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**Constitutional Law--Equal Protection--Fair Housing Legislation
[*Mulkey v. Retman*, 413 P.2d 825, 50 Cal. Rptr. 881 (Sup. Ct. 1966)]**

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Nevertheless, where a private association has attained a monopoly of the real estate brokerage business by means of a multiple listing which is made available only to members, such an association occupies a quasi-public position and therefore has certain corresponding obligations. It can no longer claim the same freedom from legal restraint enjoyed by other private associations. Any significant extension of the *Grillo* rationale is likely to have a profound effect upon the practices of similar associations.

LLOYD D. MAZUR

CONSTITUTIONAL LAW — EQUAL PROTECTION —
FAIR HOUSING LEGISLATION

Mulkey v. Reitman, 413 P.2d 825,
50 Cal. Rptr. 881 (Sup. Ct. 1966).

During the five years prior to 1964, the California legislature enacted four pieces of fair housing legislation. The first, the Unruh Civil Rights Act,¹ prohibited discrimination in all types of business establishments, the second, the Hawkins Act,² extended this protection to specifically include public-assisted housing, while a third act proscribed the use of racially restrictive covenants in written instruments transferring real property.³ The fourth, the 1963 Rumford Fair Housing Act,⁴ further expressed the policies underlying the prior enactments by prohibiting racial discrimination in the sale or rental of any private dwelling containing more than four units.

In 1964 this legislative trend was halted when the California voters, by state-wide ballot, approved the initiative measure which appeared as "Proposition 14," rendering Civil Code sections 51 and 52 void. Following its passage, "Proposition 14" was incorporated into the California Constitution, thereby prohibiting the state from denying any person the right to decline to sell, lease, or rent his real property to any person as he so chooses.⁵ The constitutionality

¹ CAL. CIV. CODE §§ 51-52.

² CAL. HEALTH & SAFETY CODE §§ 35700-41 (Supp. 1965).

³ CAL. CIV. CODE § 53.

⁴ CAL. HEALTH & SAFETY CODE §§ 35700-44 (Supp. 1965).

⁵ CAL. CONST. art. I, § 26 (Supp. 1965), which provides as follows:

Neither the State nor any subdivision or agency thereof shall deny, limit

of this provision was placed in issue in the subject case of *Mulkey v. Reitman*⁶ in which the Negro plaintiffs had attempted to rent an unoccupied apartment from the defendant proprietors but were denied the accommodation solely on the basis of their race. The Superior Court of Orange County, adhering to the provisions of article I, section 26, of the California Constitution, denied the plaintiffs' petition seeking to enjoin this discrimination. The California Supreme Court reversed the lower court's decision, striking down the amendment as being contrary to the provisions of the fourteenth amendment to the United States Constitution.

The rationale used by the California court follows from the fourteenth amendment guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Since the decision in the *Civil Rights Cases*⁷ which set forth the principle that the fourteenth amendment affords no protection against private discriminatory conduct, courts have consistently interpreted the equal protection guarantee as protecting individuals from state as opposed to private action.⁸ However, the concept of state action

or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

"Person" includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"Real property" consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable.

⁶ 413 P.2d 825, 50 Cal. Rptr. 881 (Sup. Ct. 1966), *petition for cert. filed*, 35 U.S.L. WEEK 3081 (U.S. Aug. 25, 1966) (No. 483). Prior to its enactment, the constitutionality of the proposed amendment had been argued before this same court in *Lewis v. Jordon*, Sac. 7549, Sup. Ct., June 3, 1964, but the court refused to decide the issue at that time, although it noted that "grave constitutional questions" existed.

⁷ 109 U.S. 3 (1883).

⁸ See St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 MICH. L. REV. 993, 997

sufficient to constitute a denial of equal protection has been broadened and now includes not only the executive and legislative acts of the state⁹ but also the following acts: judicial enforcement of restrictive covenants;¹⁰ the leasing of premises by a municipal authority under circumstances showing considerable public participation;¹¹ municipal ordinances;¹² public statements by city officials;¹³ quasi-public actions by a private corporation;¹⁴ municipal operation of a purported private park;¹⁵ and state health regulations.¹⁶ More generally, state action has recently been defined as those state acts which to some significant extent indicate a state's involvement in discrimination.¹⁷ Following this last definition the California court in *Mulkey* held that the enactment of section 26 (and thus the repeal of the fair housing laws) was "significant" state action, requiring that the state assume responsibility for the authorized discrimination.¹⁸

The court premised its argument on the statement that conduct which is significant as state action must constitute *action* rather than *inaction*.¹⁹ Further, the court felt that this action could be found "where the state, in any meaningful way, [had] lent its processes to the achievement of discrimination even though that goal was not within the state's purpose."²⁰ It followed, in the court's reasoning, that the affirmative act of *authorizing* discrimination by the electorate (as the law-making body) was considered as much state action as if the state had itself legislated to *impose* the discrimination.²¹

The question of whether such a position is tenable by federal standards can only be decided by the Supreme Court;²² but it is

(1961). *But see* Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 865-67 (1966).

⁹ Civil Rights Cases, 109 U.S. 3, 13 (1883).

¹⁰ *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948).

¹¹ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

¹² *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

¹³ *Lombard v. Louisiana*, 373 U.S. 267 (1963).

¹⁴ *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁵ *Evans v. Newton*, 382 U.S. 296 (1966).

¹⁶ *Robinson v. Florida*, 378 U.S. 153 (1964).

¹⁷ *Burton v. Wilmington Park Authority*, 365 U.S. 715, 722 (1961).

¹⁸ *Mulkey v. Reitman*, 413 P.2d 825, 834, 50 Cal. Rptr. 881, 890 (Sup. Ct. 1966).

¹⁹ *Id.* at 830, 50 Cal. Rptr. at 886.

²⁰ *Id.* at 831, 50 Cal. Rptr. at 887.

²¹ *Id.* at 834, 50 Cal. Rptr. at 890.

²² Certiorari has been requested of the Supreme Court in the California decision. *Mulkey v. Reitman*, 35 U.S.L. WEEK 3081 (U.S. Aug. 25, 1966) (No. 483).

submitted that the *Mulkey* concept of state action will not be acceptable. Nevertheless, the result of *Mulkey* (in declaring the statute unconstitutional) should be the same on appeal, since section 26, as a whole,²³ endorses practices which by federal standards are clearly violative of equal protection. For example, section 26, by repealing those acts which prohibited discrimination in public-assisted housing, now impliedly authorizes such discrimination. In this situation, however, state action, defined by reference to federal standards, could readily be found since the state could be considered a joint venturer in the creation of housing and should therefore be required to ensure that the availability of such housing not be determined on the basis of race.²⁴ Likewise, a lease of property from the state or a political subdivision, or assistance in financing the acquisition of real property, might color the transaction as state action.²⁵ It is also to be noted that since the California statutes regarding real property covenants were not expressly overruled by section 26, the possibility exists that an indirect abridgement of the right to sell as expressed by section 26 would come as a result of the state's failure to enforce a restrictive covenant. Thus, one could discriminate and yet have a cause of action to enforce his state constitutional right to do as he wishes with his property as provided in section 26. However, as state enforcement of racially restrictive covenants is clearly contrary to the Supreme Court decisions in *Shelley v. Kraemer*²⁶ and *Barrows v. Jackson*,²⁷ section 26 would be an unconstitutional denial of equal protection.

Although section 26 is now unconstitutional, the test of state action advanced by the *Mulkey* decision will be unacceptable not only from the view of prior decisions but also because of its ultimate

²³ The California court hinted that portions of the amendment might have been constitutional, but noted that these portions were not severable from the amendment since such a separation would create the danger of an uncertain or vague future application of the amendment. 413 P.2d at 835, 50 Cal. Rptr. at 891.

²⁴ Discrimination in public-assisted housing was at issue in *Peyton v. Barrington Plaza Corp.*, 413 P.2d 849, 50 Cal. Rptr. 905 (Sup. Ct. 1966), decided the same day as *Mulkey*. There the court said that "the 'state action' . . . evident in *Mulkey* without this facet of state participation [the public assistance] is thus even more positively identified . . ." *Id.* at 851, 50 Cal. Rptr. at 907. See also *Redevelopment Agency v. Buckman*, 64 Cal. 2d 603, 413 P.2d 856, 50 Cal. Rptr. 912 (1966); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963). *But see Dorsey v. Stuyvesant Town Corp.*, 299 App. Div. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950); *O'Meara v. Washington State Bd. Against Discrimination*, 58 Wash. 2d 793, 365 P.2d 1 (1961), *cert. denied*, 369 U.S. 839 (1962).

²⁵ See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

²⁶ 334 U.S. 1 (1948).

²⁷ 346 U.S. 249 (1953).

effect upon the legislative processes. As the dissent points out, the concept of state action propounded in *Mulkey* is not derived from past Supreme Court rulings as easily as the majority asserts, for the problem in *Mulkey* is clearly distinguishable from those presented in the prior cases.²⁸ The injury to the plaintiffs in *Mulkey* is not in the nature of a state-imposed injury which the Court sought to avoid in such cases as *Shelley* and *Barrows*, wherein "willing buyer — willing seller" relationships were preserved by the refusal of the Court to enforce the restrictive covenants. Nor is *Mulkey* comparable to those situations in which the state provided or contributed certain services to the public,²⁹ delegated its powers to private corporations,³⁰ or itself promoted discrimination.³¹ Rather, the essence of the state's action in the *Mulkey* situation was to avoid state involvement in private decisions.³²

The other apparent defect in *Mulkey* stems from its effect upon the legislative process. From the court's reasoning, it can be asserted that no state action would have been found had the legislature not enacted any legislation prohibiting discrimination in housing. But having once established the protective measures, any actions repealing such legislation are said to be prohibited by the fourteenth amendment, since the repealing constitutes state involvement in discrimination. The legislature is thus placed on a one-way street in which it must either remain at rest or move forward with ir-retraceable steps. Such regulation of the state legislature would seem to be inappropriate under the federal state-action doctrine, since the states have no direct obligation to secure the rights involved. If the Constitution requires the states to affirmatively secure these rights, then section 26 represents a dereliction of duty, but where there is no obligation to secure such rights, it would seem that the state should be allowed to take a neutral position, even after previously committing itself in a particular direction. Furthermore, this position is inconsistent with settled law. Courts are not to impose their social and economic beliefs upon the lawmakers;³³ rather, the legislators enjoy absolute discretion in their functions, subject only to the state and federal constitu-

²⁸ 413 P.2d at 838, 50 Cal. Rptr. at 894 (dissenting opinion).

²⁹ See *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

³⁰ See *Marsh v. Alabama*, 326 U.S. 501 (1946).

³¹ See *Robinson v. Florida*, 378 U.S. 153 (1964); *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

³² 413 P.2d at 841, 50 Cal. Rptr. at 897 (dissenting opinion).

³³ *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

tions.³⁴ Therefore, if a neutral position taken by a state is not prohibited by the Constitution, then that state should be allowed to restore that position if its civil rights laws have been found unsatisfactory. Aside from these factors, a strong argument based on public policy can be advanced in criticism of the *Mulkey* decision. The possibility of the "irreversible" label being placed on a given enactment not only disrupts the legislative function but also may have the undesirable effect of forestalling any new legislation by both state and federal bodies. Legislators, contemplating new civil rights laws, may feel compelled to drop such efforts; thus *Mulkey* would inhibit those same policies it seeks to promote.

It is also submitted that the *Mulkey* position is but a short step from the abrogation of the existing federal state-action doctrine. Having placed the legislature on a one-way street, the next logical step would seem to be reinterpretation of the fourteenth amendment to require affirmative action in preventing private discriminatory conduct. It may, in fact, be inevitable (with or without the *Mulkey* result) that the Supreme Court will establish this affirmative obligation.³⁵ Some recent authorities advocate that the fourteenth amendment was originally intended to establish this direct approach toward the attainment of civil rights, rather than that embodied in the state-action doctrine.³⁶ Under this "new" interpretation, "the constitutional wrong . . . is not the act of the individual, but the failure of the state to take adequate steps to prevent it, or afford redress."³⁷ Such a position might be consistent with other governmental concerns (in education and employment for example) where a heavy public interest in the availability of the fundamental necessities of life is involved;³⁸ however, many recent cases before the Supreme Court, notably the *Sit-in Cases* of 1963³⁹ and 1964,⁴⁰ have not indicated that such a conclusion, at least with regard to public accomo-

³⁴ 1 COOLEY, CONSTITUTIONAL LIMITATIONS 175 (8th ed. 1927).

³⁵ See Silard, *supra* note 8, at 855.

³⁶ Frantz, *Congressional Power To Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

³⁷ Frantz, *supra* note 36, at 1359.

³⁸ See Silard, *supra* note 36, at 870.

³⁹ The 1963 cases are enumerated in Lewis, *The Sit-in Cases: Great Expectations*, in 1963 THE SUPREME COURT REVIEW 101 n.1 (Kurland ed.), the principal case being *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

⁴⁰ As listed in Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None,"* in 1964 THE SUPREME COURT REVIEW 137 n.1 (Kurland ed.), they are: *Griffin v. Maryland*, 378 U.S. 130 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964);

dations, is forthcoming.⁴¹ The *Sit-in Cases* continued to rely on the state-action doctrine, the opinions being based primarily upon technical grounds, while the larger question, that of the existence of a self-executing federal right to equal treatment by proprietors of private establishments, was left undecided.⁴² Furthermore, the passage of the public accommodations section of the Civil Rights Act of 1964⁴³ may have effectively postponed the question for some time, since the Court can now rely on congressional guidelines to define the rights of citizens in the use of public accommodations.⁴⁴

An exception to this conclusion might be found, however, in the 1966 case of *United States v. Guest*.⁴⁵ Therein, the Supreme Court was asked to uphold an indictment which in part accused private citizens, not acting under color of law, of a conspiracy⁴⁶ to intimidate Negro citizens in the exercise and enjoyment of their right of interstate travel. Mr. Justice Stewart, speaking for the majority, recognized that rights under the equal protection clause could arise only when state action was involved.⁴⁷ He felt that although cases previously had dealt only with governmental interference with the right to travel,⁴⁸ the reasoning of the prior cases supported the conclusion that "the constitutional right of interstate travel . . . [was] secured against interference from any source whatever, whether governmental or private."⁴⁹ Mr. Justice Harlan, in his dissenting opinion, felt that the existence of such a right was dubious at best, espe-

Robinson v. Florida, 378 U.S. 153 (1964); Bell v. Maryland, 378 U.S. 226 (1964); Bouie v. City of Columbia, 378 U.S. 347 (1964).

⁴¹ Lewis, *The Sit-in Cases: Great Expectations*, in 1963 THE SUPREME COURT REVIEW 101 (Kurland ed.); Paulsen, *The Sit-in Cases of 1964: "But Answer Came There None,"* in 1964 THE SUPREME COURT REVIEW 137 (Kurland ed.).

⁴² Lewis, *supra* note 41, at 101-02. See also Silard, *supra* note 36, at 865-66. In the various cases, state action was found, for example, in city ordinances, Peterson v. City of Greenville, 373 U.S. 244 (1963); in public statements by city officials, Lombard v. Louisiana, 373 U.S. 267 (1963); in the actions of a private guard who identified himself as a deputy sheriff, Griffin v. Maryland, 378 U.S. 130 (1964); and in state health regulations requiring segregated facilities, Robinson v. Florida, 378 U.S. 153 (1964).

⁴³ 78 Stat. 243, 42 U.S.C. § 2000 (1964).

⁴⁴ Heyman, *Civil Rights 1964 Term: Responses to Direct Action*, in 1965 THE SUPREME COURT REVIEW 159 (Kurland ed.).

⁴⁵ 383 U.S. 745 (1966).

⁴⁶ The federal statute makes it a crime for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. § 241 (1964).

⁴⁷ 383 U.S. at 755.

⁴⁸ *Id.* at 759-60.

⁴⁹ *Id.* at 759-60 n.17.

cially since Congress held powers derived from other sources which were sufficient to prevent the discrimination.⁵⁰ The broad language of *Guest*, however, may not be a persuasive precedent in fair housing litigation, since the right of interstate travel has long enjoyed favorable public sentiment, while the right of freedom from discrimination in housing has only recently gained attention.

Nevertheless, a right to be free from discrimination in housing, though not explicitly granted in the Constitution, has been established in some forms by both state and federal legislatures.⁵¹ As expressed by Congress, it is a right "to inherit, purchase, lease, sell, hold, and convey real and personal property."⁵² Like the right to the use of public accommodations, it is a right to procure a share of that which is available to the general public and which by any sense of decency should be available to the entire public. But there is also prescribed a right to sell (or not to sell), and it may be that an absolute right to buy any realty in the market may effectively destroy a right to sell, just as an interpretation favoring the right to sell has denied nonwhites the right to buy.

In any event, a reinterpretation of the fourteenth amendment by the Supreme Court for the purpose of finding an obligation on the states to prevent discrimination is considered an unwise choice by some authorities, since the resulting litigation, crammed between judge-made guidelines, would burden the Court with a task which should rightfully be performed by the Congress.⁵³

Assuming, then, that the current state-action theory is still approved by the Court, while the elimination of discrimination is an honorable result, it is possible that congressional legislation, as in 1964, will allow the Court to avoid the "self-executing right" ques-

⁵⁰ *Id.* at 762.

⁵¹ 14 Stat. 27 (1866), 42 U.S.C. § 1982 (1964); OHIO REV. CODE § 4112.01-02 (Supp. 1965). Ohio is one of the seventeen states that have enacted fair housing laws. ALASKA STAT. § 11.60.230 (1962); COLO. REV. STAT. ANN. § 69-7-5 (1963); CONN. GEN. STAT. ANN. § 53-35 (Supp. 1965); IND. ANN. STAT. § 10-901 (Supp. 1966); ME. REV. STAT. ANN. tit. 17, § 1301 (Supp. 1966); MASS. ANN. LAWS ch. 151B, § 4 (Supp. 1965); MICH. STAT. ANN. § 28.343 (1962); MINN. STAT. § 363.03 (Supp. 1966); N.H. REV. STAT. ANN. § 354-A:8 (1966); N.J. STAT. ANN. § 18:25-4 to -5 (Supp. 1964); N.Y. CIV. RIGHTS LAW § 18; ORE. REV. STAT. § 659.033 (1953); PA. STAT. ANN. tit. 35, § 1664 (1964); R.I. GEN. LAWS ANN. § 34-37-4 (Supp. 1965); WASH. REV. CODE ANN. § 49.60.030 (1962); WIS. STAT. ANN. § 101.60 (Supp. 1966). Most of these laws are discussed in Pearl & Terner, *Survey: Fair Housing Laws — Design for Equal Opportunity*, 16 STAN. L. REV. 849 (1964). Also of interest is Exec. Order No. 11063, 27 Fed. Reg. 11527 (1962).

⁵² 14 Stat. 27 (1866), 42 U.S.C. § 1982 (1964).

⁵³ Paulsen, *supra* note 41, at 170; Silard, *supra* note 36, at 871.

tion. It is therefore logical to ask whether Congress has the power to enact such legislation.

The constitutionality of laws prohibiting private discrimination in housing can be discussed in relation to at least two sources, the commerce clause and section 5 of the fourteenth amendment. Whether such laws should be enacted, however, may properly require the consideration of the conflicting interests of the private parties involved as well as the public interest in securing private housing for the discriminatee.⁵⁴ It is well established that Congress has vast powers in controlling interstate commerce and intrastate activities which bear on that commerce.⁵⁵ Since the transportation of building materials and the general availability of reasonable financing arrangements can be shown as part of that commerce,⁵⁶ it is therefore reasonable that those persons who are in the business of developing and selling real estate should be subject to regulation, even though their businesses may operate wholly intrastate. As with public accommodations, the public interest in disallowing discrimination in a national housing market perhaps outweighs the motives of individual investors who would seek to maintain a high profit margin by insuring to white buyers that the neighborhood would remain white.

Regulation of the individual owner presents a more difficult problem, however. The owner of a large multi-unit dwelling may be said to have such a significant involvement (in terms of the total housing market) as to be subject to regulation, since here again his motive is essentially one of profit.⁵⁷ Such a distinction is not clearly defined, however, in the case of the average homeowner, who enters the market only occasionally, with the primary hope of getting the best price possible. It is true that he enters a national market. Also, the interests he asserts in discriminating among prospective buyers are most likely not his own but rather those of his neighbors.

⁵⁴ See Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 5 (1964), wherein the author thoroughly discusses the various interests involved.

⁵⁵ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁵⁶ See New York Lawyer's Ass'n, *Report on Civil Rights Act of 1966*, S. Doc. NO. 3296, 89th Cong., 2d Sess. 15989 (1966).

⁵⁷ In Ohio, an owner of "commercial housing" may not discriminate on the basis of race in choosing his tenants. OHIO REV. CODE § 4112.02(H) (Supp. 1965). Within the act a building occupied by more than "two individuals, two groups, or two families living independently of each other," or any housing not occupied by the owner as a bona fide residence, would be "commercial housing" subject to the fair housing provisions. OHIO REV. CODE §§ 4112.01(K), (L) (Supp. 1966).

However, even though a relationship has not been clearly shown between integration and the decline of property values,⁵⁸ the neighbors' interests in this regard (as well as the personal feelings of the seller) should be considered, and it is submitted that the commerce clause does not provide the proper setting for the weighing of these factors.

Regulation of the individual property owner may properly be derived from section 5 of the fourteenth amendment which empowers Congress to enforce, by appropriate legislation, the provisions of that amendment. Correctly viewed, it "is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."⁵⁹ If a right to be free from private discrimination in the conveyance of real property is guaranteed by the fourteenth amendment, section 5 would therefore provide proper ground for congressional action. An analogous question was raised in regard to the Civil Rights Act of 1964.⁶⁰ The Supreme Court, however, in *Heart of Atlanta Motel, Inc. v. United States*⁶¹ avoided an answer and validated that act solely on the basis of the commerce clause, although the opinion did not deny that the act could have been based on the powers granted Congress by section 5 of the fourteenth amendment. Mr. Justice Douglas was more direct in his concurring opinion, noting that "the right of people to be free of state action that discriminates against them . . . 'occupies a more protected position in our constitutional system than does the movement of cattle.'"⁶² The Supreme Court's reluctance to declare section 5 as a basis for the act does not necessarily indicate an unwillingness to so hold but perhaps reflects a hope that Congress will establish the logical relationships and prepare findings upon which an affirmative decision can be based.⁶³ The recent case of *Katzenbach v. Morgan*,⁶⁴ which upheld section 4(e) of the Voting Rights Act of 1966,⁶⁵ stated that "by including section 5 [in the four-

⁵⁸ Horowitz, *supra* note 54, at 33.

⁵⁹ *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

⁶⁰ 78 Stat. 243, 42 U.S.C. § 2000 (1964).

⁶¹ 379 U.S. 241 (1964).

⁶² *Id.* at 279. (Citing and quoting from the concurring opinion in the 1941 case of *Edwards v. California*, 314 U.S. 160, 177.)

⁶³ Congressional interest was evident in the House-approved 1966 Civil Rights Bill; however, the bill died in the Senate after a motion for cloture did not receive the required 2/3 majority vote. 112 CONG. REC. 22114 (daily ed. Sept. 19, 1966).

⁶⁴ 384 U.S. 641 (1966).

⁶⁵ 79 Stat. 439, 42 U.S.C. § 1973b(e) (Supp. 1965).

teenth amendment] the draftsmen sought to grant to Congress, by a specific provision . . . the same broad powers expressed in the Necessary and Proper Clause [of the Constitution]."⁶⁶ The intrusion of the federal government upon state interests in that case was warranted, since the Court could find a rational basis upon which Congress resolved the conflict before it.⁶⁷ Mr. Justice Harlan, dissenting, stated that the effect of the decision was to give Congress the power to define the scope of the amendment and therefore might allow it to dilute as well as enlarge the provision,⁶⁸ but he also noted that "to the extent 'legislative facts' are relevant to a judicial determination, . . . [they are] entitled to due respect."⁶⁹ It would seem, then, that the way is open for Congress, through section 5, to present the necessary "legislative facts" to establish the relationship between the buyer and seller of real property. This approach should be approved over the Supreme Court's use of the equal protection clause "to write into the Constitution its notions of what it thinks is good governmental policy."⁷⁰

It has been submitted herein that the underlying problem in *Mulkey v. Reitman*,⁷¹ that of preventing racial discrimination in housing, can be solved more effectively by congressional determinations than by court decisions. Although section 26, as a whole, was declared unconstitutional, the reasoning advanced by the California court to reach that result seems unacceptable, not only because of a faulty basis in precedent but also because of the undesirable results the decision may have upon the legislatures. Furthermore, adopting the *Mulkey* concepts and thereby preparing for the next step, that of abrogating the doctrine of state action, may force the courts to accept a considerable burden. A more acceptable result could be achieved by declaring section 26 unconstitutional on the narrow grounds suggested above, thereby retaining the integrity of the state-action doctrine. Congressional legislation, based partly on the commerce clause but primarily upon section 5 of the fourteenth amendment, would then allow the Supreme Court to avoid

⁶⁶ 384 U.S. at 650.

⁶⁷ *Id.* at 655-56.

⁶⁸ *Id.* at 668 (dissenting opinion).

⁶⁹ *Ibid.*

⁷⁰ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 673 (1966) (dissenting opinion).

⁷¹ 413 P.2d 825, 50 Cal. Rptr. 881 (Sup. Ct. 1966).

an outright abrogation of the state-action doctrine, while providing a forum in which all the conflicting interests involved could be heard and weighed.

RONALD E. HOLTMAN