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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,

Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of California in *Mulkey, et al. v. Reitman, et al.* and *Prendergast, et al. v. Snyder,* which became final in the Court below upon denial of rehearings on June 8, 1966.

Citations to Opinions Below.

The majority opinion of the Supreme Court of California in *Mulkey, et al. v. Reitman, et al.* (printed at page 35 in the separate Appendix filed concurrently

[1]Petitioners are the defendants Neil Reitman, the owner of the apartment dwelling involved in the *Mulkey* case and his agents Mr. and Mrs. Herman Straesser, and Peggy Watson, and the defendant Clarence Snyder in the *Prendergast* case. The judgments below involved substantially the same federal constitutional issues and accordingly we submit a single petition.

herewith, and abbreviated herein as App.), is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 881. Two dissenting opinions [R. Mulk., III, IV; App. 57 and 78] are reported in 64 Cal. 2d —; 50 Cal. Rptr. at 892 and 901.

The memorandum opinion of the Superior Court of Los Angeles County in *Prendergast v. Snyder* is unreported (App. 79). The majority opinion of the Supreme Court of California (App. 87) is reported in (1966), 64 Cal. 2d —, 50 Cal. Rptr. 903. Two justices dissented [R. Prend., III; App. 90, 64 Cal. 2d —, 50 Cal. Rptr. at 905].

Jurisdiction.

The judgments below were entered on May 10, 1966 [R. Mulk., III; R. Prend., II]. A timely petition for rehearing was denied on June 8, 1966 [R. Mulk., VII; R. Prend., V]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) to review judgments declaring a state constitutional provision invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[2]

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of Article I of the California Constitution, adopted as an initiative measure (Proposition 14) at the general election on November 3, 1964, by a popular vote of 4,526,460 to 2,395,747. The full text of that measure, together with the official ballot arguments, are submitted herewith (App.

[2]Referred to hereinafter, for brevity, as the equal protection clause.

1) as are the pertinent provisions establishing the initiative powers contained in Article IV, Section 1 of the California Constitution (App. 9).

The operative portion of Section 26 of Article I provides:

> "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."

The balance of the measure defines "person" so as to exclude the State and its subdivisions, defines "real property" as residential property, excludes public accommodations, and sets forth a severability clause (App. 1-2).

Statutes involved are (i) California Civil Code, Sections 51 and 52 (App. 9) as amended in 1959, which will be referred to herein as by the Court below as the "Unruh Act" and (ii) California Health and Safety Code, Sections 35,700 *et seq.* adopted in 1963 (material portions printed at App. 11), which will be referred to herein as by the Court below as the "Rumford Act".

Questions Presented.

1. Does the adoption of a state constitutional amendment providing that the state shall not deny the right of an owner of private residential property to decline to sell or rent his property to such person as he chooses, sufficiently involve the state in the private conduct of an individual who refuses to lease his property on grounds of race so as to violate the equal protection clause?

2. Does the equal protection clause itself create an affirmative obligation upon a state to prohibit or provide a remedy against, or preclude a state from repealing statutory remedies against, racial discrimination in the sale or rental of privately-owned residential property.?

3. Does the equal protection clause itself require a state to deny judicial recognition of a landlord's right to possession of his property solely on the ground that he acquired or exercised such right because of the race of his tenant?

4. Does a state court deprive a landlord of his property without due process of law, or deny him the equal protection of the laws, by refusing, upon the basis of the equal protection clause itself, to recognize or enforce a right to possession available to all landlords, solely on the ground that he acquired or exercised his right to possession because of the race of his tenant?

5. Does the judiciary, state or federal, have the power to invalidate under the equal protection clause a popularly enacted initiative amendment to a state constitution which establishes a policy of nonregulation of private conduct which the state may, but is not required, to regulate?

Statement of the Cases.

Both judgments sought to be reviewed are based squarely on the proposition that Section 26 of Article I of the California Constitution violates the Fourteenth Amendment to the Federal Constitution[3] [R. Mulk., II-

[3]Thus the California Court said: "Our resolution of the question of constitutionality [of Section 26, Article I] is confined solely to federal constitutional considerations." (64 A.C. at p. 561, 50 Cal. Rptr. at p. 884, App. 38-39); and later: "We are

5; R. Prend., II-4]. The judgment in *Pendergast* was based on the additional ground that the Court was barred by the Fourteenth Amendment from giving any relief to a landlord who exercised his right to terminate an oral tenancy on the grounds his tenant was a Negro [R. Prend., I-33, II-4].

There is no factual dispute. In each case judgment was rendered for a Negro plaintiff in actions against a white landlord who had refused on grounds of the plaintiff's race to rent, or to continue to rent, privately-owned residential property.[4] The material proceedings in each case were:

1. Mulkey v. Reitman.

This was an action for damages and injunctive relief commenced in 1963 under the provisions of the Unruh Act against the owner of an apartment building for refusal to rent an apartment to plaintiffs solely because they were Negroes [R. Mulk., II-1-3]. Following the subsequent adoption of Section 26 of Article I of the California Constitution, the trial court dismissed the action on defendants' motion, solely upon the ground that the latter provision rendered the statutes "upon

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now confronted with those questions", *i.e.*, " 'grave questions whether the . . . amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution.' " (64 A.C. at p. 563, 50 Cal. Rptr. at p. 885, App. 41). Further: "Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application." (64 A.C. at p. 573, 50 Cal. Rptr. at p. 892, App. 57).

[4]In a related decision, *Hill v. Miller,* 64 Cal. 2d —, 51 Cal. Rptr. 689, App. 91, the Court below rendered judgment for the landlord of a single family residence. As will appear, this decision is essential to an understanding of the precise basis of decision of the Court below in the cases here sought to be reviewed.

which this action is based null and void." [R. Mulk., II-3]. Plaintiffs unsuccessfully opposed the motion solely on the ground that Section 26, Article I, was unconstitutional under the state and federal Constitutions. The Supreme Court of California, with two justices dissenting, reversed, placing its decision entirely upon the ground that Section 26, Article I, contravened the equal protection clause (App. 35).

2. Prendergast v. Snyder.

This was an appeal by petitioner Snyder from an adverse judgment on his cross-complaint for declaratory relief against respondents Prendergast, husband and wife respectively a Negro and a Caucasian [R. Prend., II-1]. Mrs. Prendergast had rented an apartment from defendant in his seven unit dwelling on an oral month-to-month tenancy. Later Mr. Prendergast moved into the apartment, and in December, 1964 (following the adoption of Section 26, Article I) petitioner gave his tenants a 30-day written notice of termination of the tenancy [R. Prend., II-1, 2]. There is no dispute that this notice complied fully with the nondiscriminatory laws of California relating to tenancies at will.

Prior to the expiration of the tenancy plaintiffs sought an injunction against their eviction, relying upon the Unruh Act and the Fourteenth Amendment. Plaintiffs urged the statute was in full force notwithstanding the adoption of Section 26, Article I, because that provision was invalid under the Fourteenth Amendment [R. Prend., II 34, 35].

By cross-complaint, petitioner sought a declaration that the tenancy had been terminated and that he was entitled to possession [R. Prend., I-21]. Petitioner as-

serted his rights (1) to select the persons with whom he would associate both in the continuing relationship of landlord and tenant and in the relationship of neighbors under the same roof, (2) to acquire, use, enjoy and dispose of his property in any manner he might choose which was not prohibited by statute, ordinance or other legislation, (3) to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion of the person or persons involved, and (4) to have a court of law recognize and enforce the termination of plaintiffs' tenancy [R. Prend., I-20, 21, II-1, 2].

The trial court found it unnecessary to determine whether Section 26, Article I, was valid under the Fourteenth Amendment [R. Prend., I-34]. Nevertheless, it held that the Fourteenth Amendment barred a state court from granting petitioner any judicial relief, relying upon *Shelley v. Kraemer,* 334 U.S. 1. With two justices dissenting, the Supreme Court of California affirmed upon the ground that Section 26, Article I, violated the Fourteenth Amendment as well as upon the grounds relied upon by the trial court. [R. Prend., II-4, 64 A.C. at p. 593, 50 Cal. Rptr. at p. 905, App. 90].

In the related case of *Hill v. Miller* (App. 91) the Court below affirmed[5] the trial court's judgment for the landlord on demurrer in an action by a Negro tenant to restrain eviction. The Court gave two reasons for reaching a decision in *Hill* contrary to that in *Prendergast:* (1) The single-family residence involved in *Hill,* unlike the property involved in *Prendergast,*

[5]64 Cal. 2d —, 51 Cal. Rptr 689, after granting a rehearing of its initial decision in which it had reversed the judgment of the trial court, 64 A.C. 598, 50 Cal. Rptr. 908.

had not been covered by the regulatory legislation of 1959 and 1963, and (2) the property owner in *Hill* sought no affirmative relief as had his counterpart in *Prendergast* (App. 94).

Reasons for Granting the Writ.

Taken together, these three decisions of a divided Court below constitute an unprecedented interpretation of the equal protection clause: Although a state is not required by that Clause to take affirmative action to prohibit racial discrimination in private housing, once such statutory prohibitions are adopted, the federal constitution forbids their modification or repeal [R. Mulk., II-19-20].

Moreover, the Court below holds that the Fourteenth Amendment prohibits a state court from recognizing or enforcing the personal, contract or property rights of a private citizen if his motives in acquiring or exercising those rights are those constitutionally forbidden to the state [R. Mulk., II-12-13; Prend., II-4; App. 90]. The stultification of personal liberty consequent upon such a doctrine is manifest: Once challenged in court, all conduct of private persons which the state could constitutionally regulate is to be measured by the stringent standards applied to governmental conduct. The result is to abandon the distinction between private and "state action"; to impose total regulation of private conduct by federal constitutional mandate even if the supreme legislature, the People, deliberately determine non-regulation to be in the public interest.

It is imperative that these holdings be reviewed by this Court for the following reasons:

1. **The Decisions Below Constitute an Unprecedented Incursion Into the Legislative Prerogative in the Name of the Equal Protection Clause and Raise Questions of Nationwide Importance.**

The decisions below fail to recognize that a legislative choice not to regulate certain conduct is as valid as a choice to regulate.[6] As a result, they pose questions of vital concern not only to the millions of Californians who exercised their democratic prerogative of voting in favor of the questioned state constitutional provision, but also to a whole nation troubled by the current tendency of many to contest their views in the streets rather than in the legislatures or at the ballot box:

Are the states or municipalities already having fair housing regulations forbidden by the Fourteenth Amendment from repealing or modifying them?

Must states considering discretionary civil rights legislation henceforth reckon with the prospect that such legislation, once enacted, is somehow constitutionally immune to modification or repeal in whole or in part?[7]

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[6]See *District of Columbia v. John R. Thompson Co. Inc.*, 346 U.S. 100, 114 where this Court said: "The repeal of laws is as much a legislative function as their enactment;" or to the main dissenting opinion (Mr. Justices Holmes, Brandeis, Pitney and Clark) in *Truax v. Corrigan*, 257 U.S. 312, 348, 349: ". . . just as the states have a broad discretion about establishing police regulations, so they have a discretion, equally broad, about modifying and relaxing them. * * *"

> "* * * And, just as one state might establish such protection by statute, so another state may, by statute, disestablish the protection, even as states have differed in their judicial determination of the general law upon the subject. * * *"

[7]Fifteen states have enacted legislative prohibitions against racial discrimination in certain types of private residential housing.

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May not many legislators in the 41 states having no fair housing statutes refuse to vote for such already controversial legislation out of the fear that it can never be repealed or modified? Must our highly successful system of legislative trial and error in our several states be abandoned?

Must citizens throughout the nation abandon recourse to legislatures, courts and even the ballot box in seeking modification or repeal of unwanted regulation of wholly private areas of conduct?

Must property owners, business men, and financial institutions henceforth take into account in their dealings with members of minority groups that the generally available remedies to effect collection or repossession may be long delayed or wholly unavailable if the minority-group purchaser, lessee, borrower, or investor, though indebted or wrongfully holding property, alleges he is being sued because he is a Negro, Jew, Communist, Presbyterian, Republican or vocal proponent or opponent of the war in Viet Nam?

Does the Fourteenth Amendment to the federal Constitution grant more extensive rights to Negroes and impose more severe obligations on property owners in

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Three other states have such laws applicable only to publicly assisted housing (App. 15). The Congress is considering Federal legislation (H.R. 14765, 89th Congress, 1st Sess. §401 (1966) and the National Conference on Uniform State Laws is considering the adoption of a uniform act in this field. (L.A. Times, Aug. 5, 1966, §1, p. 11.) But thirty-one states have no such regulations. (App. 15). Interest in the decisions below is indicated by the fact that more than 92 civic, religious, labor, and civil rights organizations appeared as *amici curiae* before the Court below through no less than 74 lawyers. The constitutional issues raised here must be considered by every jurisdiction whether or not it has already enacted "fair housing" laws.

California than in other states? Can the temporary incumbents of a local legislature vary the substance of Fourteenth Amendment rights?

We submit that the decisions below, if allowed to stand, would compel an affirmative answer to each of these questions. The unintended effect would be to inhibit rather than advance the cause of civil rights as well as to disturb the basic distribution of political responsibility and power within the Nation.

Emanating from a widely-respected Court, these decisions are likely to be relied upon throughout the Nation. If so, they may be used to defeat proposed civil rights legislation or to bar any modification or repeal of such laws, however unpopular or ineffective those laws may be.[8]

For all of these practical reasons, we submit that answers from this Court to the important questions here raised are desperately needed by the entire Nation.[9]

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[8]The wisdom and necessity of legislative coercion in the field of discrimination by the owners of private residential property as applied in particular places and times is a question on which there "are rational arguments on either side and, quite clearly, there is room for difference of opinion here among reasonable men who share a common opposition to racial discrimination." Rice, *Bias in Housing: Toward A New Approach,* 6 Santa Clara Lawyer 162, 167-168 (Spring, 1966).

[9]An authoritative resolution of the questions raised by this petition is at least as imperative as the constitutional problem upon which six Justices of this Court expressed their views in *Bell v. Maryland,* 378 U.S. 226, 242, 286, 318. There the problem was whether the Fourteenth Amendment created a self-executing right of access by minority groups to a restaurant open to the public, over the racial objections of its private owner. Here one of the questions is whether there is such a constitutional right of access to privately owned residential property not devoted to public use.

2. The Decisions Below Establish a Concept of "State Action" Under the Fourteenth Amendment Which Is Wholly Unsupported by and in Substantial Conflict With Numerous Decisions of This Court.

The Court below held that California was responsible under the Fourteenth Amendment for the purely private racially discriminatory conduct of Mr. Reitman and Mr. Snyder. Such responsibility was fixed solely because in adopting Section 26 the people of California had "nullified" previously enacted legislation prohibiting such conduct and "forestalled" such legislation in the future except by further vote of the people.[10] (App. 40-41).

Solely by reason of this sequence of legislative activity, according to the Court below, the state "permits", "encourages", "authorizes", and is so "significantly involved in" private discriminatory conduct as to be responsible for it under the Fourteenth Amendment. The Court imported the quoted words from decisions of this Court rendered in cases involving conduct in the performance of inherently public or governmental functions, such as the conduct of primary elections, the exercise of municipal power by a town, or the operation of a municipal park in which there had been no change in "municipal maintenance and concern" and whose "predomi-

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[10]The Court below does not suggest that the division of legislative power between the People and the representative legislature, ordained by the California Constitution (Article IV, § 1, App. 9) raises any federal constitutional question. Nor is it suggested there is any federal constitutional prohibition against the particular allocation of power made by Section 26 to the people rather than to the legislature. In *Higgins v. City of Santa Monica,* 62 Cal. 2d 24, 41 Cal. Rptr. 9, 13, a unanimous California Supreme Court rejected an argument that a reservation of legislative power by the people rendered a measure unconstitutional.

nant character and purpose" was municipal. To apply such decisions to the private conduct of private citizens in the disposition of their private residential property is to make utter nonsense of many decades of jurisprudence establishing the fundamental distinction between private and "state" action.

Demonstrably, the Court below did not find that Section 26 in fact encourages or authorizes racial discrimination. *Mulkey* could not have been decided on that ground because there the discriminatory conduct occurred long before Section 26 was proposed or adopted [R. Mulk., II-2, 3]. More significantly, had the Court found Section 26 to have actually encouraged or authorized discrimination it could not have decided *Hill v. Miller,* 64 Cal. 2d —, 51 Cal. Rptr. 689, as it did—permitting the landlord to prevail where he expressly relied on what he asserted was the "right" given him by Section 26 to refuse to rent to Negroes (App. 92). Section 26 "encourages" and "authorizes" racial discrimination only in the sense that California no longer prohibits or provides a remedy against such conduct in the narrow field of disposition of residential property by its private owner.[11] The Court held that change of policy,

[11]There is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination. On the contrary, there are numerous laws in California which encourage and in some instances require the complete elimination of racial discrimination. A summary of those laws is set forth in Appendix, p. 12. They are described in the dissenting opinion of Justice Thomas P. White below (App. 57). In addition, of course, the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the Statewide chairmen of both the leading political parties, and the pronouncements

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without more, subjected private discriminatory conduct to the proscriptions of the equal protection clause.[12]

That holding necessarily rests upon a wholly inaccurate equating of the facts of these cases with the subject matter of prior decisions of this Court:[13]

> (a) The conduct of the private owners of residential property is equated with the conduct of institutions engaged in providing services to the public on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, *Turner v. City of Memphis,* 369 U.S. 350, *Evans v. Newton,* 382 U.S. 296 [R. Mulk., II-15-22, App. 47-54].
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> (b) The private conduct of petitioners in choosing tenants of their own residential property is equated with the joint conduct of the arresting officer, prosecutor, court, jury, and jailer in Chickasaw, Alabama, the company-owned town author-

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of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honestly be made that there is a State-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination.

[12]As pereviously noted, *supra,* p. 5, in *Prendergast,* the Court also held, relying upon *Shelley v. Kraemer,* 334 U.S. 1, that judicial recognition of the rights here asserted by the property owners against Negro tenants would violate the Fourteenth Amendment even if Section 26 were itself valid. This proposition is discussed under point 3 hereof, *infra,* p. 17 *et seq.*

[13]The conflict of the decisions below with prior decisions of this Court is analyzed in "Editors' Case Note; State Encouraged Discrimination: *Mulkey v. Reitman* (Cal. 1966)," 6 Santa Clara Lawyer 241 (Spring, 1966).

ized by the state to exercise all the governmental powers of a public municipality. *Marsh v. Alabama,* 326 U.S. 501 [R. Mulk., II-15, App. 47].

(c) The private conduct of petitioners is equated with the conduct of the elaborate electoral institutions which in combination with state officials caused all Negroes to be systematically excluded from all participation in the only meaningful elections in certain southern states. *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461; *Nixon v. Condon,* 286 U.S. 73. See also *Anderson v. Martin,* 375 U.S. 399 [R. Mulk., II-14, 15, App. 47-48].

(d) Section 26, Article I of the California Constitution is equated with the statutes in *Robinson v. Florida,* 378 U.S. 153; *Evans v. Newton,* 382 U.S. 296, 15, L. Ed. 2d 373 (as construed in the concurring opinion of Mr. Justice White), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (as construed in the concurring opinion of Mr. Justice Stewart) [R. Mulk., II-16-22, App. 49-54]. The vices of those statutes, respectively, were the imposition of a greater burden upon one who chose not to discriminate in the operation of a restaurant,[14] the legalization of discrimination on grounds of race but on no other grounds in the establishment of public trusts,[15] and the classifica-

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[14]*Robinson v. Florida,* 378 U.S. at p. 156. In that case this Court relied upon *Peterson v. Greenville,* 373 U.S. 244, where the city ordinance compelled racial discrimination by private restaurant owners.

[15]*Evans v. Newton,* concurring opinion of Mr. Justice White, 382 U.S. 296, 15 L. Ed. 2d at p. 384.

tion on racial grounds of the right of access to public accommodations.[16]

Section 26 applies to all property owners. It in no way burdens those who do not discriminate. It neither condemns nor authorizes any basis of decision by a property owner with respect to the choice of persons with whom he will deal. It certainly does not single out and favor racial as opposed to other forms of discrimination.

In *Burton,* eight of the justices treated the Delaware statute as reflecting the common law that a private restaurant operator could refuse service to anyone for any reason or for none. That is the plain effect of Section 26: It reestablishes the common law rule that was in effect until 1959 when California adopted the first of its statutes prohibiting racial and religious discrimination in housing.

Notwithstanding the adoption of Section 26, California continues to have more comprehensive legislative prohibitions of discrimination in housing than 41 other states (App. 15-24). The decisions below holding that the people of California are forbidden by the federal Constitution from maintaining or changing such a regulatory plan are plainly wrong.

Their grave portent to the integrity of the legislative process, their threat to the values of federalism, their restriction on the long-standing freedom of Americans to act in private relationships in any way they see fit so long as the action is not prohibited by law enacted

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[16]*Burton v. Wilmington Parking Authority,* concurring opinion of Mr. Justice Stewart, 365 U.S. at p. 726. See *Lewis,* "The Sit-in Cases: Great Expectations", The Supreme Court Review (1963), Univ. of Chi. Press, p. 145, n. 100 [R. Mulk., V-43, 44].

under some constitutional grant of power, and the institutional demands they would impose upon this Court, all urgently point to the necessity that such decisions should not be allowed to stand without review by this Court.

3. The Decisions Below Establish a Drastic, Almost Unique, and Wholly Erroneous Interpretation of *Shelley v. Kraemer,* 334 U.S. 1, Which Urgently Requires Clarification by This Court.

The California Court, relying on *Shelley,* held that a state court would violate the equal protection clause by merely entertaining or ruling on a defendant's plea for declaratory relief with respect to the validity of his private termination of a lease of his private property and of his right to possession of that property, if the termination had been based upon the racial prejudice of the defendant.[17]

The extreme interpretation of *Shelley* by the court below is unsupported by any decision of this Court and has been adopted by the courts of but one other state[18] in the eighteen years since *Shelley* was decided here. It is demonstrably in conflict with the Pennsylvania Supreme Court in the Second Girard Trust Case, in which this Court dismissed the appeal and denied certiorari.[19] It is also irreconcilable with the method

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[17]The superficiality of this analysis of "state action" is apparent from Mr. Justice Harlan's concurring opinion in *Peterson v. Greenville,* 373 U.S. 248 at p. 249. "* * * Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, supra (109 U.S. at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."

[18]*State v. Brown* (Del. 1963), 195 A. 2d 379; see also *Abstract Investment Co. v. Hutchinson* (1962), 204 Cal. App. 2d 242, 22 Cal. Rptr. 309.

[19]*In re Girard College Trusteeship* (Penna. 1957), 138 A. 2d 844, appeal dismissed and cert. den. 357 U.S. 570.

of analysis established by this Court in articulating its decisions in the numerous equal protection cases since *Shelley*. Many of these cases, including the sit-in cases of recent years, could have been handled summarily by citation of *Shelley* if it in fact held that judicial recognition of rights whose acquisition or assertion was motivated by racial prejudice would—without more—constitute unconstitutional state action. Instead, this Court has carefully focused on and defined the critical issue: Can the state fairly be charged with the responsibility for the discrimination in acquiring or asserting the right? If not, the discrimination is private. Surely subsequent judicial recognition of the validity of private rights cannot, standing alone, fairly be held to render the state responsible for the discriminatory act or motive out of which they arose. Such a far-reaching interpretation of *Shelley* has been rejected by all but a few of a host of learned commentators.[20]

The restrictive covenant cases are distinguishable from the cases here at issue in important respects. There, the Court was asked to compel discrimination by enjoining or burdening a transaction between willing

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[20]The principal articles are: Lewis, *The Meaning of State Action* (1960), 60 Col. L. Rev. 1083; Lewis, *The Sit-in Cases: Great Expectations.* The Supreme Court Review (1963), University of Chicago Press, particularly at pp. 114-119; Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1 (1959); Van Alstyne and Karst, *State Action,* 14 Stanford L. Rev. 3 (1961) (especially *Case* 17 at p. 50); Kauper, *Civil Liberties and the Constitution,* Chapter IV, pp. 127 166, University of Michigan Press (1962); Pollak, *Racial Discrimination and Judicial Integrity; A Reply to Professor Weschsler,* 108 U. Pa. L. Rev. 1 (1959); 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) (especially pp. 1003-1016); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action,* 41 Tex. L. Rev. 347 (1963).

parties, whereas in the cases below plaintiffs sought to force themselves on unwilling lessors. The Court below wholly ignored this vital distinction. Its holding in this respect directly contradicts the explanations of *Shelley* in the dissenting opinion of Mr. Justice Black for himself and Mr. Justice Harlan and Mr. Justice White in *Bell v. Maryland,* 378 U.S. 226 at p. 331 where it is said:

> *"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 particular person or NOT to admit that person,* 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." (Emphasis added.)

Judicial action in the restrictive covenant cases forcing willing sellers to discriminate against their will would have had the same characteristics as racial zoning ordinances, given the pervasiveness of such agreements, their duration, their intended applicability to successive non-consenting transferees, and the governmentally imposed sanctions for their breach. The restrictive covenants were held unenforceable for the same reason discriminatory zoning was invalidated, namely, they "an-

nulled the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan v. Warley,* 245 U.S. 60, 81. That rationale is plainly inapplicable to these cases where unwilling lessors are involved. Clearly, it has no bearing on the questioned provision of the California Constitution. That provision has none of the characteristics of a racial zoning ordinance, none of the features of a court-enforced system of restrictive covenants, and leaves strictly to the private decision of each property owner the choice of his buyer or tenant.

Moreover, as invoked below, *Shelley* would deprive petitioners of access to the courts to recover possession of their property from the wrongful occupation of plaintiffs and deny petitioners their due process and equal protection rights. For in California, an owner of real property with the right to possession can lawfully recover possession from one in actual though wrongful occupation only by an action in unlawful detainer.[21] If petitioners are denied the only remedy the law permits to recover their property, the result is to eliminate without their consent the only provision of the oral month-to-month tenancies they granted which distinguishes them from tenancies for a term. The result would be comparable to a reverse decree of specific performance in favor of the Negro tenants of a contract they did not have, the abrogation of a tenancy-at-will to which the parties had agreed, and the imposition upon landlords of the heavy burden of disproving a racial motive when dealing with Negro tenants.[22] Thereby petitioners

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[21]California Code of Civil Procedure, Section 1161, *et seq.*

[22]See *e.g., Rice v. Sioux City Memorial Cemetery* (Iowa), 60 N.W. 2d 110, 115, aff'd 348 U.S. 880, vac. and cert. dis-

would be deprived of their property in a very real and tangible sense without any legislative justification and without due process of law, and would be denied the equal protection of the California unlawful detainer laws.[23]

If the California Supreme Court interpretation of *Shelley* is not reversed, an issue of constitutional proportions and psychiatric overtones may be presented by virtually every dispute between members of different racial, religious or political groups. The inevitable result will be the elimination of stability in a myriad of economic transactions, a shattering of a portion of the law of wills and property,[24] an inestimable increase in the costs of collection on defaulted obligations, a consequent reluctance to deal with members of minority groups, and an enormously expanded responsibility and burden on this Court quite out of keeping with the limited role of both this Court and the Federal Government under the Fourteenth Amendment. In short, the constitutional doctrine below would require this Court on a case by case basis to determine whether private conduct in an infinite variety of contexts should be

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missed, 349 U.S. 70; *Segre v. Ring* (N.H.), 170 A. 2d 265, 266 where the court said regarding an unequivocal restriction against assignment in a lease: "The Court will not rewrite the agreement to compel the [lessor] . . . to permit the assignment or to give their reasons for not doing so." See also, 32 Am. Jur., Landlord and Tenant, § 343.

[23]*Buchanan v. Warley,* 245 U.S. 60; *Bell v. Maryland,* 378 U.S. 226, 318 (dissenting opinion).

[24]Professor Herbert Wechsler in "The Nature of Judicial Reasoning," Part III, C, p. 295 of *Law and Philosophy,* N.Y. Univ. Press, 1964: "* * * But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials. * * *"

subjected to the standards imposed upon the states by the Fourteenth Amendment.

As former Solicitor General Archibald Cox argued in the *amicus* brief filed on behalf of the United States in the 1964 sit-in cases:

> ". . . there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States —but only this Court—could exercise the final judgment."

Expressing a learned concern for the proper institutional role of the Supreme Court, the Solicitor General continued:

> "The preservation of a free and pluralistic society would seem to require substantial freedom for private choice, in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.
>
> "Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keep-

ing with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

* * *

"We read *Shelley v. Kraemer* as an instance of this moderate view. The more extreme argument may find support in some language in the opinion and has been espoused by a few commentators and two State courts,* but in our view the decision rests more solidly upon narrower grounds. The elements of law involved in the enforcement of restrictive covenants running with the land greatly outweigh any elements of private choice. The sting of restrictive covenants is the power to bind unwilling strangers to the initial transaction. * * *"[25]

**State v. Brown, supra; Abstract Investment Co. v. William O. Hutchinson,* 22 Cal. Rptr. 309 (D.C. App. 2d Dist., 1962).

For all of these reasons we urge this Court to declare that the Constitution does not oblige every court to close its doors to all litigants whose motives are tarnished by their dislike for the race, religion, or political views of their adversaries.

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[25]Supplemental Brief of the United States as *Amicus Curiae* in *Bell v. Maryland,* 378 U.S. 226, and related cases, p. 85, 87, 88-89. Substantially the same view of *Shelley* is set forth in the Government's *Amicus* brief (at pp. 17, 21, 26) in *Evans v. Newton,* 382 U.S. 296, 15 L. Ed. 2d 373.

4. The Decisions Below Conflict Fundamentally With the Broad Legislative Power Sustained by This Court in Such Decisions as *Ferguson v. Skrupa,* 372 U.S. 726, *A. F. of L. v. American Sash and Door,* 335 U.S. 538, and *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483.

Without discussion, the Court below ignored the settled principle that a legislature need not attack all evils in the same field simultaneously. It may elect to proceed one step at a time. It may select those phases of the problem it deems most amenable to regulation and leave other aspects of the same problem unregulated for a time or forever. The Court below itself recognized this principle in *Burks v. Poppy Construction Co.* (Cal. 1962), 20 Cal. Rptr. 609. There the Court sustained the power of the legislature to enact a 1959 statute[26] which prohibited racial discrimination in "publicly assisted" housing but left unregulated the conduct of owners of private housing in choosing their buyers or tenants.

Thus, the same California Court which expressly upheld the legislative power to exclude private housing in 1959 vetoed the exercise of that same power in 1964. This it did in the name of the equal protection clause and notwithstanding the fact that, after the adoption of Section 26, the law relating to private housing was still even more restrictive than it was as a result of the statute involved in *Burks.*

The judicial invalidation of state legislation by the Court below does violence to the principles of a sound federalism and of the proper distribution of govern-

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[26]This was the predecessor to the Rumford Act of 1963 (App. 9-10) which extended the prohibitions of the 1959 law to certain categories of privately owned housing accommodations.

mental power in our constitutional democracy. In this separate respect, the decisions below conflict fundamentally with the principles established by this Court in the cases cited above.

5. The Decisions Below Conflict With Decisions of the Highest Courts in Other States and With Certain Lower Federal Courts.

By invalidating Section 26, Article I of the California Constitution, the Court below has held that the failure of California to provide a remedy which it once provided against racial discrimination by the owners of private residential property violates the equal protection clause. The highest courts of other states and of certain lower federal courts have uniformly held that, to the contrary, the Fourteenth Amendment does not of its own force impose a duty upon the states to provide—or maintain—remedies against the following types of discriminatory private conduct:

1. Refusal of owner to sell or rent private residential property.[27]
2. Discrimination by real estate brokers.[28]

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[27]*Dorsey v. Stuyvesant Town Corporation* (N.Y. 1949), 87 N.E. 2d 541 [not unconstitutional though "Legislature deliberately refrained from imposing any restriction upon a redevelopment company in its choice of tenants."], cert. den. 339 U.S. 981; *Hackley v. Art Builders, Inc.* (D. Md. 1960), 179 F. Supp. 851; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

Accord: Traynor, "Law and Social Change in a Democratic Society" (1956) Univ. of Ill. Law Forum, pp. 220, 239 [". . . He has a right to choose his friends, to determine who may come upon his property or to whom he will sell it . . ."]

[28]*McKibbin v. Michigan Corporation & Securities Com'n.* (Mich. 1963), 119 N.W. 2d 557; *Jones v. Mayer* (E.D. Mo. 1966), — F. Supp. —.

3. Religious discrimination by owner of apartment complex housing 35,000 residents.[29]

4. Discriminatory refusal of service in places of public accommodation.[30]

5. Discrimination by employers.[31]

6. Discrimination by owner of cemetery.[32]

7. Discrimination by testators.[33]

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[29]*Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.* (N.Y. 11948), 79 N.E. 2d 433, cert. den., 335 U.S. 886.

Accord: *Hall v. Virginia* (1948), 335 U.S. 875, summarily dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369 [conviction of trespass affirmed as against contention that statute permitting owner of 60 unit apartment to exclude Minister of Jehovah's Witness' sect from distributing religious tracts in the entrance, elevators, hallways thereof was deprivation of rights of free speech, religious freedom, etc.]

[30]*State v. Brown* (Del. 1963), 195 A. 2d 379 [upholding statute permitting discrimination by innkeepers in derogation of common law]; *Williams v. Howard Johnson's Restaurant* (4th Cir. 1959), 268 F. 2d 845; *Williams v. Hot Shoppes, Inc.* (D.C. Cir. 1961), 293 F. 2d 835; *Williams v. Howard Johnson's Inc. of Washington* (4th Cir. 1963), 323 F. 2d 102, cert. den. 382 U.S. 814, 15 L. Ed. 2d 61, reh. den. 382 U.S. 933, 15 L. Ed. 2d 345 (1965).

In the latter case, the Court of Appeals said: "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law. * * *" (at p. 106).

[31]*Black v. Cutter Laboratories* (Cal. 1955); 278 P. 2d 905, cert. den. 351 U.S. 292; *Jones v. American President Lines* (1957), 149 Cal. App. 2d 319; *Cf. Railway Mail Ass'n v. Corsi* (1944), 326 U.S. 88, 98, concurring opinion: "Of course a State may leave abstention from such discriminations [by employers] to the conscience of individuals."

[32]*Rice v Sioux City Memorial Park Cemetery* (Ia. 1953), 60 N.W. 2d 110, aff'd, 348 U.S. 880, vac. and cert. dism., 349 U.S. 70.

[33]*In re Girard College Trusteeship* (Pa., 1958), 138 Atl. 2d 844; appeal dismissed and cert. denied (1958), 357 U.S. 570; *Gordon v. Gordon* (Mass. 1955), 124 N.E. 2d 228; *United States National Bank v. Snodgrass* (Or. 1954), 275 P. 2d 860; *Cf. Pennsylvania v. Board of Directors of City Trusts* (1957), 353 U.S. 230.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

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