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STATE ENCOURAGED DISCRIMINATION:

MULKEY v. REITMAN (CAL. 1966)

Against a background of national interest in state fair housing laws and Presidential pressure for Congressional enactment of a federal law to prohibit private racial discrimination in housing, the Supreme Court of California in *Mulkey v. Reitman* held that article 1 section 26 of the state constitution is a violation of the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution. Enacted as Proposition 14 by an overwhelming majority of the voters, article 1 section 26 was immediately attacked in several cases alleging its unconstitutional status. Four editors of the Santa Clara Lawyer have collaborated to provide an analysis of the reasoning used to support the majority opinion and to raise questions concerning future implications of the decision and its legal reasoning.

In *Mulkey*, the plaintiff-appellants alleged that they were Negroes, husband and wife, citizens of the United States and residents of Orange County (California); that the defendants were the owners and managers of a certain apartment building in Orange County and that in May 1963 at least one apartment was unoccupied and was being offered for lease to the general public; that the plaintiffs were being refused the right to rent solely because they were Negroes; that because of the refusal the plaintiffs were unable to find a suitable place to live and had suffered humiliation and disappointment; that plaintiffs had no other remedy at law because the discrimination practiced by the defendants was also practiced by all the real estate dealers in Orange County. The plaintiffs then prayed for relief under the Unruh Civil Rights Act.

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1 64 A.C. — — P.2d — — Cal. Rptr. — (1966). Unfortunately, none of the advance sheets had been received at press time so that all quotations and cites are to the original pages in the court's opinion.


3 As indicated by Justice White in his dissent, the measure was passed by a vote of 4,526,460 to 2,395,747.


5 Note that the date of the original cause of action was before both the passage of Proposition 14 and the enactment of the Rumford Act.

6 CAL. CIV. CODE §§ 51, 52. CAL. CIV. CODE § 51 states: "This section shall be known, and may be cited, as the Unruh Civil Rights Act.

All persons within the jurisdiction of this State are free and equal, and no
In the trial court the defendants raised the sole defense that the passage of Proposition 14 had rendered the Unruh Act, upon which the action was based, null and void. The plaintiffs contended, unsuccessfully, that Proposition 14 was unconstitutional. It is interesting to note that the only defense raised by defendants was article 1 section 26. One wonders whether there might also have been other defenses which would not have lead to the constitutional issue. The decision is also not clear as to whether the plaintiff was seeking equitable remedies under Civil Code section 51, or money damages under section 52, or both. If damages were sought, the additional issue of the retroactive application of Proposition 14 would be raised. There is no discussion of either suggested defense in the opinions of the majority or the dissenters.

HISTORICAL LEGISLATIVE BACKGROUND

In 1959 the California Legislature passed the Unruh Act which prohibited discrimination by business establishments of every kind on grounds of race, color, religion, ancestry, or national origin. The act was interpreted by the courts to include real estate brokers as well as businesses which sold or leased residential housing. During the same session, the Hawkins Act was passed which prohibited racial discrimination in publicly assisted housing. In 1963 the Hawkins Act was itself superseded by the Rumford Act which prohibited discrimination by an owner in selling or renting any private dwelling containing more than four units or by an owner-occupier of a single family, publicly assisted dwelling. The Rumford Act also declared that discrimination because of race, color or religion was against California's public policy. To implement this latter act, the State Fair Employment Practice Commission was given substantial powers including that of forcing the owner to sell or rent to the

matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

CAL. CIV. CODE § 52 states: "Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code.

7 See Abstract Investment Co. v. Hutchinson, 104 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309, 517 (1962). "Clearly, not all persons who rent their property to others can be held to operate business establishments."


10 CAL. HEALTH & SAFETY CODE §§ 35700-35744.
aggrieved person if the housing was still available or alternatively pay damages not to exceed $500.11

The following year, in a highly emotional campaign, marked by charges and counter-charges, Proposition 14, an initiative measure, was adopted by the electorate becoming article 1 section 26 of the California Constitution. In the words of the majority of the court,

Proposition 14 was enacted against the foregoing historical background with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market.12

The importance of the characterizing of the intent of the electorate is indicated by comparing the above quotation with the following statement of the minority,

... [T]he measure amounts only to a legislative choice by the people acting through the power reserved to them by article IV, section 1, of our California Constitution... that the state policy which existed in California prior to 1959 shall be restored; and that there be reserved to the people the exclusive legislative power to change or modify this policy.13

Unfortunately, the basic conflict as to the motive in adopting Proposition 14 has made well reasoned constitutional guidelines difficult to discern.

THE QUESTION OF RIGHT

Mulkey holds that article 1 section 26 [hereinafter referred to as section 26] of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment. In reaching this decision the court reasons as follows:

It is now beyond dispute that the Fourteenth Amendment, through the equal protection clause, secures, without discrimination on account of color, race [or] religion, 'the right to acquire and possess property of every kind'.... "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."14

12 64 A.C. at ---, --- P.2d at ---, Cal. Rptr. at ---. [Court's opinion page 7.]
13 Id. at ---, --- P.2d at ---, Cal. Rptr. at ---. [Dissenting opinion of White, J. at page 2.]
14 Id. at ---, --- P.2d at ---, Cal. Rptr. at ---. [Court's opinion at 8, 9.]
The court finds racial discrimination conceded by the defendants. Therefore:

The only real question thus remaining is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment.

In answering this question the court finds that the state is sufficiently involved "to fall within the reach of the constitutional prohibition," and in voiding all of section 26 says:

... [W]e can conceive of no other purpose for an application of section 26 aside from authorizing the perpetration of a purported private discrimination where such authorization or right to discriminate does not otherwise exist. ...

After reading this decision one is left with mixed feelings, disregarding any personal bias that may be involved. On one hand, the decision seems correct in holding that the state cannot discriminate in its laws on the basis of race, color or religion, and if the state was doing so in this case then a ruling of unconstitutionality is correct. On the other hand, one is left with a vague disquiet—one difficult to pinpoint but present nonetheless, and in an attempt to dispel the uncertainty examines the court's reasoning.

It appears that the three basic points made by the court in Mulkey were: (1) there is a right to acquire property free from racial discrimination by the state; (2) an admitted case of racial discrimination by an individual existed; and (3) state "involvement" in the discrimination was found. The following discussion will consider the points in the above order.

As authority for the right to acquire, possess and enjoy property the court cites four United States Supreme Court cases and two California Supreme Court cases. The right set forth in these cases is the right to acquire property free from discrimination by the state because of race, color or religion. Acquire is used in the sense of "to come into possession" and not in the sense of "to gain for oneself through one's actions or efforts." This is the first area of confusion in Mulkey.

The Fourteenth Amendment guarantees the right to life, liberty

15 Id. at __, __ P.2d at __, Cal. Rptr. at __. [Court's opinion at 9.]
16 Id. at __, __ P.2d at __, Cal. Rptr. at __. [Court's opinion at 9, 10.]
17 Id. at __, __ P.2d at __, Cal. Rptr. at __. [Court's opinion at 10.]
18 Id. at __, __ P.2d at __, Cal. Rptr. at __. [Court's opinion at 25.]
and property under the Due Process Clause. Without a valid reason, a state cannot lessen these rights in any way—arbitrary laws are not permitted. Clearly under modern constitutional principles race is not a valid factor upon which rights may be determined. Therefore, any law attempting to make the right to property depend upon this single factor would be arbitrary and violative of the Fourteenth Amendment's Due Process guarantee. The cases cited in *Mulkey* are examples.

In *Buchanan v. Warley*\(^{21}\) there was a city ordinance prohibiting Negroes from moving into white neighborhoods. It was pleaded as a bar to a contract made by a willing buyer and a willing seller. The United States Supreme Court held that the state could not enforce this statute because it was an impermissible interference with the otherwise valid passage of title. It was impermissible because the state had no valid reason to interfere with either the buyer's right to acquire the property or the seller's power of alienation. A similar case is *Fujii v. California*\(^{22}\) wherein the state claimed title to certain property deeded to the plaintiff. The claim was based on a state statute which withheld all interests in real property from certain designated races and nationalities. There also the state was not permitted to enforce this statute because there was no valid basis for the interference.

In *Shelley v. Kraemer*\(^{23}\) an attempt was made by a third person to enforce a racially restrictive covenant in the seller's deed, and in *Barrows v. Jackson*\(^{24}\) a suit for damages was brought for breach of a racially restrictive covenant. In both cases it was held that because the state had no valid reason to interfere with the passage of title between the buyer and seller its courts could not be used to accomplish the interference.

The crux of these decisions is that there is no basis in logic or reason to determine the extent of state power to lessen rights in property by looking to the particular *means* employed to achieve this end. Therefore, whether there is a statute affirmatively restricting rights in property, or a court so doing, the end result is to impermissibly lessen the buyer and seller's rights in the property which is prohibited by the Due Process Clause of the Fourteenth Amendment.

One aspect that *Mulkey* did not discuss in setting out the right to acquire property is the existence of a "willing buyer and willing seller relationship." The court totally ignored the problem of whether

\(^{21}\) 245 U.S. 60 (1917).

\(^{22}\) 38 Cal. 2d 718, 242 P.2d 617 (1952).

\(^{23}\) 334 U.S. 1 (1947).

\(^{24}\) 346 U.S. 249 (1953).
this relationship has any effect on the right to come into possession of property. This appears to be rather an important distinction the significance of which is not developed in the cases relied upon by the California Supreme Court. Unlike Mulkey, those cases involved willing buyers and sellers.

Another problem arises from the cases relied upon by Mulkey to establish the plaintiffs' rights to acquire property. What right to property has the state lessened? The cited cases point out that it doesn't matter which means are employed by the state to reach the prohibited end. If the state is involved in preventing the passage of title between a buyer and seller on racial grounds, it is violating the buyer's right to property.

The court seems to use two theories to show state interference. First, the court says:

\[\ldots\text{[T]he court says:}\]

\[\ldots\text{[T]he state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted.}\]

In other words, the state has enabled sellers to discriminate.

Neither of these theories show that the state has prevented the passage of title between the buyer and seller. The court says that section 26 encourages and permits racial discrimination which was previously "legally restricted," but the court does not say that this prevented the passage of title, or that it lessened the buyer's right to property guaranteed under the Due Process Clause of the Fourteenth Amendment. The court is merely saying that the effect of section 26 is that it lessens the opportunities of minority groups to acquire property which they could have acquired previously under state law.

This is one of the areas in which the decision has not come to grips with the problem presented. First, the court sets out a right to acquire property but they neither define nor delimit the right. Second, the court makes no attempt to show that such a right even

\[25\text{Id. at - , - P.2d at - , - Cal. Rptr. at - . [Court's opinion at 19, 20.]}\]
exists in the facts of the case before it. Third, the court does not establish that the state either directly or indirectly violated this right. In fact, the court never speaks of the failure of the defendant to rent his property to the plaintiff except in terms of discrimination. For these reasons, if Mulkey purports to stand for the proposition that there is a constitutional right to acquire property it has failed to support its position legally or logically.

Pointing out the lack of a constitutional right to acquire property in the sense used by the court makes the decision more confusing. Disregarding the right to acquire property, the decision is reduced to two basic points: (1) an admitted act of racial discrimination by an individual; and (2) state involvement in the discrimination which is prohibited by the Equal Protection Clause of the Fourteenth Amendment. These points are subject to the same criticism that has been made regarding the right to acquire property, that is the failure to define or delimit the problem presented.

It is well established that a state may not discriminate against a particular racial group solely because of their race. But it has also been pointed out that the Equal Protection Clause does not add anything to the rights under the Constitution which one citizen has against another and that it is not designed as a safeguard against the conduct of private persons or individuals. It is not clear why the court is concerned with finding an admitted act of racial discrimination by the defendant in this case. If the Equal Protection Clause does not proscribe individual actions how can a finding of discrimination by the defendant in this case lend any support to a finding of unconstitutionality?

The court says that section 26:

... provides for nothing more than a purported constitutional right to privately discriminate .... Thus, as a complete and only answer to plaintiffs' allegations which irrefutably establish a discriminatory act, defendants urge that section 26 accords them the right as private citizens to so discriminate.

What “purported constitutional right” is being given that has not previously existed? As Mr. Justice Goldberg stated in Bell v. Maryland:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the

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30 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 9.]
basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.\textsuperscript{32}

It seems that the court in \textit{Mulkey} is saying that section 26 purports to give a constitutional right to the defendant, namely a right to discriminate. But it is not a constitutional right that section 26 purports to give, rather it is the restoration of a right previously limited by the state. The court seems to recognize this later in the opinion where it says:

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.\textsuperscript{23}

It is difficult to conceive how the action of the defendant in this case can be \textit{transformed} into a constitutional evil merely because the state repeals a fair housing law. Even assuming that the effect of the repealer is to "encourage," "authorize," "permit," etc., the \textit{nature of the defendant's act itself} has not been changed. As the dissent points out:

As I view it, another important issue presented to us is whether in the several states a person has a right of action under the Fourteenth Amendment to obtain judicial relief against another person who refuses on grounds of race to deal with him in the sale or leasing of private residential property. If he has such a right of action, then I agree that neither section 26, nor any statute, decision of any court, nor any vote of the electorate can properly deny it.

\ldots I submit the state cannot fairly be held responsible for that conduct unless it has a duty under the Fourteenth Amendment to prohibit such conduct, and that a state has that duty only if the Fourteenth Amendment contains a self-executing cause of action for racial discrimination in private housing.\textsuperscript{34}

The editors suggest that the court has been incomplete in its explanation of the right involved in the case before them and has in fact failed to designate the precise right which has been violated. Was it the right conferred by California Civil Code section 51? Was it a constitutional right to acquire property? Or was it a constitutional right to be free from discrimination?

By speaking in vague terms regarding the rights involved in the case before them, the court has given at least the implication that once fair housing legislation is passed it cannot be repealed. A broader implication that might also be inferred from their holding

\textsuperscript{32} \textit{Id.} at 313 (concurring opinion).

\textsuperscript{23} 64 A.C. at \textemdash, \textemdash P.2d at \textemdash, \textemdash Cal. Rptr. at \textemdash. [Court's opinion at 20.]

\textsuperscript{34} \textit{Id.} at \textemdash, \textemdash P.2d at \textemdash, \textemdash Cal. Rptr. at \textemdash. [Dissenting opinion of White, J. at 25-27.]
is that the state has a duty to protect its citizens from discrimination in the sale or rental of housing and therefore must enact fair housing legislation.\textsuperscript{38}

To avoid these unnecessary implications the court should have been explicit in pointing out that the right to which the plaintiffs were entitled in this case was the right to be free from discrimination by the state.\textsuperscript{36} If the state was significantly involved in achieving such discrimination, its action violates the Equal Protection Clause of the Fourteenth Amendment. What constitutes significant involvement by the state?

\textbf{STATE ACTION}

Adopting the court’s statement that the undisputed act of racial discrimination would clearly violate the Equal Protection Clause if state action can be found, the key issue becomes the sufficiency of the state involvement to bring the act within the Fourteenth Amendment proscription. Initially, in its discussion of the state action problem, the court examines the scope and nature of the necessary involvement. There is an express rejection of the contention that inaction by the state could be construed as significant state involvement.

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.\textsuperscript{37}

In support of the proposition that state action has consistently been found when the state had lent its processes to the achievement of discrimination, the court relies on \textit{Shelley v. Kraemer}.\textsuperscript{38} There, when a Negro purchased property subject to a racially restrictive covenant, owners of adjoining property subject to the same covenant sought to prevent the vendee from occupying the premises and to have title revested in the vendor. The issue raised by the case was not the validity of the restrictive covenant itself but the validity of its enforcement by the state courts. Quoting directly from \textit{Shelley}, the court stated:

\begin{quote}
\ldots [T]he Amendment makes void “State action of every kind” which is inconsistent with the guarantees therein contained, and
\end{quote}

\textsuperscript{38} \textit{Ibid.}

\textsuperscript{36} As the Court pointed out in \textit{Anderson v. Martin}, 375 U.S. 399 (1963), “The vice lies not in the resulting injury but in placing the power of the State behind a racial classification . . . .” [Emphasis added.]

\textsuperscript{37} 64 A.C. at —, — P.3d at —, — Cal. Rptr. at —. [Court's opinion at 11.]

\textsuperscript{38} 334 U.S. 1 (1947).
extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings."39

In comparing Mulkey with Shelley, the court further said:

Shelley, and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the Shelley and the Abstract cases only in that those who would discriminate here are not seeking [emphasis in original] the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate.40 [Unless otherwise noted, emphasis added.]

As pointed out by Justice White (dissenting), the majority ignored an important factual distinction between the cases. Shelley involved a willing seller and a willing buyer: enforcement of the covenant would have compelled the seller to discriminate against his wishes; such enforcement would have deprived the property owner of his right to dispose of his property as he sees fit absent a valid legislative restriction. The instant case involves a situation of a land owner unwilling to rent his property to a particular individual. This distinction between willing seller and buyer situations and those where one party is unwilling was brought out forcefully by Justice Black's dissent in Bell v. Maryland.41 The following quotation from Bell, with emphasis added, was used by Justice White in his Mulkey dissent42 to epitomize his view of section 26.

... [T]he line of cases from Buchanan through Shelley establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to "inherit, purchase, lease, sell, hold, and convey" property, prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. Shelley v. Kraemer, supra, 334 U.S., at 19. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: "the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land." Buchanan v. Warley, supra, 245 U.S., at 74. This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. But equally, when one party is unwilling, as when the property owner chooses not to sell to a

39 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 12.]
40 Id. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 13.]
42 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Dissenting opinion of White, J. at 12, 13.]
particular person or not to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.\textsuperscript{43}

The court in Mulkey does not expressly state that the use of the state court to defend a private act of discrimination would involve "significant" state action; however, since the distinctions between Mulkey and Shelley are minimized, there is a strong implication that the majority would be willing to so extend the rule of Shelley. The legal implications of such an extension are far-reaching. Buchanan recognizes, in the absence of a valid regulatory statute, a constitutionally protected right of the land owner to use and dispose of his property in whatever manner he wishes. If such a "right" incorporates the concepts of judicial recognition and enforcement, any extension of the state action concept to include both offensive and defensive use of the courts would render what was once a constitutional right a mere power enforceable only through self help. There would be no discernible distinction between private action and state action because the very fact of use of the courts would constitute significant state involvement under the Fourteenth Amendment.

\ldots [I]f the distinction between state action and private action is to have any genuine meaning, the applicability of constitutional limitations must hinge on the nature of the private activity itself—and not on the bare presence of state enforcement or adjudication.\textsuperscript{44}

Otherwise, \ldots [I]f the courts in adjudicating rights and relationships between private persons must hold every private person to the identical constitutional standards binding on a state, then effectively over eighty-five years of unbroken constitutional rulings go by the board, and individual action for all practical purposes becomes subject to the fourteenth amendment.\textsuperscript{45}

The court in Mulkey then goes on to state, \ldots Shelley is not limited to state involvement only through court proceedings. In the broader sense the prohibition extends to any racially discriminatory act accomplished through the significant aid of any state agency, even where the actor is a private citizen motivated by purely personal interests.\textsuperscript{46}

\textsuperscript{43} 378 U.S. 226, 330-31.
\textsuperscript{45} Id. at 1008.
\textsuperscript{46} 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 13, 14.]

A trespass statute was involved in *Marsh* where a Jehovah's witness was arrested while disseminating religious literature on the sidewalk of a company town. The property consisted of residential buildings, streets, and a commercial center which was rented out to merchants and service establishments. The public character of the commercial center is emphasized in the Court's description.

Intersecting company-owned roads at each end of the business block lead into a four-lane public highway which runs parallel to the business block at a distance of thirty feet. There is nothing to stop highway traffic from coming onto the business block and upon arrival a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town or shopping center except the fact that the title to the property belongs to a private corporation.50

The property was posted to the effect that solicitation of any kind was prohibited without a permit. The appellant was denied a permit and personally warned not to distribute her literature. She continued distribution and refused to leave when requested; she was arrested for violation of a trespass law. Appellant contended that this application of the law to her activities violated her rights under the First and Fourteenth Amendments to the Constitution. The controlling rationale for the Court's position in *Marsh* is easily shown by a few quotes from the opinion.

Our question then narrows down to this: Can those people who live in or come to Chickasaw be denied freedom of press and religion simply because a single company has legal title to all the town?51

The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.52

In our view the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such

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8 286 U.S. 73 (1931).
10 326 U.S. at 503.
11 Id. at 505.
12 Id. at 505, 506.
restraint by the application of a state statute. Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand.\(^\text{53}\)

It is evident that the court was influenced by the application of the property in question to public use and was very concerned about the inhabitants of the company town being denied favored First Amendment freedoms of "press" and "religion." Nowhere in \textit{Marsh} does the court suggest or imply that the result would have been the same had a single resident or merchant in the company town requested that the appellant leave his premises. In that situation there would have been no possibility that the individual resident of the company town would have been denied freedom of the press or religion. To suggest that \textit{Marsh} is applicable to the instant situation of a single landowner, whose property is not in any way devoted to public use, and who is not engaged in an activity that is traditionally governmental in character is to completely ignore the context and rationale of the \textit{Marsh} case and to expand the concept of state action far beyond current precedent.

The next supporting argument used by the court concerns the "white primary cases," particularly \textit{Nixon v. Condon}.\(^\text{54}\) The court describes \textit{Nixon} as a situation where a political party was allowed to prescribe qualifications for membership and concludes, "A local political party thereafter barred Negroes from voting in its primaries and it was held that the permissive private action was chargeable as state action."\(^\text{55}\) The petitioner in \textit{Nixon} sought damages from election judges for their refusal to allow him to vote in the primary election. The district court's denial of relief was reversed by the United States Supreme Court. The following excerpt from the case gives the historical background and the reasoning of the decision.

\begin{quote}
This is not the first time that he [petitioner] has found it necessary to invoke the jurisdiction of the federal courts in vindication of privileges secured to him by the Federal Constitution.

In \textit{Nixon v. Herndon}... this court had before it a statute of the State of Texas... whereby the legislature had said that "in no event shall a negro be eligible to participate in a democratic party primary election..." At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States. Promptly after the announcement of that decision, the legislature of Texas enacted a new statute... "every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party..."
\end{quote}

\(^{53}\) \textit{Id. at} 509.

\(^{54}\) 286 U.S. 73 (1931).

\(^{55}\) 64 A.C. at --, -- P.2d at --, -- Cal. Rptr. at --. [Court's opinion at 15.]
Acting under the new statute, the State Executive Committee of the Democratic party adopted a resolution "that all white democrats who are qualified under the constitution and laws of Texas and who subscribe to the statutory pledge . . . and none other, be allowed to participate in the primary elections." 56

While clearly the petitioner was barred from voting at a primary because of race, the respondents urged that the action was by a political party and not subject to the constitutional restraint on the states. The Court answered:

Whatever our conclusion might be if the statute had remitted to the party the untrammeled power to prescribe the qualifications of its members, nothing of the kind was done. Instead, the statute lodged the power in a committee, which excluded the petitioner and others of his race, not by virtue of any authority delegated by the party, but by virtue of an authority originating or supposed to originate in the mandate of the law. 57 [Emphasis added.]

After pointing out that a declaration of a will to bar Negroes had never been made at State Party Conventions, the Court noted:

Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. . . . Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise. 58 [Emphasis added.]

In concluding, the Court held:

The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself. . . . What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere. They are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. 59 [Emphasis added.]

To rely on Nixon for the proposition that private action infringing constitutional rights comes under the proscription of the Fourteenth Amendment when permitted by the state is to grossly oversimplify the holding of the case. To hold that Nixon is applicable to the instant situation is to ignore the distinction between a grant of a fundamental government power to the State Executive Committee, and an elimination of a restriction on a land owner to use and dispose

56 286 U.S. at 81.
57 Id. at 84.
58 Id. at 85.
59 Id. at 88.
of his property as he sees fit. The court in Nixon pointed out that the situation was one of "high public interest" intimately connected with the function of government. If that rationale is applied to the situation of sale and rental of private property then any distinction between private action and state action will be completely obliterated in the area of property rights.

The third case relied upon in the "traditional governmental function" argument is Evans v. Newton. There, the city of Macon, Georgia, was trustee of a park dedicated to the city under the terms of a will designating its use by white persons exclusively. When the objection was raised that the city could not operate the park in a segregated manner without violating the Equal Protection Clause, the city attempted to resign as trustees. The United States Supreme Court held:

We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.

The distinction between the park in the Evans case and the apartment in Mulkey is very apparent from the Court's discussion of the park in Evans.

This park, however, is in a different posture. For years it was an integral part of the City of Macon's activities. From the pleadings we assume it was swept, manicured, watered, patroled, and maintained by the city as a public facility for whites only, as well as granted tax exemption under Ga. Code Ann. § 92-201. The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of "private" trustees. So far as this record shows, there has been no change in municipal maintenance and concern over this facility. If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment.

This conclusion is buttressed by the nature of the service rendered the community by the park. The service rendered even by a private park of this character is municipal in nature. A park is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment.

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60 86 Sup. Ct. 486 (1966).
61 Id. at 489-90.
62 Id. at 490.
63 Id. at 489.
64 Id. at 490.
To suggest that the rationale in Evans v. Newton is applicable to a private apartment such as is involved in Mulkey is to obliterate the distinction between public and private property.

After reviewing the above cases involving various government functions the court proceeds to the question of what constitutes significant involvement.

... [I]t is established that even where the state can be charged with only encouraging discriminatory conduct, the color of state action nevertheless attaches.65

The court begins its discussion of the concept of encouragement by discussing it as a result of state court action; citing Justice Black in Robinson v. Florida66 and Bell v. Maryland67 and the holding in Barrows v. Jackson.68

Robinson is a sit-in case wherein appellants were arrested under a state trespass statute for refusing to leave a lunch counter when requested. The appeal was from the denial of a motion for a directed verdict on grounds that their arrest, prosecution, and conviction by the State on this evidence would amount to state discrimination against them on account of color, thereby violating the Equal Protection Clause. The opinion of the court by Justice Black stated:

In this case we do not reach the broad question whether the Fourteenth Amendment of its own force forbids a State to arrest and prosecute those who, having been asked to leave a restaurant because of their color, refuse to do so. For here there are additional circumstances which, we think, call for a reversal. ...69

In the present case, when appellants were arrested and tried the Florida Board of Health had in effect a regulation, adopted under “authority of the Florida Legislature” and applicable to restaurants, which provided that “where colored persons are employed or accommodated” separate toilet and lavatory rooms must be provided. A month before petitioners were arrested, the State of Florida had issued a “Food and Drink Services” manual, based on state regulations. The manual said that as a “basic requirement,”—“Separate facilities shall be provided for each sex and for each race whether employed or served in the establishment.”70

Speaking of the regulations the court went on to say:

... [T]hey certainly embody a state policy putting burdens upon any restaurant which serves both races, burdens bound to discourage the serving of the two races together. Of course, state action, of the kind

65 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court’s opinion at 16.]
68 346 U.S. 249 (1953).
69 378 U.S. at 155.
70 Id. at 156.
that falls within the proscription of the Equal Protection Clause of
the Fourteenth Amendment, may be brought about through the State's
administrative and regulatory agencies just as through its legisla-
ture. . . . [W]e conclude that the State through its regulations has
become involved to such a significant extent in bringing about
restaurant segregation that appellants' trespass convictions must be
held to reflect that state policy and therefore to violate the Fourteenth
Amendment.71 [Emphasis added.]

In view of the specific holding, it would appear to be somewhat of
an exaggeration to state that the crucial state involvement in Robinson
was essentially encouragement. There were positive state regu-
lations exerting substantially greater force on private conduct than
does section 26 of the California Constitution. Contrary to the sugges-
tion of the court in Mulkey, it would appear that the state in-
volveent in Robinson was more clearly linked to the regulations
than to the enforcement of the trespass statute by the state courts.
It should be noted that there is another significant distinction be-
tween Mulkey and Robinson. The property involved in Robinson,
a lunch counter, was clearly devoted to a general public use.

It can hardly be argued that Justice Black's dissent in Bell v.
Maryland72 is strong authority for the proposition that private racial
discrimination violated the Fourteenth Amendment once the state in
any way discourages integration or instigates or encourages segrega-
tion. In Bell the majority of the Supreme Court remanded the case
to the state court in order to determine if the federal issue might be
avoided by application of superseding state legislation. Led by Just-
ice Black the minority were of the view that the court should have
decided the issue of the constitutionality of the application of the
trespass statute. They were of the view that there was no violation
of appellants' constitutional rights. Mr. Justice Black’s statement
about instigation and encouragement alluded to by the court is as
follows:

Neither the parties nor the Solicitor General, at least with respect
to Maryland, has been able to find the present existence of any state
law or local ordinance, any state court or administrative ruling, or any
other official state conduct which could possibly have had any coercive
influence on Hooper's racial practices. 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 practice should be classified as
"state action."73

It is difficult, to say the least, to understand how the majority in
Mulkey can consider Bell an example of state encouragement of
discrimination through the processes of state courts.

71 Id. at 156, 157.
73 Id. at 335, 334.
The third case cited by the court as an example of state encouragement of discrimination through court processes is *Barrows v. Jackson*74 which involved a suit for damages arising from breach of a restrictive covenant. In *Barrows* the Supreme Court stated, "If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant."75 [Emphasis added.] Again, the *Mulkey* majority appears to be stretching a point by citing *Barrows* for the proposition that action of the state courts is encouragement of discrimination which is violative of the Equal Protection Clause. In the words of the United States Supreme Court, there is substantially more than encouragement in *Barrows*, there is coercion! A land owner would be forced to discriminate against his wishes or suffer damages. The distinction between the willing seller-willing buyer situation and the situation in *Mulkey* involving an unwilling party was discussed above in connection with *Shelley v. Kraemer*76 and is equally applicable to the *Barrows* comparison.

Continuing with its discussion of what is significant state involvement the California Supreme Court cites additional cases for the proposition that governmental encouragement of private discrimination is proscribed by the Fourteenth Amendment. The first case referred to is *Anderson v. Martin*77 where the appellants were Negroes seeking election to the school board. Prior to the election the appellants had filed suit to enjoin the enforcement of a Louisiana statute which required that the race of the candidate appear on the ballot opposite his name. The United States district judge denied their request for a temporary restraining order; subsequently a preliminary injunction was also denied. After the election the appellants tried to amend their complaint and sought a permanent injunction against enforcement of the statute. The United States Supreme Court gave its ruling and the rationale behind it as follows:

> It [the case] has to do only with the right of a State to require or encourage its voters to discriminate upon the grounds of race. In the abstract, Louisiana imposes no restriction upon anyone's candidacy nor upon an elector's choice in the casting of his ballot. But by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizens' attention to the single consideration of race or color, the State indicates that a candidate's race or color is an

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74 346 U.S. 249 (1952).
75 Id. at 254.
76 334 U.S. 1 (1947).
important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.78

Nor can the attacked provision be deemed to be reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates. We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualification for office. Indeed, this factor in itself "underscores the purely racial character and purpose" of the statute.79

The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls.80

No one would dispute that in Anderson there was encouragement of racial discrimination in voting. However, where the issue is the presence of significant state involvement, the question becomes one of the degree of the involvement, and therefore the distinctions between cases becomes critical. Mulkey may be distinguished from Anderson in several important respects. In Anderson the state itself makes an express racial classification upon which the voters may or may not react: In Mulkey there is no classification, rather, section 26 states that the owner of property shall have absolute discretion to whom he will sell or rent his property. As the United States Supreme Court noted in Anderson, the racial classification on the ballot did not serve any legitimate governmental interest, its only purpose was to make race a factor in the election of public servants. In Mulkey there are competing interests involved, the interest of minority groups in finding adequate housing in areas of their choice and the interest of property owners in maintaining their rights to acquire, enjoy, own and dispose of their property as they see fit. In Anderson there is a governmental function involved—voting and elections. To use the distinction suggested by the majority in Mulkey81 between the nature of the function and the identity of the one responsible for its performance, there is no question that the state is responsible for the rules and regulations concerning the conduct of elections. But Mulkey involves the rental of a family apartment which is neither a governmental function, by nature, nor a function the performance of which is the responsibility of the state.

Citing McCabe v. Atchinson T. & S.F. Ry.,82 the majority opinion notes a statement in the case that denial of equal railroad facilities by private railroad was unconstitutional state action on the ground that the right to discriminate was authorized by local statute,

78 Id. at 402.
79 Id. at 403.
80 Id. at 402.
81 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 16.]
82 235 U.S. 151 (1914).
and said: "The court reasoned that state authorization to discriminate was no less state action than state imposed discrimination." In McCabe, the Oklahoma legislature passed an act known as the Separate Coach Law which provided that railroads doing business in the state should provide separate facilities for white and Negro passengers which facilities should be equal in comfort and convenience. Section 7 of the act provided that nothing in the act should be construed to prevent the railroads from hauling facilities for use exclusively by one race. The Negro appellants tried to restrain the railroads from making any distinction in service on account of race, and then sought to enjoin the railroads from complying with the act alleging among other grounds that it violated the Fourteenth Amendment. The respondents' demurrer to the complaint was sustained. The Supreme Court affirmed the lower court on the grounds that the allegations of the bill were too vague and indefinite to warrant the relief sought. There were no allegations that any of the appellants had ever travelled on the railroad, nor that any of them had ever requested or been refused equal accommodations. With respect to section 7 of the Separate Coach Law the Court said, "It is not questioned that the meaning of this clause is that the carrier may provide sleeping cars, dining cars and chair cars exclusively for white persons and provide no similar accommodations for negroes." The railroad argued that this action was necessary because there was not sufficient demand for such services by Negroes. The Court rejected that argument.

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.

The importance of factual distinctions as indicated in the prior discussion of Anderson is equally applicable here. There is no doubt that the above quoted dictum from McCabe suggests that state authorization of discrimination is violative of the Equal Protection Clause. Two important distinctions to be noted between McCabe and Mulkey are first that McCabe involved a common carrier, property clearly devoted to public use; and second, no legitimate governmental interest is served by allowing the railroad to provide unequal facilities. As pointed out in the discussion of Anderson there are legitimate competing interests involved in the Mulkey situation.

The California Supreme Court also cites Burton v. Wilmington
Parking Authority\textsuperscript{86} for the proposition that state authorization of private discrimination is violative of the Fourteenth Amendment. In Burton, the appellant was refused service in the Eagle Coffee Shoppe, a lessee of the Parking Authority which is an agency of the State of Delaware. The appellant claimed that the refusal of service on account of his race abridged his rights under the Equal Protection Clause. The Supreme Court of Delaware held that the coffee shop was acting in a "purely private capacity" and therefore no state action was involved. The decision of the United States Supreme Court includes a discussion of the extent of state involvement.

Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.\textsuperscript{87}

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." . . . The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable . . . . [T]he commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits.\textsuperscript{88}

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.\textsuperscript{90}

Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscription of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.\textsuperscript{90}

It would appear that the majority in Mulkey has substantially over-simplified and broadened the scope of the Burton decision beyond the limitation expressly set by the highest Court in its opinion. In

\textsuperscript{86} 365 U.S. 715 (1960).
\textsuperscript{87} Id. at 722.
\textsuperscript{88} Id. at 723, 724.
\textsuperscript{89} Id. at 724.
\textsuperscript{90} Id. at 726.
addition if we "sift facts and weigh circumstances" to measure the
state involvement, it is clear that there was considerably more state
involvement in the Burton situation, in addition to the fact that
there property was devoted to public use.

The California Court next discusses Turner v. City of Mem-
phis,91 where a Negro was refused nonsegregated service in the
Memphis municipal airport restaurant operated by appellee Dobbs
Houses, Inc. as lessee of the city. In discussing the action seeking an
injunction against the discrimination, the California Supreme Court
said:

... [A] Tennessee statute renounced the state's common law cause
of action for exclusion from hotel and other public places and declared
that operators of such establishments were free to exclude persons
for any reason whatever. In the particular circumstances of that case
the statute was deemed to bear on the issues "only insofar as" it
"expressed an affirmative state policy fostering segregation." The
court stated that: "our decisions have foreclosed any possible con-
tention that such a statute ... may stand consistently with the
Fourteenth Amendment. . . ."92

In comparing Turner with Mulkey the California court argues that
they are "undeniably analogous," and describes Mulkey as follows:

... [T]he 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.93

This discussion of Mulkey and the court's link to the Turner
case create the implication that it was the change of the law in the
Turner case that was the controlling consideration. The following
statements of the Court in Turner relating the facts and basis of deci-
sion suggest that such an implication is not completely accurate.

... [A]ppellees' answers, in addition to asserting that the restaurant
was a private enterprise to which the Fourteenth Amendment did not
apply, invoked Tenn. Code Ann. §§ 53-2120, 53-2121, and Regulation
No. R-18 (L). The statutes as now phrased authorize the Division
of Hotel and Restaurant Inspection of the State Department of Con-
servation to issue "such rules and regulations ... as may be necessary
pertaining to the safety and/or sanitation of hotels' and restau-
rants ...," and make violations of such regulations a misdemeanor.
The regulation, promulgated by the Division, provides that "Restau-
rants catering to both white and negro patrons should be arranged

92 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 19.]
93 Id. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 19, 20.]
so that each race is properly segregated. . . ." Dobbs Houses later amended its answer to include a defense based on Tenn. Code Ann. § 62-710. That statute "abrogates" Tennessee's common-law cause of action for exclusion from hotels or other public places, and declares that the operators of such establishments are free to exclude persons "for any reason whatever." 9

Since, as was conceded by Dobbs Houses at the bar of this Court, the Dobbs Houses restaurant was subject to the strictures of the Fourteenth Amendment under Burton v. Wilmington Authority . . . the statutes and regulation invoked by appellees could have furnished a defense to the action only insofar as they expressed an affirmative state policy fostering segregation in publicly operated facilities. But our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. 95

The discussion of the appellees answer indicates that there were other statutes involved besides the one abrogating the common-law cause of action for exclusion from public places. It would appear that the significant point in Turner was the concession that the case was controlled by Burton, which clearly prohibits discrimination in service by a lessee of a state owned facility. With respect to the three statutes and the regulation defensively relied on by the appellees, the Court in Turner did not decide that the statutes did provide a defense or that they were in fact an expression of an "affirmative state policy fostering segregation."

The Mulkey court's discussion of the issue of what is significant state involvement may be summarized briefly as follows: The majority says that state encouragement and state authorization of private discrimination are significant state actions violative of the Equal Protection Clause. The discussion above has analyzed the cited authority for these propositions of law and demonstrated that there was more than simple encouragement or authorization in the majority of the cases and in the others, has pointed out the significant factual distinctions between Mulkey and the cases cited. As applied by this court, there are some very far-reaching implications in the encouragement and authorization arguments.

Concerning encouragement, the court said:

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. Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final private act of discrimination itself. 96

94 369 U.S. at 351, 352.
95 369 U.S. at 353.
96 64 A.C. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 20.]
The clear import of the above language is that once the state enacts legislation prohibiting private discrimination, it cannot alter or repeal that legislation if the impact of such amendment or repeal would have the effect of encouraging racial discrimination. The effect of such a rule would be to severely limit the power of the state to deal with racial problems. The courts would have to examine each change of legislation even remotely connected with civil rights to determine if the effect was to encourage racial discrimination. It is not clear from the court's discussion whether the state action must be shown to have actually encouraged discrimination in the given situation or whether instead the possibility or tendency that private racial discrimination might be encouraged is sufficient to render that action violative of the Fourteenth Amendment. The latter alternative seems more likely because it would be very difficult to determine the actual influence of the state's action in a given case. The majority of the court characterized Proposition 14/section 26 as being "designed to" or for the "purpose" of allowing private racial discrimination and in that sense it encourages and condones such conduct. There is no doubt that some people who supported the initiative measure were motivated by racial bias, however, one might seriously question the validity of the court's ascribing that motive to all or even the majority of the more than 4,500,000 who voted in favor of its passage. Clearly there were some who supported the measure because they objected to the letter and not the spirit of the existing fair housing legislation. Is a state to be burdened with ineffective, imperfectly drafted legislation without popular support because a repeal of such legislation would or might encourage private individuals to discriminate?

The implications of the court's authorization argument are equally broad and far-reaching. The logical conclusion from the court's position is that the proscribed authorization will not be limited to express, statutory examples, but will include authorization implied by failure to prohibit. The clear import of this argument is that the state has a positive duty to enact legislation prohibiting conduct by private individuals that would be violative of the Fourteenth Amendment if carried on by the state: that which the state does not prohibit it allows or authorizes. Therefore, the end result of this "authorization" argument is that private conduct would be governed by the Bill of Rights through the Fourteenth Amendment, in spite of the court's express disclaimer of such a proposition.

Concluding its discussion of the state action issue, the court states:

From the foregoing it is apparent that the state is at least a
partner in the instant act of discrimination and that its conduct is not beyond the reach of the Fourteenth Amendment.\(^{97}\)

The court's failure to more definitely pinpoint their finding of state action and the analysis of the cited cases has led the editors to suggest that the comment of Justice Harlan in his dissent in *Burton* is equally applicable to this case.

The Court's opinion... seems... to leave completely at sea just what it is in this record that satisfies the requirement of "state action."\(^{98}\)

**Severability**

The court in *Mulkey* noted the express severability clause of section 26 and acknowledged that there were possible applications of the section in which no unconstitutional discrimination would result. The court recognized that a statute which has unconstitutional applications may still be effective in instances in which the Constitution is not violated. However, the majority cites a limiting principle in the recognition of severability.

... [W]hen the application of the statute is invalid in certain situations we cannot enforce it in other situations if such enforcement entails the danger of an uncertain or vague future application of the statute...\(^{99}\)

The court cautions that they must be particularly aware of such danger when the enforcement of the statute would impinge on the exercise of constitutional rights or impose criminal sanctions. The opinion includes a citation to *In re Blaney*\(^{100}\) for the rule that the language of the statute must be mechanically severable.

We further held in *Blaney* that a severability clause is ineffective to sustain valid portions or applications of a statute unless "... the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words," and that where the statute is not so severable "... then the void part taints the remainder and the whole becomes a nullity."\(^{101}\)

The court in *Mulkey* concluded,

It is immediately apparent from the operative portion of the instant constitutional amendment that it is mechanically impossible to differentiate between those portions or applications of the amendment which would preserve the right to discriminate on the basis of

\(^{97}\) 64 A.C. at ——, —— P.2d at ——, —— Cal. Rptr. at ——. [Court's opinion at 22.]

\(^{98}\) 365 U.S. at 728 (dissenting opinion).

\(^{99}\) 64 A.C. at ——, —— P.2d at ——, —— Cal. Rptr. at ——. [Court's opinion at 23.]

\(^{100}\) 30 Cal. 2d 643, 184 P.2d 892 (1947).

\(^{101}\) 64 A.C. at ——, —— P.2d at ——, —— Cal. Rptr. at ——. [Court's opinion at 24.]
race, color or creed, as distinguished from a proper basis for discrimination. The purported preservation of the right to discriminate on whatever basis is fully integrated and, under the rule of Blaney, not severable.

\[\ldots\] The severability clause is ineffective in the instant case, and the whole of the constitutional amendment must be struck down.\[102\]

Considering the practical problem which would result from any other holding, the logic of the court's decision in this aspect of the case can be clearly understood.

**CONCLUSION**

*Mulkey v. Reitman* is an important case because the issues involved are some of the most challenging facing our courts. The editors have endeavored to examine this decision of the California Supreme Court from the standpoint of its legal reasoning and possible implications. We specifically do not imply any support for or condemnation of either Proposition 14/article 1 section 26 or the legislative acts which may have been intended to be affected by its enactment. Our discussion has been intended as a critical analysis of the reasoning in the decision itself.

Like many of the recent cases involving racial discrimination, *Mulkey* involves a situation in which the principal legal question is the presence of state action. As a natural result, the major legal implications and impact of the case will relate to the state action problem. In the previous United States Supreme Court cases holding "private" action subject to constitutional limitations, three elements appear to have been controlling.

\[\ldots\] (1) the private body was exercising a basic state function, typically with the affirmative cooperation of the state; (2) the private body was invoking affirmative state action by seeking judicial enforcement of a private contract; or (3) the private body had derived its power to act in a particular capacity or engage in a specific activity, usually monopolistic or exclusive, by virtue of a statute, and was regulated in the exercise of this power by governmental authority.\[103\]

Therefore it would appear that *Mulkey* extends the concept of state action far beyond the limits of previous case authority. The most significant implications of the decision flow from the results of the court's apparent willingness to extend *Shelley* to include defensive

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\[102\] Id. at —, — P.2d at —, — Cal. Rptr. at —. [Court's opinion at 24, 25.]

use of the state courts and the court's argument that state encourage-
ment or authorization of private discrimination, without more, con-
stitutes significant state involvement. The logical results of these
arguments are (1) that the distinction between private and state
action is almost entirely obliterated with the result that conduct
formally considered private is now governed by the Fourteenth
Amendment; (2) that once a state enacts civil rights legislation it
may not amend or repeal that legislation if the effect could tend to
courage private discrimination; (3) that there is a positive duty
on the state to enact positive anti-discrimination statutes because the
state cannot permit or authorize discrimination. These results sug-
gest that the concept of state action by itself is no longer a useful
tool in evaluating conduct that was traditionally considered private.

If any conduct is to remain outside the scope of the Fourteenth
Amendment proscription, the inquiry must be more precise than a
search for state action as presently defined. One factor that should
be considered is the type of private conduct involved. Private racial
discrimination in the choice of one's dinner guests is substantially
different than refusal to serve Negroes in a lunch counter open to
the public; however, if the inquiry is limited to whether such conduct
is permitted or authorized by the state, both discriminatory acts can
be said to involve state action.104

The following test has been proposed as a more precise tool in
determining the limits of applicability of the Fourteenth Amend-
ment.

Has the state permitted, even by inaction, a private party to exercise
such power over matters of a high public interest that to render
meaningful the type of rights protected by the fourteenth amend-
ment the action of the private person or organization must be deemed,
for constitutional purposes, to be the action of the state?105

The editors agree with the author of the proposed test that the real
advantage of such a test is that it focuses the attention of the court
on the "truly significant factor."

Frank Clohan
Aurelio Munoz
Gary Priest
Allen Reames

104 See generally St. Antoine, supra note 103.
105 St. Antoine, supra note 103, at 1011.