THE EQUAL PROTECTION JUGGERNAUT AND EXEMPTIONS FROM OPEN-HOUSING LAWS

Berback v. Mangum, 297 N.Y.S. 2d 853 (Sup. Ct. 1969)

Petitioners, owners of a two-family owner-occupied dwelling, were facing investigation by the New York Division of Human Rights for an alleged discriminatory refusal to rent housing because of race or color.[1] Petitioners sought to enjoin the investigation, arguing that the anti-discrimination provisions of the New York open-housing law were not applicable to their circumstances because the law explicitly exempted two-family owner-occupied dwellings from its open-occupancy provisions.[2] The Division of Human Rights argued that the exemption was an unconstitutional affront to the fourteenth amendment.[3] The trial court granted petitioners' request for an injunction; and *held*: the exemption in the New York open-housing statute of two-family, owner-occupied rental dwellings does not violate the equal protection clause of the fourteenth amendment.[4]

---

1. N.Y. EXEC. LAW § 295(6)(a) (McKinney Supp. 1970) provides that the Division of Human Rights has the power to investigate complaints alleging unlawful discrimination.

2. *Id.* § 296(5)(a) provides:

> 5a. It shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof:
> (1) To refuse to sell, rent, lease or otherwise to deny or to withhold from any person or groups of persons such a housing accommodation because of the race, creed, color, national origin or sex of such person or persons . . . .
> (3) . . . The provisions of this paragraph (a) shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other if the owner or members of his family reside in one of such housing accommodations . . . .

3. Berback v. Mangum, 59 Misc. 2d 41, 43, 297 N.Y.S.2d 853, 855 (Sup. Ct. 1969), *aff'd mem.*, 33 App. Div. 2d 655, 306 N.Y.S.2d 671 (1969).

4. *Id.* The *Berback* court also mentioned additional constitutional and statutory provisions which could pose a challenge to the validity of the New York statutory exemption—the thirteenth amendment (U.S. CONST.), the equal protection clause of the N.Y. state constitution (N.Y. CONST. art. I § 11) and the 1866 Civil Rights Act [codified in 42 U.S.C. § 1982 (1970)], as construed by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). For a criticism of the *Berback* court's failure adequately to discuss the possible applicability of these provisions, *see* A. KOLBEN, ENFORCING

The prerogative of the owner to sell or rent his property to persons of his choosing was largely unchallenged until the middle of the twentieth century.[5] Following World War II state legislatures began to curtail the discretion of owners to discriminate on the basis of race or color in the sale or rental of housing.[6] New York joined the list of states prohibiting race and color discrimination both in public housing and in private sales or rentals in 1961.[7] The New York anti-discrimination law also granted the State Division of Human Rights administrative jurisdiction "to eliminate and prevent discrimination . . . in housing accommodations. . . ."[8] However, as finally amended in 1963, the state open-housing law contained an exemption of two-family, owner-occupied residences from its anti-discrimination provisions.[9]

The validity of such state statutory exemptions can be tested constitutionally under the equal protection clause of the fourteenth amendment.[10] Under traditional analysis the equal protection clause has involved a high degree of deference to the judgment of the state legislature, requiring only a rational basis for the legislative classification to withstand constitutional attack.[11] But the Supreme Court has

---

OPEN-HOUSING: AN EVALUATION OF THE RECENT LEGISLATION AND DECISIONS 30 (1969).

5. REV. R. ROBERTS, THE EMERGENCE OF A CIVIL RIGHT: ANTI-DISCRIMINATION LEGISLATION IN PRIVATE HOUSING IN THE U.S. 180-248 (1961).

6. Sloane, *Housing Discrimination—The Response of the Law*, 42 N.C. L. REV. 106, 123 (1963).

7. N.Y. EXEC. LAW § 296 (McKinney Supp. 1970) (as amended on September 1, 1961, L. 1961, c.414, § 4). *See also Governor's Memorandum on Bills Approved*, NEW YORK STATE LEGISLATIVE ANNUAL, 441-42 (1961). The constitutionality of the New York proscription on discrimination in the sale or rental of housing was upheld in State Comm'n for Human Rights v. Kennelly, 23 N.Y.2d 722, 244 N.E.2d 58 (1968).

8. N.Y. EXEC. LAW § 290(3) (McKinney Supp. 1970).

9. *Id.* § 296(5)(a). *See Governor's Memorandum on Bills Approved*, NEW YORK STATE LEGISLATIVE ANNUAL, 452 (1963).

10. U.S. CONST. amend. XIV:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

The Civil Rights Cases, 109 U.S. 3 (1883), established the principle that the equal protection clause and the fourteenth amendment as a whole apply to state action. A state legislature's enactment of a statute clearly constitutes sufficient state action to bring the statute within the purview of the fourteenth amendment, Strauder v. West Virginia, 100 U.S. 303 (1888). For a discussion of erosion of the "state action" limitation to the fourteenth amendment, see Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966). *See also Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087-1107 (1969).

11. *See* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), where

also developed a doctrine that certain legislative classifications are "suspect" and will be subjected to more rigorous judicial scrutiny to see if the equal protection clause has been violated by an invidious discrimination.[12] Classifications based on race are especially "suspect."[13] State statutory classifications fraught with racial distinctions require a "very heavy burden of justification."[14] A "compelling governmental interest" may be required to sustain validity of a state action which promotes racial discrimination.[15]

In the *Berback* situation it might be possible to argue that the exemption does not involve a racial classification subject to rigid scrutiny under the equal protection clause of the fourteenth amendment. The exemption could be characterized as a simple distinction between owner-occupied duplexes and other types of housing. The New York Division of Human Rights rejected this perspective and argued that the exemption entailed a racial classification which affronted constitutional doctrines prohibiting racial discrimination.[16] The position of the Division of Human Rights seems a plausible depiction of the exemption.[17]

---

the U.S. Supreme Court upheld administration of a state system of licensing pilots which guaranteed a tight family monopoly. The Court found the system valid under the equal protection clause and rationally related to legitimate objects like the promotion of high morale in the trade. In Goesaert v. Cleary, 335 U.S. 464 (1948) the Supreme Court sustained against an equal protection challenge a statute prohibiting women other than the wife or daughter of a male bar-owner from obtaining a bartender's license. *See also* constitutional authority, Kenneth Karst, who notes that the Supreme Court's deference to the judgment of the state legislature in equal protection cases has been strongest with regard to state economic regulation, Karst, *Invidious Discrimination: Justice Douglas and the Return of the Natural-Law-Due-Process Formula,* 16 U.C.L.A. L. REV. 716, 721-22 (1969).

12. Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Skinner v. Oklahoma, 316 U.S. 535 (1942). For a suggestion that strict scrutiny of some classifications might stem from a desire to protect disadvantaged minorities *see* Justice Stone's footnote in United States v. Carolene Prod. Co., 304 U.S. 144, 152-53, n.4 (1938). *But see* Labine v. Vincent, 401 U.S. 532 (1971) which distinguishes the *Levy* case and may herald a modification of the scope of strict scrutiny.

13. McLaughlin v. Florida, 379 U.S. 184 (1964); Brown v. Board of Education, 347 U.S. 483 (1954). For a discussion of the special focus of the fourteenth amendment on the race problem *see* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

14. Loving v. Virginia, 388 U.S. 1, 9 (1967).

15. Hunter v. Erickson, 393 U.S. 385, 392 (1969); Korematsu v. United States, 323 U.S. 214, 223 (1944).

16. 59 Misc. 2d at 43, 297 N.Y.S.2d at 855.

17. *Cf.* Hunter v. Erickson, 393 U.S. 385 (1969), where the Supreme Court

In a law which sweepingly proscribes racial discrimination in sale or rental of housing, the legislature carved out an exemption—a group of people insulated from the requirements of the law.[18] The Division of Human Rights viewed this insulation as state-sanctioned discrimination.[19] The *Berback* court was thus squarely presented with the issue of whether an exemption to an open-occupancy law can withstand strict scrutiny under the equal protection clause.

However, the *Berback* court did not resolve this issue in deciding the case. The *Berback* court upheld the constitutionality of the exemption based on the normal presumption of constitutionality[20] and on the existence of a parallel exemption in the 1968 Federal Fair Housing Act.[21] However, these two reasons do not seem to be conclusive justifications for the validity of the exemption, if the exemption is to be viewed as a racial classification. The *Berback* court placed reliance on the presumption of constitutionality without discussing the possibility that the exemption could be viewed as embodying a racial classification required to meet "a very heavy burden of justification."[22] Similarly inconclusive is the *Berback* court's argument that the existence of a parallel provision in a federal statute provides a basis for upholding the constitutional validity of a similar provision in a state statute. The

---

struck down a city charter amendment which posed an impediment to open-housing laws.

18. *Id.*

19. 59 Misc. 2d at 43, 297 N.Y.S.2d at 855.

20. 59 Misc. 2d at 46, 297 N.Y.S.2d at 858. For a discussion of the presumption of constitutionality *see* Madden v. Kentucky, 309 U.S. 83, 88 (1940) and McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

21. 59 Misc. 2d at 46, 297 N.Y.S.2d at 858. The provision in the Federal Fair Housing Act which parallels the New York exemption is 42 U.S.C. § 3603(b)(2) (1970):

> *Exemptions*
>
> (2) rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

The *Berback* court did not raise the possibility that the New York open-housing law might have been pre-empted by the federal Fair Housing Act of 1968. However, preemption seems to be obviated by the federal act itself, which provides at 42 U.S.C. § 3615 (1970):

> Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective that grants, guarantees, or protects the same rights as are granted by this subchapter.

See also Hunter v. Erickson, 393 U.S. 385, 388 (1969).

22. *See* notes 14 & 15 *supra.*

fourteenth amendment and its equal protection clause have been construed as applicable only to state action,[23] and the constitutional validity of the federal exemption itself has never been tested.[24]

Thus, it is necessary to probe beyond the *Berback* court's opinion to test possible justifications of the exemption capable of withstanding the attack of the Division of Human Rights that the exemption constitutes an indefensible racial classification. Even if the exemption involves a racial classification, it can still survive scrutiny under the equal protection clause upon meeting a "very heavy burden of justification"[25] or upon showing a "compelling governmental interest."[26] There are three arguments that might reasonably be advanced to support the constitutionality of the exemption in the face of strict scrutiny. The first argument involves the doctrine sometimes enunciated in equal protection cases that a legislature is free to attack a problem in a piecemeal fashion.[27] The New York statutory exemption of two family, owner-occupied housing could be argued as a practical legislative alternative to an unrestricted open-housing law.[28] Rather than an instrument of race discrimination, the exemption would be depicted as a necessary compromise which enabled the state to undertake a sweeping attack on racial discrimination after a battle for housing legislation which spanned two decades.[29] The second possible argument to justify the exemption looks to the owner's property in-

23. *See* note 10 *supra*. *But see* Bolling v. Sharpe, 347 U.S. 497 (1954), which suggested that certain "concepts" of the equal protection clause might also be inherent in the due process clause of the fifth amendment and hence applicable to federal action. However, even *Bolling* did not hold that federal legislation is subject to precisely the same scrutiny under the due process clause of the fifth amendment as state legislation under the fourteenth amendment. The *Bolling* court noted that " 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and, therefore, we do not imply that the two are always interchangeable phrases." 347 U.S. at 499.

24. For a suggestion that the federal exemption itself might be vulnerable to constitutional attack *see* A. KOLBEN, ENFORCING OPEN-HOUSING: AN EVALUATION OF THE RECENT LEGISLATION AND DECISIONS 30, 31 (1969).

25. *See* note 14 *supra*.

26. *See* note 15 *supra*.

27. Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

28. *See* Robison, *Fair Housing Legislation in the City and State of New York*, in THE POLITICS OF FAIR-HOUSING LEGISLATION 27-64 (L. Eley & T. Casstevens eds. 1968) for a background on the difficulties in passing open-housing legislation in New York.

29. *Id.*

terest as a principle legitimizing private discrimination.[30] The argument seems to assume an inviolate property right protected by a constitutional provision. The most likely constitutional peg to defend this right of property from state legislative regulation would be the due process clause of the fourteenth amendment.[31] The New York exemption could be viewed as protecting the property rights also protected by the fourteenth amendment.[32] Thus, the heavy burden of justification or compelling interest required by strict scrutiny analysis might be met. The third argument to justify the exemption involves a "freedom of association" rationale.[33] One commentator has suggested that "freedom of association" could be argued as a justification for discrimination in housing, especially as the size of the housing unit declines with the parties consequently in closer proximity.[34] Constitutional support for the rationale may be derived from *Griswold v. Connecticut*, which suggested in a different context that a constitutional right of free association and privacy could be derived from the penumbra of the Bill of Rights and could be made applicable to the states by incorporation into the due process clause of the fourteenth amendment.[35] As with the "property interest" argument, a constitutional right of "free association" could be posited, and the New York exemption could be argued as codifying this right to meet the heavy burden of justification required under strict-scrutiny analysis.

However, each of these three arguments in support of the exemption could be met by strong counterarguments. The first hypothetical argument, supporting the exemption as a justifiable and necessary product of legislative compromise, can be met by the assertion that the exemption is *impermissible under any circumstance.* The exemption might be depicted as indefensible in light of the standards articulated in some strict-scrutiny, equal-protection cases that deal with race discrimina-

30. Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1, 30 (1964).

31. U.S. CONST. amend. XIV, § 1:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

32. It is possible that the *Berback* court was alluding to this notion of the owner's property interest when it commented that "a man's home is his castle." 297 N.Y.S.2d at 860.

33. Horowitz, 52 CALIF. L. REV. *supra* note 30 at 30.

34. *Id.*

35. 381 U.S. 479 (1965). The *Griswold* decision struck down a Connecticut statute which prohibited counselling on the use of contraceptives. The decision featured six separate opinions.

tion. In *Burton v. Wilmington Parking Authority* the Supreme Court found an affront to the equal protection clause in the state action of allowing a restaurant leasing public land to discriminate based on race.[36] The Court found the arrangement unconstitutional because the state had become a party to racial bias, placing its power and authority behind private acts of race discrimination.[37] In *Reitman v. Mulkey* the Court struck down a state constitutional amendment which prohibited state interference with the individual's discretion to sell or rent his property.[38] The Court found the constitutional provision invalid on the grounds that the amendment embodied a legal authorization and encouragement for those practicing racial discrimination, insulating them from interference from official sources.[39] Though the facts of these cases might be distinguishable,[40] the language of the Court places the New York exemption in an awkward posture. The New York exemption was being used by the petitioners in the *Berback* case as an official authorization for their act of race discrimination, protecting the petitioners from official sanctions.[41] This depiction of the exemption as constitutionally indefensible collides forcefully with the defense of the exemption as a product of permissible legislative compromise. Yet neither argument clearly overwhelms the other.

Such does not seem to be the case with the second hypothetical defense of the exemption (protection of the owner's property rights) and the third hypothetical defense of the exemption (protection of the owner's freedom of association). These two defenses would probably fail to meet the "heavy burden of justification" or "compelling interest" required in a strict scrutiny case dealing with a racial classification.[42] The "property interest" rationale for the exemption might be

36. 365 U.S. 715 (1961).

37. *Id.* at 725.

38. 387 U.S. 369 (1967). The *Reitman* court quotes in its entirety the provision under review—the initiative amendment to the California Constitution approved by the voters of the state in 1964 as Proposition 14:

> 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 to such person or persons as he, in his absolute discretion, chooses. 387 U.S. 369, 371 (1967).

39. *Id.* at 377.

40. *Burton*, a 6-to-3 decision, involved a lease of state property (365 U.S. 715). *Reitman*, a 5-to-4 decision, involved a state constitutional amendment which had the effect of abolishing all existent open-housing legislation (387 U.S. 369, 374).

41. 59 Misc. 2d at 42, 297 N.Y.S.2d at 854.

42. *See* notes 14 & 15 *supra*.

deficient in meeting the requirements of strict scrutiny because of the lack of an apparent necessity for the state to protect the "property interest" only of duplex owners, rather than owners of other types of housing. Furthermore, property interest arguments have not proved very effective in the federal courts in countering charges of racial discrimination.[43] Looking to the New York courts, one finds that they have favored the principle that in any conflict between human rights and property rights protection of human rights, such as freedom from discrimination, will prevail.[44] Likewise, the freedom-of-association argument for the exemption seems insufficient to meet the requirements of strict scrutiny. First, the free-association argument would have to stretch the existing penumbra doctrine of *Griswold v. Connecticut* and might well be vulnerable to the charge of deriving a penumbra from a penumbra.[45] Secondly, it is difficult to see how the "heavy burden of justification" or "compelling interest" requirements could be met by the free-associaton argument, since the state would have to justify protection of the free-association of the duplex-dweller because of his proximity to his neighbors but not to the dweller of a five-room apartment who shares a common bathing facility with a tenant of another race. Thus, the probable inadequacy of the property-interest and the free-association arguments appears to leave only one justification of the exemption tenable enough to withstand strict scrutiny.

The strongest argument in support of the exemption seems to be that the exemption is the product of reasonable legislative compromise whereby the legislature chose to attack only part of the problem of discrimination in housing.[46] As was discussed earlier, this argument in support of the exemption can be met by the equally cogent counter-argument that the exemption is an impermissible state protection and encouragement of race discrimination. The clash between these two perspectives is illustrative of the great dilemma facing the courts in applying strict scrutiny analysis to contemporary problems. In the past

43. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Shelley v. Kraemer, 334 U.S. 1 (1948) where property interest arguments were rejected.

44. State Comm'n for Human Rights v. Kennelly, 30 App. Div. 2d 310, 314, 291 N.Y.S.2d 686, 691 (Sup. Ct. 1968), *aff'd*, 23 N.Y.2d 722, 244 N.E.2d 58, 296 N.Y.S.2d 367 (1968).

45. For the explication of the "penumbra" doctrine *see* Justice Douglas' opinion in Griswold v. Connecticut, 381 U.S. 479 (1965).

46. *See* notes 27-29 *supra.*

the breakthrough doctrine of *Brown v. Board of Education* unleashed an equal protection juggernaut which sought to sweep away the blatant forms of state-sanctioned race discrimination.[47] Today the easy cases have all been decided, and the courts face the far more difficult task of determining how far we will extend the equal protection clause as a check on state legislative action. On the one hand, it is quite possible to see the crucial need to maintain maximum legislative flexibility in attacking the problem of racial discrimination in America. This view was aptly articulated by the late Justice Harlan in his dissent in *Reitman v. Mulkey*:

> "More fundamentally, the doctrine underlying this decision may hamper, if not preclude, attempts to deal with the delicate and troublesome problems of race relations through the legislative process. The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum. This decision, I fear, may inhibit such flexibility . . . ."[48]

This perspective would counsel caution in striking down an exemption to an open-housing law, lest the state legislature be prevented from making any attack at all on the problem. On the other hand, it could be said that the problem of discrimination in housing which plagues this country would be exacerbated by condoning state legislation which protects and encourages race discrimination.[49] This perspective would depict exemptions to open-housing laws as constitutionally repugnant in creating privileged pockets of state-sanctioned race discrimina-

47. *See, e.g.*, Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (striking down segregation on beaches); Gayle v. Browder, 352 U.S. 903 (1956) (striking down segregation on buses); New Orleans City Park Imp. Ass'n v. Detiege, 358 U.S. 54 (1958) (striking down segregation of parks).

48. 387 U.S. at 369, 395-96.

49. *See* the report of the Kerner Commission on civil disorders, which stated: "America is divided into two societies, black and white, separate and unequal" NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968). The acute shortage of minority housing is a critical domestic problem with at least one out of eight families in substandard housing. 1 REPORT OF PRESIDENTIAL COMM. ON URBAN HOUSING, TECHNICAL STUDIES 9 (1967). For a discussion of the subtle means used to maintain segregated housing patterns *see* Justice Douglas' concurrence in Reitman v. Mulkey, 387 U.S. 369, 391 (1967).

tion. There is obviously no easy resolution of these two conflicting views. The exemption in the New York law and similar exemptions in other state laws will probably be a continuing source of litigation until the constitutionally permissible scope of exemptions to open-housing laws is finally determined.[50]

50. See the suggestion of one civil rights attorney that the N.Y. exemption is in constitutional jeopardy in A. KOLBEN, ENFORCING OPEN-HOUSING: AN EVALUATION OF THE RECENT LEGISLATION AND DECISIONS 30 (1969). *But see* Richards v. Mangum, 60 Misc. 2d 410, 303 N.Y.S.2d 321 (Sup. Ct. 1969) where the New York Division of Human Rights undertook a second abortive attack on the exemption.