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Racial Restrictions in Real Estate--Property Values Versus Human Values

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RACIAL RESTRICTIONS IN REAL ESTATE —
PROPERTY VALUES VERSUS HUMAN VALUES*

Our system of law can hope to withstand the vicissitudes of the social revolutions rampant in the world today only by maintaining close liaison with justice and with social reality. Unfortunately, too often a double hiatus intervenes, and our jurisprudence presents, in spots, a denuded skeleton from which the heart and soul have been removed. When that occurs, when the law finds itself out of step with right and blind to truth, then a readjustment somehow must be made, or its desiccation soon will follow. When a citizenry becomes aware that its judicial oracles and legal ritualisms serve only as flimsy facades for the maldistribution of political, economic, and social freedoms, then the hour is one ripe for sudden and violent upheaval.¹

Happily, our own top oracle, the Supreme Court of the United States, has been alive to the danger of allowing the law to lag too far behind the times over which it attempts dominion. Indeed, in the field of civil liberties the Supreme Court seems determined to have the great generalities of the Constitution (and especially those of the Fourteenth Amendment) instilled with a strong, impartial, and socially

¹ An example can be found in the infamous Dred Scott case. A Supreme Court majority, blinded by their racial and sectional prejudices and predilections, gave to an already divided nation a decision which intensified that division, irreparably damaged the reputation of the Supreme Court, and hastened the violent crisis which followed. See SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 243-251 (1943). Ominous rumblings of a dangerous societal unrest can be detected in the alarming suggestion of some Negro leaders that Negro youths refuse induction into the nation's armed forces so long as an official policy of segregation therein continues in effect. See, e.g., Randolph, REVOLT AGAINST JIM CROW. The Progressive, May, 1948, p. 18.

* The writer wishes to express his deep appreciation to Mr. Burton M. Apker, 1948 graduate of the Notre Dame College of Law and former note editor of the Notre Dame Lawyer, whose intelligent, co-operative, and painstaking research made this article possible. In addition, a kudo must be tossed in the direction of Professor Anton-Hermann Chroust, of the faculty of Notre Dame. He provided, in a large measure, the intellectual stimulation which evoked many of the views herein expressed.
realistic meaning. In short, they seem bent on assuring to everyone, regardless of race, creed, color, or ethnic origin the broad protections of the basic charter of our democratic republic.

Examination of the many examples of this judicial evangelizing in the sphere of civil liberties lies beyond the province of this article. Herein the writer wishes to treat of a recent chapter in the current attempt to revitalize the Fourteenth Amendment, namely, the Supreme Court decisions, and ramifications thereof, in which a unanimous Court struck down as unconstitutional judicial enforcement of restrictive real estate covenants that discriminated against certain minorities. The fundamental problem involved in such a study is whether the courts should enforce real estate agreements that bar a fellow citizen from occupying this house or that because of the color of his skin, the nature of his religious beliefs, or the character of his national origin.

This inquiry presents an appropriate field of investigation within which may be witnessed the clash of so-called "property rights" with the powerful moral forces involved in any

\[2\] "The Roosevelt Court has, then, expanded its power in the only direction where such expansion is compatible with a democratic constitutionalism—in the direction of safeguarding the right to believe, to speak, to assemble, to practice one's religion, to have a fair trial." PRECHETT, THE ROOSEVELT COURT 285 (1948), reviewed in 24 NOTRE DAME LAWYER 142 (1948). See also SWISHER, op. cit. supra note 1, at 329-343; Note, Applicability Of The Fourteenth Amendment To Private Organizations, 61 HARV. L. REV. 344 (1948). For the view of at least one of the present Supreme Court Justices who feels that the Court has not yet gone far enough in this direction, see the dissenting opinion of Mr. Justice Black in Adamson v. California, 332 U. S. 46, 68, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

\[3\] Shelley et ux. v. Kraemer et al. and McGhee et ux. v. Sipes et ux., 334 U. S. 1, 68 S. Ct. 836 (1948); Hurd v. Hodge, 334 U. S. 24, 68 S. Ct. 847 (1948). These cases have been noted, among other publications, in 23 NOTRE DAME LAWYER 256 (1948); 46 MICH. L.REV. 978 (1948) and 24 So. CALIF. L.REV. 358 (1948). The vote was six to nothing. Justices Reed, Jackson, and Rutledge disqualified themselves, presumably on the grounds that they held property bound by restrictive covenants.

\[4\] Real estate restrictions of various sorts have been drawn to restrict real property from sale to and occupancy by Mexicans, Armenians, Chinese, Japanese, Jews, Persians, Syrians, Filipinos, American Indians, "non-Caucasians", and Negroes. U. S. DEPT. OF JUSTICE, PREJUDICE AND PROPERTY 18 (1948).
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program of attempted racial segregation and reflected in the imposing statistical data which gives cold and unchallengeable evidence of the grossly inferior housing accommodations of certain minority groups in America. On the one side are raised the hoaried shibboleths of "freedom of contract" and "freedom to choose one's neighbors". On the other we shall encounter broad constitutional principles, calling for equal protection of the law, resting on a firm belief of the equality of human dignity, and re-enforced by overwhelming factual testimony of the dreadful housing situation which afflicts at least one of our great minority groups, the American Negro.

It shall not be the purpose of this article to point up the very heavy social costs which inhere in any policy of racial segregation by private contract. Many studies have demonstrated beyond cavil the menace to health, to morals, and to the general decency of cities, the plague spot for racial exploitations, frictions, and riots, the media for crime, juve-

5 See, e.g., the remarks of Most Reverend Bernard J. Sheil, Auxiliary Bishop of Chicago, contained in Sheil, RACIAL RESTRICTIVE COVENANTS 25-31 (1946). His Excellency puts the case in strong terms when he remarks: "When smug, complacent idolators of the status quo, or so-called defenders of property rights deny to any human being the opportunity to live on terms of honest, objective equality, they are denying the Son of God."

6 "Nothing is so obvious about the Negroes' level of living as the fact that most of them suffer from poor housing conditions. It is a matter of such common knowledge that it does not need much emphasis." Myrdal, The American Dilemma 376 (1944). The accuracy of Mr. Myrdal's observation is substantiated by a tremendous body of social and statistical studies including Drake and Cayton, Black Metropolis ch. 8 (1945); Woofter, Negro Problems in Cities (1928); Sterner, The Negro's Share (1943). The social pattern of racial discrimination in housing has not, of course, been restricted to Negroes only. See Taylor, Mexican Labor in the United States 80, 208 (1928); Taylor, An American Mexican Frontier 226 (1934). Konvitz, The Asiatic in American Law 168 (1948).

7 Report on Negro Housing 45-46 (1932).

8 Lee, Race Riot 60, 89, 93, 119 (1943) wherein it is made unmistakably clear that the ominous threat of violence and bloodshed is an integral part of any pattern of racial discrimination in housing. On the other hand, the experience of the 1943 Detroit race riot revealed that peace prevailed only in the non-segregated areas of the city. See Walter White's autobiography, A Man Called White 72, 73, 226, 228 (1948).
nile delinquency and prostitution, and the proportionally greater expense to the community in required police, fire, and health services, which a policy of legalized ghetto housing has caused. Moreover, we shall leave for theologians the appraisal of the moral dilemma involved in tolerating what have been aptly termed the "legalistic concentration camps of America." Inquiry here will restrict itself to an examination of the legal effects of the Supreme Court's recent decisions concerning racial restrictive covenants and to an examination of the legality or illegality and the practicability or disutility of certain schemes to circumvent the Supreme Court's ruling. If such an approach seems to be a parochial curtailment of what obviously is a fundamental philosophical issue, the writer can only plead the limitations of time, space, and the selected channel of expression.

A resume of the general status of the law governing racial restrictive covenants should serve to set the stage for an analysis of the recent Supreme Court decisions. Racial restrictive covenants were of three general types. One type restricted either sale, lease, conveyance to, or ownership by, any member of an excluded group. The second type prohibited use or occupancy by any member of such group. The third prohibited both ownership and occupancy. Some of the covenants were limited in duration while others were perpetual. The use of racial restrictive covenants grew in popularity with the great migration of the Negroes from the country to the city and from the South to the Northern and

9 A Chicago housing conference listed among the "ghetto" conditions high sickness and death rates; a heavy relief burden during the Great Depression; inadequate recreational facilities; lack of building repairs; neglect of garbage disposal and street cleaning services; overcrowded schools; high rates of crime and juvenile delinquency; and rough treatment by the police. DRAKE AND CAYTON, op. cit. supra note 6, at 202 (1945).


11 SHEEH, op. cit. supra note 5, at 28.

12 It would appear that there never has been adequate philosophical treatment of the problem of applying civil liberties in a constitutional democracy. Some of those philosopher-lawyers who are wont to decry, at length, recent alleged manifestations of government absolutism, would be performing a great service if they would turn just a bit of their intense efforts in this direction.
Middle Western states. Their continued use was made an absolute necessity in maintaining racial restrictions in real estate when the Supreme Court in 1917 invalidated state and municipal efforts to enforce urban residential segregation on the grounds that it offended the Fourteenth Amendment.

As a general proposition such covenants have been held not to violate the Fourteenth Amendment, since that great effort to insure human liberty, because of the double restriction of a judicial myopia and a petrifying stare decisis, has been held applicable only to state action and not to the conduct of private individuals. Since such covenants are the matter of private agreement their immunity from constitutional condemnation followed. However it might be noted that at least one lower federal court thought them unconstitutional. Racial restrictive covenants which were lim-


14 Buchanan v. Warley 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917). In this decision the Supreme Court rejected the spurious "separate but equal" argument which had been successfully used in sustaining the validity of segregation legislation in the fields of education and public transportation. The Court pointed out that, since land is a unique commodity, it is impossible to provide "equal" housing locations. The municipal racial zoning ordinance in that case was, therefore, a violation of the equal protection clause and not justified as a reasonable exertion of the police power.

15 Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). Whether this interpretation was one in accord with the original congressional intent is highly questionable. See Place, The Adoption Of The Fourteenth Amendment (1908); Swisher, op. cit. supra note 1, at 329-334.

16 Corrigan et al. v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969 (1924) where the Supreme Court, without a discussion on the merits, dismissed an appeal from a lower federal court which had upheld the validity of a racial restrictive covenant in the District of Columbia. The Court merely noted that it was without jurisdiction since no substantial federal question was raised. Although there was a wayside nibble to the effect that court enforcement of such covenants would not violate the Fifth Amendment, the point had not been argued and certainly was not conclusively decided in the case. See McGowney, Racial Residential Segregation By State Court Enforcement Of Restrictive Agreements, Covenants Or Conditions In Deeds Is Unconstitutional, 33 Calif. L. Rev. 1 (1945).

17 Gandolfo v. Hartman, 49 Fed. 181 (1892) where Judge Ross made it very clear that for the court to enforce a covenant in a deed providing that the grantee should never rent the property "to a Chinaman" would be a denial of
The rationale was that the restraints of this sort were reasonable measures to protect real property values. The analogy relied on was the field of building restriction litigation where the right of landowners to contract with each other as to the future use which their property could be put had been sustained. The fallaciousness of this comparison will be referred to later. However, some courts balked when the restriction was unlimited as to time, and held them to be, in such a case, an unreasonable restraint.  

As to covenants prohibiting sale to certain racial groups, there existed a split of authority. Earlier decisions invalidated them on the grounds that such a restriction constituted an absolute restraint on alienation since the restriction was against all of a race all of the time. Later decisions adopted the somewhat strained rationale that restraints as to sale were not unreasonable since they were only limited in scope, i.e., they applied only to one group. This line of reasoning can be criticized on the theory that it has conveniently overlooked the fact that these covenants almost always bar more than one race or religion.

Nor had attacks on these covenants based on considerations of public policy enjoyed much success. It is true that equal protection of the laws. Moreover, the court relied on provisions of a treaty with China to justify the decision. Indeed, Judge Ross appears in this decision as a man who was far ahead of his times!


19 Foster et al. v. Stewart et al., 134 Cal. App. 482, 25 P. (2d) 497 (1933). The case seems later to have been implicitly overruled on the point in Burkhardt v. Lofton et al., 63 Cal. App. (2d) 230, 146 P. (2d) 720 (1944).

20 Williams v. Commercial Land Co., 34 Ohio L. Rep. 559 (1931); Bulen v. Rice, 11 Ohio L. Abs. 175 (1931); Doherty et al. v. Rice et al., 240 Wis. 389, 3 N.W. (2d) 734 (1942).

21 Steward v. Cronan et al., 105 Colo. 393, 98 P. (2d) 999 (1940); Lyons v. Wallen, 191 Okla. 567, 133 P. (2d) 555 (1942); Lion's Head Lake v. Brzezinski, 23 N. J. Mis. Rep. 290, 43 A. (2d) 729 (1946).

22 The courts on frequent occasions have refused to discuss the public policy
Pennsylvania seemed to have outlawed them through judicial decisions, although the point had not been settled with finality. The very great majority of state tribunals, however, had either rejected arguments based upon public policy or ignored them entirely. Public policy arguments were relegated to secondary consideration. The primary issue seemed to be whether a particular restrictive covenant violated the rule against restraints on alienation. If this were not the case, the covenants were allowed to stand.

Moreover, this tendency to emphasize dry, historical abstractions concerning property concepts was aided by the manner in which the question arose. The earliest cases were suits at law for forfeiture on breach of condition. The precedents thus laid down had their roots in an atmosphere of excessive emphasis on contract rights, an emphasis which was carried over into the later cases where equitable relief was the remedy sought. Normally, in decisions involving requests for the assistance of the "long arm of equity" constitutional and public policy questions occupy a position of paramountcy. In the cases dealing with racial restrictive covenants they were slighted to a large extent, and contract "rights" became the dominant, if unrealistic theme.

It could be noted that the courts who pitched their decisions in these cases solely on alleged principles of contract aspects of granting equitable relief in these cases. See e.g., Porter v. Johnson, supra note 18; Burkhardt v. Lofton, supra note 19.

Ellsworth v. Stewart, 9 Erie County L. J. 305, 311 (Pa. 1928); Yoshido v. Gelbert Improvement Co., 58 Pa. D. & C. 321 (1946). Although these cases treated of permanent restrictions on sale, the language of the court in both cases would seem to outlaw all racial restrictions.

Steward v. Cronan et al., 105 Colo. 393, 98 P. (2d) 999 (1940); Mays et al. v. Burgess et al., 147 F. (2d) 869 (D. C. App. 1945), 79 U. S. A. D. C. 343. In rejecting public policy arguments the usual technique was to point the fact that the legislature had not forbidden the practice of racial restrictive conditions in deeds of property. It was felt, therefore, beyond the proper functions of the court to do so. See, e.g., Lion's Head Lake v. Brzezinski, supra note 21.

Queensborough Land Co. v. Cazeaux et al., 136 La. 724, 67 So. 641 (1915).


law were in reality making a choice of public policy. In effect, as Dean Ribble has accurately appraised it,

... a court's finding that a restraint is reasonable and consequently valid, is simply a way of saying that the court believes that the policies favoring the [racial] restraint outweigh the policies opposed to it, so that the state's welfare is better served by allowing the validity of the restraint than by denying it.28

However, it must not be thought that in all cases wherein racial restrictive covenants were sought to be enforced there were no successful defenses open to the defendant property purchasers. At least one federal court thought racial restrictions were unconstitutional, and, moreover, in that particular case held that they violated the treaty power.29 Furthermore, they seemed to be outlawed in at least one state as contrary to public policy.30 In addition to these isolated examples of judicial refusal to enforce racial restrictive covenants because of broad considerations of constitutionality and public policy, there were some technical defenses which sometimes were successfully asserted by the defendant property purchaser. For instance, a substantial change in the restricted district or adjoining neighborhood would at times lead a court to deny enforcement of the racial covenant.31 The defense was given a strict construction by the courts and the test applied was, whether the infiltration of the excluded group had caused such a change in the neighborhood that it would be to the pecuniary advantage of the property owners to remove the restriction and permit them to sell outside the restriction.32


30 Supra note 23.


Again, the ancient doctrine of laches, abandonment, and waiver of enforcement had sometimes been successfully invoked. Miscellaneous other defenses once in a while had saved the day for the purchasers of property covered by racial restrictions. They included technical deficiencies in signatures on mutual covenants, and ambiguities in the agreement itself which afforded a chance for application of the rule of strict construction of an instrument against the grantor. All these successful technical defenses were the exception, however, not the rule.

A short resumé of the legal aspects of racial restrictive covenants, plus just a brief reference to the more recent sociological background prior to the recent Supreme Court pronouncements on the subject, should serve to introduce that decision. Racial restrictive covenants did not in themselves violate the due process and equal protection clauses of either the Federal Constitution or those of the states. Whether judicial enforcement of these covenants violated the constitutional prohibitions had not been squarely decided although there were off hand dicta to the effect it did not. Whether they could be interpreted as outlawed by certain treaty obligations on the part of the United States had scarcely been considered, although one perspicacious federal judge had given a hearty affirmative. Public policy considerations were no barrier to the enforcement of racial restrictive covenants although one state, along with Canada, had felt otherwise. Restraints on sale, as opposed

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33 See cases cited and discussed in 162 A.L.R. 194 (1946).
34 Jones, Legality Of Racial Restrictive Housing Covenants, 4 NATIONAL B. J. 14, 25 (1946).
36 Corrigan et al. v. Buckley, supra note 16.
37 Ibid.
38 Gandolfo v. Hartman, supra note 17.
39 Ibid.
40 Re Drummond Wren, 4 D.L.R. 674 (1945). But cf. Re McDougall and Weddell, 2 D.L.R. 244 (1945). Moreover, the Ontario Supreme Court has recently, in an unreported case, upheld a covenant restricting Jews and Negroes from purchasing or occupying certain summer resort property on Lake Huron. The prin-
to restraints on occupancy and use, had, however, been struck down as offending against the rule prohibiting restraints on alienation. Moreover, there were isolated examples of successful assertion of technical defenses.

While restrictive covenants might have seemed to the socially myopic quite secure from the possibilities of successful legal attack, the concentrated pressures of ghetto housing conditions were beginning to make a severe challenge to their continued immunity and their divorcement from the realities of our society. Previous reference has been made to the many sociological and statistical surveys which accurately and dramatically painted the dismal picture of the effects of racial discrimination in housing. The problem had been less acute in the "Age of the Great Depression" since Negro migration to Northern cities had decreased greatly. However, with World War II came an acute housing shortage plus a great influx of Negro war workers to the great urban centers. With the boosted income which the Negro war worker was receiving he was able more successfully to compete in the market for lower and middle-class housing. Numerous sales in violation of racial restrictive covenants followed and the stage was set for a battle in which the Supreme Court finally had to speak, in what, it is hoped, will be the last word on the question.

The racial restrictive covenant cases which were joined and brought before the Supreme Court for decision at the last term illustrate three different types of these discriminatory real estate devices. *Shelley et ux. v. Kraemer et al.*, cipal ground upon which prior decisions disallowing racial covenants were distinguished was that the previous cases had dealt with shelter, in the instant case the court felt the main purpose of the resident was recreation! Is there no limit to the artificial rationalizations which some courts can conjure up when they wish to sustain racial and religious discriminatory practices? See *Shelter But No Fun*, New Republic, July 5, 1948, p. 8. In the *Re Drummond Wren* case the Ontario High Court had relied, in part, on Canadian adherence to Articles 55c and 56g of the United Nations Charter which pledge the member nations to active steps in removing racial discriminations. Apparently the court believes that a summer colony enjoys a peculiar immunity from treaty commitments.
one of the state cases, involved a restrictive covenant limiting use and occupancy to the "Caucasian race" for fifty years. The condition ran with the land and was to be a condition precedent to the valid sale of the same. The owners of various parcels of land subject to the terms of the restrictive covenant brought suit against a Negro purchaser, Shelley, who had bought without knowledge of the restriction. The relief prayed for was that Shelley be restrained from taking possession, and that judgment be entered divesting title out of Shelley and revesting it in the immediate grantor or such person as the court might direct. After being denied relief before the trial court on a technicality, the Supreme Court of Missouri reversed and granted the relief requested, holding inter alia that the covenant violated no provisions of the Federal Constitution. 41

The second case involving an appeal from a state supreme court ruling was Sipes et al. v. McGhee et ux. 42 There the restriction was once more limited to the anthropological elite, the members of the "Caucasian race". This time, however, the barrier against alleged racial inferiors was to run forever. The Michigan Supreme Court affirmed a lower court decision directing the Negro purchasers to move from their property within ninety days and enjoining them from using or occupying the premises in the future.

The third of the racial and religious restrictive trilogy was Hurd v. Hodge, a case wherein appeal was made from a decision of the Circuit Court of Appeals for the District of Columbia which had upheld a restrictive covenant on property located in the District of Columbia. 43 Here the prohibition was extended to sale, in addition to occupancy, and was to run indefinitely. The Circuit Court had sustained a judgment of the District Court declaring the sale to a Negro purchaser null and void, enjoining the Negro

purchasers from leasing or conveying the properties, and
directing them "to remove themselves and all of their per-
sonal belongings" from the enclave of white supremacy which
they had invaded. It should be noted, however, that this
last decision was punctuated by a courageous, brilliant, and
devastating dissent on the part of Associate Justice Henry
Edgerton of the circuit court of appeals. Indeed, Justice
Edgerton's dissent was a classic in the Holmes-Brandeis
tradition. It undoubtedly served to focus the attention of
the Supreme Court on the problem and to induce an authori-
tative ruling on the points involved.44

Although the three cases involved different types of racial
restrictive covenants, all three presented fundamentally the
same constitutional issues. Specifically, the prime question
to be decided was whether judicial enforcement of the re-
strictive covenants violated the equal protection clause of
the Fourteenth Amendment of the Federal Constitution. Of
course, in the District of Columbia case, the contention was
that such judicial enforcement violated the Due Process
Clause of the Fifth Amendment. Analysis of the opinion of
the Court discussion of Hurd v. Hodge will be taken up
after appraisal of the Court's ruling concerning state judi-
cial enforcement of restrictive covenants.

The first hurdle to be judicially cleared was the imposing
figure of Corrigan v. Buckley, where it had been decided that
restrictive covenants, as such, do not violate the Fourteenth
Amendment.45 Moreover, there was the dicta in that deci-
sion which indicated that judicial enforcement of the cove-
nants was likewise free from any constitutional defects.46

44 Justice Edgerton would strike down restrictive covenants as "void because
contrary to public policy," and void as an unreasonable restraint on alienation.
He regarded judicial granting of equitable injunctive relief in such cases as for-
bidden by the Constitution, by the Civil Rights Act, and by principles of equity.
As he so penetratingly put it: "Suits like these, and the ghetto system they en-
force, are among our conspicuous failures to live together in peace". Hurd v.
Hodge, supra note 43, 246.
45 Corrigan v. Buckley, supra note 16.
46 Counsel had argued in Corrigan v. Buckley that judicial enforcement
would violate the equal protection clause of the Constitution. To this the Court
In the instant case the Supreme Court thrust *Corrigan v. Buckley* aside by the ingenious, but not entirely accurate technique, of saying that decision was not an adjudication on the merits of the constitutional issues now raised. *Corrigan v. Buckley* stood only for the proposition that the prohibitive force of the Fifth and the Fourteenth Amendments do not apply to the actions of private individuals.\(^{47}\)

With *stare decisis* removed as an obstacle, the Court then plunged forward to analyze the nature and purpose of restrictive covenants. It is to their everlasting credit that the Court rejected the spurious analogies to building and land use restrictions,\(^{48}\) a concept which many courts had accepted in the past. The Court pointed out the obvious fact, that racial and religious restrictive covenants are directed not at the *use* made of the property, but rather at the *user* of the property, the prohibited racial group. The judicial realism which the Court demonstrated in piercing the purely semantic similarity between *land* use restrictions and *race* use restrictions is commendable. After all, restrictions prohibiting land to be used for saloons, slaughter houses, and manufacturing plants exuding noxious vapors and ringing with the disturbing cacophony of an industrial bedlam, have a reasonable relation to the public health, safety, and the general welfare.\(^ {50}\) Racial restrictions on property purchases carry no such implied justification. In fact, the point was settled in *Buchanan v. Warley*,\(^ {51}\) wherein racial zoning by a municipality was struck down as unconstitutional, with the Court there making the point that racial zoning has no relevancy "to the public health, safety, moral or general welfare."\(^ {52}\)

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47. 68 S. Ct. 836, 840.
52. See Miller, *op. cit. supra* note 27, at 101.
Having exposed the false analogy between land use restrictions and land user restrictions the Court approaches more closely to the legal heart of the matter: do these racial restrictive covenants offend in the constitutional sense? While the writer appreciates the fact that the barnacles of stare decisis would make any direct outlawing of racial restrictive covenants in this decision a rather rash reversal of entrenched constitutional doctrine, he does regret certain unnecessary remarks made by the Chief Justice, who wrote the opinion. After making it clear that one of the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment was the right to acquire, enjoy, own, and dispose of property, he goes on to give aid and comfort to those who wish to vitiate the spirit of the Fourteenth Amendment by restricting it to the dry letter, or less. The Chief Justice remarked that the Fourteenth Amendment touches only state actions, and does not provide a shield against "merely private conduct, however discriminatory or wrongful". He concludes, therefore, that restrictive covenants standing alone and effectuated only by voluntary adherence, remain in the constitutionally immune sphere of private conduct and do not violate the Fourteenth Amendment. This unnecessary dicta is, as Professor Frank has recently pointed out, the most unfortunate aspect of the decision. The recent growing demand, dramatically articulated by Justice Black's well documented dissent in the Adamson case, for a return to what is believed to be the proper original Congressional intent in passing the Fourteenth Amendment, should warrant judgment on the merits of the issue when specifically raised. Wayside nibbles couched in unnecessary dicta serve only to confuse the issue, deter

68 S. Ct. 836, 842.


55 See Note 2 supra. See also Coudert, Adamson v. California and the Bill of Rights, 34 A.B.A.J. 19 (1948).

56 See Note 2 supra.
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its precise presentation, and give aid and comfort to those who rejoice in the fact that the crimes against humanity which they commit as an individual homo sapiens are still beyond the constitutional pale. In his unneeded asides Mr. Chief Justice Vinson ignored the late Mr. Justice Harlan's acute admonition that "a question was never settled until it was settled right."

However, the opinion of the Chief Justice more than atones for the disturbing dicta when the problem of state action is tackled. He recites first the many decisions in which judicial recognition had been made of the fact that judicial action is to be regarded as action of the state for the purposes of the Fourteenth Amendment. Moreover, the rule thus enunciated in the prior cases has not been confined to unfair judicial action of a purely procedural nature. State court action enforcing a substantive common-law rule has sometimes resulted in a violation of the Fourteenth Amendment in the past. Against this background the Supreme Court then proceeds to extract the rule of the case, a decision of constitutional law of the utmost importance. The Court decides that the equal protection provision of the Fourteenth Amendment, which protects against discrimination by the states in the enjoyment of property rights, is violated when the racial restrictive covenants are judicially enforced. The boldness of the Supreme Court's action can be best appreciated by remembering that never before had it been even intimated that the action of a state court in construing a private contract, such as a restrictive covenant, was state action. But here, said the Supreme

57 68 S. Ct. 836, 842-844. See, e.g., Ex Parte Commonwealth of Virginia, 100 U. S. 339, 25 L. Ed. 676 (1880), where the discriminatory exclusion of Negroes from jury panels by a state judge was struck down as unconstitutional.

58 68 S. Ct. 836, 844. See, e.g., American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941), where enforcement of state courts of the common-law policy of the state, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Fourteenth Amendment due process provisions protecting freedom of speech.

59 68 S. Ct. 836, 845.
Court, "the States have made available to individuals the full coercive power of government to deny the petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell". 60

Here then is the crux of the decision. Judicial enforcement of a private contract can violate the equal protection provisions of the Fourteenth Amendment if its effect is to lend the coercive power of court enforcement in a constitutionally prohibited manner. Now will come the wailing and gnashing of teeth on the part of those who believe alleged contract "rights" stand alone and beyond the Constitution. It would do no good to remind them, in a sense, the case represents a victory for property rights since a contrary result would have meant that the valuable contract obligations of a willing purchaser and equally willing seller were abrogated.

While the proposition that judicial enforcement of a private agreement is state action might shock many, little reflection is needed to demonstrate its analytical accuracy, not to mention its advantages as a means of insuring that the letter of the Constitution is now revitalized by a large swallow from its spirit. After all, the law of contracts is not a matter of private agreement. The agreements entered into may be classified as private affairs. However, when resort is had to a state court seeking enforcement for breach of such an agreement, it is the law of contracts which then must be invoked. The law of contracts does not tell what contracts one must make, but only that if one chooses to act in a certain way, certain legal consequences will follow. 61 The law of contracts like any other positive law is "a general rule of external human action enforced by a sovereign poli-

60 Ibid.
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tical authority."\textsuperscript{62} Agreements may reside in the sphere of private acts; their enforcement by a court invades the domain of sovereign action and must partake of the constitutional limitations affixed thereto. (Emphasis supplied.) As a learned colleague of the writer has said:

Any contract between two parties . . . is in its ultimate significance but an act of specification of the unity of the administration of human conduct. As a law making act and, therefore, an administrative act, this contract is actually an act of public law.\textsuperscript{63}

To put the matter in a more concrete frame of reference, law in its broad sense may be compared to an electrical wiring system. The legal remedy is the light switch; the wires are the various forms of legal process, judicial, legislative, and administrative; the electricity carried by the wires is the substantive operation of the law; and the light which it furnishes is the end result of the process, such as the judgment, statute, administrative adjudication or rule. The initiation of a legal remedy is often a private matter; you must pull the switch in many cases, since its operation is not always automatic. Once, however, the proper switch is pulled, the matter becomes one of public cognizance. The remedy, process, and legal result entailing whatever consequences they do, are all forms of sovereign action. As such, all are subject to the constitutional safeguards. In instituting suit for enforcement of a restrictive covenant you are pulling the switch. After that, the matter passes out of the

\textsuperscript{62} \textsc{Holland}, \textit{Jurisprudence} 40 (10th Ed., 1906).

\textsuperscript{63} \textsc{Chroust}, \textit{Law And The Administrative Process: An Epistemological Approach To Jurisprudence}, 58 \textsc{Harv. L. Rev.} 573, 581 (1945). Professor Chroust informed this writer in a personal chat that there is a sound historical basis for this proposition, in addition to its apparent analytical accuracy. In ancient times if A agreed to oversee B's land in return for payment in gold and goods upon completion of the job, what rights did he have if B refused to pay, rejected his claims, and had A soundly thrashed by his men? If he had no followers, he had no remedy for enforcement of the agreement. If he had followers, then civil war or rebellion was his remedy. We sophisticated moderns have substituted judicial enforcement of agreements for armed attack. Your contract rights in both cases depend on your remedies. Without them, your private agreement remains simply that.
domain of private affairs and enters into the arena of public authority. Thus seen, the positive law basis of legal rights (which, of course, find their fundamental roots in the immutable principles of justice, i.e., natural law) lies in the remedy afforded by the sovereign. In granting this remedy through court enforcement, even of private agreements, the mandates of the Constitution are applicable. The restrictive covenant decision by the Supreme Court articulates that proposition beyond question. It is a monumental contribution to legal theory in general, and to constitutional law theory in particular.

One final point raised by respondents in the state cases needs to be met. The argument was pressed that since the state courts stand ready to enforce restrictive covenants which exclude white persons from ownership or occupancy of property, enforcement in the instant case of the covenants excluding Negroes could not be deemed a denial of equal protection of the laws. Mr. Chief Justice Vinson's rejoinder to that non sequitur is his best turned phrase since his elevation to the Supreme Bench. He pithily puts it: "Equal protection of the laws is not achieved through the indiscriminate imposition of inequalities". And that is that. Any alleged pattern of racial restrictions on property imposed by Negroes against non-Negroes probably exists only in the frenzied imaginations of the apostles of intolerance. Moreover, if true, they would be as unjustified as similar acts on the part of whites.

Completing discussion of the restrictive covenant decision requires us to examine briefly the federal case, *Hurd v. Hodge* arising from the District of Columbia. Principal reliance of petitioners in this case was on the Fifth Amendment due process objection. However, additional arguments

64 68 S. Ct. 836, 846. As one note writer put it, the Negro's "right" to discriminate is as much value to him, "as the right possessed by a creditor whose cause of action is barred by his debtor's release in bankruptcy." Note, 37 ILLINOIS B.J. 88 (1948).

65 334 U.S. 24, 68 S. Ct. 847, 92 L. Ed. 857 (1948).
had been pressed, including objections that judicial enforcement of the covenants would violate the Civil Rights Act of 1866 and would be contrary to the treaty obligations of the United Nations charter; enforcement of the covenants would contravene the public policy of the United States; enforcement of the covenants would be inequitable.

The Court resorted to a familiar technique for avoiding a ruling on the constitutional issue. It placed its holding on purely statutory grounds, finding that judicial enforcement of these discriminatory private agreements is prohibited by the Civil Rights Act of 1866. Moreover, the Court indicated that even in the absence of statute judicial enforcement of the restrictive covenants would violate the public policy of the United States. Chief Justice Vinson felt that the action by the federal courts was of a nature that if undertaken by state courts it would be held to be a violation of the Fourteenth Amendment. The public policy of the United States requires no less protection for equal protection of the laws.

It is to be regretted that the Court hedged in placing their decision squarely on the constitutional point as they had done in the state cases. However, since it is beyond legitimate cavil that they would have done so if absolutely necessary, there was no harm in their display of judicial timidity after such bold and courageous action in the state cases. This writer is disappointed, however, that the treaty power argument was not at least discussed. This argument has been raised in two recent cases involving state legislation.

66 68 S. Ct. 847, 849. Although the vote was once again six to nothing, Mr. Justice Frankfurter concurred on the sole ground that it would be inequitable to enforce these covenants in a federal court.

67 Id. at 852. The Court referred to the historical background of the Civil Rights Act and correctly concluded that the guarantees of that Act, including the right to hold property free from discrimination, were the same which the Fourteenth Amendment later embodied as applicable to the states. See Flack, op. cit. supra note 15, at 94-96.

68 68 S. Ct. 847, 853.
discriminating against aliens. The time is getting ripe for a precise determination of the question whether federal action under a bona fide treaty, by the terms of which we are pledged to eliminate racial discrimination, would prevail over state imposed discrimination. This writer feels that the only barriers which face an affirmative answer to that question are the still strong traces of a parochial nationalism. Maybe the Court was right in postponing the issue till another day. The passage of time and the accumulation of experience on the part of the United States in active internationalism might make easier the acceptance of the concept that federal action under a valid treaty may be relied on to restrict racial discrimination masquerading under the seductive cliché, "states rights."

69 Oyama v. State of California 332 U. S. 633, 68 S. Ct. 269, 92 L. Ed. 257 Adv. (1948), noted in 23 NOTRE DAME LAWYER 409 (1948); and Takahaski v. Fish and Game Commission et al., 334 U. S. 420, 68 S. Ct. 1143, 92 L. Ed. 1101 Adv. (1948), noted in 24 NOTRE DAME LAWYER 119 (1948). In the Oyama case, Mr. Chief Justice Vinson in his majority opinion impliedly acknowledges the validity of the treaty power argument. 68 S. Ct. 269, 277. In their concurring opinion, Mr. Justice Murphy and Mr. Justice Rutledge recognize the violence which the discriminatory alien land laws of California do to the charter of the United Nations. Id. at 288. In the Takahaski case, while the treaty power argument was not alluded to, the general flavor of Mr. Justice Black's majority opinion and that of the concurring opinion of Mr. Justice Murphy and Mr. Justice Rutledge give definite indication that the hour of its reception might not be too far in the future.

70 In the opinion of this writer no legal obstacle would seem to stand in the way. The proposition was early established that a valid treaty overrides conflicting state legislation. Fairfax Devissee v. Hunter's Lessee, 7 Cranch 603 (1813). Moreover, the Federal Government may be permitted to act by the treaty power in cases where it could not act under its other delegated powers. Missouri v. Holland, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A.L.R. 984 (1920). See III BOYD, THE EXPANDING TREATY POWER, in III SELECTED ESSAYS ON CONSTITUTIONAL LAW 410-435 (1938). The limitations on the use of the treaty power would appear to be: (1) it must be a bona-fide and not a sham treaty; (2) there must be a legitimate subject matter of a treaty; (3) the power given could not be one in contradiction of one of the direct prohibitions of the Constitution, such as passing an ex post facto law; and (4) the treaty power could not be used to impair the federal nature of our form of government. This last condition is the one which the racial baiters and "haters" might enlarge and distort in order to prevent federal action taken under the treaty power to remove discrimination enforced through state action.

71 For an interesting analysis and appraisal of recent achievements of international legal cooperation on the functional level, see Freeman, International Administrative Law: A Functional Approach To Peace, 37 YALE L.J. 976 (1948).
Having completed analysis of the constitutional and jurisprudential aspects of the Supreme Court's ruling, conjecture as to future consequences: legal, economic, and social, would be in order. There is no doubt that the important constitutional point of the case will again rear its head in litigation to come. Remember, we have accepted the cases as sound, if novel, authority for the proposition that a court may not by its decree achieve a constitutionally prohibited discriminatory result, even in enforcing a private agreement, when the same result could not be constitutionally permissible if attempted to be achieved by legislative action. This is a broad proposition. It covers a vast area. But then again, the pattern of racial segregation by private agreement is broad. In fact, the Justice Department has demonstrated that racial covenants as a substitute for legislative action have far greater effectiveness than the latter method. Thus the Court may have fashioned nothing less than was needed for the job. Still, the broad ramifications have given at least one friendly observer a moment of wonder, if not apprehension. Where the precise logical limitation on the broad sweep of the doctrine will be applied must remain, for a while, the disputed theorem of law review soothsayers. Sprinkling his share of Sibylline leaves, this writer ventures to say the doctrine that judicial enforcement of private agreements are subject to the prohibitions of the Fourteenth Amendment will be canalized within the clearly delimited sphere of civil or personal liberty cases, and will not lap over into the great expanse of substantive due process, wherein the fertile fields of contract, tort, equity, administrative law, et al., might present a plethora of certiorari petitions to plague the Supreme Court on its stilly night watches as guardian supreme of the Constitution.

72 Prejudice and Property, op. cit. supra note 4, at 60-61.
73 Frank, op. cit. supra note 54, at 23.
75 The writer's prophecy grows out of a conviction that the Court will continue to display a zealous attitude in reviewing civil liberty cases, while maintain-
Moreover, the doctrine announced by the Supreme Court gives constitutional theory a moral catharsis which it has long needed. The dry bones of the letter of due process and equal protection have now been fattened up a bit with the tough fiber of their spirit. The tonic which did the trick may have involved some legalistic hair splitting on the part of the Court who administered it. Nevertheless, the vivification of the Fourteenth Amendment by our top oracle, the American Delphi, should have its ramifications in our jurisprudence and in the social conditioning of the American people, and as a persuasive advertisement to our foreign neighbors that we “practice what we preach” when we crusade for human rights on the international level.

There have been several lower court decisions since the Supreme Court spoke. In one, the New York Court of Appeals reversed a lower court decision and refused to enforce racial restrictive covenants. No opinion was written by the reversing court. The order simply reversed on the authority of the Shelley case. In New Jersey the Court of Chancery followed the Shelley case in holding restrictive covenants unenforceable. The reason assigned was that “action by state courts in the enforcement of such agreements” was prohibited on the authority of the United States

ing an attitude of judicial self restraint in approaching questions which involve allegations of the deprivation of property rights. The grand paradox in the Holmes tradition will continue to manifest itself in the present Court. At least, that is a hopeful personal conviction. See Barnett, Mr. Justice Murphy, Civil Liberties And The Holmes Tradition, 32 CORN. L.Q. 177, 220 (1946); Pritchett, op. cit. supra note 2, at 286-287; and Schlesinger, The Supreme Court: 1947, 35 Fortune 78 (1947) for corroboratory views. In fact, this belief gains added weight out of the restrictive covenant decisions themselves. Mr. Chief Justice Vinson, whose first year on the bench had not produced any startling displays of his admiration for civil liberty, wrote the instant opinions. Having sired a radical doctrine for the defense of human rights, his abandonment of it seems unlikely.

The law can never equal ethics, but it can approximate that goal. Last year aroused community pressure caused the dismissal of suit brought on a restrictive covenant to compel a Gentile wife to evict her Jewish husband. The husband, overwhelmed by the tremendous wave of sympathy and offers of assistance, announced that he had renewed faith “in the essential decency of people.” Newsweek, Sept. 29, 1947, p. 29.

Supreme Court decision.\textsuperscript{78} New Jersey courts might very well have reached the same result by relying on a provision of their new State Constitution (effective Jan. 1, 1948) which prohibits discrimination in the enjoyment of a civil right.\textsuperscript{79}

However, while the legal protections surrounding the pattern of racial segregation in real estate have been irrevocably impaired, if not entirely vitiated, nevertheless the social and economic barriers remain almost unscathed. The vicious practice of racial segregation, reinforced up to now by the sheriff’s writ, has eaten deeply into the moral core of our society. The Negro ghetto has become, unfortunately, “an accepted part of the American landscape”.\textsuperscript{80} It maintains its position by many lines of defense, of which the restrictive covenant has been classified as the least effective, far inferior in its coercive power than others.\textsuperscript{81} A hypocritical code of real estate “ethics” insures few, if any, sales by a white vendor to a “non-Caucasian” purchaser. However, it can be noted that in a falling, deflationary market these alleged protectors of “white supremacy” seem easily able to violate the tacit provisions of their own unwritten understandings.

However, if a Negro purchaser does manage to find a willing white seller he usually finds almost insurmountable the problem of mortgage financing and construction credit.

\textsuperscript{78} Rich v. Jones, 142 N. J. Eq. 215, 59 A (2d) 839 (1948).

\textsuperscript{79} “No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry, or national origin.” N. J. Const. Art. I, § 5. This same provision had been relied on by New Jersey’s governor to sustain that state’s policy of non-segregation in the state militia even when under federal control during training periods. The War Department, which has pursued a policy of segregation in the armed forces, bowed to state sovereignty in this matter. New York Times, Feb. 9, 1948, p. 9. It is refreshing to see the concept of “states rights” being applied, as Jefferson intended it to be, to promote the equality of human dignity. Too often it has been perverted and used as a protective facade for human oppression.

\textsuperscript{80} ABRAMS, RACE BIAS IN HOUSING 5 (1947).

\textsuperscript{81} See Frank, \emph{op. cit. supra} note 54, at 24.
The property suddenly becomes less valuable although the rate of return, if leased, would usually be higher. Even the Federal Housing Administration until recently has impliedly sanctioned racial restriction in real estate by their mortgage underwriting practices. Happily, recent successful anti-trust prosecution against the Mortgage Conference of New York indicates that the weapon of discrimination in mortgage financing may be breaking down. A consent decree judgment was obtained in the Federal District Court for the Southern District of New York which prohibits thirty-three banks, trust companies, and insurance companies from getting together with other mortgage lenders to engage in various restrictive and discriminatory practices in placing in the New York City area. For the purposes of this article, the most relevant of the practices now outlawed was the lack of competition for mortgages on property owned by certain racial or religious minorities. It is hoped that we are witnessing the demolition of another line of defense in the fortress of intolerance and racial discrimination.

Unhappily, other more powerful protective battlements remain. The most potent of all, of course, is voluntary adherence to a community practice of racial or religious segregation in housing. Here the problem becomes one of ethics, an individual tussle with conscience. In this sphere, the operative effects of the positive law in breaking down real estate segregation are dull and ineffective instruments. Only a long-range experience in peaceful and harmonious inter-

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82 Walter White points out that when Negro tenants are taken in, owners profit through lower taxes, decreased expenditures for upkeep, and are able to break one-family dwellings down into many multiple units yielding a higher total rent. White, op. cit. supra note 8, at 45.

83 To Secure These Rights, Report of the President's Committee on Civil Rights 68 (1947).


85 For the reaction of some local realtors to the Supreme Court's ruling in the instant cases see New Republic, Sept. 20, 1948, p. 29. Purchase of a home in a fashionable district of Los Angeles by the Negro musician, King Cole, touched off a storm of local protest recently. Chicago Sun-Times, Aug. 1, 1948, p. 5.
RACIAL RESTRICTIONS IN REAL ESTATE

racial neighborhood social exchanges can serve to introduce the day when societal ethics corresponds with the great democratic spirit of the Constitution.

Even when voluntary adherence fails to hold the color line there are ugly, more violent methods of enforcing the collective will of neighborhood bigotry. Examples of mob violence against Negro purchasers are all too well established on the black escutcheon of America's history to be denied. Moreover the Michigan Committee on Civil Rights has come forth with a documented account of mob violence, police indifference, and mounting tension, which were set off recently by the Negro purchase of property in the Hamilton-Boulevard area of Detroit. Fortunately, the occurrences of such incidents seem to be diminishing as the realization grows that the presence of "non-Caucasian" neighbors will not cause the sky to fall, nor herald the arrival of the Interregnum. The experience of several large cities, including New York, Chicago, Philadelphia, and Los Angeles, with mixed occupancy housing projects has demonstrated that interracial harmony can flourish in non-segregated housing patterns.

Having digressed for some length on the social and economic obstacles which dot the long and difficult path to democracy in American housing patterns, it would be appropriate to return to the legal aspects of the situation. One

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86 See, e.g., Walter White's dramatic and tragic portrayal of the Sweet affair, a terrible episode of race hate and violence directed toward Negro purchasers of property in what had been considered a "restricted" area. WHITE, op. cit. supra note 8, at 72-79.

87 PROTEST DEMONSTRATIONS AGAINST NEGRO OCCUPANCY, Bulletin by the Detroit Chapter of the Michigan Committee On Civil Rights, Sept. 30, 1948, pp. 1-5. The Most Rev. Francis J. Haas, Bishop of Grand Rapids, is Honorary Chairman of this Committee.

88 See, e.g., supra note 76.

89 "Where Negroes are integrated with whites into self-contained communities without segregation, reach daily contact with their co-tenants, are given the same privileges and share the same responsibilities, initial latent tensions tend to subside, distinctions become reconciled, cooperation ensues and an environment is created in which interracial harmony will be effected." ABRAMS, op. cit. supra note 80, at 22.
thing is certain. The Supreme Court's ruling in the instant case, while it may have broken the back of the legal impediments to non-discrimination in housing facilities available to minority groups, does not mean that those who resist democracy on this front have given up. Unfortunately, there are many lawyers with a full bag of legal stratagems who will lead a last ditch fight for the continued legal sanctioning of immorality. There are many possible devices which may appear as the legal rearguard action of "operation bigotry" tries vainly to circumvent the Constitutional mandate. The following pages contain some of them. They should be appraised from two points of view: (1) Are they constitutional, and in all other respects legal? (2) Are they practical from the aspects of financial considerations of expediency?

The first possibility that suggests itself is the ordinary legal remedy of a damage suit against a seller who has sold in violation of a restrictive covenant. However, it would appear from a literal reading of the Supreme Court's decision in the instant case that judicial enforcement of the covenant by awarding money damages would be under the constitutional prohibitions equally with judicial enforcement in equity.\(^90\) Usually, the restrictive covenant contains a provision for liquidated damages for its breach.\(^91\) It appears as only an alternative method to enforce the racial discrimination. As such, its enforcement would be state official action and it would seem, according to the analysis previously made herein, that it must undergo the same tests of constitutionality. In this regard, it is obviously defective.\(^92\) Moreover, since money damages would hardly suffice as the real objective sought in these cases, the utility of the ordinary

\(^{90}\) "... the Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection to other individuals." 68 S. Ct. 836, 846. See Miller, op. cit. supra note 13, at 601.

\(^{91}\) There was a $2,000 penalty for breach of the covenant in one of the instant cases. The Court paid no heed to it.

\(^{92}\) At least two other writers agree. Miller, op. cit. supra note 13, at 601; Constitutionality of Enforcing Racial Covenants 17 U. OF CIN. L. REV. 277, 282 (1948).
liquidated damage provision would be very small. If the
damages were set at a very high figure they would act as
too great a deterrent to prospective purchasers, who might
contemplate that in a deflationary market at some future
day they might only be too glad to sell to a willing "non-
Caucasian" vendee. Furthermore, a prohibitive damage
provision in the covenant would in all likelihood be construed
as a penalty bond and hence unenforceable. The damage
suit as a means of preserving a pattern of segregation in
real estate seems constitutionally defective, and inefficacious
from pragmatic considerations of the realities of real estate
markets.

Another possible variation of the damage suit may be
attempted. Future restrictive covenants may require that
purchasers of the property give a cash deposit or bond to
insure compliance with the covenant. Thus, if the restric-
tive covenant is violated by one of the signers he may be
penalized through forfeiture of the cash he had deposited
when he signed the covenant. This method of securing the
aim of racial restriction seems exposed to the same twin
defects which were in a suit for money damages. A suit to en-
force the cash or bond requirements would be a resort to en-
forcement through state or public action and would seem to
be outlawed by the principle of the Shelley case for the
reasons advanced ante. On the other hand, if the money
was required in advance and a suit is instituted by the
vendor for the return of the forfeiture bond, the picture is not
so clear. No federal cause of action appears, and, unless these
covenants were considered void per se as against the public
policy of the state, the suit for recovery might well be un-
successful. Even if the policy of the state prohibited the
racial restrictive covenant, recovery of the cash deposit might
be denied on the theory that the parties are in pari-delicto.

93 In such a case the damage clause clearly would be not a pre-estimate of
the damage suffered by sale to the restricted minority, but merely a deterrent to
prevent breach and thus a "penalty". See McCormick, DAMAGES 599 (1935).
A realistic court, however, might take the view that such a penalty deposit was extracted under the duress of an almost unbreakable sellers' market in real estate. The real barrier, however, to the widespread use of the forfeiture bond as a circumvention of the Supreme Court's mandate is not legal, but practical. If the amount required to be put up in advance is too high, it would deter sales, and could be used only in very high price property areas. If the deposit required is small it may pay the prospective vendor to sell and forfeit the deposit. This would be especially true in today's inflationary real estate market.

Another device which may come into its own as an escape from conformance to constitutionality is the insertion of a covenant giving the original sub-divider of a real estate development power to approve or disapprove of future purchasers and occupants. Even if this plan were free of legal objections its utility would be confined to new developments. Moreover, the restraints imposed by the covenant are very broad in nature and theoretically could be used to bar any purchaser who incurred the disfavor of the original sub-divider. The hazardous implications of such an extremely vague and general power would cut down the sales attractiveness of almost any property which was subject to it. In addition to the practical disutility of this scheme there are certain legal objections that make its widespread adoption an unlikely probability. The rule against unreasonable restraints on alienation would seem to be directly in point here. Provisions which forbid alienation except with the consent of designated persons have been held invalid. The usual rule is that an equitable servitude which runs with the land, if unreasonable, will violate the rule against restraints on alienation. It is submitted that a covenant giving unlimited power to the original sub-divider to reject any purchaser would violate that rule. For the same reasons it is

95 Gladstone Mt. Mining Co. v. Tweedel, 132 Wash. 441, 232 Pac. 306 (1925).
96 CLARK, COVENANTS RUNNING WITH THE LAND 137 (1929).
believed a covenant forbidding purchase or occupancy of property by persons not approved by the majority of the five nearest neighbors would be void.\textsuperscript{97}

Another variation of the two plans just discussed is the "club" arrangement. A "club" might be established consisting of the local property owners who might either own all the land in the area concerned and lease it to desired occupants or have the right, under a covenant, to pass upon purchasers and occupants. Such an arrangement would hardly appeal to owners of property in fee simple who would, in all probability, take an unenthusiastic view of this surrender of ownership. The possibilities of the employment of this plan might be somewhat more real, however, in the case of future new real estate developments. Nevertheless, it is exposed to two objections from the legal point of view. If the ownership of the land by the "club" was merely technical, concealing the real purpose of the arrangement, it seems very probable that the present Supreme Court would pierce the fake covering of legality and deny enforcement of the covenant as an attempt to obtain indirectly the enforcement of a racial restrictive covenant where it could not be achieved directly. The Constitution applies equally to "sophisticated as well as unsophisticated" violations of its broad provisions of principle. In addition, if the "club" preserved the power, through a covenant, to pass upon purchaser and occupants, the rule against restraints on alienation would loom as a probable barrier to legality.\textsuperscript{98}

Another slight variation of the scheme to vest control in local property owners would be to use the corporate form. It would appear that this contrivance is exposed to the same legal and practical weaknesses which, it has been suggested, afflict the other types of "neighbor control" devices. Perhaps the creation of a land trust, under which all property would be conveyed to a title company which would not deed

\textsuperscript{97} \textit{Supra} note 95 and 96.

\textsuperscript{98} \textit{Supra} p. 184.
any parcel of land to an unwanted person, might be a more efficacious method of preserving "Caucasian culture". Yet, this idea too suffers from the fact that few home owners would desire to subject their right to sell to the necessarily vague, and perhaps arbitrary authority of another.

The use of the fee simple determinable may perhaps furnish an out for those who would seek to detour around the restrictive covenant decisions. A conveyance vesting a fee simple in the grantee, until a certain specified event happens, at which time the fee automatically reverts to the grantor or his successors, is a fee simple determinable. It is true that here also title reverts automatically, upon the occurrence of the event. However, application of the fee simple determinable device to racial prohibitions is a horse of another color. In the first place, attention has already been called to the fact that the Supreme Court acutely distinguished in the restrictive covenant cases between a restriction on a class of purchaser or occupant (user) as opposed to one on the use of the property. Enforcement of the former is unconstitutional, of the latter, constitutional, if reasonable. If the Negro purchaser refused to vacate the premises after the sale to him which would be the event causing the determination of the fee, a writ of entry or suit for ejectment would be necessary. Judicial enforcement would be public action and as such subject to the infirmity of violating the equal protection clause. Moreover, the sale price of property subject to this type of forfeiture clause would have to be set quite low to induce future purchasers to buy under such onerous possibility of reverter and loss of ownership.

The same objections, with perhaps more force, apply to a fee simple subject to a condition subsequent, for breach of which the grantor has a right of entry. Here, the fee does not terminate in the grantee automatically, but remains in the grantee until the grantor has exercised the right of entry reserved to him for breach of condition subsequent.
A proposal which, according to information received from the National Association for the Advancement of Colored People,\(^9\) has actually been put forward in Washington, D. C., merits explanation. Under this plan, a seller would notify a group of persons previously selected by the various local property owners of the respective sale. That person would then get a report of the prospective purchaser and if in the minds of the other residents the purchaser was undesirable, they would seek to find a new purchaser and could join together to buy the property themselves. Although there does not seem to be any legal flaw in this form of voluntary action on the part of property holders, it is obvious that the tremendous economic burden it would place on the participants to make its use purely theoretical save in the very expensive neighborhoods where more subtle and more effective forms of Caucasian self preservation make resort to it unnecessary.\(^10\)

Another scheme which has received some publicity in the District of Columbia area is the “square captain” plan.\(^11\) The proposal calls for the appointment of “square captains”, each one of whom would voluntarily be given options on the property in his area. If a property owner wishes to sell he would notify the “captain” giving him the name of the prospective buyer and the sale price. If upon investigation the prospective buyer is found to be “undesirable” the “captain” exercises his option and buys the house, actually not for himself, but for a more “desirable” buyer. The main defects in effective utilization of this scheme are practical ones. The protection it would give to those who participated would be largely illusory. False offers to buy would be easy

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\(^{9}\) Letter received by the writer from Marian Wynn Perry, Assistant Special Counsel of the N.A.A.C.P. Legal Defense, July 8, 1948.

\(^{10}\) Realtor “ethics”, discrimination in mortgage and construction financing, and high purchase prices, are already holding the color line so well in such areas that any further protection would be merely gilding the “white” lily.

\(^{11}\) Letter received from Dixie Duke, Executive Assistant of the National Association of Real Estate Boards, Washington, D. C. June 11, 1948.
to arrange and when substantial economic pressure made a change in the neighborhood inevitable, the restrictors would soon find themselves unable to take up all the options. Moreover, if a vendor sold in violation of the contract right bestowed by the option, a suit to set the sale aside might run into grave constitutional difficulties.\(^{102}\) Possibly too, the defense of "no consideration" might be available to the recalcitrant vendor. Moreover, an option to purchase realty is regarded in real property law as creating a future interest contingent upon exercise of the option. Thus, if there is a possibility that it will not be exercised within the time period prescribed by the Rule against Perpetuities the option would be void.\(^{108}\)

One final stratagem in the arsenal of those who would circumvent the mandate of the equal protection clause is the "high occupancy standard" plan. Under this idea covenants would be inserted to require high occupancy standards, such as those governing the minimum cost of dwellings, the number of occupants per room, the type of construction, etc. In the main such covenants are perfectly legal and, in fact, socially advantageous in preserving the stability, appearance, and beauty of residential living. This type of covenant, however, would be of little value in maintaining a segregated racial pattern. Moreover, if these covenants were broadened and specifically applied to the type of purchaser, such as one requiring him to have a college degree, they would very likely run afoul of the rule against restraints on alienation. Furthermore, their utility as added bulwarks against infiltration by "non-Caucasians" would decrease as expanding educational and economic opportunities increase for the members of minority groups who, up to now, have been held back in those fields.

\(^{102}\) Unless the "square captain" could demonstrate that he wished to purchase the property for his own use, which is obviously not the case, a court of equity would probably require that he be content with his remedy at law for damages.

\(^{108}\) See, e.g., Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914).
These are some of the devices that may be resorted to in a desperate effort to preserve "Anglo-Saxon" dominance in housing accommodations. There may be others. From this writer's view all appear to be deficient, in one respect or another, for successful accomplishment of their socially reprehensible purpose. Some are financially impossible to carry out on any large scale. Others would frighten the homeowner who does not like others to control his power of sale. Others, while practically possible, seem to be clearly illegal for a variety of reasons. Some would offend the constitutional prohibitions which inhere in the equal protection clause. A few encounter other legal obstacles, such as the rule against restraints on alienation, or the Rule against Perpetuities. It would appear then, that the Supreme Court's decision in the restrictive covenant cases cannot be circumvented by new legalisms artfully conceived by shrewd lawyers. At least here subterfuge cannot be substituted for social justice and constitutional principle.

Conclusion

This writer's survey of the restrictive covenant decisions and surrounding problems has led him to a number of conclusions, some of which may still be only minority conjectures. The Supreme Court's decision is a landmark in constitutional law and jurisprudential theory. The proposition is now firmly established that judicial enforcement of what would otherwise be purely private agreements is state action which must be exercised within the protective enclose of the constitution. What the limits to the doctrine are must await the judgment of accumulated experience as reflected in the cases to come. Suffice to say this writer hopes they will be broad enough to successfully accomplish the very great task of helping to achieve the ideal of equality of human dignity in America.
The decision sounds the death knell for all racial restrictive covenants and related superficially legal schemes as effective weapons in enforcing racial discrimination in housing accommodations. All are found wanting, either because of their illegality or their disutility. Unfortunately, this does not mean that we are now on the verge of achieving real democracy in real estate opportunities. Community prejudice, re-enforced by voluntary adherence to written and unwritten agreements or customs, will, perhaps, continue to make America safe for hypocrisy. Perhaps, the expected appearance of "fair housing practices" statutes will soften the community's will to resist. Still, mob violence and the other more ugly manifestations of intolerance may persist for a while as the throbbing conscience prickers of our societal soul.

No great change in the race patterns of America's housing accommodations will come overnight. The Negro purchaser can now drive a sharper bargain and, as a result, prices in Negro neighborhoods will drop. However, the Negro who seeks entrance into the holy of holies, a "white neighborhood" still must face onerous difficulties. Yet, as more people come to realize that there are no areas now legally "safe" from Negro infiltration, if law enforcement agencies are vigilant in their duty to protect the Negro purchaser from mob violence, and as the experience of peaceful inter-racial communities accumulates, America will finally remove this curse on its honor. We will have heeded the bitter admonition of Christ: "Woe unto ye hypocrites". On the national level we will have achieved the goal, which, the historian Toynbee has said, is our prime objective on the international plane; that is, we will have reversed the bitter paradox of history which shows that, up to now, "Man has been a

104 Maslow and Robison, A Civil Rights Program For America, 7 LAW. GUILD REV. 3 (1947). See also Chicago Sun-Times, December 2, 1948, for an account of a proposed municipal ordinance in Chicago which would forbid racial segregation in housing.
dazzling success in the field of the intellect and 'know how' and a dismal failure in the things of the spirit . . ." Indeed, the road ahead is long and arduous for those who must traverse it, but the sun of human liberty is already slightly visible from where we stand. Let us walk on again, but faster, for the gathering clouds of a possible atomic disaster make haste imperative.

Alfred Long Scanlan.