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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No. 483

NEIL REITMAN, et al.,
Petitioners,

vs.

LINCOLN W. MULKEY, et al.,
Respondents.

CLARENCE SNYDER,
Petitioner,

vs.

WILFRED J. PRENDERGAST, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Civil Liberties Union of Northern California respectfully moves for leave to file a brief as *amicus curiae* in this case. The consent of the attor-

neys for respondents has been obtained. The consent of the attorneys for petitioners was requested but refused.

Amicus is a non-profit organization which has participated in significant civil liberties causes for the thirty-three years of its existence. Counsel for *amicus* was counsel in the Supreme Court of California in two cases[1] also raising the issue of the validity of Proposition 14. Neither of the losing parties in those cases chose to carry them further. One of the two cases is still pending, the other having been settled before trial. *Amicus* believes that the constitutionality of Proposition 14 which is at issue in this litigation, poses a highly significant constitutional question as to which the Court should have a number of varied legal arguments.

An examination of the briefs filed in the Court below suggests that the arguments which we offer will not be presented by the respondents in these cases.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

MARSHALL W. KRAUSE,
Staff Counsel, American Civil Liberties Union
of Northern California,
Attorney for Amicus Curiae.

[1] *Thomas v. Goulis*, 64 Cal.2d 884, and *Grogan v. Meyer*, 64 Cal.2d 875.

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On Writ of Certiorari to the Supreme Court of California

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA AS AMICUS CURIAE

OPINION BELOW

The opinion of the California Supreme Court in *Mulkey v. Reitman* is reported at 64 C.2d 529, 50 Cal. Rptr. 881, 413 P.2d 825, and *Prendergast v. Snyder* is reported at 64 C.2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847.

SUMMARY OF ARGUMENT

The effect of Proposition 14 (which, if lawful, would add Section 26 to Article I of the Constitution of California) is to create a constitutional right to discriminate on the basis of race in the sale or rental of housing in California.

The establishment of such a right has the effect of encouraging race discrimination in the housing market. Unlike the mere repeal of unwanted legislation, it provides great assurance that in the future the practice of race discrimination will not be disturbed, either by legislative, executive, or judicial action on a statewide basis, or by governmental action on a municipal basis. Moreover, the establishment of a *constitutional right* of any kind inevitably carries the connotation that the State does not find the exercise of that right morally objectionable. This alters the moral climate in California with regard to race discrimination in housing, thus further encouraging the practice of such discrimination.

ARGUMENT

INTRODUCTION

The purpose of this brief is to suggest arguments in support of the judgment of the California Supreme Court. In our view the importance of the issues which this case presents makes it fruitless to seize upon, as petitioners have done, isolated language in the opinions of the Court below. While this tends toward depicting the judgments which peti-

tioners attack as radical departures from accepted doctrine, it also obscures analysis. As a result, the central theme of the California Supreme Court's opinion—that Proposition 14 encourages and assists acts of race discrimination—is virtually ignored and nearly all of petitioners' brief is devoted to other, irrelevant, matters. We propose to bring, in the pages that follow, the real issues in these cases into clearer focus.

Because petitioners' brief contains so many criticisms of theories advanced—or, rather, which petitioners assert have been advanced—in support of the judgment here under review, we believe it will be helpful to state what it is *not* necessary to contend to support the judgment below:

(1) We do not here urge obliteration of the distinction between state and private action. The Court reiterated last term that the Equal Protection Clause reaches only "state action" in *United States v. Guest,* 383 U.S. 745 (1966); this case presents no occasion whatever to question that principle.

(2) Nor do we urge that a state, having enacted "fair housing" legislation, is forever barred from repealing it. The California Supreme Court's opinion perhaps lends itself to interpretation as having adopted such a principle. We may agree with the petitioner that adoption of such a principle would constitute a radical extension of constitutional doctrine. But the considerable discussion devoted in petitioners' brief to this aspect of the case is an attack on a straw-man. The vice of Proposition 14 is that it

goes far beyond mere repeal of the existing fair housing legislation in California and enshrines the affirmative right to discriminate in the State's Constitution.

(3) We do not here contend that the State has an affirmative duty to prevent acts of private race discrimination in the housing market. Indeed, despite an assertion to the contrary in the petitioners' brief,[2] the California Supreme Court advanced no such notion, expressly stating its view that the "Fourteenth Amendment does not impose upon the State the duty to take positive action to prohibit a private [act of] discrimination." *Hill v. Miller,* 64 C.2d 757, 759, 51 Cal. Rptr. 689, 415 P.2d 33 (1966), decided together with the instant cases. This case does not, therefore, require consideration of whether the absence of *any* legislation in the area of housing presents problems of constitutional stature. Indeed, we assume that it does not.

(4) We do not argue that *Shelley v. Kraemer,* 334 U.S. 1 (1948), disposes of this case. This Court is doubtless aware of the scholarly discussion which *Shelley* has generated; although these questions are of considerable interest, they need not be resolved here. We do not understand the decision of the California Supreme Court to rest on *Shelley.*[3] In any

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[2]"By invalidating Section 26 the Court below has held that the failure of California to provide a remedy which it once provided . . . violates the equal protection clause." Brief for Petitioners, p. 28.

[3]Although the Court below in *Prendergast v. Snyder* seemingly approved the *Shelley* rationale adopted by the trial Court, its opinion elsewhere states, in reference to *Abstract Investment Co. v. Hutchison,* 204 Cal.App.2d 242, 22 Cal. Rptr, 309 (1962)

event, the judgment in these cases can be sustained without relying on *Shelley* in any way. There is, therefore, no occasion to consider whether the principle announced in *Shelley* applies to situations other than that where there is judicial enforcement of racial restrictions contrary to the wishes of a seller and buyer.

I. PROPOSITION 14 CREATES A CONSTITUTIONAL "RIGHT" TO DISCRIMINATE IN THE SALE OR RENTAL OF HOUSING AND THEREBY LENDS THE APPROVAL AND SANCTION OF THE STATE TO ACTS OF RACIAL DISCRIMINATION IN THE HOUSING MARKET.

A. Proposition 14 Creates a Constitutional "Right" to Discriminate in the Sale or Rental of Housing.

The addition of Article I, Section 26 to the Constitution of California would work radical changes in the fabric of California's legal and social structure as respects racial discrimination in the field of housing.[4] The *effect* of the Amendment[5] would be to

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(holding that *Shelley* bars judicial enforcement of a landlord's desire to evict a tenant for racial reasons): "[W]e are not required to rely upon that case in affirming the judgment herein." 64 C.2d at 879.

Moreover, the Court below refused to extend the *Abstract* case's broad reading of *Shelley* in a companion to the instant cases, *Hill v. Miller,* 64 C.2d 757, 51 Cal. Rptr. 689, 415 P.2d 33 (1966). In *Hill,* no state legislation was applicable. Plaintiff sued to restrain his landlord from evicting him on the sole ground of his race. Although it was alleged that the landlord intended to seek *judicial* relief through an unlawful detainer action, the Court below denied relief rejecting plaintiff's *Shelley-Abstract* argument.

[4]Prior to the passage of Proposition 14, opponents of fair housing legislation had been unsuccessful in stemming the tide. The Unruh Act (Calif. Civ. Code §§ 51-52), which bars discrimination by "business establishments", was enacted in 1959. It was thereafter held to apply to real estate brokers, *Lee v. O'Hara,* 57 C.2d 476, 20 Cal. Rptr. 617, 370 P.2d 321 (1962), to apartment

establish a *constitutional right* to discriminate on racial[6] grounds in the sale or rental of California residential property. This right is based on far more than the mere absence of any legislation forbidding such discrimination. Rather, the "right" of which we speak is derived from several distinctive features of Proposition 14:

(1) Without a further amendment of the California Constitution, the Legislature is disabled from enacting "fair housing" legislation of any kind or description. Presumably, since the entire field is withdrawn from the legislative domain, the Legislature is even barred from investigating the need for such legislation.

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buildings of 3 units or more, *Swann v. Burkett,* 209 Cal.App.2d 685, 26 Cal. Rptr. 286 (1962), and to commercial real estate developers, *Don Wilson Builders v. Superior Court,* 220 Cal.App.2d 77, 33 Cal. Rptr. 621 (1963). In addition, the Hawkins Act (Cal. Stat. 1959, ch. 1681, at 4074, formerly Calif. Health & Safety Code § 35700 et seq.), which the Rumford Act superseded, barred discrimination in certain "publicly assisted" multiple housing. The Rumford Act (Calif. Health & Safety Code § 35700 et seq.) consolidated the coverage of Unruh and Hawkins, generally speaking, and added a procedure for administrative enforcement modeled after California's earlier Fair Employment Practices Act (Calif. Labor Code § 1410 et seq.).

[5]For the present, we need not inquire as to the "purpose" of Proposition 14. Our immediate concern is with its effect. Petitioners, who raise Article I, Section 26 as a defense to charges that they violated California's anti-discrimination laws, appear to be in agreement with our view as to the Amendment's effect.

[6]The language of the Amendment is not, of course, confined to race; it purports to protect the "right" of the property owner to "decline to sell, lease or rent . . . to such person or persons as he, in his absolute discretion, chooses." Petitioners do not dispute that, as a matter of California law, Proposition 14 at the least operates in the field of race discrimination to nullify existing "fair housing" legislation and to forbid similar future legislation. See 64 C.2d at 533-535, where the California Supreme Court so found.

(2) Municipal and other local governments are similarly disabled.[7]

(3) The executive branch of California's government is precluded from taking any action in this field such as President Kennedy took in barring discrimination in federally assisted housing (Executive Order, No. 11063, 27 Fed. Reg. 11527 (1962)).

(4) California's judiciary is likewise barred from developing common-law principles forbidding race discrimination in housing as it did with regard to discrimination by labor unions, see *James v. Marinship Corp.*, 25 C.2d 721, 155 P.2d 329 (1944); *Williams v. Boilermakers,* 27 C.2d 586, 165 P.2d 903 (1946), and *de facto* segregation in the public schools, see *Jackson v. Pasadena City School District,* 59 C.2d 876, 881-882, 31 Cal. Rptr. 606, 382 P.2d 878 (1963) (state policy requires school boards to take steps to alleviate sub-

[7]Article I, Section 26, prohibits the State of California and "any subdivision . . . thereof" from adopting legislation forbidding discrimination in the sale or rental of housing. Thus the State of California—through its Constitution—provides assistance to those who would practice discrimination wherever a local governmental body would otherwise have enacted fair housing legislation and have been supported by a large majority of the voters.

Many communities in California may well wish to adopt fair housing legislation notwithstanding the opposition to such legislation in other parts of the State. By adopting Article I, Section 26, the State facilitates race discrimination by owners of residential property within such communities. It is, in other words, one thing for the State to choose not to adopt fair housing legislation on a statewide basis; it is quite another to prevent each local government from passing such legislation. Although we can find no cases squarely on point, this in itself seems to be "state action" on the side of race discrimination.

stantial racial imbalance even where no *de jure* segregation is shown).[8]

Not long ago, the California Supreme Court was able to declare with respect to discrimination in housing:

> "Discrimination on the basis of race or color is contrary to the public policy of the United States *and of this State.*" (*Burks v. Poppy Construction Co.,* 57 Cal.2d 463, 471 (1962) (Emphasis added.)

As respects California's policy toward housing, that statement simply would no longer be true if Proposition 14 becomes law. It would create a new policy permitting property owners to discriminate against their fellows on racial grounds, and disabling government at all levels within the State from dealing with such discrimination.

B. The State May Not Enshrine the "Right" to Discriminate in Its Constitution Where This Serves to Encourage Citizens to Exercise That "Right".

With the effect of Proposition 14 in mind, we are brought to the ultimate question of whether, if the constitutional "right" of property owners to engage in racial discrimination is created, California will

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[8]For example, without the restraint of Article I, Section 26 it might be determined that, whatever the reach of *Shelley v. Kraemer,* the Courts of California will not lend judicial assistance to a property owner seeking to dispossess a tenant on the ground of race. *Cf. Abstract Investment Co. v. Hutchison, supra,* note 2, where the Court, while reading *Shelley* as barring an unlawful detainer action motivated by racial prejudice, also viewed the landlord's motives as a proper basis for denying him relief as a matter of equity. See 204 Cal.App.2d at 247-249, 250-251.

have departed from that position of neutrality the Equal Protection Clause commands it to maintain. We believe that the Amendment has this effect. Creation of a constitutional "right to discriminate" in the field of housing will inevitably encourage and promote exercise of that "right."

1. The Amendment Guarantees That the Practice of Race Discrimination in Housing Will Not Be Abolished by Governmental Action, and the Development and Use of Property Will Proceed in Reliance Upon This Promise.

Proposition 14 assures the citizens of California that race discrimination may be practiced freely not only today but in the years to come. While no one can state with certainty that the California Constitution will *never* be amended, the economic and political difficulties in securing such an amendment render that action unlikely. Thus, so long as Article I, Section 26 remains the law of California, the State government and local governments will be powerless to deal with the serious problem of discrimination in housing. Citizens will order their conduct in reliance upon this state of affairs. Patterns of housing will develop with the expectation that the practice of discrimination may continue unrestricted in the foreseeable future. For example, citizens wishing to reside in an "all-white" community may forego the conveniences of an urban address and purchase a home in a segregated suburb in the expectation that, without the pressure of fair housing legislation, the segregated character will be preserved. The expectations which will develop in such a community will

serve to create a formidable barrier to any member of a minority group seeking to acquire property in that community. Conversely, the barriers surrounding racial ghettos in the cities of California will be intensified. Private capital—necessary to upgrade the quality of housing and achieve integration—will not be attracted to the ghettos. In short, the complex fabric of commercial and residential life within California will be affected by the creation of an environment in which patterns of discrimination in housing may develop and flourish.

2. By Enshrining the "Right to Discriminate" in California's Constitution, the State Encourages the Exercise of That Right by Altering of the Moral Climate as Respects Discrimination.

Discrimination is encouraged in another, equally significant way. Article I, Section 26 puts the State in the position of condoning race discrimination; it repudiates, in the field of housing at least,[9] California's historic policy opposing race discrimination in the private as well as public sector, including the housing market. *Burks v. Poppy Construction Co.,*

[9]The accuracy of our description of Proposition 14 as establishing an affirmative State policy sympathetic to race discrimination in housing is in no way diminished by the existence of various statutes forbidding discrimination in other contexts, summarized by Petitioners in an appendix to their brief. (App., pp. 12-14). Except for a few statutes which either restate what the Constitution plainly requires, such as those forbidding the state to discriminate with regard to publicly held property, these statutes do not pertain to the area of real estate and housing. While there is undoubtedly some moral inconsistency in accepting Negroes in a commercial setting (e.g., in employment, see Calif. Labor Code §§ 1410-32) but not in certain residential neighborhoods, that is precisely the posture in which the State finds itself.

supra. In its place the Amendment substitutes a constitutional right to discriminate.

Proposition 14 purports to add a new section to Article I of the Constitution of the State of California. Article I carries the general caption "Declaration of Rights". Safeguarded against legislative interference by Article I are the rights of religious liberty and conscience (Article I, Section 4); the privilege of the Writ of Habeas Corpus (Section 5); the right to bail and the prohibition against cruel and unusual punishment (Section 6); the right to trial by jury (Section 7); the right to counsel (Section 8); freedom of speech and press (Section 9); the right of assembly and to petition for redress of grievances (Section 10); the right to a speedy and public trial (Section 13); the prohibition against double jeopardy (*id.*); the prohibitions against bills of attainder and ex post facto laws (Section 16); and the prohibition against unreasonable searches and seizures (Section 19). Proposition 14 adds a new "right"—the "right" to practice race discrimination.

We submit that the State may not add the right to discriminate to its Bill of Rights and then claim "neutrality" on the subject. Constitutional rights are respected and revered in this country as proof of its highest principles. Article I, Section 26 establishes an *affirmative public policy* in California facilitating discrimination in housing; it would equate the "right to discriminate" with the great rights already enshrined in California's Declaration of Rights. Housing discrimination, no matter how harmful to the

community at large and to the minorities within it, cannot be reproached by legislative, executive, or judicial action. This striking declaration of public policy will inevitably encourage many Californians to exercise their new-found "right". Race discrimination no longer need be practiced in shame in California; it now bears the imprimatur of State approval.

The effect of this elevation of race discrimination to a constitutional right is not diminished by the absence of any reference to race in the Amendment. For there is no question that—as the California Supreme Court found as a fact—Proposition 14 was passed for the principal (if not the sole) purpose of protecting the property owner's privilege of discriminating on grounds of race. Whatever other ends may be attributed to Proposition 14 (and we can think of none which are not fictitious), its core purpose had to do with race discrimination, and it was and is so understood by the public.[10]

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[10]The California Supreme Court found as a fact that Proposition 14 was enacted for the purpose of protecting the privilege of the property owner to discriminate on the basis of race, religion and national origin in the sale or rental of his property:

> "A state enactment cannot be construed without concern for its immediate objective [citations], and for its ultimate effect [citations]. To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. . . ."
>
> [The court then reviewed the historical development of legislation in California respecting race discrimination.]
>
> "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

The elevation of the "right" to discriminate to constitutional status is particularly significant in California where respect for the exercise of constitutionally protected rights is cultivated by the State. The State Board of Education, reflecting Mr. Justice

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circumscribe this right. In short, Proposition 14 generally nullifies both the Rumford and Unruh Acts as they apply to the housing market." (64 C.2d, at 533-535).

The California Supreme Court elsewhere stated, in a similar vein:

> "[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." *(Mulkey v. Reitman,* 64 C.2d, at 544.)

The purpose of Proposition 14—to facilitate race discrimination—was expressly urged upon the voters of California. Indeed, the official ballot argument's guarded language makes clear the purpose to restore the privilege of race discrimination in the disposition or management of real property:

> "Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish without interference by State or local government.
>
> "Most owners of property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.
>
> . . . . . .
>
> *"Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions."* (Quoted in Appendix to Brief for Petitioners, pp. 3-4, emphasis added).

This Court cannot be hampered by clever draftsmanship in exercising its role as final arbiter of constitutional disputes. Time and again this Court has found in seemingly neutral legislation a concealed discriminatory condition or purpose. See, e.g., *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Lane v. Wilson,* 307 U.S. 268 (1939); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960).

We suggest that the popular understanding of Proposition 14's purpose and effect was and is precisely what the Court below found it to be. "Its . . . effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?" *Child Labor Tax Case,* 259 U.S. 20, 37 (1922).

Brennan's concern with "the need to place greater emphasis upon individual rights and liberties in the American social studies curriculum" (Brennan, "Breathe Life Into Constitutional Guarantees of Liberty," *Journal of the California Teachers Association,* January, 1965, p. 4) has resolved that:

> "No student should leave our schools without a lively knowledge of the American Constitution, for here are found the main principles of our heritage. Our democracy can be kept strong only by the dedication of every new generation to the discipline of liberty. In knowledge of the Bill of Rights and in loyalty to its propositions rests our faith in the future.
>
> * * * * *
>
> "We believe that teaching in this field no matter how controversial the issue, should be conducted within the framework of free discussion. Not only the history of the Bill of Rights should be taught, but contemporary issues it raises, such as the debate over separation of church and state embodied in the First Amendment, and the privilege against self-incrimination as provided in the Fifth Amendment, should be discussed. Now is the time to help our young people to become aware of the risks, the privileges and the personal demands of freedom." (Resolution of the California Board of Education, October 10, 1963).

The legislature requires that this program of instruction not be confined to the United States Constitution, but that it include the study of the State Constitution as well. (Calif. Education Code § 7901).

Calling on the resources of private groups and educators, California's educational system is a leader in the national movement to inculcate younger citizens in the fundamental principles of constitutionalism.[11] If Proposition 14 became a section of the California Constitution, the "right to discriminate" will become a required subject of instruction in California; students throughout the State will come to view race discrimination as an essential component of a free society.

A striking parallel to the instant case is found in *Anderson v. Martin,* 375 U.S. 399 (1964). There a Louisiana law required designation of the race of all candidates for public office on the ballot. Although the law did not *compel* discrimination, this Court struck it down, declaring that it was *likely* to encourage the voters to cast their ballots on racial grounds. The Court, drawing on its own understanding and experience, did not require statistical data to conclude that the designation of the candidates' race on the ballot would foster discrimination in the voting booth. The kind of encouragement found in *Anderson* is similarly present here. And the disfavor in which the constitution holds racial discrimination, see

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[11]See, e.g., McKenney, *Teaching the Bill of Rights in California, Saturday Review,* March 19, 1966:

> "California's experiment, however, has moved further than most toward effective teaching in this area. It is unique because it is not being developed in one school district or one university or college, but is the result of the cooperative effort of members of the State Board of Education, university and college educators, classroom teachers, lawyers, and community leaders . . . . [I]f the movement spreads, it will be good for the whole country."

Harper v. Virginia, 383 U.S. 663, 667 (1966), again commands judicial sensitivity to constitutional encouragement of discrimination.

Anderson also provides an opportunity to correct petitioners' misconception about the determination of the Court below that Proposition 14 unconstitutionally authorizes and encourages race discrimination. Petitioners correctly point out that there has been no finding that Proposition 14 *caused* the discriminatory conduct in the case at bar.[12] This, of course, is related to the point raised by Mr. Justice Harlan in *Peterson v. Greenville,* 373 U.S. 244, 252-253 (1963) (separate opinion) and in his dissenting opinion in *Evans v. Newton,* 382 U.S. 296, 316, n. 1 (1966). But this case differs in a critical respect from those cases.

In *Peterson v. Greenville,* the Court reversed the trespass conviction of 10 negroes who had refused to leave a segregated lunch counter after having been denied service on the ground of their race. The basis of reversal was the existence of a local ordinance requiring segregated service in such establishments. Mr. Justice Harlan's difficulty with the Court's opinion lay in the majority's failure to demonstrate a *causal relationship* between the ordinance and the discriminatory conduct of the restaurant owner.

Similarly, in *Evans v. Newton,* 382 U.S. 296 (1966), Mr. Justice Harlan rejected Mr. Justice White's approach because there was no showing of

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[12]Such a finding could not have been made in *Mulkey* as the discrimination there occurred prior to the passage of Proposition 14.

causation. There a Georgia statute was seen by Mr. Justice White as facilitating establishing discriminatory provisions in the dedication of a park in trust for the public. The issue was whether a park, so dedicated, could be operated on a segregated basis. Mr. Justice Harlan, though not contending that the state statute was valid, was unable to conclude that its existence infected the dedication of the trust by causing the insertion of the discriminatory provisions.

But these difficulties are simply not present in the instant case. The challenge here is directed toward the *existence* of a state law which authorizes and encourages race discrimination.[13] We do not suggest that, in this respect, the discrimination of petitioners is itself "state action" any more than this Court held in *Anderson* that racially motivated voting is "state action." Indeed, Justice Clark's opinion very carefully disclaims any such holding:

> "At the outset it is well we point out what this case does not involve. It has nothing whatever to do with the right of the citizen to cast his vote for whomever he chooses and for whatever reason he pleases. . . . It has only to do with the right of the State to require or *encourage* its

[13]Respondents, who seek relief under a California statute forbidding discrimination (Unruh Act, Calif. Civ. Code §§ 51-52), therefore have standing to attack the constitutionality of Proposition 14 without providing that it "caused" the discrimination of which they complain. The unconstitutionality of Proposition 14 arises because it will inevitably encourage some owners of property to discriminate. A judgment holding Article I, Section 26 unconstitutional restores the Unruh Act which prohibits discrimination by the owner of commercial real estate regardless of any state participation in the transaction.

> voters to discriminate on the grounds of race." (375 U.S. at 402.)

We do not, therefore, focus on private conduct. We do not contend that Proposition 14 "caused" the property owners who are petitioners here to discriminate against respondents. We contend only that Proposition 14 must cause acts of racial discrimination in California which would not take place had the state merely repealed all fair housing legislation. To strike it down would, so far as the Constitution is concerned, permit private property owners to discriminate, but would restore the state to a neutral position by ending state encouragement of such discrimination.

The constitutional principle which we urge follows from the often expressed view that a state may not, by statute, authorize acts of race discrimination. Years ago this Court held that a state may not enact a statute which authorizes private acts of discrimination. *McCabe v. A.T.&S.F. Ry. Co.,* 235 U.S. 151 (1914). In that case this Court concluded that the denial of equal railroad facilities to Negroes by a railroad was unconstitutional state action where authorized by a state statute.

This principle was reiterated by several Justices in *Burton v. Wilmington Park Authority,* 365 U.S. 715 (1961). Mr. Justice Stewart, concurring, read the opinion of the lower Court to have construed state law as:

> "authorizing discriminatory classification based exclusively on color. Such a law seems to me

> clearly violative of the Fourteenth Amendment." (*Id.*, at 727).

While unable to read the statute in the same manner, Mr. Justice Frankfurter, dissenting, stated:

> "If my brother [Stewart] is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is undoubtedly a denial by a State of the equal protection of the laws. . . ." (*Id.*, at 727.)

Mr. Justice Harlan, joined in dissent by Mr. Justice Whittaker, also expressed the same view. See *Id.*, at 728.

Mr. Justice White's concurring opinion in *Evans v. Newton,* 382 U.S. 296, 302 (1966) follows similar lines. There Justice White reviewed the legal background against which Senator Bacon drew his will containing provisions for the establishment, in trust, of a racially segregated park. State legislation, adopted six years before execution of the Senator's will, expressly authorized the dedication of parks to be operated on a segregated basis. Because the statute was permissive only, Justice White concluded that "the State cannot be said to have coerced private discrimination" *Id.*, at 306. But, Justice White added, the statute clarified certain legal doubts smoothing the way for the dedication in trust of a segregated park, and thereby implicated the state in the discrim-

ination reflected in the trust created pursuant to this statute.[14]

Concededly, Justice White's opinion placed some emphasis on an aspect of the Georgia law for which there is no parallel here. Georgia had removed certain legal obstacles to creating *racial* limitations in the dedication of public parks while leaving unaffected the barriers to creating other kinds of limitations. Thus, it might be argued that Georgia singled out race discrimination for special treatment.

Any distinction between *Evans* and the instant cases in this respect is, we submit, superficial. Despite its neutral language, Proposition 14 is in fact directed toward *racial* discrimination and no other.[15] The vice of the Georgia statute with which Justice White dealt in *Evans* was that it tended to encourage race discrimination by those dedicating parks to the public. The singling out of *racial* restrictions by the Georgia legislature made certain the State's approval

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[14]The opinion of the Court expressly states that the majority did not reach the questions posed by Mr. Justice White. 382 U.S. at 300, n. 3.

Mr. Justice Black dissented on the ground that the issue of the trust's validity was not before the Court. 382 U.S. at 312-315.

Mr. Justice Harlan, joined by Mr. Justice Stewart in dissent, rejected the approach of Justice White because, *inter alia*, there was no showing in the record that Senator Bacon would have acted otherwise but for the statute. 382 U.S. at 316, n. 1. We have discussed this causation problem above and shown that that difficulty is not present here. The constitutional challenge in these cases is directed against the existence of a State enactment authorizing and encouraging race discrimination. Thus these cases are in the posture as *Evans v. Newton* would have been had it arisen as a suit for a declaratory judgment invalidating the Georgia legislation authorizing dedication of segregated parks.

[15]See note 10, supra.

of such restrictions; the greater sophistication of Proposition 14's draftsmen which resulted in its superficially "neutral" language is matched by the considerable sophistication of the public. The California citizenry understood the meaning of Proposition 14 which, no less than the Georgia statute in *Evans,* would place the State on the side of race discrimination.

CONCLUSION

Proposition 14 assists and encourages race discrimination in several respects. It has disabled the local governmental bodies within the State from dealing with the problem of race discrimination in the residential housing market. It precludes the legislature from dealing with (and, presumably, even investigating) the problem of racial barriers to housing. It forbids executive action in this field. And it bars California courts from developing common law principles respecting the right to obtain housing irrespective of race. The effect of these radical innovations in the law of California is to establish a climate in which the perpetuation and development of racial barriers can prosper. Public and private affairs—the location of schools and parks, the acquisition of property, the planning and development of real estate developments—all can proceed with greater assurance that segregated housing patterns can be maintained. All aspects of state and local government are powerless to act to alter these conditions. Finally, it en-

shrines the "right to discriminate" in California's Constitution, thereby lending the State's stamp of approval to the exercise of this newly created "right".

For these reasons, we urge that the judgments of the California Supreme Court in both *Mulkey v. Reitman* and *Prendergast v. Snyder* be affirmed.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,

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