

CURRENT LEGAL ATTACKS ON RACIAL RESTRICTIVE COVENANTS

As interracial tensions have become more acute in the postwar period the intensity of legal attacks on racial restrictive covenants has also mounted. The magnitude of the attack is evidenced by the large number of recent cases.¹ In the most significant of these, efforts were made to present appropriate social data to the courts and to focus attention upon the constitutional and policy issues involved.² Against this background the Supreme Court has granted

¹ *Swain v. Maxwell*, 196 S.W. 2d 780 (Mo., 1946); *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946); *Kraemer v. Shelley*, 198 S.W. 2d 679 (Mo., 1946); *Perkins v. Trustees of Monroe Avenue Church of Christ*, 70 N.E. 2d 487 (Ohio, 1946); *Hurd v. Hodge*, 162 F. 2d 233 (App. D.C., 1947); *Sipes v. McGhee*, 25 N.W. 2d 638 (Mich., 1947); *Northwest Civic Ass'n v. Sheldon*, 27 N.W. 2d 36 (Mich., 1947); *Mrsa v. Reynolds*, 27 N.W. 2d 40 (Mich., 1947); *Schwartz v. Hubbard*, 177 P. 2d 117 (Okla., 1947); *Linder v. Stapp*, 178 P. 2d 617 (Okla., 1947); *Hawkins v. Whyne*, 179 P. 2d 138 (Okla., 1947). In addition there have been a number of cases in the lower courts such as *Drury v. Neely*, 69 N.Y.S. 2d 677 (N.Y., 1947) and *Kemp v. Rubin*, 69 N.Y.S. 2d (N.Y., 1947). There has also been a large amount of writing on the subject. For example see *McGovney, Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 Calif. L. Rev. 5 (1945); *Kahen, Validity of Anti-Negro Restrictive Covenants*, 12 Univ. Chi. L. Rev. 198 (1945); *Hale, Rights under the Fourteenth and Fifteenth Amendment against Injuries Inflicted by Private Individuals*, 6 Lawyer's Guild Rev. 627 (1946). *Miller, Race Restrictions on the Use or Sale of Real Property*, 2 Nat. B. J. 24 (1944); *Miller, Race Restrictions on Ownership or Occupancy of Land*, 7 Lawyer's Guild Rev. 99 (1947); *Weaver, Racial Restrictive Housing Covenants*, 30 J. of Land and Public Utility Economics 183 (1944). *Jones, Legality of Race Restrictive Housing Covenants*, 4 Nat. Bar J. 14 (1946); *Tefft, Marsh v. Alabama—A Suggestion concerning Racial Restrictive Housing Covenants*, 4 Nat. Bar J. 133 (1946); *Martin, Segregation of Residences of Negroes*, 32 Mich. L. Rev. 721 (1934); *Bruce, Racial Zoning by Private Contract in the Light of the Constitution and the Rule against Restraint on Alienation*, 21 Ill. L. Rev. 704 (1927); *Judicial Enforcement of Restrictive Covenants against Negroes*, 40 Ill. L. Rev. 432 (1946); *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy against Restrictive Covenants*, 13 Univ. Chi. L. Rev. 477 (1946).

² In the earlier cases and in most of the recent cases the attacks were narrow in scope. Among these attacks have been the following: 1) The covenant is an unlawful restraint on alienation. Where the covenant is against selling or otherwise conveying to persons of a particular race, this attack, which continues to be asserted vigorously, has sometimes been successful. *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Porter v. Barrett*, 233 Mich. 373, 206 N.W. 532 (1925); *White v. White*, 108 W. Va. 128, 150 S.E. 531 (1929); *Perkins v. Trustees of Monroe Avenue Church of Christ*, 70 N.E. 2d 487 (Ohio, 1947). But where the covenant is against use or occupancy the courts give it full effect, thus rendering these decisions of little or no practical significance. *Chandler v. Zeigler*, 88 Col. 1, 291 Pac. 822 (1930) and cases collected in *McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions Is Unconstitutional*, 33 Calif. L. Rev. 5 (1945); *Bowman, The Constitution and Common Law Restraints on Alienation*, 8 B.U.L. Rev. 1 (1928); *Bruce, Racial Zoning by Private Contract in the Light of the Constitution and the Rule against Restraints on Alienation*, 21 Ill. L. Rev. 704 (1927). 2) The covenant is void as against public policy. Although this attack is now being amplified, and has met with success in Canada in the case of *In re Drummond Wren*, 4 D.L.R. 674 (High Ct. of Ontario, 1945), it was originally asserted only as part of the restraint on alienation argument and frequently has been unsuccessful in this limited context. *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922); *Schulte v. Starks*, 238 Mich. 102, 213 N.W. 102 (1927). 3) The neighborhood restricted has already been infiltrated by Negroes and therefore it would be inequitable to enforce the

certiorari in two cases to review the questions presented by the judicial enforcement of restrictive covenants.³ Certiorari has been petitioned for and seems likely to be granted in two other cases.⁴

In the first of the cases in which certiorari has been granted, *Sipes v. McGhee*,⁵ the Supreme Court of Michigan held a restrictive covenant reading: "This property shall not be used or occupied by any person or persons except those of

covenant. See *Letteau v. Ellis*, 122 Cal. App. 584, 10 P. 2d 496 (1932); *Pickel v. McCawley*, 329 Mo. 166, 44 S.W. 2d 857 (1931); *Hundley v. Gorowitz*, 132 F. 2d 23 (App. D.C., 1942); and cases collected in *Negro Restrictions and the "Changed Conditions Doctrine,"* 7 Univ. Chi. L. Rev. 710 (1940); *Judicial Enforcement of Restrictive Covenants against Negroes*, 40 Ill. L. Rev. 432 (1946); 3 *Tiffany, Real Property* § 871-75 (1920). 4) Although there has been no change of conditions within the restricted area the immediately surrounding area has been so changed as to greatly reduce the value of the property, and therefore the enforcement of the covenant would be inequitable. This attack has not met with success. *Grady v. Garland*, 89 F. 2d 817 (App. D.C., 1937), cert. den. 302 U.S. 694 (1937); *Vernon v. R. J. Reynolds Realty Co.*, 226 N.C. 58, 36 S.E. 2d 710 (1946); *Schwartz v. Hubbard*, 177 P. 2d 117 (Okla., 1947); *Swain v. Maxwell*, 196 S.W. 780 (Mo., 1946); and see *Miller, Race Restrictions on the Use or Sale of Real Property*, 2 Nat. Bar J. 24 (1944). 5) The occupancy by Negroes was not such as to come within the scope of the covenant. *Gableman v. Dept. of Conservation*, 309 Mich. 416, 15 N.W. 2d 689 (1944). Negroes having access to lake for fishing purposes through property owned by State Department of Conservation do not occupy the property within the meaning of the recorded restrictions. 6) The particular restrictions were ambiguous and did not exclude all non-Caucasians even where that effect might have been intended; *Kathan v. Williams*, 307 Mich. 219, 15 N.W. 2d 137 (1944) (successful attack); or racial terms themselves are inherently ambiguous. *Burkhardt v. Lofton*, 63 Calif. App. 2d 230, 146 P. 2d 720 (1944) (unsuccessful attack); *Sipes v. McGhee*, 25 N.W. 2d 638 (Mich., 1947) (unsuccessful attack). 7) The effect of a tax-sale deed was to render the restrictions inoperative. *Doherty v. Rice*, 240 Wis. 389, 3 N.W. 2d 734 (1942) (successful attack on prohibition against use or occupancy but not the prohibition against alienation); *Hawkins v. Wayne*, 179 P. 2d 138 (Okla., 1947) (unsuccessful attack). 8) There were insufficient signers to effectuate the agreement, or the agreement was not recorded or was improperly recorded. See *Foster v. Stewart*, 134 Cal. App. 482, 25 P. 2d 497 (1933); *Burke v. Kleiman*, 277 Ill. App. 519 (1934); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Thornhill v. Herdt*, 130 S.W. 2d 175 (Mo., 1939); *Kraemer v. Shelley*, 198 S.W. 2d 679 (Mo., 1946); and see *Richardson, Some of the Defenses Available in Restrictive Covenant Suits against Colored Citizens of St. Louis*, 3 Nat. Bar J. 50 (1944). These objections are generally upheld when they are asserted and proven in a timely manner. 9) The vendor is a subsequent owner, not a party to the original agreement. The courts do not appear to have given any effect to this distinction. *Hurd v. Hodge*, 162 F. 2d 233 (App. D.C., 1947); and cases cited therein. 10) There was no evidence defendants were not of the Caucasian race. *Sipes v. McGhee*, 25 N.W. 2d 638 (Mich., 1947) (not a successful attack where the contrary was proved). 11) The covenant is repugnant to the fee. This has also been an unsuccessful attack. *Chandler v. Zeigler*, 88 Col. 1, 291 Pac. 822 (1930); *Stewart v. Cronan*, 105 Col. 393, 98 P. 2d 999 (1940); and see *Martin, Segregation of Residences of Negroes*, 32 Mich. L. Rev. 721, 733 (1934). When Professor McGovney published his article in 1945, op. cit. supra note 1, the highest courts of 36 states had not yet passed on the validity of restrictive covenants. The number is now reduced to 35 by the decision of the Ohio Supreme Court in *Perkins v. Trustees of Monroe Avenue Church of Christ*, 70 N.E. 2d 487 (Ohio, 1946).

³ *Sipes v. McGhee*, 25 N.W. 2d 638 (Mich., 1947) cert. granted 15 U.S.L. Week 3478 (1947); *Kraemer v. Shelley*, 198 S.W. 2d 679 (Mo., 1946) cert. granted 15 U.S.L. Week 3478 (1947).

⁴ *Hurd v. Hodge*, 162 F. 2d 233 (App. D.C., 1947); *Perkins v. Trustees of Monroe Avenue Church of Christ*, 70 N.E. 2d 487 (Ohio, 1946).

⁵ 25 N.W. 2d 638 (Mich., 1947), cert. granted 15 U.S.L. Week 3478 (1947).

the Caucasian race"⁶ valid and enforceable by injunction, basing its decision on a similar Michigan case decided in 1922.⁷ The *Sipes* case is notable for the form of the policy arguments and for the social data and supplementary legal arguments presented in the amicus curiae briefs.⁸ In the amicus briefs the attempt was made to establish a public policy against racial discrimination by reference to Michigan statutes outlawing various other forms of racial discrimination,⁹ by analogy to recent related decisions of the United States Supreme Court,¹⁰ by reference to the United Nations Charter and other international agreements,¹¹ and on broad principles of social welfare with special

⁶ *Ibid.*, at 640.

⁷ *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922).

⁸ Amicus curiae briefs were submitted by the American Jewish Congress (Detroit Section); Wolverine Bar Association; National Lawyers Guild (Detroit Chapter); United Automobile Workers (C.I.O.); Ardmore Association; and the National Bar Association.

⁹ Discrimination by state medical institutions, by public educational institutions, and in places of public amusement and recreation is prohibited. Mich. Stat. Ann. (Henderson, 1929) § 28.343-45; § 14.845; § 15.76; § 15.380. Life insurance companies are prohibited from making any discrimination based on race. Mich. Stat. Ann. (Henderson, 1929) § 24.293. A list of statutes in other jurisdictions prohibiting various forms of racial discrimination is noted in *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy against Restrictive Covenants*, 13 Univ. Chi. L. Rev. 477 (1946). The author of the note suggests that where a state legislature has outlawed many forms of discrimination, but has failed to act with regard to the widely publicized problem of restrictive covenants, the better inference may be that the legislature at least has no policy against such covenants. See *Lion's Head Lake v. Bizezensky*, 43 A. 2d 729 (Dist. Ct. N.J., 1945); *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944). In other fields, however, the courts have not been unwilling to infer a public policy from related statutes. See *Landis, Statutes and the Sources of Law*, Harvard Legal Essays 213 (1934), and for comment thereon see *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy against Restrictive Covenants*, 13 Univ. Chi. L. Rev. 477, 481, and *Gelhorn, Contracts and Public Policy*, 35 Col. L. Rev. 678 (1935).

¹⁰ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding validity of the minimum wage law; not deprivation of due process); *United States v. Classic*, 313 U.S. 299 (1941) (acts of election officials in altering ballots in state primary election were acts under color of federal law depriving voters of constitutional rights within the meaning of 18 U.S.C.A. § 52 making such deprivation a crime); *Smith v. Allright*, 321 U.S. 649 (1943) (holding exclusion of Negroes from primary election state action within the prohibitions of the Fourteenth Amendment); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944) (certified union must fairly represent the interests of those in the collective bargaining unit, including Negroes); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (state could not furnish legal education for whites without providing comparable opportunity for Negroes); and see also *Betts v. Easley*, 161 Kan. 459, 169 P. 2d 831 (1946), noted in 14 Univ. Chi. L. Rev. 492; *James v. Marinsnip Corporation*, 25 Cal. 2d 721, 155 P. 2d 329 (1944) (labor union with closed shop contract cannot maintain a closed union).

¹¹ Art. 55c. of the United Nations Charter provides: "The United Nations shall promote . . . uniform respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language, and religion." Art. 56 states: "All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Art. 55." The United States also signed the Act of Chapultepec, undertaking with the Latin American Nations to "prevent with all means within their power all that may provoke discrimination among individuals because of racial and religious reasons."

reference to a recent Canadian case²² in which a covenant against Jews was held void as against public policy. It would seem to represent a measure of success for the opponents of covenants that although there was nothing in the record concerning the wider policy arguments, the court thought it necessary to comment on the social data presented in the amicus briefs.²³

In reply to the argument that the United Nations Charter makes the device of restrictive covenants a matter of public concern rather than private contract, the Michigan court said:

So far as the instant case is concerned these pronouncements are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples. These arguments are predicated upon a plea for justice rather than the application of the settled principles of established law.²⁴

The court considered that it was bound by the earlier decision and refused to overrule it.²⁵

In the second case in which the Supreme Court has granted certiorari, *Kraemer v. Shelley*,²⁶ the Missouri Supreme Court reversed a decree of the Circuit Court of St. Louis, which had held a covenant against occupancy unenforceable on the ground that it was the intention of the parties that all the property within the specified area was to be restricted before the covenant would operate. Thirty out of thirty-nine owners had signed, five of the non-signers being Negroes. The Missouri Supreme Court, in reversing, distinguished *Thornhill v. Herdt*,²⁷ where it was held that a restrictive covenant designating as parties all owners of property in the district was invalid unless signed by all. The court said that the rule in the *Thornhill* case was applicable only where it could be shown that the agreement was intended to bind all or none, and since at the time signatures were sought five of the owners of property in the restricted area were Negroes, it was patent that the signers could not have intended all owners to sign before the covenant was to operate.

The principal case revolved about the narrow question of the intent of the parties to the covenant. There was no special showing of social data in the record and consequently the policy issue was disposed of summarily. On the constitutional question the court was of the novel opinion, although it did not amplify its meaning, that to construe enforcement of the covenant as "state action by the state itself in violation of the 14th Amendment . . . would be to

²² In re Drummond Wren, 4 D.L.R. 674 (High Ct. of Ontario, 1945).

²³ 25 N.W. 2d 638, 644 (Mich., 1947). "The arguments based on the factual statement pertaining to public health, safety, and delinquency are strong and convincing. However, we must confine our decision to the matters within the record submitted to us and the questions raised in the briefs of the parties to the cause."

²⁴ *Ibid.*, at 644.

²⁵ *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922).

²⁶ 198 S.W. 2d 679 (Mo., 1946), cert. granted 15 U.S.L. Week 3478 (1947).

²⁷ 130 S.W. 2d 175 (Mo., 1939).

deny the parties to such an agreement one of the fundamental privileges of citizenship, access to the courts."¹⁸

In the first of the cases in which certiorari has been petitioned for but not yet granted, *Hurd v. Hodge*,¹⁹ the Court of Appeals for the District of Columbia upheld a perpetual deed covenant against rent, lease, transfer, or conveyance. The validity of both restrictive deed covenants²⁰ and restrictive covenants expressed in agreements between landowners²¹ had been upheld by that court on several occasions. The court, therefore, in a brief opinion, rested its decision on an earlier case²² in which the same area was covered by the covenant. The court was of the opinion that no such change of neighborhood had occurred as to make enforcement inequitable, that the restriction was not an unlawful restraint on alienation, and that all other contentions of the petitioner were answered by the previous decisions.

The case, however, is notable chiefly for the dissent of Judge Edgerton, who said:

The covenants are void as unreasonable restraints on alienation. They are void because contrary to public policy. Their enforcement by injunction is inequitable. Their enforcement by injunction violates the due process clause of the Fifth Amendment. Their enforcement by injunction violates the Civil Rights Act which requires that "All citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." R.S. § 1978, 8 U.S.C.A. § 42.²³

He pointed out that the court apparently thought *Corrigan v. Buckley*,²⁴ decided by the United States Supreme Court in 1926, was controlling, but that there was a big difference between holding that such covenants are not void under the Constitution and the Civil Rights Act and holding that they are valid and enforceable by injunction. It has increasingly been insisted that *Corrigan v. Buckley* is not squarely in point. The argument is that since the Supreme Court had only held that the petitioner's contentions did not afford a jurisdictional

¹⁸ 198 S.W. 2d 679, 683 (Mo., 1946).

¹⁹ 162 F. 2d 233 (App. D.C., 1947).

²⁰ *Hundley v. Gorewitz*, 132 F. 2d 23 (App. D.C., 1942); *Torrey v. Wolfes*, 6 F. 2d 702 (App. D.C., 1925); *Grady v. Garland*, 89 F. 2d 817 (App. D.C., 1937), cert. den. 302 U.S. 694 (1937); *Cornish v. O'Donoghue*, 30 F. 2d 983 (App. D.C., 1929), cert. den. 279 U.S. 871 (1929).

²¹ *Corrigan v. Buckley*, 299 Fed. 899 (App. D.C., 1926), appeal dismissed 271 U.S. 323 (1926); *Mays v. Burgess*, 147 F. 2d 869 (App. D.C., 1945), cert. den. 325 U.S. 868 (1945); *Russell v. Wallace*, 30 F. 2d 981 (App. D.C., 1929), cert. den. 279 U.S. 871 (1929).

²² *Mays v. Burgess*, 147 F. 2d 869 (App. D.C., 1945), cert. den. 325 U.S. 868 (1945).

²³ 162 F. 2d 233, 235 (App. D.C., 1947). Judge Edgerton also thought that enforcement of the covenant defeated its reason for being as Negroes would pay more for the property than whites, and that the injunction was broader than the covenant since the covenant contained no provision against use or occupancy. This he regarded as reversible error. See *Hundley v. Gorewitz*, 132 F. 2d 23 (App. D.C., 1942); *Gospel Spreading Ass'n v. Bennetts*, 147 F. 2d 878 (App. D.C., 1945). His dissent in this case was an elaboration of what he said in *Mays v. Burgess*, 147 F. 2d 289 (App. D.C., 1945).

²⁴ 299 Fed. 899 (App. D.C., 1926), appeal dismissed 271 U.S. 323 (1926).

basis for appeal, it did no more than decide that the Constitution did not make the covenant itself void. The Court thus necessarily left open the questions of whether the covenant might be void either as against public policy, or as an unlawful restraint on alienation. Moreover, according to this view, even if covenants are valid on all of these grounds, whether their enforcement by injunction violates the Constitution, the Civil Rights Act, or principles of equity could not be, and was not, decided in the *Corrigan* case.²⁵

In arguing that enforcement of the covenant in the *Hurd* case would be inequitable, Judge Edgerton said:

It is enough to point out that the familiar principle of "balancing equities" precludes any injunction in this case because, in view of the present housing situation, the extreme hardship which injunctions will inflict upon the appellant greatly outweighs any benefits which the appellees may possibly derive from them and that "especially courts of equity, may appropriately withhold their aid when the plaintiff is using the right asserted contrary to the public interest."²⁶

He then went on to discuss the effect of the United States Supreme Court's decision in *Buchanan v. Warley*²⁷ on the constitutional question. The core of the case, which had held a Louisville ordinance forbidding Negroes to move into predominantly white blocks and whites to move into predominantly Negro blocks unconstitutional, was that the constitutional rights of Negroes to buy and use, and of whites to sell to Negroes, real property, may not be directly interfered with by the government.²⁸ He said:

The action that begins with the decree and ends with its enforcement is obviously direct government action. . . . Every case that holds legislation unconstitutional holds in terms or in effect that its judicial enforcement would be unconstitutional. . . . The Constitution does not exempt any kind of judicial action from the requirements of due process of law. Not only legislation and procedure but judicially adopted rules of substantive law, including equity, are invalid when they conflict with these requirements.²⁹

²⁵ But the state and federal courts have constantly relied on the *Corrigan* case to hold restrictive covenants valid and enforceable by injunction. The *Corrigan* precedent is carefully analyzed and state cases are collected and criticized in *McGovney*, op. cit. supra note 1; Kahen, Validity of Anti-Negro Restrictive Covenants, 12 Univ. Chi. L. Rev. 198, 200 (1945); Miller, Race Restrictions on Ownership or Occupancy of Land, 7 Lawyers Guild Rev. 99, 104 (1947). The recent cases, note 1 supra, have continued to rely on the *Corrigan* case. But see the early case of *Gandolfo v. Hartman*, 49 Fed. 181 (C.C. Cal., 1892) in which a restrictive covenant was held unenforceable as a violation of a treaty with China.

²⁶ 162 F. 2d 233, 237 (App. D.C., 1947).

²⁷ 245 U.S. 60 (1917).

²⁸ Although the specific ground of decision was that the ordinance, in restraining the seller's right of disposition, deprived him of property without due process of law, the court also said that the occupancy, and necessarily the purchase and sale of property cannot be prohibited solely because of the color of the proposed occupant. See *McGovney*, op. cit. supra note 1; Jones, Legality of Race Restrictive Housing Covenants, 4 Nat. Bar J. 14 (1945). *Buchanan v. Warley* was followed in *Harmon v. Taylor*, 273 U.S. 668 (1927) and in *City of Richmond v. Deans*, 281 U.S. 704 (1930).

²⁹ 162 F. 2d 233, 239-40 (App. D.C., 1947). See Judge Edgerton's dissent in *Mays v. Burgess*, 147 F. 2d 869 (App. D.C., 1945), and *McGovney*, op. cit. supra note 1.

Since the *Civil Rights Cases*,³⁰ decided in 1883, it has been clear that the Fourteenth Amendment is prohibitive of state action only. If judicial enforcement of restrictive covenants is construed as state action, for which there seems to be considerable authority,³¹ then within the meaning of *Buchanan v. Warley*, when an injunction issues to prevent a willing buyer from taking and occupying premises conveyed by a willing seller, it is arguable that there has been a deprivation of due process of law.

In calling attention to the possible relevance of the Civil Rights Act, Judge Edgerton made an original contribution to the discussion of the covenant problem. He thought that "since the injunctions are based on covenants alone and the covenants are based on color alone, ultimately the injunctions are based on color alone."³² Under this view any restriction imposed upon the right of colored citizens to purchase and hold property not similarly imposed upon the right of white citizens denies to the former "the same right . . . as is enjoyed by white citizens," and is, therefore, a violation of the Act.³³ In dealing with the point of restraint on alienation, he expressed satisfaction with the American Law Institute's restatement of the subject³⁴ and concluded that the covenant in the suit was unreasonable and should have been held void. On the point of public policy he adduced considerable data concerning the impoverished living conditions of

³⁰ 109 U.S. 3 (1883); see *United States v. Cruikshank*, 92 U.S. 542 (1876); *Virginia v. Rives*, 100 U.S. 313 (1880); *United States v. Harris*, 106 U.S. 629 (1882). When legislative authority is given for discrimination it is generally held to be a violation of the Fourteenth Amendment. *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

³¹ "The judicial act of the highest court of the State in authoritatively construing and enforcing its laws is the act of the State." *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908); "But it must be observed that the prohibitions of the [Fourteenth] Amendment refer to all the instrumentalities of the State, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.'" *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913) and cases cited therein; *Iowa-Des Moines Bank v. Bennet*, 284 U.S. 239 (1931) (action of state court in sustaining unlawful collection of taxes held state action); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941) (action of state court in construing its state law as limiting peaceful picketing held state action); *Bridges v. California*, 314 U.S. 252 (1941) (construction of contempt power by state court held state action); *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930); *Raymond v. Chicago Traction Co.*, 207 U.S. 20 (1907); *Bakery Driver's Union v. Wohl*, 315 U.S. 769 (1942). And see *McGovney*, op. cit. supra note 1; *Kahen*, op. cit. supra note 1.

³² 162 F. 2d 233, 241 (App. D.C., 1947).

³³ *Ibid.*

³⁴ The American Law Institute lists six factors, which tend, when present, to make restraints on alienation reasonable and valid: "1) The one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint; 2) the restraint is limited in duration; 3) the enforcement of the restraint accomplishes a worthwhile purpose; 4) the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained; 5) the number of persons to whom alienation is prohibited is small . . . ; 6) the one upon whom the restraint is imposed is a charity." Rest., Property § 406 (1944).

Negroes in the District of Columbia and throughout the country generally,³⁵ criticized the opinion of the court and its previous opinions for not taking account of such facts, and sketched the implications of anti-Negro discrimination for the future of American democracy. He thought the United Nations Charter could not "be neglected in any consideration of the public policy of preventing men from buying homes because they are Negroes."³⁶ He added:

Suits like this and the ghetto system they enforce, are among our conspicuous failures to live together in peace. . . . The question in these cases is not whether law should punish racial discrimination, or even whether law should try to prevent racial discrimination, or whether the law should interfere with it in any way. The question is whether law should affirmatively support and enforce racial discrimination.³⁷

In the second of the cases in which certiorari has been petitioned for but not yet granted, *Perkins v. Trustees of Monroe Avenue Church of Christ*,³⁸ the Supreme Court of Ohio upheld an injunction prohibiting the defendants from using or occupying the Church premises they had purchased. The court denied that there was any question of discrimination involved, saying: "White may exclude black. Black may exclude white."³⁹ The court argued that the use restrictions in the covenant were comparable to building use restrictions, saying: "Would anyone gainsay that one allotting and selling property for strictly residential purposes might not legally write into conveyances for the benefit of the purchasers and their assigns, a restrictive covenant against letting a property therein to be occupied and used as a house of prostitution?"⁴⁰ The court rationalized its decision on the basis of what appears to be a rather curious conception of democracy:

We well recognize that vociferous minorities of our citizens, instigated by politicians, not statesmen, clamor for judicial denial of private rights under the guise of public welfare which is to say public policy; but the courts ought to be and are ever mindful of that basic thought which underlies representative democracy, "give all power to the many and they will oppress the few, give all power to the few and they will oppress the many, so that each should retain within themselves the power for their own preservation."⁴¹

³⁵ There is abundant authoritative comment on the evils of racial segregation. "Segregation . . . has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to health, morals and general decency of cities, and 'plague spots for race exploitation, friction and riots.'" 6 Report of The Committee on Negro Housing of the President 45-46 (1932); and see Myrdal, *An American Dilemma* 378, 624-26; Weaver, *Racial Restrictive Housing Covenants*, 30 *J. Land & Pub. Util. Econ.* 183, 185, 190 (1938).

³⁶ 162 F. 2d 233, 245 (App. D.C., 1947).

³⁷ *Ibid.*, at 246.

³⁸ 70 N.E. 2d 487 (Ohio, 1946). The court invalidated that part of the injunction which prohibited sale. See *Perkins v. Trustees of Monroe Avenue Church*, 70 N.E. 487 (Ohio, 1947).

³⁹ *Ibid.*, at 491.

⁴⁰ *Ibid.* In other cases the rules in racial and building use restrictions have been regarded as the same. Cases are collected in Miller, *op. cit. supra* note 2.

⁴¹ 70 N.E. 2d 487, 492 (Ohio, 1946).

The constitutional questions were disposed of on the authority of *Corrigan v. Buckley*, and the court rested its decision on freedom of contract, saying: "The liberty of contract, being one of those rights secured by our constitution, is not to be restrained upon an insufficient or mere fanciful conceit of what might possibly happen."⁴²

The *Perkins* case illustrates a continuing pattern, based on the earlier cases and exemplified in *Corrigan v. Buckley*, whereby the issues are narrowed to include only the contractual rights of the parties to the action. Inasmuch as the attack in the *Corrigan* case and in the other early cases was based on the theory that the covenant was itself void, it was logical that the courts should stress the contract problems and pay little heed to policy considerations.⁴³ With the attempt made in the *Sipes* and *Hurd* cases to broaden the issue, to emphasize the social results of enforcement, and to question the constitutionality of the remedy of injunction, the courts have been given an opportunity to reconsider what importance should be attached to the freedom of contract approach.

The Supreme Court has already considered an important question related to this type of situation. In *Marsh v. Alabama*⁴⁴ the right of a member of Jehovah's Witnesses to distribute religious literature on the streets of a town entirely owned by a corporation was upheld. The Court said: "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation [and] the managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the constitutional guarantees."⁴⁵

It has been suggested that if *Marsh v. Alabama* and *Buchanan v. Warley* are considered together, in a case where the neighborhood restricted constitutes so large a proportion of the community that enforcement results in the community being zoned on a racial basis, the covenant is unenforceable as failing to satisfy the requirements of the Fourteenth Amendment.⁴⁶ But in neither the *Sipes* and *Kraemer* cases, nor in the *Hurd* and *Perkins* cases, will the Supreme Court be confronted with covenants covering substantial areas. In no one case, moreover

⁴² *Ibid.*

⁴³ For example: "The question is whether a contractual duty, knowingly and voluntarily assumed may be enforced. If the contract is valid and enforceable, its wisdom is not a question for the court." *Ridgway v. Cockburn*, 296 N.Y.S. 936, 943 (N.Y., 1937). Similar language is to be found in most of the cases cited note 1 *supra*.

⁴⁴ 326 U.S. 501 (1946).

⁴⁵ *Ibid.*, at 506, 508.

⁴⁶ *Tefft, Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Housing Covenants*, 4 *Natl. B.J.* 133, 134 (1946). In *Dorsey v. Stuyvesant Town Corporation*, decided in the Supreme Court of New York, *N.Y. Times*, § 3, p. 73, col. 5 (July 29, 1947) the court disregarded the rule in the *Marsh* case and refused to grant relief where plaintiffs sued to enjoin the corporation from refusing to rent to them simply because they were Negroes. *Stuyvesant Town* is a housing project accommodating 24,000 persons, and was made possible by numerous grants and concessions from the City of New York. See *N.Y. Development Companies Law* (McKinney, 1945) §§ 3401-26. It would appear that even if the project were entirely a private venture, which it plainly is not, its very physical pattern as a town would bring its corporate owners within the restraints of the Fourteenth Amendment as in the *Marsh* case.

is it ever to be expected that the particular restricted area will comprise a very large proportion of a city's total area. Nonetheless, the suggested approach is still relevant since the cases most often arise in cities having a substantial Negro population and in which all the restricted areas together constitute a specified large proportion of the total.⁴⁷ It seems that when a court considers only the particular covenant in issue it is disregarding the fact that enforcement of one covenant means enforcement of all like covenants, and as an agency of the state⁴⁸ it is actually enforcing a discriminatory situation by judicial decision which *Buchanan v. Warley* bars the states from creating by legislation. Moreover, the value of this approach need not necessarily depend upon a specified percentage of a city's area being restricted, for the same racial zoning result is achieved where only that part of a city's area which immediately surrounds the "black belt" or protects the more desirable residential districts of the city is restricted.

The cases indicate that, on the whole, the new attacks on restrictive covenants so far have been met by a firm adherence to precedents originating in the older types of attack. Although there is no showing of social data in the record in either of the cases in which the Supreme Court has granted certiorari, if the Court should consider the data and arguments in the amicus briefs in *Sipes v. McGhee* or grant certiorari, in *Hurd v. Hodge*, it will have before it a complete presentation of the attacks on restrictive covenants. The weight of precedent in the state courts and the improbability of direct legislation outlawing covenants make it evident that the Supreme Court in granting certiorari affords, perhaps, the major hope of ameliorating one of the most critical areas of racial tension in contemporary American life.⁴⁹

RECENT APPLICATIONS OF THE CIVIL-CRIMINAL CONTEMPT DISTINCTION

The distinction between civil and criminal contempt, always troublesome, played an important part in *United States v. United Mine Workers*,¹ where the Supreme Court approved the procedure used by the District Court in imposing a fine combining both civil and criminal elements in a single contempt proceeding. Mr. Justice Rutledge, in his dissent in the *Mine Workers* case² and again in

⁴⁷ For example: "The exact extent of the restrictive covenant has not been ascertained, but 'in Chicago it has been estimated that 80% of the city is covered by such agreements. . . .'" Myrdal, *op. cit. supra* note 35, at 624.

⁴⁸ Authorities cited note 31 *supra*.

⁴⁹ What the Supreme Court will decide is conjectural, but if it should decide only that injunctions in such cases are unconstitutional, without determining that restrictive covenants are themselves void, the question of damages might become prominent. It is the remedy of enforcement by injunction, however, that effectively and necessarily prevents Negroes from acquiring restricted property.

¹ 67 S. Ct. 677 (1947).

² 67 S. Ct. 677, 720 (1947).