Maryland Law Review

Volume 27 | Issue 3 Article 6

California's Proposition 14 And The "State Action" Concept - Reitman v. Mulkey

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Fourteenth Amendment Commons

Recommended Citation

California's Proposition 14 And The "State Action" Concept - Reitman v. Mulkey, 27 Md. L. Rev. 291 (1967)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol27/iss3/6

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

California's Proposition 14 And The "State Action" Concept

Reitman v. Mulkey[1]

Prior to 1964 the California legislature passed a series of open housing laws designed to prohibit discrimination in the sale or rental of housing by certain private sellers and landlords.[2] In the 1964 general election the voters of California, by an overwhelming vote, approved Proposition 14 as an initiative amendment to the California Constitution. Proposition 14, which became Article 1, Section 26 of the California Constitution,[3] repealed pro tanto the previously enacted open housing legislation and by its terms barred action by any agency of the state government to deny, limit or abridge the right of any person to discriminate in the sale, lease, or rental of his residential real estate.

Mulkey, a Negro, and his wife were refused a lease on an available apartment solely on the basis of their race. Mulkey's suit to enjoin the discrimination was based on the open housing laws; the suit was defended on the theory that the laws had been repealed by Article 1, Section 26. The trial court, rejecting the plaintiff's contention that the amendment was unconstitutional, granted summary judgment to the defendant. The Supreme Court of California reversed and held that the new constitutional section amounted to state action within the meaning of the fourteenth amendment[4] of the federal constitution and therefore denied the plaintiffs equal protection of the laws guaranteed by the same amendment.[5] The United States Supreme Court affirmed the decision of the California Supreme Court.

1. 387 U.S. 369 (1967).
2. CAL. CIV. CODE §§ 51-53, 707 (West 1954); CAL. HEALTH AND SAF. CODE § 35700-35741 (West 1967).
3. CAL. CONST. art. 1, § 26 states:

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.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article 1, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purpose by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in force and effect. To this end the provisions of this Article are severable.

4. U.S. CONST. amend. XIV, § 1 provides: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
5. Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966); *Comments on Mulkey v. Reitman*, 14 U.C.L.A.L. REV. 1 (1966), articles by Alfred

Four justices dissented and Justice Douglas wrote a separate opinion concurring in the affirmance. Justice White, writing for the remaining four justices, stated his holding as follows:

> This Court has never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations. "Only by sifting the facts and weighing the circumstances" on a case-to-case basis can a "nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*. . . . Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of § 26, and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discrimination to an unconstitutional degree. We accept this holding of the California court.[6]

Finding support in prior Supreme Court cases, the California court had found that § 26 "encouraged" and "authorized" private discrimination and made the state "at least a partner in the instant act of discrimination."[7] The Court did not question that the people of California, acting by constitutional amendment, could have merely repealed existing open housing legislation. However, the amendment went further as the Court viewed its effect:

> The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.[8]

Justice White went on to note that discrimination as to residential real property was purportedly authorized regardless of any interest of the state in such property or its financing, so long as the property was not owned by the state.

As will be discussed more fully later, it is difficult to determine if Justice White viewed the problem as whether the state action was "significant"[9] or whether the action was discriminatory. A review of the prior cases may shed some light on the meaning of the decision.

Although cited only by Justice Douglas, the case of *Shelley v. Kraemer*[10] is generally considered to represent a basic shift in the

---

Avins, Jerre S. Williams, Harold W. Horowitz and Kenneth L. Karst, and Arthur Selwyn Miller.

6. 387 U.S. 369, 378-79 (1967).
7. *Id.* at 375.
8. *Id.* at 377.
9. *See* notes 27-32 *infra* and accompanying text.
10. 334 U.S. 1 (1948).

general attitude on what activity will be deemed to constitute state action prohibited by the fourteenth amendment. In *Shelley* the Court ruled that specific enforcement by a state court of racially restrictive covenants, which by private agreement sought to zone neighborhoods as white only, was significant state action and, therefore, prohibited by the equal protection clause. In *Barrows v. Jackson*,[11] it was held that a suit for damages based on a racially restrictive covenant cannot be entertained by a state court. The state action found in *Shelley* and *Barrows* was much more incidental than that in previous cases in that the state courts were merely the means by which private parties seeking to discriminate sought to effectuate that discrimination and were not a force motivating private citizens to discriminate.[12]

Justice White, however, sought to rely on two pre-*Shelley* cases as supporting by analogy the invalidation of the California amendment. *Nixon v. Condon*[13] involved an attempt by the state to divorce itself from the process of voting in primary elections so that the executive committee of a political party could exclude Negroes from voting for that party's candidates. The state was said to be abandoning a traditional state function to enable those beyond the reach of the fourteenth amendment to discriminate.[14] As phrased by Justice White, this abdication "was said to insinuate the State into the self-regulatory, decision-making scheme of the voluntary association."[15] The statute involved in *McCabe v. Atchison, Topeka & Santa Fe Ry. Co.*[16] was construed as authorizing carriers to provide service to white persons without providing similar service for Negroes.[17] The question was governed by *Plessy v. Ferguson*,[18] which had upheld the "separate,

11. 346 U.S. 249 (1953).

12. Though *Shelley* is in no way dispositive of the issues in *Reitman*, it is important to note the effect that *Shelley* had on the somewhat settled theories of state action which had been derived, in the main, from the Civil Rights Cases, 109 U.S. 3 (1883), which held that congressional legislation designed to enforce the equal protection clause by prohibiting discrimination in public accommodations could only be directed at action by the state. The Court said: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." *Id.* at 11. In a few cases, the Court acted against sham procedures to evade the original concept of state action, *see* note 13 *infra* and accompanying text, and developed the concept of state authorization of, in addition to the original idea of state requirement of, discrimination as fitting within the prohibited area of state action. But since *Shelley* involved neither authorization nor requirement, and since there was no restriction placed on the *Shelley* holding, the logical extension of *Shelley* would be involved when the state acted to aid a private discriminator by the exercise of its coercive power. A situation was thus created in which the concept of state action could be considerably expanded, and the need for determining the limits of state action arose anew.

13. 286 U.S. 73 (1932).

14. "They [the executive council of the political party] are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." *Id.* at 88. "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black." *Id.* at 89.

15. 387 U.S. at 379.

16. 235 U.S. 151 (1914).

17. The statute in *McCabe*, REV. LAWS OKLA. (1910) § 860 *et seq.*, provided that the railroads had to provide "separate, but equal" coaches but did not have to provide equal facilities for dining and sleeping and could not serve both races in the same dining or sleeping car.

18. 163 U.S. 537 (1896).

but equal" doctrine. Although denying relief because the complaint was defective, the Court indicated that the statute constituted unconstitutional state action. Jusice White stated this case in support of the rule that merely authorizing, rather than compelling, discrimination by a permissive state statute is contrary to the fourteenth amendment.

Justice White indicated that the California court had cited the case of *Anderson v. Martin,*[19] although he did not discuss the case. In *Anderson,* Louisiana had a law which required the placing of a candidate's race beside his name on the ballot. The Court ruled that such a law places "the power of the State behind a racial classification that induces racial prejudice at the polls."[20] In a state such as Louisiana, where the psychological environment renders the citizens particularly susceptible to racial prejudice, the mandatory placing of race on the ballot was an obvious and overt attempt by the state to cause its citizens to discriminate in voting.

Justice White also discussed three sit-in cases in which the petitioners were convicted under state trespass laws for failure to leave restaurants and lunch counters which were required to segregate by some coercive power of the state.[21] These sit-in cases stand for the proposition that, where a state has a requirement of discrimination, the state may not enforce even privately motivated discrimination by the use of its coercive power; the use of its power in such a context is prohibited state action.

The case of *Burton v. Wilmington Parking Authority*[22] best represents the difficulty the Court has had in resolving state action cases since the *Shelley* decision. The Parking Authority leased part of one of its garages to a restaurant which proceeded to practice discrimination; the Authority took no part whatever in operating the restaurant, yet the Court found state action because all the circumstances, especially the physical placement of the restaurant and its entrances made it appear that the state had placed its "power, property, and prestige"[23] behind the discrimination. The facts of *Burton* do not indicate even the slightest amount of "action" by anyone except the restaurant,

---

19. 375 U.S. 399 (1964).
20. *Id.* at 402.
21. In Robinson v. Florida, 378 U.S. 153 (1964), a Florida Board of Health regulation stated, "Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment [restaurant]." This regulation does not specifically require segregation, but it is certainly susceptible to such an interpretation. In Lombard v. Louisiana, 373 U.S. 267 (1963), a statement by the Mayor of New Orleans, "I have today directed the superintendent of police that additional sit-in demonstrations . . . will not be permitted . . . regardless of the avowed purpose or intent of the participants. . . . It is my determination that community interest, the public safety, and the economic welfare of this city require that such demonstrations cease and that henceforth they be prohibited by the police department," coupled with similar statements by the Superintendent of Police were interpreted as requiring restaurants to continue to discriminate. In Peterson v. Greenville, 373 U.S. 244 (1963), a city ordinance, CODE OF GREENVILLE, N.C. (1953 *as amended* 1958) §§ 31-38, provided: "It should be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding-house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. . . ."
22. 365 U.S. 715 (1961).
23. *Id.* at 722.

which, had it not been in a state building, could have discriminated under the then existing law of Delaware and the United States. Despite the lengths to which the Court went to claim otherwise, *Burton* appears to be a case where state inaction, by failure of the state to require in the lease that the restaurant serve all races, was labeled prohibited state action because there appeared to be authority from the state agency to discriminate; thus the state's prestige became intertwined with the acts of its lessee.

The Court in *Burton* announced that it would not attempt to state a broad formula for state action but would examine all the circumstances in each case and then determine whether state action existed on a case-by-case basis.[24]

Justice White stated that all of the cases he cited were distinguishable from *Reitman* though he did not say in what way they could be distinguished. *Nixon,* though the Court in that case spoke in terms of authorization and delegation, involved state abdication of a traditional state function denying Negroes a meaningful right to vote. Such is clearly not the case in *Reitman.* Two of the sit-in cases, *Lombard v. Louisiana* and *Peterson v. Greenville,*[25] were cases in which the states *required* discrimination. If the Court accepted in full the California court's finding that § 26 authorized and encouraged discrimination, *McCabe* and *Robinson v. Florida,*[26] which are authorization cases, are distinguishable only in that the states in those cases sought by statutes and regulations to create a new area in which a certain class of persons could discriminate rather than the state's mere enunciation in *Reitman* that all people had a right to discriminate where those people appeared to have such a right in any case in view of the repeal of the open housing laws. If *McCabe* and *Robinson* are distinguishable, as Justice White indicated, and not for the strained reason given in the preceding sentence, *Reitman* in the Court's view is not really an authorization case but an encouragement case. *Anderson* is also difficult to distinguish from *Reitman* because the state there was really only facilitating what the voters could have done on their own. However, the environment of that southern state in 1964 makes it clear that the state's facilitation in *Anderson* was far greater than that resulting from § 26.

Arguably, *Burton* is distinguishable from *Reitman.* In *Burton* there was clearly no authorization by the state nor was there any affirmative encouragement except to the extent that the state failed to take any step to end or prevent discriminatory practices by its lessee. In *Reitman,* on the other hand, the state has affirmatively acted in that an amendment to its constitution, providing that everyone has a right to discriminate, has been added. This constitutional provision arguably authorized and to some extent, at least, affirmatively encouraged private discrimination. It is thus possible that *Burton* repre-

24. *Id.* at 725.

25. *See* note 21 *supra* and accompanying text.

26. *See* note 21 *supra* and accompanying text. *Robinson* is treated here as an "authorization" case, even though treated by Justice White as a "requirement" case, because of the ambiguity in the Florida regulation.

sents the least significant state action with which the Court has been confronted and that the *Burton* result demands the result actually reached in *Reitman.*

Justice Harlan, joined by Justices Black, Clark, and Stewart, dissented, arguing that the California amendment did not push the state beyond a permissible neutral or inactive position. Before considering this dissent, it will be helpful to review the opinions in a 1964 restaurant sit-in case, *Bell v. Maryland.*[27]

Although the result in *Bell* was a remand to the Maryland Court of Appeals for consideration in light of new state public accommodations legislation, the opinions of Justices Douglas and Black may help to explain their positions in *Reitman.* In *Bell,* Justice Douglas would have reversed the trespass convictions of the defendants for refusing to leave a restaurant upon request. Justice Douglas believed that the convictions violated both the privileges and immunities clause and the equal protection clause of the fourteenth amendment. Relying primarily on *Shelley v. Kraemer,* he found state action because:

> Maryland's action against these Negroes was as authoritative as any case where the State in one way or another puts its full force behind a policy. The policy here was segregation in places of public accommodation; and Maryland enforced that policy with her police, her prosecutors, and her courts.[28]

He found that such discrimination was squarely within the intent of the reconstruction amendments, stating:

> Prior to those amendments [the thirteenth, fourteenth and fifteenth] Negroes were segregated and disallowed the use of public accommodations except and unless the owners chose to serve them. To affirm these judgments would remit those Negroes to their old status and allow the States to keep them there by the force of their police and their judiciary.[29]

On the other hand, Justice Black, joined by Justices Harlan and White, would have affirmed the convictions. His answer to the state action argument of Justice Douglas was:

> There is no Maryland law, no municipal ordinance, and no official proclamation or action of any kind that shows the slightest state coercion of, or encouragement to, Hooper to bar Negroes from his restaurant. Neither the State, the city, nor any of their agencies has leased publicly owned property to Hooper. It is true that the State and city regulate the restaurants — but not by compelling restaurants to deny service to customers because of their race. . . . Under such circumstances, to hold that a State must be held to have participated in prejudicial conduct of its licensees is too big a jump for us to take. Businesses owned by

27. 378 U.S. 226 (1964).
28. *Id.* at 257.
29. *Id.* at 247.

> private persons do not become agencies of the State because they are licensed; to hold that they do would be completely to negate all our private ownership concepts and practices.[30]

The concurring opinion of Justice Douglas in *Reitman* is in accord with his opinion in *Bell.* First he noted that the segregation of housing in our cities is largely accomplished through real estate brokers, mortgage lenders, and builders. He then argues:

> Zoning is a state and municipal function. . . . When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act.[31]

He goes on to make it clear that there are only certain matters on which state inaction will be deemed to be action, a limiting point which was somewhat obscured in his *Bell* opinion because of his privileges and immunities argument. He argues that the equal protection clause requires licensed and regulated business "affected with a public interest" to provide service to all without discrimination; he includes in the public interest area urban housing, restaurants, inns, carriers, telephone companies, drug stores, and hospitals. Some undefined "domain exclusively private" would, it is said, present a different problem.

Justice Black's language in *Bell* could be used to sum up Justice Harlan's dissenting opinion in *Reitman,* in which Justice Black joined. Both opinions are based on a finding that the record did not show "the slightest state coercion of, or encouragement to" the private discrimination. He disagreed with the majority view that the question of whether California, by § 26, had encouraged or authorized the discrimination was one of fact and argued rather that it was one of federal constitutional law to be determined by the Supreme Court. He characterized the amendment as "simply permissive of private decisionmaking rather than coercive."[32] He distinguished the prior cases in which the state was said to have induced or authorized the discrimination by stating that in those situations "the focus has been on positive state cooperation or partnership in affirmatively promoted activities, an involvement that could have been avoided."[33] In the instant case he found "only the straight forward adoption of a neutral position."[34] Based on his view that there was simple neutrality, he argued that under the majority's theory

> "state action" in the form of laws that do nothing more than passively permit private discrimination could be said to tinge

30. *Id.* at 333.
31. 387 U.S. at 384.
32. *Id.* at 391.
33. *Id.* at 394.
34. *Id.*

all private discrimination with the taint of unconstitutional state encouragement.[35]

In view of the discussion of neutrality in the dissent, it seems implicit in the opinion of Justice White in *Reitman* that a state is not neutral when it recognizes that its citizens have the right to discriminate, and in addition, when the state seeks to protect that right by constitutional guarantee. It also seems clear that when the state goes beyond neutrality, so defined, there is present state action which is prohibited by the fourteenth amendment. Neutrality, in the White view, would seem to be no longer present when a state, to any extent, recognizes, by official act, a right to practice discrimination.[36] The dissent on the other hand concludes that a state is neutral so long as it takes no *positive* step which would make it an accomplice in the discrimination, even though its actions facilitate discrimination. Justice Douglas takes the view that any time the state is at all involved, any resulting discrimination in areas which he deems affected with a public interest is prohibited by the fourteenth amendment.[37]

The *Burton* case, though it did not speak in neutrality terms, is relevant to any discussion of neutrality because it appears that the state there did not violate either of the definitions of neutrality discussed above. There was no showing that the Authority approved, aided, encouraged, or even considered the discriminatory practices of the restaurant. In view of the fact that *Burton* appears to rest on a notion of apparent authority from the state to the restaurant to discriminate without a showing that the state acted at all, the *Reitman*-majority's definition of neutrality is not at all difficult to reach from an examination of *Burton* and is in accord with the underlying theory of that case.

For those who would now oppose open housing legislation by arguing that civil rights legislation cannot be repealed, Justice White indicated that had Article 1, Section 26 been a mere repealer it would not have been struck down.[38] It is only because the amendment went so far as to attempt to guarantee a state constitutional right to discriminate that the fourteenth amendment came into play.

This case does not, however, settle the problem with a clear definition of an easily applicable formula for determining what is state action. The uncertainty in the area has been cleared very little by *Reitman,* except to the extent that "neutrality" may have been defined by the Court. Even though the question of whether a state is neutral may

35. *Id.* at 394-95.

36. Neither the California court nor Justice White argued that the prohibition against future open housing regulation implicit in § 26 pushed or helped push California beyond neutrality. It can be argued that a state is no longer neutral when it prevents, permanently, legislative action in the field of open housing, because such prevention establishes a "state policy which encourages present discrimination." The "state policy" concept is a device, often used by the Court in encouragement cases, *i.e.,* Anderson v. Martin, 375 U.S. 399, 402 (1964), which permits the Court to find prohibited state action without the necessity of overruling its prior decisions holding that the equal protection clause does not require a state to act affirmatively to halt existing private discrimination.

37. *See* notes 28 and 29 *supra* and accompanying text.

38. 387 U.S. at 380-81.

become an important one in future decisions, that determination apparently will be made by a case-by-case examination of all the relevant factors and circumstances. What does seem evident from the *Reitman* decision, however, is that the Court's majority is edging closer to the Douglas view in that the Court is now finding unconstitutional state action in cases such as *Burton* and *Reitman* where the state's conduct is indirect and non-essential to the resulting discrimination. It appears that in the future the Court will be applying the Douglas rationale in state action cases as it pays lip service to the case-by-case approach announced in *Burton* and verbally followed in *Reitman*. The problem of how far to extend *Shelley* remains, and since the Court in *Reitman* said it was following *Burton's* principle of looking at all the surrounding circumstances, even though it seemingly looked no further than the California court's logical conclusions, the problem is likely to go unresolved and the uncertainty is likely to remain for some time.