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Reitman v. Mulkey

With the amount of taxpayers money that subsidizes housing, and with its relation to educational and job opportunities and access to governmental services, I am close to the view that the state has a constitutional obligation to see that housing transactions are free of discrimination. So as a matter of philosophy, I am not bothered by our position which only forbids the state to authorize and encourage discrimination. I am not suggesting that we argue that the state has an affirmative obligation to eliminate discrimination in housing transactions; but it seems to me that we must somehow bring to the courts' attention the importance and significance of housing transactions in the achievement of equality in order to put this case in its proper perspective. I fear that the court will react adversely to our position, absent a lack of a convincing factual picture, because it seems like such an authoritarian pronouncement with only one state having taken such action and many states having passed fair housing laws.

The Civil Rights Division has substantial reservations about exclusively relying on the argument suggested by Nat Lewin. The principal defect in the argument, aside from its oblique nature, is the question of standing. Since none of the respondents are seeking access to housing in which the state is significantly involved, it is hard to see why they should be permitted to object to that application of Proposition 14 which arguably (and only arguably, at that) forbids state officials responsible for such housing to take steps to eliminate discrimination with respect to it.

Lewin's standing argument seems to run up against United States v. Raines, 362 U.S. 17, to mention one example. There it was held that a state official had no standing to object to the possible application of the Civil Rights Act of 1957 to private persons whom (it was then thought) Congress had no authority to reach. A contrary position may jeopardize the enforcement of innumerable statutes, since many laws are subject to some possible constitutionality infirmity in their marginal applications. While in the First Amendment area such marginal application may be raised by others, I doubt the applicability of that doctrine here because I question that Proposition 14 has a chilling effect on public officials. They are not like persons contemplating speeches or meetings or parades and who may be intimidated by the prospect of prosecution; if public officials are in doubt about their authority they obtain a legal opinion from the state's legal officers, and then they act one way or the other.

Second, it does not follow from the state court's ruling that Proposition 14 is not severable that respondents have standing to challenge it. Mr. Lewin's memo equates standing with severability, but I think the severability issue is not reached until someone has been held to have standing to challenge the invalid application of the law.