (a) a finding of state financial support together with an unusual degree of control over the management and policies

93 AIR 1967 SC 1857.

94 See Also. *Ujjam Bai v. State of Uttar Pradesh*, (1963) 1 SCR 778.

95 AIR 1975 SC1329 at ¶ 4. The Court also held that since the employees of Council for Scientific and Industrial Research would not be entitled to the protection under Part XIV of the Indian Constitution, it cannot be termed as State.

96 AIR 1975 SC 1331 [*Sukhdev Singh*]. The question that arose for consideration in this case was whether statutory corporations such as the Oil and Natural Gas Corporation, Life Insurance Corporation and the Finance Corporation would fall within the definition of State under Article 12.

97 AIR 1967 SC 1857.

of the body may lead to an inference that the body is a State entity; (b) another important indicator may be if the operation carried out by the entity is an important public function, with state support being an irrelevant consideration.⁹⁸

C. GOVERNMENT INSTRUMENTALITY TEST

The correctness of the decision in *Sabhajit Tewary v. Union of India*⁹⁹ was doubted in *RD Shetty v. International Airport Authority of India*,¹⁰⁰ wherein the Court held that an entity would be treated as an instrumentality of the State when, "where a Corporation is wholly controlled by Government not only in its policy making but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation". Further, the Court held that a corporation created by statute which is otherwise autonomous in its functioning will answer to the test laid down in Article 12 when "extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character".¹⁰¹ The Court also noted that the existence of monopoly, which is either State conferred or State recognized may also lead to an inference of "State Action." Importantly, the Court hinted at the importance of the functional test and observed that, "the public nature of the function, if impregnated with governmental character or 'tied or entwined with Government' or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government."

Subsequently, in the case of *Ajay Hasia v. Khalid Mujib*,¹⁰² the Court enunciated a six stage test in determining whether an entity would within the definition of Article 12 - (a) if the entire share capital of the corporation is owned by the Government; (b) when the financial assistance given by the State is enough to cover the entire expenditure of the entity; (c) if the Corporation enjoys a monopoly status which is either Government conferred or Government protected; (d) existence of deep and pervasive state control may afford an indication that the entity is imbued with Governmental character; (e) if the functions of the entity are of public importance or closely related to Governmental functions; (f) if a Government department is transferred to a corporation, it will be a strong indicator of the fact that the entity is

98 The dissenting opinion delivered by Alagiriswami, J. was premised on the notion that in the absence of a statute, an entity undertaking commercial operations cannot be termed as State, even though the entity is entirely owned by the State.

99 AIR 1975 SC 1329.

100 AIR 1979 SC 1628.

101 Interestingly, the Court relied on the US doctrine of State Action to come to this conclusion. See, *Kerr v. Enack Pratt Free Library*, 149 F. 2d. 212.

102 AIR 1981 SC 487.

an instrumentality of the State.

In *Som Prakash Rekhi v. Union of India*,¹⁰³ the question for consideration was whether a public corporation would fall under the definition of Article 12. In answering the question in the affirmative, the Court observed that, "if only fundamental rights were forbidden access to corporations, companies, bureaus, institutes, councils and kindred bodies which act as agencies of the administration there may be a breakdown of the rule of law and the constitutional order in a large sector of governmental activity carried on under the guise of jural persons"

D. DEEP AND PERVASIVE CONTROL TEST

The judicial exposition on Article 12 was decisively settled in the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*¹⁰⁴ wherein the a seven judge bench¹⁰⁵ held that the ultimate test in determining whether an entity would be an instrumentality of the State would be whether functionally, financially and administratively the body was under the deep and pervasive control of the State.¹⁰⁶ Mere regulatory control by the Government will not suffice to fulfill the requirements of Article 12.

E. PRIVATE RELATIONS

The Supreme Court of India had occasion to deliberate on the question whether a private entity discharging important public functions would come under the definition of 'other authorities' in *MC Mehta v. Union of India*.¹⁰⁷ The question that arose in *MC Mehta* was whether victims of a gas leak from a private chemical and fertilizer plant could sue for compensation under Article 32 of the Constitution. Bhagwati, CJ who delivered the opinion of the Court observed that the expansion of Article 12 has been intended to coincide with the expansion of human rights jurisprudence in India. Responding to the argument that the inclusion of private

103 AIR 1981 SC 221

104 (2002) 5 SCC 111 at ¶ 40 [*Pradeep Kumar Biswas*]. The question that arose for consideration in this was whether the Council for Scientific and Industrial Research (CSIR), a body registered under the Societies Registration Act would fall under the definition of "other authorities" under Article 12. The CSIR was created by the Government of India to promote Industrial Research in India, with a majority of its members being nominated by the Central Government and most of its financial requirements supplied by the Government. *Pradeep Kumar Biswas* thus overruled the decision in *Sabharwal v. Union of India*.

105 It is pertinent to note here that due to the strength of the Bench, the ratio in this case would be binding on all other Constitutional Benches, comprising of five judges unless the same were to be overruled by a larger bench. (Article 141 of the Constitution of India)

106 The minority Court in the *Pradeep Kumar Biswas* case observed that merely because an entity was an instrumentality of the State, it would not come within the definition of "other authorities" under Article 12 as the entity has to be created by statute or under a statute and have the power to make law or directions amounting to law under Article 13(2). Thus, the minority observed that the distinction between "authority" and "instrumentality of State" is fundamental, and in order to satisfy the test under Article 12, an entity must answer to the definitions of both.

107 AIR 1987 SC 1086. [*MC Mehta*]

entities within the definition of Article 12 would strike a death blow to the policy of private enterprise. Bhagwati J., opined that “it is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists.” Despite giving favorable indications, Bhagwati J., however, left the question unanswered justifying the Court’s indecision on the ground that they had been given merely four days to deliberate on the question.¹⁰⁸ However, despite the wasted rhetoric, the case remains important as the Court observed that the American doctrine of State Action might be applicable in India, and therefore, all the functions of a body judged as “State” need not be public.¹⁰⁹

An interesting question arose in the case of *Zee Telefilms v. Union of India*¹¹⁰ wherein the Court was called upon to determine whether the Board of Cricket Control of India, the principle body regulating the sport of cricket in India, would fall within the definition of Article 12. On the basis of the “deep and pervasive State control” test laid down in *Pradeep Kumar Biswas*, the majority Court held that the BCCI would not come within the definition of State under Article 12. On the other hand, basing its reasoning on the “public function” doctrine, the minority Court held that the BCCI would fall within the ambit of the definition of “State” under Article 12.¹¹¹ The minority in *Zee Telefilms* opined that keeping in view the fact that the BCCI discharges an important public function¹¹² and that its actions may impinge on the fundamental rights of the players,¹¹³ the actions of the body are subject to judicial review. Interestingly, the minority Court in the same breath also opined that in times of privatization and liberalization wherein most of the Governmental functions are being relegated to private bodies, the actions of such private bodies would also be amenable to the writ jurisdiction of the Court.¹¹⁴

Importantly, the minority distinguished the test laid down in *Pradeep Kumar*

108 AIR 1987 SC 1086 at ¶ 30.

109 This view was later upheld by the minority in the *Zee Telefilms* case.

110 AIR 2005 SC 2677 [*Zee Telefilms*].

111 At ¶ 158 and 168. The Minority Court observed that “a body which carries on the monopolistic function of selecting team to represent the nation and whose core function is to promote a sport that has become a symbol of national identity and a medium of expression of national pride, must be held to be carrying out governmental functions.”

112 The Majority Court held that in the absence of State Authorization, any entity performing important public function cannot be said to be an instrumentality of the State.

113 The Majority Court opined that the suggestion that every entity that is capable of violating fundamental rights comes within the definition of State under Article 12 is untenable, as under the Constitutional scheme, the test under Article 12 is at the threshold while proving a violation of fundamental rights.

114 At ¶ 152. The Minority Court observed that “... [the] time is not far off when having regard to globalization and privatization, the rules of administrative law have to be extended to the private bodies whose functions affect the fundamental rights of a citizen and who wield a great deal of influence in public life.”

Biswas by observing that the "deep and pervasive State control test" applies only in cases when a body has been created by the State but for different purposes under the Indian Companies Act, 1956 or the Societies Registration Act, 1860. The minority in *Zee Telefilms* observed that merely because an authority answers to the test under Article 12 as it discharges a public function does not lead to the conclusion that all its functions are public in nature.

In the opinion of the researcher, in the Indian context, actions of private entities may be brought within the fold of Article 12 largely through the public function test. The Indian Courts will not be drawn to the logic of the *Shelley case*, as it is an accepted Constitutional doctrine that judicial action is not susceptible to the Article 12 test.¹¹⁵ In this regard, the opinion of Mathew J., in *Sukhdeo Singh* is instructive as he contemplated a situation wherein due to a monopolistic presence, a private entity might be imbued with Governmental character. However, this premise has been rejected by the majority Court in *Zee Telefilms*. Importantly, though, the majority in *Zee Telefilms* does not reject the possibility that a private entity may be considered public if it discharges important public functions-the majority in that case merely concludes that regulating cricket is not an important public function.

V. CONCLUSION

The preceding analysis demonstrates that in both the jurisdictions compared, the judicial choice pertaining to the extent of the State Action doctrine. In the US, a large part of the activism stemmed from the concern to control racial discrimination. In India, on the other hand, the Courts have expanded the reach of the State Action doctrine whenever the Government has been perceived to be relegating its Constitutional obligations. In the words of Bhagwati J.:

"with tremendous expansion of welfare and social service functions, increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise."¹¹⁶

115 *RS Nayak v. AS Antulay*, AIR 1984 SC 684.

116 *RD Shetty v. International Airports Authority*, AIR 1979 SC 1628.

In the American context, the issue of federalism presents a pressing concern as it has been often argued that in absence of state action in the form of either legislation or Court holding, the assumption by the Federal Courts of a power of uniform interpretation of Constitutional issues would do violence to the constitutional theory of federalism.¹¹⁷ A tactical solution invented by the Supreme Court was to State that unless the highest tribunal in the State had not ratified the conduct, the same would not amount to "State Action".¹¹⁸ However, the same has been rejected by the Supreme Court in subsequent cases. Through the analysis, the researcher has demonstrated that whenever the State Action doctrine has been expanded to its breaking point - either by holding judicial ratification of private discrimination as State Action or holding the State liable for acts done outside authority and even on personal motivations - the enquiry in its substance has turned to whether a political choice in subjecting that domain of individual action to Constitutional protections is desirable or not - thus the Courts may find themselves drawn to outlaw discrimination in public utilities; but they may not be willing to enforce the same standard to an individual home.

In India, as has been mentioned earlier, the focus of the Courts has to been to check the growth of Governmental power clothed as private conduct. As Mathew J. observes, "...the governing power wherever located must be subject to the fundamental Constitutional limitations. The need to subject the power centers to the control of Constitution require an expansion of the concept of State action."¹¹⁹

Though the controlling test in India remains the "deep and pervasive State control" test, the minority opinion in the *Zee Telefilms*, has left behind constitutional material for subsequent Courts to observe and possibly adopt. Importantly, the minority observes,

"There is no doubt that people will differ as to the cogency of these reasons. The line drawn by the cases considered within this section has, not surprisingly, been contested...has argued that the exercise of monopolistic power should serve to bring bodies within the ambit of judicial review. To speak of a consensual foundation for a body's power is largely beside the point where those who wish to partake in the activity will have no realistic choice but to accept that power. Black has argued that the emphasis given to the contractual foundations for a body's power as the reason for withholding review are misplaced. She contends that the courts are construing contract as an instrument of economic

117 "The Disintegration of a Concept-State Action under the 14th and 15th Amendments", 96 U. Pa. L. Rev. 402.

118 See for instance *Raymond v. Chicago Union Traction Company*, 207 US 20 (1907).

119 Mathew, J., in *Sukhdev Singh v. Bhogal Ram*.

exchange, with contract as a regulatory instrument. She argues further that the reliance placed on private law controls, such as restraint of trade and competition law, may also be misplaced here. Such controls are designed for the regulation of economic activity in the market place, and they may not be best suited to control potential abuse of regulatory power itself.¹²⁰

As illustrated, the Courts concerned in both the jurisdictions have sought to locate the 'governing power' in the society, and have through ingenious tactics subjected the same to Constitutional limitations. In essence thus, the pursuit of the source of such power, has forced Courts to make a political choice of either heeding to the actions of the Government or fostering newer balances in the balance of power. Political decision making is an accepted phenomenon in both these jurisdictions, however, it makes any discussion on locating a concrete distinction between public and private domains futile - the boundaries will continually change as distinctions between governments acting privately and private entities acting governmentally continually erode.

¹²⁰ *Zee Telefilms Ltd. v. Union of India*, AIR 2005 SC 2677 at ¶ 128.