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# RACIAL RESTRICTIONS AND THE FOURTEENTH AMENDMENT: THE *RESTRICTIVE COVENANT* CASES

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AFTER more than fifty years of litigation on the subject in federal and state courts, the Supreme Court at the last term held in the *Restrictive Covenant* cases that judicial enforcement of restrictions on the ownership and use of real property by Negroes, even though the limitations were imposed by the acts of private persons, violated the Constitution of the United States.[1]

The decisions terminated a kind of litigation which probably had attracted as much public attention and interest as any in our history. In October 1947 the Report of the President's Committee on Civil Rights

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[1] Shelley v. Kraemer and McGhee v. Sipes, 334 U.S. 1 (1948); Hurd v. Hodge and Urciolo v. Hodge, 334 U.S. 24 (1948) arising in Missouri, Michigan, and the District of Columbia, respectively. Hereafter these cases will be referred to as the Restrictive Covenant cases.

The first reported case involving a limitation on the ownership or use of land in terms of who might own or use it rather than how it might be owned or used was Gandolfo v. Hartman, 49 Fed. 181 (C.C. Cal., 1892). There Judge Ross, donor of the prize for the American Bar Association Annual Essay Contest, held that judicial enforcement of such a limitation against Chinese would violate both the Fourteenth Amendment and the 1880 treaty between the United States and China. Prior to the instant cases this precedent was largely ignored; see Kraemer v. Shelley, 355 Mo. 814, 823, 198 S.W. 2d 679, 683 (1946).

The history of judicial enforcement of such restrictions has been exhaustively reviewed elsewhere and will not be repeated here. See Ming, Legal Disabilities Affecting Negroes, 8 Journ. of Negro Education 406 (1938); McGovney, Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945); and Miller, Race Restrictions on Ownership or Occupancy of Land, 7 Lawyers Guild Rev. 99 (1947). Suffice it to say that reported appellate decisions show that at least sixteen states and the District of Columbia provided judicial enforcement for restrictions on occupancy by particular racial, religious, and national groups, ten of these jurisdictions also enforcing restrictions on ownership. In the latter group were Missouri, Louisiana, Colorado, Kansas, Oklahoma, Georgia, Kentucky, New Jersey, Illinois, and the District of Columbia. "Use" restrictions alone were enforced in California, Michigan, Ohio, Maryland, West Virginia, Wisconsin, and North Carolina. It is significant that most of these states were northern or "border" states.

had roundly denounced judicial enforcement of these agreements.[2] In recent years each opinion of an appellate court enforcing such a limitation was the subject of one or more law review notes, usually critical of the result.[3] Even action by trial courts in these cases was usually reported by the wire services, and the stories published in newspapers throughout the country.

An ever increasing number of such cases had intensified public interest. At the time the Supreme Court acted, there was a substantial number of these cases pending throughout the country, although no accurate data are available to show how many there were. It is estimated that about thirty were pending in California, several awaiting decision by the supreme court of that state. Nearly that many were on the dockets in Illinois, most of them involving Chicago property. In one case a substantial amount of sociological and economic data on the effect of residential segregation in the city had been offered to the trial court to support the attack on judicial enforcement of restrictive covenants,[4] and by agreement of counsel the other cases had been continued until the "test case" should be decided. In addition a number of covenant cases were pending in Missouri, Michigan, Ohio, and the District of Columbia.[5]

When the Supreme Court granted certiorari in two state and two District of Columbia cases, the litigation before the Court became the focal point of nation-wide interest. Twenty-three briefs on behalf of amici

[2] "To strengthen the right of equality of opportunity, the President's Committee recommends: The enactment by the states of laws outlawing restrictive covenants; renewed court attack, with intervention by the Department of Justice, upon restrictive covenants. The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances; under present conditions when severe housing shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation."

[3] See, for example, Mays v. Burgess, 147 F. 2d 869 (App. D.C., 1945), noted critically in 40 Ill. L. Rev. 432 (1946); 59 Harv. L. Rev. 293 (1946); 18 Rocky Mt. L. Rev. 148 (1946).

[4] Tovey v. Levy, Case No. 45-S-947, Superior Court of Cook County, Ill. A decree enforcing the restriction was set aside by the Illinois Supreme Court on the authority of the instant cases. 401 Ill. 393, 81 N.E. 2d 441 (1948).

[5] In fact, just after certiorari had been granted in Hurd v. Hodge, 332 U.S. 789 (1948), the Supreme Court was asked to review a decision by an Ohio court that the minister of a church could not occupy the parsonage because he was a Negro. The sometimes curious legal differentiation between artificial corporate persons and natural persons permitted the congregation, although they were all Negroes, to use the church in the same area because title was in a religious corporation, which has no "race." See Peoples Pleasure Park v. Rohleder, 109 Va. 439, 61 S.E. 794 (1908). The Supreme Court reversed the Ohio ruling without argument on the authority of the instant cases. Trustees of Monroe Ave. Church v. Perkins, 334 U.S. 813 (1948); opinion below, 147 Ohio St. 537, 72 N.E. 2d 97 (1947).

curiae were filed with the Court,[6] one of them by the Attorney General of the United States, urging that judicial enforcement of these restrictions violated the constitutional limitations on the power of the several states and the federal government. The Solicitor General appeared to present the government's views orally.

During the two days of oral argument before the Supreme Court the courtroom was packed. Hundreds of persons queued up in the marble corridors waiting patiently in the hope of being admitted to the few seats available to the public after provisions had been made for counsel, members of the bar, the press, and guests of the court. All the press wire services and all the daily papers which maintain Washington bureaus covered the arguments, and at least two embassies had "official observers" busily engaged in note-taking. The oral arguments were front-page news in many of the urban centers of the country. They were the subject of feature articles, editorials, and discussion by columnists in many newspapers, and it was obvious to all observers that both the Court and counsel were deeply conscious of their respective roles in the determination of this major constitutional issue. Interestingly enough, the sometimes quaint ritualism of the legal process only served to accentuate this fact.[7]

It was nearly four months after argument that the opinions were announced.[8] The decisions were immediately and generally hailed as a victory for equal rights of racial minorities and were regarded as likely to be far-reaching in their effects and "to serve to extend social and economic

[6] Briefs amicus in support of the petitioners' position were filed on behalf of the Human Relations Commission of the Protestant Council of the City of New York, American Association for the United Nations, the Congregational Christian Churches of the United States, the American Jewish Committee and B'nai B'rith, National Bar Association, National Lawyers Guild, American Civil Liberties Union, Congress of Industrial Organizations, American Federation of Labor, American Jewish Congress, American Indian Citizens League, American Veterans Committee, Japanese American Citizens League, Non-Sectarian Anti-Nazi League, Civil Liberties Department of the Grand Lodge of Elks, Attorney General of the United States, and certain citizens of California.

Briefs amicus in support of the respondent's position were filed on behalf of Mount Royal Protective Association, Inc., Arlington Heights Property Owners Association et al., Federation of Citizens Associations of the District of Columbia, Inc., et al., and the National Association of Real Estate Boards.

[7] Three members of the court, Justices Reed, Jackson, and Rutledge, withdrew from the bench prior to the argument and did not participate in the decisions. Only Justice Reed did not participate in the decision to review the state cases, Shelley v. Kraemer, 331 U.S. 803 (1947); McGhee v. Sipes, 331 U.S. 804 (1947). No official reason has been given for the withdrawal of these justices. It was widely rumored, of course, that the withdrawals were due to the fact that each was the owner of property subject to a similar limitation. See, for example, The London Economist 183 (July 31, 1948).

[8] Oral arguments were heard January 22 and 23, 1948. The opinions were announced May 3, 1948.

justice."[9] Some fears were expressed by the more timorous that in the absence of judicial enforcement for restrictive covenants violence would be resorted to as a means of enforcing residential segregation.[10] "Expert" predictions by real estate brokers, social workers, leaders of reform organizations, and others were quoted as to the probable effects of the decisions, but in most cases these were no more than reaffirmations of opinions expressed prior to the cases. The Court was not without critics, of course, both as to the end result and as to the "extension" of limitations on the authority of the several states.

Professor John Frank, in reviewing the work of the Court during the term, called the decisions "the most important of the year in terms of legal theory," but added immediately that "[p]aradoxically their practical consequence in the immediately foreseeable future will be small."[11] Doctor Robert C. Weaver, in an exhaustive survey of residential segregation of Negroes in the North, completed just prior to the opinions in the *Restrictive Covenant* cases, titled one chapter "The Villain—Racial Covenants."[12] Although he said, "These agreements have become the symbol and most popular instrument of those who would initiate or entrench residential segregation,"[13] his whole treatment of the subject leaves no doubt that in his opinion restrictive covenants are not the only "villain" in the piece.[14]

But the pressures to maintain and the counter-pressures to destroy residential segregation were at least sharply manifested in the restrictive covenant litigation. The covenants are directed primarily at Negroes, but they affect other groups as well,[15] and they have been formidable devices for maintenance of the "walls" around the ghettos. Residential segregation raises profound problems with respect to both the housing of the national community and the status assigned to minority groups by our po-

[9] St. Louis Post Dispatch, p. 28, col. 2 (May 4, 1948); see Chicago Daily News, p. 20, col. 2 (May 5, 1948); and New York Herald-Tribune, p. 22, col. 1 (May 4, 1948).

[10] See Chicago Daily Tribune, p. 10, col. 2 (May 8, 1948).

[11] Frank, The United States Supreme Court: 1947–48, 16 Univ. Chi. L. Rev. 1, 22 (1948).

[12] Weaver, The Negro Ghetto 231–56 (1948).

[13] Ibid., at 231.

[14] See particularly ibid., at 211.

[15] "Although race restrictive housing covenants are aimed primarily at Negro Americans, they are by no means limited to this group of citizens. Most racial covenants include all non-Caucasians; some specify Negroes, Mexicans, Spanish Americans, and Orientals. Some include Jews. A few include Armenians, Hindus, Syrians, or former residents of the Turkish Empire. There is, obviously, no limit to their inclusiveness, save that of the current state of group prejudice. Recently international relations have influenced the application of these compacts in certain sections of the nation. In California, for example, the lower courts have refused to enforce racial covenants against Mexicans because such action is 'contrary to the Good Neighbor policy,' at the same time that covenants specifying 'persons whose blood is not entirely of the white race' have been interpreted to include American Indians." Ibid., at 232.

litical and social institutions. The *Restrictive Covenant* cases therefore presented major social issues and gave the Supreme Court an opportunity to aid in their solution. Since there is a growing public and professional interest in the role of legal institutions in the solution of contemporary social problems, the Court's decisions should be evaluated in terms of their effect on residential segregation and the constitutional theories with respect to protections afforded to members of minority groups.

To begin with, it must be recognized that in practically all cities and towns in the United States, Negroes may live only in one or more small areas comparable only to the ghettos of Central Europe. This segregation is practiced in the North as well as in the South and applies with as much force to long-time Negro residents of any community as to the most recent arrivals.

The reasons for this residential segregation have been discussed for many years. Its apologists have pointed to the physical characteristics of the slum housing usually allocated to Negroes and some other minority groups and have sought to justify residential segregation on the ground that it is necessary to protect other areas in the same community from the blight which poisons these ghettos.

Opponents of such residential segregation have attacked it on several grounds. They have successfully contended that such segregation by legislative fiat contravenes the Fourteenth Amendment,[16] but their success in this direction has not eliminated these ghettos. Rather, since the decision in *Buchanan v. Warley*, the number of persons so confined has increased by leaps and bounds as two major wartime migrations drew Negro agricultural workers from the cotton fields of the South to the foundries, packing plants, and mills of the North.[17]

Residential segregation has been condemned on the ground that ghettos have been established by various communities on the basis of conditions and population at a particular time, usually many years past, and no adjustment has been made for population changes or changes in economic and social conditions. As a result these ghettos have become over-

[16] Buchanan v. Warley, 245 U.S. 60 (1917); Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927).

[17] See, for example, current census estimates showing that between 1940 and 1947 more than a million non-white persons, or 9.5 per cent of the total number of such persons, moved to noncontiguous states while only 5.7 per cent of the total number of whites moved to noncontinguous states. The comparable percentages for the period 1935–40, however, were 1.9 per cent and 2.9 per cent, respectively. Current Population Reports, Population Characteristics, P-20, Bureau of the Census (1948). As to increases in Negro populations in major urban centers in the North, East, and West between 1910 and 1947, see Weaver, op. cit. supra note 12, at 49; Current Population Reports, Population Characteristics, P-21, Bureau of the Census (1947).

crowded and congested to an almost unbelievable degree.[18] The dire effects of such overcrowding and congestion have been established by inspection and analysis of their impact on birth rates, death rates, incidence of diseases (particularly of the pulmonary type), crime, vice, juvenile delinquency, and the mental health of the people in these slums. The inequality of opportunity for the segregated minority thus effected has been bitterly decried on social, economic, and political grounds. Because Ne-

[18] For example, a report by the Illinois State Board and the Regional Board of the National Housing Agency said of conditions in Chicago:

"Prior to World War I, Negroes were fairly widely distributed throughout the city, but with the influx of 50,000 Negroes from the South between 1916 and 1920 a 'tightening-up process' began, which eventually confined them largely to an area of 4.2 square miles, known as 'The Black Belt' or 'The South Side.' In 1939 this area contained 252,201 persons, of which 87,300 were estimated to be excess population. The balance of the total Negro population of 277,000 in 1946 lived mostly in a half dozen small areas. It is estimated by the Chicago Plan Commission that the Negro population has increased by 75,000 to a present total of about 350,000 persons. It may be assumed that most of the 75,000 persons reside in 'The Black Belt' where in 1940 it was estimated that the population was 83,000 persons in excess of accommodations. Restrictive covenants and intimidation of the Negro has limited protrusions from 'The Black Belt' to insignificant proportions since 1940.

"According to January, 1945, estimates of the Chicago Housing Authority, 20,812 units were then required to relieve Negro overcrowding. Replacing the approximate 44,000 substandard dwellings occupied by Negroes is another problem. To the families overcrowded in 1945 must be added the Negro veterans who have returned to compete for housing for their united and newly created families. In January of 1946 the Chicago Housing Authority reported that of the 32,500 veterans' families then in distress because of inadequate housing facilities, 14,500 were Negroes."

The non-white population of the Chicago metropolitan area increased from 330,000 to 447,000 persons between 1940 and 1947. Current Population Reports, P-21, No. 29, Bureau of the Census (1947). This population increase of approximately 36 per cent occurred while the white population increased by less than 1 per cent. The number of dwellings occupied by non-whites increased 27 per cent from 87,700 to 111,300. In other words, there was a net increase of one dwelling occupied for each additional five non-white persons since 1940. The corresponding figure for the white population of metropolitan Chicago was two and one-half dwellings for each additional person.

In 1940 only 30 per cent of dwelling units occupied by non-whites had five or more rooms. In 1947 more than 45 per cent of the dwellings of non-whites had five or more rooms. A rough index of crowding is obtained by dividing the median number of persons per occupied dwelling by the median number of rooms in occupied dwellings. Such an index for white and non-white families not only points up the racial disparity but also evidences a decrease in crowding among non-whites since 1940. On this basis the crowding index for white families dropped from 67 to 64 and for non-whites from 84 to 77.

The disparity in the amount of overcrowding among racial groups is more clearly portrayed, however, in the percentage of households containing more than one and one-half persons per room. Among white households this percentage was 4 in 1940, and 2 in 1947, but among the non-white households 18 per cent were more crowded than one and one-half persons to the room in 1940, and in 1947 the percentage was 13.

The discrepancy between whites and non-whites is also shown by the proportion of dwellings which need major repair or which lack toilet and bath. In 1940, 55 per cent of the non-white housing in metropolitan Chicago was substandard in these terms. In 1947, 34 per cent were still substandard. Among the dwellings occupied by white families, 19 per cent were substandard in 1940 and only 10 per cent in 1947. 1947 data from Current Population Report, P-71, No. 29, Bureau of the Census (1947). 1940 data from 16th Census of the United States (1940), Housing, Vol. II, General Characteristics, Part 2, at 763 et seq.

groes and whites do not live in the same communities they cannot, even if they would, cooperate, in the innumerable activities which are based on a common neighborhood. Residential segregation represents a major limitation on the market in housing, thus subjecting Negroes to an "artificial" scarcity whenever there is an increase in the demand for housing among Negroes whether it be due to an improvement in economic conditions affecting them or an increase in the number of Negroes in the particular area. Finally, it is argued that residential segregation does violence to the basic concepts of equality which underlie our social and political institutions.

The apologists for residential segregation have insisted that it was based on the decisions of individual owners as to the best use of their own property and that the unfortunate results were thus entirely "legal."[19] Actually, however, the structure of the walls around these ghettos is not so simple. They are built of a complex of social, psychological, economic, and political factors which both form the basis for, and are themselves the result of, prevailing color-caste attitudes in the community.[20] Their foundation is one of legal principles originating in the destruction of feudalism and developed to maximize the control of an owner over his real property.[21] Thus the ignorance, prejudices, fears, cupidity, and desire for power

[19] See Bowman, The Constitution and Common Law Restraints on Alienation, 8 B.U.L. Rev. 1 (1920); 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); cf. Rest., Property § 406, Comment (1944).

[20] See Myrdal, An American Dilemma 50–82, 618–22 (1944).

[21] After the statute of Quia Emptores, it was well settled at common law that complete limitation on the alienation of real property was void as inconsistent with the fee. Tiffany, Real Property § 1345 (3d ed., 1939). It was thought, however, that a restraint on alienation to a particular person or class of persons was valid. Bracton recognized the legality of such restraints and used the following illustration: "Likewise, a donation may be made to men under religious vows as well as to others to whom gifts may be made. Likewise to Jews, as well as to Christians unless the mode of donation imposes the contrary, namely, that it is permissible to the donatory to give or sell the thing to him to whomsoever he will, except to persons under religious vows and to Jews and to such persons he cannot give it as to others, neither reason nor necessity imports except the mode of donation alone." Bracton, lib. 2, c. 5, foll. 13.

At law an agreement by the owner in fee to limit the use of his land was enforceable only as between the original promisor or promisee as a personal contract. Neither the benefit nor the burden of such limitation was binding on subsequent purchasers either with or without notice of the limitation. In England the only exception to this general rule was found in the case of limitations imposed by a lessor against a lessee, which were held to bind sub-lessees as well as to operate for the benefit of assignees of the original lessor. Cheshire, Modern Law of Real Property 295–96 (1937). In the majority of American jurisdictions, however, covenants with regard to the use of land "run with the land" if there is a privity of estate as defined by the local law. Clark, Real Covenants and Other Interests Which "Run with Land" (2d ed., 1947); Tiffany, Law of Real Property, c. vi, §§ 848–57 (2d ed., 1920); see also Rest., Property § 535 (1944). The controversy among the legal scholars in this field with respect to the meaning of the requirement of "privity of estate" appears not to be material here, since

of many individuals result in the members of minority groups being denied access to the market in real property except in the few areas abandoned to their use.

Restrictive covenants did not beget residential segregation. They are the device used by property owners and groups of neighboring landowners in an effort to bind owners of adjacent property to maintain restrictions on minorities. No entirely reliable data are available as to the extent of their use, but it seems safe to conclude that they are widely employed to surround the islands of minority occupancy and to blanket suburban developments.[22]

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the equitable enforcement of such limitation appears to make the issue with respect to actions at law academic. See Tiffany, supra, at § 851 and Clark, supra, at 92, 111–43, and App. I for a discussion of the controversy.

Both English and American writers agree that urban developments and the desire of city residents to secure desirable residential surroundings demonstrated that the common-law rules as to limitations on the use of land did not satisfy modern needs. Clark, supra, at 170; Cheshire, supra, at 297. To fill the breach, the courts of equity stepped in about one hundred years ago to enforce both the benefit and the burden of restrictions on the use of land against subsequent grantees of the respective estates. The leading case is Tulk v. Moxhay, 2 Phil. 774 (Ch., 1848). Significantly, the limitation which the court enforced in that case was one aimed at maintaining a garden and pleasure ground in London where the original grantor in fee had retained title to several adjacent houses.

The original basis for the equitable rule was the doctrine of notice. It has been observed that the court of equity, as a "court of conscience," would not permit a grantee of land to disregard a limitation with respect to the use of the particular land if the grantee had clear notice of the limitation at the time of acquiring his interest in the land. Behan, Covenants Affecting Land 27 et seq. (1924). This is the prevailing English view of the basis for equitable intervention against the assignees of the convenantor's estate for the benefit of the covenantee's estate. A number of American jurisdictions have also justified the same result on the theory of a creation of an equitable easement. Tiffany, supra, at § 861, points to the difficulties involved in a theory which creates an "equitable easement" out of what in a court of law is only a contract. Tiffany urges as the more satisfactory theory that equity regard restrictive agreements as contracts enforceable by injunction or otherwise. Such agreements would then be enforceable only against subsequent takers with notice on two theories: the refusal of courts of equity to provide specific performance of contracts with respect to personal property against bona fide purchasers, and the analogous doctrine with respect to the enforcement of trusts against purchasers from trustees without notice.

The legal history of these restrictions on the use of property is significant to show that they were developed to benefit the owners of surrrounding premises by preventing particular uses of land. Innumerable illustrations show that these limitations were an early effort to improve urban residential areas by preventing uses believed deleterious to the fullest enjoyment of of residential property. For example, these agreements covered prohibitions of particular businesses, various kinds of buildings to be used as mercantile or manufacturing premises, building-line restrictions, limits to the width of driveways, and regulation of the grading of property. Tiffany, supra, at § 859. Except in the case of the racial and religious restrictions, however, these limitations were directed at the use to which the property might be put, not against the persons who might use the property. This distinction brings sharply into focus the highly material fact that these racial and religious limitations are entirely dependent for their existence upon a desire to improve the residential use of particular property by excluding certain persons from the surrounding area in the belief, mistaken or not, that residential purposes are better served by such a limitation.

[22] There is no uniformity in the extent to which such restrictions are in use in various cities. Weaver, op. cit. supra note 12, at 212–14, 236, 245–49. Estimates of the residential area in

It was the judicial enforcement of these limitations which made them such an effective device for the maintenance of residential segregation. Once a restrictive covenant was signed or included in a deed and recorded, the state courts stood ready to apply the power of the state to enforce the limitation throughout its term no matter what the present owner, other owners in the neighborhood, or the whole community might regard as the most desirable use of the property.[23] Thus the property covered was insulated by the state itself against the effect of economic and social changes in the community involving racial or religious minorities.

One of the harsh realities of residential segregation is that it draws rigid lines allowing few if any exceptions for economic, cultural, or other differences among individuals identified with the proscribed group. Since such differences inevitably exist, more and more individual Negro families, impelled by a desire to improve their housing and to escape the effects of slum life, endeavored to utilize their economic resources for this purpose. And with a general improvement in economic conditions, the number of such persons seeking to break through the walls of the ghettoes increased.

Most of the urban areas allotted to Negroes lie near to the centers of cities, and the buildings are the oldest and least desirable in the community. The areas immediately adjacent are frequently only slightly less unattractive. Thus their white occupants, as their economic condition improves, frequently are anxious to join the now familiar exodus of the city dwellers to the suburbs. The housing units which they leave become the goals of Negroes seeking some relief, even if slight, from the squalor and misery of the areas they occupy. The restrictive covenants were a "legal"

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particular cities such as Los Angeles and Chicago covered by such restrictions have ranged as high as 80 per cent of the total. Weaver is critical of this figure as applied to Chicago, but a partial study of tract books made for the record in Tovey v. Levy, No. 45-S-947, Superior Court of Cook County, Ill., showed clearly that the areas presently occupied by Negroes in Chicago were ringed by such limitations. See Weaver, op. cit. supra note 12, at 247–48 for a chart constructed from the data obtained in that study.

[23] The single exception was found in the "change of neighborhood" rule; see Hundley v. Gorewitz, 132 F. 2d 23 (App. D.C., 1942). The basis for this rule was that the purpose of the covenant could not be served if Negroes, despite the limitation, had already occupied some substantial part of the area covered. Equity would not enforce the burden to the detriment of the other owners, who would be denied the opportunity to sell to Negro purchasers by court order and at the same time limited in their access to white buyers by the presence of Negroes in the neighborhood. Edgerton, J., dissenting in Hurd v. Hodge, 162 F. 2d 233, 235 (App. D.C., 1947), pointed out that the evidence showed that Negroes lived in the area and that other Negroes would pay more for the property than whites. Therefore, he contended, enforcement of the covenant would defeat its economic purpose of supporting property values. This "economic purpose" has always presented a basic inconsistency in enforcement of these limitations. Restriction of the buyer group usually operates to the detriment of a seller. If it did not here, the only explanation would be that eligible buyers paid not only for the property but also for the monopoly which the limitation provided.

barrier to their efforts to improve their conditions. But the mere existence of such agreements, as these cases themselves show, did not operate to prevent willing white sellers from passing title or occupancy or both to willing Negro purchasers. As has already been pointed out, recourse to the courts was frequently necessary to shore up the walls around the ghettos.

It was out of this combination of circumstances that the *Restrictive Covenant* cases arose. But the court apparently limited its consideration to a few simple facts.[24] In *Shelley v. Kraemer*[25] the Court observed only that in 1911 thirty out of a total of thirty-nine owners of property in one block on both sides of a street in St. Louis had signed an agreement providing that the property was not to be used or occupied for fifty years by persons of the Negro or Mongolian races. These thirty owners of property held title to forty-seven of fifty-seven parcels of land in the area described in the agreement.[26] In 1945 the petitioners, Negroes, purchased certain premises in the area and accepted a warranty deed in fee with no actual knowledge of the restrictive agreement. They were, however, charged with constructive notice, since the agreement had been recorded. Two months later the respondents, as other owners of property subject to the restriction, brought suit seeking to divest the petitioners of title and to restrain them from taking possession of the property. The trial court denied relief

[24] In their briefs counsel for petitioners had included a considerable amount of data on the extent and effects of residential segregation of Negroes. This material was accumulated from a number of published sources, including reports of various federal and local government agencies such as the Bureau of the Census, Population Series, and "The People of Detroit," a report of the Detroit Planning Commission, as well as various sociological and public health studies. For a list including those from which materials were taken as well as others, see Weaver, op. cit. supra note 12, at 371–75. Dr. Weaver, with Miss Annette Peyser of the staff of the National Association for the Advancement of Colored People, was responsible for the collection of materials used in the briefs. This combination of the skills of lawyers and social scientists in preparation of briefs and materials for the record, as distinguished from the use of "expert witnesses," offers innumerable possibilities for use in litigation of broad public importance. Development of the practice, however, requires members in each professional group who are familiar with both the extent and the limitations of the material and techniques available to the other. Further consideration and study of the possibilities of such combinations, as well as others, would appear to be warranted.

Though much of the material dealt with the cities of St. Louis, Detroit, and Washington, D.C., specifically, it was not limited to those cities. The effort was rather to present, insofar as published material was available, the then existing Negro housing conditions in northern and border communities. Little if any of this material had been presented to the courts below, though some references had been made in briefs and arguments to general conditions. There is no expression in the opinion of the Supreme Court as to the weight given this material in the state cases. During the course of oral argument, Justice Frankfurter expressed a serious doubt as to its relevancy in those cases, though he conceded its relevancy in the District of Columbia case, apparently on the theory that it was material to a determination of the propriety of equitable relief in that case. See Frankfurter, J., concurring, Hurd v. Hodge, 334 U.S. 24, 36 (1948).

[25] 334 U.S. 1 (1948).

[26] At the time the agreement was signed, five of the parcels in the district were owned by Negroes and the other five were also occupied by Negroes for long periods thereafter.

on the ground that the restrictive agreement had never become effective, since it was intended that it should be signed by all the owners in the district.[27] On appeal this ruling was reversed and the relief sought ordered.[28]

The Michigan case involved a 1934 agreement among owners of certain Detroit property providing that it should not be used or occupied by any persons except those of the Caucasian race until 1960. The agreement further provided that it should not become effective until 80 per cent of the property fronting on both sides of the street in the block was similarly restricted. It too was recorded. Here, however, the percentage condition precedent to the effectiveness of the agreement had been met. The petitioners, Negroes, acquired title to one house in the block and moved in late in November 1944. Suit was brought in January 1945 in the state court for a decree requiring them to move from the property. Such a decree was entered and subsequently upheld in the Michigan Supreme Court.[29]

In the District of Columbia cases, twenty of thirty-one lots in a block on one side of the street had been sold in 1906 subject to a limitation in each of the respective deeds that the lot should never be "rented, leased, sold, transferred or conveyed unto any Negro or any colored person under a penalty of $2,000 which shall be a lien against said property." The remaining eleven lots in the same block not subject to such a restriction were found by the district court to have been occupied by Negroes for at least twenty years prior to the beginning of the litigation. The instant cases involved seven of the twenty lots subject to the restriction. They had been purchased from white owners either by Negroes or by white real estate dealers who had resold to Negroes. On the application of adjacent property owners the court had set aside the deeds to the Negro petitioners and ordered those who had moved into the property to leave within sixty days.[30]

The cases thus involved the common legal devices which had been used in the past to impose restrictions on the use and ownership of real property[31] by particular racial, religious, and national groups: agreements,

[27] Compare Hansberry v. Lee, 311 U.S. 32 (1940). Subsequent to the Supreme Court decision the Circuit Court of Cook County held the restrictive covenant in the Hansberry case unenforceable on the ground that the requisite number of signatures had not been obtained.

[28] It should be immediately apparent that the limitation in the Missouri case covered only use and occupancy and did not affect the right of petitioners to acquire title. The Missouri Supreme Court, however, drew no such distinction. Kraemer v. Shelley, 355 Mo. 814, 198 S.W. 2d 679 (1946).

[29] Sipes v. McGhee, 316 Mich. 614, 25 N.W. 2d 638 (1947).

[30] Hurd v. Hodge, 162 F. 2d 233 (App. D.C., 1947).

[31] Monchow, The Use of Deed Restrictions in Subdivision Development (1928).

running either perpetually or for a specified period, between persons holding title to particular parcels of land; or imposition of such a limitation by the owner of a number of parcels in deeds transferring each of the parcels to different grantees. Moreover, these cases involved both actual and constructive notice of such limitations to the persons who were sought to be charged with their burden. Since it had both state and federal cases before it, the Court was presented with the rare opportunity to dispose of a major legal issue in one set of opinions. Even more important, the Court seized on that opportunity to end judicial enforcement of racial restrictions.

The reasoning of the Court in disposing of the cases was precise. In those cases coming from the state courts, the Court denied that it had ever decided that judicial enforcement of these restrictions was consistent with the requirements of the federal Constitution.[32] The Court pointed out that it had been long recognized that action by a state court was "state action" subject to the limitations of the Fourteenth Amendment.[33] Precedents were noted in which these limitations had been applied to substantive common-law rules formulated by the state courts[34] as well as to state court procedure.[35] The Court observed that it was the decrees of the state courts, and only those decrees, which denied the petitioners the use and occupancy; and it recognized the obvious, that these decrees had been entered only because the property owners were Negroes. The Court concluded rightly, therefore, that the petitioners had been denied the equal protection of the laws guaranteed them by the Fourteenth Amendment, reminding the states that one of the primary purposes of that Amendment was to make certain "that all persons, whether colored or white, shall stand equal before the laws of the state, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination be made against them by law because of their color."[36]

[32] Defenders of restrictive covenants, and the state and federal courts in enforcing them, had customarily relied on Corrigan v. Buckley, 271 U.S. 323 (1926), in which the Court had upheld enforcement of such a covenant in the District of Columbia. In the instant cases that decision was distinguished on the grounds that the Court had considered only the constitutionality of the agreement itself and that the constitutional issue presented by judicial enforcement had not been raised in the court below and was not before the Court on appeal. Shelley v. Kraemer, 334 U.S. 1, 8–9 (1948); see Miller, op cit. supra note 1, at 103. In view of the blunt declaration in the earlier opinion that this constitutional contention "is lacking in substance," an interesting question arises as to the line between decision and dicta. On opposite sides on this question see Oliphant, A Return to Stare Decisis, 14 A.B.A.J. 71 (1928) and Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930). In any event the decision here effectively silenced the Corrigan case.

[33] See Shelley v. Kraemer, 334 U.S. 1, 14 (1948), and cases there cited.

[34] Ibid., at 17–18, and cases there cited. [35] Ibid., at 16–17.

[36] Strauder v. West Virginia, 100 U.S. 303, 307 (1880). The petitioners had also attacked the

In the District of Columbia case, though petitioners had urged that the Fifth Amendment afforded them the same protection provided by the Fourteenth Amendment, the Court found it unnecessary to resolve that constitutional issue. Instead it pointed to a simple provision of the Civil Rights Act of 1868 that "[a]ll citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property,"[37] and held that the Act prohibited judicial enforcement of restrictive covenants by the courts of the District of Columbia. Even in the absence of this statute, said the Court:

It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.[38]

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decisions of the state courts on the grounds that they resulted in a denial to petitioners of privileges and immunities of citizens of the United States, deprived them of property without due process of law, and were inconsistent with treaties to which the United States was a party, particularly the Charter of the United Nations, 59 Stat. 1033, approved as a treaty by the Senate July 28, 1945, 59 Stat. 1213. The Court found it unnecessary to pass on these contentions. For discussions of these various arguments, in addition to the materials cited note 1 supra, see Martin, Segregation of Residences of Negroes, 32 Mich. L. Rev. 721, 734–41 (1934); Kahen, Validity of Anti-Negro Restrictive Covenants, 12 Univ. Chi. L. Rev. 198, 210 (1945); Hale, Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals, 6 Lawyers Guild Rev. 627 (1946); Jones, Legality of Race Restrictive Covenants, 4 Nat. B. J. 14, 16 (1946); Current Legal Attacks on Racial Restrictive Covenants, 14 Univ. Chi. L. Rev. 193, 199 (1947); Judicial Enforcement of Restrictive Covenants against Negroes, 40 Ill. L. Rev. 432, 433 (1946); Tefft, Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants, 4 Nat. B.J. 133 (1944). The purported violation of the due process clause of the Fourteenth Amendment was usually thought to merge in the equal protection clause, but for a brief discussion of the covenants as violations specifically of the due process clause see Miller, op. cit. supra note 1, at 106. For a discussion of the covenants as in violation of public policy as expressed in the United Nations Charter see Jones, Legality of Race Restrictive Housing Covenants, supra, at 26–29 (1946); Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy against Restrictive Covenants, 13 Univ. Chi. L. Rev. 477 (1946). In his dissenting opinions in Mays v. Burgess, 147 F. 2d 869, 873, 876 (App. D.C., 1945), and in Hurd v. Hodge, 162 F. 2d 233, 235 (App. D.C., 1947), Justice Edgerton was of the opinion that the covenants were against public policy and therefore void. See also In Re Drummond Wren, 4 D.L.R. 674 (High Ct. of Ontario, 1945). For additional bibliography and a classification according to grounds of attack upon the covenants see Current Legal Attacks on Racial Restrictive Covenants, 14 Univ. Chi. L. Rev. 193 (1947).

[37] U.S. Rev. Stat. § 1978 (1870), 8 U.S.C.A. § 41 (1942); see Hurd v. Hodge, 334 U.S. 24, 32–33 (1948), for a history of this act.

[38] Hurd v. Hodge, 334 U.S. 24, 35–36 (1948). In a one-paragraph concurring opinion, Justice Frankfurter pointed out that respondent had sought "equity." He observed that "equity is rooted in conscience" and stated that the Court's result was sufficiently justified by the fact that it could not be the "exercise of a sound judicial discretion" to afford the relief which the trial courts had provided. Ibid., at 36.

The major thrust of the Court's decisions is aimed at prohibition of judicial participation in the maintenance of residential segregation. Thus these decisions appear to eliminate the possibility of judicial enforcement of restrictions on the ownership and use of real property by members of the proscribed minority groups. Since the same reasoning would apply to action by any other branch of a state government or the federal government, it is difficult to conceive of any basis for a plan of residential segregation other than voluntary compliance by the individual owners in an area containing two or more parcels of real estate owned by different persons.

Proponents of segregation, and unfortunately there are many, have not been slow, however, in seeking to devise means of continuing to use state power to maintain ghettos.[39] Most of the suggestions appear to be based on the Court's observation that "the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment." These proposals ignore the reason given for that observation, although the Court was specific in its statement that "[s]o long as the purposes of these agreements are effectuated by *voluntary adherence to their terms* it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."[40] It has been impossible to secure unanimous voluntary adherence to plans of residential segregation in the past, as its proponents know, but none of the plans proposed appears to have overcome the Court's broad barrier to segregation by judicial decree or other governmental action.

For example, one group proposes that each signer of a restrictive covenant be required to make a cash deposit or give a bond conditioned on his compliance with the terms of the limitation and providing for forfeiture to the other signers or an association of them in the event of non-compliance. In this connection it is significant that the limitation involved in the *Hurd* case expressly provided "that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or any colored person under a penalty of $2,000 which shall be a lien against said property." At the bar, counsel on both sides advised the Court that, though this was the provision commonly used in the District of Columbia because it was the one involved in *Corrigan v. Buckley*, there had never been an effort to collect the penalty, and there had been no such effort in the instant case.

[39] See U.S. News and World Report, at 22–23, 50 (May 14, 1948), for a description of a number of these proposals.

[40] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (italics added).

The superiority of specific performance over an action for damages as a means of excluding the proscribed group seems obvious. It would appear impossible, however, in the light of the reasoning of the Court in these cases to distinguish a judgment to enforce such a penalty from a decree in equity ordering specific performance. Each would be equally "state action" and each would be equally within the proscription of the Fourteenth Amendment or the Civil Rights Act, as the case might be.

If a cash forfeit were actually deposited, however, a somewhat different question might arise. If the return of the deposit was sought prior to any transfers of property to one of the proscribed group, quasi-contract rules developed to prevent "unjust enrichment" would appear to require return of the deposit.[41] The stakeholder's only defense to an action for its return would be the agreement. If this defense was upheld by a court it could only be by virtue of a rule of substantive law that such agreements were enforceable. That rule would, of course, run afoul of the constitutional limitation applied in the instant cases.

The fact that the constitutional limitation would have to be invoked by a white property owner in such a case would appear to be immaterial. Indeed, in the companion case to the *Hurd* case, *Urciolo v. Hodge*, one of the petitioners was a white real estate dealer who still owned three lots subject to the restriction. He had sold three others to the Negro petitioners in the same case and had been enjoined from selling his remaining lots to Negroes. In protecting Urciolo as well as the buyers the Court only followed the precedent established by *Buchanan v. Warley* where the ordinance was held invalid on an attack by the white seller, not by the Negro buyer.

Even if the depositor had transferred his property to one of the proscribed group, it would appear that he should be entitled to secure the aid of the courts to force the return of the deposit. As before, the *Urciolo* case appears to be a square authority, since the white real estate dealer there had already transferred three lots but was nevertheless held entitled to relief.

It might be argued in either case that restitution ought to be denied because the parties to such an action would be *in pari delicto*.[42] But, ac-

[41] See generally, 3 Page, Contracts § 1503 (1920).

[42] See 2 ibid., at § 1020. A distinction might be drawn between the two hypothetical cases on the ground that the owner who seeks to withdraw from the agreement while it is wholly executory places himself in locus poenitentiae and is thus entitled to restitution. This would be in accord with the weight of authority. In neither case, however, is there any real distinction between the owners seeking to withdraw insofar as their connection with carrying out the plan is concerned.

cording to the Court in the instant cases, it is the enforcement of the agreement, and not its making or compliance with it, which is "illegal," and therefore this limitation on the right to restitution should have no application here. The *in pari delicto* rule itself has been severely criticized,[43] and many states have modified it by statute with respect to particular classes of cases.[44] Certainly the policy on which the rule was based—that of refusing the aid of the courts to individual wrongdoers—would not justify its application here where strong policy with respect to protection of individual rights forbids judicial enforcement of such agreements.[45]

Even more important, however, than the legal objections to the deposit plan is the fact that it is doubtful whether many owners would be able or willing to post such deposits. To achieve the desired effect the deposit would have to be a substantial one, and neither present owners nor prospective purchasers are likely to be sold on the advantages of such a plan if it is to their economic disadvantage, no matter how anxious they may be as individuals to maintain the "racial purity" of the particular neighborhood.

For the present owner it would mean an increase in the cash outlay necessary to maintain previously purchased housing, and to the extent that he did not receive the current interest rate on the deposit it would increase his costs. In fact such a plan would probably be beyond the financial resources of many property owners in neighborhoods contiguous to considerable concentrations of Negroes, where restrictive covenants seem to have been most widely used. Prospective purchasers certainly will not pay the market price for property plus a substantial deposit, and there is no reason for most sellers to reduce their prices below the market by the amount of the deposit, particularly since with the sale it is more than likely that they will no longer be interested in the character of the neighborhood. Only the seller of a number of parcels, such as the developer of a new area, is likely

[43] See 2 ibid., at § 1061; Wigmore, A Summary of Quasi-Contracts, 25 Am. L. Rev. 695, 712 n. (k) (1891).

[44] See, for example, Iowa Code (1946) § 129.6 (restitution of payments on illegal liquor contracts); Ga. Code (1933) § 20–505, and Miss. Code Ann. (1942) § 24 (perhaps the most common modification—recovery of gambling losses); Miss. Code Ann. (1942) § 23 (recovery by losing gambler's family); Ariz. Code Ann. (1939) § 36–104 and D.C. Code (1940) § 28–2704 (restitution of usurious interest payments); Me. Rev. Stat. (1944) c. 100, § 154 (return of consideration prerequisite to assertion of defense that contract was made on Sunday).

[45] It has been held that where the purpose of the statute or rule of substantive law which makes the contract in question "illegal" is intended for the protection of a particular group, the doctrine of pari delicto will not be applied to bar restitution to one of that group. B. & O. S. W. R. Co. v. Hagan, 183 Ind. 522, 109 N.E. 194 (1915). In restrictive covenant cases the ban on judicial enforcement of these limitations operates for the benefit of both the Negro buyer and the white seller so that the cases would appear to come within this narrow exception.

to be willing to undertake establishment of such a scheme. Even such a seller will find the plan to his advantage only if the price which he can charge for each unit will exceed the price which he could charge without the limitation by the amount of the deposit plus the cost of administering the plan. Put another way, residential segregation under such a scheme would be possible only to the extent that participants were willing to pay for it.

Even if deposits were made, it would be inevitable that some owners would find it profitable to forfeit the deposit in order to take advantage of an offer for their property. In effect, then, such a plan would only result in superimposing on the market price of the property involved a premium equal to the amount of the deposit. In the absence of monopoly benefits, then, such a plan seems hardly feasible.

Another proposal is the "club membership" device. This plan envisages the formation of a "club," or use of an existing one, which would hold title to all of the property in an area. Membership in the club would, of course, be prohibited to Negroes, Jews, or other groups and would be a condition precedent to the occupancy of property in the area. The residents of the property would simply own shares of stock or a membership in the club and would thereby be entitled to occupy certain property.

One difficulty with this plan is that the occupant would never have title to any particular real estate. Obviously the "memberships" would have to be transferable in order to provide a means of accomplishing the inevitable necessary changes in occupancy of particular dwelling units. No matter what conditions were imposed on the transfer, such as approval by the other members or by a committee or board, the ability of the householder to utilize the property for security purposes or to dispose of it would be seriously limited even if it be assumed that his control of the property would be otherwise absolute. To that extent the plan would be undesirable to either present or future owners.

If at any future time a "member" sought to transfer his interest to one of the proscribed group and approval was withheld, some interesting legal questions would arise. At least two involving recourse to the courts suggest themselves at first glance. If an "undesirable" acquired possession of the property pursuant to the transfer, and the "club" brought suit to evict him, it would appear impossible to justify judicial intervention in light of the instant cases. There, as here, the state's power would be invoked to distinguish between persons on the basis of their race or religion, and application of the doctrine of the *Restrictive Covenant* cases would deny the remedy sought. On the other hand, a "member" who sought judicial aid to

free "his" property from the restraints of such an arrangement would appear to be entitled to it. No matter what device is adopted for controlling the legal title the equitable interest will rest in the individual members, and only enforcement of the restrictive agreement as manifested by the club charter or by-laws would bar the relief sought. If such a plan were upheld, the court's action and the substantive rule which it applied would fall under the constitutional limitation on "state action" just as they did in the instant cases.

The problem of proof of failure to provide "equal protection" might be somewhat more difficult in these cases than it was in the Michigan and Missouri cases. If membership were limited in terms of race or religion, as the restrictive covenants limit ownership and occupancy, there would be no difficulty in proving discrimination. If membership were not so limited, refusal by the "club" to approve a transfer to one of the proscribed group might make proof of discrimination more difficult, but it would also make it more difficult to justify withholding approval of the transfer and thus might subject the "club" to an action for damages for breach of its contract with its members. In any event, proof of the actual practice and application of the doctrine of *Yick Wo v. Hopkins*[46] would raise the question of the legality of the exclusion of a particular racial group if aid of the courts was sought to prevent transfer of a "membership" to one of the proscribed group.

Somewhat similar is the proposal to establish a business corporation to hold title to property in a particular area, the shares being distributed among the owners of the property on some pro rata basis. Under this plan a certain number of shares would entitle the shareholder to occupancy of particular property with the accompanying duty of maintenance and management thereof. One major objection to this plan is that there would appear to be no practicable way to prevent any shareholder from transferring his stock to any person. This would give rise to a duty on the part of the corporation both to record the transfer of the securities and to allow the new shareholder to occupy either the premises formerly occupied by his transferor or some comparable property owned by the corporation.[47] Here, too, the practical difficulties of getting property owners to give up the control of their property which the ownership of legal title entails would probably be a practical deterrent to any widespread adoption of such plans.

[46] 118 U.S. 356 (1886). There the court held a statute invalid which, though fair on its face, was administered unequally to the detriment of certain Chinese.

[47] 12 Fletcher, Corporations § 5518 (1932).

Combined with any of the devices just outlined, or used separately, an option on all of the property in an area to be held by a single individual or association might be thought to facilitate enforcement of limitations on ownership or occupancy of the property. For this plan to be effective, the holder of the option would have to control substantial assets lest several pieces of property be offered for sale at once and the purpose of the limitation defeated because of lack of funds to exercise the option. Moreover, some means of providing for fluctuations in the market prices of the property during the life of the option would be essential.

Actually there would be no real difference between such an option and any other restrictive agreement, and the judicial enforcement of such an option would be similarly banned by the Constitution. The mere fact that the option to buy might be required as a part of an original sale, as in the marketing of a new development, would not alter the characteristics or the legal implications of such an agreement.[48]

The practical difficulties, particularly insofar as price fixing is concerned, would appear to be insuperable, and it is at the point where the price offered by the Negro purchaser is greater than that offered by any white purchaser that voluntary compliance with residential segregation plans ceases. Unless the holder of the option is prepared to outbid all members of the proscribed group, this plan seems hardly likely to offer any greater possibility than any of the others. One version of this plan would provide for payment of a price in excess of the highest price offered by a member of the proscribed group. Apart from the administrative difficulties of operating such a scheme, its economic implications would appear to be similar to those of the "deposit" plan and equally unlikely of any considerable acceptance.

Another proposal is for an agreement that approval of the immediate neighbors be secured before such property can be transferred to any person. Judicial enforcement of such an agreement would appear to be inconsistent with the instant cases if it could be shown that the approval was withheld solely because of the race or religion of the prospective purchaser. Here, too, the problem of proof might be a difficult one, but if it could be shown that the parties concerned understood that the standard for neighborhood approval was the race or religion of the prospective purchaser or that this standard was actually used as the basis for the granting or withholding of neighbor approval, it would appear that no judicial enforcement of the limitation could be secured.[49]

[48] The restriction involved in Hurd v. Hodge, 334 U.S. 24 (1948), had so originated.

[49] Actually any case in which this issue arose would bear exactly the same relationship to the Restrictive Covenant cases that Harmon v. Tyler, 273 U.S .668 (1927), bore to Buchanan

Some proponents of restrictive covenants argued that their purpose was to maintain "property values." In one sense such an argument is demonstrably unsound, since to limit the group of buyers can never be to the seller's advantage. What was really meant was that there was an element of value in protecting a particular neighborhood from the overcrowding which characterizes the Negro ghettos. To achieve that end, even opponents of racial residential restrictions have proposed a different type of occupancy limitation aimed at maintaining neighborhood standards and therefore neighborhood property values.[50] These "occupancy standards agreements" would impose limitations on the number of persons, regardless of their race, who might occupy particular housing units or would require a minimum of space per occupant. For example, one such agreement, which has already been signed by some owners in the Oakland-Kenwood area in Chicago, requires that not more than two adult persons per room be permitted to occupy each housing unit and that a minimum of fifteen square feet per person be provided.[51]

Obviously these limitations would substitute class restrictions for racial restrictions, since only persons with sufficient income to buy or rent the requisite space per person in the family could live in an area covered by such an agreement. Widespread adoption of the plan might ultimately force the largest families in low income groups, irrespective of race, into the least desirable housing, since essentially the plan depends on maintenance of a scarcity of housing facilities to maintain neighborhood "values."

Maintenance of a residential area by a group of persons whose economic status is roughly the same will probably make this proposal attractive to subdividers and real estate developers who are already committed to the notion that uniformity among the occupants of an area tends to promote and maintain property values. Unfortunately for present evaluation of the plan in operation, the one substantial area in which it is now being tried lies on the edge of Chicago's "Black Belt"; it already has a number of

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v. Warley, 245 U.S. 60 (1917). In the Harmon case the Court held that since a city ordinance prescribing the areas in which persons of different races might live was a violation of the Fourteenth Amendment, the same Amendment also invalidated an ordinance providing that if the residents of an area so elected, persons of another race must keep out of that area.

[50] See Weaver, op. cit. supra note 12, at 342–58, where a strong case is made for adoption of such limitations.

[51] This agreement is being pushed by the Oakland-Kenwood Property Owners Association, long a leader among Chicago groups intent on excluding Negroes from particular areas. Their interest in the "occupancy standards agreements" antedated the decisions in the Restrictive Covenant cases but came after a number of Negro and Japanese families had ignored the existing restrictive covenants and moved into the area.

Negro and Japanese occupants; and its housing units in the main are old, obsolete in style and appointments, relatively large in size, and therefore readily cut up into small apartments. As a result, present owners who wish to secure the highest possible price for their property are reluctant to impose any such limitation on the property, since the price at which such property would sell is reduced if buyers are limited in the number of persons to whom they could rent space. Similarly, new owners who acquired the property with a view to maximizing income from it by imposing higher rents on as many Negro tenants as could be squeezed in, thus taking advantage of the greater relative shortage of housing among Negroes, are unwilling to enter into such an agreement, since the price they paid or contracted to pay for the property was based on the anticipated return from providing housing facilities to the largest possible number of persons.

The most favorable area for the use of "occupancy standards agreements" would appear to be one in which new single-family dwellings are currently being sold. In such an area purchasers are interested in occupancy, not rental. Moreover, they are likely to be of the same general income group at the time of purchase. Here the limitations would operate to minimize the effect on the neighborhood of a change in income of some of the residents, since a reduction in income could not be met by renting a part of the house or otherwise exploiting the property to the detriment of the area.

In one sense, such an agreement would operate as private zoning, but application of constitutional barriers to enforcement of such limitations is difficult to predict even though their impact on the whole community might be undesirable.[52] Conceivably, they might have some effect on residential segregation if they were used in some areas occupied either wholly or partly by Negroes, since they might serve to show that Negro occupancy and overcrowding were not inevitable companions. Unfortunately, these agreements would bar all families which were large in relation to their income, and to the extent that urban Negro families have lower incomes than whites more of the former would be barred by their poverty from housing in areas covered by such agreements. Taken altogether these

[52] It could be argued that judicial enforcement of such restrictions amounts to denial of "equal protection" to large low-income families. To the extent that the restrictions of such agreements are more severe than the provisions of sanitary and building codes adopted by the legislature, there would appear to be no reasonable relationship between the classification thus given effect and the unquestioned power of the state to regulate use of housing facilities. Whether any constitutional protection is provided against discrimination by a state on account of poverty has seldom been before the Court; cf. Edwards v. California, 314 U.S. 160 (1941), holding unconstitutional that state's effort to prevent the entry of destitute "Okies" who had been driven out of the "Dust Bowl" by lack of economic opportunities there. In theory, all such "class" restrictions fall under the ban of the equal protection clause.

agreements may have a limited community educational use but are hardly likely to have much appeal for either side on the issue of residential segregation, since they do not aid in its continuance but do limit the number of housing units immediately available for Negro occupancy.

When the various proposals are considered, the conclusion seems warranted that the *Restrictive Covenant* decisions render ineffective any device for maintaining residential segregation whose usefulness depends on utilization of governmental authority to achieve its end. Obviously, however, there are other and equally effective means of maintaining ghettos in the United States. First and foremost among these is the perhaps immeasurable effect of the pressure of social attitudes which affects both majority and minority groups. For example, the recognizable and often strongly articulated attitude of neighbors in a particular area on the matter of Negroes, Jews, or persons belonging to other minority groups living in a particular neighborhood will almost certainly affect a householder's decision to sell or rent to a member of such a group even without the possibility of judicial action to compel that result.[53] The same attitude on the part of neighbors will operate similarly to deter or prevent a member of a minority group from buying or renting a particular property.[54]

Economic factors operative in the allocation of housing would appear to be equally important in the maintenance of ghettos. To begin with, the owner of property located in an area in which there is, or there is said to be, hostility toward a particular minority group or groups is hardly likely to violate the community taboos by renting property to members of minority groups if he cannot collect higher rents than he could secure from some other tenants who do not belong to the proscribed class. Under conditions of controlled rents, then, there is every likelihood that the social attitudes would be determinative. This result would follow whether the controls were effective or easily evaded, since evasion would be equally

[53] As indicative of the extent of this attitude see Weaver, op. cit. supra note 12, at 214–15. The author reports a Fortune poll showing that, of the sample taken on a national basis, substantially less than 15 per cent of the people in the United States were opposed to residential segregation, and a Minnesota poll showing 30 per cent of the people there so opposed with 10 per cent undecided.

[54] One way in which the neighborhod attitude may be manifested is by acts of violence against Negro residents. Some evidence of the extent to which these acts occur may be found in the fact that in Chicago since 1944 there have been more than one hundred separate occasions on which such violence was reported to the police. In many cases the incident involved only stoning of the property occupied by Negroes, but there were at least two occasions on which dynamite bombs were exploded and several cases involving arson. On one occasion there were mobs of several thousand people and violence lasting over a period of several successive days. Yet only a few arrests and fewer convictions have ever resulted. The effect of such a history on the attitude of Negroes has never been formally studied, but it would appear to be a considerable deterrent to the exercise of a "free choice" in the housing market.

possible with respect to either group of tenants. Under these circumstances the ability and willingness of the minority group to pay higher rents, and the pressures upon it to secure better housing, are hardly likely to have any effect.

Since a sale by a resident owner would permit him to move to another neighborhood, local pressures have only a slight effect in limiting sales of property to Negroes or to other persons who buy for the purposes of renting such property to Negroes. To that extent the resident and non-resident owners would appear to be subject only to attitudes generally prevailing in large sections of the community with respect to the maintenance of residential segregation. In either case the Negro purchaser, or the purchaser who contemplates renting to Negroes with the attendant opportunity to charge higher rents on termination of rent control, can overcome the effect of social pressures by bidding more for the property than whites are willing to pay. The extent to which this course is likely to be followed is difficult to predict. It will depend in large measure, of course, on the economic resources of individual Negroes and the extent, if any, to which they are willing to devote those resources to satisfaction of their housing needs. Equally important and equally difficult to estimate is the extent to which individual and group prejudices can be overcome by appeals to cupidity. The suits brought to enforce restrictive covenants demonstrate at least that willing Negro buyers have been successful in finding some willing white sellers in areas not formerly occupied by Negroes.

Only fragmentary data are available with respect to current individual incomes and savings of Negroes generally, but it is at least clear that the relative and actual economic position of many Negroes has improved substantially in the last decade.[55] For example, according to the census estimates of income for 1946, there were about 85,000 urban Negro families in the northeastern and north central states with annual incomes of $5,000 or more. They represented more than 6 per cent of the number of Negro families in the areas, and more than 13 per cent of the Negro families in the areas had incomes between $3,000 and $5,000.[56] With these reports of conditions in 1946 should be compared the situation in 1935–36 when a survey of incomes in Chicago showed that only 5.3 per cent of Negro families had incomes over $2,000 and only 23 per cent had incomes between $1,000 and $2,000. At that time 46 per cent of the Negro families in Chicago

[55] For an authoritative discussion of income distribution among Negroes see Weaver, op. cit. supra note 12, at 125–38.

[56] Current Population Reports, Consumer Income, P-60, No. 1, Bureau of the Census, at 10 (1948).

were on relief.[57] Even in 1940 in metropolitan Chicago 35 per cent of the non-whites were unemployed as compared with 13 per cent of the whites. But in 1947, only 7 per cent of the non-whites and 2 per cent of the whites were unemployed.[58] Equally significant is the fact that a recent survey of the two worst slum areas in Chicago which are occupied by Negroes showed that more than 30 per cent of the six hundred families living in the areas had incomes in excess of $2,500 per year.[59]

Major changes in general economic conditions would alter this picture, and it might be expected that Negroes would suffer from a depression more than would whites. Nevertheless, it appears reasonable to estimate that there are many hundreds of urban Negro families now living in slums who earn enough to enable them to bid for adequate housing in their communities. If these prospective purchasers were able to pay cash for a house, only the attitudes of property owners would appear to stand in their way.

Where, however, as in a substantial majority of residential property transfers, the transactions must be financed in large part either independently or through the seller, other social and economic factors which come into play often operate to prevent the sale of property for Negro occupancy. Most if not all banks, insurance companies, and other lending institutions are unwilling to loan money for the purchase or construction of housing for Negro or mixed occupancy in areas not now occupied by Negroes.[60] Even the Federal Housing Administration's practices in approving

[57] Family Income & Expenditure in Chicago, 1935–36, Vol. I, Bulletin No. 642, U.S. Dept. of Labor, at 6.

[58] Current Population Reports, P-51, No. 29, Bureau of the Census (1947).

[59] Chicago Housing Authority, Report on Relocation Survey for Illinois Institute of Technology and Michael Reese Hospital Clearance Areas.

[60] Weaver, op. cit. supra note 12, at 222–27 describes unsuccessful efforts to finance multiple unit developments during World War II. The actual experiences of Negro would-be purchasers and their brokers and lawyers in attempting to negotiate loans are even more striking when the properties involved are single-family dwellings or two-, three-, or four-family buildings. This attitude on the part of lending institutions is reported in all parts of the country.

One of the most striking illustrations of this position is that the Metropolitan Life Insurance Company, which controls the largest aggregate of capital in the United States, excludes Negroes from its "Stuyvesant Town" in New York City, an 8,000-unit development. A Metropolitan development located in Harlem, Riverton Houses, houses about 1,200 Negro families. Since "Stuyvesant Town" was built on land acquired by municipal condemnation and is to be operated without increase in assessed value for twenty-five years, a suit has been undertaken on behalf of several Negro would-be tenants based on the theory that these public benefits impose corresponding obligations. The complaint was dismissed below, and the matter is now pending on appeal. Dorsey v. Stuyvesant Town Corp., New York Supreme Court, Appellate Division, No. 14108–1947. See 15 Univ. Chi. L. Rev. 745 (1948), noting the trial court's decision.

loans which it will underwrite manifest the same attitude.[61] Whatever justifications are offered are based on the widely held notion that Negro occupancy reduces the value of property, including both the units so occupied and those surrounding them. Therefore, it is argued, security for loans outstanding on property in the same area will be impaired if such a loan, itself a bad risk, is made.

Evidence to support this conclusion is never offered. In fact, no evidence exists. It is obvious that the overcrowding of the ghettos deteriorates the property, but deterioration is equally rapid whether Negroes or whites live under such conditions. Moreover, applications to both Negroes and whites of the same rules as to personal credit standing as a prerequisite to making loans would appear to solve much of the concern over comparative risks.[62] Under these circumstances the attitude of the lending institutions can only be explained as a manifestation of, or a concession to, general community attitudes toward residential segregation.

If there were a truly competitive capital market this attitude would not be determinative. The Negro would-be purchaser could overcome the impact of social pressures here just as he could overcome their effect on the landowner by the simple device of offering a higher price for the capital in the form of a higher interest rate or other terms more favorable to the lender than those generally prevailing. The social pressures which have been outlined could hardly be expected to operate on a lender as they would on a seller. This would be particularly true in large urban communities, unless the lender was himself a resident of the neighborhood involved or had made other loans on property in the same area. Moreover,

[61] Prior to 1947 the FHA Underwriting Manual was specific in its requirement that to receive a "high rating" the property and the areas must be covered by a restrictive covenant. In 1947 the manual was revised to eliminate references to race in discussion of "user groups." Investigation, however, reveals no change in actual FHA operations. Refusal of the agency to underwrite loans because of the race of some, or all, of the occupants of the property involved is a flagrant violation of the duty imposed on all government officers to make no distinctions on account of race. Indeed, the instant cases would appear to require FHA to withhold its approval of loans where racial restrictions are imposed. The Commissioner denies his obligation in this regard. Letter dated Nov. 1, 1948 addressed to Thurgood Marshall, Special Counsel, NAACP, signed by Franklin D. Richards, Commissioner, FHA.

For full discussion of the shameful part FHA has played in residential segregation and of its changes in policy see Weaver, op. cit. supra note 12, at 71–73, 148–54. See also Dean, None Other than Caucasian: A Study of Race Covenants, J. Land & Pub. Util. Econ. 30 (Nov. 1947).

[62] Questionnaires sent by the National Association of Real Estate Boards to local real estate boards led to the conclusions that "the provision of good housing for Negroes can be carried out as a sound business operation and that the Negro family that wants good housing is usually a good economic risk." Press release, National Association of Real Estate Boards, No. 78 (Nov. 15, 1944). For a discussion of facts and fancies on the effect of Negro occupancy on real estate values see Weaver, op. cit. supra note 12, at 279–303.

it is hardly likely that all the bankers and managers of lending institutions would live in the same neighborhood and would react to every neighborhood in the same way. In smaller communities with only one or two lending institutions the social pressures might well be determinative if funds were not available from outside sources.

It is folly, however, to assume that Negroes or other minority groups do have access to a truly competitive capital market. The decision in the *Restrictive Covenant* cases removed the legal barrier to access to capital for housing for Negroes, but it did not affect the power of the managers of lending institutions to refuse loans on property not now occupied by whites. The exercise of such power, whether on a rational basis or not, still operates in large measure to continue residential segregation.

Other factors contribute materially to the maintenance of the ghettos. Among them are the practices and the codes of real estate boards and operators. In most urban communities real estate brokers to a great extent control the movement of residential property, largely because both buyers and sellers rely on the brokers to bring them together. Throughout the country, real estate boards are agreed that they will not act to sell property to Negroes which is located in white neighborhoods.[63] That practice remains untouched by the recent decisions.

It must be concluded, then, that the Supreme Court has destroyed only one of the props for the walls around the American ghettos. Nevertheless, so important were the legal sanctions and psychological impact of restrictive covenants that the recent decisions serve to remove a major restraint on the market in urban housing. Thus, the economic resources of Negroes and other minority groups can be brought to bear on residential segregation. In that way the whole community is necessarily benefitted to the extent that such resources are no longer limited to provision of shelter in a segregated area, but are added to the total available to meet housing needs. Only in this way will major slum clearance programs ever be possible in most cities, since the worst slums are occupied by Negroes. To that extent the decisions are a major contribution to the solution of the problem of residential segregation and to the problem of national housing as well.

[63] The Code of Ethics of the National Association of Real Estate Boards provides that "[a] realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." A member board which fails to enforce this Code of Ethics may be expelled from the Association. It should be observed, however, that some realtors, both white and Negro, violate the Code. Their practice is to acquire real estate on the periphery of Negro neighborhoods for the purpose of encouraging Negro occupancy. White people subsequently leave the area, and it becomes possible to cut apartments into smaller units and charge exorbitant rents.

Though the decisions in the *Restrictive Covenant* cases are not a judicial solution for all of the problems of residential segregation, they do eliminate the use of the power of the state to maintain ghettos. The Court reached that result by applying the Fourteenth Amendment to activities seldom previously regarded as within its scope and by construing the "equal protection" clause as prohibiting judicial decisions based on race or color classifications, even though the courts are only carrying out distinctions initiated by the acts of private persons. This construction of the Fourteenth Amendment offers tremendous possibilities for future judicial aid in solution of contemporary problems similar in scope and complexity to residential segregation. Perhaps the whole range of issues arising in connection with racial segregation may be encompassed by logical application of the constitutional theory adopted in the instant cases. Moreover, the Court's construction of the Constitution suggests increased federal scrutiny of the rules of decision of state courts. Thus these decisions are of major importance above and beyond their effect on restrictive covenants.

Ever since the *Civil Rights Cases*, it has been generally accepted that the limitations of the Fourteenth Amendment apply only to "such action as may fairly be said to be that of the States." Indeed, the cases which have come before the Court have usually involved the question of what constitutes such "state action."[64] Until now, however, it does not seem to have been recognized that any prohibition on state action under the Fourteenth Amendment must inevitably impose a corresponding limitation on the conduct of individuals. In fact, even in the instant cases the Court observed: "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

The decision, however, makes it eminently plain that this generalization must be qualified, since, if the "private conduct" in question requires recourse to a state agency to make it effective, the Fourteenth Amendment precludes such state aid. The Amendment therefore vitally affects some private conduct. Thus, in the instant cases it operated to bar the adjacent St. Louis and Detroit property owners from securing judicial enforcement of the limitations on the property involved. Put another way, though the parties to the restrictive agreement had taken all the steps they could to make it binding, application of the Fourteenth Amendment nullified their acts. They were left in the same position they would have occupied had no agreement been undertaken, since then each property owner

[64] See Grovey v. Townsend, 295 U.S. 45 (1935). But see Smith v. Allwright, 321 U.S. 649 (1944), overruling the Grovey case. Generally, see Negro Disenfranchisement—A Challenge to the Constitution, 47 Col. L. Rev. 76, 86–87 (1947), and authorities there cited.

would have been free to hold his property or to sell to whomever he chose. After these decisions, as the Court pointed out, only "voluntary adherence to their terms" could be relied on to effectuate the purposes of the agreements. Thus it must be concluded that the constitutional limitations operate not to forbid any particular acts by individuals but to limit the acts of individuals which the state may treat as lawful. Necessarily, then, such acts may not be given controlling weight by courts in resolving issues between individuals.

This result followed inevitably from the Court's recognition that substantive judicial decisions are as surely the acts of the state within the meaning of the Fourteenth Amendment as are statutes passed by the legislature and signed by the governor. The range and scope of judicial decisions, however, are vastly greater than those of statutes, and decisions more often deal with the details of relationships between individuals. It is these things which raise interesting questions as to future applications of the Fourteenth Amendment, particularly when the equal protection clause is construed as outlawing race or color discrimination as a basis for unequal legal treatment of property rights.

Logical application of the rule of these decisions would appear to open to federal judicial scrutiny much, if not all, of the area of racial discrimination, including segregation.[65] Although these decisions do not ban segregation expressly, they would appear to provide judicial remedies against much of it. Concededly, it may be questioned whether the Court had any such purpose and whether there was any judicial realization that the decisions might have this effect.[66] Nevertheless, no logical basis appears for denial of federal judicial relief in many situations in which the federal courts were formerly believed powerless.

For example, in many states and the District of Columbia Negroes are uniformly refused accommodations in all public places such as hotels, theaters, and restaurants. If they are admitted, as in public conveyances, they are segregated.[67] In some cases these practices are in violation of state statutes, in others they are compelled by statute, and in still others

[65] Whether "segregation" is "discrimination" is a question which arises only if it is assumed that the equal protection clause prohibits the latter but not the former. So put, the question evades the real issue: whether lawmaking which draws distinctions based solely on race satisfies the constitutional limitations. See Fraenkel, Our Civil Liberties 201 (1944).

[66] Compare the effect of the decision in United States v. Classic, 313 U.S. 299 (1941), on the rule of Grovey v. Townsend, 295 U.S. 45 (1935). See Roberts, J., dissenting in Smith v. Allwright, 321 U.S. 649, 669 (1944).

[67] As to the scope, extent, and character of racial segregation and discrimination in the United States see Myrdal, op. cit. supra note 20, at 605–39.

there are no applicable statutory provisions.[68] With the first group we are not now concerned.[69] It is the second and third which are affected by the Court's decisions.

Where racial segregation or exclusion is compelled by statute there is no problem of "state action." The only question presented is whether the classification adopted violates the limitations of the Fourteenth Amendment. Until now that question was believed to have been answered in the negative,[70] but there has been little or no consideration given to the basis

[68] Eighteen states prohibit racial discrimination in varying degree. Twenty states and the District of Columbia compel racial segregation with the same lack of uniformity in the various statutes. Ten states and the federal government acting with respect to areas of federal jurisdiction outside the District of Columbia have no statutes on the subject. See Konvitz, The Constitution and Civil Rights 132–41, 208–41 (1947), for a classification and citations of all of these statutes.

[69] See Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945), holding valid the New York anti-discrimination statute applied to prohibit racial discrimination in qualifications for membership in a trade union. In Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), the Supreme Court upheld a state court's enforcement of that state's anti-discrimination act against a carrier operating between Detroit and an island on the Canadian side of the Detroit river. On certiorari petitioner attacked the statute only on the ground that it was an interference with foreign commerce beyond the power of the state.

[70] The question of the constitutionality of a state statute requiring racial segregation was first raised in the United States Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). There a Louisiana statute requiring separation of black and white passengers by interstate carriers was upheld chiefly on the authority of cases in which school segregation statutes had been held valid by state courts. The only one of these precedents discussed by Justice Brown was Roberts v. Boston, 5 Cush. (Mass.) 198 (1849), which had been decided nearly twenty years before the Fourteenth Amendment was adopted. As Justice Harlan pointed out in a biting dissent, the majority in the Plessy case paid lip service to the requirement that legislative distinctions must be "reasonable," but nowhere was there any showing that there is any reasonable relationship between the race of passengers and "the end to which the legisture was competent"—the regulation of public transportation. 163 U.S. 537, 559 (1896); cf. Hirabayashi v. United States, 320 U.S. 81, 100 (1943); Korematsu v. United States, 323 U.S. 214, 216 (1944); and Perez v. Lippold, 198 P. 2d 17 (Cal., 1948).

Defenders of such statutes also rely on Gong Lum v. Rice, 275 U.S. 78 (1927), and Cumming v. Bd. of Education, 175 U.S. 528 (1899), as well as dictum in Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 344 (1938). In the Gong Lum case the major thrust of the petitioner's attack on the Mississippi school-segregation statute was that Chinese were excluded from white schools. Chief Justice Taft relied on the Plessy case and authorities there cited, and he made no pretense of considering whether there was any reasonable relationship between the race of the students and the public interest in state control of public education. In the Cumming case the segregation issue was not raised. 175 U.S. 528, 543–44 (1899). In the Gaines case the Court applied the pernicious "separate but equal" doctrine but held that the segregated-school system denied equal protection to the Negro petitioner because no law school for Negroes was provided. But see Sipuel v. Board of Regents, 332 U.S. 631 (1948), and the same case sub nom. Fisher v. Hurst, 333 U.S. 147 (1948), where this dictum was not repeated.

No presumption of constitutionality of these segregation statutes should be predicated on their number or on the fact that they have seldom been seriously challenged. In Morgan v. Virginia, 328 U.S. 373 (1946), the Court ruled that application of a state "jim-crow" statute to interstate commerce violated the "negative implication" of the commerce clause of the federal Constitution despite the fact that such statutes had been so applied for generations by several states; cf. McCabe v. A.T. & S.F. Ry. Co., 235 U.S. 151 (1914), and Mitchell v.

for the result. The construction given the equal protection clause in the *Restrictive Covenant* cases, however, raises a serious doubt as to the validity of any such opinion.

In these cases the Court bluntly declared:

> We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. . . .
>
> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.[71]

In so construing this constitutional limitation the Court only followed its own declarations in *Yick Wo v. Hopkins*,[72] *Yu Cong Eng v. Trinidad*,[73] *Hill v. Texas*,[74] *Hirabayashi v. United States*,[75] and *Oyama v. California*.[76] In the *Hirabayashi* case the Court had said:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.[77]

Statutes which operate differently on persons according to their race, then, must violate the equal protection clause unless some "compelling justification which would be needed to sustain discrimination of that nature"[78] can be shown. It is customary to defend segregation statutes on the grounds that they reflect the desires of the community and are necessary to prevent disorder and conflict between the races. Certainly local attitudes are not sufficient to justify disregard of "basic doctrines of equality," and "preservation of the public peace" has already been held insufficient as a justification for racial distinctions.[79] Significantly, that holding was reaffirmed in the instant cases.

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United States, 313 U.S. 80 (1941), where the question of the validity of such statutes was evaded.

[71] Shelley v. Kraemer, 334 U.S. 1, 20, 23 (1948).

[72] 118 U.S. 356 (1886).

[73] 271 U.S. 500 (1926).

[74] 316 U.S. 400 (1942).

[75] 320 U.S. 81 (1943); see Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

[76] 332 U.S. 633 (1948).

[77] 320 U.S. 81, 100 (1943).

[78] Oyama v. California, 332 U.S. 633, 640 (1948).

[79] Buchanan v. Warley, 245 U.S. 60 (1917).

In the *Restrictive Covenant* cases the Court granted constitutional protection to "property rights." But any argument that only "property rights" are within the scope of equal protection rests on confusion between the coverage of that clause and the due process clause.[80] Certainly the rights sustained under "equal protection" in the past have not always been property rights in the legal sense.[81] And insofar as they might be called property rights in some other sense, such a definition is also satisfied when a Negro seeks admittance to a public place, since he is claiming a right to use that property on the same terms and conditions as it is used by other members of the public.[82]

The California Supreme Court has already applied the flat prohibition of racial distinctions not based on some "compelling justification" in invalidating that state's anti-miscegenation statute in *Perez v. Lippold.*[83] Indeed, the majority and concurring opinions in that case may serve as useful models for other courts faced with similar questions. Certainly that case seems a complete answer to any contention that constitutional protection is limited to cases involving property rights in any narrow sense, since the right to marry hardly falls in that category.

It thus appears that both the racial exclusion and segregation statutes are invalid, since no rational basis for their classification can be shown. Furthermore, their constitutionality may readily be attacked either by urging invalidity as a defense in enforcement proceedings brought under such statutes or by seeking to enjoin enforcement in either state or federal courts.[84]

[80] The petitioners' reliance on the assertion of property rights in the Restrictive Covenant cases is explained by the fact that they attempted to invoke the due process clause as well as the equal protection clause. See note 37 supra.

[81] In Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), and Sipuel v. Board of Regents, 332 U.S. 631 (1948), the "right" protected was that of an individual to share equally in the opportunities provided for public rights in the property used to provide public education. In earlier cases the equal protection clause was held to prohibit exclusion of Negroes from jury service solely on account of their race. Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Ex parte Virginia, 100 U.S. 339 (1880). It seems impossible to reconcile the reasoning of these cases with that of Plessy v. Ferguson, 163 U.S. 537 (1896); see Harlan, J., dissenting at 556. See also Snowden v. Hughes, 321 U.S. 1 (1944), where the right asserted was that of uniform administration of state laws governing primary elections, but where relief was denied to a candidate for office, apparently because no "purposeful" discrimination was shown.

[82] The carrier "jim-crow" statutes would appear singularly vulnerable to this argument because of the unique limitations imposed by both state and federal regulatory statutes on private control of property "devoted to the public use." It may be said that the rights of any individual with respect to such property are greater than with respect to any other property which he does not "own."

[83] 198 P. 2d 17 (Cal., 1948).

[84] American sociologists, following the Sumner tradition of regarding legislation as inconsequential, have been prone to minimize the effect of such legislation. But see Myrdal,

Under the rationale of the *Restrictive Covenant* cases judicial remedies appear available for the victims of racial segregation even in the absence of state statutes. For example, if a Negro presents himself for admission to a privately owned place of public accommodation, such as a hotel, and is denied admission solely on account of his color, it has generally been held by state courts that, in the absence of a statute to the contrary, he is without remedy.[85] But the *Restrictive Covenant* cases require such a decision to meet the test of the Fourteenth Amendment, and the Supreme Court's analysis of that Amendment should compel reversal. The decision of the state court would be "state action" as now defined. Moreover, it is this "state action" which denies the plaintiff damages, and the basis for the court's denial of damages is the race and color of the plaintiff. It thus follows that he has been denied equal protection of the laws in violation of the constitutional prohibition.

It may be argued that the state has done no more in such a case than to leave individuals free to discriminate as they choose. Actually, this is not so. It is the power of the state which ultimately determines the extent of the control which the hotel owner may exert over the hotel property and who may use it. Within the geographical confines of the state, the relationships between individuals, between individuals and property, and between individuals and the state are all determined by state law. In fact, the rules governing such relationships comprise the body of state law. These determinations may, of course, be manifested by statute, constitution, or administrative order or other executive action, but they may also be expressed by judicial judgment or decree. The *Restrictive Covenant* cases must be taken as authority for the proposition that the state's determination, no matter how manifested, must fulfil the requirements of the Fourteenth Amendment, and no determination of a relationship which may vary with the race of the persons involved will satisfy those requirements.

It thus becomes apparent that under the theory of the *Restrictive Covenant* decisions the limitations of the Fourteenth Amendment apply to in-

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op. cit. supra note 20, at 579–80, where the opinion is expressed that these statutes were "effective means of tightening and freezing—in many cases of instigating—segregation and discrimination. . . . "

[85] See, for example, de la Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P. 2d 818 (1933), and cases there cited. There a theater manager insisted that Filipinos must sit in the balcony. Upon the refusal of Filipino patrons to be so segregated, recovery was limited to the price of tickets not used. Even in those states where there are "civil rights" statutes, recovery of damages for exclusion or segregation of a member of a particular racial group is denied if the place involved is deemed not within the coverage of the statute. See Mangum, The Legal Status of the Negro 33–68 (1940), where a number of such cases are cited.

dividuals in that the states may not give their approval to individual discriminatory conduct unless some "compelling justification" is shown. This result follows even though such individuals claim a "property right" to justify their power to discriminate against particular racial or religious groups. Indeed, in the instant cases the respondents claimed a "right" in the property occupied by the petitioners, but the Court prohibited judicial enforcement of that "right" even though its creation had been the attempt of individual citizens.

The issue of judicial enforcement of private segregation and exclusion might arise before the courts in a variety of ways. One obvious case is an action for damages by a Negro whose exclusion was not supported by a segregation statute. Still another possibility is an action in tort by a Negro who had been refused admission and ousted from the premises by the use of reasonable force. Or the proprietor or his servant might sue in tort if the person refused accommodations had resisted the effort to eject him with no more than reasonable force. No material distinction should arise from the manner in which the matter comes to the attention of the court. If the decision is against the Negro, though under similar circumstances there would have been a decision in favor of a white person, the court's action violates the federal Constitution.

Extension of the federal judicial power in this field suggests greater supervision of the state courts by the federal judiciary. The limitations of the Fourteenth Amendment have long been extended beyond the protection of Negroes, and with the express recognition of the obligation of state courts to make their rules of decision conform to those limitations, the area for federal judicial activity seems greatly increased. Actually, of course, it is hardly likely that the Supreme Court will be asked to review the constitutionality of every state court decision any more than it is asked to determine the validity of every state statute. In any event, the court exercises an uncontrolled discretion with respect to granting the writ of certiorari. That alone seems enough to prevent any undue burden resulting from an increase in federal judicial scrutiny of state court action. The construction of the Fourteenth Amendment here expressed would not increase the scope of the power of the federal judiciary to scrutinize the decisions of state courts. That power arises from the obligation of the state courts to enforce the Constitution and laws of the United States and from the jurisdiction of the federal courts, particularly the appellate jurisdiction of the Supreme Court, to consider cases arising thereunder.

It has been suggested that the logical implications of the decisions in the *Restrictive Covenant* cases will lead to a search for limitations on the

doctrine. Perhaps that is true. Actually, however, the Court in those cases adopted a construction of the Fourteenth Amendment which is consistent with both the majority and minority opinions in the *Civil Rights Cases*.[86] It must be remembered that there the Court was immediately concerned with the power of Congress to establish certain standards of conduct for individuals without regard to any action taken in this connection by any of the several states. The anxiety of a majority of the Supreme Court, as then constituted, to delimit the power of the Congress over the political, economic, and social status of the newly freed Negroes led them to construe the Fourteenth Amendment as applying only to "state action." Thus, they concluded that Congress had no power to adopt a statute which prohibited discrimination against Negroes by individuals who operated carriers, hotels, restaurants, and other places of public accommodation. This conclusion, as Justice Harlan pointed out in his dissent, did violence to the public intention in adopting the Fourteenth Amendment: that Negro citizens were not to be subjected to discrimination in the exercise of their civil rights on account of their color but rather were to stand on the same footing in each state as white citizens of that state, and that Congress was to take appropriate legislative action to assure that end.

The distinction between the majority and dissent was verbally reduced to the question of which should be given controlling weight, the language of the amendment or the intention of its proponents and the general understanding of its effect at the time of its adoption. But the real issue between the majority and dissent arose from conflicting views as to whether the future status of the newly freed Negroes or the relationship between Congress and the several states should be given controlling weight. Unconcerned about the former, the majority gave full effect to its predilection for protecting the power of the several states by limiting the power of the federal government.

It seems plain, however, that even the majority assumed a remedy at state law for the minority group. It said:

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive

[86] 109 U.S. 3 (1883).

a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.[87]

Again, in distinguishing the scope of the Thirteenth Amendment from that of the Fourteenth, Mr. Justice Bradley concluded:

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such a refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.[88]

Some years ago, in discussing and comparing "official" and "private" power, Professor Hale quoted the foregoing passages from the opinions in the *Civil Rights Cases* and observed:

[87] Ibid., at 17–18.

[88] Ibid., at 24–25.

Inasmuch as negroes would presumably have a remedy under state laws against arbitrary exclusion, the result of the case might be merely to postpone the time when they could press their cases in the federal courts. The interesting question remains whether they have any right under the Fourteenth Amendment to obtain affirmative protection against the acts of the proprietors of the inns, public conveyances and theatres.[89]

On the theory of the *Restrictive Covenant* cases that question must be answered in the affirmative.

[89] Hale, Force and the State: A Comparison of "Political" and "Economic" Compulsion, 35 Col. L. Rev. 149, 185 (1935).