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Validity of State Proposition Effectively Repealing Anti-Discrimination Laws

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problem. That opinion relied on several Supreme Court cases[28] involving application of the cross-section test to state juries, which required jury commissioners to familiarize themselves with the identity and availability of potentially qualified jurors in all significant elements of the community.[29] If jury commissioners did acquaint themselves with the community, and then combined such acquaintance with readily available methods of obtaining names of prospective jurors (voter registration lists, tax rolls, utilities rolls, telephone books and city directories),[30] they could establish impartial jury lists which reasonably represent a cross-section of the community.[31] The court should have adopted the concurring judge's conclusions about the duty of jury commissioners and thereby met the problem of juror selection without an unnecessary statutory construction.

VALIDITY OF STATE PROPOSITION EFFECTIVELY REPEALING ANTI-DISCRIMINATION LAWS

The California Legislature did not attempt to prevent property owners from selecting buyers or tenants on the basis of racial considerations until 1959. Then, by enacting the Hawkins Act[1] and the Unruh

Furthermore, use of voter lists would discriminate heavily against the Negro community because Southern voter lists are unlikely to represent a cross-section of the community until fear of reprisals for registration is eliminated. See ZINN *op. cit. supra* note 23, at 138-39; The New Republic, Aug. 13, 1966, pp. 10-11. For state and federal jury selection provision of 1966 Civil Rights Bill, see Comment, 52 VA. L. REV. 1069 (1966).

[28] Cassell v. Texas, 339 U.S. 282 (1950); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940).

[29] One week after *Rabinowitz*, the Fifth Circuit accepted the arguments of the concurring opinion in a state jury selection case. Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966).

[30] City directories are ideal for the urban areas of the South which have them. However, singular use of any one source for juror selection is unsatisfactory. In 1963 only 69% of the households in Georgia had telephones. The whole Fifth Circuit had 68.3% while the national average is 81%. STATISTICAL ABSTRACT OF THE UNITED STATES 38, 517 (1965).

Use of tax rolls would discriminate against the large number of tenants in the South. In 1959, 24.1% of the farms in Georgia were tenant operated. The Fifth Circuit average (excluding Florida) is 25% compared with the national average of 19.8%. *Id.* at 615, 621. Non-farm housing presents a similar problem. In 1960, 38% of the Southern non-farm housing was rented (whites 33.6%, non-whites 58.4%, *Id.* at 761. Unfortunately use of census lists in juror selection is prohibited by 13 U.S.C. § 9(1962).

[31] In Note, 75 YALE L.J. 322, 329 n.38 (1965), it was contended that the more sources used in selecting the jury list, the more difficult it is for a judge to supervise the process. See also Comment, 73 YALE L.J. 90 (1963), which questions how closely Southern district court judges follow appellate decisions.

[1] §§ 35700-35741. Section 35720 makes it unlawful:

> For the owner of any publically assisted housing accommodation which is in, or to be used for, a multiple dwelling [or a single family dwelling], with knowledge of such assistance, to refuse to sell, rent or lease or otherwise deny to or

Civil Rights Act,[2] the legislature chose to regulate racial discrimination in all business establishments including those involving the selling or renting of residential property and in all publicly assisted housing. Three years later, by enacting the Rumford Fair Housing Act,[3] the legislature extended the regulation of discriminatory conduct to owners of most, but not all, residential property. As an initiative measure at the 1964 general election, popularly known as Proposition 14, the voters of California added to the state constitution article I, section 26, which 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 as he, in his absolute discretion, chooses.

Plaintiffs alleged that, contrary to the express provisions of the Unruh Act, defendants refused to rent available apartment units to them solely because plaintiffs were Negroes. Defendants' motion for judgment was made and granted on the ground that Proposition 14 nullified the Unruh Act. On appeal, the California Supreme Court reversed and *held* the adoption of Proposition 14 constituted significant state involvement in racial discrimination as prohibited by the equal protection clause of the fourteenth amendment. *Mulkey v. Reitman,* 50 Cal. Rep. 881, 413 P.2d 825 (1966).[4]

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withhold from any person or group of persons such housing accommodations because of the race, color, religion, national origin, or ancestry of such person or persons.

[2] CAL. CIV. CODE § 51 provides as follows:

All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

[3] CAL. HEALTH & SAF. CODE §§ 35700-35744. Section 35700 provides in part:

The practice of discrimination because of race, color, religion, natural origin or ancestry is declared to be against public policy.

Section 35720 makes it unlawful:

For the owner of any ... [dwelling, other than a dwelling containing not more than four units], ... to refuse to sell, rent or lease or otherwise to deny to or withhold from any person or group of persons such housing accommodations because of the race, color, religion, national origin, or ancestry of such person or persons.

[4] *Petition for cert. filed,* 35 U.S.L. WEEK 3081 (U.S. Aug. 25, 1966) (No. 483). In reaching its result, the court relies upon many recent decisions which have broadened the meaning of "state action." None of these cases are squarely apposite. Since the issue of state action in this case has been discussed elsewhere, see 2 CAL. W. L. REV. 109 (1966), this note will consider the theoretical and practical problems resulting from, and the implications of, the holding in *Mulkey.*

Since the fourteenth amendment is generally construed as limiting state rather than private action, the equal protection clause does not prohibit private discrimination if the state is not significantly involved in or responsible for that discrimination.[5] Neither does that amendment impose a duty upon the state to prevent such discrimination.[6] Nevertheless, the prohibitions of the equal protection clause are not confined merely to racial discrimination which is directly required or accomplished by the state itself.[7] Rather, the fourteenth amendment is also violated when private discrimination is enforced,[8] authorized,[9] encouraged[10] or, under some circumstances, merely tolerated by the state.[11] In other words, the state will be held responsible for dis-

[5] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961): "private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the State in any of its manifestations has been found to have been involved in it."

[6] Civil Rights Cases, 109 U.S. 3 (1883), in which the Supreme Court held that the fourteenth amendment was intended solely to *prohibit* public or state denials of equal protection of the law. The Civil Rights Cases have been cited in later decisions as standing for a variety of sometimes conflicting propositions. *Compare* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), *with* Dorsey v. Stuyvesant Town Corp., 209 N.Y. 512, 87 N.E. 2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950). However the restriction of the fourteenth amendment to state discrimination has been constantly reaffirmed by the courts. *E.g.*, Burton v. Wilmington Parking Authority, *supra* note 5. See generally Comment, 50 CORNELL L.Q. 473 (1965). *Contra*, Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959). For possible exceptions to the rule that the state has no duty to prevent private discrimination, see cases cited in note 11 *infra*.

[7] See, *e.g.*, Turner v. City of Memphis, 369 U.S. 350 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954).

[8] Barrows v. Jackson, 346 U.S. 249 (1953) (racially restrictive covenant could not constitutionally support suit for damages); Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant invalid); Hurd v. Hodge, 334 U.S. 24 (1948), in which the court stated that in light of *Shelley* judicial enforcement of these contracts was against "the public policy of the United States." See Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962).

[9] In McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914), the court implies that the denial of equal railroad facilities to Negroes by a private railroad was unconstitutional state action because a local statute authorized such discrimination and, therefore, the carrier perpetrating such discrimination would be acting under the authority of state law. See also, Evans v. Newton, 382 U.S. 296, 306 (1966) (White, J., concurring); Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (Stewart, J., concurring), 727 (Frankfurter, J., dissenting) (1961). See generally Henkin, *supra* note 8; Comment, 50 CORNELL L.Q. 473 (1965).

[10] In Barrows v. Jackson, 346 U.S. 249, 254 (1953), the court, in holding that a racially restrictive covenant could not constitutionally support a suit for damages, stated that "the result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants ...." In Anderson v. Martin, 375 U.S. 399 (1964), the court struck down racial labeling of candidates because, although the state practice did not require discrimination on the part of individual voters, it did encourage and assist in such discrimination.

[11] In some instances, although the active discrimination is practiced by private organizations or persons and not perpetrated, required, or participated in by the state, the state may nevertheless be held responsible because of the special character of the private activity or the state's special relationship to it. In these instances

crimination perpetrated, at least initially, by private citizens whenever the state, in any meaningful way, lends its processes to the achievement of that discrimination, even though that goal is not within the state's purpose.

The *Mulkey* holding, that the state was significantly involved in the defendant's discriminatory act of refusing to rent to Negroes, was primarily based on the court's view that Proposition 14 encouraged and authorized a form of discrimination which formerly had been prohibited: "Here the state has affirmatively acted to change its existing laws [the Unruh and Rumford Acts] from a situation wherein the discriminatory practice was legally restricted to one wherein it is encouraged. . . ."[12] The court reasoned that, although the final act of discrimination was undertaken by private parties motivated by personal, economic or social considerations, such act was made legally permissible because Proposition 14 nullified the Unruh and Rumford Acts. In the court's opinion, just as legislative enactments must be considered state action, so must the adoption of a law directly by the people. The implication of *Mulkey* is that a similar attempt by the legislature to nullify these acts would also have been prohibited.

Although the *Mulkey* holding is correct with regard to the validity of Proposition 14, the holding should not be used to support the establishment of a rule making unconstitutional *all* attempts to nullify or repeal existing anti-discrimination laws. Besides not being required by the fourteenth amendment, such an absolute rule would result in an unwarranted interference with normal state legislative processes and seriously restrict a state's ability to find workable solutions to problems involving racial discrimination.

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often involving the performance of traditional governmental or public functions, the state may not *refuse* to proscribe discriminatory conduct. *E.g.*, Evans v. Newton, 382 U.S. 296 (1966) (operation of municipal park); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) (private organization operating pursuant to scheme of statutory regulation); Terry v. Adams, 345 U.S. 461 (1953) (conducting elections); Marsh v. Alabama, 326 U.S. 501 (1946) (corporation governing town). In Burton v. Wilmington Parking Authority, *supra*, the Court implicitly held that a state has a duty to prevent discrimination by its private lessee. State inaction in good faith subsequent to the grant of the lease was no excuse for the state's failure to fulfill its duty to control. Any contrary implications of the Civil Rights Cases, 109 U.S. 3 (1883), were to that extent overruled. *Burton* thus reveals that state inaction provides a basis for applying the fourteenth amendment where *previous* state action (as the grant of the lease) establishes state responsibility for private discrimination.

That the Constitution may favor, in some instances, basic property rights and rights of personal liberty above the right to equality and freedom from discrimination, even above the right not to have the state lend its support to inequality, see Henkin, *supra* note 8.

[12] 50 Cal. Rep. 881, 890, 413 P.2d 825, 834 (1966).

Generally, there can be no vested right in an existing law which precludes its change.[13] It is clear that it is the function of the legislature to change rules of law,[14] that each subsequent legislature has equal power to legislate upon the same subject,[15] and that one legislature cannot abridge the power of a succeeding legislature.[16] Furthermore, state constitutions, including that of California,[17] typically reserve to the people the power to adopt or repeal laws and constitutional amendments.[18] A second safeguard against the legislature acting contrary to voters' wishes is the power to elect new representatives who will make desired changes.[19] These safeguards, however, are rendered meaningless at least with regard to civil rights legislation, if the *Mulkey* holding is interpreted to preclude both the electorate and the legislature from repealing or nullifying any anti-discrimination law once it is enacted.

Indeed, such an interpretation could be extended to the defeat of a proposed civil rights law by the state legislature itself. Such action does not necessarily represent public approval of private discrimination; rather, it may indicate only dissatisfaction with some aspects of the bill. But whether or not defeat does in fact reflect public approval of private discrimination, the legislature would, in effect, be declaring

[13] Arizona Employers' Liab. Cases, 250 U.S. 400 (1919); *Cf.* Middleton v. Texas Power & Light Co., 249 U.S. 152 (1919).

[14] United States v. Dickerson, 310 U.S. 554 (1940) (suspension of military reenlistment allowances); Role v. J. Neils Lumber Co., 74 F. Supp. 812 (D. Mont. 1947), *aff'd*, 171 F.2d 706 (9th Cir. 1949) (repeal of Fair Labor Standards Act of 1938).

[15] Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899); State *ex rel.* Anderson v. Brand, 214 Ind. 347, 5 N.E.2d 531 (1937).

[16] Reichelderfer v. Quinn, 287 U.S. 315 (1932); Seymour v. United States, 77 F.2d 577 (8th Cir. 1935); Preveslin v. Derby & Anosnia Developing Co., 112 Conn. 129, 151 Atl. 518 (1930).

[17] CAL. CONST. art. IV, § 1, provides:
The legislative power of this State shall be vested in a Senate and Assembly which shall be designated "The Legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

[18] MARTIN & GEORGE, AMERICAN GOVERNMENT AND CITIZENSHIP 297 (1927):
The deepest cut into legislative competence has been made by direct government .... The rise and spread of the ideas embodied in the initiative, referendum, and recall may be traced to the same spirit of distrust and discontent which promoted constitutional restrictions on state legislatures.... Legislators were not responsive to public opinion, nor responsive to the will of their masters.

[19] *Id.* at 49:
As one means of achieving political responsibility, revolutionary political theory made much of the sovereignty of the people.... Unable to make laws and execute them directly, the people were obliged to have recourse to representatives; but they made it abundantly clear that their representatives were only their agents, and as such were to be kept responsive to public opinion by frequent elections and short terms of office.

that the state will not prohibit or impose sanctions on certain discriminatory conduct and, to that extent would be offering encouragement to the particular form of discrimination. Taking the *Mulkey* reasoning to its logical extreme might produce the absurd result that a state legislator could "force" his legislature into a denial of equal protection through the mere introduction of civil rights legislation.[20]

Mulkey also leaves uncertain the extent to which the California electorate or legislature may *experiment* in the civil rights area. Placing significant restrictions on a state's ability to modify or repeal laws affecting racial discrimination may well remove much of the flexibility necessary in any attempt to solve complex social problems. Under the *Mulkey* climate, legislatures would certainly hesitate before enacting new anti-discrimination laws for fear that the courts would void any future attempt to repeal such laws even though they proved unworkable or unwise.

It is submitted that the test of whether or not repeal or modification of a particular anti-discrimination law is constitutionally permissible is whether such action results in a reversal of established state policy proscribing such discrimination, or whether it constitutes an integral part of the state's initial decision whether to establish that policy.

As a rule, a state is free to choose between establishing or not establishing a general policy proscribing a particular form of discrimination, subject only to rather broad constitutional limitations.[21] While the initial decision to refrain from establishing such a policy may have the effect of encouraging discrimination, nevertheless such encouragement hardly appears sufficient "to justify a kind of circular logic whereby inaction creates a positive duty on the state where none existed previously."[22]

Once a state, however, affirmatively establishes a policy proscribing some form of discrimination, then the subsequent reversal of that policy may indeed controvert the fourteenth amendment. The effectuation of such a reversal goes well beyond mere state inaction which incidentally encourages discrimination and may even be construed as

[20] See generally Comment, 50 CORNELL L. Q. 473 (1965); Comment, 52 NW. U. L. REV. 774 (1958). Although the *Mulkey* court places great reliance on the fact that Proposition 14 nullified existing laws, it could be argued that when the governor vetoes a particular anti-discrimination bill, he affirmatively promotes discriminatory conduct which otherwise would have been prevented. In this sense, the state, acting through the executive, would be encouraging discrimination. This line of reasoning, however, leads to the conclusion that the governor must function as nothing more than a rubber-stamp for the legislature whenever civil rights legislation is involved.

[21] See note 11 *supra*.

[22] See Comment, 50 CORNELL L.Q. 473, 498 (1965).

affirmatively expressing a state policy fostering discrimination.[23] A state cannot meaningfully claim to be merely returning to its original position of neutrality with regard to a particular form of discrimination, for the very act of retreating to a neutral position involves, in effect, state authorization of that discrimination. Whereas the rejected policy may have imposed specific sanctions on those practicing discrimination, and may have induced reliance on state protection against such discrimination, by a return to neutrality that same discrimination would be permitted and that protection withdrawn.[24]

Clearly, both a governor's veto and a legislature's defeat of a proposed anti-discrimination bill would constitute integral parts of a state's choice *not* to establish a policy against discrimination, and not a reversal of some existing policy proscribing such discrimination. Thus, such action should not constitute a denial of equal protection of the laws within the meaning of the fourteenth amendment, even though some ancillary encouragement of discrimination may thereby result. It is submitted that the electorate's direct and immediate rejection, by popular vote, of an anti-discrimination law recently enacted by the legislature could also be considered part of the state's initial choice *not* to establish a policy against discrimination. Such action by the electorate would not result in the reversal of some *long*-standing state policy, but would parallel the governor's exercise of his veto power over

[23] In Turner v. City of Memphis, 369 U.S. 350 (1962), a Tennessee statute renounced the state's common law cause of action for exclusion from hotels and other public places and declared that operators of such establishments were free to exclude persons for any reason whatever. The court held that the statute could not stand consistently with the fourteenth amendment even though the statute was relevant only insofar as it expressed affirmatively the state policy of fostering segregation. As in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the private discrimination in *Turner* was practiced in a public facility leased from the state; nevertheless, the court did not seem to limit the application of its holding to the *Burton* situation.

[24] Many states have statutes which in effect permit discrimination at the option of the individual. The statutes are typically anti-trespass in form. Other than Turner v. City of Memphis, *supra* note 23, there is little authority that such legislation violates the equal protection clause. Where the opportunity to discuss equal protection has been available, the Court typically turns its decision on other grounds. In two cases, City of Charleston v. Mitchell, 239 S.C. 376, 123 S.E.2d 512 (1961), *rev'd per curiam* 378 U.S. 551 (1964), and Bouie v. City of Columbia, 378 U.S. 347 (1964), the Court held that the state court, in retroactively applying a new construction of the statute involved, deprived the defendants of their right to fair warning of criminal prohibitions and thereby violated the due process clause of the fourteenth amendment. In Griffin v. Maryland, 378 U.S. 130 (1964), the court reversed a trespass conviction because the one evicting and arresting the defendant was a deputy sheriff. The thrust of *Griffin* is that anti-trespass statutes are invalid when used by the state to enforce private discrimination. In Robinson v. Florida, 378 U.S. 153 (1964), the court reversed defendant's conviction under a trespass statute because of a state Health Board regulation requiring segregation and not because of the statute. That these holdings are not to be narrowly construed was made clear by Mr. Justice Black in his majority opinion in *Robinson* and in his dissent in Bell v.

the legislature.[25] Moreover, if the state's initial decision to establish a policy against some form of discrimination may, unlike most governmental decisions, thereafter be irrevocably binding on the state, then the electorate should have some opportunity to reject, either directly or through their future representatives, an initial decision made by one session of the legislature acting contrary to the electorate's will.[26]

The repeal or modification of a particular anti-discrimination law, however, should not automatically be rendered unconstitutional merely because such action is not part of the state's initial policy decision. Repeal may be justified when it constitutes change in the particular method of effectuating the state's policy against discrimination without actually nullifying the policy itself.[27]

When the approach suggested above is applied to the facts in *Mulkey*, it appears that the court reached the right result. California made its initial decision to establish a policy actively condemning racial discrimination in housing when the legislature enacted the Unruh and Hawkins Acts in 1959. By those acts, the legislature imposed sanctions on the practice of discrimination in publically assisted housing and in all business establishments including those selling or renting residential

Maryland, 378 U.S. 226 (1964). The justice asserts that private discrimination generally violates the fourteenth amendment once the state in any way discourages integration or instigates or encourages segregation.

[25] Once a bill is passed by the legislature, the governor may reject the bill by exercising his veto power, or he may allow the bill to become law by either approving it or by failing to return it to the legislature with his objections within the required time. Likewise, when a law is enacted by the legislature, the electorate normally may immediately reject the law by adopting an initiative or they may accept the law either by defeating an initiative which sought to repeal the law or by simply taking no action at all. Furthermore, both the electorate's initiative and the governor's veto are often used to check hasty, ill-considered legislation; but just as the legislature may override the governor's veto, so may the legislature reenact a law repealed by the electorate.

It could be argued, however, that electorate action necessarily reverses established state policy whereas the governor's action does not, because the electorate's initiative repeals an *existing* law while the governor's veto operates only on *proposed* law.

[26] See text accompanying notes 13 to 19 *supra*.

[27] Assume that pursuant to the mandate of Brown v. Board of Educ., 347 U.S. 483 (1954), or a state constitutional provision, *e.g.*, WASH. CONST. art. IX, § 1, a state has an established policy proscribing racial discrimination in education. As one method of effectuating the policy, the state legislature abolishes the "neighborhood" school system and adopts a city-wide transfer program which results in racial balance within every school in each metropolitan area. Subsequently, the legislature determines that the transfer program was creating serious problems within some or all of the school districts and was, in fact, not promoting racial harmony. The legislature further determines that the real cause of *de facto* segregation is discriminatory practices in housing and employment which forces certain minority groups to cluster in one neighborhood of each school district. On the basis of these determinations, the legislature readopts the "neighborhood" school system, makes the transfer program optional to each school district, and commences or increases its attack on discrimination in housing and employment. Here, the state has not reversed its general policy against discrimination in education; rather, it has changed merely the method of effectuating that policy.

property. During the next four years, neither the legislature nor the electorate made any serious attempt to reverse or nullify this policy. Then, by enacting the Rumford Act in 1963, the legislature adopted as a third method of executing this policy the imposition of sanctions directly on the individual property owner. It was mainly in reaction to this latter method that the electorate adopted Proposition 14—five years after the legislature's initial decision to attack discrimination in housing. It is therefore submitted that the electorate's action in 1964 was far too removed from the legislature's initial choice in 1959 to be construed as part of some initial state choice *not* to establish a general policy proscribing such discrimination.

Furthermore, the adoption of Proposition 14 constituted far more than merely the electorate's rejection of a particular method of executing that policy, *i.e.*, imposing sanctions on private property owners. The terms of Proposition 14 were so broad as to virtually preclude state use of any meaningful method of proscribing discrimination in housing; and because Proposition 14 was constitutional rather than legislative, only the people and not the legislature would have had the power to change or modify its terms. Moreover, constitutional provisions are typically more difficult to change than legislative enactments; as a result Proposition 14 could well have continued long after a majority of the electorate would be willing to accept the sanctions of the Unruh and Rumford Acts. Since Proposition 14 affirmatively established the property owner's right to refuse to sell or rent his property for any reason whatever, including racial prejudice, the measure would seem to validate the enforcement of that right. But Supreme Court cases involving judicial enforcement of private discrimination cast doubt on the enforceability of such a right if the property owner was, in fact, motivated by racial considerations.[28]

[28] See cases cited in note 8 *supra*. See also Henkin, *supra* note 8. In Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rep. 309 (1962,) an eviction proceeding, the court applied the reasoning of Shelley v. Kraemer, 334 U.S. 1 (1948), and held as reversible error the exclusion of evidence showing that plaintiff-landlord's action was motivated by racial considerations, even though the Negro tenant was admittedly in default. The court believed that if, in fact, the plaintiff's action was motivated by racial prejudice, then judicial enforcement of the plaintiff's otherwise legal property right would effectuate plaintiff's discrimination and therefore violate the equal protection clause. Contrary to *Hutchinson*, Proposition 14 would seem to call for the enforcement of the plaintiff's actions, regardless of his racial motivations.

In striking down Proposition 14, the majority opinion in *Mulkey* emphasizes the fact that existing law was modified. This is perhaps misleading; the question remains whether Proposition 14 would have been upheld in the absence of prior legislation. That it would have been upheld is unlikely for the reasons stated in the paragraph preceding note 28.

Unanswered is the question whether the electorate or the legislature could constitutionally simply repeal the sanctions on private property owners imposed by the Rumford Act. Such action would appear to be directed only at changing a particular method of executing the state's policy against discrimination in housing, rather than at reversing the policy itself. Moreover, since the legislature could at any time reenact those sanctions or enact new laws relating to the discriminatory conduct of private property owners, the repeal of the Rumford Act would not result in the serious restrictions on the state's ability to deal with this problem which resulted from the adoption of Proposition 14. Nevertheless, even the mere legislative repeal of those sanctions against private property owners might be invalidated if the court believed that the lack of such sanctions thereby nullified the state's entire policy against discrimination in housing.

"PUBLIC PURPOSE" IN MUNICIPAL FINANCING PLANS

The City Commission of Deerfield Beach authorized issuance of municipal bonds pledged by certain excise taxes to purchase land on which a major league baseball training facility was to be built and maintained by the city. The facility was to be leased to and operated by a private corporation. Rental, payable to the city, was to be the annual debt service on the bonds plus fifty per cent of net profits in excess of prior years' losses. Validation of the proposed issuance was decreed by the circuit court. On a taxpayer's appeal, the Florida Supreme Court, in a four to three decision, reversed. *Held:* A bond issuance proposed by a municipality, whereby the municipality agreed to purchase land on which to build and maintain a baseball training facility for subsequent lease to a private corporation, violates state constitutional provisions prohibiting assessment of taxes[1] and extension of credit[2] for purposes which are not "public."[3] *Brandes v. City*

[1] FLA. CONST. art. 9, § 5 provides:
The Legislature shall authorize the several counties and incorporated cities or towns in the State to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for State taxation.

[2] FLA. CONST. art. 9, § 10 provides:
The Legislature shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

[3] Numerous state constitutions prohibit taxation except for public purposes. See