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Civil Rights: Discrimination in Private Housing

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Even the Court's previous interpretations of the First Amendment do not lead to a prohibition of New York's action here. The *McCollum* case,[20] which held unconstitutional a "released time program," is easily distinguished from this case in that the *core* of that program was formal *sectarian* instruction of public school pupils in the schools during class hours. The Regents' prayer is not sectarian instruction of any kind and is in full accord with the heritage and traditions of our people. Some may not accept that heritage as a matter of right, but they have no right to compel others to ignore or be deprived of it. "Every individual has a Constitutional right to be free from religion, but that right is a shield, not a sword, and may not be used to compel others to adopt the same attitude."[21] The Court has here ignored its own well reasoned position expressed in the *Zorach* case:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . When the state encourages religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[22]

New York's use of the Regents' prayer does not fall within the prohibition of the Establishment Clause as *intended* by the framers; is a proper reflection of our spiritual tradition antedating the ratification of the Constitution; and, is clearly within the area of permissible accommodation recognized in the *Zorach* case.

JAMES F. JANZ

Civil Rights: Discrimination in Private Housing—A Massachusetts statute[1] provides that no owner or managing agent of a multiple dwelling or contiguously located housing accommodations may refuse to rent or lease to any person on account of his race, creed, color or national origin. As defined by the statute, "multiple dwelling" means ". . . a dwelling which is usually occupied for permanent residence purposes and which is either rented, leased, let or hired out, to be occupied as the residence or home of three or more families living independently of each other. . . ."

Complainant, a Negro, sought to rent an apartment in a large private apartment building, but was refused. No government assistance was involved. He then registered a complaint with the Massachusetts Commission Against Discrimination, the administrative agency charged with the enforcement responsibility. After a formal hearing, the commission found the respondents had engaged in unlawful discriminatory practices

[20] McCollum v. Board of Education, 333 U.S. 203 (1948).
[21] *Supra* note 2, at 487.
[22] Zorach v. Clauson, 343 U.S. 306, 312-14 (1952).

in refusing to rent an apartment to complainant because of his color. Respondents appealed to the Supreme Judicial Court of Massachusetts claiming the statute was violative of Articles 1 and 10 of the Declaration of Rights in the Constitution of the Commonwealth of Massachusetts, and the Due Process Clause of the Fourteenth Amendment, in that it invaded the right of liberty to contract and use of property. The Supreme Court held that there was evidence to sustain the commission's finding that the owner and agent had engaged in unlawful discriminatory practices, and upheld the constitutionality of the act on the basis that it did not exceed the limits of the police power. *Massachusetts Commission Against Discrimination v. Colangelo* 182 N.E. 2d 595 (Mass. 1962).

The question of whether such Fair Housing Practice Acts are constitutional under the Fourteenth Amendment to the Constitution of the United States is of vast importance because of the increase in the number of states and cities passing such laws and the effect of such legislation, i.e., the government's interferring with and restricting an owner's liberty to contract and property rights.

Commencing with *Brown v. Board of Education,*[2] the United States Supreme Court has taken great strides to eliminate discrimination in any area involving state action.[3] However, even before these decisions, the courts did invalidate state discriminatory action in housing. In *Shelly v. Kraemer,*[4] the court held that the equal protection clause of the Fourteenth Amendment was not violated by private contracts whereby parties restricted Negroes from the area. But if the state court enforced the private discrimination contract, this constituted state action, and as such was a denial of the equal protection guaranteed by the Fourteenth Amendment. However, what constitutes state action is difficult to determine as seen in *Dorsey v. Stuyvesant Town Corporation.*[5] Here, although the state seized the land by condemnation, sold it to a private housing development corporation at cost, and gave a 25 year tax exemption, the New York court held that there was no state action, so the private owners could discriminate. Subsequent to this decision, a number of states and cities have passed legislation prohibiting discrimination in housing. These statutes fall into three general categories: laws extending only to public housing projects and/or urban development,[6] laws extending to publicly assisted housing, including

[1] MASS. G. L. c. 151B, Sec. 4, Subsec. 6.
[2] 347 U.S. 483 (1954).
[3] Muir v. Louisville Park Theatrical Association, 347 U.S. 971 (1954), (theatre); Beal et al. v. Holcombe, Mayor of City of Houston, et al., 193 F. 2d 384, *cert. denied* 347 U.S. 974 (1954), (golf course); Gilmore v. City of Montgomery 176 F. Supp. 776 (1959), (parks).
[4] 334 U.S. 1 (1948).
[5] 229 N.Y. 512, 87 N.E. 2d 541, *cert. denied* 339 U.S. 981 (1950).
[6] Illinois, Indiana, Michigan, Montana, Rhode Island and Wisconsin.

housing built with the aid of FHA or VA guaranteed loans,[7] and laws extending to private housing without government assistance.[8]

As seen in *Shelly v. Kraemer,* no constitutional right is violated by private discrimination. Therefore, in order to uphold a statute which outlaws discrimination in non-government assisted private housing, it must be done on the basis of its being a valid exercise under the police power of the state. Many cases have shown that government may regulate the use of property and the right to contract on the basis of its police power.

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest.[9]

Furthermore, when the legislature passes a statute, a presumption of constitutionality arises which courts are reluctant to set aside.

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the

[7] California and Washington. See the following cases concerning statutes prohibiting discrimination in publicly assisted housing: New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., 170 N.Y.S. 2d 750 (Sup. Ct. of Westchester County, 1958), (constitutionality upheld); Levitt & Sons, Inc. v. Division Against Discrimination, 31 N.J. 514, 158 A. 2d 177, *cert. denied* 363 U.S. 418 (1960), (constitutionality upheld); O'Meara v. Washington State Board Against Discrimination, 58 Wash. 2d 793, 365 P. 2d 1, *cert. denied* 369 U.S. 839 (1961), (held unconstitutional on grounds of invalid classification).

[8] Colorado, Connecticut, Massachusetts, Minnesota, New Hampshire. New Jersey, New York, Oregon, and Pennsylvania. The constitutionality of these statutes has only been challenged twice, and both times at trial court levels. In *Martin v. City of New York,* 201 N.Y.S. 2d 111 (1960), the court upheld the constitutionality of the New York City statute on the basis that it was a valid exercise of the police power, so ". . . the individual must yield to what legislative authority deems is for the common good." However, in *Case v. Colorado Anti-Discrimination Commission* decided in trial court Civ. No. 39682, D. Colo., June 2, 1961, the court declared the Colorado statute unconstitutional on the basis it was too vague, indefinite and an unlawful delegation of legislative power to an administrative agency. Although not resting their decision on it, the court did express doubt as to the constitutionality of the statute under the police power since it infringed on the right of individuals to contract privately.

[9] Nebbia v. New York, 291 U.S. 502, 523 (1934).

> judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs.[10]

Thus, even though these Fair Practice Housing Laws impinge on the individual's property and contract rights, to declare these laws unconstitutional the United States Supreme Court must decide that these statutes are "unreasonable, arbitrary, or capricious" and that the means used and purpose intended does not bear a substantial relation to the public health, safety or general welfare. Such a result seems highly improbable, considering the presumption of constitutionality of a statute and the Court's trend against discrimination, coupled with the fact the Court is generally more pliable in areas of social legislation. Statistics are available which confirm the fact that a lack of adequate housing for minority groups leads to slums, which in turn breed crime, immorality, disease, etc.[11]

Moreover, the United States Supreme Court's attitude toward state statutes prohibiting discrimination might well have been stated in *Railway Mail Association v. Corsi*,[12] where the Court upheld a state statute forbidding discrimination in labor organizations as non-violative of the Due Process Clause of the Fourteenth Amendment in selection of membership, abridgement of property rights and liberty of contract.

> We have here a prohibition of discrimination in membership or union services on account of race, color or creed. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color.[13]
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> . . . it is urged that the Due Process Clause of the Fourteenth Amendment precludes the state of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to anothers hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color, or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the de-

[10] Berman v. Parker, 348 U.S. 26, 32 (1954).
[11] See 1961 Report of the United States Commission on Civil Rights, Book 4 on Housing for an excellent factual report.
[12] 326 U.S. 88 (1945).
[13] *Supra* note 12, at 93, 94.

termination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts.[14]

Thus, although some will probably consider that these statutes go too far in infringing on an individual's constitutional contract and property rights,[15] it is felt that these laws will be upheld as non-violative of the Fourteenth Amendment's Due Process Clause.

Aside from the constitutional question, these statutes also raise a social question. It is one thing to tell an owner of an 120 unit apartment building to refrain from discriminating. But it is altogether different to require a person living in his own home who desires to rent out a room not to discriminate. However, all the statutes enacted so far have considered this social aspect, and have restricted the application of their statute.[16] From a social standpoint such a classification seems desirable.[17]

PETER J. LETTENBERGER

Conflict of Laws Under the Federal Tort Claims Act—A wrongful death action was brought against the United States in a Federal District Court in Oklahoma by the personal representative of passengers killed when an airplane, owned by the American Airlines, crashed in Missouri while enroute from Tulsa, Oklahoma, to New York City.[1] The petitioners had already received a $15,000 settlement from the Airlines, the maximum amount recoverable under the Missouri Wrongful Death Act.[2] They sought additional amounts from the United States under the Oklahoma Wrongful Death Act[3] which contains no limitation on the amount a single person may recover from a tortfeasor.

[14] *Supra* note 12, Frankfurter, J. concurring at 98.

[15] See dissent of Justice Kirk in reported case.

[16] The broadest law enacted is the ordinance of New York City which applies to all housing except the rental of one of the apartments in a two family home where the other apartment is occupied by the owner.

[17] These classifications raise the further question of equal protection of the laws. To meet the constitutional requirements of the Fourteenth Amendment, a statute must apply to all persons in the same category equally, and the classification must be made on a reasonable basis. However there appear to be a number of valid legislative reasons for such a classification which would meet the equal protection of the laws requirements; the policing of thousands of small activities would be administratively impossible, the legislature could feel the main problem area concerns those who deal in housing as a business and not those who do it merely incidentally, or the practical reason that to obtain proof of alleged discrimination, a pattern of discrimination must usually be observed, which isn't available in the one room renter.

[1] Suit was brought on the theory that the Government, through the Civil Aviation Agency, had negligently failed to enforce the terms of the Civil Aeronautics Act and the regulations thereunder which prohibited the practices then being used by American Airlines in the overhaul depot of Tulsa, Oklahoma. Under 49 U.S.C. §1425, the Administrator of the Federal Aviation Agency is charged with the responsibility of enforcing rules and regulations controlling inspection, maintenance, overhaul and repair of all equipment used in air transportation.

[2] MO. REV. STAT. §537.090 (1949). Subsequent to the origination of these actions the Missouri Code was amended to provide for maximum damages of $25,000. MO. REV. STAT. §537.090 (1959).

[3] OKLA. STAT., Tet. 12, §§1051-1054 (1951).