

October 1967

Constitutional Law - Restrictive Racial Covenants - The Interference of Proposition 14 - *Reitman v. Mulkey*, 87 S. Ct. 1627 (1967)

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Gary E. Legner, *Constitutional Law - Restrictive Racial Covenants - The Interference of Proposition 14 - Reitman v. Mulkey*, 87 S. Ct. 1627 (1967), 9 Wm. & Mary L. Rev. 259 (1967), <https://scholarship.law.wm.edu/wmlr/vol9/iss1/17>

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Miller, and those who agree with him, remain free to criticize national policy by the written and spoken word, but "they are simply not free to destroy Selective Service Certificates."²⁵

Glenn J. Sedam Jr.

Constitutional Law—RESTRICTIVE RACIAL COVENANTS—THE INFERENCE OF PROPOSITION 14. In *Mulkey v. Reitman*,¹ plaintiff was denied the opportunity to rent an available apartment due solely to his race, being a Negro. From plaintiff's appeal on summary judgment entered upon the pleadings, the California Supreme Court held that article I, section 26,² of the California Constitution, prohibiting the state from denying the right of any person to decline to sell, lease, or rent his real property to such persons as he in his own discretion chooses, consti-

to say that future appeals would concentrate on what he termed prejudicial statements by trial judges and other alleged trial errors, rather than on further constitutional challenges to the law." N.Y. Times, Feb. 14, 1967, page 1, col. 6.

25. *Supra*, note 14, at 82. On April 10, 1967, the First Circuit Court of Appeals held in *O'Brien v. U.S.*, 376 F.2d 538 (1st Cir. 1967), that the 1965 Amendment did constitute an unnecessary regulation of speech, although conviction was affirmed on other grounds. The Supreme Court has granted certiorari to resolve the conflict.

1. 50 Cal.Rptr.881, 413 P.2d 825 (1966).

2. Proposition 14 after its incorporation by the people of California at the polls in 1964.

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 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 I, 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.

tutes affirmative action on the part of the state to change its existing laws³ from a situation where discrimination was legally restricted to one wherein it was encouraged; and that, therefore, the provision was void in its general application, as it denied those similarly situated as plaintiff equal protection of the laws as guaranteed by the Fourteenth Amendment.⁴ On certiorari to the Supreme Court of the United States the judgment of the California Supreme Court was affirmed.⁵

The problem confronting the Court in this situation was not merely the stigma of *state action*⁶ significant enough to bring the matter under the proscription of the Fourteenth Amendment, as well as the conflicting claims of liberty versus equality,⁷ but essentially whether restrictive racial covenants could be in fact implied, and therefore void in their enforcement similarly to those overtly manifested.

The right that all persons should have equal opportunity to purchase and enjoy property has been derived from the constitutional and legislative history of the United States through the Fourteenth Amendment and the Civil Rights Bill of 1866⁸ respectively. In *Buchanan v. Warley*,⁹ the Supreme Court held unconstitutional, as being excessively discriminatory, state legislation that endeavored to zone a city on a racial basis.¹⁰

3. CAL. CIVIL CODE sections 51-52 (Unruh Civil Rights Act 1959); CAL. HEALTH & SAFETY CODE sections 35700-35744 (Rumford Fair Housing Act 1963).

4. U.S. CONST. amend XIX, section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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. *Reitman v. Mulkey*, 87 S. Ct. 1627 (1967).

6. A collateral issue of prime consideration in this case. For an excellent discussion on this highly controversial subject, see generally, Note, *An Argument in Favor of Strict Adherence to State Action Requirement*, 5 WM. & MARY L. REV. 213 (1965).

7. One of the major arguments by the dissenting opinion was that the liberty of the people of California in exercising their franchise had been abrogated by disregarding the will of their mandate on Proposition 14.

8. Both were passed in the first session of the Thirty-Ninth Congress (1866). One of the primary considerations of the Fourteenth Amendment was to incorporate the guarantees of the 1866 Civil Rights Bill into the organic law of the land. Also found in 8 U.S.C. section 42, 8 U.S.C. section 42.

9. 245 U.S.60 (1917). See *Oyama v. California*, 332 U.S.633 (1948). Cf., *Bridges v. California*, 314 U.S.252 (1941); *Cantwell v. Connecticut*, 310 U.S.296 (1940) (Excessive use of state's police power).

10. Why the opinion in this particular case took the shape it did is not hard to conjecture, for at the time, the equal protection clause still bore the relative fresh gloss of the separate but equal doctrine of *Plessy v. Ferguson*, 163 U.S.537 (1896).

Buchanan and subsequent similar decisions¹¹ caused supporters of residential segregation to rely upon judicial enforcement of these covenants.¹² However, it was not until *Shelley v. Kraemer*¹³ that the constitutionality of racial covenants was tested, and where the Supreme Court held that their judicial enforcement was a denial of equal protection of the laws.¹⁴

Equality in the enjoyment of property rights was regarded by the framers of the Fourteenth Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which that amendment was intended to guarantee.¹⁵ The various mentioned enactments did not deal with the social rights of men, but with those fundamental rights in property which were intended to be secured upon the same terms to citizens of every race and color.¹⁶ Restrictive racial covenants are assertions of rights acquired by contract, not traditional incidents of

11. *E.g.*, *Harmon v. Tyler*, 273 U.S.668 (1927); *City of Richmond v. Dean*, 281 U.S.704 (1930).

12. *Corrigan v. Buckley*, 271 U.S.323 (1926) (dictum) encouraged such an approach; racial covenants in and of themselves are not unconstitutional, only where state is significantly involved. *See United States v. Harris*, 106 U.S. 629 (1882); *United States v. Cruikshank et al.*, 92 U.S.542 (1875) (Fourteenth Amendment erects no shield against mere private conduct, however discriminatory or wrongful).

13. 334 U.S.1 (1948). The leading of four cases known as the Racial Covenant Cases. *McGhee v. Sipes*, 334 U.S.1 (1948); *Hurd v. Hodge*, *Urciolo v. Hodge*, 334 U.S.24 (1948). *See Gandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892). Properly speaking, the federal court's inability to enforce the covenant at the time of *Gandolfo* should have been articulated in fifth amendment terms; especially so in the era before *Eric R.R. v. Tompkins*, 304 U.S.633 (1938).

14. Prior to *Shelley*, only two cases were decided by the U.S. Supreme Court which in any way involved the enforcement of such agreements. The first of these was *Corrigan v. Buckley*, *supra* note 11, which was dismissed for want of a substantial question, as it had originated in the federal courts on matter that arose in the District of Columbia and therefore could present no issue under the Fourteenth Amendment which by its terms applied only to the states the court held. *Contra*, *Hurd v. Hodge*, *supra* note 12, which overruled as being inconsistent with the public policy of the United States to permit federal courts in Nation's capital to exercise powers to compel action denied the state courts. Secondly, in *Hansbury v. Lee* 311 U.S.32 (1940), judgment was reversed upon grounds petitioners had been denied due process of law in being held estopped to challenge the validity in earlier litigation which they did not participate of such an agreement that had not fulfilled its own requirements. In neither of these cases, however, was the question of constitutionality raised.

15. *Shelley v. Kraemer*, *supra* note 12, at 10. *See also*, *Brown v. Board of Education*, 347 U.S.483 (1954); *Barrows v. Jackson*, 346 U.S.249 (1953).

16. *Civil Rights Cases*, 109 U.S.3 (1883). *Accord*, *Hall v. DeCuir*, 95 U.S.485 (1877). A point of note is that such covenants have been used to exclude others than Negroes. Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos among others.

property rights; and states have with considerable freedom modified the bounds of contract to which they will give effect.¹⁷ The major significance of the Racial Covenant Cases was that they, by holding invalid what was once assumed to be property or contract rights, re-affirmed the holding of *Marsh v. State of Alabama*,¹⁸ that there is nothing in the Fourteenth Amendment that says it applies only to particular actions or laws of the states.

Just as there has been for some time a relaxation of the expressed state action requirement,¹⁹ the effect of *Reitman v. Mulkey* seemingly has extended coverage of the equal protection of the laws from situations where such racial covenants have been expressly stated to those situations as here where they are merely implied. Undoubtedly, the effect of this constitutional provision was to nullify the previously existing civil rights acts on fair housing in California.²⁰ Article I, section 26, provided a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved.²¹

It has been recognized that conduct that is formally private may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed on state action.²² The test is not the novelty of the form it takes, but rather the ultimate result which is achieved; and it is apparent that it is indeed the ultimate result that the court is primarily concerned with in the instant case, even in derogation of a popular mandate.

It is not a general property right which the state would be giving cognizance to here, but what would usually amount to a community pattern of racial discrimination. The movement from *Shelley v. Kraemer*

17. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 496 (1962).

18. 326 U.S.501 (1946).

19. The Civil Rights Cases, *supra* note 15, were the first and last time to date that a majority opinion of the U.S. Supreme Court has given serious consideration to the problem of the erosion of the federal system through relaxation of the state action requirement. *Supra* note 5.

20. Prior to its enactment, the unconstitutionality of Proposition 14 was urged in *Lewis v. Jordan*, Sac.7549 (June 3, 1964). In rejecting petition for mandamus to keep proposition off the ballot, the court stated it would be more appropriate to pass on such question after the election, but expressed grave doubts as to its constitutionality at the time.

21. *Mulkey v. Reitman*, *supra* note 1, at 833.

22. *Evans v. Newton*, 382 U.S.296 (1966).

to *Reitman v. Mulkey* demonstrates that where any implications of a restrictive racial covenant is apparent the state cannot lend its support or give effect by its courts to such arrangements merely because they are not expressly stated.

Gary E. Legner

Federal Procedure—STANDING OF CLASS REPRESENTING ORGANIZATIONS. In compliance with a previously valid non-discriminatory consolidation policy, the Morrilton, Arkansas, Board of Education dismissed all seven teachers of a Negro high school in order to implement a desegregation plan. This action brought by two of the Negro teachers, the Arkansas Teachers Association, Inc. (ATA), and the U.S. Government as intervenor, was an appeal¹ from a judgment of the U.S. District Court dismissing the complaint on its merits. The appellants sought an injunction requiring the employment of high school teachers without regard to race, and the reassignment of elementary teachers and pupils on a basis which disregards race. Alternatively, appellants sought relief by money damages, and the presentation and implementation of a plan of reorganization of the school system on a non-racial basis.²

The Court of Appeals, in holding that the Board of Education must give preference to the dismissed teachers in filling future vacancies also found that the ATA had standing as a party plaintiff to bring action on a constitutional question in behalf of its members.³

It is a general rule, that in order to have standing to litigate a constitutional question, one must be asserting the right in his own behalf;⁴ and that a class action must be brought by a member of the class rather than, as here, by a class representing organization.⁵ In the past, standing to representative organizations has only been allowed in absence of compliance with the above rules where:

- (1) an attempt to assert rights as individuals might result in forfeiting the protection of those rights.⁶

1. *Smith v. The Bd. of Educ.*, 365 F.2d 770 (8th Cir. 1966).

2. *Id.* at 773.

3. The court also reached the constitutional question involved holding the School Board's action deprived the plaintiffs of their constitutional rights under the fourteenth Amendment.

4. Fed. R. Civ. P. 17(a). Commented on in 3 J. MOORE, FEDERAL PRACTICE, Sec. 17.07 (2d ed. 1964). "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced."

5. Fed. R. Civ. P. 23(a).

6. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-460 (1958).