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Your draft of Argument I in
Mulkey v. Reitman

I have glanced over the draft you just sent down and have one major and two minor comments (for the moment).

First, while the brief distinguishes trespass laws on the ground that they are necessary to preserve law and order, I don't think it really distinguishes a failure to enact any fair housing law in the first place. If I am right, then a repealer is also inadequately explained. The explanation ought to be, in my view, that a state is free to decline to enact a fair housing law because the basic distinction between "state action" and private conduct demands that the State be permitted to abstain -- else that distinction itself evaporates. On this view, the repealer is just a corollary of the power not to act in the first instance.

It seems to me that unless we get that idea across we haven't adequately answered the petitioners' brief, even as to the trespass law. While it is true that trespass laws etc. are necessary to preserve law and order, that answer does not explain why in preserving law and order a state is free to support the landowner's choice rather than the Negros. The answer is -- because as an initial matter the state is free to permit the landowner to discriminate by not enacting fair housing laws -- and that freedom in turn, is derived from the state action - private action principle embedded in the Amendment.

cc: Records
Chron
Norman
Doar
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I feel strongly that an explanation of the other situations (trespass, failure to act, repealer, Mrs. Murphy exemption, common law rule, codification of the common law) which explains each of them on a different basis, or on no basis at all except that they are acceptable, will not convince the court. My theory has the virtue of explaining them all on a consistent principle.

I also note that the brief fails to deal with the "Mrs. Murphy" exemption discussed by petitioners, or with the codification of the common law problem.

Second, your statement that the common law is a "brooding omnipresence in the sky," is troublesome. I would think a quick answer is that this is precisely what Holmes said the common law was not.

Third, I view the "under color of law" argument, with respect to 1982, as very weak, unnecessary, and as adding nothing to the brief. Also, doesn't Peacock undercut the argument at least obliquely?

III. PROPOSITION 14 IS UNCONSTITUTIONAL BECAUSE IT DISABLES STATE AGENCIES FROM FULFILLING THE AFFIRMATIVE OBLIGATIONS IMPOSED ON THE STATE BY THE EQUAL PROTECTION CLAUSE

We contend, in this portion of our argument, that Proposition 14 offends the Fourteenth Amendment because, by its plain terms, it prohibits State agencies from acting in situations where the Equal Protection Clause, as construed by this Court and by lower federal courts, imposes a constitutional duty to act. The premises of this argument, which are spelled out more fully below, are: (1) that the Equal Protection Clause, by its own force, requires the State to take affirmative action to prevent racial discrimination in situations where "private" conduct is "intertwined" with governmental action; (2) that Proposition 14 disables State agencies from taking any affirmative action to prevent racial discrimination in housing in all instances other than where the State is directly and immediately involved; (3) that there is a substantial area of State conduct which is subject, at the same time, to the affirmative command of the Fourteenth Amendment and to the conflicting prohibition of Proposition 14; (4) that Proposition 14 as construed by the California courts under its rules regarding severability of constitutional and statutory provisions, must either stand or fall as a single unit; and (5) that, as a result of its nonseverability, the plaintiffs in these cases have standing to challenge Proposition 14 even

though its constitutional infirmity is not demonstrated by its application to their particular factual circumstances.

Before discussing each of the above propositions in detail, we think it important to emphasize the limited reach of the argument we make here. We do not, for purposes of this argument, contend that it is constitutionally impermissible for California or any other State to adopt a constitutional or statutory provision which would bar State agencies from taking any action to limit or restrain acts of racial discrimination which are totally "private" and are, therefore, not within the reach of the Fourteenth Amendment is judicially construed. All that we maintain is that California has not achieved that result by this provision of its constitution. What it has done in Proposition 14 is to sweep its disablement across conduct ranging from purely private acts of racial discrimination to behavior which is affected by significant State involvement -- excepting only the limited class of situations where the State is directly and immediately responsible for racial discrimination. This particular provision, therefore, is impermissibly broad because it ~~constitutes an impermissible attempt by the State to~~ inhibit ~~its~~ State agencies in an area where they must affirmatively carry out the obligations imposed upon them by the Fourteenth Amendment.

A. State agencies have a constitutional duty to take affirmative action to prevent racial discrimination in situations where private conduct is intertwined with governmental action.

It is entirely clear from many decisions of the Court that while the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful" (Shelley v. Kraemer, 334 U.S. 1, 13; see Civil Rights Cases, 109 U.S. 3; United States v. Harris, 106 U.S. 629), it protects against more than official and formal discrimination by the State itself. Conduct which appears, on its surface, to be private may nonetheless be subject to the restraints of the Fourteenth Amendment if "to some significant extent the State in any of its manifestations has been found to have become involved in it" -- i.e., if the State "must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 725. This Court recently summarized that constitutional standard in Evans v. Newton, 382 U.S. 296, 299:

> Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. * * * [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.

This Court and lower federal courts have applied this constitutional principle in a variety of factual circumstances. State encouragement has been found to have affected otherwise private decisions to

segregate restaurant facilities and other places of public accommodation. See Peterson v. City of Greenville, 373 U.S. 244, 247-248; Lombard v. Louisiana, 373 U.S. 267, 273; Robinson v. Florida, 378 U.S. 153, 156-157; cf. Bell v. Maryland, 378 U.S. 226, 326-327 (dissenting opinion). State involvement has been found in the execution of a private decision to discriminate on racial grounds, see Pennsylvania v. Board of Trusts, 353 U.S. 230; Griffin v. Maryland, 378 U.S. 130, in private discrimination relating to property which performs a public function, see Evans v. Newton, 382 U.S. 296, 301-302, and in private discrimination in a public accommodation situated on property leased from the State, see Burton v. Wilmington Parking Authority, 365 U.S. 715.

Substantial State or federal financial assistance to an otherwise private enterprise has been held sufficient to subject the enterprise to the strictures of the Fourteenth Amendment. Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 929 (C.A. 4), certiorari denied, 376 U.S. 958; Eaton v. Grubbs, 329 F. 2d 710 (C.A. 4). ~~Traditional~~ Prior governmental ownership or management of a presently private facility has also been held adequate to ~~accord to~~ guide a private discriminatory decision [redacted] as State action for Fourteenth Amendment purposes. Evans v. Newton, 382 U.S. 296, 301; Hampton v. City of Jacksonville, 304 F. 2d 320 (C.A. 5); Wimbish v. Pinellas County, 342 F. 2d 804 (C.A. 5). And the interdependence of a private establishment

and the publicly developed renewal area in which it is located requires the private owner to meet the State's duty not to discriminate an on account of race. Smith v. Holiday Inns of America, Inc., 220 F. Supp. 1 (M.D. Tenn.), affirmed, 336 F. 2d 630 (C.A. 6).

If, as these cases demonstrate, the direction of the Fourteenth Amendment that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws" applies in circumstances where the actual discriminatory choice is not made by a State agency, it necessarily follows that the State's duty is not merely to refrain from discriminating on account of race but also to take affirmative action to insure that the private "joint participant" does not engage in such discrimination. This Court recognized that principle in Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725, when it observed that the State could not avoid its Fourteenth Amendment obligation merely because the private lessor of State property was immediately responsible for the racial exclusion:

> As the chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequance of State participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. * * * By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

The Court concluded in Burton that "the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." 365 U.S. at 726. The Burton case clearly held, we submit, that in circumstances where State conduct is intertweined with private action, the State has an affirmative obligation under the Fourteenth Amendment to take steps aimed at obtaining the private party's complaince with the constitutional duty not to discriminate.

The proposition that the Equal Protection Clause does not merely impose restraints on State conduct but also creates obligations to take affirmative action is by no means novel. That premise was implicit in this Court's decision in Griffin v. Illinois, 351 U.S. 12, and was, in fact, adverted to in one of the dissenting opinion. 372 U.S. at 362. See also Griffin v. County School Board, 377 U.S. 218, 233. It applies fully to discrimination in housing -- when the State is sufficiently involved in a seller's or lessor's affairs to make them "joint participants," the State has an affirmative obligation to secure his complaince with the constitutional standard.

B. Proposition 14 disables State agencies from acting with respect to racial discrimination even in instances where the State is significantly involved.

In unequivocal terms Proposition 14 prohibits State agencies from limiting in any manner the "right of any person" to discriminate on racial grounds in the disposition of any interest in "his real property." It defines "person" as including every legal entity which could hold an interest in property except for "the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it" (p. ___, supra). It also defines "real property" as including "any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed * * *" (p. ___, supra). The effect of Proposition 14 is, we submit, to restrain State agencies from taking any affirmative steps whatever to prevent racial discrimination in all situations other than where the agency is itself directly and immediately the cause of the discrimination.

This conclusion necessarily follows from the definitions included in Proposition 14. The constitutional provision accords a right to any "person" to discriminate on racial grounds, and defines "person" as excluding the State only "with respect to * * * property owned by it" (emphasis added). That definition

is vulnera e in at least three respe s: First, it grants an absolute license to State agencies or subdivisions to sell, lease or rent for discriminatory motives property which may be privately owned; second, it permits discrimination to be practiced by private persons even with respect to property owned by the State; and third, it permits even State agencies to discriminate with respect to property which is not owned by the State but merely leased to it or otherwise subject to its control.

Even more fundamental is the fact that Proposition 14 nowhere recognizes that factors other than State ownership may amount to sufficient State involvement to call the Fourteenth Amendment into play. Indeed, with respect to financial support from State funds, Proposition 14 secures the right to discriminate "irrespective of how [the interest in real property is] obtained or financed." It seems clear beyond doubt, therefore, that private residential discrimination, even if practiced in a development financed entirely with State funds, is immunized from any form of State control by the terms of Proposition 14.

The fact is that Proposition 14 bars any form of State interference with housing discrimination of any kind except for discrimination by the State in its disposition of its own property. The decisions and principles we discuss above (pp. ____, supra) demonstrate, we submit, that there are many other dituations in which the State has an affirmative duty

arising out of some nexus with the property, with its owner, or with its surroundings. Indeed, as this Court noted in Evans v. Newton, 382 U.S. 296, 299-300 (quoting, in part, from Burton v. Wilmington Parking Authority, 365 U.S. 715, 722), "'Only by sifting facts and weighing circumstances' can we determine whether the reach of the Fourteenth Amendment extends to a particular case." Proposition 14 takes no account of such "facts" and "circumstances"; it woodenly prohibits remedial action by the State in all but the very clearest cases.

C. Proposition 14 prohibits State agencies from doing what the Fourteenth Amendment commands.

The clash between Proposition 14 and the demands of the Equal Protection Clause becomes apparent from an examination of hypothetical situations in which State agencies or their representatives would be confronted with their conflicting obligations:

1. The State or its subdivision finances, at low interest rates, the construction of a large apartment project. Should nondiscrimination clauses be inserted in the loan agreements?

2. A municipality uses a large portion of its downtown area for an urban redevelopment project. It spends State and city funds to beautify the area and draws up plans for residential construction to be performed in that area on property owned by certain

private real-estate firms which are specially licensed for this purpose. Should it impose nondiscrimination obligations upon these firms?

3. A private corporation declares a municipality as trustee of certain land and buildings which are to be rented as low-income housing to white residents only. May the municipality admit Negroes to residence?

4. The State leases a portion of a State park to a private developer who builds cabins which are rented on a yearly basis. Should the State require him to make the cabins available to Negroes?

5. The State has owned and operated a racially segregated low-income project. It leases the project to a private corporation on the condition that it continue to be used for low-income housing. Should the State take steps to insure that a nondiscriminatory policy is followed?

The above hypotheticals are, of course, illustrative of the "multitude of relationships [which] might appear to some to fall within the Amendment's embrace." Burton v. Wilmington Parking Authority, 365 U.S. 715, 726. The cases we have cited at pp. ____, supra, establish that in all these circumstances the Fourteenth Amendment applies to the apparently private decision to discriminate, and the State would have an affirmative duty to prevent such discrimination. But in each case, Proposition 14 would forbid State agencies from taking any action. In the first and second hypotheticals, the nondiscrimination clauses would plainly

constitute abridgments of the private builders' "right" -- protected by Proposition 14 -- to the free choice of tenants. In the third hypothetical, the municipal trustee would be abridging the legal owner's "right" not to rent to Negroes; the exemption would not apply because the property is not "owned" by the municipality. In the fourth and fifth hypotheticals -- as is also true of the first and second -- the "person" engaging in the discrimination is not the State but a private party. Although the State may not, in its leasing of its own land, discriminate on account of race, Proposition 14 gives the private lessee an unabridgeable right to do so. And nothing in Proposition 14 authorizes the State, when it leases its land, to demand a non-discrimination clause as a condition of the lease. Indeed, that very conduct appears to violate the lessee's "right" protected by Proposition 14.

To be sure, the Supreme Court of California in Redevelopment Agency of Fresno v. Buckman, 50 Cal. Rptr. 912, 413 P. 2d 856, pretermitted the question whether Proposition 14 would be violated if the State Redevelopment Agency attempted to prevent racial discrimination on the part of real estate redevelopers who had been financed by State or federal funds. We believe, however, that the California constitutional provision is clear on its face, and that it would prohibit any such steps. Moreover, in Peyton v. Barrington Plaza Corp., 50 Cal. Rptr. 905, 413 P. 2d

849, decided the same day, the court apparently held that Proposition 14 applied to a publicly assisted housing accommodation located in the midst of an urban renewal center.

D. Respondents may challenge the constitutionality of Proposition 14 on the above grounds even though its constitutional infirmity is not demonstrated by its application to their cases.

We have domonstrated that Proposition 14 collides, in a substantial variety of situations, with the commands of the Fourteenth Amendment. We do not, however, contend that the cases presently before the Court involve the elements of State participation which, under the principles and decisions we have discussed, give rise to an affirmative obligation on the part of the State to prevent private acts of racial discrimination. The question remaining, therefore, is whether the respondents in these cases, who have been the victims of discrimination which is free of the State involvement discussed above, may attack the application of Proposition 14 to them on the ground that it would be unconstitutional as applied to other hypothetical situations. We believe that under this Court's decisions that avenue is available to them, and that the obvious unconstitutionality of Proposition 14 as applied to these other situations warrants striking down the provision in its entirety.

Preliminarily, we note that there can be no question as to respondents' "standing" to sue in the sense that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of * * * enforcement" of the challenged provision. Massachusetts v. Mellon, 262 U.S. 447, 488. Respondents were accorded statutory rights under California Civil Code §§ 51, 52, and upon proving their allegations, they would have been entitled to the relief requested in these cases if not for Proposition 14. The injury to them is, therefore, most direct in nature; the constitutional provision invalidates a State statute which has given them a legal right.

A more serious question is presented, however, by the principle -- often repeated in this Court -- that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, and see authorities there cited. That principle -- i.e., "that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22) -- is, as this Court noted in Raines (id. at 22-23), subject to a substantial number of exceptions. We believe that at least three reasons exist for not applying that rule to these cases.

First, this Court noted expressly in Raines that the general limitation discussed above is inapplicable "when a state statute comes conclusively pronounced by a state court as having an 'otherwise valid provision or application inextricably tied up with an invalid one * * *," 362 U.S. at 23. That, we believe, is the situation here because the highest court of California has, consistently with its prior decisions, read Proposition 14 as being the kind of provision which must either stand or fall as a single unit. It has held, in other words, that under California law the constitutional provision is inseverable and cannot be sustained in part if it is in part invalid.

Although the California court did not proceed on the theory which we are presently urging, it did hold that Proposition 14 was invalid under the Fourteenth Amendment as applied to racial discrimination. It then went on to recognize that there were other bases for choice than racial ones which might be exercised by persons subject to the Act, and that "in many applications [of Proposition 14] no unconstitutional discrimination will result * * *" (R. 29). Notwithstanding this observation and the added circumstance that Proposition 14 itself contains an explicit severability clause, the Supreme Court of California held that the constitutional provision was inseverable and that the clause saving it whenever it might constitutionally be applied "is ineffective" (R. 31).

That conclusion followed from the earlier decisions of California's highest court in Franklin Life Ins. Co. v. California, 63 Cal. 2d 222, 404 P. 2d 477, and In re Blaney, 30 Cal. 2d 643, 184 P. 2d 892, on which the court relied in the present case. Those decisions had established two State tests of severability: (1) whether "the language of the statute is mechanically severable, that is, [whether] the valid and invalid parts can be separated by paragraph, sentence, clause, phrase or even single words" (30 Cal. 2d at 655, 184 P. 2d at ____), and (2) whether "enforcement [of the constitutional part] entails the danger of an uncertain or vague future application of the statute" (63 Cal. 2d at 227, 404 P. 2d at ____). The severability of Proposition 14 under the theory of unconstitutionality which we urge apparently fails both California standards. There is no way of "mechanically" separating out, under the present text of Proposition 14, the situations in which the State is sufficiently involved to subject the private "joint participant" to the obligations of the Fourteenth Amendment from those cases where the discrimination is entirely private. And there could be no clearer instance of "uncertain or vague future application" than would follow a decision sustaining Proposition 14 in part. This Court noted in its Burton opinion that decision in this area turns entirely on "the framework of the peculiar facts or circumstances present." 365 U.S. at 726. There could, therefore, be no demonstrable certainty as to when Proposition 14 would apply and when it would not.

We submit, therefore, that the State court has held, in a decision binding on this Court, that all the situations covered by Proposition 14 are "inextricably tied up" (362 U.S. at 23) with one another, and that one cannot be sustained while the other falls. In this posture of the case, the outcome here is controlled by Dorchy v. Kansas, 264 U.S. 286, where this Court, speaking unanimously through Mr. Justice Brandeis, held that although a State statute containing an unconstitutional provision might be saved in part, this Court would be bound by the determination of the State's highest court on the question whether the provision was severable. Although the Kansas courts had not spoken to the question of severability and the challenged statute contained an explicit severability clause (264 U.S. at 290, n. 2), this Court remanded the case to the Supreme Court of Kansas for it to determine the issue. In the present case, the California court has already held that Proposition 14 is inseverable insofar as it might be thought necessary to save it with respect to non-racial discrimination. The reasons that court gave apply fully -- and, indeed, more persuasively -- to the issue of severability raised in this phase of our argument. We believe, therefore, that there is no need here as there was in Dorchy to remand the case; the judgments may be affirmed directly.

A second reason for considering the principle "that a litigant may only assert his own constitutional rights or immunities" (362 U.S. at 22) inapplicable here is that this case, like Barrows v. Jackson, 346 U.S. 249, 257, concerns rights which cannot be readily asserted by those whom the impermissible conduct affects directly. We have shown that Proposition 14 has the effect of restraining State agencies from taking the affirmative steps required by the Fourteenth Amendment whenever State and private action are "intertwined." We know of no case, however, where suit has been successfully maintained against the State or its agencies to compel it to perform these obligations, and we take no position on whether such an action could be successfully maintained. It is quite clear, however, that the vice which is, under our present theory, at the heart of Proposition 14, is that State agencies will unconstitutionally sit idly by even where the Fourteenth Amendment commands them to act and will take no hand in insuring that racial discrimination is not practiced. That evil is not reached even where suit is brought by a rejected Negro applicant for a residence in publicly assisted housing, for even then the court's order ordinarily runs no further than to direct the private proprietor to cease his discriminatory conduct. Hence the constitutional rights of potential and future applicants for such

housing to have State agencies fulfill their Fourteenth Amendment obligations may be properly presented (like the rights of the "non-Caucasian" buyer in Barrows v. Jackson, 346 U.S. 249, only through some other person. There is no requirement, we submit, that it be presented through a rejected applicant for publicly assisted housing rather than through the respondents in this case.

Finally, a third ground for holding the "rule of practice" discussed in Raines (362 U.S. at 22) inapplicable here, is that the consequences of Proposition 14 are, in significant respect, like an overbroad restriction on speech -- as to which there is a long-standing exception from the principle being discussed. NAACP v. Button, 371 U.S. 415, 432-433; Smith v. California, 361 U.S. 147, 151; Thornhill v. Alabama, 310 U.S. 88, 97-98; see United States v. Raines, 362 U.S. 17, 22. Statutes effecting First Amendment freedoms and other personal liberties protected by the Bill of Rights are tested on their face and not by their application to the particular cases brought by the parties challenging them because "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. 415, 433. This Court recently applied this exception to the freedom to travel secured by the Fifth Amendment, Aptheker v. Secretary of State, 378 U.S. 500, 515-517, and it applies here as well.

The protected right of Negro citizens not to be denied equal protection by the State or by private persons acting jointly with the State is no less "delicate and vulnerable," we submit, with the freedom to travel secured by the Fifth Amendment. Proposition 14, in its overbreadth, prevents the full realization of those rights in California. For just as an overbroad restriction in the area of speech has a "chilling effect" (Dombrowski v. Pfister, 380 U.S. 479, 487) on expression which is constitutionally protected, so does the existence of an overbroad prohibition in this area inhibit State agencies and public officials from doing what they are required to do under the Equal Protection Clause.