EXCLUSION OF NEGROES FROM SUBSIDIZED HOUSING PROJECT

Stuyvesant Town is a housing project in process of construction by Stuyvesant Town Corporation in an area comprising eighteen city blocks on the east side of Manhattan in New York City. The project is to consist of 35 buildings containing 8,755 apartments which will house about 24,000 persons. There are to be streets, parks, playgrounds, and shopping facilities, but no schools. Moderate rentals will be charged. The cost of the project has been estimated at $90,000,000, all of which is being supplied to Stuyvesant Town Corporation by the Metropolitan Life Insurance Company from funds held for the benefit of its policy holders.

The project is being erected under a contract entered into in June 1943 between the City and Stuyvesant and Metropolitan. Such contracts are authorized by the Redevelopment Companies Law,[1] which was enacted to implement the "Housing Article" of the New York Constitution.[2] The Redevelopment Companies Law recites the public interest in low-cost housing and provides for the exercise of the eminent domain, police, and tax powers of the state to attract private capital and make possible such projects. All of these powers were exercised in the case of Stuyvesant Town: the City condemned the property for the company; the residents of the area were forced to move elsewhere in a period of acute housing shortage; the City turned over all the streets in the area to Stuyvesant Town Corporation and placed it in complete control of them; and a twenty-five-year tax exemption was granted on the improvements.

Soon after Stuyvesant Town was conceived it was announced that there would be no interracial occupancy.[3] The public reaction was so unfavorable that in 1944 the New York City Council passed an ordinance[4] prohibiting discrimination because of race, creed, or color in the selection of business or residential tenants for any future projects granted tax exemption under the Redevelopment Companies Law.

In June 1947 three Negro war veterans sued to enjoin Stuyvesant Town Corporation and the Metropolitan Life Insurance Company from refusing to

[1] New York Redevelopment Companies Law (McKinney, 1943) c. 234, §§ 3401–26. The constitutionality of the Redevelopment Companies Law was upheld in Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1944), cert. den. 321 U.S. 771 (1944).

[2] Art. XVIII is known as the "Housing Article." Sec. 1 provides: "Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto."

[3] Abrams, The Future of Housing 322 (1946).

[4] Administrative Code of the City of New York § J. 41–1.2 (July, 1944). See also Local Law 45, 1947, which prohibits insurance companies from discriminating in tax-exempt projects.

rent to them or other similarly situated solely because of their race or color.[5] The plaintiffs sought relief chiefly on the theory that state aid and control were so important in the project[6] that refusal to rent to them solely on the grounds of race amounted to state action in violation of the equal protection clause of the Fourteenth Amendment. The defendants admitted that it was their policy not to rent to Negroes but contended that despite its public elements the project was private and hence not subject to constitutional limitations. They pointed out in support of this position that their contract with the City permitted them to terminate the public controls at any time after five years by payment of past tax exemptions with interest.[7] The defendants maintained, moreover, that the state legislature had shown an intention that redevelopment companies be free to discriminate in the selection of tenants by its frequent refusal to pass bills forbidding such discrimination.[8] They also argued that if they were prohibited

[5] In Pratt v. LaGuardia, 294 N.Y. 842, 62 N.E. 2d 394 (1945), a similar suit was dismissed as premature, since the project was not yet under way and the defendants answered that they had not yet formed an admissions policy.

[6] New York Redevelopment Companies Law (McKinney, 1943) c. 234, § 3414 provides that projects to be carried out under the authority of this law shall be designed and used primarily for housing purposes; § 3423(1) provides that a project cannot be sold except as permitted by law; § 3408 limits profits to 6% for interest and amortization; §§ 3405, 3415 set up a supervisory agency which must consent to the method of incorporation, the method of financing, and to the use of a project, and a planning commission is empowered to make final acceptance or rejection of a project; § 3415 also provides that the city's approval must be obtained to any modification of a project; § 3415(2)c provides for rent control and requires the consent of the city to increases; § 3424(1) provides that upon dissolution any cash surplus belongs to the city; §§ 3408–13 impose far-reaching controls over the financing of redevelopment corporations; § 3417 authorizes the state, municipalities, and all public officials to sell, lease, or transfer property to a redevelopment company and hold its stock, income debentures or other securities, secured or unsecured.

[7] The Contract of June 1, 1943 entered into between the City of New York, Stuyvesant Town Corporation, and the Metropolitan Life Insurance Company provides, § 601, that at any time after five years from the completion of the project Stuyvesant may pay the city the total of all accrued taxes for which exemption has been granted, together with interest at 5% per annum from the time such taxes would have become payable without penalty or interest in the absence of such exemption, and thereupon all tax exemption as well as rent control terminates. The parties thus intended that Stuyvesant should be able to slough off public controls after 5 years; but for the first 5 years, at least, the city is to maintain controls. The validity of the contract was upheld in Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1944), cert. den. 321 U.S. 771 (1944).

[8] See discussion of the legislative history in Kemp v. Rubin, 187 N.Y. Misc. 707, 69 N.Y.S. 2d 707 (1946). However, the New York Public Housing Law (McKinney, 1945), c. 808, § 223 prohibits discrimination because of race, color, creed, or religion in low-rent housing projects erected pursuant to the provisions of that law. Art. XVIII, Sec. 1 of the state constitution provides that a city or public corporation may engage "in building and operating low rent housing for persons of low income as defined by law," but Art. XVIII, Sec. 10 prohibits municipal corporations from "engaging in any private business or enterprise other than the building and operation of low rent dwelling houses for persons of low income as defined by law." Inasmuch as the Court of Appeals in Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884 (1944), cert. den. 321 U.S. 771 (1944), took the position that Stuyvesant Town involves only the clearance and rehabilitation of a substandard and unsanitary area—not low-rent housing for persons of low income, it would appear that Stuyvesant Town is not a public corporation; therefore § 223 of the Public Housing Law does not apply.

from discriminating the consequent decline in the value of the project's property would amount to a deprivation of property without due process of law. The New York trial court found Stuyvesant Town to be a private enterprise and denied the plaintiffs' motion for an injunction. The Court said: "The fundamental fallacy in plaintiffs' argument is that it confuses 'public use' and 'public purpose' with 'public project,' and assumes that, because the work of redevelopment and rehabilitation is a public purpose, the project involved is necessarily a public project . . . [T]he project itself is not now and never was a public project." *Dorsey v. Stuyvesant Town Corporation.*[9]

A companion case, *Polier v. O'Dwyer*,[10] was dismissed summarily on the basis of the opinion in the *Dorsey* case. This was a taxpayer's suit to restrain, upon grounds similar to those relied upon by the plaintiffs in the *Dorsey* case, further performance of the contract by the City as long as Metropolitan and Stuyvesant continued their discriminatory policy. The two cases have been consolidated for appeal.

These cases represent another development in the increasing legal attack on racial discrimination in housing. They present the same social problems as the widely publicized restrictive covenant cases now before the Supreme Court[11] but raise different constitutional issues. In the covenant litigation the Supreme Court must decide whether judicial enforcement of express private agreements to discriminate is state action. In the instant cases the question is at what point state aid becomes so important to the construction of "private" housing developments that discrimination by the private owners becomes discrimination by the state. The *Dorsey* case presents the additional issue of whether, even apart from state aid, the proprietors of a large housing project exercise power which is so analogous to state power that they may not discriminate. A Supreme Court decision either way in the covenant cases, then, although useful as an index of current judicial thinking, would not control the instant cases. And it is probable that it is the instant cases which contain the more explosive constitutional analogies.

The *Dorsey* decision was based in part upon the conclusion that omission of

[9] 74 N.Y.S. 2d 220, 226 (1947). The court was thus able to conclude that ". . . defendants may exercise the usual powers and functions of an owner of a privately owned and controlled apartment house, and . . . may, in managing the property, select its tenants upon any basis which, in its judgment, is most likely to insure the success of the project and the safety of its investment." Ibid., at 225.

[10] New York Supreme Court No. 44213–47.

[11] The Supreme Court has recently heard oral argument in four restrictive covenant cases, noted in 15 Univ. Chi. L. Rev. 193 (1947). The Review has followed carefully the postwar development of the covenant litigation. See Kahen, Validity of Anti-Negro Restrictive Covenants, 12 Univ. Chi. L. Rev. 198 (1945); Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy Against Restrictive Covenants, 13 Univ. Chi. L. Rev. 477 (1946). A comprehensive review and criticism of all aspects of the covenant litigation is to be found in McGovney, Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945); see also Race Discrimination in Housing, 57 Yale L. J. 426 (1948).

a non-discrimination provision in the Redevelopment Companies Law and inclusion of such a provision in the Public Housing Law[12] indicated a legislative intent not to prohibit discrimination by redevelopment companies.[13] This view may appear to have merit, especially since the legislatures of several of the states that have adopted laws similar to the Redevelopment Companies Law have included in them express anti-discrimination provisions.[14] But considerations of legislative intent cannot foreclose the constitutional issue. Regardless of state legislation the Fourteenth Amendment would seem to forbid discrimination in projects entirely state-operated. In such a case the discrimination would constitute undoubted state action. The best case is probably *Buchanan v. Warley*,[15] in which the Supreme Court held that an ordinance zoning the city of Louisville on a racial basis violated the Fourteenth Amendment. The specific ground of the decision was that the ordinance, by restricting the seller's right of alienation, deprived him of property without due process of law; but the Court said also that the occupancy and necessarily the purchase and sale of property cannot be prohibited by the state solely because of the color of the proposed occupant.[16]

The plaintiffs' contention that a project made possible by extensive public aid is subject to constitutional limitations, even though nominally private, merits careful consideration. The contention took the form of an attempt to spell out an agency in the defendants to implement state and city purposes in slum clearance and in low-rent housing. The defendants refuted the agency argument by pointing out that the City could not legally have undertaken such a project as Stuyvesant Town.[17] However, the plaintiffs' position would not seem to depend upon the establishment of an agency in the orthodox sense; certainly

[12] New York Public Housing Law (McKinney, 1945) c. 808, § 223. See the discussion note 8 supra.

[13] The Court said: ". . . a rather narrow question is here presented; that is, whether our statute books contain any specific provision against discrimination in housing on the ground of race, color, creed or religion. . . . [I]t is to be noted that, not only were unsuccessful attempts made to insert an anti-discrimination provision in the Constitution during the 1938 Constitutional Convention, but equally unsuccessful efforts were thereafter made to amend the Redevelopment Law and the Civil Rights Law as to so provide. . . . However, . . . such efforts were successful so far as they concerned the Public Housing Law and the Administrative Code of the City of New York." Dorsey v. Stuyvesant Town Corporation, 74 N.Y.S. 2d 220, 223 (1947).

[14] Ind. Stat. Ann. (Burns, 1945) c. 48-8503(b); Pa. Stat. Ann. (Purdon, 1946) tit. 35, § 1711(8); Ill. Rev. Stat. (1947) c. 67½, § 82 which provides that no deed of conveyance of the Land Clearance Commission or any subsequent owner shall contain a racial or religious restrictive covenant.

[15] 245 U.S. 60 (1917). Accord: City of Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1926).

[16] For an excellent discussion of the case see McGovney, Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).

[17] See discussion note 8 supra.

none of the parties to the contract intended, for example, that the City should be liable for the torts of Stuyvesant Town Corporation. The thrust of the position seems to be rather that an interdependent, cooperative relationship was entered into whereby the City and the defendants, each proceeding within the limits conferred under constitutional and statutory authority, have jointly made Stuyvesant Town possible. It is plain that without the Redevelopment Companies Law there would have been no Stuyvesant housing project. The City could have undertaken another type of housing project by itself under the Public Housing Law. The Metropolitan Life Insurance Company, as it has elsewhere done,[18] could have constructed housing through its own resources without the benefit of condemnation and tax exemption. But Stuyvesant Town, displacing a slum area in the heart of Manhattan, incorporating city streets, and providing moderate rental housing for 24,000 people, could have been achieved only by the cooperation of the city government and private capital as enabled by the Redevelopment Companies Law.[19] The extent of the state's interest and initiative is indicated by the fact that the City would have saved approximately $33,000,000 if it had simply bought the land and presented it to Metropolitan as a gift instead of providing for a twenty-five-year tax exemption on the improvements.[20]

Because interdependent public and private activity comprised the indis-

[18] Metropolitan Life Makes Housing Pay, 33 Fortune 133 (April, 1946).

[19] New York Redevelopment Companies Law (McKinney, 1943) c. 234, § 3402 declares, passim, that the public interest requires the clearance, replanning, reconstruction and neighborhood rehabilitation of substandard and unsanitary areas; that this cannot be done by the ordinary operation of private capital; that provision must be made to encourage the investment of funds engaged in providing redevelopment facilities to be constructed according to the requirements of city planning and in effectuation of official city plans, and regulated by law as to profits, dividends, and disposition of their property or franchise; that provision be made for the acquisition for corporations at fair prices of real property in substandard areas, and for public assistance of such corporations by the granting of partial tax exemptions; that the cooperation of the state and its subdivisions is necessary to accomplish such purposes; "that the clearance, replanning and reconstruction, rehabilitation, and modernization of substandard, and insanitary areas, and the provision of adequate, safe, sanitary and properly planned housing accommodations in effectuation of official city plans by such corporations in these areas are public uses and purposes for which private property may be acquired for such corporations and partial tax exemptions granted; that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

[20] The cost of the project is estimated at about $90,000,000. The cost of the land was about $17,000,000. The total tax exemption over the twenty-five-year period, computed on the basis of 3% on the improvement cost—about $73,000,000—amounts to over $50,000,000, which is three times the cost of the land. "In arriving at the figure of 50 million dollars, Charles Abrams, attorney for the plaintiffs, apparently based his calculations on the current tax rate and the assessed valuation which probably would have been used in the absence of the subsidy, a combination amounting to approximately 2 million dollars annually for over 25 years. The present value of the total subsidy might more accurately be calculated by discounting the amount of the exemption for future years." Blum and Bursler, Tax Subsidies for Rental Housing, 15 Univ. Chi. L. Rev. 255, 269 (1948). In either event it is clear that the cost of the tax exemption is much greater than the cost of the land.

pensable basis of the project's existence and will control its future, it is reasonable to regard the power lodged in Stuyvesant Town Corporation as a manifestation of governmental power and subject to its limitations. In a group of recent decisions the courts have indicated a willingness to restrain even "private" organizations from discriminating when their status and functioning were so dependent upon legislation as to render them virtually "quasi-public." In *Kerr v. Enoch Pratt Free Library*,[21] the closest in point of these cases, a library had been founded with a private grant of more than a million dollars conditioned upon an annual contribution by the city of $50,000 towards its maintenance, and the state had passed a statute authorizing the city to accept the grant. It was held that the self-perpetuating board of trustees appointed by the settlor could not bar a Negro from the library's school for librarians merely because of her race. The Fourth Circuit Court of Appeals was of the opinion that the state aid was so extensive that it would be unrealistic to regard the library as an entirely private organization. The court concluded, therefore, that the discrimination by the trustees was tantamount to state action. The court said: "How can the well known policy of the Library . . . be justified as solely the act of a private organization when the state, through the municipality, continues to supply it with the means of existence?"[22] In *Betts v. Easley*[23] the Kansas Supreme Court construed the Railway Labor Act,[24] under which a union had a closed-shop contract, as permitting the union to exclude Negroes from participation in collective bargaining and on this basis held the statute unconstitutional under the Fifth Amendment as a discriminatory exercise of federal power. This decision followed *Steele v. Louisville & Nashville R. Co.*,[25] in which the Supreme Court upheld the constitutionality of the Railway Labor Act by construing it to require that the union use its bargaining power derived from the statute in a non-discriminatory way. The Court indicated, however, that had the statute conferred power on the union to discriminate, its negotiation of the contract would have been discriminatory federal action.[26] In addition, there are the well-known "white primary" cases. Although these cases are distinguishable in that they involve, in a special context of studied avoidance, the federally guaranteed right to vote in federal elections,[27] they are further indications of a trend. In the latest of these cases to reach the Supreme Court, *Smith v. Allwright*,[28] it was held that the action of the Democratic Party of Texas in exclud-

[21] 149 F. 2d 212 (C.C.A. 4th, 1945). [22] Ibid., at 219.

[23] 161 Kan. 558, 169 P. 2d 831 (1946), noted 14 Univ. Chi. L. Rev. 292 (1946). For further discussion see Judicial Intervention in Internal Affairs of Labor Unions, 14 Univ. Chi. L. Rev. 479 (1946).

[24] 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 (1943).

[25] 323 U.S. 192 (1944). [26] Ibid., at 198, 199.

[27] United States v. Classic, 313 U.S. 209 (1941).

[28] 321 U.S. 649 (1944). Beginning with Nixon v. Herndon, 273 U.S. 536 (1927) in which it was held that the state could not by statute exclude Negroes from the Democratic primary

ing Negroes from the primary election was state action subject to constitutional limitations. The Court said: "The party takes its character as a state agency from the duties imposed upon it by statute; the duties do not become matters of private law because they are performed by a political party."[29]

The constitutionality of the discrimination practiced by Stuyvesant Town may be questioned on another basis. In *Marsh v. Alabama*[30] the Supreme Court held that the managers of a company-owned industrial town could not consistently with the First and Fourteenth Amendments deny to a Jehovah's Witness, on the ground that she was trespassing, the right to use the streets for the distribution of religious literature. In reversing her conviction under a statute[31] which made trespass after warning a crime, the Supreme Court said: "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."[32] "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it [the company town] is subject to state regulation."[33] In the *Marsh* case the company town appeared to have the same facilities and functions as any ordinary municipality and therefore was required, like an ordinary municipality, to maintain freedom of speech, press, and religion. Stuyvesant Town presents a similar case; it has residential buildings, shopping facilities, streets, postal service, and playgrounds and appears to be simply a part of New York City, just as the company town in the *Marsh* case appeared to be part of the surrounding city of Mobile.

The *Marsh* case might be distinguished, however; therein the Court was enforcing explicit and jealously guarded civil rights—freedom of speech, press, and religion[34]—whereas in the instant cases the right asserted is more general: the right not to be denied equal protection of the laws. The New York trial court stated that the civil rights article of the state constitution[35] created no

---

election, and ending in the Smith case, which overruled Grovey v. Townsend, 294 U.S. 669 (1935), each successive attempt by the State of Texas to detach itself from the Democratic primary so as to avoid constitutional limitations has failed. Nixon v. Condon, 286 U.S. 73 (1932), held the attempt of the state executive committee to exclude Negroes from the primary of the Democratic Party to be state action; cf. Elmore v. Rice, 72 F. Supp. 516 (S.C., 1947), aff'd Rice v. Elmore, 165 F. 2d 387 (C.C.A. 4th, 1948), noted 15 Univ. Chi. L. Rev. 756 (1948), wherein it was held that the Democratic Party of South Carolina could not constitutionally exclude Negroes from the primary election even though all laws relating to primary elections had been repealed.

[29] Smith v. Allwright, 321 U.S. 649, 663 (1944).

[30] 326 U.S. 501 (1946).

[31] Ala. Code Ann. (Mitichie, 1940) tit. 14, §426.

[32] Marsh v. Alabama, 326 U.S. 501, 508 (1946).

[33] Ibid., at 506.

[34] Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943), and cases cited therein.

[35] N.Y. Const. Art. 1, § 11 provides: "No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

new civil rights and that there is no civil right not to be discriminated against in housing.[36] Nonetheless, if Stuyvesant Town's exclusion of the plaintiffs because of race amounts to state action it transgresses the prohibitions of the Fourteenth Amendment. Probably under the doctrine of the *Marsh* case Stuyvesant Town may not inhibit the freedom of speech or religion of persons entering its streets. Whether or not the *Marsh* doctrine is broad enough to bridge the gap between the rights to freedom of speech and religion and the asserted right not to be subjected to racial discrimination by a corporation allegedly exercising powers analogous to state power can only be speculated upon. If it were possible to determine from the *Marsh* case whether there the company town could have denied residential facilities to Negroes, the question would not be so difficult in the instant cases. But the following language in the *Marsh* case, which contrasts markedly with the language of the Court in the instant cases,[37] suggests an answer:

> We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[38]

The fact that Metropolitan is constructing a project in New York known as Riverton for exclusive occupation by Negroes impelled the plaintiffs to foreclose the "equal but separate facilities" argument, not actually made by defendants, by pointing out[39] that the Riverton project is subject to the city ordinance forbidding discrimination in tax-exempt projects.[40] Riverton therefore cannot be maintained exclusively for Negroes and cannot be held out as a "separate but equal facility." In the states which follow the doctrine it may constitute a defense to an action similar to the instant cases. But the doctrine has suffered considerable attrition since it was laid down by the Supreme Court fifty years ago in *Plessy v. Ferguson;*[41] the Court has been increasingly insistent upon the "equal" aspect of the formula[42] and it is probable that proprietors of

[36] Dorsey v. Stuyvesant Town Corporation, 74 N.Y.S. 2d 220, 222–23 (1947).

[37] Note 9 supra.

[38] Marsh v. Alabama, 326 U.S. 501, 505–6 (1944).

[39] Dorsey v. Stuyvesant Town Corporation, Brief of Plaintiffs in Support of Motion for Temporary Injunction p. 40 (July, 1947).

[40] Administrative Code of the City of New York § J. 41-1.2 (July, 1944).

[41] 163 U.S. 537 (1896).

[42] Sipuel v. Board of Regents of the University of Oklahoma, 68 S. Ct. 299 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). Even such a showing might not be enough. In Westminster School District of Orange County v. Mendez, 161 F. 2d 744 (C.C.A. 9th, 1947) the court implied that there could be no such thing as "separate but equal" facilities and held that separate school facilities for children of Mexican origin denied to them equal protection of the laws.

housing projects seeking to defend the legality of their discrimination on the basis of the *Plessy* case would have to make a clear showing of the availability of genuinely equal facilities.

The economic justification for Metropolitan's position—the notion that Negro occupancy would cause a white exodus with a consequent diminution in the value of the property—was disclosed by the defendants' allegation that if they were enjoined from discriminating they would be deprived of valuable property rights without due process of law. Although in the past this position may have been tenable, the present housing shortage renders it virtually nugatory. Moreover, interracial occupancy of housing projects, including wartime projects built for higher income tenancy, has in general been economically and socially successful.[43] Therefore, were the cases to turn on the due process question, it is difficult to perceive in what respect the defendants could claim that they would be damaged. Furthermore, if a property value has been maintained only because of an unconstitutional discrimination, its owner can scarcely expect to be compensated for a decline in the value resulting from elimination of the discrimination.

Since the *Polier* and *Dorsey* actions each seek the same ultimate result, the question arises whether the substantive question is any different if presented one way or the other and whether the ultimate result is more likely to be achieved through one course or the other. Since the plaintiffs consolidated both cases for appeal, it is apparent that they regarded the substantive issues as the same. However, a taxpayer's suit to enjoin allowance of the tax exemption by the City as long as the defendants continue to discriminate attacks immediately and directly the state aid, assumes at once the presence of state action without regard to whether the project is public, quasi-public, or private, and leaves only the question of whether the admitted state action is sufficiently connected with the discrimination. It is true that the *Dorsey* case raises the same question, but it does not do it with the same directness or with the same rhetorical force. For example, if Metropolitan were the subsidized owner of many scattered, individual dwelling units instead of an entire housing project, the analogy of the *Marsh* case, upon which the *Dorsey* action leans so heavily, would not be applicable. The only question would be whether the state aid was of such quantity and quality that the discrimination constitutes state action. When the issue is placed in such sharp relief it might be difficult for a court to decide the case merely by determining that the project involved was not public, which is essentially all that the Court decided in the *Dorsey* case in order to reach its decision.

A possible result of a final decision favorable to the plaintiffs in the *Polier* case might be continued discrimination by the companies despite the injunction upon the state aid. Although the companies would then suffer a loss, they could

[43] Annual Conference of Racial Relations Advisers, Experience in Public Housing Projects Jointly Occupied by Negro, White, and Other Tenants 4 (1944).

continue to discriminate. A more likely result, however, would be admission of Negroes to the project in order that the subsidy be continued.

Although the companies in the instant case admitted they were discriminating, it is probable that in similar cases there would be denials. Difficult problems of proof would then be presented. Experience of the temporary federal Fair Employment Practice Commission and of various state Fair Employment Practice Commissions indicates, however, that most problems of proof of discrimination and of the administration of remedies have not been insurmountable.[44] In the case of a large housing project mere reference to the percentage of Negro tenants to Negro applicants otherwise eligible as compared to the percentage of white tenants to white eligible applicants should indicate whether discrimination is being practiced. There seems, then, to be no reason why an injunction would not be appropriate and adequate if the plaintiffs in the *Dorsey* case were entitled to relief.[45] Difficulty would arise if a few Negroes were being accepted as tenants; under such circumstances Negroes suing to enjoin discrimination might prove statistically that the project was discriminating, but they might not be able to prove that the project had discriminated against them personally. In an action such as the *Polier* case, however, which seeks to enjoin the state aid, there is no necessity to prove that any particular individual has been discriminated against; so if a cause of action could be maintained, the only proof required would seem to be statistical evidence that the project was discriminating in general.

An ultimate decision for the plaintiffs in the instant cases might well mark an extension of the guarantees of the Fourteenth Amendment beyond that which has generally been considered their scope.[46] A number of state-subsidized activities, previously regarded as "private," might become subject to attack for discrimination, either directly by injunction or by loss of subsidy. For example, the Federal Housing Authority might not be permitted to insist, as it has frequently done in the past, upon protection by racial restrictive covenants of the

[44] See Report of the President's Committee on Civil Liberties, § 4 (1947); Hunt, The Proposed Fair Employment Practice Act: Facts and Fallacies, 32 Va. L. Rev. 1 (1946); Murray, The Right to Equal Opportunity in Employment, 33 Calif. L. Rev. 388 (1945).

[45] Query whether the result would be res judicata as to all persons similarly situated. The class to be bound is very large, but not undefinable. It would seem to comprise all persons who might, apart from their race, be eligible for occupancy and who might seek occupancy.

A minority policy holders' derivative suit might be an additional type of action that could have been brought, but the obstacles to maintaining such a suit under the circumstances would seem prohibitive. But see Shareholder Derivative Suit as a Check on Corporate Anti-Labor Policies, 15 Univ. Chi. L. Rev. 423 (1948).

[46] As far back as the Civil Rights Cases, 100 U.S. 3 (1883), which first held that it is only state action that is limited by the 14th Amendment, Justice Harlan, dissenting at 26, 37–43, maintained that the discrimination practiced by the defendant hotels, railroads, and theaters constituted state action because their existence was made possible through various forms of governmental privilege and subsidy. A decision in favor of the plaintiffs in the Stuyvesant Town litigation would thus appear to cut deeply into the doctrine of the majority decision in the Civil Rights Cases.

value of property on which it guarantees loans.[47] Even in the absence of legislation private employers receiving government priorities or engaged on public works might not be allowed to discriminate. Corporations benefiting from postal or tax subsidies, from eminent domain, or from other special privileges such as tariff subsidies might be held to exercise state power for these purposes. A difficult problem would thereby be posed: the courts would have to determine at what point subsidies, obvious or hidden, become so extensive that a recipient's discrimination is state action subject to constitutional limitations. Probably a decision in the Stuyvesant litigation enjoining the discrimination or the tax subsidy could be limited in its application as a precedent to cases in which the recipient of the state aid has been organized especially to take advantage of it in the accomplishment of a public purpose, in which it appears that the recipient cannot accomplish the purpose without the aid, and in which extensive and prolonged public controls are exercised. Nevertheless, the examples cited indicate on how wide a legal front the fight to enlarge the scope of the Fourteenth Amendment is likely to be fought.[48]

Even if the cases are restricted in their application as precedents, the final outcome of the Stuyvesant Town litigation will unquestionably influence the future pattern of housing in the United States. An estimated 39 per cent of the dwellings in the nation are substandard, and urban redevelopment has become a principal device for rebuilding depressed areas.[49] Twenty-three states and the District of Columbia now have some type of urban redevelopment legislation, and bills are now pending before the legislatures in thirteen additional states;[50] but anti-discrimination provisions have been included in only a few of the redevelopment laws similar to the New York law.[51] An important element of this process is the role played by insurance companies in determining the living conditions of much of the population. Although not all of its projects are being constructed under redevelopment laws, it is noteworthy that when its current projects are completed Metropolitan will be landlord to 100,000 people.[52] The

[47] Hearings before Senate Committee on Banking and Currency on S. 1592 (part 2), 79th Cong. 1st Sess., at 759 (1945).

[48] Some implications of enlarging the concept of state action are set forth in Hale, Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals, 5 Lawyers Guild Rev. 627 (1946), and in Miller, Individual Invasion of Individual Rights, 3 Nat. Bar. J. 126 (1945).

[49] Statement of John B. Blanchford, Jr., former National Housing Administrator, before the Subcommittee on Housing and Urban Redevelopment of the Senate Special Committee on Post War Economic Policy and Planning, 79th Cong. 1st Sess., at 1233–37 (1945).

[50] National Housing Agency, Comparative Digest of the Principal Provisions of Urban Redevelopment Legislation 1 (1947). For a discussion of tax-exemption provisions see Blum and Bursler, Tax Subsidies for Rental Housing, 15 Univ. Chi. L. Rev. 255 (1948).

[51] Statutes cited note 14 supra.

[52] Testimony of George Gove, vice-president of the Metropolitan Life Insurance Co., before the Senate Committee on Banking and Currency, 80th Cong. 1st Sess., at 340–41 (1947). Metropolitan has constructed housing projects in New York City, Los Angeles, San Francisco,

nation as a whole might well benefit were insurance companies with their vast influence in the commercial and industrial life of the country to have a financial stake in the success of interracial housing projects.

THE RIGHT TO VOTE IN SOUTHERN PRIMARIES

Four years ago South Carolina made the latest move in the game of constitutional chess which the southern states have long been playing with the Supreme Court on the question of the "white primary." The South Carolina legislature repealed every statute relating in any way to primary elections or political parties,[1] and proposed a constitutional amendment,[2] subsequently ratified[3] by the voters at the general election of 1944, which eliminated every reference to "primary" and "political party" in the state constitution. The Democratic state convention then met and adopted a set of regulations embodying virtually all the provisions previously contained in the repealed statutes. By this action it was hoped to circumvent the rulings in *Smith v. Allwright*[4] and *United States v. Classic*,[5] and thus enable the Democratic Party, in the guise of a private club, to retain an all-white primary. In an action for a declaratory judgment to determine the rights of Negro voters under the new primary rules, the federal district court held that in the South Carolina Democratic convention the "people of the State . . . had enacted" what amounted to "custom, usage, or regulation" of the state, and that such state action depriving the Negro plaintiff and others similarly situated of the right to vote violated the Fifteenth Amendment of the federal Constitution.[6] On appeal, the circuit court affirmed the decision, but on the ground that the South Carolina primary is an integral, inseparable part of the election machinery of the state, and when party officials deny the Negro a vote in what is a part of the state's election machinery, they are exercising state power for an unconstitutional purpose. *Rice v. Elmore*.[7]

---

and Alexandria, Virginia and has over $200,000,000 invested in housing. Metropolitan Life Makes Housing Pay, 33 Fortune 133 (April, 1946). Its Parkchester Project in New York is the best-paying investment that it has. Ibid., at 134. Since the New York Redevelopment Companies Law, § 3408, permits the corporate owner of a housing project to earn 6% on its investment it is particularly interesting to note that Metropolitan reported to the New York Insurance Commission in 1946 that its income from all assets averaged exactly 3%. PM, § 1, p. 11, col. 3 (July 30, 1947). Metropolitan has constantly earned its statutory 6% on its New York and other housing projects. Metropolitan Life Makes Housing Pay, 33 Fortune 133, 209 (April, 1946).

[1] S.C. Acts Extra. Sess. 1944, Nos. 688–839. In 1943 the Legislature had repealed forty-five code provisions governing the conduct of the primary effective June 1, 1944. S.C. Acts 1943, No. 63.

[2] S.C. Acts Extra. Sess. 1944, No. 830.

[3] S.C. Acts 1945, No. 11, whereby the amendment to Article II, § 10 of the Constitution was adopted by the voters at the general election of 1944.

[4] 321 U.S. 649 (1944). [5] 313 U.S. 299 (1941).

[6] Elmore v. Rice, 72 F. Supp. 516 (S.C., 1947), aff'd on other grounds, Rice v. Elmore, 165 F. 2d 387(C.C.A. 4th, 1947), noted in 33 Iowa L. Rev. 412 (1948).

[7] Rice v. Elmore, 165 F. 2d 387(C.C.A. 4th, 1947), cert. den. 16 U.S.L. Week 3314 (1948).