SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Statutes

Textbooks

IN THE

Supreme Court of the United States

October Term, 1966
No. 483

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

vs.

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

On Writ of Certiorari to the Supreme Court of the State of California.

REPLY BRIEF FOR PETITIONERS.

I.
STATEMENT AND SUMMARY.

A. Preliminary Statement.

With the day of argument nearly upon us, we are continuing to receive, as of the time this is written, *amicus* briefs filed in support of Respondents' position. The contentions advanced by Respondents and their supporting *amici* are almost too numerous to catalogue. They are in many respects inconsistent with one another. More importantly, many of them are in no way material to the resolution of the issues which need be resolved in the cases presently before this Court.

Time does not permit a comprehensive or exhaustive reply to all of the contentions advanced by our opponents, particularly in light of the multiplicity of issues they raise. However, we feel that it is incumbent upon us to endeavor to restore some perspective to the issues which actually require decision in these cases. It is to that end that we direct this reply brief.

B. Summary of Argument.

Section 26 had but two purposes and effects: The repeal of a small portion of pre-existing antidiscrimination legislation (*i.e.,* portions of the Unruh and Rumford Acts), and the reservation to the people acting through the initiative process of the power to enact future regulation of the exercise of discretion by the owner of private residential property in the selection of the persons to whom he will or will not sell, lease, or rent his own property.

The cases before this Court have not placed in issue any possible application of Section 26, (1) to the conduct of persons other than the owners of residential real property, such as brokers, (2) to any conduct on the part of the State or any of its agencies, (3) to any transaction in which the slightest argument of State "involvement" in, or "responsibility" for discrimination can properly be advanced, or (4) to any joint or conspiratorial activity. The sole questions, therefore, which confront this Court are whether, under the circumstances of these cases, the equal protection clause nullifies the repeal of pre-existing legislation by the enactment of Section 26, and whether, under the circumstances of these cases, the equal protection clause prohibits the reservation of political power to the people.

We emphasize the qualification "under the circumstances of these cases" because, as noted above, many of the problems hypothesized by Respondents and their supporting *amici* are wholly unrelated to the circumstances of these cases. They, therefore, neither can be nor should be considered by this Court in reviewing the decisions below.

We also emphasize that qualification because, as we shall demonstrate, Respondents and *amici* present an inaccurate and misleading version of the *milieu* in which Section 26 was passed and the circumstances out of which these cases arise. It is critical to a proper application of constitutional principles in the cases before this Court that the cases be viewed fairly in their true context. It is highly significant that these cases come to this Court not from a state which has been recalcitrant or even passive in its approach to civil rights, but from a state which has, unquestionably, been in the vanguard of progress in the field of human and racial relationships. It is equally important to recognize that California did not, by the enactment of Section 26, nullify the tremendous gains it has made in the war against discrimination. Section 26 does not effect a wholesale nullification of California's pervasive body of antidiscrimination law. Section 26 merely repealed a small portion of those laws, a portion dealing only with a narrow area of activity, the exercise of discretion by a property owner in selecting the persons to whom he will or will not sell, lease or rent his own residential property. Far from being a novel principle, the resulting policy of non-regulation of freedom of choice by the owner in the disposition of his own private property was a universally accepted ingredient of the concepts of

liberty and property from the beginnings of modern democracy until 1959 when certain states first adopted fair housing laws. It is the same policy that exists in a large majority of the states. Surely something more than the social, economic and emotional views argued by Respondents and *amici*—arguments more appropriately directed to the people, to Congress, or to a legislature—is required to support the contention that such a long-standing common law rule is suddenly a violation of the Fourteenth Amendment.

II.
THE ISSUES.

Article I, Section 26 of the California Constitution was an initiative measure (Proposition 14) adopted by a vote of 4,526,460 to 2,395,747 in the General Election of November 3, 1964,[1] after the Court below had refused to prohibit the Secretary of State from placing it on the ballot.[2]

It was passed after an intensive, widely publicized, and emotionally-charged campaign in which both its supporters and opponents numbered among their ranks

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[1]"California Statement of Vote, General Election, November 3, 1964", compiled and certified by Frank M. Jordan, Secretary of State of the State of California, p. 25. The support for § 26 was in no sense confined to any geographical portion of the state; a majority of the votes cast in all but one of the 58 counties of the state favored adoption, the margin in the sole exception being but 19 out of 3,091 votes cast. *Ibid.* Indeed, 370 of the 393 incorporated cities in the state voted in favor of § 26, and the measure was defeated by less than 100 votes in 12 of the 23 cities voting against it. "State of California, Supplement to Statement of Vote, General Election, November 3, 1964", compiled and certified by Frank M. Jordan, Secretary of State, pp. 65 through 79.

[2]*Lewis v. Jordan* (Calif. S.Ct. 1964), No. Sac 7549 [Unreported Minute Order of June 3, 1964], R. 18-19.

leading newspapers and radio stations, respected and influential religious, civic and political organizations and widely known and respected individuals.[3]

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[3]Comment, 19 Stan. L. Rev. 232, 238 ["Proposition 14 quickly became the most controversial California issue on the November ballot. . . . 'No on 14' groups drew to their cause an impressive list of organizations . . ." The author identifies the organizations as the California Teachers Association, California Congress of Parents & Teachers (State PTA), California Labor Federation (AFL-CIO), League of Women Voters of California, Council of Churches, Roman Catholic Archdiocese of San Francisco, and Board of Rabbis.]

The federal government was also active in opposing Proposition 14, the Federal Housing Administrator announcing his prediction that the United States would cut off urban renewal and development funds if the measure passed (Beck, "Prop. 14 Called Peril to Urban Renewal Fund", Los Angeles Times, October 20, 1964, Part I, page 26), a threat that was carried out upon enactment of §26 (Foley, "U.S. Funds for State Renewal Jobs Cut Off", Los Angeles Times, November 11, 1964, Part I, page 2). The supporters of §26 included the Los Angeles Times. "Times Editorials", Los Angeles Times, February 2, 1964, §G, page 6 (attached as Exhibit A to the *Amicus* Brief submitted on behalf of Attorneys for the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) AFL-CIO, Region 6, and Paul Schrade, its Regional Director). In its endorsement of the measure, The Times declared:

> "The immediate effect of this proposed amendment, if ratified by a majority of the voters, would be to nullify portions of the Rumford Act (relating to discrimination in housing) and the Unruh Act (dealing with real estate brokers)."

Noting that it had already urgently espoused the granting of all minority rights guaranteed under the U.S. Constitution, particularly in connection with the implementation of equality in education and employment, The Times observed that the privilege of using and disposing of private property in whatever manner he deems appropriate is one of man's most ancient rights in a free society and that it felt strongly "that housing equality cannot safely be achieved at the expense of still another basic right." Though declaring it morally wrong to deny housing to anybody, regardless of race, color or creed, The Times favored §26 and its repeal of conflicting provisions of the Rumford and Unruh Acts because "unofficial laws designed to hasten the process of social, as distinct from civil, justice can only exacerbate the situation—and, in the opinion of The Times, defeat their very purpose."

As the Ballot Argument in favor of the measure makes plain (App. 3-5),* it was intended to reinstate the common law rule of freedom of choice in a limited sphere of private conduct, *i.e.* the exercise of discretion by the owners of residential real property in the choice of persons to whom they would or would not dispose of their own residential property; and for the further clear purpose of repealing then-existing legislation restricting that right, particularly the recently-enacted Rumford Act.[4] Though it proscribes any state action that would deny, limit or abridge the freedom of individuals in the narrow area of conduct which it affects, Section 26 remains subject to modification or repeal by subsequent vote of the people, as even Respondents concede. In this respect, it should be noted that by the provisions of Article Four, Section 1 of the California Constitution:

> "No act, law or amendment to the Constitution, adopted by the people at the polls under the initiative provisions of this section, shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure".

Acordingly had the measure proposed a statute rather than an amendment to the California Constitution, it

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*References to "App." herein are to the Appendix to the Opening Brief for Petitioners, not to the Appendix to the Petition for Certiorari.

[4]The court below so found: "Proposition 14 was enacted . . . with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate. . . ." R. 18. Respondents and *amici* concede and indeed contend that Section 26 was passed for the purpose, at least in part, of repealing conflicting provisions of certain antidiscrimination legislation existing at the time of its enactment (more specifically, portions of the Unruh and Rumford Acts).

could still be repealed or modified only by vote of the People.

Simply put, therefore, the questions before this Court are whether, under the facts of these cases and the equal protection clause,

(1) Section 26 is an effective repeal of certain portions of then-existing antidiscrimination legislation which the state had the power but clearly no constitutional duty to enact,

(2) Section 26 lawfully reserves to the people the exclusive power to take future action that would restrict the right of an owner of private residential real property to freely select in his sole discretion the persons to whom he chooses to sell, lease, or rent his own property. If, contrary to well-established principles, this Court should determine that the reservation of state power to the people acting through an initiative system is justiciable and, further, that it is unconstitutional, then a third question would need to be resolved, namely, whether Section 26 is nevertheless lawful, valid and effective as a repeal of the conflicting portions of the Rumford and Unruh Acts, as was manifestly the intention of the four and one-half million people who voted in favor of Section 26.[5] These, then, are the questions which must be resolved now.

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[5]That intent is manifested in the severability clause in § 26 itself, in the official Ballot Argument in favor of § 26, and in the endorsements and arguments in favor of §26 which were presented to the people, some of which are presented and referred to in the various briefs filed by respondents and *Amici*. There are no facts whatever, either in or out of the record, indicating that § 26 was not intended to repeal pre-existing conflicting portions of the Unruh and Rumford Acts, regardless of what further effect § 26 might be permitted to have. See generally *infra*, pp. 32-42.

Actually, the issues may be even narrower. Both of these actions were suits brought under the provisions of the Unruh Act (App. 8-9) for injunctive relief and damages against the Petitioners who are each individual owners of private residential property.[6] If that statute is now in effect, following the adoption of Section 26, then the judgment of the Court below should be affirmed. If, however, Section 26 was intended, among other things, to accomplish a *pro tanto* repeal of the Unruh Act—which is obvious and admitted—then the dispositive question in these cases is whether Section 26 is valid to accomplish that repeal. The Court below held it was a denial of equal protection to apply Section 26 so as to nullify the previous legislation. We ask this Court to disavow so startling a proposition of federal constitutional law and to uphold the validity of Section 26 in the only respect in which it affects the rights of the parties in these two cases: At the very least the People of California have the power to repeal the pre-existing legislation.

Section 26 does not protect or affect, and neither of the cases now before this Court involve, any governmental or traditionally public function, any joint or conspiratorial activity, any public or private conduct or pressure having the purpose or effect of inducing discriminatory conduct by coercion, persuasion or encouragement or the purpose or effect of discouraging nondiscriminatory conduct in any manner, or any act other than the individual act of the owner of private residential real property in selecting the persons to whom he will or will not sell, lease, or rent his own private,

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[6] *Mulkey v. Reitman,* R. 14; *Prendergast v. Snyder,* R. 72.

residential property.[7] Much of the opposition by Respondents and *amici* to Section 26 consists of an array of imaginative problems posed without reference to the fair meaning and intent of Section 26 and wholly unsupported by the facts of the cases presently before this Court.

III.

THE CONTEXT IN WHICH SECTION 26 SHOULD BE JUDGED.

The Court must be aware that it is a distortion of the character of California to portray it, as do Respondents and the several *amici,* as a place where racial discrimina-

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[7]The decisions of the court below have been criticized for failing to recognize the wide middle ground within which discrimination is not constitutionally prohibited though it is subject to regulation by the state should the state decide to exercise its power. Thus, between situations in which the state is so involved in an activity as to fairly be responsible for any ensuing racial discrimination on the one hand, and situations involving only purely private conduct (such as the admission of guests to a home or the selection of residents in a religious institution) on the other, "there is a broad middle ground where the individual has no constitutional right to discriminate nor do others have a constitutional right to be free from discrimination. The failure to recognize this broad middle area is the basic difficulty in current analysis of the role that state action plays in eliminating discrimination." Williams, "*Mulkey v. Reitman* and State Action", 14 U.C.L.A. L. Rev. 26 (1966). As Professor Williams observes:

> "The danger in an analysis such as that in *Mulkey v. Reitman* is the failure to recognize the broad middle area of individual discretion to discriminate until the state, as a matter of public policy, stops such discrimination. The freedom to discriminate is individuality. And while the state does have the power to forbid discrimination in many facets of life, and thus to curb individuality, it should exercise this power wisely and with restraint. It has done so, for example, in public accommodations, equal employment opportunity, and fair housing legislation. But the policy should also be subject to revision and review by the people in that broad middle area where discrimination by the individual is not constitutionally prohibited." *Id.* at 36.

tion is rampant, where "ghettoes" are steaming forth discontent over private racial discrimination in housing and where patterns of racial segregation have been caused by reason of past state conduct or lack of official concern or both; as a society riven with fixed community customs of racial bigotry in housing; and as a place where the continued existence right now of fair housing legislation is absolutely critical to the long-range protection of California minorites. Respondents and *amici* portray California through a clouded glass. That in so doing they unfairly discredit the state is of less significance here than the possibility that the distorted picture may obscure the true issues and thereby prevent the proper application of constitutional principles in the decision of these cases.

We do not represent California to be a state in which the enormously troubling problems of the relationships between people of differing races, creeds, or political beliefs have been resolved. The record here shows, however, that the people and State of California have strived mightily to deal with the problems of racial discrimination. Their effort is in part reflected by the many varied and effective laws preventing discrimination in a wide variety of contexts.[8]

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[8]California forbids discrimination and statements that might reflect or encourage discrimination in such varied context as applications for marriage licenses, restrictive covenants, teaching and entertainment around public schools, selection of textbooks, the hiring or appointment of teachers, registrars of voters, civil service employees, and classified employees, access to beaches, dealings with lessees and purchasers of urban renewal property, the sale or cancellation of insurance, the employment of persons by contractors engaged in public works, and the employment of persons generally (with certain exceptions for employers of less than five persons and social, fraternal, charitable, educational, and religious associations and certain other limited types of employers). California legislation also authorizes counties and cities

Indeed, notwithstanding the adoption of Section 26, California continues to have more comprehensive legislative prohibitions against discrimination in housing than 41 other states.[9] In November of 1965 (after Section 26 had been in effect for one year), a survey covering at least 95% of all the residential property sold through multiple listings in the State of California disclosed that only 1,036 listings out of 185,768 (or 0.558%) contained discriminatory restrictions.[10]

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to expend funds to promote racial tolerance and preserve peace among citizens of all races. The state itself recognizes the need for elimination of racial discrimination in housing as a factor to be taken into consideration in any redevelopment program. See generally App. 12-14.

[9]See Op. Br. for Pet. p. 13 and App. to Pet. for Cert. 15-24.

[10]"A Minority Report, CREA Reports Restricted Listings at .6% of total", Los Angeles Times, March 27, 1966, § J, p. 2:

> "An almost unlimited supply of houses for sale is available to Negroes and other minorities who have the financial ability to buy them, according to a survey released by the California Real Estate Assn.
>
> "Burt Smith of Bellflower, CREA president, discussed the survey during the Association's quarterly meeting of its board of directors in Sacramento, last week.
>
> "He said CREA queried its 176 real estate boards throughout California to learn how many houses for sale through their multiple listing services were racially restricted by their owners. The survey covered the first 11 months of 1965.
>
> "The answer, with 170 boards reporting, came to 1,687 listings out of a total of 286,406, or approximately .6% (.589).
>
> " 'This was a follow-up' Smith said, 'of a sampling we took earlier of 50 representative boards for the first 10 months of 1965. The result was almost identical. Total listings for those 50 boards was 185,768 with 1,036 restricted, or .558%. The highest rate for any one board was 6%.'
>
> "Six Boards Silent
>
> "He said the six boards not reporting on the latest survey were small and would not 'significantly alter' the finding, representing only 1,809 of a total CREA membership of 54,768 at that date.

(This footnote is continued on the next page)

Neither Respondents, nor the Court below, has ever questioned our assertions that 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; or that 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 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. To be sure, a great deal remains to be done before it could fairly be said

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" 'Multiple listing services offer the largest pool of housing for sale by far,' he stated, 'and most of them are operated by real estate boards that are members of our association.'

"Smith pointed out that real estate agents are obligated to show housing to any qualified buyer, the only exceptions being those stipulated by the owner. Any violation of this obligation makes them liable under the Unruh Act [under provisions of that act not affected by Section 26]."

See also, " 'Unlimited' Housing for Minorities", San Francisco Sunday Examiner & Chronicle, March 27, 1966:

"Smith concluded from the survey that housing for sale, 'at least that being offered through CREA member boards' multiple listing services,' is available to qualified Negroes and other minority races.

" 'When Proposition 14 was passed,' he said at the Sacramento meeting, 'it gave owners of residential property freedom to choose the buyer or renter of his property. This survey indicates, where the sale of housing is concerned, that the owner is not using this freedom to discriminate against buyers of another race or religion.' "

that racial discrimination has been completely eliminated in California, but that should not obscure the fact that, relative to other states of the union, great strides have indeed already been made.[11]

Eastern reporters of the tragic civil disturbances widely but somewhat inaccurately known as the Watts Riots, bore witness to the progress made by the Negro in the Los Angeles community. Perhaps the most complete was that of Theodore H. White in his syndicated column of August 22, 1965:

> "[I]n Los Angeles, Negroes have lived better than in any other large American city, with the possible exception of Detroit.
>
> "One approaches the 50-square-mile rectangle of south central Los Angeles where live its 400,000 Negroes (density 26 per acre, in contrast to Harlem's 222 per acre) with the word 'ghetto' firmly fixed in mind. Then one drives through mile after mile of open streets, without a tenement, a flat, or a single multiple dwelling. Green lawns, palm trees, flower beds, white frame houses, succeed each other mile after mile, broken by open spaces, airy school houses, with huge playgrounds, large parks with swimming pools.

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[11]Even respondents have conceded that "since earliest days of statehood" California has had a "consistent pattern of treating racial discrimination as against public policy." Br. in Op. to Pet. for Cert. 16. The Attorney General of the State of New York likewise concedes at p. 2 of his Amicus Brief that California has taken great strides in this field in recent years. More significantly, the relatively good life available to Negroes in California doubtless goes far to explain the enoromous influx of Negroes from various other states into California in recent years. While that increase has created problems, many of them severe, it would not have occurred had the Negro's plight not been far better in California than in the places from which he comes in ever increasing numbers.

"To Harlem Negroes, squeezed in the dingy red-brick cubicles north of Central Park, where the rat is the symbol of the white man's power structure, such living is entirely imaginary. When one recalls the conditions of Chicago's South Side, where the summer stink of the stockyards can brood like a living curse on crowded Negro two-family houses, the smog of Los Angeles seems comparatively benign.

"When one adds to outer impressions the statistical comparisons, the mystery grows. Income per capita for Negroes (while heavily below that of white Angelenos) is higher than for any other Negro community in the country, again with the possible exception of Detroit. Crime among Negroes is lower in Los Angeles. Welfare burden is lower. Illegitimacy rates, though high, in no sense approach the terrifying rates of Negro illegitimacy in the East where, in New York's Harlem, it peaks at an out-of-wedlock birth rate of 44%.

"To this city in the sun, Negroes by the thousands have flocked in the past 15 years, doubling in number in Los Angeles city in the decade 1950-60, from 171,209 to 334,916, expanding steadily from areas of original settlement south, west and north, filling nine distinct communities in the 30 communities that the city's planning commission calls the Central District.

"One can trace this movement—from the Watts community, an infected pocket of misery, unemployment and despair where new arrivals from the South congregate, to the surrounding communities that expand through white neighbor-

hoods north and south, to the magnificent old homes on Washington Boulevard, or the distinguished new architecture of Baldwin Heights. Los Angeles is a city in progress—and Negro progress here has been spectacular.

"One can add other ingredients: an open and easy tolerance; restaurants, museums, theaters and civilized pleasures open to all who pay the price.

"And one must cap the picture with politics: a mayor elected first by an overwhelming Negro vote and reelected with substantial Negro votes; a governor known as champion of Negro rights; a five-man police commission one of whose members is a Negro. And, lastly, a 15-man city council of which three members are Negro. Los Angeles is the only city in the country where Negroes (with 13.5% of the population) are over-represented rather than under-represented as everywhere else."[12]

Similar was the report of Larry Hall (a Negro news reporter for Station WJRZ in Newark, New Jersey):

"Even after covering the Harlem riots a year ago, this is still a new experience for me. I feel strange walking through Watts, not seeing any traces of an asphalt jungle, rat-infested tenement houses, and strings of dark, nerve-racking alleys."[13]

Section 26 thus comes to this Court from a state whose official policy is and for many years has been one vigorously opposed to racial and religious discrimination. It is in that context that this Court is asked to de-

[12]Los Angeles Times, August 22, 1965, § G, p. 1.
[13]Los Angeles Times, August 14, 1965, § A, p. 22.

cide whether Section 26 is unconstitutional because it had the effect of repealing certain features of fair housing legislation which had been previously enacted by a legislature which surely believed it was acting within its legislative discretion and not under the compulsion of a federal constitutional mandate.

It is in that context and not in the fanciful imaginings of Respondents and *amici* that this Court is asked to decide whether Section 26 is forbidden by the Fourteenth Amendment because the people of California have decided that for now, they themselves shall have the exclusive right to determine whether the coercive power of the state shall be employed to restrict the rights of private individuals in determining to whom they will or will not sell, lease or rent their own residential property.

IV.
RESERVATION OF LEGISLATIVE POWER BY THE PEOPLE.

Since 1911, the people of California have reserved 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." California Constitution, Article IV, Section 1. The *pros* and *cons* of "direct law making" have been long debated, and numerous people have reviewed the products of the initiative and referendum system in California.

Professor Max Radin observed, in an article on the initiative and referendum entitled "Popular Legislation in California: 1936-1946" in 35 Calif. L. Rev. 171 (1947), at pp. 171-172:

> "The introduction of this system of popular legislation into California was part of the program of

> the Progressive movement, then captained by Hiram Johnson. The older among us remember the bitterness of the attack made against it and the prophecies of disaster that accompanied it. It was chiefly attacked as a violation of the 'republican form of government' guaranteed by the United States Constitution. And even after the decision of *Pacific States Telephone and Telegraph Co. v. Oregon* the fantastic doctrine that 'republican' excludes 'democratic', a doctrine which manages at the same time to contradict history, etymology and common sense, is still denummified from time to time and seriously presented to Americans."

In *The Initiative and Referendum in California* (University of California, 1939), the authors (V. O. Key, Jr. and Winston W. Crouch) state at page 565:

> "It is difficult to categorize the propositions adopted by the initiative. On the whole, they appear to be neither more drastic nor less intelligent in intent than acts which have been adopted by the Legislature."

Based on a detailed review of the results achieved by initiative measures during the decade, Professor Radin concluded that no predilection was observable in favor of measures that could be called popular, many of the measures having had to do with technical matters; that in at least 12 of the 33 cases in which popular feeling was evident, the result of the vote was contrary to what had been commonly believed to be the popular view; and the participation of the electorate in direct legislation in California since 1935 was very high. At

page 190, Professor Radin declares on the basis of his investigation:

> "The inferences which I felt justified in making in the former article ['Popular Legislation in California,' 23 Minn. L. Rev. 559 (1939)] seem amply confirmed by the four elections that have taken place since. Direct legislation can deal with complete competence—at any rate with a competence equal to that of representative legislatures—with the technical and routine problems which need legislative intervention. So far as large problems of public welfare are concerned, it is markedly more likely to reach a fair and socially valuable result.
>
> "One thing is clear. The vote of the people is eminently sane. The danger apprehended that quack-nostrums in public policy can be forced on the voters by demagogues is demonstrably nonexistent. The representative legislature is much more susceptible to such influences.
>
> "The evils of democracy that enemies of our system inveigh against are really abuses of the representative system. These abuses can doubtless be cured without destroying the theory of representation. Some of them, however, can clearly be cured by more democracy. Popular legislation as practised in California since the great days of Hiram Johnson is a demonstration of that fact."

The initiative and referendum are not peculiar to California. They "exist almost everywhere in some form. The town meeting in New England is a pure initiative. Twenty-two of our states have comprehensive initiative and referendum at a state level, a local level, or both [as of April, 1951]. In these states initiative and refer-

endum occupy an important position in the political scene."[14]

In the reapportionment cases of recent years, this Court has itself emphasized the importance of equal representation of the citizens in the processes of government. That ideal is nowhere realized more fully than in the initiative and referendum procedures. There and there alone can it accurately be said that every man has an equal voice in the enactment of legislation. It is therefore ironic that respondents and *amici* should charge that Section 26 denies respondents the equal protection of the laws by reserving to the initiative process the enactment of future legislation affecting the discretion of the owners of private residential property in selecting the persons with whom they will deal with respect to their own property.

Whatever may be said of the merits of the initiative system, however, objections to that system are not properly directed to this or any court. Insofar as respondents and *amici* contend that the reservation of control over state power in this limited sphere of activity constitutes an improper withdrawal or allocation of that power, they can find constitutional support only in the republican form of government clause. As this Court declared in *Coleman v. Miller,* 307 U.S. 433, 455-456.

> "[In] Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U.S. 118, 56 L. ed. 377, 32 S. Ct. 224, we considered that questions arising under the guaranty of a republican form of government had

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[14]Comment, 3 Stan. L. Rev. 497, 499 (1951).
For current analysis of California provisions, see also Comment, 54 Calif. L. Rev. 1717 (Oct., 1966).

long since been 'definitely determined to be political and governmental' and hence that the question whether the government of Oregon had ceased to be republican in form because of a constitutional amendment by which the people reserved to themselves power to propose and enact laws independently of the legislative assembly and also to approve or reject any act of that body, was a question for the determination of the Congress. It would be finally settled when the Congress admitted the Senators and Representatives of the State."[15]

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[15]The briefs filed by Respondents and others on their behalf articulate in various ways their objections to the decision of the people to reserve to themselves the power to enact future regulation over the exercise of discretion by the owners of residential property in the selection of the persons with whom they will deal in selling, leasing, or renting their own property. None of the objections is of constitutional dimension, and most reflect untenable analysis and depend upon debatable views in the field of policy. Thus:

a. The contention that the reservation of power is analogous to a "freeze" of the law (see brief filed on behalf of the United States, pp. 27-28), ignores the fact that Section 26 is not unlike any other initiative measure passed in the State of California. It is subject to amendments or repeal at any time by subsequent resort to the initiative process. California Constitution, Article IV, Section One.

b. The contention that the minority groups whom Respondents contend are adversely affected by Section 26 could not obtain sufficient votes to enact a subsequent initiative measure assumes, indeed expressly assumes, that the minority groups stand alone in the area of Civil Rights and cannot hope to muster sufficient votes to pass any measure by popular majority. That assumption is not only plainly inaccurate, but an unjust, perhaps even ungrateful reflection upon the recent history of Civil Rights activity in this country. Indeed, the vote against Proposition 14 in the California election was 2,395,747, and necessarily included vast numbers of persons not members of the minorities to which Respondents refer. Obviously, the mere fact that a minority is unable to persuade sufficient numbers of others to join with it to constitute a majority in passing upon measures which it considers vital raises no constitutional issue unless Respondents,

Reservation of power to the people acting through the initiative process, of course, in no way constitutes a withdrawal of state power. In California as throughout this nation, all political power is derived from the

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as members of the minority, are thereby denied constitutionally protected rights.

c. The contention that the reservation of power to the people destroys the power of local governments to adopt policies regulating discrimination in private housing is subject to the same criticism. It is of constitutional dimension only if there is a constitutional right to local option. Yet it is well established that there is no constitutional impediment to pre-emption on a federal or state level in various fields of activity. See, *e.g.,* the following cases upholding federal pre-emption: *Western Union Telegraph Co. v. Pendleton,* 122 U.S. 347 (regulations regarding delivery of telegrams); *Campbell v. Hussey,* 368 U.S. 297 (regulations concerning grading of tobacco); *Schwabacher v. United States,* 334 U.S. 182; *Guss v. Utah Labor Relations Board,* 353 U.S. 1 (control of unfair labor practices); *Weber v. Anheuser-Busch, Inc.,* 348 U.S. 468 (control of labor relations even where NLRB refuses jurisdiction); *International Shoe Co. v. Pinkus,* 278 U.S. 261 (bankruptcy statute); California likewise has upheld pre-emption with reference to right-to-work laws, *Chavez v. Sargent,* 52 Cal. 2d 162, 339 P. 2d 801 (disapproved on other grounds); *Petric Cleaners, Inc. v. Automotive Employees, etc.,* 53 Cal. 2d 455, 349 P. 2d 76; intoxication, *People v. Lopez,* 59 Cal. 2d 653, 381 P. 2d 637; and regulation of crime, *In re Lane,* 58 Cal. 2d 99, 372 P. 2d 897 and *In re Mingo,* 190 Cal. 769, 214 Pac. 850. Indeed the California courts have gone so far as to state that any doubt with regard to the question of whether the state has pre-empted a field of activity is to be resolved in favor of the State. See *Ex parte Daniels,* 183 Cal. 636, 639, 192 Pac. 442, 444; and *Abbott v. City of Los Angeles,* 53 Cal. 2d 674, 681, 349 P. 2d 974, 979. Obviously, the allocation of political power as among the central state government and its various political subdivisions is as much a political question as is the allocation of power among the various branches of the state government. Respondents show no basis for asserting any constitutional right to local option. The figures summarized in n. 1, *supra,* also demonstrate that there is no evidence that any substantial deviation from the policy of Section 26 could be expected even if action in this field were left within the sole discretion of the counties or cities of the state. Certainly neither of the Respondents has demonstrated that his position would be improved if his city or county retained the right to make its own independent determination of whether to enact anti-discrimination legislation.

people, and nowhere has it been held that the people cannot reserve to themselves the right to exercise that power, as through an initiative process. As the California Supreme Court declared in upholding the constitutionality of the initiative process on the city level in that state:

> "The fact that accomplishment of amendment or repeal through the initiative process may be cumbersome or difficult is not the product of the alleged restriction of future discretion; it is merely a characteristic of the kind of legislative system the Constitution of this state has ordained. The significant fact is that the full legislative power of the city remains entirely unimpaired, ... The ordinance, therefore, no more limits future discretion than does any other prohibitory ordinance admittedly within a city's power to enact."[16]

Section 26 cannot therefore be deemed unconstitutional because it has the effect of requiring the consent of the people through the initiative process for the enactment of future restrictions on the freedom of individuals in the narrow area of selecting the persons to whom they will or will not sell, lease, or rent their own private residential real property. Thus, the dispositive question is whether Section 26 violates the Fourteenth Amendment by virtue of the fact that it repealed a small portion of the antidiscrimination legislation existing at the time of its passage.

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[16]*Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30, 396 P. 2d 41, 45.

V.

REPEAL.

Analysis of the decisions below establish that the California Court found but one vice in Section 26. That was the repeal of certain pre-existing antidiscrimination legislation, particularly the portions of the Rumford Act directed at the owners of certain types of private residential property in the disposition of their own such property. (See Op. Br. for Pet. 40, 55.)

In the first place, the discriminatory conduct in *Mulkey v. Reitman* occurred and the action for damages and injunctive relief was commenced in 1963, prior to the enactment of Section 26.[17] Obviously, the enactment of Section 26 did not and could not have "encouraged" Mr. Reitman to discriminate against Negroes.

In the second place, in the companion case of *Hill v. Miller* (App. 15), the court below affirmed a judgment of dismissal on demurrer in the action brought by the Negro tenant, disregarding the landlord's stated reliance on Section 26 in the Notice to Quit which he served on Mr. Hill. (App. 16, 18.) In support of its holding, the Court found that the discrimination there involved was "private", that the Fourteenth Amendment did not impose upon the State the duty to take positive action to prohibit private discrimination, and that the State had not by action of the legislature or the people made such private acts of discrimination unlawful (the Unruh and Rumford Acts being inapplicable to the facts of that case).[18]

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[17]R. 2, 3, and 15.

[18]App. 15, 17-18.

When the opinions of the court below in the cases here on certiorari are read in light of *Hill v. Miller* it is undeniable that the court below held Section 26 violated the Fourteenth Amendment because, and only because, it repealed pre-existing antidiscrimination legislation that was applicable to the *Mulkey* and *Prendergast* cases but not to the *Hill* case. There is no finding in any of the cases below that the enactment of Section 26 "encouraged" in any causal sense the private acts of discrimination complained of by respondents in these cases. The question confronting this Court is, therefore, whether the Fourteenth Amendment prohibits a state from modifying or repealing any part of its body of civil rights legislation when the state was under no constitutional mandate to enact the legislation in the first place. We submit that to state the question is to answer it, and to answer it in the negative.

It should be obvious that no single state has the power to amend the Constitution of the United States or the Fourteenth Amendment to that Constitution.[19] It is well established, and indeed conceded by the court below,[20] that the Fourteenth Amendment imposes no affirmative duty on the states to enact legislation prohibiting racial discrimination in purely private affairs such as the sale, rental, or lease of privately owned and

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[19]Constitution of the United States of America, Article V.

[20]"The Fourteenth Amendment does not impose upon the state the duty to take positive action to prohibit a private discrimination of the nature alleged here." *Hill v. Miller,* App. 17. The court held that the Negro plaintiff's allegations of discrimination failed to state facts sufficient to constitute a cause of action because "[a]lthough the state, by action of the Legislature or the People, may make such private acts of discrimination unlawful, it has not done so" (App. 17) and "[p]laintiff is further unable to plead facts which would afford him relief under any decisional law." (App. 18).

operated residential real property.[21] Therefore, California's enactment of the Unruh and Rumford acts was a discretionary exercise of its police power, and the enactment of those statutes in no way affected respondents' substantive rights under the Fourteenth Amendment (except, of course, that so long as those statutes remained in effect, respondents' rights to due process and to equal protection of the laws included the right to due and even-handed application of those statutes as well as of the other laws of the State of California). Similarly, since those statutes possessed none of the authority of a constitutional enactment on either the state or federal level, they could be amended or repealed at will by either the representative legislature or by the people themselves acting through initiative or referendum. *Blotter v. Farrell,* 42 Cal. 2d 804, 270 P. 2d 481. There is no constitutional impediment to the removal of legislation which the state was never under a constitutional mandate to enact or maintain.

All parties before this Court are agreed that one of the primary purposes of the proponents of Section 26 was the *pro tanto* repeal of the Rumford Act.[22] It is likewise uncontested that public opposition to that Act included serious objections to the time and manner of its enactment and to many of its procedural aspects, as well as substantive objections to governmental sanctions infringing upon the freedom of a residential property owner to select the person with whom he will or will not deal in connection with his own private residential property. The procedural objections were not trivial.

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[21]See generally Op. Br. for Pet. 28-37.

[22]See n. 5, *supra.* Of course, the court below so held. *Mulkey v. Reitman,* R. 18.

They included objections to the denial to the right of a trial by jury on the issue of the existence of discrimination, objections to the utilization of the contempt power to enforce the making of contracts between unwilling parties, and the providing of free counsel to one of the parties to a dispute relating to discrimination without regard to the financial resources of the particular parties involved.[23]

The objections to the Rumford Act went beyond that, however. Many Californians seriously objected to the manner in which the Act had been passed in the first place.[24] The measure was strongly opposed when

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[23]Ballot Argument in favor of Proposition 14, App. 3-5.

[24]Much is made in several of the briefs in favor of Respondents of the fact that Section 26 is more sweeping a measure than would have been required had mere repeal of portions of the Unruh and Rumford Acts been intended. From this they conclude that Section 26 was intended to enshrine what they are pleased to call a "right to discriminate" in the California Constitution.

As is more fully disclosed in the text following this footnote, the circumstances surrounding the enactment of the Rumford Act were unusual indeed. The measure was passed at the very end of the legislative session, under extreme pressure from lobbying (or more accurately "lying-in") demonstrators, and with the assistance of intense parliamentary maneuvering. Given that background combined with the fact, demonstrated in the general election of 1964, that the regulation embodied in the Rumford Act was imposed contrary to the wishes of the overwhelming majority of the people of the State of California, it is not unreasonable to suppose that the people felt that circumstances warranted something more than simple repeal.

In a somewhat different context, Justice Charles D. Breitel observed while delivering the Twenty-Second Annual Benjamin N. Cardozo Lecture before the Association of the Bar of the City of New York:

> "No one would be so foolish as to expect a court, because a statute is in derogation of the common law, to apply to it the canon of strict construction if it had been publicly debated before enactment, vigorously proposed by an executive, pushed through a reluctant legislature by a dramatic appeal of the executive over their heads to their constituents, and bearing all the marks of having been forged in

it was before the Legislature, and most observers doubted that it would reach the Senate floor before compulsory adjournment of the Legislative Session on June 21, 1963.[25] Extreme pressure was brought on the Senate, however. Headlines reported a lie-in demonstration by the Congress on Racial Equality during the last week of the session to demand passage of the Bill.[26] The

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fire and under the hammer on the anvil. On the other hand, such a statute does not have its equal in a legislative bill passed in the closing rush days of a legislature without public hearing or committee report, on a fast roll-call while the legislative chambers may lack a quorum but for the courtesy rule that only a maverick would disturb the proceedings and protract the session unduly, and the bill is signed into law by the executive only on the very eve of the expiration of his alloted time to approve or disapprove legislation."

Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 768-769 (1965).

A most important point, however, is that Section 26 must be judged by its effects and those effects are simply the repeal of conflicting portions of pre-existing legislation and the reservation of the power of further action in a narrow field of activity to the people of the State acting through the initiative process. In the absence of a self-executing mandate emanating from Section 1 of the Fourteenth Amendment that the State must take affirmative action to eliminate racial discrimination in purely private affairs, neither of these effects of Section 26 invades any constitutional right of Respondents.

[25]Comment, 19 Stan. L. Rev. 232, 237 (1966).

[26]Comment, 19 Stan. L. Rev. 232, 237. See, *e.g.*, "Sit-ins at Sacramento Re-enforced from L.A., 15 CORE Representatives Reach Capitol to Demonstrate for Fair Housing Bill", Los Angeles Times, June 2, 1963, §A, p. A [the article reporting: "The demonstrators . . . replaced others who have been sitting in 6-hour shifts around the clock since Wednesday."]; "Sit-in Group Continuing 'Fair Housing' Protest", Los Angeles Times, June 3, 1963, § 1, p. 23 [reporting: "Baby bottles, books and buttons spread around the second floor indicated the continued presence Sunday of one of the most unusual set of lobbyists ever seen in the old Capitol. * * * They say they will stay put until the Legislature takes final action on what proponents call a 'fair housing' bill."]; "Sit-ins Fill Capitol Foyer with Litter", Los Angeles Times, June 14, 1963, §1, p. 14 [reporting: "Civil rights demonstrations in the State Capitol ro-

(This footnote is continued on the next page)

demonstrators, lying shoulder to shoulder in rows across the main doorway to the Senate, declared they would stay put until the Legislature took final action on the Bill.[27] Various civic groups and civil rights organizations brought pressure to bear to force release of the Bill from Committee.[28] At 10:00 P.M. on June 21, 1963, 2 hours before compulsory adjournment, a motion was made for a special order of business to consider the Rumford Act at 11:00 P.M.; the Speaker of the Assembly threatened to adjourn the Assembly, with many Senate Bills left unconsidered, unless the Act was voted on; at 11:00 P.M., the Act passed the Senate with amendments, receiving one vote more than the necessary majority, and was returned to the Assembly for approval of the Senate amendments; at 11:59 P.M., despite hard feelings by many Senators over the parliamentary maneuvering, the Bill was finally passed.[29]

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tunda have left the flag-draped area looking more like a camp ground than a legislative hallway. The Congress of Racial Equality—CORE—has staged a round-the-clock sit-in for 15 days . . . * * * Sleeping bags, air mattresses, blankets, books and magazines, chessboards and guitars and even baby bottle warmers are piled around the carved, polished wood railing on the Capitol's second floor."]; "Protestors Lie Across Door to State Senate, 25 CORE Members Form Human Blockade to Demand Passage of Fair Housing Bill", Los Angeles Times, June 15, 1963, § 1, p. 7 [reporting: "Twenty-five members of a group demanding passage of a fair housing bill dropped flat at the entrance of the Senate chamber Friday and stayed there motionless until carried bodily into the outside corridor by state police. The human blockade was formed seconds after the Senate adjourned for the day. * * * The demonstrators remained inert as police carried them one by one to the floor outside. * * * Stretched like lengths of cordwood all across the corridor, the demonstrators continued their 'lie-in' for several hours after their removal. Mrs. Mari Goldman, . . ., CORE spokesman, had said the participants would stay in the hall for at least several hours 'and maybe indefinitely.' "]

[27]*Ibid.*

[28]Comment, 19 Stan. L. Rev. 232, 237 (Nov. 1966).

[29]*Ibid.*

Section 26 resulted from popular dissatisfaction with this kind of legislative conduct, reflecting as it did great political pressure and disregard for the ordinary process of deliberation after public committee hearings, and it was the effective repeal of what the public viewed as an ill-considered, hastily drawn, midnight measure that was one of the primary purposes of Section 26. Another purpose, just as primary, was to make it clear that the legislature could not without a vote of the people impose governmental sanctions, civil or criminal, on any owner of private residential property for his choice of buyers or tenants, whatever his reasons were.

If California, with its pervasive policy against racial discrimination, cannot by dint of the Federal Constitution modify or repeal any part of its body of anti-discrimination legislation, the results are far-reaching indeed. A decision that it cannot do so with respect to portions of the Rumford and Unruh Acts cannot be justified on the grounds that the repeal is the act of a racially discriminatory body politic or a reflection of a public policy of encouraging racial discrimination. The facts, both those in the record before this Court and those produced by the excursions beyond the record, demonstrate that among the states of the union California is in the vanguard of the battle against racial discrimination. If repeal of portions of the Rumford and Unruh Act by California were unconstitutional, it could only be because repeal of any portion of any state's civil rights legislation is forbidden *per se* by Section 1 of the Fourteenth Amendment. Few greater deterents to progressive experimentation in the field of civil rights could be imagined than such a doctrine of

one-way constitutionality.[30] Few doctrines could have a more demoralizing, debilitating effect on the people, or on legislative institutions. Few doctrines could more effectively deflect responsibility from those upon whom in a democratic society ultimate responsibility must reside—the people.

Realization of these consequences is not apparent in the opinions of the Court below. With deference, it needs to be said regarding the "pernicious constitutional doctrine"[31] of the Court below:

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[30]As we asked in our petition for certiorari, must states considering discretionary civil rights legislation henceforth reckon with the prospect that such legislation, once enacted, is somehow constitutionally immune to qualification or repeal in whole or in part? Must 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 legislative system of 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 in wholly private areas of conduct? Does the Fourteenth Amendment to the Federal Constitution grant more extensive rights to Negroes and impose more severe obligations on property owners in California than in other states? Can the temporary incumbents of a local legislature vary the substance of Fourteenth Amendment rights?

[31]Analyzing the impact of the decisions of the court below, Professor Jerre S. Williams declared:

> "Suppose that a state did forbid by statute the creation of trust funds by testamentary disposition for the benefit of particular racial or ethnic groups. Then suppose after a few years it was decided that the state should return to the earlier principles. Under the reasoning of *Mulkey v. Reitman,* the state could not so return, for in the process of legislating to authorize this discrimination the state would engage in 'governmental action' and the Constitution would be violated. This is the core of the logical difficulty with the court's opinion. This is the doctrine of 'one-way legislation' about which concern was expressed earlier; a state may withdraw previously existing individual freedom to discriminate, but once that freedom has been withdrawn then

"Most of us must admire the vast humane improvements in the administration of the criminal law and the implementation of civil rights. These have had their inception insofar as official action is concerned largely in the judicial branch. . . . The time has long passed since reasonable men could argue about the rightness of the rise of a strong national government, but the time has not yet come when the dissolution of the federal-state system under a strong national goverment may be viewed with equanimity. The presence of backwardness, even barbarism, in some of the states, and perhaps inadequacies in all of the states, does not merit a judicial dissolution of the federal-state system. A central government perforce has its inadequacies and limitations. Such a dissolution is a political judgment of the first importance. The courts are not the intended, desirable, or efficacious organs for making or expressing that political judgment. They are not inherently the organs of democratic expression. After all, . . . it was the House of Commons, a representative legislative body, which sustained the structure of democracy for England."[32]

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the state may not return to the earlier law. This can only be said to be a pernicious constitutional doctrine taking away from the state or federal government the right to engage in legislative policy making in an area where there is no constitutional restriction on the state's common law policy."

Williams, "*Mulkey v. Reitman* and State Action" 14 U.C.L.A. L. Rev. 26, 30-31 (1966).

[32]Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 775-776 (1965).

VI.
SEVERABILITY.

Whatever real or imagined constitutional shortcomings Section 26 may have in its other applications or effects, it should at least be held to be a valid and effective repeal of the inconsistent portions of the Unruh and Rumford acts.[33] As previously stated, it is incontrovertible and undenied that a primary purpose of the proponents of Section 26 was the repeal of then-existing inconsistent legislation which restricted the freedom of private residential property owners in selecting the persons with whom they would deal and which embodied procedures which many found offensive. Given the express severability clause in Section 26,[34] given the express indication of intent to repeal in the official Ballot Argument,[35] and given the common knowledge among the electorate that Section 26 was intended to repeal inconsistent legislation, there can be no doubt that those who voted for Section 26 intended it to be effective at least as a *pro tanto* repeal of the Unruh and Rumford Acts. There is not a scintilla of evidence suggesting that those who enacted it would have preferred that it fall entirely if it were held unconstitutional because of its reservation to the people of power over future action or because of its possible application in cases not presently before the Court. If necessary to give effect to this intent, the repeal aspects of Section 26 should be sev-

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[33]Time has not permitted a systematic response to each of the many respects in which our opponents contend that Section 26 may possibly be unconstitutional. As we demonstrate throughout this Reply Brief, however, Section 26 is *in all respects material to the cases presently before this Court* a valid constitutional enactment of the people of the State of California.

[34]App. 1-2.

[35]App. 3-4.

ered from any aspects which might be deemed unconstitutional.[36]

The *amicus* brief filed herein for the United States argues, at pages 41-47, that Section 26 would be unconstitutional if applied in certain circumstances not present in the cases now before the Court and that it should for that reason be held unconstitutional here. As that brief acknowledges,[37] the leading authority on the related questions of severability and standing is *United States v. Raines,* 362 U. S. 17. In that case, it was declared at page 21:

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [Citations omitted] Kindred to these rules

[36]Apart from its effect as a repealer, Section 26 does no more than reserve to the people of the State of California the power to enact future restrictions on the exercise of discretion by the owner of private residential property in the selection of the persons to whom he will or will not sell, lease, or rent his own property. If we are correct that such reservation of power is not justiciable, or if justiciable is clearly constitutional, there is no necessity to consider further the subject of severability. In the event this Court finds the reservation of power invalid, however, we here submit that it should nevertheless hold Section 26 to have been effective as a repeal of the conflicting portions of the Unruh and Rumford Acts.

[37]Pp. 42-43.

> is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Citations omitted]"

Under those rules, Respondents and *amici* would have no standing to raise and this Court could not properly consider whether Section 26 might be unconstitutional if it applied to circumstances in which the government was "involved" in the constitutional sense in a transaction relating to residential property.[38]

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[38]Some of our opponents have urged that the state is necessarily involved in the discrimination which occurred in the cases before this Court by virtue of the fact that the alleged creation of a "right" of the owner of residential property to select the persons with whom he will deal with respect to that property constituted state action and involved the state in subsequent acts of discrimination. With reference to this contention, it should first be noted that Section 26 did not create any "right" for the property owner. Section 26 merely refers to a right which this Court has long recognized.

In *Buchanan v. Warley*, 245 U.S. 60, the plaintiff, a Caucasian, was asserting a right to *dispose* of his own property to a Negro who had contracted to buy it from him. The Negro had successfully defended an action for a specific performance by invoking a municipal ordinance which purported to prohibit the sale of specific property to a Negro. This court reversed, declaring:

> "The right of the plaintiff in error *to sell* his property was directly involved . . ." (Emphasis added; 245 U.S. 73).
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> * * *
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> "Property is more than a mere thing which a person owns. It is elementary that it includes the right to acquire, *use and dispose* of it. The Constitution protects these essential attributes of property. *Holden v. Hardy*, 169 U.S. 366, 391, 42 L.ed. 780, 790, 18 Sup.Ct.Rep. 383. Property consists of the free *use, enjoyment, and disposal* of a person's acquisitions without control or diminution save by the law of the land. 1 Cooley's Bl. Com. 127." (Emphasis added; 245 U.S. at 74).
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> * * *

In *Raines,* the Court did declare certain exceptions to the ordinary rules governing the scope of review, exceptions under which this Court may consider extraneous circumstances in passing on the constitutionality of a state enactment. However, none of the exceptions relied upon by the United States is applicable here:

1. Section 26 has not been construed by the court below to be unseverable either with respect to its repeal

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"That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded." (245 U.S. at 75).

As Mr. Justice Black concluded after reviewing the line of cases from *Buchanan* through *Shelley* in *Bell v. Maryland,* 378 U.S. 226, at 331 (dissenting opinion):

"* * * . . . [T]he 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 principle 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, then as this Court emphasizes 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. * * *"

Thus Section 26 did not "create" any right. In the absence of legislation regulating the discretion of a property owner in selecting the persons with whom he will deal with respect to his own residential property, the owner has always had a right to exercise that discretion in any fashion he might choose. Nothing in Section 26 (1) requires racial discrimination, or (2) singles out racial discrimination as permissible while prohibiting other forms of arbtrary conduct, or (3) places a special burden on those who desire not to discriminate or grants a special benefit to those who do, or (4) confers or withholds legal rights based upon a racial classification. In no sense does it deny respondents the equal protection of the laws.

The fact that Section 26 is an amendment to the State Constitution is of course without significance here. Had it been enacted merely as an initiative act, as opposed to an initiative constitutional amendment, it would nevertheless have been subject to

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aspects or with respect to any attempt to apply it to transactions in which the government might be constitutionally involved. As previously shown, the court held Section 26 unconstitutional because of its repeal effects;[39] therefore it never reached the question of the severability of that feature of the enactment. Similarly, the court below held Section 26 unconstitutional as applied to all racial discrimination, unseverable only with respect to its possible effects on non-racial criteria of selection of the persons to whom a property owner might or might not sell, rent or lease his own property.[40] It did not consider or rule on the severability of the government involvement aspects of Section 26.

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modification or repeal only by subsequent vote of the people. California Constitution, Article IV, Section 1.

Nor is there any support for the implication that the very existence of Section 26 necessarily encourages racial discrimination. As noted in n. 10, *supra*, a survey of property listings throughout California in 1966 (more than a year after the enactment of Section 26) disclosed that only .6% of a total of 286,406 listings contained any racial restrictions.

There is no evidence whatever that the acts of discrimination involved in the cases before this court were in any respect affected by the enactment of Section 26. As previously noted, p. 23, *supra*, the discriminatory act in *Mulkey v. Reitman* occurred prior to the passage of Section 26 and therefore could not conceivably have been affected by its enactment. There is simply no evidence that the state is "involved" in the discrimination of the private property owners who are before this court.

[39]*Supra*, pp. 23-24 and nn. 4, 17-20.

[40]The scope of the severability ruling in the court below is apparent from the following statement of the court in *Mulkey v. Reitman:* "It is immediately apparent from the operative portion of the instant constitutional amendment that it is mechanically impossible to deferentiate between those portions or applications of the amendment which would preserve the right to discriminate on the basis of race, color or creed, as distinguished from a proper basis for discrimination." R. 30. As that and the portion of the opinion which follows makes plain, the court below considered severability only in the sense of distinguishing between discrimination on the grounds of race and discrimination on other grounds, and neither in the sense of distinguishing between

2. The second exception relied upon by the United States is based upon its assertion that this controversy "concerns rights which cannot be readily asserted by those whom the impermissible conduct affects directly" (p. 45). "We know of no case," says the Solicitor General, ". . . where suit has successfully been maintained against the state or its agencies to compel it to perform" the affirmative steps required by the Fourteenth Amendment (p. 45). The real vice of Section 26 is that state agencies will "sit idly by even where the Fourteenth Amendment commands them to act . . ." (pp. 45-46).

Those assertions are puzzling to say the least. No state agencies in California to our knowledge are sitting idly by, and none in that category is identified by the Solicitor General. The Attorney General of California, himself, has not been idle, even here. There is no reasonable possibility that any agency in California will ignore its Fourteenth Amendment responsibilities. Moreover, Section 26 was not intended to and does not protect or affect the conduct of the state or any of its instrumentalities.[41] It does not apply to urban redevelopment

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purely private discrimination (on whatever grounds) and the discrimination in which the state is "involved" nor in the sense of distinguishing between the repeal effect of Section 26 and any other effects that section might have.

[41]In *Redevelopment Agency of the City of Fresno v. Buckman*, 64 Cal. 2d 886, 50 Cal. Rptr. 912, decided concurrently with the cases now before this Court, the majority of the court below took no issue with the following analysis of Justice Thomas P. White, dissenting (at 64 Cal. 2d 889-890, 50 Cal. Rptr. 914):

> "The redevelopment and housing legislation in California establishes a redevelopment agency in each community as an administrative arm of the state. Indeed, the California Health and Safety Code, section 33005, defines the term 'State' to include any state agency or instrumentality.

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and other similar governmental programs. *Cf. Redevelopment Agency v. Buckman,* 64 Cal. 2d 886, 889, 890, 50 Cal. Rptr. 912, 913, 914 (dissenting opinion). Finally,

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Since property owned by a redevelopment agency is excluded from the coverage of section 26, the agency may clearly include a nondiscrimination covenant as a condition of the disposition of its own property. And a purchaser of project property, whether from the redevelopment agency or a subsequent purchaser of the same property, may purchase it or not, as he sees fit. However, if he does purchase he accepts the land subject to other conditions or restrictions running with the land. If these restrictions, including a nondiscrimination one, do not suit his tastes, he is under no obligation to purchase.

This is equally true with the owner of property in a redevelopment project who enters into an agreement as a participating owner, thereby avoiding the acquisition of his property by eminent domain. It seems clear to me that if one enters into an agreement to sell or to purchase property upon terms satisfactory to the buyer and seller, such an agreement is binding and enforceable. Therefore, if a person chooses to take property with a nondiscrimination covenant, the state is not interfering with any right he might have to refuse to sell in the absence of such a contract. A nondiscrimination covenant running with the land is legal and lawful, and is accepted the same as all other covenants by subsequent purchasers."

In accord was the opinion of the Los Angeles City Attorney, given to the city shortly after the passage of Section 26, that Section 26 did not affect the power of the community redevelopment agency to enforce non-discriminatory practices in urban renewal projects. Los Angeles Times, November 11, 1964, Part I, page 2. As there reported, the City Attorney was not aware of any federally imposed policy requirement that could not be met by virtue of Section 26.

The Ballot Argument in favor of Section 26 (Proposition 14) clearly disclaimed any intent to affect the conduct of the state or its instrumentalities:

> "The amendment does not affect the enforceability of contracts voluntarily entered into. A voluntary agreement not to discriminate will be as enforceable as any other. Contrary to what some say, the amendment does not interfere with the right of the State or Federal government to enforce contracts made with private parties. This would include Federal Urban Renewal projects, College Housing programs, and property owned by the State or acquired by condemnation." (App. 4-5).

any persons whose rights might be adversely affected by any wrongful failure of any state agency to take such affirmative steps as the Constitution might require where state and private actions are "intertwined" has ample access to redress, coercive as well as compensatory, through the courts. In the event of any wrongful failure of a state agency to act, *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal. Rptr. 606 is evidence of the availability of relief in California, and the Solicitor General is surely aware of *Brown v. Board of Education* [42] and its progeny in this Court. By virtue of the Supremacy Clause, Section 26 obviously cannot affect in the slightest the duties or responsibilities of the state or its agencies under the Fourteenth Amendment or the obligation of the state courts to recognize and enforce those duties and obligations.

3. Section 26 contains no sanctions whatever. It in no way attempts to control or prevent or even discourage nondiscrimination. It does not deter the exercise of rights by any persons whatever. The rule of *Aptheker,*[43] *Thornhill,*[44] and similar cases, that governmental attempts to coerce, control or prevent conduct must not be couched in terms so broad as to deter the exercise of fundamental personal liberties is clearly not applicable to a measure which does not bring the power of government to bear on private conduct in any manner whatsoever.

The severability question not having been resolved by the court below so far as is here material, this Court

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[42] 347 U.S. 483.

[43] *Aptheker v. Secretary of State,* 378 U.S. 500.

[44] *Thornhill v. Alabama,* 310 U.S. 88.

is free to rule upon it.[45] The resolution of the question depends only upon (a) whether legal effect can be given to the severed feature and (b) whether the legislature (here the people) intended that the severed feature stand in the event the measure were in other respects invalid.[46] Here, legal effect can certainly be given to the repeal aspects of Section 26 quite independently of the balance of its features. Similarly, any possible application of Section 26 to transactions in which the government is involved is readily severable from its application to strictly private transactions. Indeed, the issue which this Court held severable in *United States v. Raines,* 362 U.S. 17, was the application of Section 131 of the Civil Rights Act of 1957 to the conduct of public officials where it was contended that the act might also apply to private persons and that so applied it would be unconstitutional.[47] That is precisely the

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[45]"In cases coming from the state courts, this court, in the absence of a controlling state decision, may, in passing upon the claim under the Federal law, decide, also, the question of severability." *Dorchy v. Kansas,* 264 U.S. 286, 291.

[46]*Dorchy v. Kansas,* 264 U.S. 286, 289-291. And see separate concurring opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan in *United States v. Raines,* 362 U.S. 17, 28:

> "To deal with legislation so as to find unconstitutionality is to reverse the duty of courts to apply a statute so as to save it."

[47]The action was brought by the United States seeking, in part, an injunction against the continuation of discriminatory practices by Members of the Board of Registrars and certain Deputy Registrars of Terrell County, Georgia. The action was based upon Section 131(c) of the Civil Rights Act of 1957 which provided for the institution of such an action whenever there were reasonable grounds to believe "that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a)", such rights relating to the vote. The District Court dismissed the complaint on the grounds that subsection (c) was unconstitutional since its language might permit its application "to enjoin purely private action designed to deprive citizens of the right to vote on account of their race or color." There was

type of severance the United States here contends this Court cannot make.

For the reasons set forth in Part III hereof and in our previous brief, the reservation of power to the people which Section 26 effects in a narrow area of private conduct is not unconstitutional. Regardless of the decision on that point, however, Section 26 was obviously intended at least to repeal conflicting portions of the Unruh and Rumford Acts. Unless the state was under federal constitutional compulsion to take affirmative action to prevent racial discrimination in purely private transactions, a proposition which is untenable as we demonstrated in our opening brief,[48] California was under no constitutional duty to enact either of those statutes. What it voluntarily enacted in an attempt

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no question but that "the complaint in question involved only official action". 362 U.S. 17, 20. This Court reversed, declaring:

> "The District Court seems to us to have recognized that the complaint clearly charged a violation of the Fifteenth Amendment and of the statute, and that the statute, if applicable only to this class of cases, would unquestionably be valid legislation under that Amendment. We think that under the rules we have stated, that court should then have gone no further and should have upheld the Act as applied in the present action, and that its dismissal of the complaint was error."
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> 362 U.S. 17, 26.

Similarly, Section 26 is clearly constitutional insofar as it affects only private action, and since only private action is involved in the cases before this Court, Section 26 should be upheld as applied in this action and the decision of the Court below should be reversed.

[48]Op. Br. for Pet. 28-37. See particularly *Williams v. Howard Johnson's Inc. of Washington* (4th Cir.), 323 F. 2d 102, 106, *cert. den.* 382 U.S. 814, *reh. den.* 382 U.S. 933, cited at p. 29, n. 33 of that brief where the Court of Appeals declared:

> "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of [*sic.*, was a ?] deprivation of the equal protection of the law would be totally to emasculate existing case law."

to promote the public peace and welfare in the field of private housing, it was certainly free to modify or repeal in its continuing search for the best solution with the least friction for all of the people.

VII.
CONCLUSION.

The problem of racial discrimination in housing has been in recent years, still is, and promises to continue to be a serious and complicated one. It involves a confrontation of people in an area of peculiarly intense emotional attachment. It involves the conflict between long-cherished rights of privacy and freedom of association and established and valued though admittedly not absolute rights to own, enjoy and dispose of property not devoted to any governmental or public use, and the important rights of individuals of all races and creeds to acquire property, to enjoy the equal protection of the laws, and to receive due process. These rights have all been recognized by this Court. They all find support in the Constitution of the United States. The choice among them is one not easily made. Moreover, it is a choice that may and almost certainly does differ from place to place within as well as among the several states and from time to time in any location. It is a problem peculiarly suited to legislative rather than judicial treatment.[49]

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[49]As Mr. Justice Brandeis declared, dissenting in *Truax v. Corrigan*, 257 U.S. 312, 357:

> "* * * Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly when the public conviction is both deep-seated and widespread, and has been reached after deliberation. [Citations omitted] What, at any par-

The problem is not one being ignored today. It is being vigorously debated in Congress. It is the subject of various legislative experiments in California and other states throughout the nation. Judicial intervention cannot be justified by legislative neglect in the light of these facts.

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ticular time, is the paramount public need, is, necessarily, largely a matter of judgment. Hence, in passing upon the validity of a law challenged as being unreasonable, aid may be derived from the experience of other countries and of the several states of our Union in which the common law and its conceptions of liberty and of property prevail. The history of the rules governing contests between employer and employed in the several English-speaking countries illustrates both the susceptibility of such rules to change and the variety of contemporary opinion as to what rules will best serve the public interest. The divergence of opinion in this difficult field of governmental action should admonish us not to declare a rule arbitrary and unreasonable merely because we are convinced that it is fraught with danger to the public weal, and thus to close the door to experiment within the law."

In a separate dissenting opinion joined in by Justices Holmes, Brandeis, Pitney, and Clarke, it was observed:

"* * * That no person has a vested interest in any rule of law, entitling him to have it remain unaltered for his benefit, is a principle thoroughly settled by numerous decisions of this court, and having general application, not confined at all to the rights and liabilities existing between employers and employees, or between persons formerly occupying that relation. * * *"

"The use of the process of injunction to prevent disturbance of a going business by such a campaign as defendants here have conducted is, in the essential sense, a measure of police regulation. And 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. * * *"

Truax v. Corrigan, 257 U.S. 312, 348 (dissenting opinion).

Indeed, judicial intervention is likely to stultify legislative efforts to cope with the problems of discrimination in housing. Judicial assumption of the burden of administering social policy in so sensitive and complex a field would necessarily further undermine public faith in and reliance upon their legislatures while simultaneously aggravating the problem by eliminating the sense of urgency which presently attends legislative review of civil rights problems. Moreover, the policies declared and enforced by this Court, necessarily being constitutional rather than legislative in character, they necessarily will be less flexible, less precise, less adaptable and changeable as differing times and circumstances warrant. Democracy can be most effective only when the responsibility for formulating policy and effectuating that policy by the institution of practical programs is placed where it belongs—on the legislature and the people.[50]

Unfortunately, solutions are also sometimes being sought in the streets rather than in the legislative halls or polling booths, by demonstration and counter-demonstration rather than through the orderly appeal to the processes of government. It is to the available institutions of democratic government, whether to the initiative process or through representative government, that efforts to effect satisfactory solutions must be directed. It is to those processes of government that the

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[50]More recently Justice Breitel declared:

> "It is folly and a contradiction of the teachings of history to believe, whatever the defects of the legislative institution, that democracy can be preserved without legislative primacy in a people-elected and a people-responsive delegate legislature."

Breitel, "The Lawmakers", 65 Colum. L. Rev. 749, 763 (1965).

people of California duly resorted in enacting Section 26 as an expression of a policy of government neutrality for the time being in this field. If time proves that policy to be unwise, relief should be sought at the polls.[51]

Where, as here, reasonable men can differ as to the propriety of a policy adopted by the state,[52] and where, as here, the policy does not clearly offend any provision of the Constitution, it is essential that the people be left free to effectuate their will through the established procedures of government. If the physical confrontations of Watts and Cicero are to be avoided, it is essential that this Court permit and encourage effective resort to due legislative process, both direct and representative.

The judgments of the California Supreme Court should be reversed.

Respectfully submitted,

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[51]"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. * * * . . . [I]t is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those upon whom in a democratic society it ultimately rests—the people. * * * [The endorsement of the electorate] would be a vindication that the mandate of this Court could never give." (Frankfurter, J. concurring in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553.)

[52]For proof of the existence of differences of opinion on the desirability or need for the kind of legislative sanctions reflected in the Unruh and the Rumford Acts, see Op. Br. for Pet., p. 34, n. 45.