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Amicus Curiae Participation in Reitman v. Mulkey and Snyder v. Prendergast, No. 483, O.T. 1966

STATUS OF THE CASE

Certiorari was granted[1/] on December 5, 1966, but the record has not yet been printed and therefore due dates for briefs are not yet established. Assuming that a government amicus brief would support the respondents and urge affirmance, it would not be due until at least the latter part of February.

FACTS

1. Background. These cases involve the constitutionality of Article I, Section 26 of the California Constitution, commonly called "Proposition 14", which was adopted as an initiative measure in the 1964 California general election. It provides in pertinent part that --

> 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.

1/ A single petition for certiorari was filed covering both Reitman and Snyder; certiorari was granted as to both cases.

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The Article defines "real property" as single or multiple units, regardless of how obtained or financed,[2] which are ". . . used, designed, constructed, zoned or otherwise devoted to . . . residential purposes." The Article is expressly made inapplicable to the sale or rental of property owned by the State, to the acquisition of property by eminent domain, and to hotels, motels, and similar establishments engaged in furnishing lodging for transient guests.

Prior to the adoption of Proposition 14, California had two statutes prohibiting, in differing (and some overlapping) respects, racial discrimination in residential housing. The "Unruh Civil Rights Act" (Cal. Civ. Code §§51-52), adopted in 1959, prohibited discrimination on account of "race, color, religion, ancestry, or national origin" by "business establishments of every kind." This statute was construed to apply to real estate brokers (Lee v. O'Hara, 57 Cal.2d 476; 378 P.2d 321) and to tract developers selling single-family dwellings (Burks v. Poppy Constr. Co., 57 Cal.2d 463, 370 P.2d 313). In 1963, the "Rumford Fair Housing Act" (Cal. Health & Safety Code §§35700-35744) was passed; it prohibited discrimination on the same grounds as the Unruh Act and covered publicly assisted housing and apartment houses with more than four units. Proposition 14 purports to nullify both of these statutes so far as they prohibit discrimination in privately owned residential housing.

2. Facts in Reitman v. Mulkey. This action was instituted in 1963 under the Unruh Act against the owner of an apartment building for allegedly refusing to rent an apartment to plaintiffs on account of their race. Following the adoption of Proposition 14, the trial court dismissed the action on defendants' motion, solely on the ground that Proposition 14 had nullified the Unruh Act as applied to residential housing.

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[2] As to possible "overreach" of Proposition 14 with respect to residential real property financed or otherwise supported by the state or federal governments, see p. 21, infra and attached memorandum from the Office of Legal Counsel.

No evidence was introduced at trial. The trial court characterized its disposition as a granting of summary judgment. The State Supreme Court said that it was properly characterized as a judgment on the pleadings. That court went on to add that ". . . in any event the allegations of the complaint stand as admitted for our purposes." Thus, for purposes of this appeal, there is no dispute that the petitioners' refusal to rent their property was based solely on race.

3. Facts in Snyder v. Prendergast. This action was instituted in December 1964 following the adoption of Proposition 14 by an interracial married couple against the owner of a seven-unit apartment house in which the plaintiffs were residing. The Caucasian wife had rented the apartment on an oral month-to-month tenancy basis. Following her marriage to a Negro, who thereupon moved into the apartment, the apartment house owner gave the plaintiffs a 30-day written notice of termination of tenancy. Prior to the expiration of the tenancy, plaintiffs sought an injunction against their eviction, relying on the Unruh Act and the Fourteenth Amendment. The apartment house owner then filed a cross-complaint seeking a declaration that the tenancy had been validity terminated and that he was entitled to possession. Among other bases for relief, the apartment owner asserted his right ". . . to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion or the person or persons involved. . . ." See Petition for Certiorari, page 7.

Finding it unnecessary to rule on the validity of Proposition 14, the trial court held that the equal protection clause, as construed in Shelley v. Kraemer, precluded the granting of "affirmative relief" in support of a private decision to discriminate.

4. Rationale of the California Supreme Court's Decision. The California court held in Reitman by a 4-to-2 vote that Proposition 14 violates the equal protection clause and reversed the trial court's

judgment. 3/ The opinion of the majority in Reitman is somewhat confusing and it is difficult to say precisely what was the court's basis for holding Proposition 14 unconstitutional.

The court first reviewed the historical context of the adoption of Proposition 14 and rejected plaintiff's contention that the States have an affirmative duty under the Fourteenth Amendment to assure nondiscrimination in housing, saying --

> However subtle may be the state conduct which is deemed "significant," it must nevertheless constitute action rather than inaction. The equal protection clause and, in fact, the whole of the Fourteenth Amendment, is prohibitory in nature and we are not prepared to hold, as has been urged, that it has been or should be construed to impose upon the state an obligation to take positive action in an area where it is not otherwise committed to act.

The court then stated the issue in the following terms --

> The problem thus becomes one of ascertaining positive state action of a degree sufficient to be deemed significant in the accomplishment of the recognized and admitted discrimination.

Thereafter the court reviewed a series of Supreme Court decisions of more or less doubtful relevance, including Shelley v. Kraemer, Marsh v. Alabama, the "white primary" cases, Evans v. Newton, Robinson v. Florida and Anderson v. Martin,

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3/ In Snyder, the judgment against the landlord was affirmed but the court based its decision on the Reitman ruling and the invalidity of Proposition 14, not on the Shelley v. Kraemer rationale relied upon by the trial court. Since the opinion in Snyder merely referred to the reasoning adopted by the majority in Reitman, the discussion of the California court's rationale here is confined to the Reitman opinion.

to support its conclusion that Reitman presents an --

> analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. . . . . Here the State has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged, within the meaning of the cited decisions.

The Reitman opinion concludes with a discussion of whether, as a matter of California law, the vice found in Proposition 14 -- that it purports to authorize private discrimination on racial grounds -- is "severable" so that Proposition 14 would remain in effect as to decisions to discriminate on a "proper basis" -- i.e. bases other than race, color, etc. In the course of this discussion, the court suggested that Proposition 14 was directed only toward discriminations in the sale of real property that were formerly prohibited by law.4/ In other words the court implied that, despite its sweeping and neutral terms, Proposition 14 only authorized discrimination on racial and other invidious grounds, since those were the only grounds upon which discrimination was formerly prohibited.

4/ "[W]e can conceive of no other purpose for an application of section 26 aside from authorizing the perpetuation of a purported private discrimination where such authorization or right to discriminate does not otherwise exist. . . (emphasis added)." Since, presumably, the right of property owners to discriminate against people with red hair or bad credit ratings did "otherwise exist" under California law, Proposition 14 did not include a declaration of that right, in the court's view.

It is possible to read the Reitman decision as establishing three different principles:

> (1) A State has discretion to require non-discrimination in housing, but once it passes such a law, it can not repeal it because to do so would constitute State "encouragement" of private discrimination;
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> (2) A State law which expressly authorizes private racial discrimination in housing makes all otherwise private decisions to discriminate in housing unconstitutional "State action"; this would mean that Proposition 14 is, inadvertently, a comprehensive open-housing law; or
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> (3) A State law which expressly authorizes private racial discrimination is void and has no effect whatsoever; this means that whatever fair housing laws were on the books before Proposition 14 was adopted remain in effect, but that discrimination in non-covered housing is permissible until the State prohibits it.

The language last quoted above, referring to State action "to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged" suggests that principle (1) underlies the court's decision. However, it seems unlikely that the court would have intended that its decision be read to establish such a startling principle.

The court's seemingly heavy reliance on Justice White's concurring opinion in Evans v. Newton (Discussed more fully below) suggests that principle (2) more closely corresponds to the majority's rationale. The difficulty here is that Proposition 14 covers all residential real property, regardless of whether it was previously covered by the Unruh or Rumford Acts. An Evans v. Newton "encouragement" rationale should presumably mean that private home-owners not covered by those statutes should nevertheless not be entitled to rely on Proposition 14 in asserting a right to discriminate on racial grounds.

In a companion case, Hill v. Miller, 413 P. 2d 852, opinion vacated on rehearing, 415 P. 2d 33, in which certiorari has not been sought, the California court held that Negroes are not entitled to non-discriminatory treatment with respect to residential housing not covered by the Unruh or Rumford Acts. Hill was factually similar to Snyder v. Prendergast in that it involved a landlord who served a notice of termination of tenancy on his Negro tenant, asserting that he refused to continue to rent to a Negro and that Proposition 14 conferred on him the right to so discriminate. Judgment for the landlord in the tenant's suit for an injunction was affirmed by the California court.

Thus, it appears that principle (3) above affords the most reasonable analysis of the California court's decision. This means that the California legislature would be free to repeal the State's fair housing laws, but only if it restricts itself to repeal and does not go on to articulate an express right to discriminate. Although this explanation may be inconsistent with certain language in the opinion, it at least accords with the different results reached in Reitman and Hill v. Miller.

DISCUSSION

1. Introduction. We believe that any argument against Proposition 14 must first establish that its only real purpose is to authorize discrimination against minorities in the sale or rental of housing, notwithstanding the generality of its language. That is, Proposition 14 must be differentiated from neutrally-worded trespass laws of the kind involved in the "sit-in" cases. Such laws, to be sure, have the effect of authorizing property owners to exclude persons from their property for purely racial reasons, but there are--at least with respect to private homes, if not with respect to businesses open to the public--a variety of other

reasons both legitimate and arbitrary which property owners may conceivably have for invoking them. 5/

To show that Proposition 14 should be treated as an express authorization of racial discrimination presents some difficulties, but we believe that a persuasive argument could be based on the following points:

(1) The California court's apparent construction that Proposition 14 only applies to discrimination that were formerly prohibited by law (see note 4 supra and accompanying text);

(2) The historical context of its adoption as recited in the lower court's decision. Cf. Anderson v. Martin, 375 U.S. 399; Harman v. Forssenius, 380 U.S. 528.

(3) The "ballot arguments" distributed to all California voters by the State prior to the election in which the proponents and opponents of the Proposition explained its purpose. These "ballot arguments" are, under California law, an accepted aid to ascertainment of legislative purpose (see People v. Ottey, 5 Cal. 2d 714, 723-724; Beneficial Loan Soc'y v. Haight, 215 Cal. 506, 515) and they leave no doubt that the primary purpose of Proposition 14 was to repeal the State's fair housing laws and to assure that the State legislature and local authorities would not adopt such laws or ordinances in the future. The "ballot arguments" are reprinted at pp. 3-8 of the Appendix to the Petition for Certiorari.

5/ Moreover, with respect to non-commercial private property, the owner's right to invoke a neutrally-worded trespass law for racial reasons assures some latitude for private choice in personal associations, a factor not present in the rental of a multiple-unit apartment, at least where the owner does not live on the premises.

(4) It is unrealistic to argue that Proposition 14--limited as it is to securing "absolute discretion" to property owners in choosing prospective buyers or renters--protects any substantial concern of property owners other than their well-known disinclination to sell or rent to Negroes. This is borne out by the "ballot argument" in favor of Proposition which included the following--

"If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?

Your "Yes" vote will prevent such tyranny."

Discrimination in housing on account of sex, age, or marital status are not serious current problems. The suggestion that a law might be enacted compelling non-discrimination in housing on account of financial status is outlandish.

Therefore, we assume, arguendo, that Proposition 14 may be read as if it expressly provided that property owners are free to discriminate on account of race.

2. The "Encouragement" Argument. There is case authority for the principle that a state law which expressly authorizes, but does not require, racial discrimination by private persons is unconstitutional. These precedents appear to afford the strongest argument against Proposition 14.

The unconstitutional authorization doctrine was first announced in McCabe v. Atchison, Topeka & Santa Fe Ry., 235 U.S. 151, involving an Oklahoma statute which authorized railroads to provide dining and sleeping cars for whites or Negroes exclusively. Without

addressing itself to whether discrimination by a privately-owned railroad might involve "State action" in the form of delegations of "inherent governmental functions" (cf. Boman v. Birmingham Transit Co., 280 F. 2d 531 C.A. 5), the Court said that (235 U.S. at 161-162):

> It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded (emphasis added).

However, the Court ruled against the Negro plaintiffs on an unrelated technical ground.

More recently, in Burton v. Wilmington Parking Authority, 365 U.S. 715, involving discrimination in a privately-managed restaurant located on publicly-owned property, Justice Stewart said in his concurring opinion that (365 U.S. at 726-727) --

> In upholding [the restaurant's] right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers. . . ." There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment (emphasis added).

In separate dissenting opinions, Justices Frankfurter and Harlan agreed that a statute expressly authorizing discrimination in a private restaurant would be unconstitutional, but disagreed with his conclusion that the Delaware court had construed the statute in question as such an express authorization. As noted above, there is language in the California court's opinion suggesting that Proposition 14 has been so construed.

In Evans v. Newton, 382 U.S. 296, which involved substitution of private for public trustees for a park established for whites only by a charitable trust, Justice White based his concurring opinion on an "unconstitutional encouragement" rationale. Prior to 1905, it was unclear under Georgia law whether all charitable trusts, with a few well-recognized exceptions, were required to be dedicated to the general public, or whether they could be restricted by race, sex, and other factors. In 1905, Georgia enacted a statute expressly authorizing racial (and only racial) restrictions in charitable trusts establishing public parks. Shortly thereafter, the testamentary trust was executed, tracking in part the language of the new statute. From this Justice White concluded that (382 U.S. at 305) --

> . . . the racial condition in the trust may not be given effect by the new trustees because. . . it is incurably tainted by discriminatory state legislation validating such a condition under state law.

Justice White reasoned as follows (382 U.S. 306) --

> As this legislation does not compel a trust settlor to condition his grant upon use only by a racially designated class, the State cannot be said to have directly coerced private discrimination. Nevertheless, if the validity of the racialcondition in Senator Bacon's trust would have been in doubt but for the 1905 statute and if the statute removed such doubt only for racial restrictions, leaving the validity

> of nonracial restrictions still in question, the absence of coercive language in the legislation would not prevent application of the Fourteenth Amendment. For such a statute would depart from a policy of strict neutrality in matters of private discrimination by enlisting the State's assistance only in aid of racial discrimination and would so involve the State in the private choice as to convert the infected private discrimination into state action subject to the Fourteenth Amendment.
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> * * * *
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> The natural construction of this provision would be that it authorizes a trust only for the use of the whole public or for the use of a racially designated subpart of the public, but not for the use of some other portion of the public such as men only or Irish persons only.
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> * * * *
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> This case must accordingly be viewed as one where the State has forbidden all private discrimination except racial discrimination (emphasis added).

There are other authorities which more or less support the general proposition that a State can not affirmatively encourage private racial discrimination,6/ but they are probably distinguishable from the present situation. See e.g., Lombard v. Louisiana, 373 U.S. 267 (exhortations from public officials to maintain segregation in restaurants); Robinson v. Florida, 378 U.S. 153 (separate toilet facilities required in

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6/ Even in Justice Black's dissenting opinion in Bell v. Maryland, 378 U.S. 226, 318 (discussed infra), there is language to support this argument. He states that (378 U.S. at 333-334):

> Yet despite a complete absence of any sort of proof or even respectable speculation that Maryland in any way instigated or encouraged Hooper's refusal to serve Negroes, it is argued at length that Hooper's action should be classified as "State action."

restaurants serving whites and Negroes); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (C.A. 4), cert. denied, 376 U.S. 938 (federal statute authorizing separate but equal facilities in Hill-Burton hospitals); cf. Anderson v. Martin, 375 U.S. 399 (race designations required on ballots).

Thus, there is substantial case support for the argument that an express State authorization of private discrimination is unconstitutional. Nevertheless, we believe that there are substantial difficulties in making that argument here.

3. Difficulties in the "Encouragement" argument

a. We assume that the California legislature could have simply repealed the State's fair housing laws without violating the equal protection clause, that, in the absence of special historical consideration (perhaps present in the Deep South but not in California), any argument to the contrary would be frivolous. If this is not so, then California property owners covered by the Unruh and Rumford Acts are forever barred from discriminating, while persons owning similar property in Mississippi and other States with no fair housing laws remain free to discriminate.

There can be no question that the repeal of legislation requiring non-discrimination by private persons results in an increase in such discrimination. Thus, the proposition that any State legislative action which "encourages" private discrimination is unconstitutional must be unsound.

The issue here is whether, by articulating a right to discriminate in the State constitution, California can be said to have "encouraged" private discrimination more than it would have done by simply repealing its fair housing laws. The answer to this depends upon whether there is any substantial basis for saying that private discrimination in housing is more likely to occur in a "Proposition 14" State than in a State whose laws are silent on the subject but

whose courts would not grant relief to Negroes who are refused housing because of their race.

The laws of over half the States are silent as to racial discrimination in housing, but the homeowners in those States must assume that they have the "right" not to sell to Negroes; it is a notorious fact that this "right" is widely exercised in such States. If a Negro sought judicial relief in such a State and the State Supreme Courtheld that some vague provision of the State constitution gave the homeowner the right to discriminate on racial or any other grounds, the situation would be much the same as in the present case.7/

Where a State statute requires discrimination by private persons, the court has held that the matter must be viewed "on the basis of what the [law] required people to do, not on the basis of what the [private individual] wanted to so." Robinson v. Florida, supra at 155. See Peterson v. City of Greenville, 373 U.S. 244, 248. The cases do notmake it clear whether the same rule applies to a state law which merely authorizes private discrimination. But it would seem that there ought at least to be some substantial basis for a judicial inference that private choices to discriminate are influenced by the "authorizing" statute more than they would be had the State law been silent on the subject but, as a practical matter, allowed discriminatory choices. On this hypothesis, Justice White's reasoning in Evans v. Newton seems sound. In that case there was a substantial basis for inferring that the private choice to discriminate

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7/ Justice Goldberg said in Bell v. Maryland, 378 U.S. 226, 311 that --

> The decision of Maryland's highest court in sustaining these trespass convictions cannot be described as "neutral", for the decision is as affirmative in effect as if the State had enacted an unconstitutional law explicitly authorizing racial discrimination in places of public accommodation.

was actually influenced by the authorizing statute because the State singled out racial restrictions as the only permissible restrictions in charitable trusts establishing public parks. The validity of other restrictions was doubtful under Georgia law.

If Justice White was right in Evans v. Newton, it does not necessarily follow that Proposition 14 is bad, because a similar basis for an inference that it actually influences property owners to discriminate is lacking. Insofar as Proposition 14 repealed the State fair housing laws, there is a powerful inference that private choices to discriminate were "encouraged" by the State, but that is irrelevant because California has the undoubted power to repeal its fair housing laws. Unlike the Evans v. Newton situation, where State law prohibited all restrictions on the use of trust property for parks, except race restrictions, California law now allows the property owner to make any kind of restriction in selling or renting property, be it based on race, sex, age, hair color, or anything else. Thus California has not singled out race restrictions for special treatment in the same way that Georgia had in Evans v. Newton.

b. To argue that a State law authorizing race discrimination is invalid because it encourages private discrimination may raise questions concerning the validity of exemptions in civil rights statutes. From a practical point of view, it is hard to read section 403(e) of Title IV of the House-passed version of the 1966 civil rights bill (the so-called "Mathias amendment") as anything but an authorization for the private homeowner to discriminate if he instructs his broker in writing to do so. The same is true of the "Mrs. Murphy" and private club exemptions in Title II of the 1964 Act.

There are two answers to this problem. First, such exemptions are not phrased in terms of an affirmative right to discriminate, they merely say that the statute is inapplicable to certain kinds of persons or transactions. Second, it can be said that it is the traditional and necessary legislative function to select certain areas for regulation and to leave other areas alone, but that it is not a legitimate legislative function to do nothing more than single out a narrow area in which discrimination is to be expressly permitted.

c. The issue here is very similar to the issue in Bell v. Maryland, 378 U.S. 226, and the companion "sit-in" cases -- whether the State can constitutionally enforce private choices to discriminate on racial grounds in the use of private property. The Court avoided resolution of the constitutional issue in those cases. In Bell, Justices Douglas and Goldberg and Chief Justice Warren expressed the view that the right to non-discriminatory service in places of public accommodation was secured by the equal protection clause, without implementing legislation. Justices Black, White and Harlan disagreed, saying that the State courts could enforce private choices to discriminate on racial grounds through enforcement of neutrally-worded trespass laws, in the absence of valid State or federal legislation requiring nondiscrimination. They attempted to distinguish Shelley v. Kraemer principally on the ground that both parties to the transaction there were willing -- it was a neighboring property owner who sought to enforce the restrictive

covenant. The dissenters also rejected the government's historical argument, based, as they described it, on the fact that ". . . the 'momentum' of Maryland's 'past legislation' is still substantial in the realm of public accommodations." 378 U.S. at 334.

The pros and cons of whether and to what extent the Fourteenth Amendment bars judicial recognition and enforcement of private decisions to discriminate were thoroughly canvassed in our supplemental brief in the "sit-in" cases and we will not attempt to cover that ground here. The following points should be noted however --

(1) Shelley v. Kraemer is not controlling here and we implied as much in the "sit-in" cases (see government supplemental brief at pp. 87-90);

(2) The historical argument we made in the "sit-in" cases is not available, unless we are prepared to press it against all 17 of the States which, like California, enforced restrictive convenants prior to the Shelley decision. The factual premise of our historical argument in the "sit-in" cases, based on comprehensive State involvement in the maintenance of a segregated society in the past, probably could not be sustained against California, where slavery has never existed and a variety of non-discrimination statutes are on the books.

(3) The enactment of the 1964 Civil Rights Act and recent decisions making it clear that Congress has extensive power to enforce the Fourteenth Amendment may indicate that a majority of the court would not be inclined to invalidate Proposition 14 but would decide to leave this problem to Congress. The fact that Title IV passed the House of Representatives may lend support to that view, despite the gloomy prospects for federal fair housing legislation in the near future.

4. Factors Supporting the "Encouragement" argument

While acknowledging that this is a very difficult case, we nevertheless conclude that a valid equal protection argument can be made against Proposition 14. We would distinguish the Bell v. Maryland problem on the following grounds:

(1) Proposition 14 is not a truly "neutral" position, as are trespass laws which conceivably may be invoked for a variety of legitimate purposes, or a court's refusal to grant relief against private discrimination where the State's laws are silent. Viewed in its historical context, Proposition 14 serves no purpose other than to authorize private racial discrimination.

(2) The State had available to it other means for allowing private discrimination in housing which might have had a lesser discriminatory impact. The legislature could have repealed the State's fair housing laws or the constitutional amendment might simply have nullified those laws, without disabling the legislature and local governmental units from passing fair housing laws or ordinances in the future. In Bell v. Maryland situations, the State legislature remains free to change the law or override most court decisions. We might urge that the equal protection clause -- historically viewed as assuring meaningful "civil" equality before the law -- assumes that the usual legislative processes of the State can be employed to assure equality for minority groups, that those processes cannot be disabled from acting by State constitutional amendments whose only purpose is to insulate private discrimination from possible remedial action by the legislature.

(3) The laws of every State but California either prohibit housing discrimination or say nothing about it. While it may be true that the effect on patterns of private discrimination of a court decision

in the latter category of States denying relief against private discrimination in housing is about the same as under Proposition 14, the court's decision would lack such an unequivocal basis in State law. Such a decision could later be overruled, the legislature could supply a remedy, or local ordinances can be passed.

(4) The right to be free from discrimination in housing is fundamental to the enjoyment of equal protection of the laws with respect to public schools, facilities, employment opportunities, and other aspects of public life. Private discrimination in housing means enforced ghetto living which in turn perpetuates pervasive second-class citizenship for Negroes. Thus, discrimination in housing is a greater evil than discrimination in places of public accommodation. Conceding that the State is not obliged to require non-discrimination in private housing, it must maintain a very strict neutrality in this area, a test that Proposition 14 does not meet.

5. Alternative Arguments

We have discussed the "unconstitutional encouragement" argument above at some length because it appears to be the most promising approach. We have not had sufficient time fully to consider alternative arguments that may be available, but ~~four~~ five such arguments are indicated briefly below.

a. An equal protection argument might be based on the way in which the use and disposition of real property is regulated under California law. Only a few provisions of the California Constitution relate directly to real property, and most of these are relatively unimportant. As in other States, general legislative power is vested in the legislature and this power has been exercised to enact hundreds of statutes relating to real property. Moreover, legislative control over the use of real property --

by zoning ordinances and local "police power" regulations -- is delegated to a substantial extent to county and city authorities. Cal. Const., Art. 11. §11. Proposition 14 carves out a narrow area of regulatory authority -- the criteria property owners may use in selling and renting their property -- and places it beyond the control of not only local authorities but also the State legislature.

As a result, California property owners can seek a wide variety of changes in the law governing the use of their property at the local level by appealing to zoning boards or local authorities having general police power. Similarly, property owners, real estate brokers, contractors, and others interested in laws regulating real property can seek changes in the law governing real property favorable to their special interests in the State legislature. However, Negroes, who have a special interest in legislation requiring the disposition of real property in a non-discriminatory basis, cannot seek to change the law in this respect except by the cumbersome procedure of constitutional amendment.

The equal protection clause nullifies all State law classifications based on race. To be sure, making a particular law more difficult to change by placing it in the State constitution is not a "classification" in the usual sense. It may be possible to argue, however, that a distribution of law-making power which places special burdens on Negroes with respect to a particular subject matter -- here, the sale and rental of real property -- is inconsistent with equal protection. The basic difficulty with this argument is that the same thing can probably be said of any State constitutional provision which adversely affects a minority of the population with respect to some narrow area.

b. Applicability of 42 U.S.C. 1982. This Reconstruction statute, originally part of the Civil Rights Act of 1866 and re-enacted following the adoption of the Fourteenth Amendment, provides that Negroes shall have the same right to purchase, inherit, hold, etc. real property as do white persons. The courts have indicated that the statute requires "State action" (see Hurd v. Hodge, 334 U.S. 24) and, historically, its purpose was to override the "Black Codes"--statutes of several States which denied or restricted the legal capacity of Negroes to hold property, sue in court, etc. Historical research might show that some of these "Black Codes" were similar to Proposition 14 and this might afford an argument under section 1982. In the absence of a very strong historical argument, however, we question whether such an argument should be made. Proposition 14 does not violate the literal language of the statute.

c. Interference with Agreements Between the Federal Government and California State Agencies to Require Non-Discrimination in Housing. We have considered the possibility that Proposition 14 may interfere with the obligations of State urban renewal agencies receiving federal funds to assure nondiscrimination in their projects. A memorandum from the Office of Legal Counsel to the Deputy Attorney General dated April 19, 1966, is attached. At the time Reitman was decided, the California Supreme Court held in a companion case presenting aspects of this problem that the issue was moot, in view of its Reitman ruling that Proposition was completely void. See Redevelopment Agency of the City of Fresno v. Buckman, 413 P. 2d 856.

Since the property in the instant cases does not appear to involve federal funds, we do not at this time believe that amicus participation on this issue alone would be warranted. We intend to give the matter further consideration, however.

INTEREST OF THE UNITED STATES

We believe that if the Supreme Court sustains Proposition 14, the current stalemate in fair housing legislation would be reinforced at the national, state and local levels. It seems probable that if

Proposition 14 is held valid, similar state constitutional amendments will be successfully sponsored by organized groups of real estate brokers and large property owners in other states. If that happens, the chances for a federal fair housing law will be substantially diminished.

Title IV of the 1966 civil rights bill and the Executive Order on housing have committed the executive branch of the federal government to the goal of non-discrimination in housing. The present case involves basic issues as to the responsibilities of the States in the area of housing discrimination. Accordingly, we think it is important for the Department to express its views.

RECOMMENDATION

We recommend that the Department participate in these cases as amicus curiae and urge affirmance of the lower court.