

January 2010

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Recommended Citation

David B. Oppenheimer, *California's Anti-Discrimination Legislation, Proposition 14, and the Constitutional Protection of Minority Rights: The Fiftieth Anniversary of the California Fair Employment and Housing Act*, 40 Golden Gate U. L. Rev. (2010).
<http://digitalcommons.law.ggu.edu/ggulrev/vol40/iss2/1>

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ARTICLE

CALIFORNIA'S ANTI-DISCRIMINATION LEGISLATION, PROPOSITION 14, AND THE CONSTITUTIONAL PROTECTION OF MINORITY RIGHTS:

THE FIFTIETH ANNIVERSARY OF THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

*DAVID B. OPPENHEIMER**

Fifty years ago, in 1959, the State of California outlawed racial discrimination in employment. But it took the California Legislature four more years to prohibit racial discrimination in private housing, and the immediate response was a successful

* Clinical Professor of Law and Director of Professional Skills, U.C. Berkeley School of Law (Boalt Hall). This essay was originally delivered as a keynote speech at the California State Bar Fair Housing & Public Accommodations Subsection Symposium/FEHA 50th Anniversary Collaboration, April 17, 2009, Golden Gate University School of Law. I cannot address the topic of fair-housing law without recognizing the contributions of Carol Schiller, the former Deputy Director of the Department of Fair Employment & Housing, and a long-term fair-housing activist in Los Angeles. Carol was a hero at every stage of the fight for fair housing in California, and in her fight against cancer. Those of us who knew her were inspired by her leadership and courage, and we miss her. I am grateful to Ricardo Rodriguez, Boalt Hall '11, for his assistance in preparing this essay for publication. Any errors, of course, are solely my responsibility.

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campaign by the real-estate industry to repeal the law through a voter initiative. This essay tells the story of that campaign and the courageous judicial decisions that nullified the initiative. I address four related events in California's civil-rights legal history. They are (1) the adoption of the Fair Employment Practices Act (FEPA), the Hawkins Act and the Unruh Act by the California Legislature in 1959; (2) the subsequent passage in 1963 of the Rumford Fair Housing Act; (3) Proposition 14, the 1964 initiative campaign that nullified the Rumford Act and parts of the Unruh Act, creating a California Constitutional right to discriminate against members of racial minority groups; and (4) the judicial decisions that rejected that nullification. I will conclude that our courts acted with great courage, defying the will of the voters, to protect minority rights.

To celebrate the fiftieth anniversary of the FEPA and Unruh Act, we should perhaps begin by asking why this is only the fiftieth, not the sixty-fourth, anniversary? The precursor to the FEPA was introduced into the California Legislature in 1945.¹ Similar legislation was introduced and adopted in New York, and soon thereafter in several other states.² But in California, each effort was stymied until 1959.³

What happened in California that led to the passage of civil rights legislation on April 16, 1959? The 1958 election brought a dramatic change in the makeup of the California Legislature. By the late Fifties, the Democratic Party across much of the United States, although not in the South, was becoming a pro-civil-rights party. The California Democratic Party swept the 1958 legislative elections, and Pat Brown was elected Governor of California, in a campaign in which part of his platform was to pass the FEPA.⁴ The Democrats had achieved a majority in California before 1958, but they now had

¹ Assemb. B. 3, Reg. Sess. (Cal. 1945).

² Law Against Discrimination, N.Y. EXECUTIVE LAW § 296 (1945); The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 (1945); Massachusetts Fair Employment Practice Act, MASS. GENERAL LAWS 151B (1946).

³ See Assemb. B. 2211, Reg. Sess. (Cal. 1947); Assemb. B. 3027, Reg. Sess. (Cal. 1949); Assemb. B. 2251, 3436, Reg. Sess. (Cal. 1951); Assemb. B. 900, 917, 1526, Reg. Sess. (Cal. 1953); Assemb. B. 971, 1868, Reg. Sess. (Cal. 1955); Assemb. B. 7, 2000, 2001, Reg. Sess. (Cal. 1957).

⁴ THOMAS W. CASSTEVENS, UNIVERSITY OF CALIFORNIA, BERKELEY, INSTITUTE OF GOVERNMENTAL STUDIES, POLITICS, HOUSING AND RACE RELATIONS: CALIFORNIA'S RUMFORD ACT AND PROPOSITION 14, at 7 (1967).

a super majority of over two thirds of the Legislature, making it impossible for anti-civil-rights Republicans to block legislation.⁵

At the same time, and throughout the United States, the civil-rights movement was becoming a catalyst for law reform. As a law-reform effort, the civil-rights movement was led by Thurgood Marshall, who was then the Director of the NAACP Legal Defense Fund and would later serve as an Associate Justice of the United States Supreme Court.⁶ Marshall's success before the Court, then led by Chief Justice (and former California Governor) Earl Warren, fundamentally changed how Americans viewed our Constitution.⁷ Marshall was probably the greatest American lawyer of the twentieth century. He essentially invented the public-interest law firm and the idea of a long-term social-justice litigation strategy. His leadership and advocacy through the long line of cases that led to the *Brown* decision in 1954⁸ helped pave the way for Pat Brown to be able to embrace a pro-civil-rights platform and made it possible for Earl Warren to lead the Supreme Court to a unanimous decision in the *Brown* case.⁹

During this same period there was a social movement for civil rights running parallel to the legal movement. The social movement, led by Rev. Dr. Martin Luther King Jr. and others, was changing the way Americans looked at discrimination. Beginning with the Montgomery bus boycott in 1956, it was harder for Americans to defend segregation and discrimination. That gave license to Democrats in the North and West to support civil rights.

These changes were possible in California despite the lack of a significant African-American vote in 1958. In the 1960 Census, 83% of the California population was listed as white, and 5% was listed as Negro.¹⁰ For black Californians in 1960,

⁵ *Id.*

⁶ See generally, JACK GREENBERG, CRUSADERS IN THE COURTS (1994); David B. Oppenheimer, *Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Civil Rights Act of 1964*, 29 U.S.F. L. Rev. 645, 647-48 (1995).

⁷ See generally GREENBERG, *supra* note 6.

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹ *Id.*

¹⁰ CASSTEVENS, *supra* note 4, at 5; see also United States Census, 1960 Census of Population, at California p. 4, available at <http://www2.census.gov/prod2/decennial/documents/15611114.pdf>.

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there was nearly total residential isolation. In the 1960 Census, the black population of Los Angeles County was listed as 461,000, but fewer than 4,000 lived in neighborhoods that were not majority black neighborhoods; the City and County of Los Angeles was, in essence, a 99% segregated city.¹¹ Such segregation was common throughout the state, with housing discrimination then entirely legal. What were the consequences of living in a majority/minority neighborhood? The effects were similar in 1960 and 2009. There were fewer services, worse schools, less police protection, less public transportation, and less representation in government, which in turn leads to worse schools and fewer services and all of these related problems.¹²

The original FEPA, passed in 1959, addressed only part of the problem.¹³ It prohibited discrimination based on race, religion, color, national origin or ancestry in employment, but not in housing.¹⁴ The Unruh Civil Rights Act, passed at the same time, prohibited discrimination based on race, religion, color, national origin and ancestry, by “all establishments” in access to public accommodations,¹⁵ but its application to housing was uncertain. And the Hawkins Act, also passed in 1959, applied to housing, but only in “any publicly assisted housing accommodation.”¹⁶ To complete the package, in 1963 the Legislature took up the Rumford Fair Housing Act, which prohibited discrimination based on race, religion, color, national origin and ancestry in private housing.¹⁷ It was to be the most controversial of the lot.

January 1, 1963, was the hundredth anniversary of the Emancipation Proclamation. Dr. King asked President Kennedy to proclaim a second Emancipation Proclamation in

¹¹ See Brief of the State of California as Amicus Curiae at 8 n.6, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483), 1967 WL 113956.

¹² Compare Brief of the State of California as Amicus Curiae at 8 n.6, *Reitman v. Mulkey*, 387 U.S. 369 (1967) (No. 483), 1967 WL 113956 (describing effects of residential segregation in 1950s), with MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (describing effects of residential segregation in 2000s).

¹³ CAL. LAB. CODE § 1400 (1959).

¹⁴ *Id.*

¹⁵ CAL. CIV. CODE §§ 51, 52 (1959).

¹⁶ CAL. HEALTH & SAFETY CODE § 35720 (1959); see CAL. HEALTH & SAFETY CODE §§ 35700-35741 (1959).

¹⁷ Rumford Fair Housing Act of 1963, 1963 Cal. Stat. ch. 185.

support of civil rights.¹⁸ President Kennedy did not respond.¹⁹ Congressman Emanuel Celler had introduced a bill that would prohibit discrimination in public accommodations, as the Unruh Act did in California, but President Kennedy would not support it.²⁰ President Kennedy said privately (and presciently) that to do so would destroy the Democratic Party for fifty years.²¹ As he foresaw, when the Democratic Party ultimately supported civil-rights legislation, it swung the South to the Republican Party and killed the Democratic Party coalition of the Roosevelt era.

In California, students were demonstrating in support of civil rights. They were marching, picketing, and leafleting in support of students in the South who, beginning in 1960 in Greensboro, had been sitting-in at lunch counters and public libraries protesting segregation. Berkeley students were picketing at Woolworth's on Shattuck Avenue protesting the company's compliance with Jim Crow laws²² throughout the South. They were picketing Lucky Stores in support of black workers in Richmond, California, who wanted the grocery chain to hire black clerks.

In January of 1963, the Berkeley City Council passed a fair-housing ordinance.²³ The following month a repeal petition was filed with sufficient signatures of registered voters to require a vote on whether to repeal the ordinance.²⁴ And on April 2, 1963, two critical things happened in the civil-rights movement. They were unrelated, yet they tied together the law-reform movement and the social movement for civil rights. First, by a narrow margin—22,750 to 20,456—the voters of Berkeley repealed the Berkeley fair-housing ordinance.²⁵ They passed an initiative that provided that housing segregation and

¹⁸ See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS*, 1954-63, at 518 (1988).

¹⁹ *Id.* at 589-90, 685-87.

²⁰ CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 4 (1985).

²¹ *Id.* at 376-77, 414-15, 808-09, 883-85.

²² "A law enacted or purposely interpreted to discriminate against blacks, such as a law requiring separate restrooms for blacks and whites." *BLACK'S LAW DICTIONARY* 853 (8th ed. 2004).

²³ CASSTEVENS, *supra* note 4, at 21.

²⁴ *Id.*

²⁵ *Id.* at 22.

housing discrimination should be legal in Berkeley.²⁶ And on that same day, Dr. King arrived in Birmingham, Alabama.²⁷

Birmingham in 1963 was the most segregated city in America.²⁸ Under Birmingham's apartheid system, all aspects of public life were segregated.²⁹ The buses were segregated. The taxicabs were segregated. The public bathrooms were segregated. The public library was for whites only, as were the public swimming pools.³⁰ The ambulances were segregated since, of course, the hospitals were segregated.³¹ The parks, churches, theaters and schools were segregated.³² It was a violation of law for a white person and a black person to marry or even to play checkers together.³³

On April 2, 1963, as the voters of Berkeley, California, voted to nullify the city's housing-discrimination ordinance, Dr. King arrived in Birmingham to lead a public campaign to desegregate Birmingham. Over the next six weeks, he would lead a direct-action campaign that would become the turning point in public opinion among white Americans about the civil-rights movement.³⁴ On April 2, 1963, there was still great antipathy toward the civil-rights movement, and great hostility towards Dr. King, among white Americans. But by the time he left in late May, swift-changing public opinion had forced President Kennedy to support a civil-rights bill.

It was in Birmingham in 1963 that Dr. King was arrested on Good Friday and, while in jail, wrote the "Letter From Birmingham Jail."³⁵ It was in Birmingham at the beginning of May of 1963 that the "Children's Campaign" began, where tens of thousands of young black middle-school and high-school students in Birmingham engaged in nonviolent demonstrations.³⁶ These children were attacked by

²⁶ *Id.*

²⁷ BRANCH, *supra* note 18, at 706-07.

²⁸ MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 50 (1964).

²⁹ See David B. Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791, 794-98 (1993).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*; see also BRANCH, *supra* note 18.

³⁵ See Oppenheimer, *supra* note 29, at 794-98.

³⁶ *Id.*

Birmingham's police dogs and fire hoses. They were beaten and arrested, and their treatment shamed the nation.³⁷ In response to the growing outcry, in mid-May the President directed his aides to draft a comprehensive civil-rights bill.³⁸

As the voters of Berkeley debated the city's fair-housing law, Assemblyman William Rumford of Berkeley introduced a state fair-housing bill in the California Assembly.³⁹ It was supported by Governor Pat Brown, Attorney General Stanley Mosk, and Assembly Speaker Jesse Unruh.⁴⁰ It was opposed by the Chamber of Commerce, the construction industry, and the real-estate industry. As Dr. King sat in a Birmingham jail, on April 25, 1963, the California Assembly passed the Rumford Fair Housing Act.⁴¹

In May 1963, as the Rumford Act was stalled in the State Senate, a young black couple, Lincoln and Dorothy Mulkey, who lived in a segregated neighborhood in Orange County, attempted to rent a vacant apartment in the city of Santa Ana.⁴² But the landlord, Neil Reitman, refused to rent to them because of their race.⁴³ The Mulkeys brought a lawsuit challenging Reitman's authority to deny them an apartment based on their race.⁴⁴ As the case began to move through the Superior Court, the statutory law was moving too.

In June, the California Legislature's session was drawing to a close. June 21st was the last day to pass a bill, and the Rumford Act was still stalled in the Senate. At 9:50 p.m., it passed out of the Senate, but with amendments.⁴⁵ It had to go back to the Assembly. At 11:35 p.m., with 25 minutes to spare, it passed the Assembly as amended and was immediately signed by Governor Brown.⁴⁶ It was essentially a straight party vote.⁴⁷ No Democrat voted against it, while only three Republicans voted for it, including Milton Marks of San

³⁷ *Id.*

³⁸ *Id.*

³⁹ CASSTEVENS, *supra* note 4, at 22.

⁴⁰ *Id.* at 23-25, 31-32.

⁴¹ *Id.* at 36-37.

⁴² *Mulkey v. Reitman*, 413 P.2d 825, 827 (Cal. 1966); *aff'd*, *Reitman v. Mulkey* 387 U.S. 369 (1967).

⁴³ *Mulkey*, 413 P.2d at 827.

⁴⁴ *Id.*

⁴⁵ CASSTEVENS, *supra* note 4, at 35.

⁴⁶ *Id.* at 36.

⁴⁷ *Id.* at 37.

Francisco and Bill Bagley⁴⁸ of Marin.⁴⁹

In response to the Rumford Act's passage, and bolstered by the defeat of the Berkeley fair-housing law at the polls, the real-estate industry funded an initiative campaign.⁵⁰ They called their campaign committee the "Committee for Home Protection."⁵¹ The campaign slogan was: "A man's home is his castle." The initiative, Proposition 14, proposed an amendment to the California Constitution, to be determined by the voters on the November 1964 ballot.⁵² It provided that "[n]either the State, nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."⁵³ In effect, it proposed a constitutional right to discriminate on the basis of race, religion, ethnicity, national origin, ancestry or any other basis.

Proposition 14 divided the state.⁵⁴ It was opposed by the Democratic Party, the AFL-CIO, the State Bar, the San Francisco Examiner, and the San Francisco Chronicle.⁵⁵ It split the California Republican Party into two factions.⁵⁶ Its leading supporters were the Los Angeles Times, U.S. Senator Barry Goldwater (the Republican Party candidate for President), and a new figure in California politics, Ronald Reagan.⁵⁷ (Meanwhile, in Texas, Reagan's future Vice President, George H.W. Bush, was running unsuccessfully for the United States Senate on a platform opposing a federal fair-housing law.)

In Berkeley, in response to several civil-rights issues, including Proposition 14, students set up a table in Sproul Plaza to get other students to help in the campaign.⁵⁸ The

⁴⁸ Bagley would go on to serve as a Regent of the University of California, where he helped lead the fight to save affirmative action in the 1990s.

⁴⁹ CASSTEVENS, *supra* note 4, at 37-38.

⁵⁰ *Id.* at 48.

⁵¹ *Id.*

⁵² *Id.* at 50.

⁵³ *Id.* at 48.

⁵⁴ See, e.g., *California: Proposition 14*, TIME, Sept. 25, 1964, available at <http://www.time.com/time/magazine/article/0,9171,876158,00.html>.

⁵⁵ CASSTEVENS, *supra* note 4, at 53.

⁵⁶ *Id.* at 58.

⁵⁷ *Id.* at 57-58.

⁵⁸ See Free Speech Movement Chronology, The Bancroft Library,

university, under pressure from the real-estate industry, prohibited them from on-campus advocacy for candidates or propositions.⁵⁹ The students protested. Their protests were met with arrests. And so began the 1964-65 Free Speech movement.⁶⁰

On November 3, 1964, President Lyndon Johnson defeated Barry Goldwater in a landslide but lost in the formerly reliably Democratic South.⁶¹ In California, President Johnson received over sixty percent of the vote,⁶² while Proposition 14 passed by an even bigger landslide.⁶³ By a margin of over 2 million votes, the people of California amended the California Constitution to provide for a legal right to discriminate.⁶⁴ In Orange County, in the Superior Court, Neil Reitman moved for summary judgment. Relying on Proposition 14's constitutional right to discriminate, the court agreed and entered judgment.⁶⁵ The *Mulkeys* appealed directly to the California Supreme Court, which agreed to hear the case.

In a 5-2 ruling, the California Supreme Court held that the California Constitution, as amended by the initiative, violated the U.S. Constitution's Equal Protection Clause.⁶⁶ Proposition 14, the majority reasoned, required the state to become an agent of discrimination.⁶⁷ The court rejected the argument that the initiative merely permitted private discrimination.⁶⁸ Relying on *Burton v. Wilmington Parking Authority*⁶⁹ and *Evans v. Newton*,⁷⁰ the court found that the private exercise of the right created by the initiative was a form of state action.⁷¹ In *Wilmington*, a privately owned restaurant renting space in a publicly owned garage was treated as the state itself by the

<http://bancroft.berkeley.edu/FSM/chron.html> (last visited Mar. 13, 2010).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ U.S. Election Atlas, 1964 Presidential General Election Results, www.uselectionatlas.org/RESULTS/national.php?f=0&year=1964.

⁶² *Id.*

⁶³ CASSTEVENS, *supra* note 4, at 67.

⁶⁴ *Id.*

⁶⁵ *Mulkey*, 413 P.2d at 827.

⁶⁶ *Id.* at 836.

⁶⁷ *Id.* at 830.

⁶⁸ *Id.*

⁶⁹ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁷⁰ *Evans v. Newton*, 382 U.S. 296 (1966).

⁷¹ *Mulkey*, 413 P.2d at 831-34.

U.S. Supreme Court in reviewing the restaurant's policy of denying service to African Americans.⁷² In *Evans*, a racially segregated privately owned park, administered by a public agency, was treated as a public park subject to the Fourteenth Amendment.⁷³ Similarly, the California Supreme Court reasoned, the purpose of Proposition 14 was not simply to provide property owners with economic liberty, but to assist them through the power of state action in discriminating against racial minority groups.⁷⁴

On review, the United States Supreme Court affirmed the decision of the California Supreme Court by a vote of 5-4.⁷⁵ Justice White explained: "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State."⁷⁶ On May 29, 1967, the Supreme Court's decision reinstated the Unruh Act and Rumford Act. Given the overwhelming vote in support of the initiative, it was undoubtedly a courageous decision by the California and United States Supreme Court Justices.

Today, we are again faced with the question whether "equal protection" protects minority-group members when the majority votes to deprive them of fundamental rights. Here in California, the voters have again amended the California Constitution to single out a minority group for unequal treatment by passing Proposition 8, prohibiting same-sex marriage.⁷⁷ In the Proposition 8 case, the California Supreme

⁷² *Burton*, 365 U.S. at 726.

⁷³ *Evans*, 382 U.S. at 296.

⁷⁴ *Mulkey*, 413 P.2d at 834 ("The instant case presents an undeniably analogous situation wherein the state, recognizing that it could not perform a direct act of discrimination, nevertheless has taken affirmative action of a legislative nature designed to make possible private discriminatory practices which previously were legally restricted. We cannot realistically conclude that, because the final act of discrimination is undertaken by a private party motivated only by personal economic or social considerations, we must close our eyes and ears to the events which purport to make the final act legally possible.").

⁷⁵ *Reitman v. Mulkey*, 387 U.S. 369 (1967).

⁷⁶ *Id.* at 380-81.

⁷⁷ See California Secretary of State, Official Declaration of the Vote Results on November 4, 2008, State Ballot Measures, http://www.sos.ca.gov/elections/sov/2008_general/6_official_results_on_statewide_ballot_measures.pdf.

Court has sided with the voters, holding that there was no violation of the California Constitution.⁷⁸ The question is now in the federal courts, where it will be decided based on the U.S. Constitution.⁷⁹ As in the Proposition 14 case, the courts must ask: “May the voters of California amend the Constitution to provide a right to discriminate? May the voters amend the Constitution to provide that some fundamental rights, like the right to housing, or marriage, can be denied to a specific minority group?”

The answer awaits.

⁷⁸ *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal. 2009).

⁷⁹ *Complaint, Perry v. Schwarzenegger*, No. C 09-2292 VRW (N.D. Cal. 2009).