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CONSTITUTIONAL LAW—State Action: Significant Involvement in Ostensibly Private Discriminations—*Mulkey v. Reitman**

From 1959 through 1963, the California legislature enacted a series of statutes which prohibited racial discrimination in the sale or rental of housing. Most important among these were the Unruh Civil Rights Act,[1] which proscribed racial discrimination by "business establishments of every kind,"[2] and the Rumford Fair Housing Act,[3] which prohibited such conduct by anyone in the sale or rental of residential housing containing more than four units.[4] Adverse public reaction to these statutes resulted in an amendment to the California constitution[5] by means of an initiative measure in the general election of 1964.[6] This amendment, popularly known as Proposition 14, effectively nullified the Unruh and Rumford Acts to the extent that they applied to housing since it prohibited any state interference with an individual's exercise of "his absolute discretion" in the sale or rental of his real property.[7] The constitutionality of

* 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *cert. granted*, 87 Sup. Ct. 500 (1966) (No. 483) [hereinafter referred to as principal case].

1. CAL. CIV. CODE §§ 51-52 (Supp. 1966).

2. This includes real estate brokers and all businesses selling or leasing residential housing. See Lee v. O'Hara, 57 Cal. 2d 476, 370 P.2d 321, 20 Cal. Rptr. 617 (1962); Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962).

3. CAL. HEALTH & SAFETY CODE §§ 35700-44 (Supp. 1965).

4. *Id.* § 35720.

5. CAL. CONST. art. I, § 26.

6. The measure passed by a vote of 4,526,460 to 2,395,747.

7. The amendment provides in part: "Neither the State nor any subdivision or agency thereof shall deny, limit, or abridge, directly or indirectly, the right of any

the amendment was tested in the principal case when the defendant, contending that his conduct was justified under the amendment, refused to rent a vacant apartment to the plaintiffs, a Negro couple, solely because of their race. The trial court sustained the defendant's argument and granted a motion for summary judgment. On appeal to the California Supreme Court, *held,* reversed, two justices dissenting. The initiative measure constituted state action which denied the plaintiffs the equal protection of the laws guaranteed by the fourteenth amendment to the federal constitution.

It has long been established that the safeguards of the fourteenth amendment apply only to action by the state and that an abridgement of one individual's civil rights by another does not violate the equal protection clause.[8] However, in recent years the line separating private and state action has become blurred. In many instances where the act which constituted discrimination was committed by an individual, or a group of individuals, the Supreme Court has nevertheless applied the fourteenth amendment because the state had taken some action which was connected to the discrimination.[9] The type or degree of connection that the state action must have to the private conduct has never been clearly defined.[10] Indeed, the Court has considered the fashioning of any precise formula "for recognition of state responsibility under the Equal Protection Clause" to be an "impossible task" and has decided each case by "sifting facts and weighing circumstances."[11] In the principal case, it is obvious that there was action by the state when the people enacted the initiative measure,[12] and it is equally clear that the defendant's refusal to rent was an act of discrimination which would have been a violation of the fourteenth amendment had the act been committed directly by the state.[13] Moreover, some connection existed between these two acts since prior to the passage of the amendment the Unruh Act

person, who is willing or desires to sell, lease, or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

8. Civil Rights Cases, 109 U.S. 3, 17 (1883).

9. See, *e.g.*, Robinson v. Florida, 378 U.S. 153 (1964); Griffin v. Maryland, 378 U.S. 130 (1964); Peterson v. City of Greenville, 373 U.S. 244 (1963); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

10. See, *e.g.*, Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

11. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

12. A state can act through the electorate as well as the legislature. See Lucas v. Forty-fourth Gen. Assembly, 377 U.S. 713, 737 (1964); State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

13. "It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property." Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

would have rendered unlawful such discrimination.[14] The question remains whether this connection was sufficient to "bring the matter within the proscription of the Fourteenth Amendment."[15] The court concluded that it was, because, in its view, the state will be held responsible for discriminatory conduct whenever the state is "significantly involved" in that conduct.[16]

In support of its position, the court relied on *Shelley v. Kraemer*[17] where parties to a restrictive covenant obtained from a state court an order enjoining a sale of real property to a Negro in violation of their agreement. The Supreme Court held that, by enforcing the covenant, the state became a participant in the allegedly private discrimination since the court's active intervention made it possible to bar the Negroes' occupancy of the property.[18] Conceptually, the situation in the principal case is analogous, for it can be argued that it was the action of the state in passing Proposition 14 that made the defendant's discrimination possible.[19] However, as the dissenting justice pointed out, the seller in *Shelley* was willing to convey his property to the Negro, and therefore enforcement of the covenant did not merely make discrimination possible, but rather compelled it.[20] This factual distinction is especially important in light of the

14. From the facts of the case it is not clear whether there would also have been a violation of the Rumford Act. The suit was originally instituted in May 1963, prior to passage of either the Rumford Act or Proposition 14.

15. Principal case at 830, 50 Cal. Rptr. at 886.

16. *Id.* at 832, 50 Cal. Rptr. at 888. The phrase was derived from Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961), where the Supreme Court stated that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."

17. 334 U.S. 1 (1948).

18. *Id.* at 19: "It is clear that but for the active intervention of the state courts, . . . petitioners would have been free to occupy the properties in question without restraint."

19. The court's interpretation of *Shelley* was unclear, but it seemed to indicate that it believed *Shelley* stood for the proposition that "but for" the action of the state the discrimination could not have occurred. Clearly, this is one possible view of the Supreme Court's holding. See Manning, *State Responsibility Under the Fourteenth Amendment: An Adherence to Tradition*, 27 FORDHAM L. REV. 201, 211-14 (1958). However, if the state action requirement is to be a meaningful limitation on the scope of the fourteenth amendment, it is probably too broad a view. Today, it is difficult to postulate a situation, especially one relating to a private property owner, in which the state is not involved to some degree; whether it be through granting a building license or providing services such as water, the state is involved in private activity to the extent that it makes it possible. It could therefore be argued that since the building and occupancy of a home would not be possible but for the state, neither would the discrimination be possible. See Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 12 (1964). In addition, the Supreme Court would probably decline to adopt this broad a view. See Bell v. Maryland, 378 U.S. 226, 333 (1964) (Black, J., dissenting).

20. Principal case at 842, 50 Cal. Rptr. at 898 (White, J., dissenting); see Horowitz, *supra* note 19, at 3; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). It has also been pointed out that judicial enforcement in *Shelley* would deny the willing seller and willing buyer their federally guaranteed rights to "inherit, purchase, lease, sell, hold, and convey" property

Supreme Court's apparent refusal to give effect to the potential breadth of its holding in *Shelley*.[21] Indeed, a restrictive view of the case may be necessary since the Court has not relied upon *Shelley* even in its subsequent expansions of the concept of state enforcement of private discriminations.[22]

Further examples of "significant involvement" cited by the court in the principal case were *Marsh v. Alabama*,[23] and the series of "white primary cases."[24] In the former, a private company owned a town and attempted to restrict the freedom of speech within its limits, while in the latter private groups attempted to exclude Negroes from voting through their control of the party's primary elections.[25] The majority in the principal case concluded that in both of these situations, the Supreme Court had found the requisite state action in the fact that the state had "permitted" practices that would have been unconstitutional had it been running the town or controlling the elections.[26] By analogy, California also "permitted" an act of racial discrimination when it nullified the Unruh and Rumford Acts by enactment of the amendment. However, once again the analogy of the court is an oversimplification. In the cases cited, the Supreme Court's decisions were based on the proposition that private groups performing functions which are governmental in nature will be

under the Civil Rights Act of 1866. Bell v. Maryland, 378 U.S. 226, 328-32 (1964) (Black, J., dissenting). It would seem that where an *unwilling* seller is a party to the litigation, as in the principal case, judicial action under these circumstances would also impinge on the seller's right to "sell" or "convey."

21. See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 474 (1962); Comment, 50 CORNELL L.Q. 473, 477 (1965).

22. In *Griffin v. Maryland*, 378 U.S. 130 (1964), the Supreme Court indicated that enforcement by the state of a private policy of racial segregation would be a violation of the fourteenth amendment. See discussion in text accompanying note 52 *infra*. This would appear to be an expansion of the principle announced in *Shelley*, and yet the Court failed to cite its decision in that case.

23. 326 U.S. 501 (1946).

24. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

25. The court also referred to the recent decision of Evans v. Newton, 382 U.S. 296 (1966). This case was concerned with an attempt by the city of Macon, Georgia, to abdicate its function as trustee of a public park in favor of private parties, so that a policy of segregation of the facility could be maintained. The Court concluded that the "public character of the park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment . . . ." *Id.* at 302. However, the property involved in the principal case was private and therefore in a different posture in relation to the fourteenth amendment. See note 28 *infra*.

26. Principal case at 832, 50 Cal. Rptr. at 888. Support for this view is contained in statements like: "In our view the circumstance that the property rights . . . were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . . ." Marsh v. Alabama, 326 U.S. 501, 509 (1946).

"This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination . . . ." Smith v. Allwright, 321 U.S. 649, 664 (1944).

subject to the same constitutional limitations as is the state.[27] Clearly, the defendant in the principal case was not acting in a capacity related to any traditionally governmental function but rather his act was of a purely private character. In addition, the Court in *Marsh* relied on the idea that a property owner's rights may be circumscribed by the constitutional rights of others when he opens his property to the public,[28] while in the "white primary cases," the basis of the decisions was the fifteenth rather than the fourteenth amendment and it may be argued that the state action requirement is subject to a different interpretation where voting rights are involved.[29]

In its discussion of "significant involvement," the court in the principal case went on to say that "the color of state action" may attach when the state merely *encourages* the discriminatory conduct.[30] Support for this proposition was found in several related cases. In *Barrows v. Jackson*,[31] a case involving a factual situation similar to that in *Shelley*, the Supreme Court alluded to the "encouragement" of discrimination that would be provided by judicial enforcement of the restrictive covenants.[32] The same idea was present in *Anderson v. Martin*[33] where the Court took judicial notice of the "inducement" to racial prejudice provided by a statute requiring the racial labeling of candidates on the ballot.[34] Also, a plan for integrating schools which permitted a student to transfer to a school in which the majority of the students were members of his race was declared invalid under the equal protection clause because it "promoted" continued segregation of the races.[35] In the principal case, the court inferred that encouragement of racial discrimination in the sale or rental of housing was evidenced by the fact that the amendment made lawful conduct which had been prohibited. However, it is questionable whether such encouragement, if any existed, was comparable to that present in the cases cited.[36] In *Barrows*, it seems

27. See Evans v. Newton, 382 U.S. 296, 299 (1966).

28. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

29. See Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448 (1965); Lewis, *supra* note 10, at 1094.

30. Principal case at 832, 50 Cal. Rptr. at 888.

31. 346 U.S. 249 (1953). The only difference is that in *Shelley* the plaintiffs sought to enjoin the sale, while in *Barrows* the suit was for damages.

32. *Id.* at 254.

33. 375 U.S. 399 (1964).

34. "The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice . . . ." *Id.* at 402.

35. Goss v. Board of Educ., 373 U.S. 683, 688 (1963).

36. The court also relied on Robinson v. Florida, 378 U.S. 153 (1964); McCabe v. Atchison, T. & S. F. Ry., 235 U.S. 151 (1914); and Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), to support its conclusion that state encouragement of discrimination is the equivalent of "significant involvement." It is questionable whether

clear that substantially more than mere encouragement was involved, for the opinion alluded to the fact that the court's action would actually "coerce" the seller into discriminatory conduct.[37] Similarly, the racial classification in *Anderson* was, to be sure, an inducement to racial prejudice, but equally important was the fact that the attempt to inject bigotry into the elective process served no legitimate governmental interest.[38] Finally, the transfer plan was an obvious attempt to prolong segregation in the schools and was also not related to any proper purpose. On the other hand, the principal case clearly involved competing interests:[39] a minority group's quest for adequate housing versus an individual's right to dispose of his property as he pleased. It is thus conceivable that the amendment had a legitimate purpose and was no more than a "declaration of neutrality in a relatively narrow area of human conduct."[40] Furthermore, the state action which was present in the above-mentioned cases could be equated with a state policy favoring bigotry whereas it is difficult to equate Proposition 14 with a state policy favoring racial prejudice in light of the anti-discrimination legislation left undisturbed by its enactment.[41]

From the above discussion it is possible to conclude that there was substantially less state involvement in the principal case than in those relied upon by the court and that therefore the court's holding extends previous concepts of what constitutes a sufficient connection between private and state action. Of equal, if not greater, interest are the implications of the decision with respect to the enactment of anti-discrimination statutes by state legislatures. In the principal case, the court concluded that it was the nullification of the Unruh and Rumford Acts, statutes which had extended an individual's right to buy property from another free of discrimination, which constituted significant involvement by the state in the discriminatory conduct of the defendant. The decision therefore seems to imply

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any of these cases do support the court's argument, for the idea of state inducement of racial prejudice was not the basis of any of these decisions. Moreover, in *Robinson* and *Burton* the property involved was a restaurant, and in *McCabe* it was a common carrier. All of these are public facilities and consequently are in a different posture in relation to the fourteenth amendment than purely private property. See note 28 *supra*.

37. "If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner . . . ." Barrows v. Jackson, 346 U.S. 249, 254 (1953).

38. "We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualification for office. Indeed, this factor in itself 'underscores the purely racial character and purpose' of the statute." 375 U.S. 399, 403 (1964).

39. Principal case at 839, 50 Cal. Rptr. at 895 (White, J., dissenting).

40. *Id.* at 838, 50 Cal. Rptr. at 894.

41. These include CAL. PEN. CODE § 365, relating to innkeepers and common carriers; CAL. LABOR CODE §§ 1410-32, concerning employment practices; and CAL. CIV. CODE §§ 51-54 (Supp. 1966), containing the portions of the Unruh Act which were not nullified by the amendment.

that once a state commits itself to a policy of anti-discrimination and implements that policy by enacting legislation, such legislation cannot be repealed without violating the equal protection clause, for to do so would constitute encouragement of the denial of a previously extended right. Such a conclusion raises interesting questions as to the effect that this will have on a legislature's willingness to pass such legislation or its ability to repeal measures that have proved to be ineffective or unenforceable.[42]

The decision further suggests that a legislature may not even have a choice as to whether it will enact the unrepealable anti-discrimination legislation—it may have a duty to do so.[43] It can be argued that failure to enact measures that restrict private discrimination makes such discrimination possible, if indeed it is not an inducement to such conduct. Therefore, one could conclude that the state's inaction would sufficiently involve the state in the discrimination so as to constitute a denial of equal protection. Since the court stated that the involvement must consist of action on the part of the state,[44] one could argue that inaction would not be sufficient. However, there are a series of decisions indicating that where there is a duty to act, state inaction is the equivalent of state action.[45] Additional support for this proposition may be provided by the government function cases where arguably the inaction of the state in permitting private parties to discriminate constituted the requisite state involvement.[46] It should be obvious that if these implications are

42. This conclusion also raises questions concerning the constitutionality of the repeal of Reconstruction statutes passed to restrict racial prejudice in states like Mississippi. Though it can be argued that any encouragement they may have given to private discriminations has long since ceased, in light of the California court's treatment of this element of state action, such a contention may not be decisive. See Henkin, *supra* note 21, at 483 n.20.

43. It is unclear what the effect of a breach of such a duty would be. It may mean that anyone who was the subject of a private discrimination which the state should have prevented would be able to bring suit to compel the enactment of an anti-discrimination statute. This would be somewhat analogous to the procedure followed in some states with regard to reapportionment. See Scholle v. Secretary of State, 367 Mich. 176, 116 N.W.2d 350 (1962).

Another possibility would be to allow a suit directly against the perpetrator of the discrimination. In such an action the court would have no choice but to grant some form of relief, since imposing a duty to pass anti-discrimination legislation is the equivalent of compelling the state to prohibit private acts of discrimination that would be subject to such legislation. Use of this approach would be dependent on an expansive interpretation of *Shelley* to include *all* judicial enforcement of private discriminations, rather than only those which result from solicitation of the court by the party attempting to discriminate. See note 53 *infra*.

44. Principal case at 830, 50 Cal. Rptr. at 886.

45. Bell v. Maryland, 378 U.S. 226, 310-11 (1964) (Goldberg, J., concurring); Lynch v. United States, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). For a discussion of these and other cases relating to the same proposition, see Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

46. See note 26 *supra*.

unavoidable, the line separating state action and private action has been further blurred and probably obliterated.[47] Conceivably, the state could be held responsible for practically every private discrimination that infringed upon a right protected by the fourteenth amendment, since such discrimination would not have been lawful but for the state's failure to act.

It is interesting to note that in the subsequent case of *Hill v. Miller*,[48] the California court attempted to dispel the notion that the decision in the principal case contained such implications. In *Hill*, the defendant purchased a single unit dwelling and attempted to evict the Negro tenant, admittedly because of his race. The Negro brought suit, but it was dismissed for failure to state a cause of action. The California Supreme Court, affirming, declared that the fourteenth amendment does not impose an affirmative duty on the state to prohibit private discriminations of the nature alleged.[49] Consequently, the court concluded, the state was in no way responsible for the discriminatory conduct. The decision, however, presents several problems of a practical nature. If the tenant refrains from bringing suit and instead chooses to remain on the premises, the landlord will be without a remedy, for if the landlord were to bring suit for unlawful detainer and were to prevail, enforcement of the order would constitute state action denying equal protection of the laws. This result is dictated by *Abstract Investment Co. v. Hutchinson*,[50] in which the California Supreme Court expanded *Shelley v. Kraemer*[51] so as to include an "unwilling seller." Admittedly, in the hypothetical the party attempting to discriminate sought the aid of the court whereas in the actual case the subject of the discriminatory conduct initiated the litigation. However, this may be a distinction without a difference, for it would seem that, regardless of who initiates the litigation, the important factor should be that the courts are being used to enforce a policy of racial discrimination.[52] Indeed, in

47. Some commentators have concluded that the state action requirement has, for all practical purposes, already been read out of the fourteenth amendment. Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963). *But see* United States v. Guest, 383 U.S. 745, 755 (1966), where the Supreme Court, at least formally, reaffirmed the requirement.

48. 415 P.2d 33, 51 Cal. Rptr. 689 (1966).

49. *Id.* at 34, 51 Cal. Rptr. at 690.

50. 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962).

51. 334 U.S. 1 (1948); see discussion in text accompanying note 17 *supra*.

52. Although this was, in fact, the distinction relied on by the California court, 415 P.2d at 34, 51 Cal. Rptr. at 690, support for the textual conclusion can be found in the case of Griffin v. Maryland, 378 U.S. 130, 136 (1964). There the court declared that any time "the State undertakes an obligation to enforce a private policy of racial segregation, the State is charged with racial discrimination . . . ." At least one commentator has argued that the broad implications of the Court's holding in *Griffin* must be limited for "certain private rights outweigh the presence and effect of state action." Comment, 50 CORNELL L.Q. 473, 484 (1965). As an example, he suggested the case where the state

the principal case the court casts doubt on the idea that only offensive use of the courts is prohibited by the fourteenth amendment, for it intimated that defensive use may also constitute state enforcement of discrimination.[53]

The court in the principal case was obviously conscious of the fact that affirmation of the lower court's decision and the consequent nullification of previous anti-discrimination legislation would have jeopardized the entire Civil Rights movement in the area of fair housing. However, no other court has held that, absent evidence of state compulsion of or a state policy favoring discriminatory conduct, the repeal of a statute, which repeal merely makes private discrimination possible and only to that extent encourages it, "significantly involves" the state in that conduct.[54] Such a decision would signal the end of the state action requirement as a meaningful limitation on the scope of the fourteenth amendment. Thus, it would appear that the principal case is "more the product of human impulses . . . than of solid constitutional thinking."[55]

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aids in the enforcement of the discrimination of a private property owner. However, the holding in *Abstract* may negate the idea that courts will engage in a balancing process to determine which forms of state enforcement of private discriminations are prohibited.

53. Though in its discussion of *Shelley* the court recognized the distinction between one who "solicits and obtains the aid of the court in the accomplishment of that discrimination" and one who is in court "because [he has] been summoned there by those against whom [he seeks] to discriminate," it seemed to minimize this difference, thereby implying that *any* judicial enforcement of a private discrimination may be unconstitutional state action. Principal case at 831, 50 Cal. Rptr. at 887. The implications of such a holding would be far-reaching. If defensive use of the courts does come within the ambit of *Shelley*, the judiciary would be forced to grant some sort of relief in any suit initiated by one who was the subject of a discrimination or face the prospect of being reversed on the basis of enforcement of that discrimination.

54. As seen earlier, the question of "significant involvement" is one of degree and in each decision cited the connection of the state to the discrimination had been more substantial. However, it is somewhat incongruous that a state should be able effectively to nullify all fair housing legislation and thereby enhance the probabilities for prolonging the segregation of the races. In this connection, it would seem that the unique facts of the principal case suggest the need for an alternative approach to the sifting of facts and weighing of circumstances to find whether the state is significantly involved in a private discrimination. See text accompanying note 11 *supra*. It has been suggested that the question should be "whether because of the character of state involvement . . . there has been a denial for which the state *should* be held responsible." Henkin, *supra* note 21, at 481. (Emphasis added.) Clearly, this would shift the emphasis to policy considerations, but the inadequacies of the decision in the principal case indicate that such a change may be desirable.

55. Evans v. Newton, 382 U.S. 296, 315 (1966) (Harlan, J., dissenting).