Duquesne Law Review

Volume 5 | Number 2 Article 9

1966

Constitutional Law

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Recommended Citation
John R. Kenrick, *Constitutional Law*, 5 Duq. L. Rev. 201 (1966).
Available at: https://dsc.duq.edu/dlr/vol5/iss2/9

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states for the purpose of vitalizing the amendment there—when the states have not, by positive action, taken steps to protect those "rights" of a citizen which are derived from the fourteenth amendment. This case finds "the equal utilization of state facilities" to be among such derived rights. What other positive rights may be so derived remains to be seen. The concurring opinions suggest that section 5 may now be interpreted as a grant of positive power authorizing Congress to implement the fourteenth amendment by fashioning remedies designed to achieve civil and political equality within all the states.

The need to find "state action" may be a loosening hobble on congressional authority.[22] In the future, federal law may be able to reach private individuals who attempt to deprive a citizen of his fourteenth amendment rights, although the role of the state be merely one of compliance or "inaction." Such an interpretation would seem to seriously threaten the existence of such problem areas as *de facto* segregated schools and private-housing discrimination.

Thomas Patrick Ruane

CONSTITUTIONAL LAW—Initiative measure permitting discrimination in the sale or rental of private housing held to be "state action" in violation of the equal protection clause of the fourteenth amendment.

Mulkey v. Reitman, 413 P.2d 825 (1966), *cert. granted*, — U.S. — (1966) (No. 483).

Plaintiff Negroes sought a restraining order under sections 51 and 52 of the California Civil Code (the Unruh Civil Rights Act)[1] to prevent the defendants from discriminating according to race in the rental of an apart-

22. See, *Time*, Sept. 23, 1966, p. 76.

1. Civil Code, section 51:

All persons within the jurisdiction of this State are free and equal, and no 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.

Civil Code, section 52:

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 the provisions of 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.

Justice Peek, writing for the majority in Mulkey v. Reitman, 413 P.2d 825 (1966), *cert. granted*, — U.S. — (1966) (No. 483), states at 829, "On its face, this measure [Civ. Code §§ 51-52] encompassed the activities of real estate brokers and all businesses selling or leasing residential housing."

ment owned and managed by the defendants. The trial court dismissed plaintiffs' request for a restraining order stating that sections 51 and 52 were rendered null and void by article I, section 26 of the California Constitution. Article I, section 26, was an incorporation into the California Constitution of Proposition 14, an initiative measure approved by a substantial majority of voters[2] in the general election of 1964. The first paragraph of article I, section 26, reads as follows:

> 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.[3]

On appeal from the trial court judgment the California Supreme Court in a 5-2 decision reversed, holding that the whole of article I, section 26, despite the presence of a severability clause, violated the equal protection clause of the 14th Amendment to the United States Constitution.[4] This decision is a significant further step in a trend toward more liberal interpretations as to what constitutes "state action" in violation of the 14th Amendment.

The majority opinion, written by Justice Peek,[5] stated that the 14th

2. 4,526,460 to 2,395,747, Mulkey v. Reitman, *supra* note 1, at 836 (Justice White's dissent).

3. The rest of article I, section 26, reads as follows:

"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.

4. U.S. CONST. amend. XIV, § 1: "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. With whom Traynor, C. J., and Peters, Tobriner, and Burke, J. J., concur. There was an interesting political development to this decision. Four of the Justices involved in the *Mulkey* decision were up for re-election in the general election of 1966. In California

Amendment is a limitation on state, not private, action.[6] Moreover, it agreed that remote state involvement (recording title, etc.) was not an adequate basis for invoking the protection of the 14th Amendment, noting that a significant state involvement in the violation alleged was required.[7]

Justice Peek rejected the contention of appellants that "the Fourteenth Amendment . . . 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."[8] It had been urged that the state had an affirmative duty under the 14th Amendment to enact fair housing legislation.[9]

Justice Peek reviewed cases establishing the fact that the 14th Amendment state action 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."[10] Several cases were cited to substantiate this position.[11] A brief discussion of two of them will suffice to illustrate the majority's point. In *Marsh v. Alabama*[12] an entire town was owned by a private corporation. The corporation had the defendant arrested on a trespass charge when the defendant attempted to hand out religious literature on the streets of the

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Justices are not opposed by other candidates, instead the electorate decides whether to return an incumbent to the Bench for another twelve years. Chief Justice Traynor and Associate Justices Peek and Burke of the *Mulkey* majority were on the ballot as was Associate Justice McComb of the *Mulkey* minority.

According to an article entitled "Judges Face Voters' Axe" appearing in the *Pittsburgh Press*, Oct. 24, 1966, page 22, conservative factions disturbed by the *Mulkey* decision conducted an open campaign to influence all voters who voted "yes" on Proposition 14 in 1964 to vote against Traynor, Peek, and Burke in 1966.

As this casenote goes to press the official returns of the November election are not available to this writer. However, it has been determined that Traynor, Peek, Burke, and McComb were re-elected; this information was obtained from an article entitled "Voters Approve High Court Judges" in the Final Home Edition of the *San Francisco Chronicle*, Nov. 10, 1966, page 9, column 4. According to the article the vote percentage against approval of the Justices for new terms was the highest recorded in the last 32 years. In the article vote totals for the nine major counties in California (Los Angeles, San Francisco, Orange, Alameda, Contra Costa, Santa Clara, San Diego, Sacramento, and Fresno) were given: Traynor, 2,286,142 yes (indicating approval for new term), 1,336,000 no; Peek, 2,005,601 yes, 1,344,156 no; Burke, 2,206,514 yes, 1,313,160 no; McComb (who dissented in *Mulkey*) 2,701,094 yes, 726,369 no.

6. See Civil Rights Cases, 109 U.S. 3 (1883).

7. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

8. 413 P.2d at 830.

9. *Ibid.* For a summary of this argument see Clancy, J. G., and Nemerovski, H. N., *Some Legal Aspects of Proposition Fourteen*, 16 HASTINGS L.J. 3,7-8 (1964).

10. 413 P.2d at 831.

11. Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Marsh v. Alabama, 326 U.S. 501 (1946); the "white primary cases": Terry v. Adams, 345 U.S. 461 (1953), Smith v. Allwright, 321 U.S. 649 (1944), Nixon v. Condon, 286 U.S. 73 (1932), Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949), Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947).

12. 326 U.S. 501 (1946).

town. The Supreme Court found state action in violation of the 14th Amendment in the fact that the state had permitted a corporation to restrict the fundamental liberties of citizens in the town which the corporation, rather than the state, governed. In *Nixon v. Condon*[13] the Supreme Court found prohibited (by the 14th Amendment) state action where a state permitted political parties to prescribe their own membership qualifications.

The majority in *Mulkey* stated that state action is significantly involved "where the state can be charged with only *encouraging* discriminatory conduct. . ."[14] (Emphasis added.), citing several cases in support.[15] *Anderson v. Martin*,[16] cited by the majority, illustrates the approach in this area. There a state required that the race of every candidate appear on the ballot. While the voter was not forced by law to vote for a candidate of a certain race, the labeling *encouraged* such voting and was struck down for this reason.

The majority also found significant state action where a state *authorized* discrimination by private persons, citing several cases in support.[17] The majority recognized that *Turner v. City of Memphis*[18] seemed especially applicable to the case at bar. In *Turner* the Tennessee legislature had eliminated the common law cause of action for admission to hotels and other public places being refused. The elimination statute stated that managers of such places were permitted to refuse admission for any reason whatever. In the circumstances of that case the statute was considered relevant "only insofar as . . . [it] . . . expressed an affirmative state policy fostering segregation."[19] That court stated that: "our decisions have foreclosed any possible contention that such a statute . . . may stand consistently with the Fourteenth Amendment."[20]

After this review of "state action" as violative of the 14th Amendment,[21] Justice Peek proceeded to the case at bar and stated:

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

14. 413 P.2d at 832.

15. Bell v. Maryland, 378 U.S. 226, 334 (1964) (Justice Black dissenting); Robinson v. Florida, 378 U.S. 153, 156 (1964); Anderson v. Martin, 375 U.S. 399 (1964); Barrows v. Jackson, 346 U.S. 249, 254 (1953); Baldwin v. Morgan, 287 F.2d 750 (5th Cir. 1961).

16. 375 U.S. 399 (1964).

17. Turner v. City of Memphis, 369 U.S. 350, 353 (1962); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

18. 369 U.S. 350 (1962).

19. *Id.* at 353.

20. *Ibid.*

21. For a comprehensive review of the "state action" concept see: Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); and St. Antoine, *Color Blindness But Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993 (1961).

> We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible. 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.[22]

Justice Peek therefore concluded, after reviewing the severability argument and rejecting it, that article I, section 26, denied the plaintiffs and those similarly situated the equal protection of the laws as guaranteed by the 14th Amendment and was thus void.

Justice White and Justice McComb dissented. Justice White argued that since the Legislature could repeal its enactments the people by initiative measure must also be allowed to do so.[23] In this regard article IV, section 1, of the California Constitution is pertinent:

> The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

Neither Justice White nor Justice McComb believed that article I, section 26, violated the equal protection clause of the 14th Amendment. They both argued that the section "guaranteed to all persons, regardless of race, color or religion, equal rights in their property."[24] Practically speaking, however, article I, section 26, is of primary benefit to the white owners of "prime" property, bent on maintaining a separation of the races.

Justice White viewed the facts of the case at bar as an individual invasion of individual rights[25] and he could not understand how the state could be held responsible for such an invasion. Justice White was unimpressed

22. 413 P.2d at 834.

23. 413 P.2d at 839. But see Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. PA. L. REV. 473 (1962), at 483, n.20, where the writer discusses the possibility that a legislature, once it has enacted certain laws, might be constitutionally prohibited from ever repealing them.

24. 413 P.2d at 845.

25. Civil Rights Cases, 109 U.S. 3, 11 (1883).

by the cases cited by the majority in support of their reasoning. He distinguished many of the cases on the grounds of public ownership or public uses, or as the governmental delegation to private parties of functions "which were inherently governmental in character. . . ."[26] This inherently governmental function delegation distinction was contested by the majority which stated, "those cases are concerned not so much with the *nature* of the function involved as they are with *who* is responsible for conduct in performance of that function."[27]

The controversy cannot be settled merely by resorting to the semantics of "nature of the function" versus "who is responsible for conduct in performance of that function." An analysis of the nature of the function is required before it can be determined who is responsible for conduct in regard to that function; the two are inseparable. The fact remains that in most of the cases relied on by the majority the governmental involvement or abdication prohibited, *i.e.*, state action, was more readily apparent than in the sale and rental of private housing.

State action which *encourages* and state action which *authorizes* discrimination are vague concepts. Courts are more likely to utilize them in situations where traditional constitutional concepts fail to meet the challenges to newly developing areas of legislative concern. The field of fair housing legislation is one such developing area. As of August 19, 1966[28] seventeen states and thirty-one cities had fair housing laws of one kind or another.[29] With few exceptions these laws have been held to be constitutional by the state courts.[30] Since 1959 the California Legislature had been very active in the area.[31]

The *Mulkey* decision must be viewed in light of these circumstances. Proposition 14 did more than effectively repeal current fair housing laws; it prohibited the Legislature from passing any fair housing legislation in the future (barring another constitutional amendment). Thus Proposition 14 did not merely restore California to its pre-1959 position, as argued by

26. 413 P.2d at 843.

27. 413 P.2d at 832.

28. The *Mulkey* decision was handed down on May 10, 1966.

29. Time, Aug. 19, 1966, p. 20.

30. *Ibid.* For a leading case which upheld the constitutionality of a fair housing law see Massachusetts Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 182 N.E.2d 595 (1962).

31. The two major pieces of legislation were the 1959 Unruh Civil Rights Act (CAL. CIV. CODE, §§ 51-52), and the 1963 Rumford Fair Housing Act (CAL. HEALTH & SAF. CODE, §§ 35700-35744). These two acts are discussed in *Mulkey* at 828-829 of the majority opinion and at 836-837 of Associate Justice White's dissent. It is estimated that the Rumford Act banned race, creed, or color discrimination in the sale or rental of approximately 70 per cent of California's housing; see *Voters Approve High Court Judges, San Francisco Chronicle*, Nov. 10, 1966, p. 9, col. 4 (final home ed.).

Justice White in his dissent[32] when the Legislature was free to act or not to act in the fair housing area. In contrast to 1959, the Legislature, with Proposition 14 in effect, was prohibited from even considering the subject of fair housing laws. Justice White failed to notice this subtle but very significant effect of Proposition 14 and thus his argument that Proposition 14 is nothing more than a repeal loses its weight.

However, it is significant to note that no where in the majority opinion did Justice Peek specifically point out that Proposition 14 prohibited legislative activity in the fair housing area. Justice Peek did not base his holding of state encouragement on this, or any other, particular effect of Proposition 14. Justice Peek chose instead to hold that Proposition 14 was void because it encouraged discrimination "within the meaning of the cited decisions"[33] previously discussed in the opinion. Thus Justice Peek avoided the task of specifically illustrating how the principles announced in those "cited decisions" applied to Proposition 14. To this writer there is one obvious way to apply those principles to Proposition 14. Proposition 14 prohibited the Legislature from acting in the fair housing area. It could rationally be argued that this departure from the previous (prior to 1959) strict neutrality position was readily apprehended by the citizens of California, thereby significantly encouraging them to discriminate in the sale or rental of their private homes. By not relying on this specific argument Justice Peek forces those opposed to his decision to consider and evaluate all the "encouragement" ramifications of "cited decisions" in relation to Proposition 14. It will be difficult for the opposition to focus its attack on any particular aspect of the decision. However, the opposition may capitalize on the fact that Justice Peek does not make the specific argument outlined above by arguing that the majority lacks confidence in its position and is thus reluctant to explicitly commit itself.

Since the *Mulkey* decision involves a sensitive subject matter and is a significant development in the evolution of the "state action" concept it will be closely scrutinized on review. It will be interesting to note whether the lack of a specific application of the "cited decisions" to Proposition 14 in *Mulkey* adversely influences the final outcome.

John Ralph Kenrick

32. 413 P.2d at 839.
33. 413 P.2d at 834.