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## The Fourteenth Amendment and the State Action Doctrine

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origin, when it was used to expand liability by merely curtailing the imputation of contributory negligence where there would not be vicarious liability, to the present, when it acts to curtail liability by automatically imputing contributory negligence in every situation where there would be vicarious liability. The rule has been rejected in the situations in which it was originally applied. Diverting the application of the rule to follow vicarious liability has only served to decrease liability in an area where the vicarious liability rule itself aimed for the opposite result. Recognizing this, writers have begun to criticize the rule.

The use of the factor of "the right to control" the body or conduct of another as creating an "agency" for this purpose in relationships such as parent-and-child, husband-and-wife, and bailor-and-bailee has been almost universally discarded as an outworn anachronism contrary to justice and the requirements of modern civilization. It should also be discarded in master-and-servant situations.<sup>37</sup>

Hopefully, this decision will lead other jurisdictions to the same conclusion.

BRUCE H. JACKSON

### THE FOURTEENTH AMENDMENT AND THE STATE ACTION DOCTRINE

The guaranty of equal protection of the laws under the fourteenth amendment<sup>1</sup> applies only to action by a state or an agency thereof.<sup>2</sup> Since the adoption of the fourteenth amendment in 1868, courts have considered the amount of state action necessary to invoke the amendment.<sup>3</sup> *Mulkey v. Reitman*<sup>4</sup> is an example of how difficult this task may be. The California Supreme Court held that the 1964 initiative proceeding, entitled Proposition 14, violated the fourteenth amendment. Proposition 14 was an amendment to the state constitution, which proclaimed the state's strict neutrality concerning discrimination in real estate. Upon approval by a majority of the electorate

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<sup>37</sup>Lessler, *Imputed Negligence*, 25 CONN. BAR J. 30, 51 (1951).

<sup>1</sup>U.S. Const. amend. XIV, § 1.

<sup>2</sup>*Virginia v. Rives*, 100 U.S. 313 (1879).

<sup>3</sup>*Hawkins v. North Carolina Dental Soc'y*, 355 F.2d 718, 723 (4th Cir. 1966). Recognition of "the true boundaries between the individual and the community is the highest problem that thoughtful consideration of human society has to solve."

<sup>4</sup>64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 (1966).

Proposition 14 was incorporated into the California Constitution as article I, section 26.<sup>5</sup>

In *Mulkey*, the plaintiff applied to rent an apartment offered to the public by the defendant. When the plaintiff's application was denied on the sole ground that he was a Negro, he filed suit seeking an order restraining the defendant from further discrimination. The trial court issued a summary judgment in favor of the defendant based on section 26. The California Supreme Court reversed and impliedly held section 26 to be discriminatory because by repealing prior legislation forbidding discrimination, section 26 established an atmosphere conducive to discrimination.<sup>6</sup> *Mulkey* then found affirmative state action on the theory that the electorate acts as an agent of the state when it passes a law of the state in an initiative proceeding.<sup>7</sup> *Mulkey* is not a significant deviation from the existing state action doctrine but merely finds state action at an earlier stage than prior cases. In prior cases involving statutory discrimination the state action found to be unconstitutional was in the enforcement of an existing statute, not in the statute's adoption.<sup>8</sup>

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<sup>5</sup>Cal. Const. Art. I, § 26, reads in part, "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent 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 . . ." This section was approved by the electorate, 4,526,460 in favor; 2,395,747 against. Prior to the approval of section 26, California had two broad anti-discrimination statutes: The Unruh Civil Rights Act, Cal. Civ. Code, §§ 51-52, which prohibited discrimination based on race, religion, ancestry, or national origin in business establishments of every type; and the Rumford Fair Housing Act, Cal. Health & Safety Code, §§ 35,700-35,744, which prohibited discrimination in the sale or rental of any private dwelling of more than four units.

<sup>6</sup>This is an interpretation of the implied holding in *Mulkey*. The court stated "A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective . . . and for its ultimate effect. . . . To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment." *Mulkey v. Reitman*, 413 P.2d at 828. The court then pointed out that § 26 revoked prior civil rights legislation. *Id.* at 829. However, the court also emphasized that "defendants urge that section 26 accords them the right as private citizens to . . . discriminate." *Id.* at 830.

<sup>7</sup>*Id.* at 834. The dissent in *Mulkey* maintained that § 26 was not discriminatory. "It is rather a declaration of neutrality in a relatively narrow area of human conduct. . . ." *Id.* at 838. The dissent then raised the question of whether or not the state has the right under the majority opinion to repeal legislation it has placed on the books. Where the majority strictly applied the prohibition of the fourteenth amendment upon a finding of discrimination and a state action, the dissent concerned itself with the consequences of such an application.

<sup>8</sup>*E.g.*, *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. Louisiana*, 373 U.S. 267 (1963); and *Department of Conservation & Dev. v. Tate*, 231 F.2d

The state action doctrine of the fourteenth amendment may conveniently be divided into two categories: those cases where the state or an agent thereof has directly and affirmatively acted; and those cases where the state has become significantly involved in the actions of a private individual thus making the individual's actions those of the state.<sup>9</sup> While the cases in the affirmative state action group tend to be of a like nature, the cases in the state involvement category can be subdivided on the basis of four situations where the discriminating party: (1) receives some form of state financial assistance which benefits the instrumentality which discriminates; (2) leases the instrumentality of his discrimination from the state; (3) seeks judicial assistance in enforcing his discrimination; (4) appoints the state to be trustee of his estate and requires discrimination in the administration of the trust.

*Affirmative State Action.* It is well settled that a state may not act directly<sup>10</sup> nor through an agent<sup>11</sup> to deprive another of rights protected under the fourteenth amendment.<sup>12</sup> "At least in the area of constitutional rights . . . a state can no more delegate to its subdivisions the power to discriminate than it can itself directly establish inequalities."<sup>13</sup> If one clothed with the state's power deprives another of the guarantees of the amendment and acts in the name of and for the state, his act is that of the state.<sup>14</sup> Being clothed with state authority is all that is necessary; whether the state has authorized the wrong is immaterial.<sup>15</sup> Thus, the actors need not be "the representatives of

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615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956). State enforcement in this context includes not only prosecution by the state but those situations where private individuals are precluded from acting freely because of state law or regulation proscribing their conduct, and thus they are forced to discriminate. These situations differ markedly from *Mulkey* where the party discriminating is not forced to do so, but rather acts freely and at his discretion.

<sup>9</sup>Such a proposition is, of course, a fiction. Private discrimination, by definition, is not discrimination by the state, and no amount of state involvement will make a private individual's act the act of the state. The state involvement doctrine is a judicial device whereby the action of a private individual may be treated as an action by the state in order to invoke the prohibitions of the fourteenth amendment. Because the state involvement doctrine is distinguishable from the affirmative state action doctrine, it will be treated separately in this comment.

<sup>10</sup>*Virginia v. Rives*, 100 U.S. 313 (1879); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Singleton v. Board of Comm'rs*, 356 F.2d 771 (5th Cir. 1966).

<sup>11</sup>*Ex parte Virginia*, 100 U.S. 339 (1879).

<sup>12</sup>The fourteenth amendment "must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 347.

<sup>13</sup>*Allen v. County School Bd.*, 207 F. Supp. 349, 354 (E.D. Va. 1962).

<sup>14</sup>*Ex parte Virginia*, 100 U.S. 339 (1879).

<sup>15</sup>*Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913).

the State in the strict sense in which an agent is the representative of his principal.”<sup>16</sup>

*State Involvement.* The antithesis of state action is discrimination by the private citizen acting as such. There is no question under present law about the individual's right privately to discriminate if he so chooses.<sup>17</sup> But the courts are alert for significant state involvement which will make the allegedly private citizen's discrimination violative of the fourteenth amendment. The involvement of the state need not be either exclusive nor direct.<sup>18</sup> “Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”<sup>19</sup>

(1) The most obvious group of state involvement cases deals with private persons or corporations who have discriminated and the instrumentality of the discrimination has benefited from some form of government financial assistance. Thus, a private hospital which has participated in and has received funds from a federal aid program may not engage in discrimination.<sup>20</sup> In taking this position *Simkins v. Moses H. Cone Memorial Hosp.* held, “the initial question is . . .

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<sup>16</sup>*Nixon v. Condon*, 286 U.S. 73, 89 (1932). This is one of a series of “White Primary” cases in which it was held that the state cannot delegate state functions to private clubs or associations which discriminate. See *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953) for later but similar holdings. The application of the principle of affirmative state action may be found in many cases of varying fact situations. Of course, where a state passes legislation promoting discrimination, it is clearly acting in violation of the fourteenth amendment. *Robinson v. Florida*, 378 U.S. 153 (1964). Similarly, where a city passed a discriminatory ordinance, it does so in violation of the amendment, for a city is, in the strict sense, the agent of the state. *Peterson v. City of Greenville*, 373 U.S. 244 (1963). A school board, an agent of the state, may not close school doors to Negro children, *Allen v. County School Bd.*, 207 F. Supp. 349 (E.D. Va. 1962); nor may it establish district lines for the purpose of avoiding integration of the school system, *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal Rptr. 606, 382 P.2d 878 (1963). Nor may a state agency discriminate through any other scheme, *Cooper v. Aaron*, 358 U.S. 1 (1958). Similarly, a state cannot delegate clearly state functions to discriminating private individuals, *Department of Conservation and Dev. v. Tate*, 231 F.2d 615 (4th Cir. 1956); nor may a private corporation which has assumed certain state functions engage in discrimination, *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>17</sup>*Virginia v. Rives*, 100 U.S. 313 (1879); *United States v. Guest*, 383 U.S. 745 (1966).

<sup>18</sup>*United States v. Guest*, 383 U.S. 745 (1966).

<sup>19</sup>*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

<sup>20</sup>*Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). It is interesting to note that this decision, in effect, overruled *Wood v. Hogan*, 215 F. Supp. 53 (W.D. Va. 1963) which under almost identical facts found that the investment of state and federal funds did not amount to sufficient state involvement to deny the hospital its private status.

whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments . . . without the private body necessarily becoming their instrumentality or their agent in a strict sense."<sup>21</sup> Where there is a jointly planned and administered project involving the city, state, and federal governments, such as in an urban renewal program, no discrimination by a developer who purchased one of the prepared lots will be permitted, for the "inextricably inter-mingled" public funds have created a sufficient degree of state involvement to invoke the fourteenth amendment.<sup>22</sup> Because of the involvement of federal funds in the construction of a federal building, a labor union working on the project will not be permitted to discriminate in the selection of its members.<sup>23</sup>

(2) Another line of cases wherein the actions of a private citizen are readily brought under the fourteenth amendment applies when the private individual has leased from the state the instrumentality used for discrimination. Thus, where a lessee leases quarters within a state parking authority's garage,<sup>24</sup> or within the county court house,<sup>25</sup> and proceeds to exclude Negroes, the courts have found sufficient state involvement to make the fourteenth amendment applicable.<sup>26</sup>

(3) Significant state involvement attaches to what would otherwise be a purely private action in the area of judicial enforcement of private discrimination. Beginning with *Shelley v. Kraemer*,<sup>27</sup> the Supreme Court has held that a person bound by a covenant not to sell to a Negro or other non-Caucasian may not be held liable by a court

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<sup>21</sup>323 F.2d at 966.

<sup>22</sup>*Smith v. Holiday Inns of America*, 336 F.2d 630 (6th Cir. 1964). The court emphasized, however, that former state ownership of land will not constitute state involvement without something more.

<sup>23</sup>*Todd v. Joint Apprenticeship Comm.*, 223 F. Supp. 12 (N.D. Ill. 1963); *rev'd as moot*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

<sup>24</sup>*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

<sup>25</sup>*Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957). Similarly, the rental of quarters at the municipal airport, *Turner v. City of Memphis*, 369 U.S. 350 (1962), or the lease of land, *Smith v. City of Birmingham*, 226 F. Supp. 838 (N.D. Ala. 1963), are acts within the same theory.

<sup>26</sup>In arriving at their decisions, some courts have taken note of the fact that the city has supplied the heat and water or other benefits, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Derrington v. Plummer*, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957), or that any improvements redound to the benefit of the lessor, *Smith v. City of Birmingham*, 226 F. Supp. 838 (N.D. Ala. 1963), but in view of the Supreme Court's failure to refer to such factors in *Turner v. City of Memphis*, 369 U.S. 350 (1962), it is doubtful that they are significant in such cases.

<sup>27</sup>334 U.S. 1 (1948); see also *Hurd v. Hodge*, 334 U.S. 24 (1948).

to a co-covenantor for breach of the covenant. On the theory that the judiciary branch of government is as much an arm of the state as the executive or legislative branches, and keeping in mind that purely private discrimination is permissible under the Constitution, the Supreme Court held in *Barrows v. Jackson*<sup>28</sup> that when a court enforces a covenant's discriminatory clause "to that extent the State would put its sanction behind the covenant . . . . Thus it becomes not the . . . [seller's] . . . voluntary choice but the State's choice that she observe the covenant or suffer damages."<sup>29</sup> These cases must, at this stage, be limited to their facts. In each case there was a willing seller, a willing buyer, and a disgruntled beneficiary under the covenant who initiated the action. In no case was the action between a desirous buyer and a reluctant seller, as in *Mulkey*, and the Supreme Court has not addressed itself to such litigation.<sup>30</sup>

(4) Another act of private discrimination which violates the fourteenth amendment is the establishment of a trust for the benefit of the public but administered by the state, or an agency thereof. If the trust is discriminatory, the state will be depriving the Negro of the equal protection of the laws if it abides by the trust's provisions.<sup>31</sup> Similarly,

<sup>28</sup>346 U.S. 249 (1952).

<sup>29</sup>346 U.S. at 254.

<sup>30</sup>A California court dealt with the situation in *Abstract Inv. Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962), in which a landlord was attempting to evict his Negro tenant. The court held that "the defendant should have been permitted to produce proof of the allegations of his special defense of discrimination, which if proven would bar the court from ordering his eviction because such state action would have been violative of both federal and state Constitutions." *Id.* at 317. A review of the cases in which *Shelley* or *Barrows* have been cited by the Supreme Court indicates a willingness to extend the *Shelley* rule to such fact situations. There is language to the effect that the state sanctions the judgments handed down by the courts, or at least, that a judicial proceeding has state action or involvement. *United States v. Williams*, 341 U.S. 740 (1951) (Douglas, J., dissenting); *Rice v. Sioux City Cemetery*, 349 U.S. 72 (1959); *Railway Employee's Dep't A.F.L. v. Hanson*, 351 U.S. 225 (1956); *Cooper v. Aaron*, 358 U.S. 1 (1958); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Bell v. Maryland*, 378 U.S. 226 (1964) (Douglas, J., concurring).

<sup>31</sup>*Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957). "The Board which operates Girard College is an agency of the State of Pennsylvania. Therefore, even though the Board was acting as trustee, its refusal to admit . . . [the applicants] . . . to the college because they were Negroes was discrimination by the State." *Id.* at 231. This case has a curious history. Upon remand, the Pennsylvania Orphan's Court (the trial court in the case) substituted private individuals as trustees to carry out the testator's intentions. The Pennsylvania Supreme Court upheld the substitution, *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844 (1958) *cert. denied*, 357 U.S. 570 (1958). Whether or not the court would grant certiorari today is an interesting question. Despite ex-