Shelley
v.
Kraemer
334 U.S. 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY; ETHEL LEE SHELLEY, his wife, and JOSEPHINE FITZGERALD, *Petitioners,*

—vs.—

LOUIS KRAEMER and FERN W. KRAEMER, his wife, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC, AND BRIEF IN SUPPORT THEREOF.

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J. D. SHELLEY; ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS,

vs.

LOUIS KRAEMER AND FERN W. KRAEMER, HIS WIFE, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Come now J. D. Shelley and Ethel Lee Shelley, his wife, citizens of the United States and State of Missouri, and respectfully petition this Honorable Court to grant a writ

of certiorari to review the opinion and judgment of the Supreme Court of Missouri, en banc, rendered and entered on the 9th day of December, 1946, rehearing denied the 13th day of January, 1947, lately pending in said Supreme Court, in this case entitled Louis Kraemer and Fern W. Kraemer, his wife (plaintiffs), appellants, v. J. D. Shelley and Ethel Lee Shelley, his wife, et al. (defendants), respondents, No. 39997 on the docket of said Supreme Court of Missouri, reversing a judgment of the Circuit Court of the City of St. Louis (Division No. 3 presided over by Hon. William K. Koerner, Circuit Judge) in said case in favor of your petitioners and against respondents, Louis Kraemer and Fern W. Kraemer, with directions.

OPINION OF THE COURT

The said opinion of the Supreme Court of Missouri, En Banc, in this cause, entitled Louis Kraemer and Fern W. Kraemer, his wife, appellants, v. J. D. Shelley and Ethel Lee Shelley, his wife, and Josephine Fitzgerald, respondents, appear in pages 153 to 159, inclusive, of the Printed Record filed herewith. Said opinion is reported in the 198 S. W. (2d), page 679.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On August 11, 1945, pursuant to an earnest money contract theretofore executed by them, petitioners paid the sum of $5,760.00 (in cash and deeds of trust) for the property involved in this case, and received a warranty deed from their co-defendant, Josephine Fitzgerald, conveying the same to them as husband and wife.

Thereafter, on the 9th day of October, 1945, respondents, as plaintiffs, brought an action in injunction against

petitioners and their said co-defendant in the Circuit Court of the City of St. Louis, the same being cause No. 91283, in which plaintiffs sought, among other relief prayed for, to enjoin petitioners from taking possession of said property, and prayed for a judgment divesting title thereto out of the petitioners and revesting it in their immediate grantor or in such other person as the Court should direct. And respondents based their right to bring said action upon a breach of certain provisions of a restrictive agreement (R. 19, 20) which had been signed on the 16th day of August, 1911, and recorded in the office of the Recorder of Deeds of the City of St. Louis on the following day, and purporting to cover the property fronting on Labadie Avenue, between Taylor Avenue on the east and Cora Avenue on the west, and located in city blocks 3710-B and 3711-B of the City of St. Louis, including property involved in this case. Said agreement contained the following provisions, among others:

> The said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as (or) not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of people of the Negro or Mongolian race. It is further ccontracted and agreed that upon a violation of this restriction either one or all of the parties to this agreement shall be permitted and authorized to bring suit or suits at law or in equity to enforce this restriction as to use and occupancy of said property in any court or courts and to forfeit the title to any lot or portion of lot that may

be used in violation of this restriction for the benefit of each and every person that may now or hereafter, after the recording of this restriction, become the owner of any property on said street.

Thereafter, petitioners in their Amended Return to the Order to Show Cause and Answer to Plaintiffs' Petition (R. 9, 16) specially set up property rights conferred upon them by Section 42 of Title 8 of the United States Code (Sub. Par. [a] of Par. 5) (R. 10), and further specially set up the right to make and enforce contracts and to the same full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens of Missouri, and to equal rights and protection under the law, all as guaranteed to them by Section 41 of Title 8 of United States Code (Par. 6) (R. 10); and pleaded that said agreement was invalid because its enforcement would deprive petitioners of the rights conferred upon them by said sections of the code.

Petitioners further specially set up rights, privileges, and immunities conferred upon them by the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States and alleged that the enforcement of said provisions of said agreement by the courts of Missouri would constitute state action contrary to said Section 1 of said Amendment, and would deprive petitioners of their property without due process of law, and constitute a denial to them of the equal protection of the laws, within the meaning of said Amendment (R. 11).

In paragraph 12 (R. 13) of said Return and Answer Petitioners invoked, in the consideration of this case, the construction given and the application made of said provisions of said Sections 41 and 42 of the United States Code and of Section 1 of the Fourteenth Amendment by the

Supreme Court of the United States in Buchanan v. Warley (245 U. S. 60) in passing upon the right of colored citizens to purchase, enjoy, and use real property without discrimination against them by state action (legislation) based solely on race and color; and further invoked the application of the principle of law enunciated in the opinion of the Court in Gandolfo v. Hartman (49 Fed. 181), that:

> "Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other."

Petitioners further pleaded in their said Return and Answer that said agreement was executed in furtherance of a scheme to segregate persons belonging to the Negro race from the white inhabitants of said City of St. Louis, and that an overcrowded ghetto had been created in said city by means of the use thereof and of restriction in deeds and agreements similar in import and purposes to those of the agreement involved in this case; that Negroes are restricted thereby to places of residence in said ghetto, and that the same was overcrowded beyond any other comparable area in said city, now housing more than 117,000 persons in an area comparable in size to the one occupied by members of said race in said city in 1910, when their number was 40,000; and that, as a result of said overcrowding, ill health, crime, the death rate and juvenile delinquency had increased therein beyond the average in said city, and that the purchase price and rate of rentals for real property in said ghetto were much higher than are charged for similar property in other areas of said city; and invoked the exercise of the powers of the Court of equity for relief from said social conditions (Par. 13, R. 14, 15).

Thereafter, hearings upon the Order to Show Cause and upon the merits were had before Division No. 3 of said Circuit Court, and said cause was submitted and taken under advisement by the Court.

Thereafter, on the 19th day of November, 1945, the Court made Findings of Fact (R. 140) and Conclusions of Law (R. 141); and on said same day the Court rendered and filed the following judgment (R. 144):

> "The contention that the restriction violates the Constitution of Missouri and of the United States and the federal civil rights statutes, and is against public policy, are ruled against defendant on the authority of Thornhill v. Herdt and Porter v. Prior, supra, and the numerous authorities cited in the note to 14 A.L.R,. pp. 1237 et seq. * * *.
>
> "In accordance with the above views (contained in the memo filed by the Court) (R. 142), the restraining order heretofore issued (but never in force) will be dissolved, the temporary injunction will be denied and plaintiffs" bill will be dismissed."

After plaintiffs' motion for a new trial had been overruled (R. 148), they appealed said cause to the St. Louis Court of Appeals (R. 148), and the same was thereafter transferred to the Supreme Court Court of Missouri and lodged in the Court en banc. Thereafter on the 3rd day of October, 1946, said appeal was argued by both parties before said Supreme Court and submitted on their respective briefs and oral arguments (R. 153), and thereafter, on the 9th day of December, 1946, said Supreme Court rendered and filed its Opinion (R. 153) and Judgment (R. 160) in said cause, reversing the judgment and the order of said circuit court dismissing said petition, with directions to set aside its said order and to render judgment in favor of the respondents herein as prayed for in their said petition.

Rulings of Supreme Court of Missouri.

1. On the federal questions raised by the petitioners in specially setting up their property and other rights, the Supreme Court of Missouri ruled as follows:

> "The restriction does not contravene the guaranties of civil rights of the Constitution of the United States. Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969. A recent case, reviewing the Corrigan case and again upholding such an agreement, is Mays v. Burgess, 147 F. (2d) 869, 162 A.L.R. 168, decided by the United States Court of Appeals for the District of Columbia. That case considered the question whether a restrictive agreement violated the Fifth and Fourteenth Amendments and Section 1 of the Thirteenth Amendment of the Constitution of the United States and the statutes enacted thereunder, particularly 8 U.S.C.A., Sections 41, 2 (42), and held it did not. That case followed the ruling in Corrigan v. Buckley that neither the Thirteenth nor Fourteenth Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property. While Gandolfo v. Hartman (1892), 49 F. 181, takes a contrary view, we find it has been criticized and not followed, and so far as we find it relates to the question here has been overruled in effect by Corrigan v. Buckley. Nor can it be claimed that the enforcement of such a restriction by a court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to a state action exclusively. To sustain such a claim would be to deny the parties to such an agreement one of the fundamental privileges of citizenship, access to the courts. This would violate both the state and Federal Constitutions. Art. I, Sec. 14, Constitution 1945, Art. IV, Sec. 2, Constitution United States" (R. 158).

2. On the social conditions resulting from the formation of the ghetto for Negroes in the City of St. Louis, the Opinion ruled:

> "The chancellor found the Negro population in St. Louis has greatly increased in recent years, and now numbers more than 100,000, and that some of the sections in which Negroes live are overcrowded, which is detrimental to their moral and physical well being.
>
> "Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast. See Mays v. Burgess, supra, and Fairchild v. Raines, 24 Cal. (2d) 818, 151 Pac. (2d) 260. But their correction is beyond the authority of the courts generally, and in particular in a case involving contractual rights between parties to a law suit. If their correction is sought in the field of government, an appeal must be addressed to its branches other than judicial" (R. 159).

3. In paragraph 7a of their Return and Answer (R. 11), petitioners alleged that description of the property mentioned is "defective and so indefinite that it does not enable defendants and others, not parties to said agreement, to know what property is attempted to be restricted thereby, and fails to impart any notice to these defendants" (R. 11).

The parties to the suit, for the purposes of the appeal, stipulated in the transcript that said agreement did not contain any lot numbers of the property therein described nor any other means whereby said lots could be identified (R. 3).

The trial court found that petitioners had no knowledge of the restriction agreement in question [par. 4 of Findings of Fact (R. 140) and in the Memo filed with its Findings (R. 143, top of page]). Notwithstanding said stipulation and the said findings of the trial court in regard to the question of notice, the Supreme Court of Missouri failed to take note thereof, and to apply to the facts established thereby well-settled rules of law in Missouri, although fully briefed and argued by petitioners, and ruled as follows:

> "The filing of the agreement for record with the recorder of deeds gave the defendants at least constructive notice of the restrictions which is sufficient. * * * Defendants are in no position to claim lack of notice" (R. 158, 159).

It is a well-settled rule of law in Missouri that, in order for the recording of a deed or other instrument conveying real property or affecting interest therein, the description of property therein mentioned must be such as to enable a subsequent purchaser to identify the land by name, location, monuments and distance, or numbers, or the deed should refer to some instrument lawfully of record which does contain such means of identification. Said stipulation No. 3 and the rule of law above stated, together with the supporting Missouri authorities, were called to the attention of the Supreme Court of Missouri by petitioners in Point III, page 7, of their Brief (R. 149), and in both the written and oral arguments and in their said motions for a rehearing (R. 160) and to modify (R. 168), petitioners again called the Court's attention to said stipulation and said rule of law, and repeated said supporting authorities, adding thereto the latest ruling of said Court upholding said rules [Federal Land Bank of St. Louis v. McColgan, 332 Mo. 860, 59 S. W.

(2d) 1052]; and in paragraph 7 of said motion for a rehearing (R. 167), petitioners specially claimed their right to the protection of the inhibitions of the due-process and equal-protection clauses of Section 1 of the Fourteenth Amendment, in the following language:

> "7. Because, in overlooking stipulation 3 contained in the transcript of the record on page 4 thereof, and failing to apply and follow the rulings and decisions in Ozark Land Co. v. Franks, supra, and Gatewood v. House, supra, the decision and opinion of the Court deprives the respondents of their property without due process of law and denies to them the equal protection of the laws, contrary to section 1 of the Fourteenth Amendment (of the Constitution) of the United States."

Said federal rights and contentions were thus set up and claimed by petitioners at the first opportunity in the progress and consideration of said case. But the Supreme Court of Missouri denied said rights and protection by overruling said motions to modify and for rehearing on the 13th day of January, 1947 (R. 169), on which said day the judgment of the Supreme Court of Missouri, en banc, in this case became final. Thereafter, on the 10th day of February, 1947, the Court's mandate in this case was stayed pending application for a writ of certiorari to the Supreme Court of the United States.

JURISDICTION OF THIS COURT.

The jurisdiction of this Court is based upon Section 237 (b) of the Judicial Code, 36 Stat. 1156, as amended by Act of Feb. 13, 1925, ch. 229, Sec. 1, 43 Stat. 937, Title 28, U.S.C.A., Sec. 344 (b) providing for review by this Court, by certiorari, of final judgments in the highest court of a state in which a decision could be had, where any title,

right, privilege or immunity is specially set up or claimed under the Constitution, or any treaty or statute, of the United States. The judgment of the Supreme Court of Missouri, en banc, here sought to be reviewed was entered on the 9th day of December, 1946 (R. 160). Motions to modify and for rehearing were duly filed by petitioners, respondents in said Supreme Court, on December 24, 1946, within the time provided by the rules of said Supreme Court (R. 160), and said motions were denied by said Supreme Court on the 13th day of January, 1947 (R. 169), on which said date said judgment became final. The following cases are thought to sustain the jurisdiction of this Court:

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697.
Longest v. Langford et al., 274 U. S. 499.
Seabury Rec. v. Green, Admin., 294 U. S. 165.
Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358.

QUESTIONS PRESENTED.

(1) Whether the restrictive agreement involved in this case (R. 19, 20), which prohibits any portion of the land therein described from being sold to or occupied by a member of the Negro or Mongolian races, and which further provides for actions at law and in equity to enforce provision thereof and to forfeit the title of such prohibited purchaser to any of said property, is void by reason of being contrary to the provisions of Sections 41 and 42 of Title 8 of the United States Code, and because it necessitates denying petitioners rights conferred upon them by said sections; and whether said agreement is contrary to public policy.

(2) Whether the enforcement of said agreement by the courts of the state of Missouri is state action within the meaning of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States which forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and whether such enforcement of said agreement by the Supreme Court of Missouri constitutes depriving petitioners of their property and property rights without due process of law, and the denial to them of the equal protection of the laws, within the meaning of said section of said amendment.

(3) Whether the construction given to and the application made of said Sections 41 and 42 of the Federal Code in connection with Section 1 of the Fourteenth Amendment by this Court in Buchanan v. Warley (245 U. S. 60), in so far as the same relates to the rights of colored persons to purchase real property and enjoy and use the same without discriminations against them solely on account of their color, determine principles of law which are applicable to the issues in this case and binding upon the Supreme Court of Missouri, when that Court is called upon to enforce the provisions of said restrictive agreement against the petitioners in this case.

(4) Whether the principles of law enunciated in the opinion of the Court in Gandolfo v. Hartman (49 Fed. 181), while ruling on the invalidity of a similar agreement to that involved here which prohibited renting or selling lands to a Chinese: "That any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other" (R. 13), and invoked by petitioners in their Return and Answer, is a

construction of the Constitution and laws of the United States touching the property right of members of the Negro and Mongolian races in the United States which the Supreme Court of Missouri should apply to the rights of petitioners herein.

(5) Whether the refusal of the Supreme Court of Missouri to afford petitioners relief from the perils to their health, life and well being, and from the unequal and higher financial burdens upon them in renting and purchasing property in which to live, by reason of being compelled to reside in a segregated area in the city of St. Louis created by means of said restrictive agreement and of others similar thereto in import and purpose, is a denial to petitioners of the same full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens of Missouri, within the meaning of Section 41 of the United States Code, and contrary to the equal-protection clause of the Fourteenth Amendment.

(6) Whether the ruling of the Supreme Court of Missouri that:

> "The filing of this agreement with the Recorder of Deeds gave the defendants at least constructive notice of the restriction which is sufficient. * * * Defendants are in no position to claim lack of notice" (R. 158, 159),

in view of the reliance of petitioners upon the insufficient and defective description of the property mentioned in said agreement to constitute its recording notice to them, as a defense, under the circumstances, stipulation (R. 3), finding of fact by the trial court (R. 140), and the claim to federal right in connection therewith as set up in petitioners" motions to modify, and for rehearing (R. 168, 168),

constitutes a denial to petitioners of the equal protection of the laws within the meaning of the Fourteenth Amendment.

(7) Whether the ruling of the Supreme Court of Missouri, that to sustain the claim that enforcement of the restrictions in said agreement is state action forbidden by the Fourteenth Amendment would constitute denial to the parties to the same to one of the fundamental rights of citizenship, access to the courts, violative of both the state and federal constitutions, is a proper construction of Art. I, Sec. 14, Const. of Mo., 1945, and of Art. IV, Sec. 2, Const. of the United States.

REASONS RELIED ON FOR GRANTING WRIT.

1. The Supreme Court of Missouri, in making the following ruling, has decided a federal question of substance not heretofore decided by this Court. Said ruling being as follows:

> "Nor can it be claimed that the enforcement of such restriction by court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to state action exclusively. To sustain such a claim would be to deny to parties of the agreement one of the fundamental privileges of citizenship, access to the courts. This would violate both the state and federal constitutions" (Latter pt. Par., R. 158).

Only two cases seem to have been before this Court, in which the question of the enforcement of restrictions against Negroes contained in agreements between individual citizens was involved, Corrigan v. Buckley (271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969) and Mays v. Burgess (147 F. [2d] 869, 162 A. L. R. 168).

In the former this Court dismissed the appeal on the ground that no federal question of substance was presented by the Record, and specifically declined to rule on the question of enforcement by court process being forbidden by the Fifth and Fourteenth Amendments. In the latter, certiorari was denied in a decision, without opinion, in which two of the justices were in favor of granting the writ and two others did not participate.

Both of these cases arose in the District of Columbia, where only the Fifth Amendment applies, the two pleaded sections of Title 8 of the Federal Code and the Fourteenth Amendment applying to states only in this regard.

Denial of certiorari by the Supreme Court of the United States imports no expression of opinion upon the merits. Atlantic Coast Line Ry. Co. v. Powe, 283 U. S. 401, 51 S. Ct. 498, 75 L. Ed. 1142; United States v. Carver, 260 U. S. 482, 490.

The following cases support the contention that the above ruling is state action within the meaning of the Fourteenth Amendment:

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673.
Raymond v. Chicago Traction Company, 207 U. S. 20.
Twining v. New Jersey, 211 U. S. 78.
Ex Parte Virginia (1880), 100 U. S. 339.
See also "What is 'state' action under the 14th, etc., Amendments of the Constitution" by James D. Barnett, 24 Oregon Law Review, 227.

Certiorari is proper method of review of this question.

Brooklyn Sav. Bank v. O'Neil, 324 U. S. 697; Sup. Ct. Rule 38, Par. 5.

2. In making the ruling, and in adhering to its former decisions holding that an agreement "restricting property from being transferred to or occupied by Negroes * * * is one which the parties have a right to make and which is not contrary to public policy" (R. 157, 158), the Supreme Court of Missouri has decided a federal question of substance in a manner not in accord with principles of law established by applicable decisions of this Court, particularly, Buchanan v. Warley (245 U. S. 60, 75, 77 et seq.), the application and construction of which principles petitioners specially invoked in paragraph 12 of their Return and Answer (R. 13, 14). See also: Harmon v. Tyler, 273 U. S. 668; City of Richmond v. Dean, 281 U. S. 704.

Among the rulings in Buchanan v. Warley, declaring principles which it is contended are applicable to the facts disclosed by this Record, are the following:

Construction.

"Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments (Sections 41 and 42 of Title 8, U. S. Code) did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. The Fourteenth Amendment and those statutes enacted in furtherance of its purposes operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

Application.

(Question.)

"The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of

which occupancy is an incident, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

(Answer.)

"We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

When a court refuses to give a federal statute the construction insisted upon by a party which would lead to a judgment in his favor, it is a denial to him of the right or immunity under the laws of the United States. St. L. I. M. & S. Ry. v. Taylor, 210 U. S. 281, 293. Certiorari is proper remedy for review. San Giorgio v. Rheinstrom Co. (294 U. S. 494).

3. In ruling that: "The agreement is valid and the restriction should be enforced" (bottom 2d Par., R. 168), the Supreme Court of Missouri has decided a federal question of substance not heretofore determined by this Court, and has deprived the petitioners of their property, and of their property rights conferred upon them by Section 42 of Title 8 of the United States Code, and has denied to them the equal protection of the laws within the meaning of Section 41 of said title of the Federal Code, particularly the same full and equal benefit of all laws and proceedings for the protection of persons and property as is enjoyed by white citizens of Missouri, contrary to the due-process and equal-protection clauses of the Fourteenth Amendment of the Constitution of the United States.

It is contended that the agreement under consideration is void for the following reasons:

(a) It has for its object the violation of valid laws, in that its enforcement requires depriving petitioners of property and other rights conferred upon them by said laws. 17 C. J. S., Sec. 191, p. 545.

(b) It is based upon an illegal consideration, in that its enforcement deprives petitioners of their said property rights and the right to the same equal protection of the laws as white citizens enjoy in Missouri. Buchanan v. Warley, supra; Sprague v. Rooney, 104 Mo. 349, 358; Lehigh Valley R. Co. v. United Lead Co. (N. J.), 133 A. 290 (and cases cited on the invalidity of contracts violative of valid laws).

(c) Said agreement has for its purpose the establishment of racial segregation, contrary to the above mentioned statutes and the Fourteenth Amendment as construed in Buchanan v. Warley, supra, in relation to the question of racial segregation. It is an attempt to do by private agreement of individuals what is prohibited by the laws above mentioned, that is, take away the rights and immunities granted to petitioners by said laws by enforcing in the courts an agreement having an illegal purpose, contrary to the Fourteenth Amendment, Gandolfo v. Hartman, 49 Fed. 181.

(d) It is contrary to public policy, in that its enforcement is injurious to a large number of citizens of Missouri, violates public statutes, and tends to injure the public welfare. 12 Am. Jur. 663.

It is contrary to the present public policy of Missouri as expressed in the recently adopted Constitution, reading: "All persons are created equal and are entitled to

equal rights under the law." (Sec. 2, Art. I [Bill of Rights), Constitution of Mo. 1945] It is also contrary to the liberalized public policy of the United States, as set forth in the following treaties, made under the authority of the United States and of which it is a signatory; and which, by Clause Two of Article VI of the Constitution of the United States, are made the supreme law of the land and binding on the judges of the courts of Missouri, to-wit:

Act of Chapultapec, executed March 6, 1945, with Latin American Nations at Mexico City, Mexico (see Appendix A); Articles 55 (c) and 56 of United Nations Charter (see Appendix A), in both of which the United States redefined its public policy with reference to racial equality.

4. By overruling petitioners' Motion to Modify the Court's' opinion (R. 169) and their Motion for Rehearing, the Supreme Court of Missouri denied petitioners the equal protection of the well-settled rule of law in Missouri, that a document conveying or affecting real property which is too indefinite in its description thereof to enable a stranger thereto to know what property is being affected imparts no notice by its recording (Gatewood v. House, supra), contrary to the due-process and equal-protection clauses of the Fourteenth Amendment.

Petitioners gave notice in their Return and Answer (R. 9, 11), that they relied upon lack of proper description of the property in question in said agreement to constitute its recording notice, as one of their defenses, introduced sufficient evidence to establish the contention as a fact of the case (Stip. 3, R. 3), and to warrant a finding of fact by the trial court (R. 140), that petitioners had no actual knowledge of the existence of the restriction at the time they purchased the property in ques-

tion. They briefed said defense in Point III (R. 149), and presented the same to the Supreme Court of Missouri in their argument on appeal. Promptly after the opinion and judgment of the said Supreme Court were filed, petitioners filed their motions to modify said opinion and for rehearing, in the latter of which (par. 7, R. 167), petitioners set out that the failure to consider stipulation 3, supra, and to apply to it the principles of law established by the rulings in Gatewood v. House, 65 Mo. 663, supra; Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540, supra; Federal Land Bank v. McColgan, 332 Mo. 860, said Supreme Court deprived petitioners of their property and denied equal protection of the laws within the meaning of the Fourteenth Amendment.

Said stipulation reads as follows:

> "3. It is further stipulated and agreed that said restriction agreement does not contain the lot number of any parcel or lot of ground mentioned therein, nor does it contain any reference to any other recorded document wherein such information may be found."

5. In paragraph 13 of their Return and Answer petitioners pleaded the direful conditions which they and other members of their race suffer resulting in danger to their moral and physical well being and caused by the employment of agreements containing restrictions against members of the Negro race (R. 14, 15). The trial court found that more than a hundred thousand Negroes now reside in the City of St. Louis and that in some parts of the area in which they live overcrowding obtains that "is detrimental to their moral and physical well being" (R. 141, par. 7, Findings). The Supreme Court of Missouri considered said finding in the following language:

> "Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast. See Mays v. Burgess, supra, and Fairchild v. Raines, 24 Cal. (2d) 818, 151 Pac. (2d) 260. But their correction is beyond the authority of courts generally, and in particular in a case involving the determination of contractual rights between parties to a law suit. If their correction is sought in the field of government, the appeal must be addressed to its branches other than the judicial" (R. 159).

In ruling: "The judgment dismissing the petition should be reversed and the cause remanded with directions to the Chancellor to enter a decree upholding the restrictions and granting the plaintiffs the relief prayed for * * * Such is our order" [Fols. 171-172] (R. 159), and in making the said ruling considering said finding of the Chancellor, the Supreme Court of Missouri denied to petitioners one of the fundamental privileges of citizenship, access to the courts, contrary to the provisions of Section 1 of the Fourteenth Amendment, and to the provisions of said Section 41 of the Federal Code, and of Sec. 14 of Art. I (Bill of Rights) of the Constitution of Missouri, 1945, all of which constituted a denial of due process of law and the equal protection of the laws within the meaning of said amendment.

The Supreme Court of Missouri had ample power to give relief to petitioners from the detriment to their moral and physical welfare which they and other members of their race suffered by reason of the restrictions in the agreement in question, by proceeding under the provisions of said Sec. 14 of the Constitution of Missouri, and

by refusing to enforce a contract which was both void and injurious to a large number of citizens of the state of Missouri, including petitioners. 17 C.J.S., Sec. 16, p. 348; Sprague v. Rooney, 104 Mo. 349, 358; Thurston v. Rosenfeld, 42 Mo. 474, 97 Am.D. 351.

Since the conditions, injury and peril complained of and found by the trial court and Supreme Court of Missouri to be true, are general in the large urban centers from coast to coast of the United States (opinion of Court, R. 159), this case comes within the class of causes which former Chief Justice Taft said come "within the functions of the Supreme Court," involving principles the application of which are of wide public interest and which will "affect large classes of people." 35 Yale Law Journal 7. Undoubtedly, this Court ought to determine the principles of law and the rules of decision which apply to so grave a question now pending before a large number of courts of the land.

For further information as to the character of the conditions and the resulting overcrowding, ill health, increased death rate, juvenile delinquency, crime and unequal financial burdens among and imposed upon, the colored citizens of the United States, the attention of the Court is respectfully called to the following authoritative publications:

Report of the Committee on Negro Housing of the President, Conference on Home Building, 45, 46.

Woofter, Negro Problems in Cities, 95 (Doubleday, Doran and Co., New York).

Racial Problems in Housing, 9 (National Urban League, New York).

Myrdal An American Dilemma, 376, 379 (Harper and Bros., New York).

Report of Howard L. Holtzendorf, Housing Director, Abstract Housing, Feb. 24, 1945.

The Urban Negro: Focus of the Housing Crisis-Real Estate Reporter—Oct., 1945, p. 12, citing Mayor's Planning Committee on City Planning.

Embry—"Brown Americans" (Viking Press, 1943, p. 34).

McGovney: Racial Segregation (33 Cal. Law Review, 5.37).

Under the circumstances shown to exist by the record, it is contended that certiorari should be granted to review the decision of the Supreme Court of Missouri on this question and to fix the principles of law in reference thereto. McGildrick v. Bernard White Coal Min. Co., 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565.

Petitioners Have Made Timely and Persistent Claim to Invasion of Federal Right.

All the federal questions presented and the issues contended for herein, except that in relation to lack of notice by recording of the agreement (Reason 4), were raised in the Return and Answer (R. 9, 16) of petitioners, and have been kept alive at every stage of the proceedings. As to Reason 4 hereof, there was no reason to anticipate a federal question arising until after the rendering and filing of the Opinion and Judgment of the Supreme Court of Missouri. However, promptly thereafter, in their Motions to Modify and for Rehearing (R. 168, 169), petitioners brought said federal question to the attention of the Supreme Court of Missouri, and its ruling and judgment directing the trial court necessarily overruled and denied the same. A federal question of substance so raised, preserved, and thus adjudicated is reviewable in this Court, by certiorari. Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358.

Prayer.

Wherefore, petitioners pray that a writ of certiorari be issued by this Honorable Court, directed to the Supreme Court of Missouri, En Banc, to the end that said Opinion and Judgment of said Supreme Court of Missouri, En Banc, in said case of Louis Kraemer and Fern W. Kraemer, appellants, v. J. D. Shelley and Ethel Lee Shelley, respondents, No. 39997 in said Supreme Court, be reviewed by this Court as provided by law, and that, upon such review, said judgment of said Supreme Court of Missouri be reversed, and petitioners have such other relief as this Court may deem appropriate.

Respectfully submitted,

GEORGE L. VAUGHN,
HERMAN WILLER,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. .....

J. D. SHELLEY; ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS,

vs.

LOUIS KRAEMER AND FERN W. KRAEMER, HIS WIFE, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI, EN BANC, AND BRIEF IN SUPPORT THEREOF.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Supreme Court of Missouri, En Banc, Louis Kraemer and Fern W. Kraemer, appellants, v. J. D. Shelley, Ethel Lee Shelley and Josephine Fitzgerald, respondents, which petitioners here seek to have reviewed, appears on page 153 of the transcript of the Record filed herewith; and the opinion of the Court appears on pages 153 to 159, inclusive, of said transcript, pp. . . . to . . . of printed Record.

Statement of the Case.

The essential facts of the case are fully stated in petitioners' petition for a writ of certiorari herein, and in the interest of brevity are not repeated here, but are included herein by reference thereto. Reference will be made to such facts, on the points involved, in the course of the argument which follows:

Specification of Errors to Be Urged.

The Supreme Court of Missouri, En Banc, in its opinion in this cause (R. 163-170), erred:

(1) In holding and deciding that the agreement containing a restriction which prohibits the transfer to or occupancy by Negroes of the property therein described, solely on account of their race and color, is one which the parties have a right to make and which is not contrary to public policy.

(2) In holding and deciding that the enforcement by the Missouri Supreme Court of the restrictions against Negroes in said agreement is not state action within the meaning of the provisions of the Fourteenth Amendment forbidding any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(3) In holding and deciding that the agreement in question is not invalid by reason of being contrary to the provisions of Sections 41 and 42 of Title 8 of the United States Code, and because its enforcement necessitates the depriving of petitioners of rights and immunities conferred upon them by said sections, the Constitution of the United States, and by other valid laws.

(4) In following and applying its former rulings and decisions upholding and enforcing similar restrictions against the transfer to or occupancy by Negroes of real property, solely because of their race, and in refusing to apply the principles of law in reference to the regulation and enforcement of residential segregation of colored persons by a state determined by this Court in Buchanan v. Warley (245 U. S. 60).

(5) In holding and deciding that it would be a denial to the parties to the restrictive agreement under consideration in this case of their fundamental privilege as citizens to have access to the courts, in violation of both Sec. 14 of Art. I of the Constitution of Missouri, 1945, and Art. IV, Sec. 2 of the Constitution of the United States, to sustain the claim of petitioners, that the enforcement of the restriction against them by court process would construe state action forbidden by the Fourteenth Amendment.

(6) In holding and deciding that petitioners are in no position to complain of lack of notice of the restrictions contained in the agreement in question.

(7) In holding and deciding that the courts of Missouri are without power to grant petitioners relief from the greater and unequal perils which they suffer to their physical and moral well being, and the higher and unequal financial burdens imposed upon them for housing accommodations by reason of being compelled to live in a segregated area of the City of St. Louis created by the use of the agreement in question and others of similar import.

(8) In that the decision of the Supreme Court of Missouri, En Banc, deprives petitioners of their property, and of property rights, without due process of law, contrary

to the Fourteenth Amendment, constitutes denial to them of the equal protection of the laws within the meaning of said Amendment; and abridges the privileges and immunities of petitioners as citizens of the United States, contrary to the Fourteenth Amendment.

Summary of the Argument.

I.

An agreement which is contrary to valid law, and the enforcement of which necessitates depriving petitioners of their property and other rights conferred upon them by said laws, resulting in peril to their physical and moral well-being and in imposing unequal financial burdens for housing accommodations solely because of their race, is invalid and contrary to public policy, and incapable of being enforced by the courts.

Secs. 41, 42, Tit. 8 U. S. Code (Conferring Rights)

17 C. J. S., Sec. 201, p. 555.

12 Am. Jur., Sec. 153, p. 647 (Mode of Performance).

State ex rel. Am. Surety Co. of New York v. Haid, 30 S. W. (2d) 100, 325 Mo. 949.

Lehigh Valley R. Co. v. United Lead Co. (N. J.), 133 A. 290 (and cases cited on invalidity of contracts.

Sprague v. Rooney, 104 Mo. 349, loc. cit. 358, 16 S. W. 505, 508.

(1) The purpose of enacting Sections 41 and 42 of Title 8 of the United States Code was to secure to citizens who are colored the fundamental rights of inheriting, owning, using and enjoying real and personal property upon the same terms as are enjoyed by white citizens living in a state, and to entitle them to the same full and equal

benefit of all laws and proceedings for the security of their property and persons as are enjoyed by the white citizens of the same state, and petitioners, under the provisions of said sections, are clothed with the same property rights and are entitled to the same full and equal benefit of all laws and proceedings offered by the State of Missouri for the security of the persons and property which the white citizens of said state enjoy.

Secs. 41, 42, supra.
Buchanan v. Warley, 245 U. S. 60.
Civil Rights cases, 109 U. S. 3, 22.
U. S. v. Rhodes, 1 Abb. 28, 27 Fed. Cas. No. 16,151.
Screws v. United States, 325 U. S. 91, 118-128.
U. S. v. Morris, 125 Fed. 322, 325.

(2) Among the statutory provisions of the laws of Missouri touching the property rights of citizens of said state, the benefits of which have been denied to petitioners, are:

(a) Laws of Descent and Distribution, Chapter 1, Art. 14, Secs. 306, 308, 309, 310 and 316, R. S. of Mo., 1939;
(b) Liens of Mechanics and Materialmen, Chapter 26, Art. 3, Secs. 3547, 3549, 3550, 3553 and 3561, R. S. of Mo., 1939;
(c) Judgment Liens on Real Property, Chapter 6, Art. 18, Secs. 1269, 1278, 1279, 1300, 1301, 1302 and 1303, R. S. of Mo., 1939;
(d) Conveyances of Real Estate, Section 3427, R. S. of Mo., 1939.

(For laws of Mo. cited above, see Appendix A.)

(3) The results of the employment and enforcement of the agreement in question, and of others of similar import and purpose, containing restrictions against the ownership and occupancy of real property against citizens of Missouri

who are colored, particularly these petitioners, have been to force them to live in a segregated area of the City of St. Louis which is grossly overcrowded, and where, by reason thereof, they are caused to suffer greater peril to their moral and physical well being and are compelled to pay higher rentals and purchase prices for places in which to live than white citizens of said city, who are not so restricted, have to suffer, or to pay for comparable places in which to live. Agreements thus endangering and injuring citizens of the United States are contrary to public policy, and should not be enforced by the courts.

12 Am. Jur., Sec. 191, p. 693.
13 C. J., Sec. 25 (3), p. 254.
Thurston v. Rosenfeld, 42 Mo. 474, 97 Am. D. 351.
17 C. J. S., Sec. 16, p. 348.

(4) By Clause Two of Article VI of the Constitution of the United States, that Constitution and the treaties and laws made and enacted thereunder are made by the supreme law of the land, and are binding upon the judges of the courts of Missouri, as fully as if they were set out in the constitution and laws of said state, forming a part of the public policy which the courts are without power to overrule.

Sola Electric Co. v. Jefferson, 317 U. S. 173, 176.
De Pass v. Harris Wool Co., 346, Mo. 1038, 1042, 144 S. W. (2d) 146.
Anderson v. Carkins, 135 U. S. 483.

II.

The ruling of the Supreme Court of Missouri, that the enforcement of the restrictions contained in the agreement in question by court process is not state action within the

meaning of the provision of the Fourteenth Amendment forbidding any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is manifestly unsound and in direct conflict with principles of law determined by this Court in the following decisions:

Ex Parte Virginia (1880), 100 U. S. 339, 347.
Mo. ex rel. Gaines v. Canada, 305 U. S. 337, 343.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673.
Raymond v. Chicago Traction Co., 207 U. S. 20, 36.
Twining v. New Jersey, 211 U. S. 78.

(1) The Supreme Court of the United States has applied the same rule to the question of state action, whether by the legislative, judicial, or executive branches of state governments, and has not distinguished between judicial proceedings involving substantive or procedural laws.

Twining v. New Jersey, supra.
Brinkerhoff-Faris Co. v. Hill, supra.
Mo. ex rel. Gaines v. Canada, supra.
Alabama v. Polwell, 287 U. S. 45.
Cantwell v. Connecticut, 310 U. S. 296.
Bridges v. California, 314 U. S. 252.

III.

The refusal of the Supreme Court of Missouri to place the construction on Sections 41 and 42 of Title 8 of the United States Code, in connection with the provisions of Sec. 1 of the Fourteenth Amendment, contended for by petitioners, and which would have led to a judgment in their favor, constitutes a denial to petitioners of a federal right which is reviewable by this Court.

St. L. I. M. & S. Ry. v. Taylor, 210 U. S. 281, 293.

(1) The refusal of the Supreme Court of Missouri to construe Sections 41 and 42 of the federal code, supra, in accordance with the construction thereof by this Court in Buchanan v. Warley, supra, and as contended for by the petitioners, has deprived them of their property, and of property rights conferred upon them by the said sections of the federal code, and by the laws of Missouri hereinbefore mentioned in (2) (a), (b), (c), and (d), under I of this summary, contrary to the due process and equal protection clauses of the Fourteenth Amendment.

U. S. v. Morris, supra.
Mo. ex rel. v. Canada, supra.
Buchanan v. Warley, supra.
Civil Rights cases, supra.
Brinkerhoff-Faris Co. v. Hill, supra.
De Pass v. Harris, supra.

IV.

Certiorari is the proper remedy by which to obtain a review in this Court of the federal questions presented by the record in this case.

Sec. 237 (b) Jud. Code, Sec. 344 (b) Tit. 28 USCA.
Longest v. Langford, 274 U. S. 499, 500.
Seabury v. Green, 294 U. S. 165, 168.
Great Northern Ry. v. Sunburst Oil Co., 287 U. S. 358.
San Giorgio v. Rheinstrom Co., 294 U. S. 494.
Brooklyn Sav. Bank v. O'Neil, 324 U. S. 697.

(1) Where a state question relied upon by petitioners as a defense, disallowed by the Supreme Court of Missouri in its decision, thereby creating the first occasion to suspect a federal question in connection therewith, the federal claim in regard thereto set up in the motion for a rehearing, that being the first opportunity, is timely raised and reviewable on certiorari by this Court.

Brinkerhoff-Faris Co. v. Hill, supra.
Great Northern Ry. v. Sunburst Oil Co., supra.
Mo. ex rel. Mo. Ins. Co. v. Gehner, 281 U. S. 313, 320.

ARGUMENT.

I.

A RESTRICTIVE AGREEMENT PROHIBITING THE TRANSFER OF REAL PROPERTY TO OR ITS OCCUPANCY BY NEGROES, SOLELY ON ACCOUNT OF THEIR RACE OR COLOR IS ILLEGAL AND UNENFORCEABLE.

An agreement contrary to valid law or statute is void and unenforceable. Sprague v. Rooney (Mo.), 16 S. W. 505 (house rented for use as a brothel; written contract of sale to evade statute unenforceable); Hagerty v. St. Louis Mfg. Co., 44 S. W. 1114 (contract to store and preserve game during the "closed season" and restore it in open season held void); 17 C. J. S., p. 555, Sec. 201; 12 Am. Jur. 647, Sec. 153; Lehigh Valley R. Co. v. United States Lead Co. (N. J.), 133 Atl. 290. The same is true even though the statute does not therein expressly declare the agreement void. 17 C. J. S., supra; Sprague v. Rooney, supra. And as was said in Dettloff v. Hammond, Standish & Co., 195 Mich. 117, 161 N. W. 949, l. c. 955: "A contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against its positive provisions."

The restrictive agreement in this case against transfer to, or occupancy by Negroes solely on account of race is contrary to the federal statute, Section 42, Title 8, United States Code. That statute provides:

> "ALL CITIZENS OF THE UNITED STATES SHALL HAVE THE SAME RIGHT IN EVERY STATE AND TERRITORY AS IS ENJOYED BY THE WHITE CITIZENS THEREOF TO INHERIT, PURCHASE, LEASE, SELL, HOLD, AND CONVEY REAL AND PERSONAL PROPERTY."

The restrictive agreement in this case contravenes and is contrary to Section 41, Title 8, United States Code, which provides:

> "ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES SHALL HAVE THE SAME RIGHT IN EVERY STATE AND TERRITORY TO MAKE AND ENFORCE CONTRACTS * * * AND TO THE FULL AND EQUAL BENEFIT OF ALL LAWS AND PROCEEDINGS FOR THE SECURITY OF PERSONS AND PROPERTY AS IS ENJOYED BY WHITE CITIZENS * * *"

The laws of Missouri make no distinction because of race or color as to who can inherit property, purchase property on tax sale, occupy property, purchase property on execution sale, etc., but the restrictive agreement in this case is contrary to those laws and contravenes their express terms as well as the spirit thereof. A colored person would not be permitted to inherit — the restrictive agreement would make his title subject to forfeiture; nor could he occupy the property. The statute gives him a right to purchase property at a tax sale, but the restrictive agreement of private parties attempts to thwart the government's right and policy to have anyone purchase the property. The agreement is illegal, being founded on a breach of the law.

Furthermore, the restrictive agreement in this case violates the FUNDAMENTAL RIGHTS of petitioners, as contrasted with the social rights, and violates not only the spirit of our laws, but the Fourteenth Amendment of the United States Constitution. Treiber J., in U. S. v. Morris, 125 Fed. 322, after quoting the construction given to the two federal statutes in question from the opinion of Mr. Justice Bradley in the Civil Rights Cases, and from the opinion of Mr. Justice Swayne in U. S. v. Rhodes, supra, conclues, as follows:

> "That the rights to lease land * * * are **fundamental rights,** inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States within the meaning of Section 5508 Rev. St. U. S." (Emphasis added.)

The rights concerning which the conspiracy was charged to exist were conferred under what are now Sections 41 and 42 of Title 8 of the United States Code.

In the Civil Rights Cases, 109 U. S. 3, 22, this Court construed the two sections of the federal statutes in question as follows:

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment before the Fourteenth was adopted, undertook to wipe out the burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those **fundamental rights** which are the essence of civil freedom, namely, **the same right to make and enforce contracts,** to sue and be parties, give evidence, and **to inherit, purchase, lease, sell and convey property, as is enjoyed by the white citizens.** (Emphasis added.) * * * It (the aid given by the adoption of the Fourteenth Amendment) is referred to for the purpose of showing that at the time (1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery."

The Court points out the distinction between the powers of Congress conferred by these two amendments and further says:

> "The legislation, so far as necessary or proper to eradicate forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." (Emphasis added.)

Legislative restrictions restricting the right of a member of a particular race to live upon particular land denies rights guaranteed by the Fourteenth Amendment. Buchanan v. Warley, 245 U. S. 60; Harmon v. Tyler, 273 U. S. 668; City of Richmond v. Deans, 281 U. S. 704. As was said in Buchanan v. Warley, supra:

> "Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. These enactments (laws enacted to effectuate the 14th Amendment) did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. The Fourteenth Amendment and those statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

In its reference to "laws enacted to effectuate the 14th Amendment" the Court had reference in particular to Title 8, Sections 41 and 42 of the United States Code.

These statutes, together with the Fourteenth Amendment, led to the following well-reasoned holding:

> "We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State,

> and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

In Harmon v. Tyler, supra, legislation permitting the adoption of racial residential segregation by private action was passed in the state of Louisiana through a law forbidding whites or Negroes from occupying a residence in any portion of the city of New Orleans, except on written consent of the majority of the persons of the opposite race inhabiting such community or portion of the city. This race ordinance thus extended governmental sanction to racial segregation by community or neighborhood agreement. The Supreme Court, adhering to Buchanan v. Warley, supra, again declared legislative interference with residential patterns along lines of color to be violative of the 14th Amendment's guaranties and, as such, unconstitutional. There is, and can be, no logical distinction between **legislative** sanction of a **private** agreement of discrimination, and **judicial** sanction of the same **private** agreement. The act of discrimination in each case is exercised directly on the individual through the power of the government. And as said by Mr. Justice Murphy in Steele v. Louisville and Nashville Ry. Co. et al., 65 S. Ct. 225:

> "The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color."

This conclusion was long ago established in Gandolfo v. Hartman, 49 Fed. 181, decided in 1892, wherein the Court said:

> "It would be a very narrow construction of the constitutional amendment in question and the decisions based on it and a very restricted application

> of the broad principle upon which both the amendment and the decisions proceed to hold that while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract which the courts may enforce * * * Any result inhibited by the Constitution can no more be accomplished by contracts of individual citizens than by legislation and the court should no more enforce the one than the other."

The policy of the law is further shown by the treaties that have been made in recent years. On March 6, 1945, in Mexico City, the United States duly executed a treaty with the Latin American nations known as the Act of Chapultepec which provides, among other things, that the signers will:

> " * * * prevent with all the means within their power all that may provoke discrimination among individuals because of racial and religious reasons."

This pledge is similarly contained in the United Nations Charter, Article 55 (c), where it is stated that:

> "The United Nations shall promote * * * uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion."

Article 56 of the United Nations Charter further states that:

> "All members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."

Treaties are the supreme law of the land and are binding upon the judges of the courts of Missouri, as fully

as if they were set out in the Constitution and laws of the state, and form a part of the public policy which the courts are without power to overrule: Article VI, Clause 2, Constitution of the United States; Sola Electric Co. v. Jefferson, 317 U. S. 173; Missouri v. Holland, 252 U. S. 416; Hanenstein v. Lynham, 100 U. S. 483. In Kennett v. Chambers, 14 How. 38, the Supreme Court of the United States asserted the supremacy of the treaty by denying specific performance of a contract which, if enforced, would be repugnant to the objectives of treaties with Mexico. The Court, per Taney, J., stated at page 46:

> "These treaties, while they remained in force were by the Constitution of the United States, the supreme law, and binding not only upon the government, but upon every citizen. No contract could lawfully be made in violation of their provisions."

These constitutional, treaty and statutory provisions declare the public policy of the United States, and the courts of Missouri are without authority to set it at naught or deny their benefits. Sola Electric Co. v. Jefferson, supra; DePass v. Harris Wool Co., 346 Mo. 1038, 144 S. W. (2d) 146.

The Supreme Court of Missouri, by its decision, has refused to place the construction upon said constitutional, statutory and treaty provisions contended for by petitioners, and which would have resulted in a judgment in their favor, and has decided the aforesaid federal questions of substance in a manner not in accord with the principles of law heretofore determined by this Court in applicable decisions thereof, as set out above.

In Sola Electric Co. v. Jefferson, 317 U. S. 173, 176, it is ruled:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied by state statutes or common law rules * * * **To the federal statute and policy, conflicting state law and policy must yield.**" (Emphasis added.)

It is contended that certiorari should be granted to review each of the above mentioned federal questions, all of which are questions of substance which have been specifically set up or claimed at the earliest possible time in the proceedings, kept alive at each stage thereof, and duly called to the attention of the highest court in the State of Missouri in which a decision could be had, prior to its ruling in this case. Sec. 237 (b), Judicial Code [Sec. 344 (b), Title 28, U. S. Code]; Rule 38, par. 5 of the Rules of the Supreme Court; St. Louis I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 293; Longest v. Langford, 274 U. S. 499, 500; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673; Seabury v. Green, 294 U. S. 165, 168; Murray v. Gerrick & Co., 291 U. S. 315, 316.

In none of the cases heretofore decided by the Supreme Court of Missouri involving racial restrictions, have the federal statutes and questions involved in this case, been at issue therein or passed on.

The party to an illegal or void contract is not denied access to the courts by the courts' refusal to enforce same. Sprague v. Rooney, supra. The Missouri Constitutional provision, Section 14, Article I, means only that for the redress of such wrongs and the protection of such rights as are recognized by the law of the land, the courts shall be open and afford a remedy. Landis v. Campbell, 232 S. W. 464; State ex rel. Nat'l Refining Co. v. Seehorn, 127 S. W. (2d) 418.

II.

RACIAL RESIDENTIAL SEGREGATION BY STATE COURT ENFORCEMENT OF RESTRICTIVE AGREEMENTS IS UNCONSTITUTIONAL AND CONSTITUTES STATE ACTION IN VIOLATION OF THE FOURTEENTH AMENDMENT.

This question has never been presented to the Supreme Court of the United States. 33 Calif. Law Review 5. In Mays v. Burgess, 147 Fed. (2d) 869, involving a restrictive agreement similar to the one in this case, Edgerton, J., in his dissenting opinion said, l. c. 875:

> "But the Court (in Corrigan v. Buckley) had no occasion to decide, and it expressly refrained from deciding, whether or not a contract of this sort was 'void because contrary to public policy' or 'was of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant'. **The Supreme Court has never decided whether this sort of contract is enforceable against anyone.**" (Emphasis added.)

State courts in upholding restrictive agreements have cited the case of Corrigan v. Buckley, 245 U. S. 60, but in that case the appeal was dismissed for want of jurisdiction and consequently did not pass on the question.

The Corrigan case has never since been cited by the Supreme Court itself, except on a different point not material here. The Corrigan case could not and did not settle anything about the application of the Fourteenth Amendment to this type of case because the case came to the Supreme Court on appeal from a court of the District of Columbia and involved solely a question of the law of the District to which the Fourteenth Amendment and the two federal statutes in question here have no

application. The Supreme Court dismissed the appeal for want of jurisdiction. The question of whether state **enforcement** of a racial restrictive agreement is a violation of the Equal Protection clause of the Fourteenth Amendment was not before the Court (although mentioned by the Court). The provisions of the Fourteenth Amendment are addressed only to the states and not to the District of Columbia. 33 Calif. Law Review 5; 12 University of Chicago Law Review 199.

The **enforcement by court process** of the agreement involved in this case, which was unenforceable by reason of being illegal and void, as hereinbefore set out, is state action within the meaning of the provision of the Fourteenth Amendment forbidding any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The ruling of the Supreme Court of Missouri:

> "Nor can it be claimed that the enforcement of such a restriction by court process amounts to action by the state itself in violation of the Fourteenth Amendment, which relates to state action exclusively,"

is manifestly unsound, has never been decided by this Court in connection with the question of the enforcement of racial restrictions in private agreements prohibiting the sale or occupancy of property to or by Negroes solely on account of their race; and said ruling is not in accord with the principles of law applicable to said question which this Court has determined in the following cases: Twining v. New Jersey, 211 U. S. 78; Raymond v. Chicago Traction Co., 207 U. S. 20, 36; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673; Ex parte Virginia, 100 U. S. 339, 347; American Federation of Labor v. Swing, 312 U. S. 321, 326.

Legislative restrictions restricting the right of a member of a particular race to live upon particular land denies rights guaranteed by the Fourteenth Amendment. Buchanan v. Warley, supra; Harmon v. Tyler, supra; City of Richmond v. Deans, supra. Judicially established rules are subject to the same constitutional limitations as those established by the Legislature. Chicago B. & Q. R. R. v. Chicago, 166 U. S. 224.

The principle that judicial enforcement or court order constitutes action by the state has abundant authority. In Brinkerhoff-Faris Co. v. Hill, supra, the Supreme Court reserved the decision of the Supreme Court of Missouri, stating:

> "If the result above stated were obtained by the exercise of the state's legislative power, the transgression of the Due Process Clause of the Fourteenth Amendment would be obvious * * * The Federal guarantee of due process extends to state action through the **Judicial** as well as through the Legislative, Executive or Administrative branch of government." (Emphasis added.)

As early as 1880 the Supreme Court in ex parte Virginia, supra, cited by nearly every term of the court as a basic case on state action by courts, held that the limitation on state action applies to the exercise of the decisional powers of state courts as well as to laws enacted by a State Legislature. The Court said, at page 347:

> "Whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the law, violates the constitutional inhibition; and as he acts in the name or for the state, is clothed with the state's power, his act is that of the state. This must be so,

> or, as we have often said, the constitutional prohibition has no meaning and the state has clothed one of its agents with power to annul or evade it."

So also in Twining v. New Jersey, supra, the Court said:

> "The judicial act of the highest court of the state in authoritatively construing and enforcing its laws is the act of the state."

The Court in construing not only statutes but the common law is acting for the state. In Cantwell v. Connecticut, 310 U. S. 296, the Supreme Court reversed a conviction on the ground that the **common law** of Connecticut as interpreted and applied by the courts, was a denial of due process by state action, contrary to the Fourteenth Amendment. Similarly in Bridges v. Calif., 314 U. S. 252, the Supreme Court reversed a contempt sentence on the ground that the State Court improperly interpreted the **common law** so as to infringe on the guarantees of the Fourteenth Amendment. Activities of individuals are not only of private concern, but frequently involve state action. In Smith v. Allwright, 321 U. S. 649, it was held that in view of the relationship of the primaries to the whole electoral process, the delegation to a political party by the state of the power to fix membership qualifications as to exclude Negroes, made the subsequent act of the parties excluding Negroes the act of the state, and therefore the discrimination was prohibited by the Fourteenth Amendment. This same principle of law was again decided by this Court in Mo. ex rel. Gaines v. Canada, 305 U. S. 337, 343. Should the elementary right to live in a community be deemed of less importance than the right to vote? What does it benefit a Negro to be given the right to vote if he be denied the right to live in the community? In Steele v. L. & N. Ry., 65 St. Ct. 226, the

Supreme Court indicated that since the law gave a union exclusive bargaining rights, the union had to use those rights in a non-discriminatory manner. In this case, the relationship of the governmental action, i. e., legislation to the discrimination was far less direct than in a restrictive covenant case. In the labor case, the union exercised powers conferred by legislation (however, unions have often achieved the status of exclusive bargaining representatives even independent of legislative aid) but the finally discriminatory exercise of such powers was their own act. In the restrictive covenant case the "private" discrimination is ineffectual, in every contested case, until the judicial agency of the Government implements it by injunction.

As stated under Point I, the case of Harmon v. Tyler, supra, prohibited the legislative attempt to authorize individuals by private agreement to effect racial segregation, and held such attempt invalid in violation of the Fourteenth Amendment.

Judicial enforcement by injunction of the restrictive covenant achieves precisely the same purpose as a zoning ordinance. In either case the power of the Government is exercised directly on the individual and on a discriminatory basis. Certainly judicial action should not be permitted where legislation to the same effect would be invalid. Permitting the enforcement by injunction will permit the state through its judiciary in violation of the Fourteenth Amendment to deny the right to a person because of his color or race alone to freely settle in the in the community.

So far as private agreements operate without state aid, they are indeed purely the acts of individuals, but as stated in the 33 Calif. L. R. 5:

> "but when the discriminatory objectives of private persons cannot be obtained without calling upon the state for aid, sanction or enforcement and that aid is given, unconstitutional action by the state has been taken."

The acts involved in the Civil Rights cases were the acts of a kind that accomplish their objective without any aid whatever from the state. If an innkeeper refuses entertainment to a Negro, or any other person, because of his race, that is the end of the matter. The refusal to serve operates of itself without any aid or intervention by the state or any of its officers or agents.

Although the discriminatory agreements, conditions or covenants in deeds that exclude Negroes or other racial minorities from buying or occupying residential property so long as they remain purely private agreements may not be unconstitutional so long as they are voluntarily observed by the covenantors or the restricted grantees, but when the aid of the state is invoked to compel observance and the state acts to enforce observance, the state takes forbidden action. The deed to the colored buyer cannot be cancelled by purely private action. The Negro cannot be ousted from occupancy by purely private action. When a state court cancels the deed or ousts the occupant, the state through one of its organs is aiding, abetting, enforcing the discrimination.

Does the state action make or result in a forbidden discrimination? The constitutional question is one of equality for all citizens. The laws which provide for equal accommodation of services can be sustained only because they require the facilities or services to be equal. Without equality there would be a forbidden racial discrimination. Equality of the services or accommodations is in fact a

possibility and can be brought about by rigid law enforcement. But residential segregation cannot stand that test. In 33 Calif. L. R. 5, the author states:

> "No two residential districts are equal. Even in mass production, though two houses may be identical, their locations are different. In the specific performance of contracts to convey lands, courts have traditionally held that every part of land is unique. In doing so, they have recognized as a fact what is a fact. Obviously, therefore, when a Black is barred from buying or residing on Whiteacre, no equality results to him from the fact that there is other property that he may buy or live in, nor would equality be produced by reason that White is or may be barred from buying or living on Blackacre. * * * When a Negro is denied the occupancy of the house of his choice, is not it specious to say that there may be other houses elsewhere that he may occupy from which Whites may be excluded by restrictive agreements "

There are types of non-racial restrictions which are valid, such as a restriction that intoxicating liquor shall not be sold on the premises, that the property may not be used for a slaughter house, soap or glue factory, livery stable, etc., but these restrictions are valid and can be enforced whether embodied in zoning laws or in private agreements as a legitimate exercise of police power and because they do not discriminate against a user by reason of his color or race; they apply equally to white or colored occupants. Are Negroes to be lumped with slaughter houses, soap and glue factories and livery stables? This would constitute a rather arbitrary classification. The above restrictions would violate the Equal Protection Clause if they forbade the use of the property as a livery stable when operated by a Negro, but permitted it when the stable was operated by a white person.

Isn't it illogical to say that the Legislature is powerless to establish ghettos, but that private individuals may do so and obtain the sanction of another branch of the Government, the Judiciary, in establishing and maintaining ghettos. In Gandolfo v. Hartman, supra, the Court said:

> "Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation and the Court should no more enforce the one than the other."

The Record in this case discloses that private individuals got together to do what the state was forbidden to do, and created a ghetto solely because of race or color. This was a violent violation of the very function which the Constitution of the United States under the 14th Amendment directs the state to perform in the interest of the citizen. The actual result is usurpation and exercise by private individuals of the sovereign functions of the administration of justice in order to defeat the performance of duties required of the state by the Supreme law of the land. The inevitable effect is not merely to prevent the state from doing its duty, but to use the state as an instrumentality to deprive the citizen of the very rights which the 14th Amendment intended to secure for him. It permits the individual to set himself above the state and directly attacks the purpose which the Constitution of the United States had in view when it enjoined the duty upon the state. Such a situation cannot be tolerated in a land that gave birth to the Declaration of Independence, the Constitution and Democracy. State inaction exists, and will continue to exist. The extent to which this evil exists is stated in the decision of the Supreme Court of Missouri here sought to be reviewed. It extends from coast to coast. A standard form of restrictive agreement, comparable to standard insurance policies, is now in use for that pur-

pose. It is therefore important that the federal authority secure equal rights to all citizens and enforce federal rights guaranteed by statute. The evils of discrimination because of color exist and doubts as to whether or not federal power now exists to remedy it can only adversely affect our national morale. Hence, it is highly desirable that whatever doubt that may exist be authoritatively resolved.

For a further consideration of this, and of the other constitutional questions hereinbefore raised, the Court's attention is respectfully called to the following authoritative and exhaustive articles:

"What Is State Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments to the Constitution."
By James O. Barnett, Prof. Emeritus Political Science, Univ. of Oregon, in 24 Oregon Law Review, p. 227, June, 1945.

"Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem."
By Harold I. Kahen (12 Univ. of Chicago Law Review 198, 1945).

"Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants and Conditions in Deeds Is Unconstitutional."
By Prof. D. O. McGovney (33 California Law Review 5, 1945).

Undoubtedly the ruling of the Supreme Court of Missouri, that the enforcement of the restriction in question is not state action forbidden by the Fourteenth Amendment is fallacious and cannot be upheld under the overwhelming authority to the contrary. Its interpretation of that provision of the Amendment is nowhere supported by respectable authority. It is further contended that the above ruling of the Supreme Court of Missouri, as it ap-

plies to the question of state action in regard to the enforcement of restriction against Negroes contained in agreements between private persons, has decided a federal question of substance not heretofore determined by this Court, and is reviewable on certiorari. Sec. 237 (b), U. S. Judicial Code, as amended; Sup. Ct. Rule 38, Par. 5; Brooklyn Sav. Bank v. O'Neil, 324 U. S. 697.

III.

THE SUPREME COURT OF MISSOURI IN HOLDING AND DECIDING THAT PETITIONERS ARE IN NO POSITION TO COMPLAIN OF LACK OF NOTICE OF THE RESTRICTIONS CONTAINED IN THE AGREEMENT, DENIED THE PETITIONERS THE EQUAL PROTECTION OF A WELL-SETTLED RULE OF LAW IN MISSOURI.

The rule of law contended for in this case is set out in Federal Land Bank v. McColgan (Mo.), 59 S. W. (2d) 1052, l. c. 1055, as follows:

> "It has been ruled by this court that if the description in a deed is void for uncertainty, its record does not impart notice * * * only the parties to the conveyance and those having actual knowledge were bound."

As to what is certainty, the Supreme Court of Missouri in Ozark Land & Lumber Co. v. Franks, 156 Mo. 673, 57 S. W. 540, l. c. 543, quoted the following with approval from Gatewood v. House, 65 Mo. 663:

> "To constitute the record of a deed notice to subsequent purchasers, the description contained in the deed should be such as would enable such purchasers to identify the land by any location, monuments,

courses and distances, or numbers, or the deed should refer to some other instrument lawfully of record which does contain some means of identification."

And this ruling has been consistently adhered to by the appellate courts of Missouri since the Gatewood decision.

The trial court found that the petitioners had no actual knowledge of the restriction at the time of the purchase (Par. 4 Findings; R. 140; Memo. 143).

On appeal, the parties stipulated as follows: "It is further stipulated and agreed that said restriction agreement does not contain the lot number of any parcel or lot of ground mentioned therein, nor does it contain any reference to any other recorded document wherein such information may be found" (R. 3). The refusal of the Supreme Court of Missouri to apply the foregoing well-settled rule of law to the facts in this case constitutes a denial to the petitioners of the equal protection of the law and deprives them of their property without due process of law, contrary to the 14th Amendment. Cantwell v. Connecticut, supra.

No occasion arose for raising this federal claim prior to the decision of the Supreme Court of Missouri, and the issue was raised by a pleading upon motion for rehearing and passed upon by the Supreme Court of Missouri in overruling the same.

Where a state question relied upon by petitioners as a defense, and properly presented to the highest court of the state and disallowed by that Court, thereby creating the first occasion to suspect a federal question in connec-

tion therewith, the federal claim in regard thereto set up in the motion for a rehearing, that being the first opportunity, is timely raised and reviewable on certiorari by this court. Brinkerhoff-Faris Co. v. Hill, supra; Great Northern Ry. Co. v. Sunburst Oil & Refin. Co., 287 U. S. 358.

IV.

WHERE THE ENFORCEMENT OF A CONTRACT WILL ENDANGER THE STATE OR CAUSE INJURY TO ITS CITIZENS, THE COURTS WILL NOT ENFORCE THE SAME.

The record clearly discloses that, by means of the use of this agreement, and of others of similar import and purpose, petitioners and other members of the Negro race have been segregated and compelled to live in an area of the city of St. Louis which is grossly overcrowded by more than 100,000 persons; and that, by reason of such overcrowding, ill health, the death rate, juvenile delinquency and crime have increased among them beyond the average in said city. In some sections of said segregated area each room in a house is occupied by a different family, and many of them have children. A city housing project within said area, containing 629 family units, has 7,000 waiting applications, and some Negro families are living in buildings hardly fit for the habitations of beasts. (Testimony of John T. Clark and Mrs. Lillian Masee, (R. 134, 135).

Jas. T. Bush, a colored real estate dealer, testified that he received from 15 to 20 calls per day from colored persons seeking housing accommodations, and was able to place only about 5 per month; and that the only way to get a house at that time for Negroes in St. Louis was for someone to die, leave the city, or be evicted (R. 128).

Mrs. Fannie Cook, a prominent authoress and a member of the Mayor's Race Relations Committee, active in organization and social work among Negroes in St. Louis, testified that Negroes in some parts of St. Louis lived in crowded, congested conditions contributing to crime, juvenile delinquency and disease among them; that she had made a book review of Gunner Myrdal's work, "An American Dilemma," for the St. Louis Public Library, and that she fully agreed with what the author said therein with reference to the overcrowded and congested conditions in which Negroes live in the cities of the United States, and about the results of overcrowding. She read passages from said book, and from other pamphlets and magazines which she testified were true representations of said living conditions among Negroes and of the injury resulting therefrom.

Upon the testimony of the above-named witnesses, and certain census facts of which the trial court took judicial notice, that Court made the finding of fact in regard to these conditions which was reviewed by the Supreme Court of Missouri in its opinion (R. 134), where it said:

> "The chancellor found the Negro population in St. Louis has greatly increased in recent years, and now numbers in excess of 100,000; and that some of the sections in which Negroes live are overcrowded, which is detrimental to their moral and physical well-being.
>
> "Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast. See Mays v. Burgess, supra, and Fairchild v. Raines, 24 Cal. (2d)

> 818, 151 Pac. (2d) 260. But their correction is beyond the authority of the courts generally, and in particular in a case involving the determination of contractual rights between parties to a law suit. If their correction is sought in the field of government, the appeal must be addressed to its branches other than the judicial."

The refusal of the Supreme Court of Missouri to afford petitioners relief from the above conditions and injuries, as disclosed by the Record, was due, not to a lack of authority, but to its failure to apply to said facts the rule of law which has prevailed in Missouri since the decision in Thurston v. Rosenfeld, 42 Mo. 474, that: where enforcement of a contract will cause damage to the state or injury to its citizens, the courts will refuse to enforce the same.

No statement from counsel, other than that the living conditions shown by this Record to exist among Negroes in St. Louis are general in the large urban centers of the United States, could add anything to the dismal and terrible picture which has been painted by the testimony of the witnesses above cited and the reviewing comment of the Supreme Court of Missouri. However, for further information concerning these social conditions the Court's attention is respectfully directed to the following authoritative publications:

> An American Dilemma — Myrdal, Vol. 1, p. 379 (showing the payments of higher rents and suggesting it as a good reason for housing segregation).
>
> "The Urban Negro: Focus of the Housing Crisis"— Real Estate Reporter, October, 1945, p. 12, citing Mayor's Committee on City Planning, and showing 3,781 people housed in a single city block of the Harlem District in New York City.

"Brown American" by Edwin Embree (Viking Press—1943), commenting at p. 34 upon the above condition, that: "comparable concentration for the entire population would result in all of the people of the United States living in one-half of New York City."

Report of the Committee on Negro Housing of the President, Conference on Home Building, 45, 46.

Woofter, Negro Housing in Cities, 95 (Doubleday, Doran & Co., New York).

Racial Problems in Housing, 9 (National Urban League, New York).

Report of Howard L. Holtzendorf, Housing Director, Abstract in Housing, Feb. 24, 1945, Los Angeles, Cal.

The results of overcrowded housing conditions among Negroes in portions of the City of Chicago, Illinois, pictured by Richard Wright in his book, "Native Son," are not overdrawn. The denial of relief to petitioners under the circumstances disclosed by this Record is a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment, particularly, Section 41, supra, and Section 14 of Article I of the Constitution of Missouri, 1945. If it is lawful to restrict one piece of property against Negroes in Missouri solely because of their race, then it would be lawful to restrict all of the property against them in that state, and thus take away their fundamental right to live in the state.

The courts of Missouri, at least, are not helpless; Section 14 of Article I, supra, reads:

> "That the courts of justice shall be open to every person, and certain remedy afforded for every injury to persons, property or character, and that right and justice shall be administered without sale, denial or delay.'"

CONCLUSION.

The issues involved in this case affect not only these petitioners but large numbers of citizens throughout the United States. The constitutional and statutory principles of law applicable to the conditions disclosed by the facts in this case are in need of being determined and clarified by this Court to the end that the several states will be able to deal authoritatively with these questions in accordance with what is just and right.

Wherefore, it is respectfully submitted that a writ of certiorari should issue as prayed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 72

J. D. SHELLEY and ETHEL LEE SHELLEY, His Wife,
Petitioners,

—VS.—

LOUIS KRAEMER and FERN W. KRAEMER, His Wife,
Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

J. D. SHELLEY and ETHEL LEE SHELLEY, His Wife, *Petitioners,*

vs.

LOUIS KRAEMER and FERN W. KRAEMER, His Wife, *Respondents.*

No. 1268

Respondents' Brief Opposing Issuance of Writ of Certiorari

OPINION OF COURT BELOW.

The case herein sought to be reviewed was decided by the Supreme Court of Missouri, being the highest Court in which a decision could be had, and was there entitled Louis Kraemer and Fern W. Kraemer, his wife, appellants, v. J. D. Shelley and Ethel Lee Shelley, his wife,

and Josephine Fitz-Gerald, respondents. The decision and rulings of the Court below appear in pp. 153 to 159 of the Record filed herein.

Said opinion is reported in 198 S. W. (2d) 679.

JURISDICTION OF THIS COURT.

Respondents concede that the writ of certiorari, provided for in Sec. 237 (b), Judicial Code, 36 Stat. 1156, as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937, Title 28 U. S. Code, Sec. 344 (b), is the proper method of review by this Court of the instant case, provided: That a Federal question of substance is supported by the record made in the lower Courts.

Respondents contend, however, that the Record filed herein presents no Federal question of the kind and character this Court has, in previous decisions, demanded in order to establish and sustain jurisdiction.

REASONS URGED IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

I.

The Record fails to disclose that Petitioners were deprived of property without due process of law.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Leeper v. Texas, 139 U. S. 462.

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

II.

The Record fails to disclose that Petitioners have been denied the equal protection of the laws.

16 C. J. S., p. 988, Sec. 502.

Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923.

Plessy v. Ferguson (1896), 163 U. S. 537, 551, 16 S. Ct. 1138, 41 L. Ed. 256.

McPherson v. Blacker (Mich., 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

III.

The Record fails to disclose that the State of Missouri has made or enforced any law which abridges the privileges or immunities of the Petitioners as citizens of the United States.

Slaughter House Cases (1873), 16 Wall (U. S.) 36, 21 L. Ed. 394.

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.

Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597.

Twining v. N. Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

Younger v. Judah (1892, Mo.), 111 Mo. 303, 19 S. W. 1109.

IV.

(a) The record fails to disclose the violation of any right of Petitioners arising from or out of the statutes, treaties, or Constitution of the United States.

Slaughter House Cases (1873), 16 Wall (U. S.) 36, 21 L. Ed. 394.

Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 836.

McPherson v. Blacker (Mich., 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

Virginia v. Rives (1880), 100 U. S. 313, 25 L. Ed. 667.

(b) Question of violation of treaties was not properly raised in Court below.

Rule 12 (1), Rev. Rules of Sup. Ct.

Godchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L. Ed. 213.

Amer. Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98.

V.

The Fourteenth Amendment, and the Statutes enacted thereunder, are directed against State action and not against the actions or agreements of individuals.

Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

Slaughter House Cases, 16 Wall (U. S.) 36, 21 L. Ed. 394.

Corrigan v. Buckley (D. C., 1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

U. S. v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290.

Hodges v. U. S. (1905), 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65.

Virginia v. Rives (1880), U. S. 313, 25 L. Ed. 667.

VI.

A Federal question sufficient to sustain the jurisdiction of this Court cannot be created by mere assertions, conjectures or conclusions unsupported by the record.

Ennis Water Works v. City of Ennis, 233 U. S. 652, 658, 34 S. Ct. 767, 58 L. Ed. 1139.

U. S. Fid. & Guar. Co. v. State of Oklahoma et al., 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876.

Zucht v. King et al., 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

Delmar Jockey Club v. Missouri (1908), 210 U. S. 324, 28 S. Ct. 732, 52 L. Ed. 1080.

VII.

(a) This Court has denied the existence of a substantial Federal question on a record such as presented in this case.

Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

(b) That a Federal question does not exist in such a case has been consistently held by State and Federal Courts.

Letteau v. Ellis (1932), 122 Cal. App. 584, 10 P. (2d) 496.

Chandler v. Ziegler (1930), 88 Colo. 1, 291 P. 822.

Edwards v. West Woodridge Theatre Co. (1931), 60 App. D. C. 362, 55 F. (2d) 524.

United Co-Operative Realty Co. v. Hawkins (1937), 269 Ky. 563, 108 S. W. (2d) 507.

Meade v. Dennistone (1938) (... Md. ...), 196 A. 330, 114 A.L.R. 1227.

Ridgway v. Cockburn (1937), 163 Misc. 511, 296 N.Y.S. 936.

Stone v. Jones (1944), 66 Cal. App. (2d) 264, 152 P. (2d) 19.

Doherty v. Rice (1942), 240 Wis. 389, 3 N. W. (2d) 734.

Los Angeles Investment Co. v. Gary (1919) (... Cal. ...), 186 Pac. 596, 9 A.L.R. 115.

Queensborough Land Co. v. Cazeaux (1915), 136 La. 724, L.R.A. 1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248.

Kohler v. Rowland (1918), 275 Mo. 573, 205 S. W. 217, 9 A.L.R. 107.

Steward v. Cronan (1940), 105 Colo. 393, 98 P. (2d) 999.

Dooley v. Savannah Bank & Trust Co. (1945) (... Ga. ...), 34 S. E. (2d) 522.

Lion's Head Lake v. Brzezinski, 23 N. J. Misc. R. 290, 43 A. (2d) 729.

Lyons v. Wallen (1942), 191 Okla. 567, 133 P. (2d) 555.

Hemsley v. Sage (1944), 194 Okla. 669, 154 P. (2d) 577.

Hemsley v. Hough (1945) (... Okla. ...), 157 P. (2d) 182.

Thornhill v. Herdt (1939), 130 S. W. (2d) 175.

Burkhardt v. Lofton (1944), 63 Cal. App. (2d) 230, 146 P. (2d) 720.

Swain v. Maxwell (1946) (... Mo. ...), 196 S. W. (2d) 780.

Mays v. Burgess (1945), 79 U. S. App. D. C. 343, 147 F. (2d) 861.

Hundley v. Gorewitz (1942), 77 App. D. C. 48, 132 F. (2d) 23.

Gospel Spreading Assn. v. Bennett (1945), 79 App. D. C. 352, 147 F. (2d) 878.

Torrey v. Wolfes (1925), 56 App. D. C. 4, 6 F. (2d) 702.

Russell v. Wallace (1929), 58 App. D. C. 357, 30 F. (2d) 981, Cert. Den. 279 U. S. 871, 49 S. Ct. 512, 73 L. Ed. 1007.

Grady v. Garland (1937), 67 App. D. C. 73, 89 F. (2d) 817, Cert. Den. 302 U. S. 694, 58 S. Ct. 13, 82 L. Ed. 536.

Herb v. Gerstein (1941), 41 Fed. Supp. 634.

SUMMARY OF ARGUMENT.

I.

The Courts below had jurisdiction over the subject-matter and the parties. The trial was fairly conducted in a Court of justice according to the modes of proceeding applicable to such a case under the laws of Missouri and petitioners had and enjoyed equal opportunity to be heard and defend. The laws under which the trial and review by the Missouri Supreme Court were had operate on all citizens alike.

Since no legislative enactment is here involved, the State of Missouri has not made or enforced any law which deprives petitioners of life, liberty or property without due process of law.

II.

The "equal protection" clause of the Fourteenth Amendment was designed to prevent a State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. The Supreme Court of Missouri, in the case at bar, has enforced, by equitable principles applying equally to all citizens, a private contract of private citizens. The State of Missouri afforded to respondents a remedy in enforcing those substantive rights which accrued to respondents by virtue of the solemn contract to which the State of Missouri was not a party nor in which the State of Missouri had any interest. This system of equitable justice is available, in Missouri, to all citizens without regard to race, color, or creed. Hence the laws of Missouri protect all citizens equally.

III.

The "equal privileges and immunities" clause of the Fourteenth Amendment protects only against invasion by the State of privileges and immunities which accrue to persons by reason of Federal Citizenship. The privilege which petitioners assert is to use and occupy specific private property which was subject to and burdened with an equitable charge of which petitioners had legally sufficient notice prior to their actual use and occupancy.

Since this is not a privilege accruing to petitioners by virtue of their United States citizenship, the State of Missouri has not made or enforced any law abridging a Federally protected interest.

IV.

Since petitioners did not raise specifically in the Court below, and at the earliest possible stage of the proceedings, the question involving Clause 2 of Article VI of the Constitution of the United States, they cannot now urge a consideration of an alleged violation of that Article.

The violation, by the agreement involved in this case, of treaties to which this government is a signatory was not alleged in the trial Court, nor is it found anywhere in the Printed Record herein filed prior to the Motion for Rehearing filed in the Missouri Supreme Court following decision and judgment.

V.

Only State action is violative of the Fourteenth Amendment, and while State action includes legislative, executive and judicial acts, it is State action of a particular character which is prohibited. It must be the State itself acting before the Federal power proclaimed in the Fourteenth Amendment and Statutes enacted thereunder shall be brought to bear.

It has been consistently held by this Court and all the Federal and State Courts that the Fourteenth Amendment is not directed against the acts of individuals whether such individuals act singly or in groups, or whether such private acts result in, or have for their purpose, discrimination. And the same rule applies to the contracts of private individuals. Such are considered to be the internal affairs of a State, and are subject, exclusively, to State determination.

A Court, adjudicating the contested rights of litigants, is not acting in the sense of that State action prohibited by the Fourteenth Amendment.

VI.

The contentions of petitioners that restrictive agreements result in the dire conditions under whch some negroes live in some urban communities are based upon mere conclusions of petitioners, and are not founded upon any finding by the Courts below that there is any relation of cause and effect between agreements like the one here involved and the living conditions claimed to exist.

VII.

In the only two cases in which restrictive agreements have been before this Court it was felt that no substantial federal question is involved where a contract of private citizens has been sought to be enforced. Certiorari was recently denied in a similar case.

No court, sitting as a State or Federal Tribunal, has ever held that an agreement such as the one in this case is violative of the Fourteenth Amendment or the Statutes enacted thereunder. On the contrary, they have consistently held, in line with previous decisions of this Court, that the private contracts of individuals are not affected by the provisions of the Fourteenth Amendment or the Statutes thereunder.

ARGUMENT.

The purpose of this Argument is to point out that the Record in this case fails to reveal any basis for the Court assuming jurisdiction of the controversy by granting its Writ of Certiorari as prayed for by Petitioners.

If a substantial Federal question is not disclosed in the Record then, even though designated as such by Petitioners throughout the entire proceeding in the courts below, the writ should not issue.

> Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

And the mere fact that the Supreme Court of Missouri has decided a Federal question in its decision will not warrant assumption of jurisdiction by this Court, if the Federal question decided does not appear to have been a substantial one.

> Sugerman v. U. S., 249 U. S. 182, 184, 39 S. Ct. 191, 63 L. Ed. 550.

And, further, a Federal question of sufficient color to sustain the jurisdiction of this Court may be precluded by reason of previous decision.

> Leonard v. Vicksburg R. R. Co., 198 U. S. 416, 422, 25 S. Ct. 750, 49 L. Ed. 1108.
>
> Corrigan v. Buckley, supra.

Petitioners partially ground their application for issuance of the writ on the first three clauses of the Fourteenth Amendment and on Sections 1977, 78 of the Federal Code (now Sections 41 and 42 of Title 8 United States Code). These are the Civil Rights Statutes and were enacted under the authority of the Fifth Section of the Fourteenth Amendment.

Since the statutes can go no farther than the Amendment under the authority of which they were enacted, it will suffice to examine the Record to determine if any Federal right under and by virtue of the Amendment is involved. Corrigan v. Buckley, supra. The statutes merely enumerate fundamental rights referred to generally in the amendment.

Strauder v. W. Va., 100 U. S. 303, 25 L. Ed. 664.

The Argument of respondents will concern itself with the separate clauses of the amendment.

I.

The Record fails to disclose that Petitioners were deprived of property without due process of law.

It is nowhere contended specifically in Petitioners' Brief in what manner or by what means they were "deprived of property without due process of law." The Record clearly discloses that the ruling of the Supreme Court of Missouri followed a contested trial in the Circuit Court of St. Louis which, under the laws of the State of Missouri, is a duly constituted court of original jurisdiction for the trial of equitable actions. The defendants were accorded the same rights in the trial of the case as are afforded to all citizens of Missouri of whatever race, color or creed. The Supreme Court of Missouri reversed the decision of the trial court by applying to the facts of the litigated controversy well-known and long established equitable principles deeply grounded in the substantive law of Missouri. These principles apply equally to the citizens of Missouri. Both Courts had jurisdiction over the matter and the parties. Both parties were accorded every opportunity to defend their conception of the facts

and of the applicability of the common law. Thus, all the essential principles of due process were present.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.
Leeper v. Texas, 139 U. S. 462.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

Petitioners cannot show where, in the Record, there appears any deprivation of their property. The Supreme Court of Missouri found that Petitioners had legally sufficient notice of the equitable charge upon the land which resulted from a solemn and sealed contract having been recorded in compliance with the statutory law of Missouri. Thus, Petitioners sought to acquire by purchase, and to use and occupy, property which they knew was subject to the equitable charge. What they acquired was at best a defeasible title subject to be divested by the application of rules of equity well-established in the common law of Missouri. By the attempted purchase they became parties to the contract as if they had executed it. They cannot assert a Federal right to the effect they were deprived of **their** property without due process of law.

Before the due process clause of the Fourteenth Amendment can be brought to bear, it must be shown by the Record that the act of the State was the subject of the controversy. No such conclusion can be drawn from this Record. The subject of the controversy was the act of private individuals of whom the Petitioners were one.

If it should be held that private citizens cannot control their individual private property by private contract because it might produce a result which the State could not affect by legislation; or if it should be held that a private

contract should not be enforced between individuals, though it has for its purpose the denial to a negro of a right which he has as a citizen of the State, then no contract could be made whereby a negro could be refused service in a restaurant; no contract could be enforced the provisions of which denied a negro participation at a dance place; no contract could be made whereby a party to it could refuse, because bound by a contract, to admit a negro to a private swimming pool. No one denies that a fundamental right of man is to work and earn a living and to make contracts of employment with an employer. But the law does not forbid an employer the right to refuse to hire a man even though the refusal to do so is based solely upon the fact the employer has entered into a contract to employ only union men. No man can be forced to breach his solemn contract unless those contracts are violative of public health, safety, morals or welfare.

If a contract were made by the terms of which the facilities of a business or enterprise set up under the contract were to be limited to males only, could it be said that a female could demand those services or facilities? Even though she is a citizen of the United States she has no right, protected by law, to the services or facilities in general, and those in control of such facilities need assign no reason for their refusing them to her. But no one doubts that such contracts can be made, and when enforced, they are not violative of the Fourteenth Amendment or of the statutes enacted thereunder.

If, as above asserted, the Record fails to disclose the denial to Petitioners, by the State of Missouri, of the equal protection of its laws, then, on this ground, the Writ should be denied.

While Petitioners rely heavily on the proposition that the Fourteenth Amendment was not properly applicable to the restrictions in Corrigan v. Buckley, supra, since the case arose in the District of Columbia, it must certainly be admitted that the decision correctly declares the law insofar as it holds that the due process clause of the Fifth Amendment is not violated.

Could it be held that enforcement of restrictions by the Federal courts is not a denial of due process under the Fifth Amendment, but that enforcement by a State court of similar restrictions is a denial of due process under the Fourteenth Amendment?

It has been held by this Court that the phrase "due process of law" has the same meaning in both the Fifth and Fourteenth Amendments.

> Levy v. Lewis, 295 U. S. 768, 55 S. Ct. 652, 79 L. Ed. 1709.

Thus it should be clear that both on the Record here presented, and the authority of Corrigan v. Buckley, supra, the State of Missouri did not deprive Petitioners of property without due process of law.

II.

The Record fails to disclose that Petitioners have been denied the equal protection of the laws.

The "equal protections" clause of the Fourteenth Amendment was designed to prevent a State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. Nowhere has it been asserted that a court of competent jurisdiction deciding a case, as a Court of Equity, in which the

contract rights of private individuals was the subject matter, was violating the "equal protections" clause. In McPherson v. Blacker (Mich. 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869, it is said:

> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile **legislation**" (emphasis ours).

The Supreme Court of Missouri in 1892 stated the following in Younger v. Judah, 111 Mo. 303, 19 S. W. 1109:

> "These clauses (privileges and immunities and equal protection clauses of the Fourteenth Amendment) do not undertake to confer new rights, nor do they undertake to regulate individual rights. They are simply prohibitory of State **legislation,** and of State action" (emphasis ours).

The Record discloses no discriminatory legislation involved in this case. Petitioners do not specifically allege in what particular or by what manner or means they were denied the equal protection of the laws of Missouri. As for the allegations in Petitioners' Brief, they assert a denial to them of constitutional and fundamental rights without pointing out what rights were denied, whether or not they are such rights as accrue to them by their citizenship of the United States, or how there was denied to them the equal protection of the law. The Record discloses there was no denial or refusal to protect them equally under the law or to deny to them the application of equal laws.

What the Record does disclose is that the Supreme Court of the State of Missouri decided the legal questions

involved in a contested case, and, in its decision, applied well-established, equitable principles which are applied equally in Missouri to all citizens regardless of race, color or creed. The Record discloses no discrimination against Petitioners in the application of either substantive or procedural law. The principles by which the Court arrived at its conclusions are applied equally to all citizens and, while no such case has arisen, it should be assumed that, were the positions of the parties reversed and the agreement had been one to which negroes were a party, a violation by a white person would have been promptly enjoined by applying to such a case exactly the same principles employed by the Missouri Supreme Court in this case.

For several generations, following the reasoning of the decisions in the Slaughter House Cases, the Civil Rights Cases, and others, an unbroken chain of State and Federal decisions have uniformly held that the equal protection clause of the Fourteenth Amendment is directed, not against individuals nor their contracts or actions, but against the State or against individuals who, at the time they act in violation of the Amendment, are acting as and for the State.

III.

The Record fails to disclose that the State of Missouri has made or enforced any law which abridges the privileges or immunities of the Petitioners as citizens of the United States.

There is no intimation by Petitioners that any "immunity" guaranteed to them has been abridged. It is "privilege" which they assert has been abridged. It remains to

search the Record to discover what privilege it is that has been abridged and whether or not that privilege is one protected by the Fourteenth Amendment.

Corrigan v. Buckley settled the question that the right to own **specific property** was not a right recognized or protected by the laws of the United States on any theory of Constitutional limitations. The case came to the United States Supreme Court by appeal from the Court of Appeals of the District of Columbia. In the decision appealed from the Court had said:

> "Appellant seems to have misconstrued the real question here involved. . . . The Constitutional right of a Negro to acquire property does not carry with it the Constitutional power to compel sale and conveyance to him of any particular private property."

The United States Supreme Court, in affirming the judgment, decided:

> "* * * and the prohibitions of the Fourteenth Amendment 'have reference to State action exclusively, and not to any action of private individuals.' Virginia v. Rives, 100 U. S. 313. 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the right.' Civil Rights Cases, 109 U. S. 3."

In ruling on Sections 1977, 78 and 79, Revised Statutes of the United States (now Sections 41, 42 and 43 of Title 8 of the U. S. Code), the United States Supreme Court said:

> "* * * while they (the statutes) provide, inter alia that all persons and citizens shall have equal right with white persons to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in

any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

For earlier decisions that the "equal privileges and immunities" clause of the Fourteenth Amendment protect, against State action, **only** those rights which accrue by virtue of Federal Citizenship, see

Slaughter House Cases (1873), 16 Wall (U. S.) 36, 21 L. Ed. 394.

Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.

Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597.

Twining v. N. Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

Younger v. Judah (1892, Mo.), 111 Mo. 303, 19 S. W. 1109.

This Court, in many decisions, has held that, while the Fourteenth Amendment requires a State to provide equal public facilities to both whites and negroes, the Fourteenth Amendment protects equality but not identity of rights.

Gong Lum et al. v. Rice et al. (1927), 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172.

This same principal has been enunciated by the State Courts in cases involving educational facilities to white and colored students.

People v. Gallagher, 93 N. Y. 438, 451.

People ex rel. Cisco v. School Board, 161 N. Y. 598, 56 N. E. 81.

Even Congress has established separate school facilities in the District of Columbia.

Wall v. Oyster (App. D. C. 1910), 36 App. D. C. 50, 31 L.R.A. (N.S.) 180.

Segregation of negroes and whites in separate educational institutions has been the public policy of Missouri as set out in the Missouri Constitution of 1865, Section 2, Article IX; Constitution of 1875, Section 3 of Article XI; Constitution of Missouri 1945, Section 1 of Article IX; Section 10349, R. S. Mo. 1939; Section 10632, R. S. Mo. 1939. See also Lehew et al. v. Brummell et al. (Mo. Sup. Ct. 1891), 103 Mo. 546, 15 S. W. 765.

Petitioners assert, contrary to the authority of the many decisions of this Court and the courts of their own State and of other States, that the privilege of owning and acquiring property should carry with it the privilege to own the specific property involved or mentioned in the Record of this case. Such a holding would be contrary to all of the cases above cited and would be a deviation from an interpretation of the Constitutional provision that has stood for generations.

On the authority of Corrigan v. Buckley, supra, the Slaughter House Cases and many others, the Writ should be denied since no Federally protected right or privilege has been abridged by the State of Missouri through discriminatory or unequal laws.

IV.

The Record fails to disclose the violation of any right of Petitioners arising from or out of the Constitution, laws, or treaties of the United States.

The points raised by Petitioners under "Reasons Relied on for Granting Writ 3 (d)", and found in Appellant's Petition for Writ of Certiorari and Brief in Support Thereof, pp. 18 and 19, and in their Argument, pp. 39, 40 and 41,

undoubtedly are grounded upon the provisions of the second section of Article VI of the United States Constitution, which reads:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State notwithstanding."

Respondents wish to point out to the Court that the first time this point was raised by Petitioners in the lower Court proceedings was in Petitioners' "Motion for Rehearing" filed in the Supreme Court of Missouri after that Court had handed down its decision (Printed Record, p. 166, ground No. 6).

Neither the point nor the Constitutional Article relied upon were raised by Petitioners in their amended "Return to Order to Show Cause", nor in their "Answer" filed in the trial Court (Printed Record, pp. 9-16, incl.). It is not raised in "Extracts from Petitioners' Brief" filed in the Missouri Supreme Court and set out in the Printed Record, pp. 149-152, incl.

Petitioners have no right to have the point considered now by this Court. Rule 12 (1), Revised Rules of the Supreme Court; Godchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L. Ed. 213; American Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98.

V.

The Fourteenth Amendment, and the Statutes enacted thereunder, are directed against State action and not against the actions or agreements of individuals.

That the prohibitions of the Fourteenth Amendment were directed only against the States was first proclaimed by this Court in the Slaughter House Cases (1873), 16 Wall 36, 21 L. Ed. 394. The Amendment has never been held to apply to the acts of individuals whether such acts involve private contracts or not.

In an unbroken chain of land-mark cases this Court has steadfastly retained the interpretation and construction proclaimed in the Slaughter House Cases, supra; and such construction of the Fourteenth Amendment, and the Statutes enacted under the authority of the Fifth Section of the Amendment, has never been assailed by any State or Federal Court. Following the lead of the Slaughter House Cases are:

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Virginia v. Rives (1880), 100 U. S. 313, 25 L. Ed. 667.

U. S. v. Harris, 106 U. S. 629, 639, 118 S. Ct. 601, 27 L. Ed. 290.

Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 836.

McPherson v. Blacker (1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

Hodges v. United States (1905), 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65.

Delmar Jockey Club v. Mo. (1908), 210 U. S. 324, 28 S. Ct. 732, 52 L. Ed. 1080.

Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149.

Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

While Petitioners seem to agree that it is only the action of a State, or of the State acting as a sovereign power, which is forbidden by the Fourteenth Amendment, they seek, by argument, to have this Court construe the judicial determination of litigants' rights to be such State action. It is unnecessary to point out that the cases cited by Petitioners in support of that contention do not support Petitioners' reasoning. None of the cases go farther than to expound the fundamental principle that a State may act, not only through its legislative department, but also through its executive and judicial department in a manner repugnant to the Fourteenth Amendment. This argument, that enforcement by a State of a private contract is "State action," within the meaning of the Fourteenth Amendment, is most effectively answered by the pronouncements of this Court in decisions which have stood for generations.

In the Civil Rights Cases, supra, this Court said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

And on page 13 of the same opinion:

> "* * * for the prohibitions of the amendment are against State laws and acts done under State authority."

That the Amendment does not prevent individuals acting singly or in a group from doing that which might result in discrimination is supported by all of the decisions above cited. In Virginia v. Rives, supra, it is said:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action **exclusively** and not to **any action** of private individuals." (Emphasis ours.)

To the same effect is Hodges v. U. S. supra. The Supreme Court of Missouri has recognized the limitations of the Federal power under the Fourteenth Amendment when, in the case of In re Chambers Estate, 322 Mo. 1086, 18 S. W. (2d) 30, the Court said:

> "It seems clear that the provisions of the due process clause in the State Constitution and in the Federal Constitution, as well, are inhibitions upon the power of the State, and not upon freedom of action of private persons in respect to disposition of their own property."

The judicial interpretation and construction of the meaning of the Amendment was clearly expressed by the California Court in the case of Title Guaranty and Trust Company v. Garrott, 42 Cal. App. 152, 183 P. 470:

> "The Fourteenth Amendment * * * addressed itself to the State Government and its instrumentalities, to its legislative, executive and judicial authority, and not to contracts between individuals. It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. The Fourteenth Amendment, it is true, applies to the judicial as well as the legislative department of the State Government. But the judiciary does not violate this provision of the Federal Constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals * * * The 'equal protection' clause of the Fourteenth Amendment makes but one demand upon the State, and gives to the State but one right. It is that the State shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another."

That the internal affairs of a State are not the subject of Federal jurisdiction unless some constitutional provision is violated is long settled. And on the authority of Corrigan v. Buckley, supra, and numerous other decisions of this Court Respondents submit that neither the Fourteenth Amendment nor Sections 41 and 42 of the United States Court create any new rights. They merely enumerate and guarantee, against invasion by State legislation, rights which are the fundamental rights of all. The right to contract respecting one's own property is one of the most fundamental of such rights, and the right to use and dispose of one's property is the fundamental right which would have to be denied to Respondents if Petitioners' request is to be granted and the well-reasoned decisions of this Court and all the State and Federal Courts overthrown.

VI.

A Federal question sufficient to sustain the jurisdiction of this Court cannot be created by mere assertions, conjectures, or conclusions unsupported by the record.

Petitioners rely heavily on what they contend to be the living conditions of Negroes in urban centers as a basis for invoking the jurisdiction of this Court. While it may be conceded that some of the cases cited by Petitioners support the general statement that segregation of Negroes by the State is not to be condoned, there is nothing in this record from which the many conclusions drawn by the Petitioners can be based.

The Petitioners call to this Court's attention many times the finding made by the Chancellor in the trial Court below. That finding is set out in full in the Printed Record, page 141, being finding No. 7, and reads as follows:

> "The Negro population has greatly increased in recent years, and now numbers in excess of 100,000. Some parts of the area in which they live are overcrowded, which is detrimental to their moral and physical well-being."

Petitioners re-quote that finding throughout their Brief and assume what is not in the record of the evidence, and certainly is nowhere to be found in the finding of the Chancellor, namely, **that the overcrowded condition mentioned by the Chancellor is the result of this restriction agreement or others like it.** That the relation of cause and effect exists between these private contracts and the conditions under which some Negroes live in large urban centers is merely the assumption and assertion of Petitioners, and is totally unsupported by the record or the Court's findings.

Respondents refer the Court to the Printed Record, page 134, where Petitioners agree that Fannie Cook also testified, upon cross examination, that **white people** in St. Louis live in overcrowded and congested conditions which result in crime, juvenile delinquency and disease; that John T. Clarke (Record, page 135), testified that large areas in St. Louis were populated by whites who lived in overcrowded, congested, and unsanitary conditions, and that great areas in St. Louis were not restricted by these agreements or otherwise. To the same effect was the evidence brought out upon cross examination of all of Petitioners' witnesses.

Petitioners rely heavily, too, on the expression by the Missouri Supreme Court (Record, page 159):

> "The Chancellor found the Negro population in St. Louis has greatly increased in recent years, and now numbers in excess of One Hundred Thousand;

and that some of the sections in which Negroes live are overcrowded which is detrimental to their moral and physical well-being.

"Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast."

In Petitioners' "Application and Brief" [page 18 (c) (d)], Petitioners actually state that the agreement has for its purpose the establishment of racial segregation * * * and that its enforcement is injurious to a large number of citizens of Missouri; violates public statutes, and tends to injure public welfare. No finding by either of the Courts below supports those allegations. And the mere statement by Petitioners of their own conclusions, not borne out by a finding of either of the Courts who heard the matter, is not sufficient for this Court to consider. Petitioners, in their Brief (page 20, paragraph 5), reassert allegations contained in their "Return and Answer," but those allegations were not found by the Courts below to have been proved. The Courts below were unable, from the record, to find that the condition under which some Negroes live in St. Louis is traceable to, or the result of, restriction agreements.

On page 22 of Petitioners' Brief, in the second paragraph thereof, Petitioners insert much information with which the lower Courts were not concerned in the adjudication of the case and which are not part of the record presented to this Court. No one disputes the fact that in some urban communities areas populated by Negroes are overcrowded. No one disputes that ill health, juvenile de-

linquency, and crime can be traced to overcrowding. But Respondents assert that these conditions exist also in urban areas populated by whites and that Petitioners did not prove, but merely conclude and assume for their own purposes, that the outlawing of the right of people to contract regarding the disposition of their property will solve all the Negroes' health, crime and slum area problems. The Courts below did not so find and such a conclusion cannot be reached by this Court unsupported by the record.

In their Brief [page 27 (4) (7)]; on page 28 I; page 29 (3); pp. 38 and 39; page 42 II; page 53 IV; pp. 54, 55; and in all of the matters therein set out, Petitioners assume, without foundation in the Record or in the findings of the Court below, that restriction agreements have racial segregation as their purpose; that they have discrimination as their purpose and result; that the State of Missouri is segregating Negroes into unhealthful environments, and that the State of Missouri is discriminating against Negroes with the result they are suffering ill health and that crime and juvenile delinquency is present among them. Most of Petitioners' Brief is made up of such argument based upon nothing more solid than their own assumptions and conjectures without actual foundation in this Record or in the findings of the Courts.

VII.

On a record similar to the one here presented, this Court has denied the existence of a substantial Federal question and State courts and Federal courts without exception have followed this Court's ruling.

Corrigan v. Buckley, supra, considered a restriction agreement almost exactly like the one involved in this

case. The decision denied that a Federal question was presented in a case involving such a contract between private citizens. No court has held that such an agreement violates either the spirit or letter of the Fourteenth Amendment and the Statutes enacted thereunder, but have consistently ruled that no Federal question of substance is involved.

CONCLUSION.

It is asserted, then, that the foregoing is conclusive that no Federal question of substance is presented by this Record and that the Writ of Certiorari should be denied on the ground that the State of Missouri has not made nor enforced any law violating Petitioners' rights, and that the absence of such right in this kind of case has been affirmatively asserted by this Court in prior decisions.

Wherefore, respondents urge that the Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 72

J.D. SHELLEY; ETHEL LEE SHELLEY, His Wife, and JOSEPHINE FITZGERALD, *Petitioners,*

—vs.—

LOUIS KRAEMER and FERN W. KRAEMER, His Wife, *Respondents.*

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF REVIEW BY CERTIORARI

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IN THE

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No. 72

J. D. SHELLEY; ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS,

vs.

LOUIS KRAEMER AND FERN W. KRAEMER, HIS WIFE, RESPONDENTS.

Supplemental Brief of Petitioners in Support of Review by Certiorari

STATEMENT.

Petitioners, by reference thereto in this Supplemental Brief, hereby adopt and include herein the following matters from their Petition for the Writ of Certiorari and their Brief in support thereof:

(a) Petition: Summary Statement of Matters Involved, Statement of Jurisdiction of this Court, Questions Presented, and Reasons Relied on for Granting the Writ of Certiorari.

(b) Supporting Brief: Specification of Errors, Summary of the Argument, and the Argument.

The main purpose of this Supplemental Brief is to call to the attention of the Court further matters relating to the questions presented and the issues implicit in this case, and additional decisions and authorities bearing upon the merits of the case which were not stressed in the original Brief of petitioners, believing that petitioners may thereby assist the Court to a clearer understanding of the matters relied upon by petitioners, and their contentions in regard to the principles of law governing the same. To that end the following Summary of the Argument and the Argument, together with their supporting authorities, are herewith submitted.

ADDITIONAL SUMMARY OF THE ARGUMENT.

I.

An agreement whose execution interferes with rights, privileges, or immunities secured to a citizen of the United States by the Constitution or laws thereof, whose enforcement by the courts of a state deprives, or tends to deprive the Federal citizen of such rights, privileges, or immunities, is void as being against public policy.

1. One of the privileges bestowed upon citizens of the United States in Section 1 of the Fourteenth Amendment is that of becoming a citizen of any state in which he desires to live by establishing therein a bona fide residence.

Const. U. S., 14th Amend., Sec. 1, First Sentence.
Const. of U. S., 14th Amend., Sec. 1.
Slaughter-House Cases, 16 Wall. 36, loc. cit. 72, 73, 74, 86.

2. Birth or naturalization in the United States and being subject to the laws thereof makes a person a citizen of the United States. In order to become a citizen of a state, the Federal citizen must exercise his privilege to become a citizen of the state of his choice by establishing his residence therein, within the meaning of the provision of the Amendment.

U. S. v. Anthony, 11 Blatch. U. S. 200, 24 Fed. Cas. No. 14,459.
Const. Amend., supra.
Slaughter-House Cases, supra.

3. The first inhibition of the Fourteenth Amendment to the states is: "No state shall **make** or **enforce** any law which shall abridge the privileges or immunities of citi-

zens of the United States." (Emphasis supplied.) Therefore, no state may pass a law prohibiting a citizen of the United States from becoming a citizen of the state, or enforce the same; nor can such state pass any law, or enforce any rule of law, statutory or common-law, or substantive rule of decision law, which will hinder, or prevent a citizen of the United States from doing the things necessary to comply with the requirements under the Federal Constitution to become a citizen of a state.

Const., 14th Amend., Sec. 1.
Buchanan v. Warley, 245 U. S. 60.
Am. Federation of Labor v. Swing, 312 U. S. 321.

4. A contract whose main purpose is to prevent citizens of the United States from acquiring real property and occupying the same for residence purpose is illegal and void because of being contrary to public policy, and in violation of Federal constitutional and statutory provisions securing the right to acquire and use real property to citizens of the United States, and is unenforceable in the courts of that state.

(a) Willful and intentional deprivation of rights secured to citizens of the United States by its Constitution or laws, is made a criminal offense under the statutes of the United States.

Tit. 18, U.S.C.A., Sec. 51 (Crim. Code, Sec. 19).
Tit. 18, U.S.C.A., Sec. 52 (Crim. Code, Sec. 20).
U. S. v. Morris, 125 F. 322.
Nixon v. U. S., 289 F. 177.
Tit. 8, U.S.C.A., Sec. 42.
Tit. 8, U.S.C.A., Secs. 43, 47(3).

(b) Conspiracies to prevent citizens of the United States from doing the necessary acts to perfect title to real property in order to own it under government grant of a Federal right to enter and acquire the same are punishable under the criminal statutes above cited under (a), and, by analogy, conspiracies to prevent the ownership and use of real property by a colored person who is a citizen of the United States, whether for the purpose of exercising his privilege of becoming a citizen of a particular state, or for any other purpose regarding the enjoying or exercising the rights or privileges secured to him by the Constitution or laws of the United States, are also punishable under said criminal sections.

U. S. v. Morris, supra.
Nixon v. U. S., supra.
Tit. 8, U.S.C.A., Secs. 42, 43, 47(3).
U. S. v. Waddell, 112 U. S. 76, 80.
Montoya v. U. S., 262 F. 759.

(c) The Federal right contended for here is also protected by or secured to petitioners and others of their racial class by statutes of the United States providing for the assessment of damages against such persons who, under color of any statute, ordinance, regulation, custom, or usage of any state, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by its Constitution and laws.

Tit. 8, U.S.C.A., Sec. 43.
Tit. 8, U.S.C.A., Sec. 47(3).

II.

1. Agreement is contrary to the public policy of the United States.

(a) Public policy has been defined as follows:

"Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated as it sometimes has been, policy of the law or public policy in relation to the administration of the law."

13 C. J., p. 425, Sec. 360.

(b) Agreements contrary to public policy:

"An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates a public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and in conflict with the morals of the times."

12 Am. Jur. 663.

(c) Test of violating public policy:

"The evil tendency of the contract, and not the actual injury to the public in a particular instance, is the test of whether a contract is against public policy; and, if the threatened injury may be consummated under the terms of the contract, the agreement is contrary to public policy whether the injury has been inflicted in a particular case or not."

13 C. J., supra.
Roberts v. Criss, 266 F. 296, 302.
Schibi v. Miller (Mo.), 268 S. W. 434, 435.

2. Sources of public policy.

"The public policy of the United States in reference to the right of colored citizens to acquire and use and enjoy real property for residence and other purposes is found in the Constitution (particularly the Thirteenth and Fourteenth Amendments), and in the declaration of equality in the Declaration of Independence; in Sections 41, 42, 43, 47, of Tit. 8, U.S.C.A.; Sections 51 and 52 of Tit. 18, U.S.C.A., and in the decisions of the Supreme Court of the United States, and the lesser Federal Courts, in construing the aforementioned constitutional and statutory provisions in reference to said right; and in the Treaties of the United States, particularly Act of Chapultepec and United Nations Charter, regarding the personal dignity of the individual and its accordance without regard to race, religion, or color, and the wiping out of discrimination based on the same, as a means of securing the peace of the world."

13 C. J. 426, Sec. 362.
Beasley v. Texas, etc., R. Co., 191 U. S. 492.

3. State policy must yield to Federal policy.

(a) "It is familiar doctrine that the prohibition of a Federal statute may not be set at naught, or its benefits denied by state statutes or common law rules * * * To the Federal statute and policy, conflicting state law and policy must yield."

Sola Electric Co. v. Jefferson, 317 U. S. 173, 176.
DePass v. Harris Wool Co. (Mo.), 144 S. W. (2d) 146.

(b) Agreement involved is contrary to public policy of United States, as set forth in sources above named, and its enforcement is contrary to inhibitions to the states contained in the Fourteenth Amendment.

Const. of U. S., 14th Amend., Sec. 1, 1st Sentence.
Tit. 8, U.S.C.A.,Secs. 41, 42, 43 and 47.
Tit. 18, U.S.C.A., Secs. 51 and 52.
Slaughter-House Cases, supra.
Virginia v. Rives, 100 U. S. 321, 317.
Civil Rights Cases, 109 U. S. 3, 22, 23.
Buchanan v. Warley, 245 U. S. 60, 75, et seq.
U. S. v. Morris, 125 F. 322.
Gandolfo v. Hartman, 49 F. 181, 182.
Steele v. Louisville & Nash. Ry. Co., 65 S. Ct. 225.
Ex Parte Virginia, 100 U. S. 339, 347.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673.
Am. Federation of Labor v. Swing, 312 U. S. 321.

III.

The refusal of the Supreme Court of Missouri to grant petitioners relief from the conditions arising out of the enforcement of restriction agreements which imperiled their moral and physical welfare and placed added financial burdens, handicaps, and other exactions beyond those to which white citizens in Missouri are subjected, constitutes a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

1. Petitioners are citizens of the United States and of the State of Missouri wherein they reside, and are entitled, under the provisions of Section 41 of Title 8 of the United States Code, to the same right to make and enforce contracts, and to be parties in actions in the courts of Missouri, and to "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens of the state."

Virginia v. Rives, 100 U. S. 313, 317.
Buchanan v. Warley, 245 U. S. 60.
Civil Rights Cases, 109 U. S. 3, 22, 23.
Const. of U. S., Sec. 1, 14th Amend.
Secs. 51, 52, Title 18, U. S. Code.
Const. of Missouri, Art. I, Secs. 2, 10, 14.
Steele v. Louisville & Nashville Ry. Co., supra.

2. The ruling of the Supreme Court of Missouri, that correction of the conditions of peril to the health, moral and physical well-being, and the increased financial burdens placed upon petitioners and other members of the Negro race by reason of the use and enforcement of the restrictions contained in the agreement under consideration, and similar ones in agreements having the same

objective, purposes and import, is beyond the authority of the courts, constitutes a denial to the petitioners of rights secured to them by the Constitution and laws of the United States, and the denial of equal protection of the laws, as well as due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

See authorities cited under III, 1.
Steele v. Louisville & Nashville Ry., 65 S. Ct. 225.
Slaughter-House Cases, 16 Wall. 36, 71.
Buchanan v. Warley, supra.
Gandolfo v. Hartman, 49 Fed. 181.

3. The agreement in question here constitutes a conspiracy between the signers thereof, their privies, and the officers and members of the St. Louis Real Estate Exchange, willfully to deprive the petitioners, and other members of the Negro and Mongolian races in the City of St. Louis, or to subject them to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and for which offense the laws of the United States give both criminal and civil redress.

Secs. 51 and 52, Title 18, U. S. Code.
Secs. 43 and 47 (3), Title 8, U. S. Code.
United States v. Morris, 125 Fed. 322.
Screws v. United States, 325 U. S. 91.

ARGUMENT.

Invalidity of Contract.

Two basic principles of contract law underlie and govern the application of the Federal Constitutional and statutory provisions relied upon by the petitioners herein to the questions presented by them on the record in this case. They are:

1. An agreement which is contrary to a valid law or statute, whether expressly prohibited therein or not, or which in its execution contravenes the policy and spirit of a statute, is illegal and void and unenforceable; and the same is true where the agreement is contrary to public policy. 17 C. J. S., 555, Sec. 201; 12 Amer. Jur., 647, Sec. 163; Sprague v. Rooney, 16 S. W. 505, 508; Detteloff v. Hammond, Standish & Co., 161 N. W. 949, 955.

2. A court of equity is without jurisdiction to enforce an illegal contract, and will not lend its aid or assistance in the enforcement of its terms, when the enforcement, so far as the principal object is concerned, would be in violation of the state or federal laws, but will leave the parties where it found them, "unsanctioned by its favor and unaided by its process." Reisler v. Dempsey (Mo.), 232 S. W. 229, 231; Sprague v. Rooney, supra; Hagerty v. St. Louis Mfg. Co. (Mo.), 44 S. W. 1114, * * * ; Lehigh R. Co. v. United Lead Co. (N. J.), 133 A. 290.

The principal Federal statutes which petitioners contend are violated by the terms and purposes of the agreement which the Supreme Court of Missouri upheld and enforced are Sections 41 and 42 of Title 8 of the United States Code. They provide as follows:

> "Section 42. Property Rights of Citizens.—All 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.

"Section 41. Equal Rights under the Law.—All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

These provisions of the two sections are derived from Section 1 of the Civil Rights Act of 1866, which was adopted by Congress under the sole authority of the Thirteenth Amendment (Civil Rights cases, 109 U. S. 3, 22), although it was re-enacted after the adoption of the Fourteenth Amendment in the Act of May 31, 1870. In Section 1 of the Act of 1866 the provisions above quoted from the two sections was followed with the phrase: "No law, statute, ordinance, resolution, or custom to the contrary notwithstanding". After the adoption of the Fourteenth Amendment, this last provision of Section 1 of the Act, as well as its first, which defined who are citizens of the United States, was dropped, but this concluding phrase was still in the statute when it was first construed by the federal courts.

Since the statutes in question were adopted under the authority of the Thirteenth Amendment, notice of the construction of that amendment as granting authority to Congress to enact this legislation is both important and necessary. Section 2 of that amendment reads: "Congress shall have the power to enforce this article by appropriate legislation." But the main purposes of the amendment are set out in Section 1 thereof. It reads: "Neither slavery nor involuntary servitude, except as a punishment for

crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

This Court, in the majority opinion in the Slaughter-House cases (16 Wall. 36, 80), after naming a number of privileges possessed by a citizen which depend "upon his character as a citizen of the United States," stated: "To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendments, and by the other clauses of the Fourteenth, next to be considered, meaning that portion of Section 1 of the Amendment, which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Court, in this opinion, after reciting the facts connected with the institution of slavery and its burdens and disabilities, both in the United States and in the British West Indies, of which the members of Congress had knowledge (pp. 68, 69, 70), and which they had hoped to wipe out by the adoption of the Civil Rights Bill of 1866, but failed, stated that Congress passed "the proposition of the Fourteenth Amendment, and declined to treat as restored to their full participation in the government of the Union any of the States which had been in insurrection, until they had ratified that article by a formal vote of their legislative bodies." Experience soon proved that the provisions of the Thirteenth and Fourteenth Amendments and the laws passed under their sanction, were "inadequate for the protection of life, liberty, and property," as long as the laws were administered by white men alone,

and the former slaves were denied the right of suffrage in all those states. It was to complete the intended bestowal of equality of rights that the Fifteenth Amendment was proposed and adopted. The Court, in a recapitulation of these events which it declared were "almost too recent to be history," stated that (p. 71):

> "* * * the one pervading purpose found in them all, lying at the foundation of each (amendment), and without which none of them would have been suggested; (to be) the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppression of those who had formerly exercised unlimited dominion over him."

It follows that the rights secured to petitioners and protected by the Thirteenth Amendment are: to be free from slavery and **involuntary servitude,** to have that freedom firmly established and protected, and to have the laws enacted under the authority of that amendment enforced in protecting those rights and privileges which belong to free men and citizens of the United States, whether they be fundamental rights, or privileges and immunities, so long as they are created by the provisions of the Federal Constitution and statutes. The right or privilege regarding those created by state laws is that they shall apply to all citizens equally, without regard to race, creed, or color.

Under the Fourteenth Amendment, petitioners have the right to have the inhibitions of its provisions applied to their rights to life, liberty, and property, and the equal protection of the laws.

Under Section 42, supra, petitioners are entitled to have the same right, "as is enjoyed by white citizens of Missouri," to acquire, own, occupy, use and sell real and per-

sonal property; and, under Section 41, supra, petitioners have the same right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and to be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind as white citizens of Missouri are subject to, and to the further right that they shall not be subjected to different and other punishments, taxes, exactions, etc., from those imposed upon, or required of white citizens of said State.

In Virginia v. Rives, 100 U. S. 313, 317, it is stated:

> "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect to their Civil Rights, upon a level with whites."

In the Civil Rights cases, 109 U. S. 3, 22, this Court ruled:

> "Congress * * * by the Bill passed in 1866, undertook to wipe out the burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, without regard to previous servitude, those **fundamental rights** which are the essence of civil freedom, namely, the **same right** to make and enforce contracts, to sue and be parties, give evidence, and **to inherit, purchase, lease, sell and convey property,** as is enjoyed by white citizens, * * * and to declare and vindicate those fundamental rights which appertain to the **essence of citizenship,** and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." (Emphasis ours.)

At page 23, the Court further said:

> "The legislation, so far as necessary or proper to eradicate forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state action or not."

To the same effect is Clyatt v. U. S., 197 U. S. 207, 217.

In Buchanan v. Warley, 245 U. S. 60, 75, a case in which the above mentioned statutes and the inhibitions of Section 1 of the Fourteenth Amendment were applied to an attempt of a municipality of the State of Kentucky to inhibit occupancy and ownership of real property, solely because of the color of the proposed occupant of the premises, this Court held:

> "The Fourteenth Amendment and those statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him because of color."

The rulings in Buchanan v. Warley, supra, were followed and applied in Harman v. Tyler, 273 U. S. 668, and City of Richmond v. Deans, 281 U. S. 704, so that the principles of law enunciated in the Buchanan case have now become firmly established in our jurisprudence.

Thus it seems clear that the right of colored citizens to have the above quoted statutory and constitutional provisions enforced in regard to theis property and other civil rights, as well as the right to freedom from the incidents and disabilities of slavery and involuntary servitude, are rights secured to petitioners and protected by the Constitution and laws of the United States. Slaughter-

House Cases, supra; Civil Rights Cases, supra; Buchanan v. Warley, supra; U. S. v. Classic, 313 U. S. 299, 314; Hague v. C.I.O., 307 U. S. 496, 508, 513, 526, et seq.

Willful deprivation of the rights enumerated in the two sections of the statutes above cited, as well as of other civil rights enacted under the authority of the Thirteenth and Fifteenth Amendments, have been made criminal offenses, Secs. 51 (Criminal Code, Sec. 19) and 52 (Criminal Code, Sec. 20) of Title 18 of the U. S. Code; U. S. v. Morris, 125 Fed. 322; Screws v. U. S., 325 U. S. 91.

The agreement involved in this case, which restricts against the sale of real property to, or its occupancy by, members of the Negro and Mongolian races, and which provides for court actions to divest title out of a willing and able colored purchaser from a willing seller, violates the provisions of Section 42, supra, and its execution tends to, and does interfere with rights and privileges belonging to petitioners secured and protected by the Constitution and laws of the United States. Such an agreement is illegal and void. Sprague v. Rooney, supra (a contract to evade a statute prohibiting the leasing of property for purposes of conducting a bawdy house); Hagerty v. St. Louis Mfg. Co., supra (contract to store and refrigerate game during "closed" season and return to owner when season reopened for possessing game under state law); Reisler v. Dempsey, supra (contract to manage pugilist made in state forbidding prize fights); Lehigh Valley R. Co. v. United Lead Co., supra (contract to make rebates in freight rates paid to railroad in consideration of exclusive right to carry freight of Lead Company, contrary to Federal Statute prohibiting rebates).

Privilege to Become Citizen of Any State Granted by Fourteenth Amendment.

(a) But there is another regard in which the restrictions contained in this agreement interfere with rights and privileges secured and protected by the Constitution and laws of the United States. The first provision of the Fourteenth Amendment reads:

> "All persons **born** or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and **of the state wherein they reside.**" (Emphasis ours.)

In U. S. v. Hall, C. C. Ala. 1871, 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282, it is said that, by the original Constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed, citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the Constitution of the United States to citizens thereof. To the same effect is Sharon v. Hill, C. C. Cal. (1885), 26 F. 337.

In U. S. v. Anthony, C. C. N. Y. 1873, 11 Blatchf., U. S. 200, 24 Fed. Cas. No. 14,459, it is said:

> "The Fourteenth Amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially determined to the contrary, that there was no such thing as a citizen of the United States, except as the condition arose from citizenship of some state. No mode existed, it was said,

> of obtaining a citizenship in the United States, except by first becoming a citizen of some state. This question is now at rest. The Fourteenth Amendment defines and declares who shall be citizens of the United States, to-wit: all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification, every person born in the United States or naturalized is declared to be a citizen of the United States and of the state wherein he resides."

In the Slaughter-House Cases, 16 Wall. 36, l. c. 72, 73, this Court stated that one of the privileges bestowed upon citizens of the United States in Section 1 of the Fourteenth Amendment is that of becoming a citizen of any state in which he desires to live, and that this privilege is one secured to the Federal citizen by the Constitution of the United States. As was held in U. S. v. Hall, supra, a person born or naturalized in the United States, and subject to its jurisdiction, is, **without reference to state constitutions or laws,** entitled to all privileges and immunities secured by the Constitution of the United States to citizens thereof.

This provision changed the order of becoming a citizen of a state. Prior to the adoption of the Amendment it was necessary to become a citizen of one of the states, in order to become a citizen of the United States. The states, by the exercise of their power to determine who should become citizens thereof, could prevent a person, although born in the United States, and subject to its jurisdiction, from becoming a federal citizen. But the greater change in regard to the acquirement of citizenship in a state which this provision wrought was the conferring on the federal citizen of the privilege to make a choice of which state he would become a citizen of. This he could accomplish

by establishing a bona fide residence in such state (Slaughter-House Cases, supra, 80). This privilege of becoming a citizen of any state he desired to live in was one of those which Mr. Justice Miller described as owing "their existence to the Federal government, its National Character, its Constitution, or its laws." To this list, he added the rights secured by the Thirteenth and Fifteenth Amendments, and by the prohibiting clauses of the Fourteenth (Slaughter-House Cases, supra).

Method of Becoming State Citizen.

(b) This privilege of becoming a citizen of a state required two things: (1) Being a citizen of the United States, and (2) establishing a bona fide residence in the state of his choice. Birth or naturalization under the jurisdiction of the United States determined the first prerequisite, but the second depended upon the ability of the federal citizen to acquire—by inheritance, purchase, lease or gift—real property in such state, and to establish on it his place of residence. This second requirement could only be done in this way. It is clear then that the property rights secured by the provisions of Section 42, supra, were necessary to enable a colored federal citizen to become a citizen of the state of his choice; in other words, to exercise his constitutional privilege in that regard. No one would seriously contend that a state could pass a valid law which would prohibit a colored person possessing the necessary federal citizenship prescribed by the amendment from becoming one of its citizens. Likewise, it could not pass a valid law prohibiting him from doing any act necessary in order to the exercise of his constitutional privilege of becoming such citizen. The right to enjoy this privilege is a fundamental right of citizenship secured to him by the constitutional amendment in question, and the right to acquire real property in which to live, for that or any

other legitimate purpose, is a federal right secured to him by the Constitution and laws of the United States. "The Fourteenth Amendment and those statutes enacted in furtherance of its purposes," says the Court in Buchanan v. Warley, "operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." The Court further says that the attempt to prevent alienation of the property to a person of color "is in direct violation of the fundamental law enacted in the Fourteenth Amendment to the Constitution preventing **State interference** with property rights except by due process of law." (Emphasis ours.)

The second provision of the Amendment forbids any state "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It follows then that no state may pass any law, **or enforce one,** which shall in any manner prevent a citizen of the United States from exercising this privilege of becoming a citizen of such state, without action in violation of that inhibition of the Fourteenth Amendment.

It is well to remember, in this regard, that the Civil Rights Act of 1866 was re-enacted after the adoption of the Fourteenth Amendment, and in aid of its purposes. While it has been sometimes asserted that its re-enactment was due to doubt on the part of some persons that Congress had the power to enact its provisions under authority of the Thirteenth Amendment, there is no substantial proof that this was the reason for its re-enactment, nor has any court authoritatively so declared. But the first provision of the Amendment, defining citizenship in the United States, changing the method of its attainment, depriving the states of the power to determine who should become citizens of the United States, or even of themselves, and conferring the privilege on the individual citizen to make

choice of the state of which to become a citizen, carries within itself the real reason for the re-enactment of the Civil Rights Act of 1866. One of the provisions of that Act is found in Section 42, Tit. 8, U.S.C.A., and it deals with the right of the Federal citizen to do the very thing which is necessary to enjoy the privilege of becoming a citizen of a state, to-wit, establish a bona fide residence therein. This he cannot do, without occupying real property in such state. Whether he lives in a cave, a hole in the ground, a hut, or a mansion, he must occupy real property. It follows that his right to this Federal privilege is further protected by the provisions of Section 42, supra, which are necessary and apt for that purpose; and the provision of Section 41 of Tit. 8, which says that he shall have "the same full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" of a state, is a further protection of his right to do the things necessary to the exercise of the privilege conferred in the first provisions of the Amendment. The whole is further protected by the inhibitions contained in Section 1 thereof, which also declare rights, privileges and immunities secured to the citizen by the Constitution of the United States, though negatively stated. This Court has declared that Congress intended, by the enactment of the Civil Rights Bill of 1866, "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." This Court further declared that it was the intention of Congress, by enacting the Civil Rights Bill, "to wipe out the 'burdens and disabilities * * * constituting the substance and visible form' of slavery, and 'to declare and vindicate

those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery'."

The ruling of the Supreme Court of Missouri has abridged the above named rights, privileges and immunities of petitioners; and has deprived them of their property and civil rights without due process of law, as well as denied them the equal protection of the laws within the meaning of the Fourteenth Amendment.

An agreement whose execution and enforcement, both interferes with Federal privileges of citizens and requires deprival of rights, privileges and immunities secured by the Constitution or laws of the United States, is void for being against public policy. 12 Am. Jur. 663.

The Thirteenth Amendment abolished slavery as a public policy of the United States. The Civil Rights Bill of 1866, as well as the laws thereafter enacted in aid of the enforcement of its provisions, further declared that public policy with regard to the civil rights of colored persons. This was further declared, strengthened, and protected by the Fourteenth Amendment and further secured by the Fifteenth. Slaughter-House Cases, supra, loc. cit. 70.

Of the purpose of these Civil War Amendments, this Court, in the Slaughter-House Cases, declared (p. 71):

> "The one pervading purpose found in them all * * * (is) the freedom of the slave race, the security of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over them."

In Virginia v. Rives, supra, loc. cit. 317, this Court declared:

> "The plain meaning of those statutes, as of the Constitution which authorized them, was to place the colored race, in respect to civil rights, upon a level with the whites."

Question at Issue.

In Buchanan v. Warley, supra, and in Harmon v. Tyler, and City of Richmond v. Deans, supra, which followed the rulings of the Buchanan case, this Court further declared the public policy of the United States in regard to the identical question involved here:

> "May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the State * * * solely because of the color of the proposed occupant of the premises?"

In its answer, this Court said:

> "We think the attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law."

State Sanction of Private Acts.

It has been held that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. But, when the state, acting through any of its agencies, adopts or sanctions the unlawful acts of private individuals, they become the acts

of the state, and constitute violation of the inhibitions of the Fourteenth Amendment.

Mr. Justice Fields, in his dissenting opinion, defined the term "involuntary servitude" in apt language which does not differ, in meaning, to the definition of that term in the majority opinion of the Court. He said:

> "The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition, that I am aware of, except that which is found in the Civil Rights Act,* * * It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. **A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude** * * *" (pp. 90, 91, Slaughter-House cases.

In a number of the states, free persons of color could not own land or come into town except as servants, prior to the adoption of the Fourteenth Amendment (U. S. v. Rhodes, 1 Abb. 28, 27 Fed. Cas. 16, 151).

The attempt to prevent the acquirement and use of real property involved in Buchanan v. Warley, which this Court said was violative of the Fourteenth Amendment, was an effort to continue the burdens and disabilities of involuntary servitude.

Likewise, the enforcement of restrictions in deed covenants, and in the agreement under consideration here, and in others similar thereto, is an attempt to continue this disability of involuntary servitude which prohibited a colored person from acquiring and occupying real property from a willing vendor in whatever place he might desire to live. As was said by Mr. Justice Fields: "A prohibition to him to * * * reside in places where others are permitted to live would place him, as respects others, in a condition of servitude." Not only that, but the enforcement of the prohibition by court process would deprive colored citizens of the right to exercise the privilege of becoming citizens of the state of their choice. For, if one parcel of real property may be restricted against ownership or occupancy by a citizen of the United States, solely on account of his race or color, then all property in a state might be similarly restricted against him, so that he could not find residence in that state in furtherance of the exercise of his privilege to acquire citizenship in a particular state.

It is not necessary to show that such a result has happened in the case under consideration here in order to establish the invalidity of the agreement now before this Court. It is enough if such a result is possible of consummation under its terms. Roberts v. Criss, supra.

Comparable Federal Right.

A comparable federal right to the one just discussed is that of exercising the federal privilege of entering government lands for the purpose of homesteading them. Attempts to deprive citizens of the United States of the right to continue on said lands, or to do any other act in compliance with the federal requirements for perfecting their title thereto have been punished under the federal criminal statutes. U. S. v. Waddell, 112 U. S. 76; Nixon v. U. S., 289 F. 177. In these cases it was held that the homesteading citizen had the right to continue to live on the land and do the other things necessary to enable him to perfect his title and receive his patent. In other words, to complete the enjoyment of this federal privilege secured to him by the Constitution and laws of the United States.

Similarly, the right to enjoy the federal privilege of becoming a citizen of the state of his choice, is a right secured to him by the Constitution and laws of the United States. U. S. v. Morris, 125 F. 322; Screws v. U. S., 325 U. S.

Agreement Against Public Policy.

The agreement is against the public policy of the United States, as set forth in the Constitution, particularly in the Thirteenth, Fourteenth and Fifteenth Amendments, and in the two sections of the Federal Code relied on by petitioners, and in the two treaties which the United States recently entered into with other nations in an effort to secure the peace of the world, to-wit: the Act of Chapultepec, executed by this nation and the other nations of the Western Hemisphere; and the United Nations Charter.

It interferes with the rights of petitioners and other members of their race to inherit and to acquire real prop-

erty, or to purchase it at execution sales under judgment and other liens, and at tax sales and foreclosure proceedings, as provided for by the laws of Missouri, which make no distinction as to race or color.

"Public policy" has been defined as "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law." 13 C. J., p. 425, Sec. 360.

The sources of the Public Policy of the United States are found in its Constitution and laws, and the decisions of its courts construing them. Among those laws are the treaties which the federal government has made with other nations. They, together with the Federal Constitution itself, and the laws enacted under its authority, are made the supreme law of the land, and binding upon the judges in every state.

Among these public-policy declaring laws is the applicable provision of the Declaration of Independence declaring: "All men are created equal, and are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness." The right to acquire and use property in which to live is one of the things necessary to the pursuit of happiness. The right to freedom from fear, that is, security of person and property from danger of injury or destruction, is another necessity for the enjoyment of happiness.

By its recent treaty with the nations of the Western Hemisphere known as the Act of Chapultepec, and by the United Nations Charter, the government of the United States has been attempting to secure the peace of the

world, and thereby the protection of its own citizens from fear of injury from war, by pledging itself to accord to all men, regardless of race, national origin, or religion, the dignity of person, and has agreed to "prevent with all means within (its) power all that may provoke discrimination among individuals because of racial and religious reasons; and to promote * * * uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." Undoubtedly, these treaty declarations are in accord with our declaration of the equality of men, and their common right to enjoy life, liberty and the pursuit of happiness upon equal terms, and without regard to race, or previous servitude.

An agreement, which in its execution disregards these principles, and which has for its main purpose the interference with the rights and privileges secured to colored citizens of the United States by the Constitution and laws of the United States, is void as against public policy; and since its main purpose is to perpetuate the burdens and disabilities of involuntary servitude, it undoubtedly comes within the purview of the legislation which, "so far as necessary or proper to eradicate the forms and incidents of slavery and involuntary servitude," this Court has declared, "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." Civil Rights Cases, supra, p. 23.

By upholding and enforcing this agreement, the Supreme Court of Missouri has deprived petitioners of their property without due process of law, and denied to them the equal protection of the laws, contrary to the Fourteenth Amendment. Buchanan v. Warley, supra; Brinkerhoff-Faris Co. v. Hill, supra.

CONCLUSION.

The history of the rise of restrictive covenants in deeds and agreements between private parties, so far as the same can be ascertained from the adjudicated cases, shows that this means was very seldom resorted to for the purpose of segregating American citizens of color from the rest of the people prior to the decision of this Court in Buchanan v. Warley; Gandolfo v. Hartman (1892), 49 F. 181; Queensboro Land Co. v. Cuzeaux (1915), 136 La. 734, 67 So. 641. Today, it is reliably estimated, there are more than 250 cases pending before the courts of the various states. The inevitable conclusion is that this method has been adopted to accomplish the same ends which were accomplished in regard to racial residential segregation before the decision in Buchanan v. Warley. They are one of the most effective means of denying the fundamental rights of freemen and citizens of the United States.

Restrictive covenants are illegal and void, but constitute one of the most effective means of denying colored citizens of the United States the rights, privileges and immunities secured to them by the Constitution and laws of the United States. They should be denied judicial enforcement under principles of law which this Court is urged to announce herein, in such unmistakable terms that no doubt will be left in the minds of reasonable men that this practice is at an end.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 72

J.D. SHELLEY and ETHEL LEE SHELLEY, His Wife,
Petitioners,

—vs.—

LOUIS W. KRAEMER and FERN E. KRAEMER, His Wife,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY AND ETHEL LEE SHELLEY, HIS WIFE, PETITIONERS,

vs.

LOUIS W. KRAEMER AND FERN E. KRAEMER, HIS WIFE, RESPONDENTS.

On Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENTS' BRIEF

STATEMENT.

Respondents accept the statement of the case set out in petitioners' Petition for Writ of Certiorari but assert that the only issues involved in this review are: (1) Whether the agreement entered into by respondents violates public policy and is, therefore, unenforceable, (2) whether the enforcement of such an agreement by a State Court is State action within the meaning of the Fourteenth Amendment,

(3) whether the petitioners have the right to assert any defenses in a suit which seeks injunctive relief against petitioners' grantor which relief affects, only incidentally, the petitioners; and where, as here, such grantor is not a party to the petition for this review, and (4) whether a State Court or this Court has the right to deny to respondents their property rights or their fundamental rights to have their legal and valid contracts enforced.

Respondents adopt, by reference thereto, all matters and things asserted, set out and argued in their Brief opposing issuance of the Writ of Certiorari and adhere to their position that there is involved in this case no substantial Federal question sufficient to sustain the jurisdiction of this Court; that the legal questions involved are matters of State law and State public policy.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is set out in full in the Transcript of the Record at page 153 and is officially reported as Kraemer et al. v. Shelley et al., 198 S. W. (2d) 679.

JURISDICTION OF THIS COURT.

Following a petition for the issuance of a writ of certiorari to the Supreme Court of Missouri, which petition was opposed by respondents, this Court granted the writ. [Judicial Code, Sec. 237(b), 28 U. S. Code 344(b), 28 U.S.C.A. 344(b).]

SUMMARY OF ARGUMENT.

I.

The agreement enforced by the Supreme Court of Missouri is one which the parties have a right to make in Missouri. Such agreements do not violate the Civil Rights Statutes enacted under the Fourteenth Amendment and violate no valid laws of Missouri or of the United States. Since the Civil Rights Statutes can go no farther than the Amendment under the authority of which they were enacted, it follows that nothing prohibitory can be read into them beyond that which the Congress had the right to enact. Neither the Amendment nor the Statutes confer rights. The Amendment merely protects the fundamental rights of all men against State invasion, and the Statutes enumerate rights referred to in the Amendment.

The public policy, derived from the Constitution and laws of a state or nation, is not offended by a contract when the Constitution and laws are not only not positive on the point but indicate a clearly contrary policy. And it is the State's public policy which must determine the validity of a contract between citizens of the same State and which is to be wholly performed in that State and affects realty lying exclusively within that State. The public policy of a State respecting the enforcement, judicially, of a private contract concerning private property, is not affected, controlled, and certainly not changed, by indirect implications in general statements contained in international agreements.

The United States Supreme Court will not only refrain from interfering with the public and social policy of one of the States, but will follow such policy as determined by the decisions of the highest Court of the State.

II.

Although it is possible for a State to offend against the Fourteenth Amendment through its judiciary since rules of law involved by State Courts have the same legal efficacy as Legislative acts, Missouri has evolved no rule that falls within the scope of the prohibition.

The rule of the Missouri judiciary in this case is simply permissive of private discrimination—not mandatory of public discrimination; and it is this rule of law, judicially evolved as annunciative of Missouri's public policy, and only this rule, that must be measured by this Court under the requirements of the Fourteenth Amendment.

The contract itself cannot be void under the Amendment, nor can the filing of the suit by the respondent. Nor can the judgment of the Supreme Court of Missouri be the offensive feature.

Although the right of individuals to control their private property by contract is subject to the State police power, this right was not created by the State nor delegated to the Federal Government by virtue of the Federal Constitution. A doctrine recognizing the primary right of control to be in the State is not in keeping with American tradition.

The Amendment is prohibitive of State action only when the State acts as a sovereign in its own right, not when a State Court is called upon to decide private rights that are distinct from the State. All previous authority affirms this doctrine, and authorities cited by petitioners are not in conflict with respondents' position.

Measured against any previous standard defined by this Court, the rule of law announced by the Supreme Court of Missouri has not offended against the Fourteenth

Amendment. Private property used as a home does not fall within the scope of the "public use" test as to constitute those who use it agents of the State; nor does this case fall within the scope of the "direct agency" test since the parties who signed the contract and their heirs in title did not sign or agree to be bound under or by virtue of State compulsion.

Petitioners, urging that a judgment be favorable to them irrespective of the reasoning of the State Court as to the application of the Fourteenth Amendment to private action, are involved in a contradiction.

In the last analysis it is "State inaction" and not "State action" of which petitioners complain.

III.

The petitioners have no real standing in this Court when urging Constitutional questions in connection with the restriction agreement of their grantor. They are asserting rights and the deprivation of alleged rights which they never had. They are, in reality, asserting defenses belonging strictly and exclusively to their grantor who is neither a party to this review nor one who sought the review.

For what they assert is that their grantor had no right, by contract, to limit her own (grantor's) right of alienation by restricting the use of her property. This defense would be one limited strictly to the promisor against one asserting such right. Petitioners are incidentally and merely accidentally parties to this litigation. They acquired no right and, therefore, could lose none. They have no defenses of their own and could, consequently, assert none.

Petitioners actually seek, by the arguments advanced, to have this Court rule in such a way as to command the

Courts of Missouri not to enforce contracts like the one here involved. The result of such mandate would be to deprive respondents and other parties to the contract of their property without due process of law; it would forbid to respondents their fundamental rights to property and the use thereof and would deny to them access to the Courts for the adjudication of their contract and property rights, thus denying them the equal protection of the laws, and the privileges and immunities granted to other citizens. It would deny to respondents the very rights the petitioners complain are being denied to them.

In the face of the United States Constitution and the laws of the United States, nothing short of an Amendment to the Constitution could deprive respondents of the right to privately contract regarding their own property and to have those contracts enforced in the Courts.

IV.

The decision of the Supreme Court of Missouri, in holding that the recording of the instrument of restrictions was adequate to give constructive notice of the restrictions, is a State matter.

V.

The petitioners were not denied any right protected by any of the several clauses of the Fourteenth Amendment as these clauses have been heretofore construed by this Court. All the essentials of due process were accorded petitioners.

ARGUMENT.

I.

The agreement here involved is one which the parties have a right to make; is not contrary to any valid law, and is not contrary to public policy.

a.

Petitioners indicate in their Brief that they rely on a Constitutional or substantial Federal question by contending that the restriction agreement involved here either violates treaties of the United States, or that the agreement is invalid because contrary to public policy and that such public policy is expressed in the treaties and other international agreements referred to by them.

Such contention could only be grounded, as a Constitutional or Federal question, on the provisions of the Second section of Article VI of the United States Constitution, which reads:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State notwithstanding."

This point was first raised by petitioners in their "Motion for Rehearing" filed in the Supreme Court of Missouri after that Court had handed down its decision (Printed Record, p. 166, ground No. 6). Neither the point nor the Constitutional Article relied upon were raised by petitioners in their amended "Return to Order to Show Cause," nor in their "Answer" filed in the trial Court (Printed

Record, pp. 9-16, incl.). It is not raised in "Extracts from Petitioners' Brief" filed in the Missouri Supreme Court and set out in the Printed Record, pp. 149-152, incl.

The point that the agreement involved here is invalid by virtue of being contrary to public policy, or is unenforceable for such reason, was not raised in the trial Court in petitioners' "Amended Return to Order to Show Cause and Answer" (Printed Record, pp. 9-16, incl.), which was their first pleading in the case. The point is first mentioned in petitioners' "Extracts from Respondents' Brief" filed in the Missouri Supreme Court [Printed Record, p. 152(d)]. Even there, no contention is made that the agreement is violative of the public policy of Missouri. It is stated merely that Missouri had "modified and liberalized" its public policy. The point is next raised in petitioners' "Motion for Rehearing" filed after decision of the Missouri Supreme Court (Printed Record, p. 166, para. 6). There the matter of violation of public policy is squarely grounded on Article VI of the United States Constitution set out above.

Petitioners have no right to have either point considered by this Court. Rule 12(1), Revised Rules of the Supreme Court; Godchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L.Ed. 213; American Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98.

Further, the defense that a contract is void or unenforceable as against public policy is an affirmative defense and must be pleaded as such. Barnes v. Boatmen's National Bank (Mo.), 156 S. W. (2d) 597. Petitioners, as defendants in the trial Court, did not plead either point, thereby depriving the Court of the right to rule such defenses. An Appellate Court in Missouri could not have considered the defenses not pleaded.

b.

The defense of "public policy," even though properly and duly pleaded and preserved, does not present a substantial Federal question sufficient for this Court to assume jurisdiction.

This case could not have been brought originally in a Federal Court by the plaintiff nor removed to such Court by the defendant. No Federal question appears in the plaintiffs' petition. It is not a case originally cognizable in a Federal Court. Tennessee v. Union and Planters Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L.Ed. 511.

It could not have been removed by defendants because of diversity. Both parties, plaintiff and defendant, are residents of Missouri. No Federal question appears in the plaintiffs' petition. It could not have been removed because defendants were "denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States" (Judicial Code, Sec. 31; 28 U.S.C.A., Sec. 74). Such a right prevails only when there is State legislation of a character thought to deprive the defendant of his civil rights. Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L.Ed. 633; Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L.Ed. 1075.

Public policy that will void or invalidate a contract between citizens of the same state—a contract entered into and to be completely performed in that state—is the public policy of the State. While it is true that cases cited by petitioners correctly hold that where the Federal public policy comes into conflict with State policy the State policy must yield, still the burden remains on petitioners to show affirmatively that a contract, and the contract

here involved, is contrary to any public policy. Respondents submit there has been no such showing.

This Court has held that the public policy is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed interests. There must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as being contrary to public policy. Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442, 89 L.Ed. 744.

Petitioners certainly have pointed out no clear and unmistakable law or legal precedent to support the declaration of a Federal public policy against which the contract involved here is invalid.

The sources of public policy are the Constitutions, the Statutes, and judicial construction and announcement. In determining what is the public policy, the Supreme Court and State Courts must ascertain the law of each, its general policy, and the usages sanctioned by the Courts and Statutes. Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L.Ed. 1481; Wheeler v. Smith, 50 U. S. 55, 9 How. 55, 13 L.Ed. 44; Preston's Heirs v. Bowman, 19 U. S. 580, 6 Wheat. 580, 5 L.Ed. 336.

Missouri requires that her public policy be determined from her Statutes, "and when they have not spoken, then in the decisions of the Courts." Reed v. Jackson County, 142 S. W. (2d) 862; State ex rel. Equality Assn. v. Brown, 334 Mo. 781, 68 S. W. (2d) 55.

One of the most thorough discussions of the sources of "public policy" is to be found in the opinion of the Missouri Supreme Court deciding In re Rahn's Estate, 361 Mo. 492, 291 S. W. 120, 51 A.L.R. 877. The Missouri Court adopted the theory and words of a Federal Court:

"Vague surmises and flippant assertions as to what is the public policy of the State, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which Courts must appeal to determine the public policy of a State * * * The only authentic and admissible evidence of the public policy of a State on any given subject are its Constitution, laws and judicial decisions. The public policy of a State, of which Courts take notice, and to which they give effect, must be deduced from these sources * * *

It seems clear to us, therefore, from the great weight of judicial authority, that no act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the State or nation, as an organized body politic, which expression must be looked for and found in the Constitution, Statutes, or judicial decisions of the State or Nation, and not in the varying personal opinions and whims of judges or Courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.

So it necessarily follows that Courts should exercise extreme caution in declaring any act or transaction void as against public policy, unless it clearly appears that the transaction contravenes the Constitution, some positive Statute, or some well-established rule of law announced by the judicial decisions of the State or Nation."

But despite petitioners' failure to point out any clear mandate or prohibition in the United States Constitution or the Constitution of their own state, and despite their failure to direct attention to any positive Statute of the State or Nation or to any clear pronouncement of any Court that the contract involved here is void as against "public policy," they still assert, in vague and indefinite

argument, that the contract should not be enforced because its enforcement would be against "public policy." Reduced to a point, petitioners' argument is that such an agreement should not be enforced because the enforcement is distasteful to them.

Petitioners, in their general statements as to the "public policy" (and it is not quite clear whether they refer to Missouri's public policy or that of the United States), refer to the various sections of the Fourteenth Amendment. This Amendment, as has been decided many times, created no rights and declared no policy. It prevented the States from making or enforcing laws, the result of which would be the prohibited deprivations or denials enumerated generally in the Amendment. Neither do the Statutes enacted under the authority of the Amendment confer any rights nor proclaim any policy. They merely enumerate the fundamental rights which the Amendment protects against State invasion. And the power given to Congress to pass this legislation is limited by what the Amendment prevents. Civil Rights cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 836; Strauder v. W. Virginia, 100 U. S. 303, 25 L.Ed. 664.

It is said by petitioners that the treaties and some recent international agreements, to which the United States is a party, declare a national public policy and it is argued such policy is binding on the Courts of Missouri and on this Court. Yet there is nothing in any quoted portions of these agreements that could be said to affect the private contracting of private citizens of Missouri on a subject and with an effect purely intra-state. Even the treaty-making power is limited by the Constitution, and respondents deny that Congress has the power, by international agreement, to indirectly, and by inference from such agreement, deprive the State of Missouri of the right to enforce or refuse to enforce a property restriction agreement of

its own citizens concerning realty exclusively within its own jurisdiction. Treaties refer to foreign, not internal policy. They are primarily a compact between nations, and enforcement or matters of infraction are subjects for international negotiation and are matters with which Courts have nothing to do. Head Money cases (Edge v. Robertson), 112 U. S. 580, 5 S. Ct. 247, 28 L.Ed. 798. The treaty-making power is a broad power but it cannot amend the Constitution. It extends to subjects which, in the intercourse of nations, had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States. Holden v. Joy, 17 Wall. 211, 243, 21 L.Ed. 523; United States v. Reece, 5 Dill. 405. They are to be construed reasonably so as not to override state laws or impair rights arising under them. Guaranty Trust Co. v. United States, 304 U. S. 126, 58 S. Ct. 785, 82 L.Ed. 1224.

Petitioners seek to have this Court declare void and unenforceable a contract approved by the highest Court of Missouri as being valid and not contrary to public policy. And as grounds for this nullification of Missouri judicial decision, petitioners advance an argument based on indirect implications from generalizations in an international agreement regarding matters not even remotely connected with the subject of this litigation. We cannot believe the point will even be considered.

c.

Federal Courts have always felt themselves bound to follow the construction and interpretation which State Courts have placed on their own Constitutions and laws. 11 Am. Jur., p. 106, Sec. 107. Missouri Courts, in deciding and declaring again and again that contracts such as the

one here involved are not contrary to public policy must have searched the Constitution and laws of Missouri to arrive at the conclusion. It must be assumed, even in the absence of a great discussion in the opinions, that Missouri Courts followed the law in declaring the State's public policy. The Federal Courts should follow the State's public policy and accept, as the State's policy, that which has been proclaimed to be such policy by the highest Court of that State from an examination, construction, and interpretation of its own Constitution, laws and judicial pronouncements.

This Court has recognized the judicial decision of a State as a source of the State's policy. Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L.Ed. 148, 134 A.L.R. 1462. In fact the Supreme Court of the United States must depend on such pronouncements of State Courts to determine the public policy of the State. Wheeler v. Smith, 50 U. S. 55, 9 How. 55, 13 L.Ed. 44; Preston's Heirs v. Bowman, 19 U. S. 580, 6 Wheat. 580, 5 L.Ed. 336.

Only when the public policy of a State is clearly violative of the Constitution or laws of the United States can that public policy be ignored or voided. In Hartford Insurance Co. v. Chicago, M., and St. Paul Ry., 175 U. S. 91, 20 S. Ct. 33, 37, 44 L.Ed. 84, this Court said:

> "Questions of public policy affecting the liability for acts done or upon contracts made and to be performed within one of the States of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or general jurisprudence of national application, are governed by the law of the State as expressed in its own Constitutions and Statutes, or declared by its highest Court."

The United States Supreme Court has been always reluctant to void a contract on public policy grounds. "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of Courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." B. & O. R. R. v. Voight, 176 U. S. 498, 20 S. Ct. 387, 44 L.Ed. 560; also Twin City Pipeline Co. v. Harding Glass Co., 283 U. S. 353, 51 S. Ct. 476, 75 L.Ed. 1112; Globe and Rutgers v. Draper, 66 F. (2d) 985; Vidal v. Girard's Extrs., 43 U. S. (2 How.) 127, 197, 11 L.Ed. 205.

Within its own sphere, the State, as a commonwealth, has a public policy distinct from questions of public policy affecting the nation at large. In the determination of whether an agreement is against public policy there must be kept in view the rule that where there is no statutory prohibition, the Courts do not readily pronounce the agreement invalid, but, on the contrary, are inclined to leave men free to regulate their affairs as they think proper. 12 Am. Jur., p. 671, Sec. 172.

The public policy of Missouri is easily ascertained from her Constitution and Statutes. That policy is one of separation of the Negro and white races in educational and social pursuits. Section 1 of Art. IX of the Missouri Constitution of 1945 provides:

> " * * * Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

This same provision, worded slightly differently, appeared in Sec. 3, Art. XI, of the Missouri Constitution of 1875:

> "Separate free public schools shall be established for the education of children of African descent."

The same provision appeared in Sec. 2, Art. IX, of the Missouri Constitution of 1865. It did not, of course, appear in the Constitution of 1820. These provisions and the laws enacted thereunder, have been held to be Constitutional from the Federal point of view. Lehew v. Brummell (Mo. S. Ct. 1891), 103 Mo. 546, 15 S. W. 765; Mo. ex rel. Gaines v. Canada, 305 U. S. 337.

It will be noted that a change in wording appears in the 1945 Constitution not limiting the separation to "children of African descent." The separation mandate appearing in the last Constitution resulted after long and serious debate. Needless to say, the provision was opposed by representatives of Negro organizations who raised the technical "African descent" question. The people of Missouri overwhelmingly approved the provision as it appears in the Constitution. This separation has ever been the public and social policy of Missouri and the cities of Missouri. In St. Louis, separate parks and playgrounds are provided; separate libraries, community centers, bath houses, public hospitals, educational institutions of all kinds. Separation in restaurants is an accepted standard of conduct. In only one theatre, separation is not the rule and even in that theatre separation within the theatre is the standard. The same separation exists in Kansas City, Joplin, Springfield and the other larger cities. It has been and remains the public policy of the State to separate the races in the public sphere. It is the policy and practice of the citizens of Missouri to separate the races in residential environ-

ment and in social pursuits. Federal and municipal housing projects in cities and in the State recognize the desire for separation.

And respondents earnestly submit this is not segregation nor discrimination. It is separation which is the will and desire and determination of the people.

Statutory law specifically enacts the Constitutional mandate and further declares the policy of Missouri on the question of Negro and white relationship.

Section 3361, Revised Statutes of Missouri 1939, first enacted in 1835 and unchanged to the present, declares marriages between white persons and Negroes to be prohibited and absolutely void. A license may not issue for such a marriage in Missouri.

Section 4651, R. S. Mo. 1939, enacted in 1879, and unchanged, declares it to be a felony for either party to the marriage if one party is white and the other has one-eighth part or more of Negro blood.

Article 4, Sections 9021-9033, R. S. Mo. 1939, sets up and provides for the regulation of a "State Industrial Home for Negro girls." Article 3, Sections 9009-9020, R. S. Mo. 1939, sets up "State Industrial Home for (white) girls."

Section 10349, R. S. Mo. 1939, enacted in 1889 and substantially unchanged, provides for separate schools for colored and white children and makes it unlawful for one to attend the school of the other. The same mandate is given to Boards of Directors for all school districts within the State: Sec. 10350, R. S. Mo. 1939. (Enacted in 1866.) In another section, enacted 1877, these Boards of Directors are given power to establish and maintain separate libraries and public parks and playgrounds for the use of white and colored persons: Sec. 10474, R. S. Mo. 1939.

Section 10488, R. S. Mo. 1939, enacted in 1917, provides for the establishment of Negro high schools. In 1921, the legislature provided for the formation of Negro consolidated school districts: Sec. 10489-10492, R. S. Mo. 1939.

Section 10632, R. S. Mo. 1939, enacted in 1901, sets up institutes for colored teachers.

A comprehensive resume of Missouri Public Policy and the Constitutional and statutory expressions of that policy can be found in the Missouri Supreme Court opinion in State of Missouri ex rel. Gaines v. Canada, 342 Mo. 121, 113 S. W. (2d) 783. This Court recognized that public policy but reversed on other grounds. Certiorari granted and case reversed, 305 U. S. 337, 59 S. Ct. 232, 83 L.Ed. 208.

Missouri has always recognized, as consistent with her public policy, the desire and determination of its citizens to maintain the separation of the races in residential environment. In Keltner v. Harris, 196 S. W. 1, a deed was cancelled when it was disclosed a white buyer, acting as agent and straw party for a Negro, purchased property from a white seller who had refused to sell to a Negro. In ruling, the Court said:

> "On the other hand, if it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy. In other words, no man is bound to sell his property to a proposed purchaser whose presence is unsatisfactory to him as a neighbor, whether he be black, or white, or some other color."

Missouri has never held a restriction agreement void as against public policy whether the restriction be imposed by subdivision plat, by deed, by devise, or by private agreement. Every Missouri Court, whether trial Court, intermediate appellate Court, or Supreme Court en banc,

has held such agreements to be one which the parties have a right to make and one which is not contrary to public policy.

Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529.
Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217, 9 A.L.R. 107.
Thornhill v. Herdt (Mo. App.), 130 S. W. (2d) 175.
Swain v. Maxwell (S. Ct.), 196 S. W. (2d) 780.

No other jurisdiction has ever held such agreements to contravene public policy. But many State and Federal Courts have uniformly and consistently held such restrictions are not violative of public policy.

Queensborough Land Co. v. Cazeau (1915), 136 La. 724, 67 So. 641.
Parmalee v. Morris (1922), 218 Mich. 625, 188 N. W. 330.
Schulte v. Starks (1927), 238 Mich. 102, 213 N. W. 102.
Corrigan v. Buckley (1924), 55 App. D. C. 30, 299 Fed. 899.
Russell v. Wallace (1929), 58 App. D. C. 357, 30 Fed. (2d) 981.
Cornish v. O'Donoghue (1929), 58 App. D. C. 359, 30 Fed. (2d) 983.
Meade v. Dennistone (1938), 173 Md. 295, 196 A. 330.
Chandler v. Zeigler (1930), 88 Colo. 1, 291 Pac. 822.
Ridgeway v. Cockburn (1937), 163 Misc. 511, 296 N. Y. Supp. 507.
Steward v. Cronon (1937), 105 Colo. 393, 98 Pac. (2d) 999.
Lion's Head Lake v. Brzezinski (1945), 23 N. J. Misc. 290, 43 A. (2d) 729.
Lyons v. Wallen (1942), 191 Okla. 567, 133 Pac. (2d) 555.
People v. Gallagher, 93 N. Y. 438, 448.
Mays v. Burgess (1945), 147 F. (2d) 869, 872.
Burkardt v. Lofton, 63 Cal. App. (2d) 230, 239.

There are many other cases so holding, and the public policy of these jurisdictions cannot be changed until the people or the legislature has spoken. Certainly the Supreme Court of the United States will not, by judicial fiat, attempt to declare and change the public policy of the State of Missouri in the face of her own Constitution, Statutes, and uniform judicial decisions. For a Federal Court will recognize a State policy and will refuse to enforce a contract which is contrary to that policy. Jamison Coal Co. v. Goltra, 143 F. (2d) 889, 154 A.L.R. 1191, certiorari denied, 323 U. S. 769, 65 S. Ct. 122; Holland Furn. Co. v. Connelly, 48 Fed. Supp. 543; Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079; Tademy v. Scott, 157 F. (2d) 826.

And the Supreme Court will not interfere with a State's public policy. Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L.Ed. 377.

Respondents urge, therefore, the affirmance of the Missouri Supreme Court on the public policy ground. The reasoning set out above, and the argument, are not that of respondents. It comes from the prior rulings of this Court and the well considered opinions of many jurisdictions. To hold such agreements to be unenforceable as against public policy would not only require ignoring all previous law in this Court, but in effect, the overruling, by implication, of everything said by the State and other Federal Courts on this point.

II.

The State of Missouri has not, through its Judiciary, infringed any right of petitioners protected by the Fourteenth Amendment to the Federal Constitution.

a.

Petitioners urge and rely on the proposition that the Missouri Supreme Court has infringed rights protected by the Fourteenth Amendment and Sections 41 and 42 of the Federal Code (Petition for Writ of Certiorari, pp. 11, 12, 13) (Amended Return to Order to Show Cause and Answer, Printed Record, pp. 10, 11, 13).

Missouri has not invaded any right of petitioners protected by the Fourteenth Amendment or any section of the Federal Code.

It may be stated as a general proposition that the propriety of the judicial function of a State may be measured by this Court against the prohibitions of the Fourteenth Amendment and the United States Statutes passed by Congress pursuant thereto. That a State Court may act in a manner prohibited by the Amendment is a question settled by this Court and Courts of lesser jurisdiction. Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, 50 S. Ct. 86, 74 L.Ed. 648; Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L.Ed. 192; Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158; Duane v. Merchants Legal Stamp Company, 120 N. E. 370, 231 Mass. 113, Cert. Den., 249 U. S. 613, 39 S. Ct. 388, 63 L.Ed. 802; Central Kentucky Natural Gas Company v. The Railroad Commission of Kentucky, 37 Fed. (2d) 938.

While the usual form of State offense against the Fourteenth Amendment is through legislative acts, yet the decrees of persons and agencies performing the executive

function under color of State authority have also been the subject of inquiry. Sunday Lake Iron Company v. Township of Wakefield, 247 U. S. 350, 38 S. Ct. 495, 62 L.Ed. 1154; Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct.. 232, 83 L.Ed. 208.

The basic reason underlying the rule that the action of a State Court may be questioned under the Federal Constitution is that the executive and legislative branches of government are not the only sources through which the law of the State is called into being or enforced against the individual citizen. From the earliest traditions of American Jurisprudence State Courts, entirely unaided by statute or legislative act, have laid down rules according to the general principles of the common law. The rules pronounced in the decisions of the State Courts are, under the doctrines of res adjudicata and stare decisis, just as much law, as if the State Legislature had adopted the rules of decision by Statute. The force of State judicial decisions as law has long been recognized by this Court and is the foundation of the rules announced in Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and Prudential Life Insurance Company of America v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

It follows, therefore, that the State Courts must, in their interpretation of **internal law** of the State, even when no State Statute is involved, declare and lay down rules of law not incompatible with any provision of the Federal Constitution.

The specific question presented is and must be whether or not the Missouri State Courts have interpreted the **internal law** of Missouri in a manner repugnant to the Fourteenth Amendment.

Missouri has laid down a rule that private individuals, irrespective of their race and color, may contract in respect to their own property and place thereon such restrictions as to occupancy and ownership as they deem best for their own protection or benefit. This rule of law has been controlling in Missouri from the very beginning of Missouri's judicial history and was the basis upon which this case was decided in the Supreme Court of Missouri (Printed Record, p. 157).

In spite of the logical necessity of stating the question in the manner above set out, petitioners do not seem to agree that this is the issue. Petitioners urge that the agreement itself is "void" under Sections 41 and 42 of the Federal Code (Amended Return to Order to Show Cause and Answer, paras. 5, 6, 7) (Printed Record, pp. 10, 11), and that the enforcement of the agreement is prohibited by the Fourteenth Amendment (Amended Return to Order to Show Cause and Answer, paras. 8, 12) (Printed Record, pp. 11, 13).

b.

It is obvious that since the Fourteenth Amendment is not directed against individual action, Civil Rights cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835; Slaughterhouse cases, 16 Wall. U. S. 36, 21 L.Ed. 394; Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969; U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; U. S. v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L.Ed. 290; Hodges v. U. S., 203 U. S. 1, 27 S. Ct. 6, 51 L.Ed. 65; Virginia v. Rives, 100 U. S. 313, 25 L.Ed. 667; and since Sections 41 and 42 of the Federal Code can be of no greater efficacy than the Amendment itself, Strauder v. West Virginia, 100 U. S. 303, 25 L.Ed. 664, there can be no offense against the Fourteenth Amendment in the making of a contract. The argument of the petitioners that the contract itself is void under the Constitution is a

manifest absurdity. In fact, petitioners, and others filing Briefs amicus curiae, also urge that the contract, unenforced, is not violative. They say it is "void."

The parties to the contract, or their assigns, respondents here, filed suit. This they did voluntarily and without compulsion on the part of the State. Therefore, the filing of the suit is not prohibited by the Fourteenth Amendment since only individual action is involved up to this point.

Can it be the judgment of the Supreme Court of Missouri which of itself offends? (Printed Record, p. 159.) Respondents answer in the negative.

The elimination of the judgment of the State Court as the possible source of offense is found by analogy in the construction of the contract clause of the Federal Constitution (Article I, Section 10, Constitution of the United States). The prohibition against interruption by a State of the obligations of contract is called into play only when the decision of the State Court relied on is founded on a State Statute, in which case it is the statute and **not the judgment** which is the objectionable feature. Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L.Ed. 382.

The judgment is merely the judicial conclusion based upon reasoning compelled by the Statutes. It is not a resolve or decree of the Court but the sentence of the law pronounced by the Court on the action or question before it. Allis-Chalmers Co. v. U. S., 162 Fed. 679, 680; Groton Bridge Co. v. Clark Pressed Brick Co., 136 Fed. 27.

While it can be admitted that the term "State action" under the Fourteenth Amendment includes judicial action, yet, when a contract is present as the subject of the action, we must preclude the **judgment itself** as the objectionable feature. Since there is no State Statute in issue in this case, and since the contract itself cannot be the proper subject

matter of the Amendment, all that is left to offend against the Fourteenth Amendment is the **particular means** that the State Court used in arriving at its judgment. This particular means is, in this case and in every case in which no Statute is involved, the **internal law** of the State itself. It is the validity of this law and this law alone that is before this Court, and just as it is the offensive statute that is unconstitutional under the contract clause of the Federal Constitution, Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L.Ed. 547; Columbia Railroad Gas and Electric Company v. State of South Carolina, 261 U. S. 236, 43 S. Ct. 306, 67 L.Ed. 629, so too, it must be the **internal law** of Missouri, if anything, that offends against the Fourteenth Amendment and not the contract itself, the filing of the suit or the judgment of the Supreme Court of Missouri.

c.

Having established that it is the rule of law, as laid down by the Supreme Court of Missouri, that is herein being questioned under the Fourteenth Amendment, it remains but to show that the Missouri rule in no way invades any rights of petitioners under the Fourteenth Amendment.

As stated before, the Supreme Court of Missouri has merely interpreted the internal law of Missouri to mean that the individual citizens of Missouri, regardless of their color or race, have a right to restrict their property against sale to or occupancy by any group regardless of its color or race (Printed Record, p. 157, and cases cited therein).

There is no law of Missouri, the result of judicial decision or Statute, to the effect that individuals **must** restrict property against sale to or occupancy by Negroes or any other group. The State internal law merely recognizes the individual **right** to do so. There is no obligation imposed.

The right is, therefore, in the individual, not in the State. The restriction in this case was made by a group of individuals, not by the State of Missouri. The State was not, directly or indirectly, a party to the contract. The Missouri rule is **permissive**, not mandatory. Absent the contract there is no prohibition against conveyance to or occupancy by Negroes, and petitioners have not and cannot cite such a prohibition anywhere or in any form of the law of Missouri. If Missouri, by its judicially formed rules of law, were to subscribe to a doctrine to the effect that no Negro could purchase or occupy property simply because he is a Negro, or that no white man could sell to a Negro or permit occupancy by a Negro simply because he is a Negro, then the Fourteenth Amendment would be applicable to the rule just stated. For in such case the Negro would be affected by the rule without any action on the part of any private individual. In such case the discrimination would be in and by the State and would be a direct violation of rights protected by the Fourteenth Amendment. Such a rule as hypothesized above would deny the Negro equal protection of laws and deprive him of property without due process of law, for admittedly the Missouri Legislature could not enact such a rule into law. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harman v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L.Ed. 831. And a decision to the same effect by a State Court would be equally offensive. Prudential Life Ins. Co. v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

The liberty of contract recognized by the States is not absolute but subject to the State police power through its Legislature. Levy Leasing Company v. Siegel, 258 U. S. 242, 42 S. Ct. 289, 66 L.Ed. 595; Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

The police power of the States over private contract rights may also be asserted by the State Judiciary. McCoy v. Union Electric Railroad Company, 247 U. S. 354, 38 S. Ct. 504, 62 L.Ed. 1156; Guillod v. Kansas City Power and Light Company, 11 S. W. (2d) 1036, 321 Mo. 586.

Although the agreement here in question **might** have been declared invalid under State law for reasons of public policy, it was not. In this respect Missouri has followed its unvarying and uniform rule on this question. Respondents do not, therefore, urge or rely on the proposition that Missouri could not have declared this contract invalid under its police power, but this point was decided against the petitioners in the Court below and is not a proper issue for this Court to consider.

The real question before the Court is whether or not Missouri is prohibited by the Fourteenth Amendment from recognizing the distinct right of petitioners to contract in regard to their own private property. In short, is Missouri under **obligation,** by virtue of the Fourteenth Amendment, **not** to recognize and enforce private rights of contract irrespective of the motives or reasons underlying the making of the contract?

There is no more fundamental concept in the American form of government than that private rights are not created by the State but are vested in the people. The State right is derived only from the people.

This proposition has been included in the Missouri Constitution from earliest times and the State of Missouri has always subscribed to it as a necessary tenet in its governmental philosophy of securing personal liberty to the citizens of Missouri.

> "All political power is vested in and derived from the people; all government of right originates from

the people, is founded upon their will only, and is instituted solely for the government of the whole."

Article I, Sec. 4, Constitution of Missouri, 1865.
Article II, Sec. 1, Constitution of Missouri, 1875.
Article I, Sec. 1, Constitution of Missouri, 1945.

"All Constitutional government is intended to promote the general welfare of the people; all persons have a natural right to life, liberty and the pursuit of happiness and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government and that when government does not confer this security, it fails of its chief design."

Article I, Sec. 1, Constitution of Missouri, 1865.
Article II, Sec. 4, Constitution of Missouri, 1875.
Article I, Sec. 2, Constitution of Missouri, 1945.

"The people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided that such change be not repugnant to the Constitution of the United States."

Article I, Sec. 5, Constitution of Missouri, 1865.
Article II, Sec. 2, Constitution of Missouri, 1875.
Article I, Sec. 3, Constitution of Missouri, 1945.

Since the right to contract is a property right, Lindsley v. Patterson, 177 S. W. 826, L.R.A., 1915 F. 680; Andrus v. Business Men's Accident Association of America, 283 Mo. 442, 223 S. W. 70, 13 A.L.R. 779, it is obvious that this right was not created by the State of Missouri. The State was granted a regulatory and supervisory right over the private right to the extent made necessary for the adequate function of the police powers of the State. Even the police power of the State resided originally in the people. State ex rel. Eaton v. Curtis, 319 Mo. 660, 4 S. W. (2d) 819; Marsh v. Bartlett, 343 Mo. 526, 121 S. W. (2d) 737.

Since the right to contract is not in the State, but in the individual, the State has a duty to enforce the contract through its judicial fora which the people of Missouri have established for the enforcement of their own contract rights.

Missouri has recognized this duty in its Constitution.

> "The Courts of justice shall be open to every person and certain remedy afforded for every injury to persons, property or character, and that right and justice shall be administered, without sale, denial or delay."
> **Article I, Sec. 14, Constitution of Missouri, 1945.**

Since the right to limit and control private property, irrespective of the motive or reason underlying the right, is an inherent right, it is obvious that the parties do not seek in the law of the State the grant or creation of the right, but only its vindication in the event of injury. It is for the State, pursuant to the will of the people, to provide a remedy. Can the State by giving remedy to the right it did not create offend against the Fourteenth Amendment? Respondents submit that to hold that a State under the Fourteenth Amendment **must** deny a remedy to a right in itself valid under the Fourteenth Amendment is to hold that a State must in effect deny the very **existence** of the right, or, more accurately, to hold that a State is the creator of a private right and must now destroy its creature.

Such a doctrine is almost a definition of a totalitarian state—a form of government which has been repugnant to Americans from the very foundation of this nation.

Since the right is in the individual and not in the State, it must follow that the Fourteenth Amendment, admittedly limited in effect to "State action," cannot control

or affect the right where the right does not exist. What right? The right to restrict private property against sale to or occupancy by people of any race or color. Obviously, this right of restriction is not in the State, as already pointed out. Respondents admit that if the State were to assume such a right in itself and enforce law pursuant to that right through any of its governmental departments, it would be acting contrary to the Fourteenth Amendment and the Statutes passed pursuant thereto. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harmon v. Tyler, 273 U. S. 668.

Respondents further submt that the individual's right to control his own property was not delegated or transferred to the control of the Federal Government by virtue of the Fourteenth Amendment or any other clauses of the Federal Constitution. Since the Fourteenth Amendment is, by nature, prohibitive of State action, certainly it cannot be construed to mean that any private right was sacrificed thereby. Civil Rights Cases, 109 U. S. 3, 11, 12; U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; Virginia v. Rives, 100 U. S. 313, 25 L.Ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L.Ed. 676.

Under what clause of the Constitution did the people of Missouri grant to the Federal Government the right to pass on their right to control their own private property? Obviously nowhere. Indeed, these rights were specifically retained by the States and the people.

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> Amendment 9, Constitution of the United States.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment 10, Constitution of the United States.

"It has been held that the powers reserved to the several States, extend to all the subjects which, in the ordinary course of affairs, concern property and the rights of property of individuals, as well as to the internal order, improvement, and prosperity of real estate." King v. The American Transportation Company, 1 Flip. U. S. 1, 14, Fed. Cas. No. 7787; Frew v. Bowers, 12 F. (2d) 625.

It is clear, therefore, that the entire reasoning of petitioners in support of their "State action" argument is predicated upon the subtle and subversive fallacy that the right of control of private property is in the State, not in the individual, and that individuals derive their rights from the State.

The Fourteenth Amendment sought to prohibit States from making and enforcing laws injurious to the fundamental rights of individual citizens. Can the remedy applied by the Missouri Courts be construed to be included in the term "law" as contemplated by the Fourteenth Amendment? Respondents submit that it cannot be so construed.

A law within the meaning of the Fourteenth Amendment is a promulgation by the State through any of its departments that binds all citizens similarly situated whether they like it or not. It is true that only one injured by it can complain, but the law itself seeks to obligate in effect all citizens similarly situated completely irrespective of their desires and completely beyond their power of control to avoid the operation of the law whatever it might be.

The judgment of the Court below binds only the parties and their privies. It affects only the specific piece of property involved. It does not seek to impose burdens independently of what the parties to the contract voluntarily assumed.

In discussing the right of a State Court to lay down a rule of law to the effect that corporations had no lawful right to enter into a combination or agreement the effect of which was to take from them the right to employ whomsoever they deemed proper, this Court held that since the Legislature might have enacted a Statute denying the parties the same right, the rule of law as laid down by the Court is as valid as the Statute would be.

> "It seems to us clear that the State might, without conflict with the Fourteenth Amendment, enact through its Legislative Department a Statute precisely to the same effect as the rule of law and public policy declared by its Court of last resort. And, for the purposes of our jurisdiction, it makes no difference, under that Amendment, through what department the State has acted. The decision is as valid as the statute would be." Prudential Life Insurance Company of America v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

Measured by the above rule, the question therefore becomes: Could the Missouri Legislature have passed a statute to the effect that private citizens of Missouri, regardless of their race or color, have a right **voluntarily** to limit their property against sale to or occupancy by any group of citizens regardless of their race or color? Obviously, the answer to this question must be in the affirmative. Such a Statute would be merely permissive to **private discrimination,** not mandatory of the **public discrimination** that the Fourteenth Amendment seeks to forbid. It is true that no such Statute exists in Missouri, for statutes are usually

prohibitive of action or mandatory of action. They are rarely permissive in character. But the fact that no such statute exists is of no importance. There is no Constitutional provision prohibitive of such a statute and there can, therefore, be no Constitutional prohibition against a rule of decision to the same effect. It must follow, therefore, that measured by the rule as laid down by this Court in the Prudential case, the Missouri courts have not by their judicial interpretation of the internal law of Missouri offended against the prohibitions of the Fourteenth Amendment to the Federal Constitution.

d.

Petitioners have cited various cases in an effort to bring this case within the scope of the general rule that judicial action may be "State action" within the scope of the Amendment. These cases should be distinguished from the case at bar.

Ex parte in the matter of The Commonwealth of Virginia and J. D. Coles, petitioners, 25 L.Ed. 676. This was an application by a State judge for a writ of habeas corpus and a writ of certiorari to review the record of U. S. District Court charging him with excluding, from grand and petit jury service, Negroes, simply because of their color. He was indicted under Section 4, Act of Congress, March 1, 1875 (18 Stat., Part 3, 336). This Act stated that:

> "No citizen possessing all the qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any Court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or

> fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than $5,000.00."

The Act was held constitutional and the writ of habeas corpus was denied.

A careful examination of this case will show that it is law **only** for the proposition that **only** a person clothed with authority by the State may be penalized and not individuals not so clothed. Here the petitioner was acting for and on behalf of the State and doing that which was positively forbidden the State—excluding jurors because of their race. In so doing the petitioner was interpreting the **internal law** of the State of Virginia in a manner hostile to the Fourteenth Amendment. If a Court so acts, it then offends against the Fourteenth Amendment in the sense that the rule declared by it is hostile to the prohibitions of the Fourteenth Amendment. But the offense lies in the **law** that it seeks to enforce. Here there is no penalty imposed on individual citizens for their action as regards one another, but only upon one clothed with authority by the State and acting in the name of the State. In excluding jurors, the petitioner was violating a State Statute which it is not necessary to set out. But it is clear that this case is not and cannot be interpreted as authority for the proposition that petitioners here seek to uphold.

Petitioners also rely on the case of **Twining v. State of New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L.Ed. 97.** This cause came to the Supreme Court of the United States by writ of error from the Court of Errors and Appeals of the State of New Jersey. In this case, a trial judge in commenting to the jury in a criminal case on failure of the defendants to testify in their own defense, in effect withheld from the defendants the privilege against self-incrimi-

nation. The case simply decides that the privilege against self-incrimination is not one protected by the Fourteenth Amendment against invasion by a State or a State Court in the interpretation of the law of a State, even though the privilege is protected against Federal action by the Fifth Amendment.

Whether the privilege is or is not protected by the Fourteenth Amendment against State action is wholly irrelevant to the issues here. The case simply decides that a State Court in the **interpretation** of its own **internal law,** common or otherwise, must interpret that law in a manner not forbidden by the Federal Constitution or, more accurately, may not lay down a rule of law contrary to any provision of the United States Constitution. Here again there is no question of applying the Fourteenth Amendment to individual action but only to the internal law of New Jersey as declared by its Courts. It must, therefore, be concluded that this case is not authority for petitioners' position.

Petitioners cite **Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, 50 S. Ct. 86, 74 L.Ed. 648,** as a favorable authority. This case simply holds that a State may not, through its Courts, deprive a person of all existing remedies for the enforcement of a right, unless there was an opportunity afforded for him to protect that right. It is true that the litigants here were not State officers, nor were they in any way acting under color of State authority, but one of them was denied by a State Court the opportunity to be heard and present whatever defenses might be available. Obviously any internal rule of law to the effect that no hearing may be had by a litigant is a direct denial to that litigant of due process of law, since the litigant has never had his day in court. Respondents have no quarrel with the rule laid down in this case and

again it is declared that it is the internal rule of a State that must be measured against the requirements of the Fourteenth Amendment and not the action of individuals or of individual litigants. Respondents submit that this case also must be distinguished from petitioners' position.

Petitioners cite **Raymond v. Chicago Union Traction Company, 207 U. S. 20, 28 S. Ct. 7, 52 L.Ed. 78.** This case simply decides that the discriminatory action of a State Equalization Board is reviewable under the Fourteenth Amendment. Since a State Tax Equalization Board is acting for and under the authority of a State as an agency of the State, there can be no doubt but that its action as sanctioned by the State laws is the proper subject of review by this Court. Obviously, it is the rule laid down and interpreted by the State Board as being the law in a particular jurisdiction that is the only possible offensive feature under the Fourteenth Amendment. Here again there is no individual action of any kind involved, and the conclusion is inescapable that this case cannot help the petitioners.

Petitioners cite **Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L.Ed. 208.** This case simply reviews the action of the curators of a state university in refusing admission of a Negro into the law school of the university. Since all State universities are supported by State tax money, they are considered agencies of the State within the meaning of the Fourteenth Amendment. Their policies, whatever they may be, are interpreted as the internal law of the State and as such the rules laid down by such agencies are reviewable. It is quite obvious again that this case is easily distinguishable from the issues herein presented.

Petitioners also cite **Bridges v. California, 314 U. S. 252 62 S. Ct. 190, 86 L.Ed. 192.** This case deals with the power

of a State Court to punish for contempt acts committed outside of the Court's presence. The question here involved is whether a State Court in the interpretation of its own **internal laws** as to contempt has acted in a manner denying the right of free speech guaranteed by the Federal Constitution. There is no thought, expressed or implied, of applying the Fourteenth Amendment to govern individual conduct in this case. The rule herein laid down is precisely in accord with the other cases cited and is not law for petitioners' theory.

Petitioners cite **Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L.Ed. 1213,** as authority for their position. This was a criminal prosecution in which there was drawn into question the validity of a State Statute regulating religious freedom. This case is not in point at all and has absolutely nothing to do with judicial action except insofar as the Court construed and applied the State Statute to the defendants. This case cannot help petitioners by the widest stretch of imagination.

Petitioners also rely on **Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158.** The question presented in this case was whether or not a Court could interpret the State internal law to the effect that defendants in a criminal action had no right to counsel for their defense. Here again, as in all the other cases cited, the question is whether or not the **internal law** of a State is in violation of the Fourteenth Amendment. There is no individual action involved.

Petitioners rely on **Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 26, 90 L.Ed. 265.** Other decisions of this Court in similar cases have also been urged. Jones v. The City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L.Ed. 1290; Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 882, 891, 87

L.Ed. 1292, 146 A.L.R. 81; Martin v. Struthers, 319 U. S. 141, 63 S. Ct. 862, 882, 87 L.Ed. 1313. This Court in the Marsh case decided that the State of Alabama could not construe a criminal trespass statute to preclude an individual from exercising the right of religious freedom and the press in spite of the fact that the right was sought to be exercised on property which was admittedly privately owned. Respondents have no direct quarrel with these decisions insofar as this case is concerned. This Court in these decisions has simply protected rights guaranteed by the First Amendment (which rights were absorbed by the judicial construction of this Court into the Fourteenth Amendment) against invasion by any State in the form of a criminal prosecution on the part of the State. In so doing, while this Court evolved a new doctrine that seemed to subordinate property rights to individual Constitutional rights, it is clear that this Court did not, and could not, go to the extent of saying that, in the absence of an attempted prosecution by á State of the trespasser involved in the Marsh case, there would have been any "State action" as the term has been previously used by this Court. The fact that the place of the alleged offense was a "town" (although privately owned) was a substantial factor in this Court's decision to ward off attempted criminal action on the State's part. There is no town or any quasi-public place involved in the case at bar. The entire property involved consists in one house and lot (Printed Record, p. 154) (Amended Return to Order to Show Cause and Answer, para. 1, Printed Record, p. 9). Nor is there any criminal prosecution attempted here under color of any State statutory law.

Indeed, the majority decision in the Marsh case carefully limited the "State action" involved to the application of the criminal statute.

> "In our view the circumstances that the property rights to the premises wherein the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of the State Statute. **Insofar as the State has attempted to impose criminal punishment** on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." Marsh v. Alabama, 326 U. S. 501, 509, 90 L.Ed. 265, 270. (Emphasis ours.)

But, as respondents read the decision, the Court did not force appellant's presence on the "town" to the extent of holding that appellant would have been excluded from civil liability for trespass. If such an action had been brought by the "town," would recognition of the private owner's property rights by the State Courts of Alabama in the form of a plaintiff's judgment be "State action" within the meaning of the Fourteenth Amendment? Respondents submit that such a holding would be a confiscation by the United States of individual property rights, and of States' rights, and neither the Marsh case nor its ancestors in principle can be said to sustain such a doctrine.

Petitioners have not been denied the right of freedom of religion, the press, or speech, or any other right which has heretofore been recognized by any construction of Constitutional law or supported by the decisions of this Court. Petitioners had no Federally protected right before the making of the contract herein and have acquired none since except those rights which petitioners seek to invent, for the purpose of this action.

This Court, in determining what is "State action" within the meaning of the Fourteenth Amendment, in the **Marsh case** and the **Swing case, infra,** applied what may be called the "public use" test and in the **Steele case** and the **Smith case** the "agency" test.

These "tests" are simply different aspects of the same principle. If the Federal Government or the State by law authorizes a person, a group of persons, a corporation, or any legally recognized interest to discriminate, the acts of discrimination are those of the State or Federal Government. If a legally recognized interest is engaged in a business, or performing a function directly affecting the public, the right to engage in the business or perform a public function is dependent on the will and law of the State, at least insofar as the State is prohibited from granting the power to engage in business or perform the public function without limiting the power to non-discrimination in its exercise. Cf. Steele v. Louisville-Nashville Railroad Company, 323 U. S. 192, 65 S. Ct. 226, 89 L.Ed. 173, Vid. 45 Mich. L. Rev. at pp. 745-746.

Thus a State may not authorize a corporation to operate a town in a manner calculated to prevent the people thereof from enjoying the free exchange of ideas and religious information, nor may a State authorize an individual or company to operate a business to exclude "peaceful persuasion" on the part of others in the form of picketing, nor may a State create or appoint by law any group to perform any lawful function on a discriminatory basis.

Neither of these tests nor any mixture of them includes this case within their scope. Respondents are holders of the fee simple title to the private property through which they derived their right to bring this suit in the first instance and to defend their claim in this Court (Printed

Record, p. 1). Petitioners derived their title from a fee simple title owned by parties who were signers of the agreement herein (Printed Record, pp. 1, 2).

Respondents have emphasized that the right to own and control real property in Missouri is not dependent on a grant of power from the State, and through no plentitude of rhetorical devices can petitioners disguise the fact that a doctrine so holding is far from American governmental idealism. Therefore, respondents cannot be said to be agents of the state in their private discriminatory actions.

Nor is the right to own or control private property a right in which the general public has a direct interest. Respondents own a private home. They are not engaging in any business or performing a public function in or with their home. The use of a house as a private dwelling cannot be tortured into having any public significance which may be the basis for linking the owners with the state so as to call private action "State action" under the Fourteenth Amendment.

The case of **American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L.Ed. 855,** relied on by petitioners, decides that a State may not assume a right in its judicial policy to forbid peaceful picketing even when there is no direct quarrel between the employer and his employees.

Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L.Ed. 987, decides that when an act of a State Legislature entrusts placing names on ballots to political parties, the parties so entrusted are then the agents of the state and may not exclude any individual from voting in primary elections by the simple expedient of excluding him from the party.

Steele v. Louisville and Nashville Railroad Company, 323 U. S. 192, 65 S. Ct. 226, 89 L.Ed. 173, simply decides that when Congress has by legislative act conferred upon a union selected by majority of a craft the power to represent the entire craft in all bargaining matters, the union must represent its members without discrimination as to color or race. See also Tunstall v. The Brotherhood of Locomotive Firemen, 323 U. S. 210, 65 S. Ct. 235, 89 L.Ed. 187.

It is clear that State or Federal law, empowering one group of persons to represent the rights of others, necessarily creates an agency between the empowered group and the individuals it represents. It must follow that the acts of the group are the acts of the State or the Federal Government and as such may be questioned under the Fourteenth or Fifth Amendments.

> "The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. 151 et seq., imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." 323 U. S. 192, at pp. 193, 194, 65 S. Ct. 226 at p. 228.
>
> "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." 323 U. S. 192 at p. 198, 65 S. Ct. 226 at p. 230.

The Court makes it clear that the power so granted must be used in a non-discriminatory fashion and that a statute

authorizing discriminatory conduct would be unconstitutional under the Fifth Amendment (and by inference under the Fourteenth Amendment if done by a State).

> "But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." 323 U. S. 192 at p. 208, 65 S. Ct. 226 at p. 235.

The State of Missouri has passed no statute authorizing anyone to discriminate against Negroes or anyone else. Neither respondents nor their ancestors in title were appointed by any State statute to enter into the contract herein. Their action is not, therefore, that of the State.

e.

Respondents submit that the prior decisions of this Court are affirmative authority for the proposition that private citizens have a right to restrict their property against occupancy by Negroes even though discrimination be the motive in so restricting their property.

Respondents, in this respect, rely on the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835. There were before the Court five (5) cases which are jointly referred to as the Civil Rights cases. Two (2) of these cases, United States v. Stanley and United States v. Nichols, originated in indictments against the defendants for denying to Negroes accommodations at an inn or hotel. Two (2) cases, United States v. Ryan and United States v. Singleton, arose in indictments for refusing Negroes seats in a theatre. The fifth (5th) case involved private litigants, Robinson et ux. v. Memphis & Charleston Railroad Company. This

suit sought damages for the denial of permission by the railroad company to a Negro to ride in a car reserved exclusively for white people.

All these cases came up to the Supreme Court under Sections 1 and 2 of the Civil Rights Act passed March 1, 1875.

Section 1 provided:

> "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color regardless of any previous condition of servitude."

Section 2 provided:

> "That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of $500.00 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500.00 nor more than $1,000.00, or shall be imprisoned not less than thirty days nor more than one year. Provided, that all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State Statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdic-

tion shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: And provided further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

In passing these Statutes, which respondents have set out in full for the convenience of this Court, Congress sought to regulate the rights of individual American citizens in their actions and relationships with each other. It was the intent of Congress to lay down rules, not to regulate State laws or rules of law promulgated by State Courts, but to regulate **directly** the standards of conduct of individuals when these individuals were performing acts based upon discriminatory motives. In ruling upon the Constitutionality of these sections, this Court said:

> "Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State Legislation and State action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law or which denies to any of them the equal protection of the laws. * * * It does not invest Congress with power to legislate upon subjects which are in the domain of State Legislation; * * * but to provide modes of relief against State Legislation or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights. * * * Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and against State proceedings affecting those rights and privileges and by power given to Congress to legislate for the purpose of carrying such prohibition into effect."

In declaring these sections unconstitutional as beyond the power of Congress under the Fourteenth Amendment, this Court not only excluded individual action from the scope of the Fourteenth Amendment, but in effect confirmed the natural right of individuals to discriminate against one another **as far as direct Federal regulation is concerned.**

Petitioners, seeking to distinguish these cases from the case at bar by insisting that Missouri has "sanctioned" the contract in recognizing the rights and duties arising thereunder and giving judgment accordingly, emphasizes that no "State action" was remotely possible under these decisions because the cases arose in the United States Courts and were never before any State judicial body.

It will have to be admitted that the Civil Rights Cases do lay down the affirmative rule that Congress has no right under the Fourteenth Amendment to regulate directly the affairs of individual citizens in the disposition and control of their own private property. Thus, the right to discriminate, insofar as that right is vested in private persons, exists beyond Federal power of control or regulation. A necessary corollary of this rule is that the Fourteenth Amendment itself, although self-executing in its prohibitive clauses, cannot be construed to regulate directly rights which Statutes passed pursuant to it cannot reach.

As respondents have already shown, the contract itself, the filing of the suit and the judgment of the Supreme Court of Missouri must be eliminated as possible sources of the offense.

The remedy provided in the Missouri Courts is all that remains. That there is a sharp distinction between a right and its remedy is a fundamental concept and finds a gen-

eral expression in the phrase "ubi jus ibi remedium." Does the remedy provided by Missouri for invaded contract rights alter or enlarge the rights themselves? Obviously not. Such a holding would be necessarily predicated on the foreign doctrine that all rights of private property are derived from the State. How then is the private right, which is admittedly free from Federal control under the doctrine of the Civil Rights cases, changed by the intervention of the State Courts in this case? Since the State cannot give rights it has no power to bestow, or withhold rights not subject to its power, no change could be affected.

To sustain a claim that the State of Missouri has offended against the Fourteenth Amendment by providing a remedy for an admittedly valid right is in effect to control directly the rights of individual citizens as between themselves. The Civil Rights cases cannot be distinguished from the case at bar, and stand as a bulwark against Federal attempts to regulate private action under the Fourteenth Amendment. That petitioners and those filing Briefs in their behalf argue that the Federal Government, either by legislative enactment or judicial fiat, should deprive private citizens of their inherent rights gives further credence to their advancement of the doctrine of State supremacy that is so repugnant to the American ideal.

Respondents cite the case of Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969, as further authority for the proposition that this question of judicial action has already been settled by this Court in their favor. In this case the question herein presented was directly before this Court, and it was then held that a restrictive agreement arising in the District of Columbia did not violate the Fifth Amendment of the Federal Constitution. The

Court also stated in the course of the opinion that the Fourteenth Amendment was not violated. Before this case reached the Supreme Court of the United States two (2) Federal Courts of lesser jurisdiction had already ruled in favor of the validity of the restrictive covenants. Can it be pretended that the right of individuals to discriminate against Negroes was not recognized by this Court in this case? Respondents submit that the case is a rule of decision favorable to their position.

The case of United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L.Ed. 290, is direct authority for respondents' position. This case arose in a criminal indictment under Section 5519 of the Revised Statutes of the United States charging that the defendant and nineteen others beat, bruised, etc., four men lawfully under State detention in custody of a deputy sheriff of a State County.

Section 5519 was held unconstitutional as being beyond the power of Congress in that it enabled Congress to lay down rules of law **directly** affecting individual action. In holding this section unconstitutional this Court recognized and enforced the right of individuals to discriminate against one another without Federal interference. It follows that this case, as direct affirmative authority for respondents' position, must be overruled if the judgment of the Supreme Court of Missouri is to be reversed.

Respondents rely in part upon the case of Hodges v. U. S., 203 U. S. 1, 27 S. Ct. 6, 51 L.Ed. 65. This case arose in an indictment under Sections 1977, 1978, 1979, 5508 and 5510 of the Revised Statutes of the United States. The defendants were charged with threatening violence to Negroes while the said Negroes were at work and with causing said Negroes to stop work and leave their positions. This Court ordered demurrers sustained to the in-

dictments on the theory that no offense under the laws of the United States was charged. Obviously, this Court again affirmed the rule that it is a legal impossibility for the Fourteenth Amendment or any law passed pursuant thereto to reach or affect directly any individual private citizen because of any act he has performed, although discrimination is admittedly the motive for his act.

Respondents cannot escape the conviction that the often used argument of petitioners that enforcement of the contract herein is "State action" within the meaning of the Fourteenth Amendment is really nothing more than a well settled doctrine of this Court attempted to be changed by petitioners through the simple expedient of calling the settled doctrine by a new name and disguising it in diction not previously used. It is impossible to distinguish in principle the case at bar and the cases above cited by respondents as authority for their position. No amount of innovation or literary machination can change the underlying rule of law. Certainly, it is impossible to categorize this case as involving a problem not heretofore presented to this Court. Such a view completely and totally disregards the settled decisions of this Court upon which respondents and many other citizens of the United States have relied in regulating their property and their lives.

The argument of petitioners in its ultimate distillation requires this Court to construe the Fourteenth Amendment to control individual action on the theory that judicial recognition and enforcement of private rights is an arrogation and adoption on the part of the State of those rights as part of its law.

Respondents cannot believe that this Court is prepared to subscribe to such a doctrine.

Since this Court has decided beyond all question that the Fourteenth Amendment has no proper application to acts of private individuals, the State Courts are bound to follow the rule laid down by this Court as the final arbiter of a Constitutional question. The State Courts cannot decide that individuals are prohibited by the Fourteenth Amendment from entering into the agreement, for to do so would be to reach a conclusion which would set at naught the decisions of this Court. All that is left for the Courts to decide is that individuals are not prohibited by the Fourteenth Amendment from entering into such an agreement. When this conclusion has been reached under the compelling necessity of the prior decisions of this Court, the State Court must give judgment accordingly and enforce the contract.

Petitioners, however, would add a third alternative. Petitioners, in effect, urge that even though the State Court has reached the correct conclusion of law, it cannot give judgment accordingly and enforce the contract but must refuse enforcement and thereby reach the same conclusion that it would have reached had it erroneously decided to apply the Fourteenth Amendment to the contract itself. In short, petitioners seek a favorable judgment no matter how the State Court has decided the Federal question. This position of petitioners involves a direct contradiction so manifestly absurd that no State Court or Federal Court has ever accepted the argument. On the contrary, every Court that has had the question before it has followed the Civil Rights cases and others to hold that individual action is not the subject matter of the Amendment.

Queensborough Land Co. v. Cazeau (1915), 136 La. 724, 67 So. 641.

Koehler v. Rowland (1918), 275 Mo. 573, 205 S. W. 217.

Los Angeles Inv. Co. v. Gary (1919), 181 Cal. 680, 186 Pac. 596.

White v. White (1929), 108 W. Va. 128, 150 S. E. 531.

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

Porter v. Barrett (1925), 233 Mich. 373, 206 N. W. 532.

Torrey v. Wolfes (1925), 6 F. (2d) 702, 56 App. D. C. 4.

Schulte v. Starks (1927), 238 Mich. 102, 213 N. W. 102.

Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969.

Russell v. Wallace (1929), 58 App. D. C. 357, 30 F. (2d) 981.

Cornish v. O'Donaghue (1929), 58 App. D. C. 359, 30 Fed. (2d) 983.

Meade v. Dennistone (1938), 173 Md. 295, 196 A. 330.

Letteau v. Ellis (1932), 122 Cal. App. 584, 10 P. (2d) 496.

Chandler v. Ziegler (1930), 88 Colo. 1, 291 Pac. 822.

Edwards v. West Wood Theater Co. (1931), 60 App. D. C. 362, 55 F. (2d) 524.

United Coop. Realty Co. v. Hawkins (1937), 269 Ky. 563, 108 S. W. (2d) 507.

Ridgeway v. Cockburn (1937), 163 Misc. 511, 296 N. Y. Supp. 936.

Steward v. Cronon (1940), 105 Colo. 393, 98 P. (2d) 999.

Dooley v. Savannah Bk. (1945), 34 S. E. (2d) 522, —(Ga.)—.

Lion's Head Lake v. Brzezinski (1945), 23 N. J. Misc. R. 290, 43 A. (2d) 729.

Lyons v. Wallen (1942), 191 Okla. 567, 133 P. (2d) 555.

Doherty v. Rice (1942), 240 Wisc. 389, 3 N. W. (2d) 734.

Burke v. Kleeman (1934), 277 Ill. App. 519.

Hurd v. Hodge (1947), 162 Fed. (2d) 233.

Nor can it be reasonably asserted, as petitioners do, and in the face of the above decisions, that the enforcement by a Court, whether trial or intermediate Appellate Court, is State action within the meaning of the Fourteenth Amendment. In every case that has reached the highest Court of the jurisdiction there was one or more decisions by Courts of lesser jurisdiction. In most, if not all, of the cases above cited the "State action" argument was advanced. No Court ever held that it must reverse a lower Court on that ground.

Would it not be absurd to say that in every case coming to the United States Supreme Court for review, in which the Fourteenth Amendment was involved and where this Court held that the action complained of was not violative of the Amendment, that it was in error because it failed to regard the action of the lower Courts in determining the controversy to be violative State action. No Court has ever held that in determining the contract rights of party litigants the Court was taking forbidden State action within the meaning of the Amendment.

If petitioners' argument that enforcement of the contract involved here is State action forbidden by the Fourteenth Amendment, then the Judges of the Supreme Court of Missouri should be liable civilly under Section 43 of Title 8, U. S. C.; and be liable criminally under Sections 51 and 52 of Title 18, U. S. C. This conclusion is strongly hinted at by the petitioners in their Supplemental Brief, p. 4, para. 4, (a), (b), (c); p. 9, para. 1; p. 10, para. 3. It would seem to follow a logical compulsion that if the judgment and mandate of the Missouri Supreme Court constitutes forbidden State action then petitioners should sue them for civil damages and the United States of America should prosecute under the penal sections of the Code.

Again relying on the decisions of this Court that individual action is not the proper subject matter of the Fourteenth Amendment, respondents cannot emphasize too strongly their position that to sustain the claim of the petitioners would completely ignore settled law.

After a State Court has reached the conclusion that the contract is not prohibitive under the Fourteenth Amendment for it then to decide that it may not enforce the private agreement because of petitioners' theory of "State action," necessitates the State Court taking from the contract the right of remedy in the Courts. In short, the State Court must, to follow petitioners' view, refuse to enforce an otherwise valid agreement. Since the right of remedy is in the individual signers of the contract or their heirs in title, and not in the Court, the State Court must, if petitioners' view is to prevail, interpret the Fourteenth Amendment as prohibiting the individual action of enforcement. To interpret the Fourteenth Amendment in accord with petitioners' view is to hold in effect that the Fourteenth Amendment can and does completely confiscate respondents' right to enforce a contract which in itself is admittedly valid under the Federal Constitution.

Such a confiscation of respondents' rights would result in a denial to them of a fundamental Constitutional right —access to the Courts.

It was upon this ground that the Supreme Court of Mssouri refused to sustain petitioners' claim (Printed Record, p. 158).

It is elemental that the Fourteenth Amendment created no rights, but merely provided a shield against invasion of certain fundamental rights by the action of a State sovereign. It is further true that Congress could not en-

act, under the Fourteenth Amendment, any law that would in effect regulate the affairs of individual citizens as to each other.

> "The Fourteenth Amendment nullifies and makes void all State Legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the Amendment invests Congress to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. * * * This is the legislative power and the whole of it." Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835.

It is clear that if Congress could not have enacted any laws pursuant to the Fourteenth Amendment which would in effect regulate private rights, the Amendment itself, the fountain-source of the law-making power of Congress, cannot regulate private rights. Such a holding would invite the inevitable conclusion that the Constitution does not grant to Congress adequate powers to enforce it.

It has never been denied by petitioners that this cause arose in private contract. Indeed, they admit that the subject of the action throughout the entire litigation was the agreement signed by respondents' ancestors in title (Amended Return to Order to Show Cause and Answer, pars. 5, 6, 7, 8) (Printed Record, pp. 10-11).

There is not and never was involved in this litigation at any stage of the proceeding any question beyond the existence and legality of the agreement referred to (Printed Record, pp. 19, 20) and other State questions incidental thereto. To this agreement petitioners were not parties.

The only persons bound were those who signed it and their heirs in title. The agreement created all rights and obligations that could possibly arise under it. Since it is undeniable that the agreement is in itself lawful, how can petitioners assert any Federal right under a contract to which they were not a party? Obviously, they cannot. Where then does this alleged "right" of petitioners arise? It is already established that this "right" could not arise under the Fourteenth Amendment because that Amendment **protects** rights. It does not **create** them. It must follow that petitioners have no rights—at least none that are protected by the Federal Constitution or this Court. Beyond this inquiry, this Court has no jurisdiction to proceed. The petitioners may be disappointed that the agreement conferred no rights upon them but the only material point here is that the agreement denied them no rights. They are in no position to complain in this Court.

Could it be urged that a Negro could sue a white man and compel conveyance to him of the white man's property in the absence of a contract to that effect? Manifestly not. If the State Courts were thus to deny the Negro the right to buy in such case, would this constitute State action within the meaning of the Fourteenth Amendment? Obviously not.

Petitioners, and those filing Briefs in their behalf, urge upon this Court the proposition that Sections 41 and 42 of Title 8, U. S. Code, give them the "right" of which the Missouri Supreme Court, by its judicial determination, has deprived them. They would argue that the sections above quoted bestow upon them a right (the sections confer no rights but merely enumerate those fundamental rights protected by the Amendment itself) to own specific property. Corrigan v. Buckley, cited supra, settled the question in ruling that the right to own specific property

was not a right recognized or protected by the laws of the United States on any theory of Constitutional limitations. The Court said:

> "Appellant seems to have misconstrued the real question here involved * * * the Constitutional right of a Negro to acquire property does not carry with it the Constitutional power to compel sale and conveyance to him of any particular private property."

If petitioners, and those urging the same point, were to carry that argument to a conclusion they would further assert that if one refused to make a contract to sell property to a Negro merely because he was a Negro the Negro could sue for specific performance on the reasoning that Section 41 gives him the right "to make and enforce contracts." If petitioners have a right to buy the property involved in this suit, or have the right not to have their use or occupancy barred, because Section 42 gives them the right to purchase property, then they have a right to sue on contracts which persons refuse to make with them under Section 41. Reduced to an absurdity they would have the right also to inherit any specific property they chose to inherit because Section 42 gives them the right to "inherit" property.

This argument of petitioners has never impressed any Court and it seems unbelievable they would seriously urge such reasoning on this Court.

In Missouri the distinction between what a legislature may not do by statute and what may be done by individuals whose contracts will be enforced in the State Courts has long been recognized by specific Constitutional provisions.

The following provision has appeared in the last three Missouri Constitutions:

> "That no person can be compelled to erect, support, or attend, any place or system of worship, or to maintain or support any priest, minister, preacher, or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."
>
> Article I, Section 10, Missouri Constitution, 1865.
> Article II, Section 6, Missouri Constitution, 1875.
> Article I, Section 6, Missouri Constitution, 1945.

If petitioners' argument regarding enforcement of a contract being State action is to be followed then the above quoted sections of the Missouri Constitution are unconstitutional from the Federal standpoint.

f.

In the final analysis of discrimination against Negroes simply because of their color there are only two general categories through which a State may be a party to such discrimination in any way whatever, so that its "action" may be questioned under the Fourteenth Amendment.

1. A State may discriminate affirmatively against Negroes by passing Statutes through its Legislature or by evolving rules of law through its Courts the effect of which is mandatory discrimination in and by the State completely independently of individual action and such discrimination by the State through its Legislature or Judiciary may be measured by this Court against the requirements of the Fourteenth Amendment.

2. A State probably may prohibit discrimination on the part of its citizens in their private capacity by passing Statutes through its Legislature or by evolving rules of

law in its Courts the effects of which are prohibitive of private discrimination and these Statutes or rules of law may be measured by this Court against the requirements of the Fourteenth Amendment.

It is admitted that a State may not through its legislative or judicial function, independently of contract or private action of any kind, affirmatively discriminate against its citizens by reason of their color in forbidding them the right to buy or occupy real property. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harmon v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L.Ed. 831.

With this contention respondents have no quarrel.

However, as has already been pointed out, Missouri has passed no Statute nor evolved any rule of law, independently of private agreement, demanding discrimination or making discrimination an obligation on the part of its citizens rather than a right.

It is further admitted that the State might prohibit, through its Legislature or its judicially evolved rules of law, individual action based on discrimination. Although this point is not directly involved it seems probable that a Statute or rule of law prohibiting private action would be held by this Court not to violate the Fourteenth Amendment. Cf. Railway Mail Association v. Corsi, 326 U. S. 88, 65 S. Ct. 1483, 89 L.Ed. 2072, in which this Court held that a State might prohibit a union of railway clerks, operating under and by virtue of New York statutory law, from denying membership in the union to any one by reason of race, color or creed.

> "A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence, in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment

> as a sword against such State power would stultify the Amendment." (Concurring Opinion of Mr. Justice Frankfurter, Railway Mail Association v. Corsi, 326 U. S. 88, 98, 65 S. Ct. 1483,, 1489.)

Admitting (in order to put the case in the best possible light for petitioners) that a State may affirmatively oppose private discrimination on the part of any of its citizens in regard to the sale or occupancy of private real property, and admitting further that this prohibition might be called into play through its judiciary alone and that the rule of law evolved by a State Court, in the event of such action, is reviewable by this Court, respondents submit that this case involved neither affirmative discrimination on the part of the State through any of its departments nor a prohibition by the State of discrimination by private citizens.

If a State should decide through its Judiciary that it will not enforce agreements of this type on the grounds of public policy or for some other reason, the State has, through its Courts, in effect prohibited the legal efficacy of such private agreements. A rule of non-recognition of private discrimination on the part of the State and a positive Statutory prohibition of private discrimination, are in legal effect, identical. It is true that a State may by a Statute prescribe a penalty for discrimination in the form of a fine or imprisonment and thus bring private acts of discrimination within the realm of the criminal law. Obviously a criminal penalty could not be assessed by judicial decision unaided by a Statute. But aside from the penal aspects, there is no distinction in effect between legislative prohibition and judicial prohibition through non-recognition. In either event, the contract would avail the parties to it nothing in the eyes of the law.

Since the Fourteenth Amendment is merely prohibitive of State action and not mandatory of it, it is clear that no construction of the Fourteenth Amendment can **force** the State to affirmative prohibitive action either through its Legislature or its Judiciary. In short, while it is admitted for the sake of argument that a State **may** prohibit private discrimination under the Fourteenth Amendment, respondents emphasize that a State **need not** prohibit private discrimination under the Fourteenth Amendment. Cf. Concurring Opinion of Mr. Justice Frankfurter in Railway Mail Association v. Corsi, 326 U. S. 88, 98, 65 S. Ct. 1483, 1489, where he said:

> "Of course, a State may leave abstention from such discriminations to the conscience of individuals."

Respondents submit that petitioners' true complaint is, and must be, not that Missouri has, through its Courts, affirmatively discriminated against them but that Missouri has through its judicially evolved policy **refused to prevent** private citizens from discriminating against them. In short, petitioners complain not of State "action" but of State "inaction". It is clear, therefore, that since a refusal on the part of a State to act may not be properly questioned under the Fourteenth Amendment, petitioners cannot prevail.

III.

a.

It is seriously urged by respondents that petitioners Shelley have no standing in this Court and had none in the Supreme Court of Missouri at least to the extent of defending against the plaintiffs' (respondents') attempt to enforce the restriction contract involved in the case. The suit was one in equity to enjoin the breach of the contract.

Only a white person in privity of contract with plaintiffs could commit a breach. Only one breaching or threatening to breach could be properly enjoined. That person, insofar as the present case is concerned, was the defendant FitzGearld. She was a white person and was in direct line of privity of estate from the signer of the contract, S. Warner (Transcript of Record, p. 1, para. 1a).

There is no actual showing anywhere in the Record that the defendant FitzGearld was represented by counsel or was even defending in the case. The counsel for defendants Shelley, in his "Amended Return * * * and Answer" (Transcript of Record, p. 11, para. 6) pleads, as a defense, that "said restrictive contract, if enforced and upheld, will abridge the rights of the defendant Josephine FitzGearld which are enjoyed by other white citizens of Missouri with regard to the making and enforcing of contracts and the full and equal benefit of all laws and proceedings for the security of property as is enjoyed in this State by other members of her race." Josephine FitzGearld was a white person and it is obvious counsel, regardless of whom he was representing, was stating an available ground of defense and was advancing it on the part of the only person who could assert it, namely, the defendant FitzGearld, against whom the injunction was being sought. It is shown affirmatively nowhere in the Record that Josephine FitzGearld was represented in the Missouri Supreme Court. She is deliberately and obviously not a petitioner for the review in this Court. The Petition for Writ of Certiorari is expressly limited to J. D. Shelley and Ethel Lee Shelley (Petition for Certiorari, p. 1.) It remains to see if the petitioners here have any rights of which they could be deprived or any rights to even petition for Certiorari. Assuming, for the sake of discussing only this point, that the contract involved here is a restriction against sale to a

Negro as well as a restriction against use by Negroes (although the restriction here is obviously only a restriction against Negro use and occupancy and not one against ownership by Negroes), let us examine the position of plaintiffs with respect to the Negro defendants as compared to the white defendant, FitzGearld, the grantor of the Negro defendants.

A contract is executed by a number of people, all of whom own the realty which is to be the subject of the contract. They formally agree not to sell, lease, etc., their property to Negroes; nor will they permit their respective properties to be used or occupied by Negroes. They describe their property by location, sign the instrument and record it. They have provided that the restriction shall be a charge upon and shall run with the land; that the restriction, for a period of 50 years, shall bind their grantees, devisees, heirs and assigns. Each one has a contract with the other which they have expressly agreed may be enforced at law or in equity. They do not agree that it must be enforced, they merely agree that any signer may enforce it.

Section 1683, R. S. Mo. 1939, provides for remedy, by injunction, when "an irreparable injury to real or personal property is threatened * * *." Let us assume that the defendant FitzGearld, a white person, and bound to the plaintiffs Kraemer by the contract in question, should **threaten** to commit a breach by a sale to a Negro or by permitting the property to be used by a Negro. Under the statutory law of Missouri, the plaintiffs could sue in equity to enjoin the threatened breach. Obviously no other defendant but FitzGearld would need to be included in the suit. Obviously the prospective Negro buyers would not have to be named as defendants. In fact, they could not be so named. Obviously, too, it would be possible for

the trial Court to grant the injunction if it decided to enforce the contract. Such a decree would operate upon and bind only the defendant FitzGearld, but would, incidentally only, prevent the purchase or use and occupancy by the prospective Negro purchaser or tenant.

What defense could she advance in such a suit? Any defense, Constitutional or otherwise, could be reduced to this: that the defendants' grantor (or her grantor's grantor back through the chain of title to the signer) could not limit or restrict his own property as provided in the contract, or that the plaintiffs seeking the injunction could not enforce it for some reason. In either case she would be asserting defenses available to her as a white person charged with a threatened breach. Could she, as a grantee of property legally charged with a restriction (which Missouri courts regard as a negative easement), successfully assert these defenses? Respondents think not. She acquired property subject to an easement running to the benefit of plaintiffs. Meder v. Wilson, 192 S. W. (2d) 606, and cases there cited; Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529; State ex rel. Britton v. Mulloy, 332 Mo. 1107, 61 S. W. (2d) 741. She may not defend against the attempted enforcement of the easement by claiming she or her grantors had not the right to grant it. Certainly she could not interpose the Fourteenth Amendment as a defense. She is being deprived by the State of no property, privilege or immunity and is not being denied the equal protection of the law. Swain v. Maxwell (Mo. Sup.), 196 S. W. (2d) 780.

Assume a further step. FitzGearld executes a written contract to sell the restricted property to a Negro. The breach is practically complete if the restriction is against sale to a Negro; it is still a threatened breach if the restriction is against use and occupancy. What has changed

as far as plaintiffs' rights are concerned? What has changed as far as FitzGerald's available defenses are concerned? Obviously nothing has changed. Under Missouri law the prospective Negro purchasers could or could not be named as defendants in the suit depending on plaintiffs' theory. If he wanted them subject to the Court's jurisdiction for any purpose he would name them. They certainly would not have a right to intervene and interpose Constitutional defenses against the plaintiffs whose rights, emanating from the contract, have not changed. The plaintiffs' requested relief would be the same. They seek an injunction against FitzGearld to stop the threatened sale or stop the threatened use or occupancy by Negroes. But the injunction they seek is still directed only against their, plaintiffs', promisor, FitzGearld. If FitzGearld interpleads her prospective purchasers to protect herself against a possible suit for specific performance, that is another matter and, under Missouri procedural law, no doubt such a matter could be adjudicated along with the primary question. But still the relief prayed for by the plaintiffs would not affect, nor be affected by, the presence or absence of the prospective Negro purchasers as defendants in the case.

Assuming one further step to bring the case to its present condition, we have FitzGearld, not only having threatened a breach of the restriction agreement; not only having executed a contract of sale to the Negroes Shelley, but she has given them a deed which they have recorded. And they have occupied the property. Have the rights of plaintiffs been changed merely by this additional step in the chain of transactions between FitzGearld and Shelleys? How could their rights be affected? Has FitzGearld's breach changed her position in relation to plaintiffs? Has she acquired any new rights against plaintiffs merely be-

cause of the additional step she took in passing a deed? Obviously not. She cannot create new rights, not previously possessed, nor give rights, against the plaintiffs, to her grantees, by an act to which plaintiffs were not a party, or by a breach. In what better position is she or they, then, when plaintiffs sue in equity seeking the same injunctive remedy they sought when they sue at the other developing stages of her transaction? If the forbidden action is merely threatened, it may be restrained by injunction, if it has been completed, a mandatory injunction may be issued to undo it. Swain v. Maxwell, 196 S. W. (2d) 780.

Unless equity can give full and completely adequate relief, the established doctrines of equity would become nonsense. To remedy the breach plaintiffs complain of (if it is a restriction against sale) the only adequate remedy is to revest title in a white owner. That this can be done only by divesting it from a Negro grantee is merely incidental. The fee cannot be in both at the same time. The decree of the Court, in revesting the title in the white grantor, is acting directly only on the white defendant who breached. It acts only incidentally and indirectly on the Negro grantee out of whom the fee is divested. He, the Negro grantee, is still not a necessary party to the decree. As to him a decree revesting title in his grantor would be automatic. That result is only the incident of equitable and adequate relief necessarily granted to plaintiffs. If the restriction is against the use and occupancy, as here, then the injunction may operate on the Negro defendant. But its operation is still to be analyzed on the same reasoning as above applied.

Out of this analysis comes the rights which the present petitioners assert. From the automatic and incidental revestiture of title in their white grantor, they create "rights"

which they now proclaim are being taken from them by the State of Missouri without due process of law. Their "rights" are privative ideas of absent entities. Their "rights" have no more real existence than "blindness" or "evil." They have, if they have anything, a privation of a right—the right itself existing in their grantor Josephine FitzGearld, who is not even a party to this review and who did not petition this Court for the review. Petitioners are in the position of asking this Court to determine rights and defenses, which if present and available at all, are present in and available to Josephine FitzGearld, who is not before this Court either in person or by attorney.

If then, petitioners have no rights and no property of which the State of Missouri could possibly deprive them; if the decree of the Missouri Court concerns them only incidentally; if what they acquired from their grantor was merely land subject to an equitable charge or easement; if whatever title they acquired was defeasible and subject to divestiture should any of those other parties to the agreement choose to sue for the enjoining of a breach, what, in the eyes of the law have they lost? And what defenses have they a right to assert in any Court, much less in this Court?

It is doubtful to respondents, if, under the doctrines of Erie R. R. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L.Ed. 1155, 51 L.R.A. (N.S.) 1097, and Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 S. Ct. 167, 59 L.Ed. 365, and others, petitioners can assert Constitutional defenses of their grantor or grantors even if they were available to their grantor. It might seriously be urged also that, even if FitzGearld has Constitutional defenses available to her, she would be estopped to assert them after 39 years of benefits to her and her grantors under the contract she should seek to attack. The Record shows no violations of the contract

since 1911, when it was signed. The violation which brought the filing of this suit was the first. The purpose of the restriction and the benefits thought by the signers to flow from such a contract had been accepted by S. Werner, owner of petitioners' property, and all the intermediate white grantors up to and including FitzGearld. Could she be heard now to say she seeks the cancellation or voiding of the contract after 39 years of benefits have been accepted under it? If such estoppel could be urged against FitzGearld or her grantors, it can be urged against her grantees, the Shelleys.

What are these "rights" of which petitioners say they have been deprived? They could arise only from the fact of receiving a deed from FitzGearld. No other action could be pointed to. What, then, did petitioners receive from FitzGearld? They could receive only what she had to deed. And the right of the Negro defendants to occupy the premises did not pass with the deed because their grantor had no such right she could pass to them.

Restrictions on the use of property create negative easements. Pierce v. St. Louis Union Tr. Co., 311 Mo. 262, 278 S. W. 398; Porter v. Johnson, 115 S. W. (2d) 529; Swain v. Maxwell, 196 S. W. (2d) 780. The easement runs to each and every signer in the property of each and every other signer. The property so burdened is charged with the restriction. Such was the property when title was in FitzGearld. Obviously all she could convey to petitioners was property so charged. That is what petitioners received. Would it not be specious to say that petitioners acquired rights of which they have been unconstitutionally deprived, and acquired them by a deed that passed property subject to an easement against the very thing they assert as the right? Respondents contend petitioners did not and could not acquire any rights by the deed that passed this

property; nor can they complain, under the Fourteenth Amendment, of being deprived of rights they never had and do not have now.

What defense could FitzGearld assert? Could she successfully contend her grantors had no right to voluntarily restrict their own power of alienation? Missouri holds that such agreements are not total restraints on alienation and void thereby, but that the restriction constitutes only a partial restraint on the alienation. Koehler v. Rowland, supra; Swain v. Maxwell, supra. May not an owner of property so limit his own power to alienate?

If a man would merely refuse to sell his property or to lease or rent it to a Negro purely and simply because he was a Negro, would that man violate any law or be subject to any judicial penalty? Clearly he would not. No man may be forced to deal with any other man, black or white, unless he chooses to do so. Frisbie v. United States, 157 U. S. 160, 165, 15 S. Ct. 586, 39 L.Ed. 657. If a man can refuse to sell his property to a Negro merely because he is a Negro, would he have a right to refuse to devise it in a will to Negroes? Could a man promise another man he would not sell or rent his property to a Negro? And if that promise was reciprocal and consideration existed on both sides, why should such a contract not be enforceable? Respondents assert that what a man may legally and rightly do, he may promise another. And the Courts are charged with the duty of enforcing those promises unless some positive and established rule of law forbids the enforcement.

And it is in this that petitioners and all those filing Briefs in their behalf mistake the American system of government. For petitioners and those supporting their position assert that respondents have no **right** to make such a contract and the State has no **right** to enforce it.

This is a philosophy foreign to America. In this country, the people have all rights except those given by them to their States or to their National Government. And for the State Courts to enforce valid contracts of their citizens is not a "right" of the State but a duty imposed on the State by the people. "This is a right neither derived from the State or Federal Government nor within their power to forbid."

Under the Tenth Amendment the States retain all power not given to the Federal Government nor denied, by the States to themselves. Nowhere have the people of Missouri given Missouri the right to deprive them of contracting regarding their own property for a valid and legal purpose. Nowhere has a right been given by the people or by the States to the Federal Government to either determine the public policy of a State or to deny the State the right and duty to enforce the contracts of its citizens which contracts the State holds to be valid and enforceable by State policy and State law.

Respondents admit that the right to contract is not an absolute or unqualified right, but the right is strong and vigorous under our Constitution. It is a part of the liberty of the individual protected by the Fifth and Fourteenth Amendments. Adkins v. Children's Hospital, 261 U. S. 525, 545. (Respondents are aware the Adkins case was overruled in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, but the principles of the Adkins case were not overruled.) The right to contract necessarily implies a right to a process of law to protect it. These "defenses" of petitioners actually seek a judicial fiat which would invade and destroy respondents' right and power to contract regarding their own property.

Petitioners are here in Court seeking to deprive respondents of a definite and positive right and, in order to effectuate that result, are asserting "rights" in themselves which never existed and do not now exist; and they seek a judicial decree by the nation's highest Court to bring about that deprivation of respondents' rights by appealing to that Court to protect their "rights" against spoliation by the State of Missouri because such spoliation would be forbidden by the Fourteenth Amendment. Plainly and baldly stated and stripped of all the haze of clever rhetoric, that is the proposition being urged. And it is being urged by parties who have no right to even request a review of the matter because no rights or property of theirs is involved, and because they are in no position to defend against the plaintiffs' attempt to enjoin their, petitioners', grantor, from a contract breach.

The right of a citizen to alienate freely his own property was upheld by this Court in Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149. There a city ordinance was held unconstitutional, not because the Negro in the case was deprived of any rights by the ordinance, but because the white owner was unduly deprived, by the ordinance, of his right to sell his property to whom he chose. It was the white litigant's power of alienation—one of the incidents of ownership—that was unduly restricted, and the ordinance was condemned as violative of the Fourteenth Amendment. It is the same incident of ownership, the power to alienate and voluntarily restrict the alienation, that petitioners are here seeking to destroy.

Respondents suspect that neither the State legislatures nor the Congress would have a Constitutionally sanctioned right to prevent or forbid the owner of property to make an enforceable promise as the signers of the contract here made between themselves. Respondents feel that the

Constitution itself, and the Fifth and Fourteenth Amendments to it, forbid such legislative interference with a citizen's inalienable rights to property.

When petitioners urge that the enforcement of this and similar contracts by a Court is the "State Action" forbidden by the Fourteenth Amendment, they seek to deprive respondents of a Constitutional right and privilege, namely, access to the Courts. (See opinion of Missouri Supreme Court, Transcript of Record, p. 158.) For when a Court is asked to adjudicate the rights of litigants where the plaintiff asserts an alleged breach of a contract, and the defendant asserts the contract is violative of the Fourteenth Amendment, only two alternatives would ordinarily be available to the Court. It must decide, first, whether the contract is violative. If it decides it is violative, the case is determined on that basis; if it decides it is not violative, it then enforces it. But petitioners urge a third procedure. They assert the Court cannot enforce it even if the contract is not itself violative because the act of enforcement would be "State action" forbidden by the Fourteenth Amendment. Such a conclusion, forbidding the Court to act even after deciding the contract was not violative of the Amendment would, in effect, deny the litigants the access to the Courts contemplated in Sec. 2 of Art. IV of the Federal Constitution and Art. I of Sec. 14 of the Missouri Constitution of 1945. In either case, as petitioners argue, they must win. Should this Court hold, as petitioners urge, that the contract, itself, is not violative of the Fourteenth Amendment, but that its "enforcement" is violative; then no Court could enforce any contract if the defense set up is that such enforcement of a valid contract is violative of the Amendment. To such ridiculous conclusions do petitioners urge this Court by their "State action" arguments.

b.

Respondents have a positive property right of which they would be deprived without due process of law, if the enforcement of this contract would be denied by the Courts of Missouri or of the United States.

The decisions of the State Courts determining their own property law will be followed by, and are binding on, the Federal Courts. In re Shyvers, 33 Fed. Supp. 643; Koval v. Carnahan, 45 Fed. Supp. 357; Dayton and Michigan R. Co. v. Commissioner of Internal Revenue, 112 F. (2d) 627, 630, and cases therein cited; Kemp-Booth Co. v. Calvin, 84 F. (2d) 377.

The Courts of Missouri have uniformly and consistently held that contracts of the kind involved in this case create reciprocal negative easements. Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529; Meder v. Wilson, 192 S. W. (2d) 606, and cases therein cited. Other jurisdictions, including the District of Columbia, have also held such contracts create easements. Queensborough Land Co. v. Cazeau, 136 La. 724, 67 So. 641; White v. White, —W. Va.—, 150 S. E. 531, 66 A.L.R. 529; Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981; Meade v. Dennistone, —Md.—, 196 A. 330.

These cases decided by the Courts of Missouri, particularly, determine property law binding on this Court. For State law is what the highest Court of the State says it is. West v. Amer. Tel. and Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L.Ed. 139. It is not for the Supreme Court to determine the correctness of a State Court decision of a non-federal question or ground. Radio Station WOW v. Johnson, 326 U. S. 120, 129, 65 S. Ct. 1475, 89 L.Ed. 2092.

And easements are property. They are encumbrances on land. Adams v. Henderson, 168 U. S. 573, 18 S. Ct. 179,

42 L.Ed. 384; Lynn v. United States (C.C.A. Ala.), 110 F. (2d) 586, 589; Batchelor v. Hinkle, 125 N. Y. S. 929, 930, 140 App. Div. 621. Therefore, they are protected by the Fifth and Fourteenth Amendments to the Constitution. Meder v. Wilson, 192 S. W. (2d) 606, and cases therein cited; 114 A.L.R. 1242.

When petitioners seek to have this Court, or a State Court, hold that the enforcement of the right to an easement, a property right, is invalid and must be denied, then petitioners actually seek to deprive respondents of property without due process. Respondents have an easement in the property which is the subject of this suit. They had that easement when the property was in FitzGearld. They have it now. But a refusal or denial of a Court to enforce, by injunction, the right inherent in that easement is a deprivation, by the Federal Government or the State, of property. And to so hold would deny to respondents access to the Courts. It would deny to them the equal protection of the laws and the protection of equal laws. Their fundamental privilege of having property rights enforced by due process would be taken from them. For of what value is an easement or any other property right, if valid in itself, but one the Courts would arbitrarily refuse or arbitrarily be forbidden to enforce? And, for 39 years prior to the breach herein sought to be enjoined, this property right—this easement—this reciprocal restriction contract had value. There was no breach during that period and all apparently enjoyed the benefits from such tranquility and observance by the signers and an uncounted number of subsequent grantees, devisees, and assigns. It was only when two unscrupulous real estate manipulators purchased the property from an aged and ailing Mrs. Mathilda Sohlmann, who "had chances to sell it to colored but I refused" (T.R., p. 22), and then passed

the property through a white "straw party" that the breach occurred and this suit was begun to protect the easement of value for 39 years. To hold that such property right can neither be asserted nor enforced would be to reduce equitable principles and remedies to nonsense.

And there is a further point. The very right to contract about a valid subject matter is a property right protected by the Fifth and Fourteenth Amendments. Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 78 L.Ed. 1434, for, as said there, "Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States * * * contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

To encumber property by debt or otherwise has always been held to be an inviolable incident of ownership. People v. Common Council, 70 Mich. 534, 38 N. W. 470, 471; Boston Elevated R. Co. v. Commonwealth, 310 Mass. 528, 39 N. E. (2d) 87, 106, 108. Such rights are protected by the Constitution of the Nation and by those of the States. "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them." It transcends Constitutions. The Missouri Court, in Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529, said:

> "A restrictive agreement creates an easement in favor of the owner of one parcel of land within the restricted district in and to all other parcels located therein. This easement is a property right which may not be taken away against the will of the owner, by reason of Constitutional provisions * * * Such property right, created by contract, will be protected by injunc-

tion where the issues are between parties to the contract * * * The property rights of every citizen, black or white, are equally under the protection of the Constitution. Defendants' position, if sustained on the ground urged, would result in overriding the very constitutional and statutory provisions upon which the Negro race places chief reliance for safety and security."

The Missouri Supreme Court in Swain v. Maxwell (1946), 196 S. W. (2d) 780, said:

"Enforcement of valid and proper restrictive covenants affecting real property is one of the well-established functions of equity. Equitable principles govern their enforcement. A threatened violation may be restrained by injunction. If the forbidden act has been done, a mandatory injunction may be issued to undo it * * *

In this case the deed made in violation of the restriction was voidable at the will of the parties to the agreement or their successors. Accordingly, the estate grantee acquired was, from its inception, subject to divestiture. Therefore, when it was divested the grantee lost nothing in the eyes of the law * * * on the other hand, cancellation of the deed had the effect of revesting title in the grantor. So the grantor lost no estate * * * It is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes."

The Missouri Court, speaking again in Meder v. Wilson, 192 S. W. (2d) 606, said:

"The right of a property owner to the protection of a restrictive covenant is a property right just as inviolable as is the right of one to the free use of his property when its use is unrestricted, and the Courts will not hunt out a way to defeat such a contract."

It seems clear that, in order to invalidate contracts such as the one here, much law and many rights grounded in antiquity and the deathless pronouncements of Statesmen and Courts must be abrogated. Respondents vigorously assert that they, too, have rights—definite and positive—not ephemeral, or vague, or owing their existence to generalizations and indirect interpretations of phrases and words snatched from the context of their settings and played upon with clever verbiage. Respondents request the preservation, protection and maintenance by this Court of their own indisputable rights of property, liberty and freedom as guaranteed to them by the Constitution of their Nation and by the Constitution, laws and decisions of their sovereign State of Missouri.

IV.

Petitioners, in their Petition for the Writ of Certiorari at p. 51, Point III, assert that the "Supreme Court of Missouri in holding and deciding that petitioners are in no position to complain of lack of notice of the restrictions contained in the agreement denied the petitioners the equal protection of a well-settled rule of law in Missouri." To support the argument they cite Ozark Land and Lumber Company v. Franks, 156 Mo. 673, 57 S. W. 540, 543. This case involved a deed which omitted from the description of the land the **township** in which the town lay. In Gatewood v. House, 65 Mo. 663, relied upon by petitioners, there was involved a deed from which was omitted even the name of the county and in which, from the face of the deed, there was embraced in the description some 6,000 acres, whereas only 160 acres sought to be conveyed.

Neither of these cases could be even remote authority for petitioners' argument, for the contract involved in the case at bar definitely defined the restricted area:

> "This contract of restriction made and entered into by the undersigned, the owners of the property fronting on Labadie Avenue in Blocks 3710b and 3711b between Cora Avenue on the West and Taylor Avenue on the East * * * and do place and make upon the real estate fronting on Labadie Avenue and running back to the alley on the North and South sides of Labadie Avenue between Taylor Avenue and Cora Avenue * * *"

The express wording of the agreement could not be clearer. The point even contradicts petitioners' own agreed statement of facts (T. R., p. 2, para. 1, e).

The ruling by the Missouri Supreme Court on this point was reached by interpretation and construction of the Missouri Recording Statute, being Sections 3426-3427, R. S. Mo. 1939. The decision is property law of Missouri binding on this Court. 11 Am. Jur., p. 106, Section 107. It is not for the Supreme Court to question the correctness of a State Court decision on a non-Federal matter. Radio Station WOW v. Johnson, 326 U. S. 120, 129, 65 S. Ct. 1475, 89 L.Ed. 2092.

V.

Although it is impossible to give an exact and comprehensive definition of the phrase "due process of law," Owen v. Battenfield, 33 Fed. (2d) 753; Cert. Den., 280 U. S. 605, 50 S. Ct. 88, 74 L.Ed. 649, in reference to judicial proceedings the phrase simply means a law which hears before it condemns and which proceeds on inquiry and renders

judgment only after trial. Pennoyer v. Neff, 95 U. S. 714, 24 L.Ed. 565; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L.Ed. 254.

The Courts below had jurisdiction over both the subject matter and the parties and the case was tried in accord with the general equitable principles of the laws of Missouri. These general remedies of Missouri's equity jurisdiction are available to all persons irrespective of race or color. Petitioners had an equal opportunity to be heard and present their defenses. Thus all essentials of due process were present. U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L.Ed. 1107.

The equal protection clause of the Fourteenth Amendment was designed to prevent the State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. McPherson v. Blacker, 147 U. S. 1, 13 S. Ct. 3, 36 L.Ed. 869.

Since the equal privileges and immunities clause has been held to protect only those rights which accrue by Federal citizenship, Slaughterhouse Cases, 16 Wall. (U. S. 36), 21 L.Ed. 394; Walker v. Sauvinet, 92 U. S. 90, 23 L.Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L.Ed. 597, petitioners necessarily assert by invoking this clause the right to own the specific piece of real property herein involved.

This argument was answered in Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969. Respondents have adequately covered this point heretofore.

CONCLUSION.

Although petitioners, seeking to prevail, have sought refuge in several different clauses of the United States Constitution, their only claim of any Constitutional substance whatever must in the final analysis be measured by this Court against the requirements of the Fourteenth Amendment. In an attempt to overcome the insurmountable barrier that the Fourteenth Amendment was never adopted to regulate the actions of private persons in their individual capacity, petitioners, through literary niceties, have injected the element of "State action" into their argument.

In so doing petitioners have asked this Court to promulgate a doctrine that would, through the Fourteenth Amendment, establish direct Federal control of the individual citizens of the United States and set State sovereignty at naught.

At no time in American judicial history has it been supposed that an individual citizen acquires his property rights from the State so as to constitute him by judicial construction a creature of the State. The implications of such a doctrine are incompatible with the most cherished American notions of individual liberty and dignity.

Respondents and countless others in the United States have for many years relied upon the doctrine of individual freedom from Federal interference under the Fourteenth Amendment. If this Court should now adopt the opposite view, the individual citizen of the United States would be deprived, not only of property held and controlled in reliance on previous decisions, but would no longer enjoy the right of freedom guaranteed to him by the American tradition.

Petitioners are not here asking for Constitutional interpretation, but rather do they seek Constitutional amendment.

Respondents cannot believe that this Court will follow petitioners' suggestion and assume that right. As was said by Mr. Justice Sutherland, "* * * the meaning of the Constitution does not change with the ebb and flow of economic events * * * the judicial function is that of interpretation; it does not include the power of amendment under guise of interpretation."

On the law respondents respectfully request that the judgment of the Supreme Court of Missouri be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72, 87, 290, 291

J.D. SHELLEY, ETHEL LEE SHELLY, His Wife, and JOSEPHINE FITZGERALD, *Petitioners,*

—v.—

LOUIS KRAEMER and FERN W. KRAEMER, His Wife.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

ORSEL McGHEE and MINNIE S. McGHEE, His Wife, *Petitioners,*

—v.—

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

JAMES M. HURD, *et al., Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

RAPHAEL G. URCIOLO, *et al., Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Department of Justice,
Washington, D.C.

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J. D. SHELLEY, ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS

v.

LOUIS KRAEMER AND FERN W. KRAEMER, HIS WIFE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THE INTEREST OF THE UNITED STATES

The Federal Government has a special responsibility for the protection of the fundamental

[1] Together with No. 87, *Orsel McGhee and Minnie S. McGhee, his wife, Petitioners* v. *Benjamin J. Sipes and Anna C. Sipes, James A. Coon and Addie A. Coon, et al.*, on writ of certiorari to the Supreme Court of the State of Michigan; No. 290, *James M. Hurd, et al., Petitioners*, v. *Frederic E. Hodge, et al.*, on writ of certiorari to the United States Court of Appeals for the District of Columbia; No. 291, *Raphael G. Urciolo, et al., Petitioners* v. *Frederic E. Hodge, et al.*, on writ of certiorari to the United States Court of Appeals for the District of Columbia.

civil rights guaranteed to the people by the Constitution and laws of the United States. The President of the United States recently stated:[2]

> We must make the Federal Government a friendly vigilant defender of the rights and equalities of all Americans. * * * Our National Government must show the way.

The Government is of the view that judicial enforcement of racial restrictive covenants on real property is incompatible with the spirit and letter of the Constitution and laws of the United States. It is fundamental that no agency of government should participate in any action which will result in depriving any person of essential rights because of race or color or creed. This Court has held that such discriminations are prohibited by the organic law of the land, and that no legislative body has power to create them. It must follow, therefore, that the Constitutional rights guaranteed to every person cannot be denied by private contracts enforced by the judicial branch of government—especially where the discriminations created by private contracts have grown to such proportions as to become detrimental to the public welfare and against public policy.

[2] Address by President Truman at the Lincoln Memorial, Washington, D. C., June 1947, quoted in the Report of the President's Committee on Civil Rights (1947), page 99.

Residential restrictions based on race, color, ancestry, or religion have become a familiar phenomenon in almost every large community of this country, affecting the lives, the health, and the well-being of millions of Americans. Such restrictions are not confined to any single minority group. While Negroes (of whom there are approximately 13 million in the United States) have suffered most because of such discriminations, restrictive covenants have also been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, Filipinos, and "non-Caucasians".

This Nation was founded upon the declaration that all men are endowed by their Creator with certain inalienable rights, and that among these rights are Life, Liberty and the pursuit of Happiness. To that declaration was added the Fifth Amendment of the Bill of Rights, providing that no person shall be deprived of life, liberty or property without due process of law; and the Fourteenth Amendment, providing that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And Congress, exercising its power to enforce the provisions of the Fourteenth Amendment, has provided that all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens to

inherit, purchase, lease, sell, hold, and convey real and personal property.

Racial restrictive covenants on real property are of comparatively recent origin. If limited in number, and confined to insignificant areas, they would not have been of such public importance. But they have already expanded in large cities from coast to coast. They are responsible for the creation of isolated areas in which overcrowded racial minorities are confined, and in which living conditions are steadily worsened. The avenues of escape are being narrowed and reduced. As to the people so trapped, there is no life in the accepted sense of the word; liberty is a mockery, and the right to pursue happiness a phrase without meaning, empty of hope and reality. This situation cannot be reconciled with the spirit of mutual tolerance and respect for the dignity and rights of the individual which give vitality to our democratic way of life. The time has come to destroy these evils which threaten the safety of our free institutions.

The fact that racial restrictive covenants are being enforced by instrumentalities of government has become a source of serious embarrassment to agencies of the Federal Government in the performance of many essential functions, including the programs relating to housing and home finance, to public health, to the protection of dependent native racial minorities in the

United States and its territories, to the conduct of foreign affairs, and to the protection of civil rights.

Housing.—The Administrator of the Housing and Home Finance Agency has prepared the following statement describing the effects which the widespread use of racial restrictive covenants has had upon the operations of that agency[3]:

> Racial restrictive covenants, as the core of a system of traditional real estate practices controlling the access of Negroes and other racial minority groups to sites and dwelling units, have affected practically every phase of public housing administration during the past thirteen years. By generally restricting these groups to sharply defined neighborhoods which provide too few houses and too little living space, these covenants have served to distort the objectives of the public housing program. The ultimate effect of covenanted land restrictions is to place the Federal agency, required as it is to clear and replace slum areas, in the position of appearing to place the stamp of governmental approval upon separate residential patterns and to render it most difficult for the agency to administer public funds in such manner as to assure equitable participation by minority racial groups.

[3] Letter of Raymond M. Foley, Administrator, Housing and Home Finance Agency, to the Department of Justice, dated November 4, 1947. Copies of this letter, as well as the other letters quoted herein, have been filed with the Clerk.

As a result, administrative problems arise to confront the agency at every stage of the program—the programming of projects and dwelling units, determination of sites, acquisition and assembly of land, provision of project services and facilities, general project management and disposition. The processes involved not only impede the progress of the program, in many instances, but are often excessive in cost and thereby reduce the total amount of housing and facilities which might otherwise be provided with the funds available.

Inasmuch as the local approach to housing is generally conditioned by the patterns maintained by racial restrictive covenants, the earliest stages of planning with local housing authorities to meet the housing needs of racial segments in the low-rent market on an equitable basis must include racial breakdowns and anticipate location and occupancy conditions accordingly.

The most serious distortion of planning occurs at the site selection stages at which sites offered by the local authority must be evaluated in terms of the racial composition of the prospective project occupants. In many communities, racial minority groups are land-bound within areas restricted by the existence of racial covenants on undeveloped as well as developed areas. The result is excessive overcrowding in the slum and blighted areas with which the basic purposes of the low-rent public housing program are concerned. Repercussions

upon the program are extensive. Obstacles to the location of racial minorities outside of the areas to which they are restricted necessitate site selection for developments to house such groups within these inordinately overcrowded areas. At the same time, the excessive overcrowding tends to increase the cost of the land. Moreover, there is the danger of increasing the density of other restricted and overcrowded areas which must absorb the racial minority group families temporarily or permanently displaced from similar areas by public housing developments. In many cases, alternative housing cannot be provided at all without demolition of units already occupied and desperately needed as the only shelter available to the racial minority groups.

While these conditions would naturally constitute a part of the inevitable problems to be dealt with by a program limited to unit for unit replacement, the degree of hardship and the limitation of sound solutions are far greater when racial minority groups are involved.

When open sites are sought or used under such circumstances as the need for lower cost land, relieving the congestion of the slum area, avoiding displacement of more units than the program can replace under acceptable density standards, or the requirements of the war housing program, objections to use of such sites for housing to which racial minorities will be admitted

are frequently obstructive and sometimes prohibitive. An outstanding example of the local, national and even international implications involved is the development of the *Sojourner Truth* project in Detroit, Michigan, which the Department of Justice investigated incident to the violence which accompanied the moving of Negroes into this project developed on open land. The cost of this experience to national unity and international prestige is incalculable.

Actual increased financial costs are incurred not only in the additional administrative processes required to effect suitable participation by racial groups in the program under the conditions aggravated by racial restrictive covenants, but also in the uneconomic development and administration of dual facilities and services. In the instance of Buffalo, an additional half million dollars was required to rehouse displaced Negro families from a slum site to allow the development of a project for essential Negro war workers on the only site locally available to minority group occupancy.

Regulations * * * require local housing authorities to give eviction notices to families which have become ineligible for continued occupancy of low-rent housing projects because of increases in their income since their original admission. Negro families whose incomes now exceed the maximum limit for continued occupancy have a great deal of difficulty in finding other housing because large areas are closed

to them by restrictive covenants. Furthermore, local housing authorities encounter almost unanimous resistance from the Negro community and its press, seriously impairing the type of public relations essential to the successful administration of the eviction policy. The protests place the PHA and the local authority in an almost indefensible position because of the difficulties of refuting the claims that the Negro evictees are virtually barred from competing in the open housing market for shelter on the same basis as other evicted tenants in similar economic position.

After March 1, 1948, it will become necessary to evict such over-income families whether or not other housing accommodations have been specifically located for particular families. In addition, over 46,000 minority group families are now living in temporary war housing which must be removed by July 25, 1949, in order to comply with the legislation under funds which were provided for their construction. This is anticipated as a major problem on the West Coast where thousands of Negro war migrant families are housed in temporary projects.

Under both of these conditions where evictions will be effected, the existence of racial restrictive covenants will probably cause a disproportionate number of Negro tenants to move from low-rent housing projects into slum areas. When such removals occur, racial minorities tend to

charge the Federal Government with forcing them into situations where they suffer inequitable and discriminatory treatment.

The disposition of permanent war housing will, of course, conform generally with the local real estate practices which are conditioned by the racial restrictive covenants. Under these local conditions, the agencies of the Federal Government responsible for the disposition program are subject to embarrassing involvement in cases where racial minority group veterans may be denied acquisition of houses to which, otherwise, they would have preference.

These are but a few illustrations of the impact of the restrictive processes upon the operations of the PHA program. To meet these and associated problems, it has been necessary to evolve specific administrative machinery and a body of policy and procedure in order to effect a measure of equitable participation by minority racial groups.

* * * * *

PREVALENCE OF RACIAL RESTRICTIVE COVENANTS

While this subject is under study in the Agency, comprehensive and conclusive information on the extent of such covenants is not now available: Field reports, however, from such localities as Los Angeles, Chicago, Detroit, St. Louis, Baltimore, New York City and Washington, D. C., reveal

the increasing application of these deed restrictions during recent years. This acknowledged fact is reflected in:

a. The multiplicity of court actions regarding racial covenants in those cities.

b. Repeated reports of the inability of private developers to locate adequate building sites uncovenanted and open to occupancy by Negroes, Latin-Americans, Asiatics and other similar groups.

c. Planning commission reports on the restriction of 20 per cent of the population (Negro) of Baltimore to 2 per cent of the land areas; a density of 80,000 persons per square mile in portions of the Negro South Side in Chicago as compared to an average population density in blighted areas of 40,000; concentration of 3,871 Negroes in the famous "lung block" in New York City's Harlem—at such density rate, all the people in the United States could be accommodated in one-half of the New York City land area.

* * * * *

ADMINISTRATIVE BURDENS ATTRIBUTABLE TO RACIAL RESTRICTIVE COVENANTS

Covenants of this type have complicated the administration of governmental housing programs throughout the past decade and have made difficult the equitable use of public funds and powers. The enforcement of such covenants provides official state support for the traditional real estate and financial practice of restricting Ne-

groes and other racial minorities to sharply defined neighborhoods which provide too little space for expanding population groups.

Hemmed in by these covenants, these areas have become highly congested, overused, under-serviced and largely substandard. As a result, the program of FHA mortgage insurance can have but limited application in such areas for purely economic reasons. The existence of such covenants outside these constricted areas, makes it inordinately difficult and often impossible for prospective Negro buyers to qualify for FHA mortgage insurance. As a result, the middle income market among Negroes and similar racial minorities is largely excluded from the benefits of the mortgage insurance program.

Land restrictions are a primary factor in the minority housing market, which results in higher costs of credit and disproportionately limits the purchasing power of the housing dollar of minority groups. This indirectly affects the extent to which minority groups benefit from state or federally aided financing operations.

Court enforced racial covenants disproportionately limit the occupied neighborhoods and open areas available for the development of public housing projects open to minority group occupancy. Thus the federal public housing program experiences serious administrative difficulties in

> efforts to meet the disproportionately large mass housing market among minority group low-income families.
>
> Local, state or federal programs offering aid to land assembly, urban redevelopment and community facilities are hampered by such covenants.
>
> The resultant inequity in the expenditure of public funds and the compulsion upon federal agencies to conform to "community patterns" render federal housing agencies subject to the double charge of placing the stamp of governmental approval upon residential segregation and administering the funds or powers of all the people in a discriminatory manner.

Public Health.—The Surgeon General of the United States Public Health Service has made the following statement as to the health problems which arise from the artificial quarantine of minority groups in overcrowded residential areas:[4]

> While national housing policy does not come within the official cognizance of the U. S. Public Health Service, we do regard the provision and maintenance of a sanitary environment for all the people of the country as a major and basic element of national health policy. The sanitation and hygiene of housing, accordingly, are of great importance in relation to the objec-

[4] Letter of Surgeon General Thomas Parran to the Department of Justice, dated October 13, 1947.

tives and programs of the Public Health Service.

The relationship between housing and health is extremely difficult technically to assess, because there are almost inevitably associated with housing concomitant factors, such as income, food, and ability to obtain medical care and education, that have a decided bearing upon health.

While an exact assessment cannot be made on technical grounds, there is general agreement among health authorities that housing deficient in basic sanitary facilities, structurally defective from the point of view of home accidents and protection against the elements, and improperly planned in relation to the cultural resources of the community, is a serious deterrent to improved national health.

To the extent that racial restrictive housing covenants would deny a citizen the opportunity to provide for himself a sanitary and healthful environment, such covenants would, in my view, be prejudicial to the public health.

Protection of dependent racial minorities.— Racial restrictive covenants have become a matter of concern to the Department of the Interior because of their impact upon the administration of Indian affairs and of the territories and insular possessions of the United States. Many types of covenants are directed against broad groups which include not only American Indians but also the

majority of the peoples of the territories. This has given rise to problems which are thus described by the Under Secretary of the Interior:[5]

INDIAN AFFAIRS

> There are now about 400,000 Indians in the United States. Of these, a substantial number live in urban areas. The implications of these restrictive covenant cases affect all of them.
>
> One of the main goals of the Indian Service is to aid the Indians to participate equally and fully in the life of the Nation. This purpose is frustrated when Indians attempting to settle in cities are segregated by restrictive covenants into undesirable slum areas solely because they are Indians. During World War II about 75,000 Indians left their tribal reservations. Of these, some 30,000 served in the armed forces, and about 45,000 took jobs in war industry. Many of these Indians, particularly war veterans, are eager to exchange their reservation life for city life. The present critical housing shortage has been an important factor inhibiting their ability to do so. This housing shortage is greatly emphasized for Indians by racial restrictive covenants, which are extensively imposed in most of the major cities of the Nation on many of the newly constructed

[5] Letter of the Under Secretary of the Interior, Oscar L. Chapman, to the Department of Justice, dated November 10, 1947.

dwellings, almost all new residential subdivisions and on many existing residential properties. The covenants, by discriminating against them solely because they are Indians and by preventing them from securing adequate urban housing, are thus an important factor in deterring Indians from going to cities to look for employment. This not only retards their economic progress but also substantially tends to burden the United States with increased expenses in the administration of Indian affairs. Since resources on many of the reservations are inadequate, relief payments by the Government would be greater, and may continue indefinitely.

* * * * *

It has long been the declared policy of Congress to give Indians preference in Federal employment. Some of these statutes are: Act of June 30, 1834 (4 Stat. 735, 737); act of March 3, 1875 (18 Stat. 402, 449); act of March 1, 1883 (22 Stat. 432, 451); General Allotment Act of February 8, 1887 (24 Stat. 388, 389–90); act of August 15, 1894 (28 Stat. 286, 313); Wheeler-Howard Act of June 18, 1934 (48 Stat. 984, 986, 25 U. S. C. 472). Many other statutes are listed in F. S. Cohen, "Handbook of Federal Indian Law," 159–162 (1945). To help the Indians achieve self-government is one of the principal aims of the Indian Service. For this reason, as well as because of their natural sympathy and understanding of Indian problems and customs, Indians are particularly

suitable for employment in the Indian Service. Over 50 percent of the employees of the Indian Service are of Indian ancestry.

There have been a number of instances in which such Indian employees have been impeded by restrictive covenants in securing adequate housing accommodations. In at least one instance, an Indian employee who had purchased a home in the Washington, D. C. area subject to such a covenant, experienced great difficulty in securing the refund of his down-payment for his home. Inability to secure adequate housing because of restrictive covenants would be a serious deterrent to the employment of Indians in the Indian Service, and would defeat the congressional policy of preferential employment of Indians.

Furthermore, the restrictions upon their securing adequate housing, by deterring them from remaining employed in the cities where Indian Service offices are located, may seriously jeopardize the functioning of the entire Indian Service. The impact of restrictive covenants on Indians has been a factor in the quest for homes in the Washington, D. C. area by the large number of Indian employees who have recently been transferred, with the transfer of the Bureau's headquarters, from Chicago to Washington.

The effect of restrictive covenants on the morale of all the Indians is also significant. Much of the effort to eradicate old

injuries to Indians and to aid in their participation in the national life is stultified by their being categorized as inferior by the exclusions caused by restrictive covenants.

* * * * *

PEOPLE OF THE TERRITORIES AND ISLAND POSSESSIONS

About 25 percent of the people of Puerto Rico, one-half of the people of Alaska, most of the people in Hawaii, and about 95 percent of the people in the Virgin Islands would be subject to classification as "non-Caucasians" and thus would be within the scope of most restrictive covenants. There is apparently no evidence that restrictive covenants are being applied against them in the territories at present; but restrictive covenants are being applied against them in the United States and may well spread to the territories.

Many thousands of Puerto Ricans, Hawaiians, and Virgin Islanders are now in the United States. It has been estimated that over 350,000 Puerto Ricans are in New York City alone. Many of them live in East Harlem under appalling conditions unquestionably resulting partially from restrictive covenants.

Restrictive covenants against these territorial peoples contribute to resentment and bitterness against the United States with consequent impairment of the Federal Government's prestige and programs in the

territories. Loyalties are impaired in strategic possessions when the inhabitants of these areas find themselves categorized as second-class citizens. To the Islanders, racial discrimination is a new experience. Vicenzo Petrullo, "Puerto Rican Paradox", pp. 20–24 (1947). Even the Governor of the Virgin Islands is subjected to restricted housing when he comes to the United States on official business.

The broad implications of restrictive covenants are entirely inconsistent with the future national and international welfare of the United States in its relations with the "non-white" peoples. This Department firmly believes that the cancer of restrictive covenants should be excised from this Nation.

Conduct of Foreign Affairs.—The Legal Adviser to the Secretary of State has advised that "the United States has been embarrassed in the conduct of foreign relations by acts of discrimination taking place in this country."[6] The position of the Department of State on such matters was set forth in a letter of May 8, 1946, from the then Acting Secretary of State to the Fair Employment Practices Committee:

> The existence of discrimination against minority groups in this country has an adverse effect upon our relations with other

[6] Letter of Ernest A. Gross, Legal Adviser to the Secretary of State, to the Attorney General, dated November 4, 1947.

countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.

I think that it is quite obvious * * * that the existence of discrimination against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private efforts to do away with these discriminations.

Protection of Civil Rights.—The final and most important concern of the Government relates to

its responsibility for the protection of fundamental civil rights. Without an atmosphere of mutual tolerance, civil rights cannot survive. That they shall survive is a prime objective of our system of government.

The experience of the Department of Justice in this field is, we believe, of some significance. In the enforcement of federal laws dealing with invasions of rights secured by the Constitution and laws of the United States, the Department has found in eight years of special effort that it is exceedingly difficult to redress invasions of civil rights in the face of hostile community projudice. We have found that the most serious invasions of human liberties go hand in hand with racial intolerance.

The difficulties encountered in the enforcement of existing civil rights laws provided the impetus for the establishment on December 5, 1946, of the President's Committee on Civil Rights. (Executive Order 9808.) No more cogent or timely statement of American ideals, and the threat to those ideals implied by the enforcement of racial restrictive covenants, could be made than that contained in the Report of this Committee, entitled "To Secure These Rights," issued on October 29, 1947, pp. 4, 67–68:

> The central theme in our American heritage is the importance of the individual person. From the earliest moment of our history we have believed that every human being has an essential dignity and integrity

which must be respected and safeguarded. Moreover, we believe that the welfare of the individual is the final goal of group life. Our American heritage further teaches that to be secure in the rights he wishes for himself, each man must be willing to respect the rights of other men. This is the conscious recognition of a basic moral principle: all men are created equal as well as free. Stemming from this principle is the obligation to build social institutions that will guarantee equality of opportunity to all men. Without this equality freedom becomes an illusion. Thus the only aristocracy that is consistent with the free way of life is an aristocracy of talent and achievement. The grounds on which our society accords respect, influence or reward to each of its citizens must be limited to the quality of his personal character and of his social contribution.

This concept of equality which is so vital a part of the American heritage knows no kinship with notions of human uniformity or regimentation. We abhor the totalitarian arrogance which makes one man say that he will respect another man as his equal only if he has "*my* race, *my* religion, *my* political views, *my* social position." In our land men are equal, but they are free to be different. From these very differences among our people has come the great human and national strength of America.

Thus, the aspirations and achievements of each member of our society are to be

limited only by the skills and energies he brings to the opportunities equally offered to all Americans. We can tolerate no restrictions upon the individual which depend upon irrelevant factors such as his race, his color, his religion or the social position to which he is born.

* * * * *

THE RIGHT TO HOUSING

Equality of opportunity to rent or buy a home should exist for every American. Today, many of our citizens face a double barrier when they try to satisfy their housing needs. They first encounter a general housing shortage which makes it difficult for any family without a home to find one. They then encounter prejudice and discrimination based upon race, color, religion or national origin, which places them at a disadvantage in competing for the limited housing that is available. The fact that many of those who face this double barrier are war veterans only underlines the inadequacy of our housing record.

Discrimination in housing results primarily from business practices. These practices may arise from special interests of business groups, such as the profits to be derived from confining minorities to slum areas, or they may reflect community prejudice. One of the most common practices is the policy of landlords and real estate agents to prevent Negroes from renting outside of designated areas. Again, it is "good business" to develop exclusive "restricted"

suburban developments which are barred to all but white gentiles. When Negro veterans seek "GI" loans in order to build homes, they are likely to find that credit from private banks, without whose services there is no possibility of taking advantage of the GI Bill of Rights, is less freely available to members of their race. Private builders show a tendency not to construct new homes except for white occupancy. These interlocking business customs and devices form the core of our discriminatory policy. But community prejudice also finds expression in open public agitation against construction of public housing projects for Negroes, and by violence against Negroes who seek to occupy public housing projects or to build in "white" sections.

The Report also stated (p. 141):

> It is impossible to decide who suffers the greatest moral damage from our civil rights transgressions, because all of us are hurt. That is certainly true of those who are victimized. Their belief in the basic truth of the American promise is undermined. But they do have the realization, galling as it sometimes is, of being morally in the right. The damage to those who are responsible for these violations of our moral standards may well be greater. They, too, have been reared to honor the command of "free and equal." * * * All of us must endure the cynicism about democratic values which our failures breed.

The United States can no longer countenance these burdens on its common conscience, these inroads on its moral fiber.

It is for these compelling reasons that the Government of the United States appears in these cases as *amicus curiae.*

RACIAL RESTRICTIVE COVENANTS IN THE UNITED STATES

A. *Nature and form.*—Racial covenants, prohibiting sale to or occupancy of designated real property by certain minority groups, had only sporadic existence before the great twin migration of Negroes, in the second decade of this century, from the country to the cities in both North and South, and from the South to the Northern and Middle Western States.[7] This extensive migration first led to efforts to insure urban residential segregation by means of state or municipal legislation—beginning with a Baltimore ordinance of 1910, which was quickly followed by Atlanta, Richmond, Louisville, and other cities—until this method was completely invalidated, in 1917, in *Buchanan* v. *Warley,* 245 U. S. 60. It was then that the racial covenant, which had been developing as a subsidiary weapon, became the primary legal means of enforcing segregation. See *infra,* pp. 40–42; Myrdal, *An American Dilemma* (1944) 622–627; Johnson, *Patterns of Negro Segregation* (1943) 172–176; Sterner, *The Negro's*

[7] The only case decided prior to 1915 was *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C. S. D. Cal.), decided in 1892, involving a restriction against Chinese.

Share (1943) 205–209; Mangum, *The Legal Status of the Negro* (1940), 140–152. The course of covenant litigation since 1917 suffices by itself to show that racial restrictive agreements have come into common and increasing use since that time. See *infra,* pp. 40–42.

In form, these covenants restrict either (a) sale, lease, conveyance to, or ownership by, any member of an excluded group or (b) use or occupancy by any member of that group, or (c) both ownership and use or occupancy. In those states invalidating group restrictions on sale or ownership under the common-law rule on restraints against alienation, the agreement usually refers only to "use" or "occupancy" (see *infra,* p. 42 and pp. 112–114); in the other jurisdictions, outright restraints on sale or conveyance appear to be more common. Some of the covenants are limited in duration, while others are perpetual.

These variations are well illustrated by the restrictions in the four cases at bar. In the District of Columbia cases, the covenant is not limited in time and runs against sale or ownership; it provides "that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person" (Nos. 290–291, R. 380). In the Michigan case, the covenant runs until January 1, 1960, and relates only to use or occupancy: "This property shall not be used or occupied by any person or persons except those of the Caucasian race" (No. 87, R. 13, 16, 37, 39,

42, 60). The restriction in the Missouri case runs for fifty years from February 1911, and is likewise phrased to exclude "use" and "occupancy" by persons "not of the Caucasian race" (No. 72, R. 154–155). Racial restrictions are sometimes inserted in deeds, as in Nos. 290–291 (R. 380–382), but often, as in Nos. 72 and 87, are embodied in written agreements between a group of neighborhood land-owners, which are then officially recorded so as to give due notice to all subsequent purchasers or occupants. Enforcement of the restriction is usually by a neighboring owner who is a party to such a recorded agreement, or who may assert an interest in the restriction under the rules normally governing covenants running with the land. Almost invariably the relief requested is the removal of the excluded occupant, or injunction against his entry, and, where sale restrictions have been violated, cancellation of the offending deeds.

B. *Racial covenants and Negro housing:* 1. *Segregation and inadequacy of Negro housing.*— Two of the notorious social facts of American life are that Negroes suffer from deplorably inadequate housing, and that in urban areas they live, in general, in segregated zones. "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,* p. 376;

cf. pp. 1290–1292; cf. Sterner, *The Negro's Share*, p. 190. Poverty is, of course, a major cause for the dilapidated, overcrowded, unsanitary, and inadequate homes in which the mass of colored people now live, but it is residential segregation in severely limited areas which accentuates these conditions and bars their alleviation. Since the turn of the century, Negroes have been streaming to the cities (especially in the North and Middle West[8]—and, since World War II, to the

[8] The following tables (taken from Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 Univ. of Chicago L. Rev. 198, 202), based upon U. S. Census data for 1910, 1920, 1930, and 1940, illustrate the extent to which Negroes have flocked to the cities in the last three decades:

Increase in Negro urban population in the United States

	1910	1920	1930	1940
Number of Negroes urbanized	2,684,797	3,559,473	5,193,913	6,253,588
Percentage of Negroes urbanized	27.3	34.0	43.7	48.6
Percentage of total United States population urbanized	45.8	51.4	56.2	56.5

Increase in Negro population in ten leading industrial cities

City	1910		1920		1930		1940	
	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.	Number of Negroes	% of total pop.
New York	91,709	1.9	152,467	2.7	327,706	4.7	458,444	6.1
Chicago	44,103	2.0	109,458	4.1	233,903	6.9	277,731	8.2
Philadelphia	84,459	5.5	134,229	7.4	219,599	11.3	250,880	13.0
Detroit	5,741	1.2	40,838	4.1	120,066	7.7	149,119	9.2
Cleveland	8,448	1.5	34,451	4.3	71,899	8.0	84,504	9.6
St. Louis	43,960	6.4	69,854	9.0	93,580	11.4	108,765	13.3
Pittsburgh	25,623	4.7	37,725	6.4	54,983	8 2	62,210	9.3
Cincinnati	19,639	5.1	30,079	7.5	47,818	10.6	55,593	12.2
Indianapolis	21,816	9.3	34,678	11.0	43,967	12.1	51,142	13.2
Kansas City, Mo	23,556	9.5	30,719	9.5	38,574	9.8	41,574	10 4

Far West), to be faced by residential segregation, enforced by informal and formal pressures and by legal and illegal methods, which keeps them from normal expansion into "non-colored" urban areas to satisfy their housing needs.[9] The result of this bottling-up of an ever-increasing Negro population within narrow confines of colored zones or ghettos has been the abnormal over-crowding, congestion, and substandard facilities stigmatized by the President's Committee on Civil Rights and by all students of Negro housing, and so graphically portrayed in the materials presented by petitioners, as well as by Justice Edgerton, dissenting below in Nos. 290–291, 162 F. 2d, at 243–245, and in *Mays* v. *Burgess,* 147 F. 2d 869, at 876–878. As far back as 1932, the Report on Negro Housing of the President's Conference on Home Building and Home Ownership found that segregation "has kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals, and general decency of cities and 'plague spots for race exploitations, friction and riots.'"[10] The passing of fifteen years—which have included the depression period, the war years, and the cur-

[9] See Myrdal, *An American Dilemma*, pp. 618–627, and pp. 1125–1128 (Appendix 7: "Distribution of Negro Residences in Selected Cities"); Drake and Cayton, *Black Metropolis*, ch. 8 ("The Black Ghetto"), esp. pp. 175–178.

[10] Report on Negro Housing (1932), pp. 45, 46.

rent acute housing shortage—has not served to weaken the soundness of this judgment.[11]

It is perhaps almost superfluous to add that, as the 1932 Report indicates, the combination of inadequate housing with racial segregation has most unfortunate economic, social, and psychological effects. Colored people are forced to pay higher rents and housing costs by the semi-monopoly which segregation fosters.[12] The incidence of crime and juvenile delinquency is much greater [13] and the occurrence of death and disease

[11] Negro housing conditions and segregation in the District of Columbia are described in Justice Edgerton's opinion below in Nos. 290 and 291, and in *Mays* v. *Burgess*, 147 F. 2d 869, 152 F. 2d 123; in the Report of the President's Committee on Civil Rights, pp. 91–92; in Agnes E. Meyer's article, "Negro Housing—Capital Sets Record for U. S. in Unalleviated Wretchedness of Slums," the Washington Post, Sec. II, Sunday, Feb. 6, 1944; and in Lohman and Embree, *The Nation's Capital*, 36 Survey Graphic, No. 1 (Jan. 1947) 33, 35, 37. These sources prove that the drastic scarcity of housing in the District is universally recognized, and that the housing position of Negroes is particularly acute.

[12] Woofter, *Negro Problems in Cities* (1928), 121–135; Myrdal, *An American Dilemma*, pp. 379, 623, 625; Drake and Cayton, *Black Metropolis*, pp. 185–186, 206–207; Robinson, *Relationship Between Condition of Dwellings and Rentals, by Race*, 22 J. of Land Pub. Util. Economics (1946), 296; Sherman, *Differential Rents for White and Negro Families*, 3 Journal of Housing (No. 8, Aug. 1946) 169.

[13] Report on Negro Housing of the President's Conference on Home Building and Home Ownership (1932), pp. 52, 71–72, 145; Report on Housing and Juvenile Delinquency, National Conference on Prevention and Control of Juvenile Delinquency (called by the Attorney General) (1946), pp. 1–8, 12–13.

among Negroes is substantially increased.[14] And to the corrosion which such congested and inadequate living conditions work upon any poorly housed individual's mental health, as a citizen and human being, there must be added the peculiarly disintegrating acid which enforced segregation distills to harm not only the victim alone, but the whole fabric of American life. Report of the President's Committee on Civil Rights (1947), *passim,* esp. 139–148.

2. *Function of racial covenants in enforcing segregation.*—Racial covenants have a dominant role in maintaining and enforcing this pattern of Negro residential segregation. In the first place, the wholesale use, in recent years, of racial restrictions in newly developed urban areas (see *infra,* pp. 38–39) cuts off those Negroes who can afford to move into a city's suburbs or outlying sections, and artificially removes from availability for Negroes large areas open to satisfy the housing needs of the rest of the city's expanding population. More importantly, covenants have frequently been used to fringe the established colored area, or "Black Belt," and thus prevent normal expansion within the already built-up portions of the city. Report of the President's Committee

[14] Myrdal, *An American Dilemma*, p. 376; Report on Negro Housing (1932), pp. 143–198; Jahn, Schmid, and Schrag, *The Measurement of Ecological Segregation* (1947), 12 Am. Soc. Review 293, 302–303; letter of Surgeon General Parran, quoted above, pp. 13–14.

on Civil Rights (1947), p. 68; Weaver, *Race Restrictive Housing Covenants* (1944), 20 J. of Land & Pub. Util. Economics 183, 185.

a. Chicago, the home of the most intense covenant activity, is perhaps the clearest example, with the existing Negro areas hemmed in by a band of restrictive agreements, or by commercial and industrial properties.[15] In Los Angeles, with the coming of large numbers of Negroes during the war, there was a "veritable wave of covenantry" in new subdivisions, and in sections surrounding existing colored settlements. Spaulding, *Housing Problems of Minority Groups in Los Angeles,* 248 Annals of the Am. Acad. of Soc. & Pol. Sci., November 1946, pp. 220, 221, 222. According to the National Association for the Advancement of the Colored People,[16] covenants in

[15] Drake and Cayton, *Black Metropolis*, pp. 113, 176–179, 182–190; Myrdal, *An American Dilemma*, p. 624; Weaver, "Hemmed In," p. 1; Sterner, *The Negro's Share*, pp. 207–208; Report of the Chicago Housing Authority for the fiscal year ending June 30, 1947, pp. 14, 38. It has been estimated that 80% of the residential area of the city is already covered by covenants; and the strategic location of the restricted region around the established Negro zone is clear. According to the American Council on Race Relations, evidence introduced in a recent racial covenant case in Chicago (*Tovey* v. *Levy*), based upon a study of the recorded restrictions in approximately two-thirds of the city's area, bears out this conclusion.

[16] The Association gathered its information at a meeting on Race Restrictive Covenants, held at Chicago, July 9–10, 1945.

St. Louis and Philadelphia are likewise strategically located so as to prevent Negroes' entry into vacant land, new subdivisions, or to most established residential areas contiguous to existing colored communities; in Detroit, the use of covenants is more recent, but even now a large part of the houses which would appeal to Negroes because of location or cost are excluded from their occupancy. Cf. Velie, *Housing: Detroit's Time Bomb,* Collier's, Nov. 23, 1946. The American Council on Race Relations makes a similar report as to Columbus, Ohio, a city with a high incidence of exclusionary covenants. In New York City it is likely that new areas in such expanding portions of the city as the Borough of Queens, and in the suburbs, are effectively closed to Negro occupancy. Dean, *None Other Than Caucasian,* Architectural Forum, Oct. 1947. In the District of Columbia, as in other cities, the present aggregate of restricted areas is not accurately known, but it seems certain that most of the "new building sites and many older areas are now covenanted" against Negroes (Report of the President's Committee, p. 91; cf. Edgerton, J., dissenting below 162 F. 2d, at 244, and in *Mays* v. *Burgess,* 147 F. 2d 869, at 876–877); and reports in the daily press of recent months indicate that vigorous efforts to increase the restricted portions of the city are continuing. In 1929, it was reported that the racial covenant

"seems to be the most widely employed method for keeping Negroes out of 'exclusively white' residential districts." Jones, *The Housing of Negroes in Washington* (1929), p. 70.

b. Governmental agencies concerned with housing, drawing upon their recent experience, buttress the conclusion that racial restrictive agreements have had widespread use in preventing proper expansion and development of Negro housing. The letter of the present Administrator of the Housing and Home Finance Agency, quoted above (*supra,* p. 11), states that his agency's field reports "reveal the increasing application of these deed restrictions during recent years," and cites "repeated reports of the inability of private developers to locate adequate building sites uncovenanted and open to occupancy by Negroes, Latin-Americans, Asiatics, and other similar groups." During the war, John B. Blandford, first Administrator of the National Housing Agency, stated publicly that "the problems of site selection and racial restrictive covenants" are "barriers which exist even for the Negro citizen who can pay for a home, and, if permitted, could raise a family in decent surroundings." [17] Wilson W. Wyatt, former National Housing Expediter and successor to Mr. Blandford as Administrator of the National Housing Agency, like-

[17] Address before the Annual Conference of the National Urban League, at Columbus, Ohio, October 2, 1944.

wise stated that "All of us know that because of neighborhood resistance and restrictions upon the use of land, new home sites—one of the keys to the problem—often are difficult to acquire for minority groups. During the war these restrictions too many times delayed or completely blocked private and public efforts to produce essential housing for minority group war workers." [18] The National Housing Agency's Conference for Racial Relations Advisers (October 28–November 2, 1946) stated: "Because of racial restrictive covenants and other discriminatory practices, heavy concentrations of Negroes in limited areas are typical in communities where there are large proportions of Negro population. In usual patterns of urban growth, congestion is relieved somewhat by decentralization in which people move to outlying areas. Not so with Negroes. Their mobility is sharply limited. * * * Large scale builders indicate that even where contractors appreciate the market for privately financed housing among Negroes and have adequate financing resources readily available, they are often stymied by lack of unrestricted or unopposed building sites."

c. The significance of racial covenants in confining Negroes' housing within tightly limited areas has likewise been stressed by unofficial stu-

[18] Letter to the Conference for the Elimination of Restrictive Covenants, Chicago, Ill., May 10–11, 1946.

dents of the general problem of racial residential segregation. The comprehensive survey of Gunnar Myrdal, and his associates, recognizes that if private restrictive agreements were not enforceable, "segregation in the North would be nearly doomed, and segregation in the South would be set back slightly." Myrdal, *An American Dilemma,* p. 624, cf. p. 527; Sterner, *The Negro's Share,* pp. 200–207. Of similar view as to the decisive effect of covenants in maintaining confined zones of segregation are Weaver, *Race Restrictive Housing Covenants* (1944), 20 J. of Land & Pub. Util. Economics 183; Weaver, *Housing in a Democracy,* 244 Annals of the Amer. Acad. of Pol. & Soc. Sci. 95 (March 1946); Robinson, *Relationship between Condition of Dwellings and Rentals, by Race* (1946), 22 J. of Land & Pub. Util. Econ. 296, 301–302.[19]

d. At times of severe general housing shortages throughout the country, like the present, restrictive covenants directed against Negroes have a specially disastrous impact. Even in more normal times, segregation tends to raise rents in the colored zones and forces overcrowding and acceptance of ramshackle housing (supra, pp. 29–31), but a period of general housing scarcity simultaneously increases both the resistance of

[19] See also the specific studies of Chicago, New York, and Los Angeles cited above, pp. 32–33.

whites against Negro expansion outward and the pressure within the colored areas to burst out of confinement. As Justice Edgerton put the matter in his dissent in Nos. 290 and 291 below (162 F. 2d, at 244): "Covenants prevent free competition for a short supply of housing and curtail the supply available to Negroes. They add an artificial and special scarcity to a general scarcity, particularly where the number and purchasing power of Negroes as well as whites have increased as they have recently in the District of Columbia. The effect is qualitative as well as quantitative. Exclusion from decent housing confines Negroes to slums to an even greater extent than their poverty makes necessary. Covenants exclude Negroes from a large fraction—no one knows just how large—of the decent housing in the District of Columbia. Some of it is within the economic reach of some of them. Because it is beyond their legal reach, relatively well-to-do Negroes are compelled to compete for inferior housing in unrestricted areas, and so on down the economic scale. That enforced housing segregation, in such circumstances, increases crowding, squalor, and prices in the areas where Negroes are compelled to live is obvious."

C. *Current trends in use of racial covenants.*—We have outlined the present incidence and effect of covenants excluding occupation by Negroes, the minority group suffering most from resi-

dential restrictions. *Supra,* pp. 31–37. Records also exist of substantial use of racial covenants against Mexicans, Armenians, Chinese, Japanese, Jews, Persians, Syrians, Filipinos, American Indians, other "non-Caucasians," or "colored persons." See Miller, *The Power of Restrictive Covenants,* 36 Survey Graphic, No. 1 (Jan. 1947), 46; Consolidated Brief for Petitioners in Nos. 290–291, pp. 90–92. And the unmistakable trend is toward increasing use of the racial covenant, primarily against Negroes but also, with accelerating expansion, against other minorities. The best available information is that the great bulk of new urban subdivisions and real estate developments which have been commenced since residential building was resumed after World War II are restricted, at least in those regions in which minorities reside. The same is probably true, though to a lesser degree, of residential developments planned and built in the decade before the war brought an abrupt halt to housing construction; and since 1920 the trend toward use of racial exclusions in new developments appears to have been steadily upward, both within those urban and suburban areas in which this method of residential segregation was originally used, and also in extension to previously untouched cities.[20] If this trend continues unchecked, almost

[20] See letter of the Administrator of the Housing and Home Finance Agency, *supra,* pp. 5–13; Report of the President's

all new residential sections of our cities will be barred, within ten or twenty years, from occupancy by Negroes, and to an increasing degree by other groups. In those communities, like Washington, in which Negroes are seeking escape from desperate overcrowding in the traditional colored areas by purchasing houses in existing "white neighborhoods," there has been a noticeable tendency to prevent the "invasion" by the intense promotion, signing, and recording of new restrictions in those old areas, as well as by more informal methods. The result is that "where old ghettos are surrounded by restrictions, and new subdivisions are also encumbered by them, there is practically no place for the people against whom the restrictions are directed to go." Report of the President's Committee on Civil Rights (1947), p. 69.

Committee on Civil Rights (1947), p. 68; Sterner, *The Negro's Share*, 208–209; Abrams, *Homes for Aryans Only*, 3 Commentary (No. 5, May 1947), 421; Abrams, *Discriminatory Restrictive Covenants—A Challenge to the American Bar*, address before the Bar Association of the City of New York, Feb. 19, 1947; Spaulding, *Housing Problems of Minority Groups in Los Angeles*, 248 Annals of the American Academy of Social and Pol. Sciences, Nov. 1946, p. 220; Dean, *None Other Than Caucasian*, Architectural Forum, October 1947; Monchow, *The Use of Deed Restrictions in Subdivision Development* (1928); Weaver, *Northern Ways*, 36 Survey Graphic (Jan. 1947) 43, 45; Report of Pennsylvania State Temporary Commission on the Condition of the Urban Colored Population (1943) 131 *et. seq.*

D. The present legal status of racial restrictive covenants

1. State law

Courts in some nineteen states, and the District of Columbia, have indicated that racial restrictive covenants of one type or another are enforceable, and in no jurisdiction have they been entirely invalidated, though there are at least two reported lower court expressions of unconstitutionality.[21] The earliest case involving Negroes was decided in Louisiana in 1915, but all the other decisions have issued since this Court's holding, in November 1917, that state or municipal residential segregation violated the Fourteenth Amendment. *Buchanan* v. *Warley,* 245 U. S. 60. Since 1918, the highest courts of Alabama, California, Colorado, Georgia, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, North Carolina, Oklahoma, Texas, West Virginia, and Wisconsin, as well as the Court of Appeals for the District of Columbia, have held, or clearly stated in dictum, that racial restraints, properly phrased, would be enforced; a recent Ohio Court of Appeals case, three lower New York courts, a New Jersey *nisi prius* decision, and apparently a decision of the Illinois Ap-

[21] Most of the cases are collected in McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945), 33 Calif. L. Rev. 5, 6–12.

pellate Court, are in accord.[22] The other twenty-nine states are silent. The two dissenting voices are those of District Judge Erskine M. Ross, who held, in 1892 in the first reported American

[22] Alabama: *Wyatt* v. *Adair*, 215 Ala. 363 (1926).

California: *Los Angeles Inv. Co.* v. *Gary*, 181 Cal. 680 (1919); *Janss Investment Co.* v. *Walden*, 196 Cal. 753 (1925); *Wayt* v. *Patee*, 205 Cal. 46 (1928).

Colorado: *Chandler* v. *Ziegler*, 88 Colo. 1 (1930); *Steward* v. *Cronan*, 105 Colo. 393 (1940).

Georgia: *Dooley* v. *Savannah Bank & Trust Co.*, 199 Ga. 353 (1945).

Illinois: *Burke* v. *Kleiman*, 277 Ill. App. 519, 534.

Kansas: *Clark* v. *Vaughan*, 131 Kan. 438 (1930).

Kentucky: *United Cooperative Realty Co.* v. *Hawkins*, 269 Ky. 563 (1937).

Louisiana: *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724 (1915).

Maryland: *Meade* v. *Dennistone*, 173 Md. 295 (1938); *Scholtes* v. *McColgan*, 184 Md. 480, 487–488 (1945).

Michigan: *Parmalee* v. *Morris*, 218 Mich. 625 (1922); *Schulte* v. *Starks*, 238 Mich. 102 (1927); Cf. *Porter* v. *Barrett*, 233 Mich. 373 (1925) (invalidating restraint on sale or lease on common-law grounds).

Missouri: *Koehler* v. *Rowland*, 275 Mo. 573 (1918); *Porter* v. *Pryor*, 164 S. W. 2d 353 (Mo. 1942); *Porter* v. *Johnson*, 232 Mo. App. 1150 (1938); *Thornhill* v. *Herdt*, 130 S. W. 2d 175 (Mo. App. 1939).

New Jersey: *Lion's Head Lake* v. *Brzezinski*, 23 N. J. Misc. 290 (1945) (2nd Dist. Ct. of Paterson); But cf. *Miller* v. *Jersey Coast Resorts Corp.*, 98 N. J. Eq. 289, 297 (Ct. Ch. 1925) (dictum that a restrictive covenant prohibiting Jews from purchasing land would be unconstitutional).

New York: *Ridgway* v. *Cockburn*, 163 Misc. 511 (Sup. Ct. Westchester Co., 1937; *Dury* v. *Neely*, 69 N. Y. Supp. 2d 677 (Sup. Ct. Queens Co., 1942); *Kemp* v. *Rubin*, 188 Misc. 310, 69 N. Y. Supp. 2d 680 (Sup. Ct., Queens Co., 1947).

North Carolina: *Vernon* v. *R. J. Reynolds Realty Co.*, 226 N. C. 58 (1946).

Ohio: *Perkins* v. *Trustees of Monroe Ave. Church*, 79

case in this field, that enforcement of a covenant against renting to "a Chinaman" would be unconstitutional (*Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C. S. D. Calif. 1892)), and of a New Jersey vice-chancellor who stated *obiter* the unconstitutionality of covenants excluding Jews. *Miller* v. *Jersey Coast Resorts Corp.,* 98 N. J. Eq. 289, 297 (Ct. Ch. 1925).

Ohio App. 457, 70 N. E. 2d 487 (1946), appeal dismissed, 72 N. E. 2d 97 (Ohio, 1947), pending on petition for writ of certiorari, No. 153, this Term.

Oklahoma: *Lyons* v. *Wallen*, 191 Okla. 567 (1942); *Hemsley* v. *Sage*, 194 Okla. 669 (1944); *Hemsley* v. *Hough*, 195 Okla. 298 (1945).

Texas: *Liberty Annex Corp.* v. *Dallas*, 289 S. W. 1067, 1069 (Tex. Civ. App., 1927), affirmed 295 S. W. 591, 592 (Com. of App., 1927).

West Virginia: *White* v. *White*, 108 W. Va. 128, 147 (1929).

Wisconsin: *Doherty* v. *Rice*, 240 Wisc. 389 (1942).

District of Columbia: *Corrigan* v. *Buckley*, 299 Fed. 899 (1924), appeal dismissed, 271 U. S. 323; *Torrey* v. *Wolfes*, 6 F. 2d 702 (1925); *Cornish* v. *O'Donoghue*, 20 F. 2d 983 (1929), certiorari denied, 279 U. S. 871; *Russell* v. *Wallace*, 30 F. 2d 981 (1929), certiorari denied, 279 U. S. 871; *Edwards* v. *West Woodridge Theater Co.*, 55 F. 2d 524 526 (1931); *Grady* v. *Garland*, 89 F. 2d 817 (1937), certiorari denied, 302 U. S. 694; *Hundley* v. *Gorewitz*, 132 F. 2d 23, 24 (1942); *Mays* v. *Burgess*, 147 F. 2d 869 (1945), certiorari denied, 325 U. S. 868, rehearing denied, 325 U. S. 896.

California, Maryland, Michigan, Ohio, and West Virginia invalidate racial restrictions on sales or lease, on common-law grounds, but uphold similar restrictions on use or occupancy, and in those states racial covenants appear to take the form of restrictions on "use or occupancy" by excluded groups; see *infra*, pp. 104–117 for discussion of this distinction and of the common-law rule on restraints against alienation.

Most of the cases sustaining the enforcement of racial agreements or conditions have dismissed constitutional objections with no more than a reference to *Corrigan* v. *Buckley,* 271 U. S. 323, which is widely but erroneously regarded as settling the issue. See, e. g., *Lyons* v. *Wallen,* 191 Okla. 567, 569; *United Cooperative Realty Co.* v. *Hawkins,* 269 Ky. 563; *Meade* v. *Dennistone,* 173 Md. 295, 302; *Doherty* v. *Rice,* 240 Wisc. 389, 396–397; *Chandler* v. *Ziegler,* 88 Colo. 1, 5; *Dooley* v. *Savannah Bank & Trust Co.,* 199 Ga. 353, 364; *Liberty Annex Corp.* v. *Dallas,* 289 S. W. 1067, 1069 (Tex. Civ. App.); *Perkins* v. *Trustees of Monroe Ave. Church,* 79 Ohio App. 457, 70 N. E. 2d 487, appeal dismissed, 72 N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term; cf. *infra,* pp. 87–92. In the others, consideration of constitutional questions has been left with the bald conclusion that the Fourteenth Amendment protects only against "state action" (*Parmalee* v. *Morris,* 218 Mich. 625; *Los Angeles Inv. Co.* v. *Gary,* 181 Cal. 680, 683–684; *Queensborough Land Co.* v. *Cazeaux,* 136 La. 724, 728) or with the intimation that the discrimination is of the type permissible under the Constitution. *Koehler* v. *Rowland,* 275 Mo. 573, 585–586.

In some jurisdictions, the cases discuss the validity of racial exclusions under the common-law rule forbidding restraints on alienation, but

in those states in which restraints on sales or leases are held void at common law, similar racial restrictions on use or occupancy are upheld. See *supra,* p. 42, *infra,* pp. 112–114. The equity of affirmatively enforcing restrictions against Negroes or other minority groups gravely in need of housing space has hardly been touched;[23] but public policy barriers to validity of the covenants have been mooted in many cases, only to meet with short judicial rejection. See, e. g., *Koehler* v. *Rowland,* 275 Mo. 573, 585–586; *Chandler* v. *Ziegler,* 88 Colo. 1, 5–6.

Some mitigation of the harsh effects of racial covenants is found in the rule, in several jurisdictions, that the agreements will not be enforced where infiltration of the excluded group has 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. *Clark* v. *Vaughn,* 131 Kan. 438; *Hundley* v. *Gorewitz,* 132 F. 2d 23 (App. D. C.); *Gospel Spreading Ass'n, Inc.,* v. *Bennetts,* 147 F. 2d 878 (App. D. C.).

[23] The notable exceptions are the opinion of Traynor, J. concurring in *Fairchild* v. *Raines*, 24 Cal. 2d 818, 832 and of Edgerton, J. dissenting below in Nos. 290 and 291, and in *Mays* v. *Burgess*, 147 F. 2d 865, 876, 152 F. 2d 123, 125. In *Porter* v. *Johnson*, 232 Mo. App. 1150, the court specifically refused to consider such factors as bearing upon the right to equitable relief. To the same effect see *Burkhardt* v. *Lofton*, 63 Cal. App. 2d 230, 239–240; *Stone* v. *Jones*, 66 Cal. App. 2d 264, 269–270.

However, even this rule is narrowly construed by some courts, including those of the District of Columbia, in order to protect owners who desire to remain. *Grady* v. *Garland,* 89 F. 2d 817 (App. D. C.); *Mays* v. *Burgess,* 152 F. 2d 123 (App. D. C.); *Porter* v. *Johnson,* 232 Mo. App. 1150, 1158; *Fairchild* v. *Raines,* 24 Cal. 2d 818, 827–828.

2. Federal law

This Court has thrice voided legislative attempts at racial residential segregation as violative of the Fourteenth Amendment. In *Buchanan* v. *Warley,* 245 U. S. 60 (1917), the Court annulled an ordinance of Louisville, Kentucky, which prohibited either white or colored persons from occupying houses in blocks in which the majority of houses were occupied by persons of the other race. A *per curiam* memorandum in *Harmon* v. *Tyler,* 273 U. S. 668 (1927) invalidated, on the authority of the *Buchanan* case, a New Orleans ordinance forbidding white or colored persons from establishing residence in a Negro or white community, respectively, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city." The third case, *City of Richmond* v. *Deans,* 281 U. S. 704 (1930), affirming 37 F. 2d 712 (C. C. A. 4), rested on the two earlier decisions in holding invalid a Richmond ordinance prohibiting "any person from using as a residence any building on any street between intersecting

streets where the majority of residences on such street are occupied by those with whom said person is forbidden to intermarry" by Virginia law. State courts have likewise refused enforcement to legislative ordinances or statutes restricting or regulating sale or occupancy of residences on a racial basis.[24]

The one case in this Court directly involving racial restrictive agreements is *Corrigan* v. *Buckley*, 271 U. S. 323 (1926) in which an *appeal* from the Court of Appeals' decision in 299 Fed. 899 was dismissed for want of jurisdiction on the ground that a contention that the covenants were "void" *ab initio* under the Fifth, Thirteenth, and Fourteenth Amendments, and the Civil Rights statutes, raised no substantial constitutional or statutory issue. No question of the constitutional validity of judicial enforcement of the covenants was properly before the Court, and issues of the common-law legality of the restraint or of equitable discretion in enforcement were not considered.[25]

[24] *Carey* v. *Atlanta*, 143 Ga. 192; *Glover* v. *Atlanta*, 148 Ga. 285; *Bowen* v. *Atlanta*, 159 Ga. 145; *Jackson* v. *State*, 132 Md. 311 (cf. *State* v. *Gurry*, 121 Md. 534); *State* v. *Darnell*, 166 N. C. 300; *Clinard* v. *Winston-Salem*, 217 N. C. 119; *Allen* v. *Oklahoma City*, 175 Okla. 421; *Liberty Annex Corp.* v. *Dallas*, 289 S. W. 1067 (Tex. Civ. App.), affirmed 295 S. W. 591 (Com. of App. Tex.) (cf. 19 S. W. 2d 845 (Tex. Civ. App.)); *Irvine* v. *Clifton Forge*, 124 Va. 781. Previous to the *Buchanan* case, some state courts, but not all, upheld segregation ordinances. *Hopkins* v. *Richmond*, 117 Va. 692; *Harden* v. *Atlanta*, 147 Ga. 248; *Harris* v. *Louisville*, 165 Ky. 559.

In the lower federal courts, the cases are those already cited: *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C. S. D. Calif., 1892), on the one side, and the series in the District of Columbia beginning with *Corrigan* v. *Buckley,* 299 Fed. 899 (1924), on the other. *Supra,* pp. 41–42.

3. Law in other jurisdictions

In Canada, the Ontario High Court has held racial and religious restrictive agreements invalid under provincial and Dominion public policy, as well as void restraints at common law. *Re Drummond Wren* [1945] 4 D. L. R. 674.[26] We have found no English or Australian cases on the point.[27]

[25] *Hansberry* v. *Lee,* 311 U. S. 32, the other case in this Court stemming from a racial covenant, was decided on the ground that the prior state court decision upholding the covenant (*Burke* v. *Kleiman,* 277 Ill. App. 519) could not bind persons who were not parties thereto.

[26] But cf. *Re McDougall and Waddell* [1945] 2 D. L. R. 244 (Ont. High Ct.) holding, apparently on technical grounds, that such a restriction does not violate the terms of the Ontario Racial Discrimination Act, 1944.

[27] Perhaps the viewpoint of the English courts may be gathered from the House of Lord's judgments in *Clayton* v. *Ramsden* [1943] A. C. 320, holding void for indefiniteness a testator's condition on a bequest to his daughter that she not marry one "not of Jewish parentage and of the Jewish faith." The rather unclear state of the English common-law rule on restraints on alienation, in general, is revealed in Cheshire, *The Modern Law of Real Property* (4th ed. 1937), pp. 518–519; cf. pp. 297–311 (covenants running with the land).

ARGUMENT

I. JUDICIAL ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS CONSTITUTES GOVERNMENTAL ACTION IN VIOLATION OF RIGHTS PROTECTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES FROM DISCRIMINATION ON THE BASIS OF RACE OR COLOR

INTRODUCTION

The Government's position in these cases is based upon the premise that the Fifth and Fourteenth Amendments are involved only if a discrimination based on race or color (a) is with respect to rights which under the Constitution and laws of the United States are protected from such discrimination and (b) constitutes "federal" or "state" action within the applicable principles laid down by this Court. We can put to one side, therefore, acts which although involving racial discrimination, do not run afoul of the Constitution, either because they do not constitute governmental action or because they do not interfere with a right which the Constitution protects from racial discrimination.

A hypothetical case may thus be distinguished: Suppose a man refuses to sell or lease his property merely because of the prospective purchaser's race or color. So long as his refusal is neither sanctioned nor supported in any way by governmental action, no constitutional question is raised. This was decided in the *Civil Rights Cases,* 109 U. S. 3, 17, which held that the Fourteenth Amendment does not prohibit racial discriminations which are merely the "wrongful

acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings." [28]

This phase of the argument may therefore be framed in the following terms: (1) Does judicial enforcement of racial restrictive convenants constitute governmental action within the applicable principles established by this Court? (2) If so, does such governmental enforcement through the judicial process constitute a denial of rights protected by the Constitution and laws of the United States?

Both these questions are clearly to be answered in the affirmative. More particularly, we contend that judicial enforcement of racial restrictive covenants constitutes governmental action in violation of each of the following rights guaranteed by the Constitution and laws of the United States: (1) The right to acquire, use, and dispose of property, without being restricted in the exercise of such right because of race or color. (2) The right to compete on terms of equality, without being discriminated against because of race or color, in securing decent and adequate living accommodations. (3) The right to equal treatment before the law.

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[28] In proceeding upon the premise that only governmental, and not individual, action is prohibited by the Fifth and Fourteenth Amendments, we do not mean to imply that this assumption, based upon the decision in the *Civil Rights Cases*, 109 U. S. 3, is not subject to re-examination by this Court. Competent scholars have long questioned the correctness of that ruling.

A. Judicial Enforcement of Private Covenants Constitutes Governmental Action

It cannot successfully be argued that the decrees involved in these cases do not constitute governmental action because the courts have acted solely to enforce private contractual or property rights. It is well settled that action is no less governmental because it is taken by the judicial rather than legislative or executive branches. *Virginia* v. *Rives,* 100 U. S. 313, 318; *Ex parte Virginia,* 100 U. S. 339, 346–347; *Neal* v. *Delaware,* 103 U. S. 370, 397; *Carter* v. *Texas,* 177 U. S. 442, 447; *Rogers* v. *Alabama,* 192 U. S. 226, 231; *Martin* v. *Texas,* 200 U. S. 316, 319; *Twining* v. *New Jersey,* 211 U. S. 78, 90–91; *Moore* v. *Dempsey,* 261 U. S. 86; *Powell* v. *Alabama,* 287 U. S. 45; *Mooney* v. *Holohan,* 294 U. S. 103; *Brown* v. *Mississippi,* 297 U. S. 278; *Chambers* v. *Florida,* 309 U. S. 227; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–311; *A. F. of L.* v. *Swing,* 312 U. S. 321, 324–326; *Bridges* v. *California,* 314 U. S. 252; *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769; *Cafeteria Union* v. *Angelos,* 320 U. S. 293, 294; *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367. This is true even where the judicial action is based upon common law enforcement of private rights. Thus, in *A. F. of L.* v. *Swing, supra,* an injunction to protect an employer from an interference with his business, which under state law was tortious, was held unconstitutional as a violation of rights se-

cured by the Fourteenth Amendment. Accord: *Bakery Drivers Local* v. *Wohl, supra; Cafeteria Union* v. *Angelos, supra.* Compare *Schenectady Union Publishing Co.* v. *Sweeney,* 316 U. S. 642, in which this Court, equally divided, affirmed a judgment for damages in a libel suit, where it was contended that such judgment infringed the freedom of speech secured by the Fourteenth Amendment. Judgments in civil cases have frequently been held unconstitutional on due process or other grounds. *Pennoyer* v. *Neff,* 95 U. S. 714; *Scott* v. *McNeal,* 154 U. S. 34; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673; *Griffin* v. *Griffin,* 327 U. S. 220; *Hansberry* v. *Lee,* 311 U. S. 32, 41; *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 476; cf. *Williams* v. *North Carolina,* 325 U. S. 226.

A court which enforces a contract is not merely a mechanical instrumentality for effectuating the will of the contracting parties. The law enforces contracts because there is a public interest in placing the force of the state behind the effectuation of private agreements not contrary to any recognized social policy. "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts." *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 356. The enforcement of contracts is a *public* act involving more than the attempt of individuals to carry out their own private arrangements.

Whatever difficulties may be involved in drawing the line between governmental and individual action for other purposes, the line of demarcation is clear and precise with respect to actions involving racial discrimination. Only those actions of individuals which are in no respect sanctioned, supported, or participated in by any agency of government are beyond the scope of the Fifth and Fourteenth Amendments. Racial discriminations which are merely "the wrongful acts of individuals" can remain outside the ban of the Constitution only so long as they are "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." *Civil Rights Cases,* 109 U. S. 3, 17.

B. The Decrees Below Invade Rights Secured by the Constitution and Laws of the United States

(1) In General: The Scope of Constitutional Protection against Governmental Discriminations Based on Race or Color

The decisions of this Court stand in vigorous affirmation of the principle that "our Constitution is color blind."[29] The Court has been consistent and unequivocal in its denunciation of discriminations based upon race or color. E. g., *Strauder* v. *West Virginia,* 100 U. S. 303; *Civil Rights Cases,* 109 U. S. 3; *Buchanan* v. *Warley,* 245 U. S.

[29] Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U. S. 537, 559.

60; *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Edwards* v. *California,* 314 U. S. 160, 185; *Hill* v. *Texas,* 316 U. S. 400; *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192. In *Hirabayashi* v. *United States,* 320 U. S. 81, 100, it was stated:

> 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. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *Hill* v. *Texas,* 316 U. S. 400.

The *Hirabayashi* case recognized, of course, that this principle, like all other principles of law, is not an absolute. But the attitude which the Court will take in dealing with assertedly justifiable racial restrictions was clearly defined in *Korematsu* v. *United States,* 323 U. S. 214, 216:

> all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

The Court's approach to these questions may thus be summarized, in general terms, as follows: Distinctions based on race or color alone are in most instances irrelevant and, therefore, invidious under the Constitution. They can be justified, if at all, only by the weightiest countervailing interests. Because of its unique role in our constitutional system as the guardian of the civil rights of minorities, this Court will make the most searching inquiry into the sufficiency of any grounds asserted as justification for racial discrimination.[30] In making such inquiry, the Court will be mindful of the fact that the Fourteenth Amendment was primarily intended "to prevent state legislation designed to perpetuate discrimination on the basis of race or color." *Railway Mail Association* v. *Corsi,* 326 U. S. 88, 94. While this constitutional safeguard extends to all persons alike in the rights which it secures (*Yick Wo* v. *Hop-*

[30] The scope of judicial inquiry concerning constitutional invasions has undoubtedly been most intense where civil liberties are involved. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115; *Follett* v. *McCormick,* 321 U. S. 573, 577; *Marsh* v. *Alabama,* 326 U. S. 501, 509; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, note 4. In the present cases, where enforcement of racial restrictive covenants against individuals belonging to distinctive minority groups has the effect of denying them the right to adequate housing, equal justification exists for the closest kind of judicial scrutiny into the asserted justification for invasion of that right. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. 252 (C. C. D. Cal.).

kins, 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33), it will not be overlooked that constitutional protection for the rights and liberties of the Negro was the primary object to be attained by adoption of the Amendment. In *Strauder* v. *West Virginia,* 100 U. S. 303, 306, 307, 310, Mr. Justice Strong's opinion for the Court stated:

> It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *
>
> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * *
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> The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an

> immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

The Court has had occasion to apply these general principles to a variety of specific situations. The earliest class of cases involving governmental action of a discriminatory character relates to the exclusion of Negroes from juries. It was soon settled that where Negroes have been intentionally and systematically excluded from serving on a grand or petit jury, equal protection of the laws is denied to the Negro defendant against whom an indictment or conviction has been obtained. This is true whether the exclusion occurred by reason of the direct command of a state statute (*Strauder* v. *West Virginia,* 100 U. S. 303; *Bush* v. *Kentucky,* 107 U. S. 110), or because of the discriminatory practices of selection employed by state officials (*Pierre* v. *Louisiana,* 306 U. S. 354; *Hale* v. *Kentucky,* 303 U. S. 613; *Hollins* v. *Oklahoma,* 295 U. S. 394; *Norris* v. *Alabama,* 294 U. S. 587; *Carter* v. *Texas,* 177 U. S. 442; *Neal* v. *Delaware,* 103 U. S. 370). Similarly, the constitutional authority given to Congress to implement the Fourteenth Amendment by appropriate legislation empowers it to provide that state officials, including judges, shall be guilty of a federal penal offense for causing such a discriminatory selection of jurors. *Ex parte Virginia,* 100 U. S. 339.

Another class of cases involving governmental racial discriminations relates to suffrage. The right to qualify as a voter, even in primary elections, may not be denied by a State on the ground of color, without offending the equal protection clause. *Nixon* v. *Herndon,* 273 U. S. 536. "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." *Id.,* at 541. This Court has held such discrimination unconstitutional even where it is imposed by a committee of a political party, if its authority to do so originates in the laws of the State. *Nixon* v. *Condon,* 286 U. S. 73. In that case, Mr. Justice Cardozo's opinion for the Court stated (p. 89):

> Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black. [Citations omitted.] The Fourteenth Amendment, adopted as it was with special solicitude for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color.

More recently, the Court has held, upon an examination of a state's statutes dealing with primaries, that the exclusion of Negroes from voting in a primary election by a political party constituted a denial by the State of the right to vote which is

constitutionally secured against discrimination. *Smith* v. *Allwright,* 321 U. S. 649, overruling *Grovey* v. *Townsend,* 295 U. S. 45. Even though the discrimination in that case was effected by a private organization, the Court held that where a State "endorses, adopts and enforces" the discrimination, the State itself has denied constitutional rights. The portion of the Court's opinion dealing with this question is pertinent here:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson,* 307 U. S. 268, 275.

Racial discriminations prohibited by the Fourteenth Amendment are not confined solely to rights as fundamental as those relating to suffrage or to a fair criminal trial. They relate as well to the privileges which a State may offer to its citizens; what is offered to its white citizens must equally be offered to its colored citizens. To deny substantial equality in the enjoyment of such privileges is to deny the equal protection of the laws. An example is the privilege of attending

the law school at a state university. A state is not required to furnish legal education to its citizens; but if it offers such education to its white citizens, an equal privilege cannot be denied to its colored citizens. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337.[31]

[31] In *Missouri ex rel. Gaines* v. *Canada*, *supra*, it was assumed (p. 344) that the State fulfills its obligation by furnishing "equal facilities in separate schools." It may be observed, however, that this Court has never had occasion to rule directly on the question whether compulsory segregation in education, even where substantially equal facilities are afforded, is a denial of rights under the Fourteenth Amendment. The *Canada* case does not so rule, for it was held that the petitioner was entitled to be admitted to the law school of the state university, no other proper provision for his legal training having been made. (The Missouri court, however, interpreted the mandate as being fulfilled by furnishing separate and equal facilities. *State* v. *Canada*, 344 Mo. 1238.) In other instances, also, this Court was not required to consider the precise point. In *Gong Lum* v. *Rice*, 275 U. S. 78, it was held that equal protection was not deprived in classifying a Chinese child as "colored" and in compelling the child to attend a school for other colored persons. The issue whether any segregation would be valid does not seem to have been directly raised, although its validity was assumed by the Court. *Cummings* v. *Board of Education*, 175 U. S. 528, held that where separate high school facilities for colored children had been abandoned, an injunction to restrain collection of local taxes was not proper. *Berea College* v. *Kentucky*, 211 U. S. 45, involved a state statute which prohibited any person, corporation or association from receiving both Negro and white persons as pupils for instruction. The decision was limited to holding the statute valid as applied to a domestic corporation whose corporate power could be defined by the state. Whether a person or association could be so prohibited from teaching or whether a pupil could claim an

A State, it has been held, may require that passengers in intrastate transportation be segregated according to color (*Plessy* v. *Ferguson,* 163 U. S. 537); but denial of equal transportation facilities because of race or color would be a discrimination prohibited by the Constitution. *McCabe* v. *Atch., T. & Santa Fe Ry. Co.,* 235 U. S. 151, 160–162. "The denial to appellant of equality of accommodations because of his race would be an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment." *Mitchell* v. *United States,* 313 U. S. 80, 94.

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unlawful discrimination was not decided. See, however, *Meyer* v. *Nebraska,* 262 U. S. 390, where the defendant was convicted for having taught the German language in a parochial school under a state statute which forbade the instruction of any language except English to children in primary schools. The right of the teacher to instruct was held to be a liberty protected by the due process clause which the Court concluded was violated by the statute. Accord: *Bartels* v. *Iowa,* 262 U. S. 404. See also, *Pierce* v. *Society of Sisters,* 268 U. S. 510, holding invalid a statute imposing compulsory attendance at a public primary school. The legislation was viewed as an infringement of the liberties of parents to direct the education of their children and was held to be an unwarranted interference with the right of a private school to secure pupils for instruction.

Plessy v. *Ferguson,* 163 U. S. 537, does not, it is believed, decide the issue, for, assuming that equal though segregated travel facilities may meet the requirements of the Constitution, it does not follow that the same is true of education where the very fact of segregation may, itself, result in inequalities of the opportunity to learn, which depends not only on instruction but on the association with fellow pupils.

It is also settled that the Constitution prohibits discriminations against persons of a particular race or color, which operate to prevent them from carrying on a business or calling. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33. Discrimination is no less invalid because it is evident only through the manner in which a state law is administered. Thus, in *Yick Wo* v. *Hopkins, supra,* it was held that equal protection of the laws was denied where city officials so administered a municipal licensing ordinance as to grant laundry permits to white persons but consistently to deny them to Chinese. The Court said (118 U. S. at 374):

> The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal * * *.

In *Truax* v. *Raich, supra,* the right of an individual to have an employer be free in his selection of employees, unrestrained by racial limitations imposed by the State, was held to be protected by the Fourteenth Amendment. Mr. Justice Hughes' opinion for the Court in that case declared (239 U. S. at 41) that a State's unquestionably broad police power

> does not go so far as to make it possible for the State to deny to lawful inhabitants,

> because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Similarly, in *Yu Cong Eng.* v. *Trinidad,* 271 U. S. 500, a statutory provision which forbade books of account from being kept in the Chinese language, and thus had the effect of preventing many Chinese merchants from remaining in business, was regarded as a denial of the equal protection and due process safeguards incorporated in the Philippine Autonomy Act (Act of August 29, 1916, c. 416, sec. 3, 39 Stat. 546).

(2) *The Right to Acquire, Use, and Dispose of Property, Without Discrimination because of Race or Color*

There is a line of cases which constitute direct precedent for the proposition that the right to acquire, use, and dispose of property is a right which neither the States nor the Federal Government can abridge or limit on the basis of race or color. The first of these cases is *Buchanan* v. *Warley,* 245 U. S. 60, decided thirty years ago by

a unanimous Court after extensive deliberation.[32] In that case, a municipal ordinance of the City of Louisville, Kentucky, enacted for the avowed purpose of preventing ill-feeling and conflict between the white and colored races, prohibited any colored person from moving into and occupying as a residence any house in a city block where the majority of dwellings were occupied by white persons. The converse was also prohibited, namely, the establishment of a residence by a white person in a city block where the majority of houses were occupied as residents by Negroes.

Suit was brought by a white property owner against a Negro purchaser to compel specific performance of a contract for the sale of property located in a block where a majority of the residences were occupied by white people. The vendee, by way of answer, asserted that he could not take occupancy of the property under the local ordinance.[33] Reversing the judgment of the Court of Appeals of Kentucky, this Court held the ordinance invalid as a deprivation of the owner's property rights without due process of law.

[32] The case was argued April 10 and 11, 1916; was restored to the docket for reargument on April 17, 1916; was reargued April 27, 1917; and was decided November 5, 1917.

[33] The contract specifically provided that the purchaser was not to be bound unless the property could lawfully be occupied by him as a residence. The majority of residences in the particular block were occupied by white persons, and the purchaser would have not been bound under the contract unless the ordinance was held invalid (245 U. S. 69–70).

"Property", the Court stated, "is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property, * * * True it is that dominion over property springing from ownership is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare." (245 U. S. at 74.) However, to impose such a restraint on alienation and acquisition, based solely on the color of the occupant, was held "not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." (*Id.*, at 82.)

In thus holding that the police power of a State—broad as it is in justifying restrictions upon property rights (see *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395)—cannot sustain restrictions based solely on color, the Court relied in no small measure on the rights of colored purchasers to acquire property, and to use and enjoy it, without being discriminated against because of their color. Referring to the provisions of Rev. Stat. § 1978, c. 31, sec. 1, 14 Stat. 27 (8 U. S. C. 42), and Rev. Stat. § 1977, c.

114, sec. 16, 16 Stat. 144 (8 U. S. C. 41), the Court stated (pp. 78–79):

> Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir,* 95 U. S. 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases,* 109 U. S. 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.

Some of the arguments which are still made, expressly or tacitly, to support the validity of racial residential segregations were rejected in *Buchanan* v. *Warley.* The answers given by the Court then are no less valid today. It was argued that the ordinance should be upheld because it represented an attempt to deal with the serious and difficult problem of race hostility. But, answered the Court, the solution of this problem "cannot be promoted by depriving citizens of their constitutional rights and privileges" (245 U. S. 80–81). Similarly, in reply to the contention that segregation would prevent race con-

flicts and promote the public peace, the Court said: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution" (p. 81). Finally, to the oft-repeated assertion that the property of adjacent owners becomes depreciated when colored persons move into the area, the Court replied: "But property may be acquired by undesirable white neighbors or put to disagreeable though lawful uses with like results" (p. 82).

Although *Harmon* v. *Tyler,* 273 U. S. 668,[34] and *City of Richmond* v. *Deans,* 281 U. S. 704,[35] were *per curiam* decisions, the factual situations presented in those cases demonstrate the broad basis on which this class of cases rests. *Harmon* v. *Tyler* involved a municipal ordinance and a paralleling state statute which, broadly summarized, forbade a Negro person from establishing a residence in a "white community" and a white person from establishing a residence in a "Negro community" except by obtaining the written consent of a majority of the persons of the opposite race living in the community. The suit involved injunctive relief sought by one inhabitant of a "white community" against another owner to

[34] Reversing 160 La. 943, in which the Supreme Court of Louisiana adhered to its previous ruling in *Tyler* v. *Harmon,* 158 La. 439.

[35] Affirming 37 F. 2d 712 (C. C. A. 4).

restrain him from renting a dwelling to Negro tenants without obtaining the necessary consents. In ruling that the laws did not contravene the provisions of the Fourteenth Amendment and that the relief could not be denied on that ground, the Supreme Court of Louisiana held that the legislation was not discriminatory since it applied equal restraints to both races, that the purpose of the legislation was to discourage social intercourse between the races, and that, unlike *Buchanan* v. *Warley,* there were no restraints on the right to sell or buy property, but only on the right to occupy it as a dwelling. Since the ruling in *Buchanan* v. *Warley* was clearly opposed to each of the grounds relied on by the Louisiana court, it is not surprising that this Court reversed *per curiam* on the authority of that case.

City of Richmond v. *Deans, supra,* involved a municipal ordinance which attempted to achieve segregation by prohibiting any person from residing in a city block where the majority of residences were occupied by those with whom such person was forbidden to enter into marriage under state law. The ordinance was thus similar to the one involved in *Buchanan* v. *Warley.* The case, however, involved the rights of a Negro purchaser who had entered into a contract to purchase a dwelling in a block where he would have been prohibited from residing under the terms of the ordinance. Upon threats of the ordinance being enforced against him, he filed

suit to enjoin the city from doing so. The District Court issued the injunction and the Circuit Court of Appeals, in affirming, ruled that the ordinance, while framed in terms of marriage, was actually based on color alone and, as such, was unconstitutional under *Buchanan* v. *Warley,* and *Harmon* v. *Tyler.* This Court affirmed *per curiam* on the authority of these latter cases.

In summary, therefore, *Buchanan* v. *Warley* and the cases following it have established the broad principle that an individual is protected by the Fifth and Fourteenth Amendments from legislative enactments which limit, solely because of race or color, his right to acquire, use, or dispose of property. As to this right, neither the States nor the Federal Government can impose or enforce general legislative restrictions based exclusively on race or color. Segregation of residential areas on the basis of the race or color of the occupants involves (1) an arbitrary and unreasonable classification which cannot be justified even under the broad police power, and (2) a deprivation without due process of law of the property right of an owner freely to sell, and the correlative right of a buyer freely to purchase and occupy. Persons who are otherwise eligible and willing to acquire property cannot be denied such right simply because they are of a particular race or color. Nor is any such racial or color classification any less unconstitutional because it

is made to depend upon the consent of the owners of neighboring property.

In *Fay* v. *New York,* 332 U. S. 261, this Court, in referring to statutes enacted by Congress to implement the Fourteenth Amendment, stated pp. 282–283: "For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination." As we have shown, the respective rights of vendor and purchaser of property to deal with each other freely and without restraint because of each other's race or color are sufficiently clear under the Fourteenth Amendment. *Buchanan* v. *Warley, supra.* Congress, however, has so plainly stated the rights which are secured by that Amendment as to leave no room for doubt in this regard. Section 1978 of the Revised Statutes (8 U. S. C. 42) provides:

> All 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.[36]

[36] The District of Columbia, which is subject to the legislative power of Congress, is undoubtedly embraced in the term "every State or Territory." *Talbott* v. *Silver Bow County,* 139 U. S. 438, 444; *Geofroy* v. *Riggs,* 133 U. S. 258.

Section 1979 of the Revised Statutes (8 U. S. C. 43) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1978 of the Revised Statutes was derived from Section 1 of the Civil Rights Act of 1866, 14 Stat. 27.[37] That statute, which became law while the Fourteenth Amendment was under consideration by Congress, is undoubtedly

[37] Section 1 provided:

"* * * That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

a clear expression of rights which, if not elsewhere guaranteed by the Constitution, were intended to be secured by the Fourteenth Amendment itself. See Flack, *Adoption of the Fourteenth Amendment* (1908) 19–40. The validity of the section, constituting as it does an exercise of the authority given to Congress by Section 6 of the Fourteenth Amendment to enforce its provisions by appropriate legislation, has never been doubted. *Strauder* v. *West Virginia,* 100 U. S. 303, 311–312; *Virginia* v. *Rives,* 100 U. S. 313, 317–318; *Ex parte Virginia,* 100 U. S. 339, 364–365; *Civil Rights Cases,* 109 U. S. 3, 16–17, 22; *Buchanan* v. *Warley,* 245 U. S. 60, 78.

In *Virginia* v. *Rives, supra,* speaking of Sections 1977 [38] and 1978 of the Revised Statutes, the Court said (p. 318):

> The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same.

[38] Section 1977 (8 U. S. C. 41) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Those statutes "partially enumerating what civil rights colored men shall enjoy equally with white persons, founded as they are upon the amendment, are intended for protection against State infringement of those rights." (*Ibid.*)

Again, in *Strauder* v. *West Virginia, supra,* the Court stated that those sections (p. 311)—

> partially enumerate the rights and immunities intended to be guaranteed by the Constitution * * *.

It was further stated (p. 312):

> This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions.

When a State, through its judiciary, enforces a restrictive covenant against a colored citizen of the United States, it thereby denies him the right to purchase or lease property solely on racial grounds. As regards the particular property involved, it enforces a disability against Negro citizens which does not exist for white citizens. It creates differences in rights between citizens on the basis of color where Congress has ordained that they shall be "exactly the same."

It is clear, therefore, that the right to acquire, use, and dispose of property is a right which the Constitution protects against governmental restrictions based solely on race or color.

There can be no doubt that racial restrictive covenants do impinge upon that right. We submit that judicial enforcement of such covenants interferes also with other constitutional rights, namely, (1) the right to equality of opportunity, without hindrance because of race or color, in securing decent and adequate housing facilities, and (2) the right to equal treatment before the law. *Buchanan* v. *Warley* and the cases following it have settled that no constitutional justification exists for legislative residential segregations based solely on race or color. There remains the question whether judicial decrees enforcing private racial restrictions have any greater constitutional justification. This question is discussed *infra,* pp. 77–85.

(3) The Right to Compete on Terms of Equality, without Hindrance because of Race or Color, in Securing Decent and Adequate Living Accommodations

Truax v. *Raich,* 239 U. S. 33, 41, holds that the Constitution forbids racial discriminations with respect to "the right to work for a living in the common occupations of the community," because that right "is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure". What is involved in the cases now before the Court is essentially the right to compete on terms of equality, without hindrance because of race or color, in securing decent and adequate

living accommodations. The State can no more participate in a denial to its citizens of that right than it can, as *Truax* v. *Raich* holds it cannot, in a denial of the right of equality of opportunity in pursuing "the ordinary means of earning a livelihood". Both rights are essential attributes of the "freedom and opportunity" secured by the Constitution. Neither can be denied on grounds of race or color without doing violence to our fundamental law.

We need not labor the point. "Housing is a necessary of life." *Block* v. *Hirsh,* 256 U. S. 135, 156. And see *Bowles* v. *Willingham,* 321 U. S. 503. The right to work for a living is meaningless without the right to live in a habitable place. It is not suggested that the Constitution guarantees every man a house of his own choosing, any more than it guarantees him a job of his own choosing. What it does guarantee is that the States and the Federal Government will not exert their authority so as to deny him equality of opportunity, simply because of his race or color, in obtaining a job or a house from an employer or property-owner who would otherwise be able and willing to give him a job or to sell or rent a house to him.

(*4*) *The Right to Equal Treatment before the Law*

The fundamental principle that all men, regardless of their race or color, stand equal before the law is imbedded in the Constitution and laws

of the United States. In *Truax* v. *Corrigan,* 257 U. S. 312, 332, this Court said:

> "All men are equal before the law," "This is a government of laws and not of men," "No man is above the law," are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute, and apply laws.

The doctrine upholding the equality of all men was given expression in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

This is more than an abstract pledge. It is given meaning and effect by the provision of the Fourteenth Amendment that no person shall be denied the equal protection of the laws. In *Hill* v. *Texas,* 316 U. S. 400, 406, Mr. Chief Justice Stone's opinion for the Court stated: "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

In *Strauder* v. *West Virginia,* 100 U. S. 303, 307, this Court paraphrased the Fourteenth Amendment in these terms:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that *all persons, whether colored or white, shall stand equal before*

> *the laws of the States,* and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? [Italics added.]

Pursuant to its authority under the Fourteenth Amendment, Congress in 1870 enacted the following statute (R. S. § 1977, c. 114, sec. 16, 16 Stat. 144):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and *to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other * * *. [Italics added.]

However vague its boundaries, the right to equal treatment before the law certainly requires, as a minimum, that courts shall not establish a rule of law which, in its very terms, makes race or color a controlling factor in its application. *Snowden* v. *Hughes,* 321 U. S. 1, makes it clear that where a statute or rule of law, fair on its face, is applied differently to those who are entitled to be treated alike, there "is not

a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." 321 U. S. at 8.

Judicial enforcement of racial restrictive covenants is quite different. In the first place, the rule of law under which such covenants are enforced is on its face unfair and discriminatory. If the courts which enforce such covenants were merely applying a general rule that all restraints on alienation are enforceable, that might be one thing. It is quite another when the courts do not enforce all restraints on alienation, but do approve those which are based on race and color. See *infra,* pp. 107, 114. We urge that, by force of the Fifth and Fourteenth Amendments and the statutes enacted thereunder, the States and the Federal Government cannot establish rules of law which in their very terms make race or color relevant in their application.

Secondly, even if the rule of law here involved is not discriminatory on its face, there can be no doubt, as has already been shown, that it is applied so as to discriminate against particular minority groups. It has been said that these covenants are enforced against all persons, regardless of their race or color. But the short answer is that, as a practical matter, such covenants are never directed against any but members of particular minority groups.

(5) Judicially-Enforced Racial Restrictions Have No Greater Constitutional Justification Than Legislatively-Imposed Residential Segregations

As has been shown, *supra,* pp. 25, 40–42, racial restrictive covenants came to be widely used only after this Court had ruled that racial residential segregation could not be imposed by state or municipal legislatures. They seem to have been adopted as a substitute for such legislation, and have, indeed, well fulfilled that role. Racial restrictive covenants have become so pervasive in this country that the consequences of their enforcement are hardly distinguishable from, and certainly no less serious than, the legislatively-imposed segregations invalidated in *Buchanan* v. *Warley* and the cases following it.

The sociological data already set forth (*supra,* pp. 27–39) show that boundaries beyond which Negroes cannot make their homes are no less real when imposed by restrictive covenants than when imposed by legislation. The result of the constantly increasing use of restrictive covenants has been large-scale compulsory segregation of racial groups with respect to housing. That segregation is not confined to Louisville, Kentucky, as it was in *Buchanan* v. *Warley;* it has become a national problem; the effects of such covenants are apparent in most of the major urban communities of our country.

Practically and realistically, judicially-enforced racial restrictive covenants have a scope and effect at least as broad as racially restrictive housing leg-

islation. Legally, we submit, they are equally invalid. The Court is not here concerned with the effect or validity of isolated racial restrictive covenants. It is confronted by the existence of such a mass of covenants in different sections of the country as to warrant the assertion that private owners have, by contract, put into effect what amounts to legislation affecting large areas of land—legislation which, if enacted by Congress, by a state legislature, or by a municipal council, would be invalid. Judicial enforcement of racial restrictive covenants has made this a Nation of racial patch quilts, thus presenting constitutional issues which must be resolved by weighing the interests of more than a single vendor or a single vendee. It is the presence of a public interest—the interest of millions of Negroes, Jews, Mexicans, Indians and others who desire to acquire property without restriction because of race or creed, as well as the interest of the non-minority public in removing and avoiding the deleterious social results of segregation—which must invalidate judicial decrees enforcing racial restrictive covenants.

As this Court, speaking through Mr. Justice Holmes, stated (*Block* v. *Hirsh,* 256 U. S. 135, 155):

> Plainly circumstances may so change in time or so differ in space as to clothe with such an interest [*i. e.,* a public interest] what at other times or in other places would be a matter of purely private con-

> cern. * * * [Citations omitted.] They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair.

The same point can perhaps be made by paraphrasing the "governing constitutional principle" which this Court has distilled from its decisions under the Contract Clause: When a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements and governmental machinery has been invoked for the effectuation of such arrangements, that public interest cannot be submerged by abstracting one such arrangement from its context and treating it as though it were an isolated private covenant immune from the prohibitions of the Fourteenth and Fifth Amendments. Cf. *East New York Bank* v. *Hahn,* 326 U. S. 230, 232.

Marsh v. *Alabama,* 326 U. S. 501, illustrates the controlling effect of such a public interest in the resolution of issues as to the validity of governmental action under the Due Process Clauses. In that case, the appellant, a Jehovah's Witness, undertook to distribute religious literature on the sidewalk of a town all of the property in which was owned by a single corporation. Although warned that the sidewalk was private property and that distribution of her literature was forbidden, the appellant refused to desist. She was arrested and convicted of violating a state statute making it criminal to enter or remain on the

premises of another after having been warned not to do so. In this Court, the appellant contended that her conviction violated her constitutional rights.

In agreeing with the appellant, this Court gave short shrift to the State's contention that the corporation's right to control activities in the company town was "coextensive with the right of a homeowner to regulate the conduct of his guests." 326 U. S. at 506. Cf. *Martin* v. *Struthers,* 319 U. S. 141, 148. It refused, in balancing the property rights of a landowner as against the civil rights of a religious propagandist, to attach the same weight to the right of a corporation to use the state machinery to deny a distributor of religious literature access to an area which, in every respect but ownership, was indistinguishable from any other town or village, as would attach to the right of an individual to invoke governmental organs in order to keep religious solicitors off his parcel of land. *Ibid.* It did so because there was another interest which weighed in the balance—the interest of the public, in that case, those inhabitants of the company town who, just as residents of municipalities, had "an identical interest in the functioning of the community in such manner that the channels of communication remain free". 326 U. S. at 507.

It is of crucial importance, therefore, that those who enter into racial restrictive covenants and who seek to employ the machinery of government in their enforcement "are not acting in matters

of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest",[89] in that they are attempting to use the power of the State to deny to millions of other persons, solely on racial grounds, the right to decent and adequate housing. To such an attempt at discrimination, the States and the Federal Government cannot proffer the aid and support of their courts.

In *Buchanan* v. *Warley,* 245 U. S. 60, the "authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare" was invoked. 245 U. S. at 74. It was urged that the ordinance should be sustained because it would "promote the public peace by preventing race conflicts" (*id.* at 81), and because "acquisitions by colored persons depreciate property owned in the neighborhood by white persons". *Id.* at 82. While recognizing that the police power of a state is "very broad" and that its exercise "is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose", the Court held that "it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution" on the

[89] *Nixon* v. *Condon,* 286 U. S. 73, 88.

power of government to deny "those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color". 245 U. S. at 74, 79.

Much less may these "fundamental rights" be denied by judicial action at the instance of those who, rather than invoking the broad police power of a State, must rely solely on their interest as neighbors to justify a discrimination which a sovereign State, through its legislature, is without power to impose. As has been noted, the legislative power denied in *Buchanan* v. *Warley* encompassed the interest of white persons in avoiding the depreciation of their property allegedly flowing from the acquisition by colored persons of neighboring property. There can be no doubt of the insufficiency of that interest alone when it, together with the general police powers of the state, was held to be inadequate constitutional justification for racial segregation.

It has been pointed out that racial restrictive covenants came into general use as a substitute for invalidated racial segregation legislation. But, in some respects, the covenant device has been more than a substitute for legislation; it has met the requirements of those desiring to exclude Negroes and other minorities and it has made it possible to do so more certainly and expeditiously. Thus the evils attendant upon racial segregation have been aggravated.

By using the restrictive covenant device, those desirous of imposing racial restrictions can bypass the democratic processes of legislation through which the desirability of such restrictions is passed upon by the elected representatives of the people. Numerous, though relatively small, groups of property owners can, through the covenant device, deny to large groups of people thought to be racially undesirable the right to buy, lease, or use property for long periods of time, indeed often forever. In so doing, they are not required to, nor do they generally, give any consideration to the broader social and economic consequences of their action. Legislative racial segregation can at least be planned so that accommodations can be made for changes in populations, needs, etc. But racial segregation through the covenant device is wholly haphazard. It is subjected to none of the restraining influences on stark racial prejudice which might make for deliberate, considered judgment.

The absence of such a judgment as a possible reasoned basis for the governmental action here involved underlines the views this Court has already announced with respect to the lower degree of deference due to state judicial action as contrasted with legislative action. Here, as in *Bridges* v. *California,* 314 U. S. 252, 261, the judgments below "do not come to us encased in the armor wrought by prior legislative deliberation." A legislative "declaration of the State's

policy would weigh heavily in any challenge of the law as infringing constitutional limitations." *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308. But not so when "the judgment is based on a common law concept of the most general and undefined nature." 310 U. S. at 308.

(6) The Decrees Below Cannot Be Justified on any Theory of "Waiver" of Constitutional Rights

It may possibly be contended that, even if judicial enforcement of private racial discriminations violates rights secured by the Constitution and laws of the United States, the decrees below are nevertheless valid because they merely enforce agreements of a voluntary nature, and the persons against whom the decrees are directed cannot be heard to complain because they have "consented" to such agreements, either actually or constructively.

We submit that such a contention would be wholly without merit. Whatever its validity as against the white sellers, the argument could have no application whatsoever against the colored purchasers. Such persons have obviously relinquished none of their constitutional rights merely by entering into agreements for the purchase and occupancy of property. These purchasers can hardly be regarded as "parties" to the restrictive agreements expressly directed against them.

That the property which they agreed to purchase was already subject to a restrictive cove-

nant is relevant only in so far as such covenant limited, under state law, the scope of the seller's rights of alienation. But it begs the question to conclude that, because the seller under state law cannot legally sell to him, the colored purchaser is therefore precluded from asserting that such state law violates *his* constitutional rights.

Moreover, the question of "waiver" involves essentially the same balancing of public and private interests as that which is involved in the broader question of constitutional validity. See *supra,* pp. 79–83. On the one hand, the State undoubtedly has an interest in enforcing private contractual arrangements. Persons who enter into such arrangements ordinarily have a right to rely upon the aid of the law in their effectuation. But, on the other hand, there is a countervailing interest against the use of such aid where it is invoked to enforce a denial of constitutional rights. A white owner of covenanted land may, in a sense, perhaps be regarded as having "waived" his property right of free alienation to the extent of the restriction imposed by the covenant. But the interest of the State in holding him to such a "waiver" is, we submit, clearly outweighed by the interest—protected by the Constitution and laws of the United States—in enabling prospective purchasers to compete on terms of equality, without being discriminated against by governmental action based solely on race or color.

C. The case of Corrigan vs. Buckley

Corrigan v. *Buckley,* 271 U. S. 323, does not foreclose the argument here presented. To be sure, the facts in the *Corrigan* case are essentially similar to those in the present cases. But a careful examination of the Court's ruling discloses that the points now being raised were not settled by that case.

The facts in the *Corrigan* case are simple. In 1921, thirty white owners of property situated in the same block in Washington, D. C., including the plaintiff Buckley and the defendant Corrigan, entered into an agreement that no part of their properties would ever be used or occupied by, or sold or leased or given to, any Negro. In 1922 Corrigan, notwithstanding this restrictive covenant, agreed to sell her lot to the defendant Curtis, a Negro. Buckley thereupon brought suit to enforce the restrictive covenant by enjoining the defendants from executing the contract of sale, and by enjoining Curtis from taking title to the property, and from using or occupying it. The defendants moved to dismiss the bill on the ground that the covenant was "void" in that it was contrary to the Constitution and laws of the United States, and was against public policy. No other issue was presented by the pleadings or the arguments in the lower courts.

The defendants' motions were overruled, a final decree of injunction was granted, and was affirmed

on appeal by the Court of Appeals for the District of Columbia. 299 Fed. 899. The defendants then prayed an appeal to this Court on the ground that such an appeal was authorized under the provisions of Section 250 of the Judicial Code, as it then stood, in that the case was one "involving the construction or application of the Constitution of the United States" (paragraph 3), and "in which the construction of" certain laws of the United States, namely Sections 1977, 1978, 1979 of the Revised Statutes, were "drawn in question" by the defendants (paragraph 6).

This Court held that the appeal should be dismissed for want of jurisdiction. The Court found that, under the pleadings, the only constitutional question involved was that arising from the allegations in the defendants' motions to dismiss, namely, that the covenant which was the basis of the suit was "void" in that it was contrary to and forbidden by the Fifth, Thirteenth, and Fourteenth Amendments. This question was found to be so insubstantial as not to authorize an appeal. The Court reaffirmed its earlier holdings that these Amendments have reference only to governmental action and not to any action of private individuals. *Civil Rights Cases,* 109 U. S. 3, 11; *Virginia* v. *Rives,* 100 U. S. 313, 318; *United States* v. *Harris,* 106 U. S. 629, 639; *Talton* v. *Mayes,* 163 U. S. 376, 383; *Hodges* v. *United States,* 203 U. S. 1, 16, 18.

Similarly, the Court held that there was no substantial question as to the "construction" of Sec-

tions 1977, 1978 and 1979 of the Revised Statutes. These provisions, like the constitutional amendments under whose sanction they were enacted, "do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." (271 U. S. at 331.) The Court also held that the contentions "earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant" were questions involving consideration of rules not expressed in any constitutional or statutory provision, and therefore could not be reviewed on appeal unless jurisdiction was otherwise acquired.

The appellants had argued before this Court that the decrees of the courts below constituted a violation of the Fifth and Fourteenth Amendments of the Constitution, in that they involved a deprivation of liberty and property without due process of law. Citing *Buchanan* v. *Warley,* 245 U. S. 60, and other cases, appellants had urged that the "decrees have all the force of a statute," and that since it would have been beyond the legislative power to authorize enforcement of such covenants, they could not constitutionally be enforced through judicial action. This contention, it may be conceded, is substantially similar to

that which petitioners are here pressing. But it is far from clear that this contention was in any way passed upon by this Court in the *Corrigan* case. The only paragraph in the Court's opinion dealing with this contention (271 U. S. at 331–32) reads as follows:

> And, while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it likewise is lacking in substance. The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. See *Delmar Jockey Club* v. *Missouri, supra,* 335. Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law. *Central Land Co.* v. *Laidley,* 159 U. S. 103, 112; *Jones* v. *Buffalo Creek Coal Co.,* 245 U. S. 328, 329.

Several observations may be made concerning this paragraph. First, the assertion that the contention "likewise is lacking in substance" is either dictum or, at most, an alternative holding. Secondly, the reasons which the Court gives for finding the contention insubstantial make it highly doubtful whether the Court understood the appellants' contention and was addressing itself to that contention. The appellants had argued that judicial enforcement was constitutionally equivalent to a legislative enactment. If the Court wished to dispose of that contention, it could hardly have chosen words less apt. The Court referred merely to the fact that the defendants had been given a full hearing, that they were not denied any constitutional or statutory right, and that it could not be said that the decrees were "so plainly arbitrary and contrary to law as to be acts of mere spoliation." The Court also referred to the principle, not questioned by the appellants, that due process of law is not denied merely because a court makes an error of law. If the Court had been of the view that judicial enforcement of a private contract was not governmental action within the scope of the Constitution, that judicial enforcement did not convert the individual action of the private contracting parties into governmental action, there surely would have been some indication to that effect in the Court's opinion. The conclusion is almost inescapable,

therefore, that the Court did not deal with or in any way pass upon the contention which the appellants had made as to the constitutional validity of judicial enforcement. We submit, therefore, that the question has not been foreclosed by *Corrigan* v. *Buckley*. Surely this Court will not regard itself as bound, in deciding issues of such constitutional importance as these, by a "precedent" so cloudy and dubious.

II. ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS IS CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES

Whatever doubts may exist as to the scope of the ruling in *Corrigan* v. *Buckley*, 271 U. S. 323, there is no doubt that it leaves wholly open the question whether considerations of public policy bar the judicial enforcement of racial restrictive covenants.[40] We urge upon this Court that the enforcement of such covenants is inconsistent with the public policy of the United States and that upon this independent ground, the judgments in these cases cannot be permitted to stand. Since the public policy upon which we rely is derived from the Federal "Constitution and the laws, and the course of administration and decision" (*Li-*

[40] "We cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant." 271 U. S. at 332.

cense Tax Cases, 5 Wall. 462, 469), that public policy should be controlling on state courts as well as those of the District of Columbia.[41]

"Public policy is to be ascertained by reference to the laws and legal precedents". *Muschany* v. *United States,* 324 U. S. 49, 66. Among these are the Fifth and Fourteenth Amendments, the legislation enacted by Congress thereunder, and the decisions of this Court construing and applying such provisions. They may be summarized as establishing most clearly that it is the policy of the United States to deny the sanction of law to racial discriminations, to ensure equality under the law to all persons, irrespective of race, creed or color and, more particularly, to guarantee to Negroes rights, including the right to use, acquire,

[40] "We cannot determine upon the merits the contentious *Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 654–655, in which this Court treated as raising a federal question a contention based upon "The public policy of the Government." This Court has recognized the existence of "those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176, and cases there cited.

To the extent that an argument based on "public policy" is another way of saying that Congress has done implicitly what it might have done explicitly, we recognize the necessity of establishing the power of Congress in this field. We believe, however, that the Congressional power expressly to implement the guaranties contained in the Fourteenth and Fifth Amendments by proscribing the enforcement of racial restrictive covenants is too clear to require discussion.

and dispose of property, which are in every way equivalent to such rights which are accorded to white persons.

A. *Statutes.*—In addition to those provisions of the Civil Right Acts having particularly to do with equal property rights (see *supra,* pp. 69–71), the Civil War marked the beginnings of a series of Acts of Congress through which runs, to this day, a persistent thread of hostility to racial discriminations. Equality of opportunity with white citizens "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property" was required at an early date after emancipation.[42] The same enactment provided that persons other than white citizens "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." In the administration of the homestead laws, discrimination on account of race or color was forbidden,[43] and in 1870, the right to vote "without distinction of race, color, or previous condition of servitude" was generally guaranteed.[44] Racial factors were made irrelevant in determining upon qualifications for jury service by the Act of March 1, 1875.[45] And it is

[42] R. S. 1977 and 1978, 8 U. S. C. 41 and 42 and R. S. 1078, 28 U. S. C. 292, prohibiting the exclusion of any witness in the courts of the United States "on account of color."

[43] R. S. 2302, 43 U. S. C. 184.

[44] R. S. 2004, 8 U. S. C. 31.

[45] 18 Stat. 336, Section 4, 8 U. S. C. 44.

of particular significance that Congress has been held to have subjected to criminal penalties persons who conspire to deny to Negroes the right to lease and cultivate lands. Section 19 of the Criminal Code, 18 U. S. C. 51, as construed in *United States* v. *Morris,* 125 Fed. 322 (E. D. Ark.).

Those charged with the administration of Federal public works, relief, and employment have consistently been enjoined against racial discriminations,[46] and legislation enacted during World War II has included comparable restraints.[47]

B. *Executive Pronouncements.*—The parallel between the right to employment and the right to decent and adequate housing has already been pointed out. See *supra,* p. 73. In the light of this close relationship, the Executive Order of President Franklin D. Roosevelt, establishing a Committee on Fair Employment Practice, has

[46] Act of June 28, 1941, 55 Stat. 361, 362, 42 U. S. C., Supp. V, 1533 (no discrimination in determining need for public works). See also 40 Stat. 1189, 1201. Relief generally: 48 Stat. 22, 23; 50 Stat. 352, 357; 53 Stat. 1147, 1148, 18 U. S. C. 61c; 53 Stat. 927, 937; 54 Stat. 611, 623; 55 Stat. 396, 405, 406; 56 Stat. 634, 643. Civilian Conservation Corps: 50 Stat. 319, 320, 16 U. S. C. 584g. National Youth Administration: 54 Stat. 574, 593; 55 Stat. 466, 491; 56 Stat. 562, 575.

Employment: 54 Stat. 1211, 1214, 5 U. S. C. 681 (e) (no discrimination in classified civil service); 60 Stat. 999, 1030, 22 U. S. C. A. 807 (Foreign Service); 40 Stat. 1189, 1201 (expenditure of funds for public roads).

[47] Congress banned discrimination because of "race, creed, or color" in the administration of the civilian pilot training and the nurses training programs. 53 Stat. 855, 856, 49 U. S. C. 752; 57 Stat. 153, 50 U. S. C. App. 1451.

particular significance here. In that order,[48] the President said:

> I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin.

This Governmental policy against racial discrimination in employment has been particularized with respect to civil service[49] and employment by Government contractors and subcontractors.[50]

It is not necessary to rely on the analogy between employment and housing, however, in order to establish a public policy directly relevant here. For both Presidents Roosevelt and Truman have spoken of "the right to a decent home" as part of "a second Bill of Rights",[51] and "of the basic

[48] Executive Order No. 8802, June 25, 1941, 6 F. R. 3109.

[49] Executive Order No. 2000, July 28, 1914; Executive Order No. 7915, June 24, 1938 (3 F. R. 1519); Executive Order No. 8587, November 7, 1940 (5 F. R. 4445).

[50] Executive Order No. 9346, May 27, 1943 (8 F. R. 7183).

[51] House Doc. No. 377, 78th Cong., 2d sess., p. 7.

rights which every citizen in a truly democratic society must possess." [52]

C. *International Agreements.*—The Charter of the United Nations (59 Stat. 1033), approved as a treaty by the Senate on July 28, 1945 (59 Stat. 1213), provides in its preamble, among other things, that:

> We the peoples of the United Nations, determined * * * to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women * * * and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance * * * have resolved to combine our efforts to accomplish these aims. (59 Stat. 1035.)

In Article 55 of the Charter, the United Nations agree to promote:

> universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (59 Stat. 1045–6.)

By Article 56,

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. (59 Stat. 1046.)

[52] Address of President Truman, June 29, 1947, 38th Annual Conference of the National Association for the Advancement of Colored People, 93 Cong. Rec. A–3505.

The United Nations General Assembly, on November 19, 1946, adopted the following resolution:

> The General Assembly declares that it is in the higher interests of Humanity to put an immediate end to religious and so-called racial persecutions and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end. (United Nations General Assembly Journal, 1st Sess., No. 75, Supp. A–64, p. 957.)

At the Inter-American Conference on Problems of War and Peace held at Mexico City in 1945, at which the Act of Chapultepec (March 1945) was agreed upon, the United States Delegation submitted a draft resolution, which was later adopted by the Conference, entitled "Economic Charter of the Americas." The following statement appears in this resolution (No. 51):

> The fundamental economic aspiration of the peoples of the Americas, in common with peoples everywhere, is to be able to exercise effectively their natural right to live decently * * * (Dept. of State Bulletins, March 4, March 18, 1945, pp. 347, 451; Report of the Delegation of the U. S. A. to the Inter-American Conference on Problems of War and Peace, Mexico City, February 21–March 8, 1945, at pp. 24, 120.)

Another resolution adopted by the Conference (No. 41) provides:

> Whereas: World peace cannot be consolidated until men are able to exercise their basic rights without distinction as to race or religion, The Inter-American Conference on Problems of War and Peace resolves:
>
> 1. To reaffirm the principle, recognized by all the American States, of equality of rights and opportunities for all men, regardless of race or religion.
>
> 2. To recommend that the Governments of the American Republics, without jeopardizing freedom of expression, either oral or written, make every effort to prevent in their respective countries all acts which may provoke discrimination among individuals because of race or religion. (Report of the Delegation of the U. S. A., *supra,* at p. 109.)

At the conclusion of this Conference, the Secretary of State issued a statement in which he said:

> * * * in the Declaration of Mexico and in other resolutions, we have rededicated ourselves at this Conference to American principles of humanity and to raising the standards of living of our peoples, so that all men and women in these republics may live decently in peace, in liberty, and in security. That is the ultimate objective of the program for social and economic co-

> operation which has been agreed upon at Mexico City.
> (Dept. of State Bulletin, March 11, 1945, p. 399.)

A particularly pertinent statement, also in the form of a Resolution, was made at and adopted by The Eighth International Conference of American States at Lima, Peru, in 1938. This Resolution, approved by the Conference on December 23, 1938, reads:

> The Republics represented at the Eighth International Conference of American States declare:
>
> 1. That, in accordance with the fundamental principle of equality before the Law, any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently, is contrary to the political and juridical systems of America.
>
> 2. That the democratic conception of the State guarantees to all individuals the conditions essential for carrying on their legitimate activities with self-respect.
>
> 3. That they will always apply these principles of human solidarity. (Documents on American Foreign Relations, Vol. I, 1938–1939, World Peace Foundation, publisher, at p. 49.)

D. *Conclusion.*—In refusing to enforce a contract on grounds of public policy, this Court, in an opinion by Mr. Justice Holmes, said: "To com-

pel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. * * * if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result". *Beasley* v. *Texas & Pacific Railway Co.,* 191 U. S. 492, 497, 498. The legislative, executive, and international pronouncements set out above reflect a public policy wholly inconsistent with the enforcement of racial restrictive covenants. The public interest in racial segregation is at least as great as the public interest in whether a railroad station should be built in a certain place, the question involved in the *Beasley* case. There, as here, an attempt to limit the use to which land could be put by means of a restrictive covenant was involved. And the Court there, as we think it should here, refused the injunction sought, noting some reluctance in any event specifically to enforce such restraints, but resting on the paramount interests of the public as a controlling reason for denying equitable relief.

A public policy against enforcement of racial restrictive covenants is the ground upon which the High Court of Ontario has denied equitable relief in a recent decision. Re *Drummond Wren,*

[1945] 4 D. L. R. 674. After referring to similar principles of political conduct, the court said (p. 678):

> the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this Province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas.

The court then went on to note "the unlikelihood of such a policy as a legislative measure". In this country, we need not speculate about likelihoods; such a legislative measure would be unconstitutional. For that reason, we submit that even if the decrees below are not stricken on specific constitutional grounds, they may properly be set aside as being inconsistent with the public policy of the United States.

III. ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS CONTRAVENES SETTLED PRINCIPLES GOVERNING VALIDITY OF RESTRAINTS ON ALIENATION AND IS INEQUITABLE

A. *Racial covenants constitute invalid restraints on alienation*

In Nos. 290 and 291, the Court of Appeals for the District of Columbia held that racially restrictive covenants do not constitute illegal restraints on alienation in the District of Columbia. We contend, on the contrary, that the common law invalidates the effort to exclude, through restraints on alienation of real property, the members of groups based on race or color.

1. *The local decisions.*—It was not until *Hundley* v. *Gorewitz,* 132 F. 2d 23, 24, decided in December 1942, that the Court of Appeals of the District of Columbia for the first time noted the argument that "the covenant constitutes an undue and unlawful restraint on alienation." The issue was not discussed at that time, the court contenting itself with the statement that "in view of the consistent adjudications in similar cases, it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction" (132 F. 2d, at 24). The earlier District covenant cases, which the court cites as

conclusive, had not, however, passed upon the alienation issue. The matter was first canvassed on its merits in *Mays* v. *Burgess,* 147 F. 2d 869, 871–872, decided in January, 1945, in which the majority of the court held a racially restrictive covenant, limited in time, not to be invalid, because it was not a total restraint.[53] In the instant cases, the court below rests on the opinion in the *Mays* case, and extends its holding to a perpetual restriction. It is clear from this history that the District's view of the effect of the common law rules against restraints upon racial agreements, far from being long established or deeply rooted, is hardly sown.

2. *Common law rules against restraint on alienation.*—a. Post-medieval common law developed a general rule against restraints on the alienation of property owned in fee which has become part of the unwritten law of every Anglo-American jurisdiction. As the Restatement of Property puts it (vol. 4, pp. 2379–2380): "The underlying principle which operates throughout the field of property law is that freedom to alienate property interests which one may own is essential to the

[53] Justice Miller, concurring, felt that this Court and the Court of Appeals had previously "established the law for the District of Columbia as it is set out in the majority opinion and we are bound to follow it," but he pointedly referred to this Court as "the highest Court of the District of Columbia," with power to reinterpret the applicable law. 147 F. 2d, at 873.

welfare of society. The basis for the assumption that social welfare requires freedom of alienation * * * is * * * found to rest in part upon the necessity of maintaining a society controlled primarily by its living members, in part upon the social desirability of facilitating the utilization of wealth, and in part upon the social desirability of keeping property responsive to the current exigencies of its current beneficial owners. Restraints on alienation are from their very nature inconsistent with the policy of freedom of alienation. Thus, to uphold them, justification must be found in the objective that is thereby sought to be accomplished or on the ground that the interference with alienation in the particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered." [54]

It is fair to say that in the latter part of the last century, and the first two decades of this, the unfolding of this policy of free alienability tended toward the invalidation of substantial restraints on conveyances of real property. A few early

[54] Comment (a) to Section 406 states (p. 2394):

"This policy is particularly applicable when the restraint is imposed on what otherwise would be an indefeasible legal possessory estate in fee simple because the curtailment of the power of alienation of such estates, totally or partially, is the situation where the dangers of restraints on alienation were first encountered."

British cases,[55] and some isolated state decisions in this country [56] looked the other way, but they felt the great weight of judicial and professional disapproval. The modern cases and the views of the recognized authorities formulated the doctrine of freedom so broadly that one would have been justified in forecasting, in 1915, that conveyors' attempts to forbid subsequent transfer to any numerically significant group would be invalidated—if the announced policies supporting the rule against restraints were to control without dilution from different streams of social or political policy. If, for instance, a conveyor had attempted to prohibit future sale of his land to any New Englander, or college graduate, he would properly have been warned that the restraint would probably be invalidated because the excluded class was too large. Cf. 2 Simes, *The Law*

[55] *Doe d. Gill* v. *Pearson*, 6 East 173 (K. B. 1805), criticized in *Attwater* v. *Attwater*, 18 Beav. 330 (Rolls Ct. 1853); *Billings* v. *Welch*, 6 Ir. R. C. L. 88 (1871); *Mandlebaum* v. *McDonell*, 29 Mich. 78, 96–97 (a leading American case); Gray, *Restraints Upon the Alienation of Property* (2d ed. 1895), secs. 41–43; Sweet, *Restraints On Alienation* (1917) 33 L. Q. Rev. 236, 342–348; *Re MacLeay*, L. R. 20 Eq. 186 (1875), criticized in *Re Rosher*, 26 Ch. D. 801 (1884); *Manierre* v. *Welling*, 32 R. I. 104, 117, 123, 125–129, 142 (another leading case); Gray, Secs. 41–43, and Sweet, *ibid.*; *Mahony* v. *Tynte*, 1 Ir. Ch. R. 577 (1851) (exclusion, in Ireland, of "Papists," the court refusing to inquire what religion predominated in the community).

[56] See Gray, *supra*, secs. 52–54; 2 Simes, *The Law of Future Interests*, sec. 458.

of Future Interests, secs. 450, 456–460; Sweet, *Restraints on Alienation* (1917), 33 Law. Quar. Rev. 236, 243, 342–348; Warren, *The Progress of the Law, 1919–1920: Estates and Future Interests* (1921), 34 Harv. L. Rev. 639, 651–653; Gray, *Restraints on the Alienation of Property* (2d ed. 1895), secs. 31–44, 279; Schnebly, *Restraints Upon the Alienation of Legal Interests* (1935), 44 Yale L. J. 961, 972, 989, 1186–1193.[57]

b. It is doubly significant that the only cases in the United States upholding the exclusion of a social group of considerable size are the racial covenant cases, and, that, except for a single case from a non-common law jurisdiction (*Queensborough Land Co.* v. *Cazeaux,* 136 La. 724 (1915)), all these cases were decided after this Court had struck down legislative housing segregation in

[57] Simes states: "In the United States the courts have been slow to approve of conditions restraining alienation as to a class." 2 op. cit., p. 300. Warren's comment in 1921 on exclusion of large classes or groups was: "Happy is the jurisdiction whose court, uncontrolled by prior decisions, or under the protection of a code provision, may declare all such restraints on alienation invalid." 34 Harv. L. Rev. at 653; Chafee, *Equitable Servitudes in Chattels* (1928), 41 Harv. L. Rev. 945, 984, calls such racial restrictions "a clear case of restraint of alienation;" Gray, in 1895, cautiously wrote that "a condition or conditional limitation on alienation *to certain specified persons* can probably be attached to a fee simple or to an absolute interest in personalty; but how far a condition or conditional limitation on alienation *except to certain specified* persons can be so attached is doubtful." Gray, *supra,* sec. 279.

Buchanan v. *Warley,* 245 U. S. 60, in 1917.[58] The considerations which appear to have moved these courts may be gathered from the American Law Institute's treatment of racially restrictive restraints. As Justice Edgerton pointed out below (162 F. 2d 233, at 241–242), covenants against Negroes would seem to be marked as unreasonable, and therefore invalid, by the Restatement's

[58] The state cases which explicitly hold at least some types of racial restraints not to contravene the common-law rule against restraints on alienation are *Chandler* v. *Ziegler*, 88 Colo. 1, 4; *Koehler* v. *Rowland*, 275 Mo. 573, 584–585; *Lyons* v. *Wallen*, 191 Okla. 567; *Kemp* v. *Rubin*, 188 Misc. 310 (N. Y. Sup. Ct., Queens County); *Lion's Head Lake* v. *Brzezinski*, 23 N. J. Misc. 290 (2nd Dist. Ct. of Paterson); *Meade* v. *Dennistone*, 173 Md. 295 (restraint against "use and occupancy" only); *Scholtes* v. *McColgan*, 184 Md. 480, 487–488 (same); *Los Angeles Inv. Co.* v. *Gary*, 181 Cal. 680 (same); *Parmalee* v. *Morris*, 218 Mich. 625 (same); *White* v. *White*, 108 W. Va. 128, 130, 147 (same); *Perkins* v. *Trustees of Monroe Ave. Church*, 79 Ohio App. 457, 70 N. E. 2d 487, app. dism. 72 N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term (same); cf. *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724 (broad restraint on sale or use permissible in Louisiana).

California, Maryland, Michigan, Ohio, and West Virginia hold the rule to be violated by restraints on sale or lease but not by similar restrictions on use or occupancy; Wisconsin apparently agrees as to restrictions on use or occupancy, but its Supreme Court has not decided the issue where a restraint on sale is involved. See, *infra*, pp. 112–114. The case in other jurisdictions sustaining racial restraints do not discuss this common-law point. In Canada, an Ontario court has held a racial covenant to violate the rule on restraints. *Re Drummond Wren* [1945] 4 D. L. R. 674, 681 (Ont. High Ct.).

For a compilation of most of the authorities see McGovney, *Racial Residential Segregation by State Court Enforcement*

stated criteria.[59] Nevertheless, the Institute has a specific provision upholding such restraints, "*in states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question*" (italics supplied), and the Restatement's full comment makes even plainer that the dominant influence is the achievement of racial or social segregation, where that is thought to be desirable, rather than the achievement of the policies historically underlying the rule against restraints. 4 Restatement, Property, sec. 406, comment l, pp. 2411–2412.[60]

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of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945), 33 Calif. L. Rev. 5, 8–11; Schnebly, *Restraints Upon Alienation* (1935), 44 Yale L. J. 961, 1186, 1189–1193; Martin, *Segregation of Residences of Negroes* (1934), 32 Mich. L. Rev. 721, 736–741.

[59] The six criteria of reasonableness are quoted and applied in the dissenting opinion below, 162 F. 2d at 241–242; the Restatement also lists the following five factors which "tend to support the conclusion that the restraint is unreasonable" (4 Restatement, Property, p. 2407):

1. the restraint is capricious;
2. the restraint is imposed for spite or malice;
3. the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint;
4. the restraint is unlimited in duration;
5. the number of persons to whom alienation is prohibited is large * * *.

[60] "A promissory restraint or forfeiture restraint may be qualified so that the power of alienation can be freely exercised in favor of all persons except those who are members of some racial or social group, as for example, Bundists, Communists or Mohammedans. In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is

There are similar indications in various of the cases upholding racial restraints that the decisive factor has been judicial approval, or at least acceptance, of a policy of residential segregation as outweighing the requirements of free alienability. In the *Queensborough* case, *supra,* the first decision passing upon racial restrictions, the Louisiana court thought "that it would be unfortunate, if our system of land tenure were so hidebound, or if the public policy of the general government or of the state were so narrow, as to render impracticable a scheme such as the one in question in this case, whereby an owner

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reasonable and hence valid if the area involved is one reasonably appropriate for such exclusion and the enforcement of the restraint will tend to bring about such exclusion (see Comment *n* ["Application—change in circumstances"]). This is true even though the excluded group of alienees is not small and include so many probable conveyees that there is an appreciable interference with the power of alienation (compare Comments *j* ["Application—Excluded group of alienees a very small number or not probable conveyees"] and *k* ["Application—Permitte dgroup of alienees very small number"]. The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.

"The desirability of the exclusion of certain racial and social groups is a matter governed entirely by the circumstances of the state in which the land is located. The most important factor in solving this problem is the public opinion of the state where the land is located on the question of the racial or social group involved living in close proximity to the racial or social groups not excluded from the land."

has sought to dispose of his property advantageously to himself and beneficially to the city wherein it lies." 136 La. at 727; see also 729. In *Parmalee* v. *Morris,* 218 Mich. 625, 628, the court felt that "The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents."[61] Dean Ribble (*Legal Restraints on the Choice of A Dwelling* (1930) 78 U. of Pa. L. Rev. 842) pithily summarizes the attitude of the courts which up-

[61] In *Meade* v. *Dennistone*, 173 Md. 295, 301, the court said: "The large, almost sudden, emigration of negroes from the country to the cities, with the consequent congestion in colored centers, has created a situation about which all agree something ought to be done. In Baltimore City, with a population of about 850,000, one-seventh is negro, occupying a relatively small portion of the city's territory, though the colored area has been, in the last several years, rapidly expanding. Since the decisions under the Fourteenth Amendment, *supra*, no public action can be taken to solve what has become a problem, and property owners have undertaken to regulate it by contract."

See also *Wyatt* v. *Adair*, 215 Ala. 363, 366; *Koehler* v. *Rowland*, 275 Mo. 573, 585; *Porter* v. *Johnson*, 232 Mo. App. 1150, 1156–1157, 1158, 1160; *Lion's Head Lake* v. *Brzezinski*, 23 N. J. Misc. 290, 291 (quoting the Restatement); *Perkins* v. *Trustees of Monroe Ave. Church*, 79 Ohio App. 457, 70 N. E. 2d 487, app. dism. 72 N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term.

hold substantial restraints: "Finally, it may be suggested that a court's finding that the restraint is reasonable, and consequently valid, is simply a way of saying that the court believes that the policies favoring the 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" (p. 847, and see also p. 853). Cf. Manning, *The Development of Restraints on Alienation Since Gray* (1935), 48 Harv. L. Rev. 373, 388–389.

The historical conception of improper restraints on alienation has had sufficient force to compel a number of state courts to invalidate racial restraints on *sales or leases* (*Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Scholtes* v. *McColgan,* 184 Md. 480, 487–488; *Porter* v. *Barrett,* 233 Mich. 373; *White* v. *White,* 108 W. Va. 128; *Williams* v. *Commercial Land Co.,* 34 Ohio Law Rep. 559; cf. *Perkins* v. *Trustees of Monroe Ave. Church,* 79 Ohio App. 457, 70 N. E. 2d 487, 491, appeal dismissed 72, N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term), but these courts simultaneously uphold restrictions against *use or occupancy* by the excluded group (*Los Angeles Investment Co.* v. *Gary, supra; Wayt* v. *Patee,* 205 Cal. 46; *Meade* v. *Dennistone,* 173 Md. 295, 305–307; *Scholtes* v. *McColgan,* 184 Md. 480, 487–488; *Parmalee* v. *Morris,* 218 Mich. 625;

Perkins v. *Trustees of Monroe Ave. Church,* 79 Ohio App. 457, 70 N. E. 2d 487, 491, *supra; White* v. *White,* 108 W. Va. 128, 130, 147).[62] "Now it is apparent that, however a restraint upon occupancy may be classified in theory, in practice it is a restraint upon alienation in this type of case. Negroes and Asiatics, against whom the restriction is directed, are not likely to buy land which they themselves cannot occupy, and which they cannot even lease to members of their own race. The actual effect of the retriction is to exclude members of these races as potential purchasers of the land. Restraints upon occupancy, nevertheless, have been sustained in almost every case in which the problem has arisen. This state of the authority seems explicable only upon the supposition that the courts have believed the social interest to require the toleration of these restrictions, that they have felt precluded by supposed authority from upholding the restrictions when phrased directly as restraints upon alienation, but have eagerly seized upon the theoretical difference between a restraint upon alienation and a restraint upon occupancy to justify their conclusions." Schnebly, *Restraints Upon Aliena-*

[62] Wisconsin apparently upholds a restraint on use but the validity of a restriction on sale has not been determined by the Supreme Court, although it has been said to be "difficult of decision." *Doherty* v. *Rice,* 240 Wis. 389, 397–398.

tion (1935), 44 Yale L. J. 961, at 1192–1193.[63] The American Law Institute explicitly recognizes the identity of the two restrictions by providing the same rule for restraints on use by excluded groups as on sales. 4 Restatement, Property, sec. 406, Comment n, p. 2412.[64]

c. In short, the carving out of racial real estate limitations from the application of the common-law rule against restraints on alienation has largely resulted from intervention of sympathy with, or affirmative acceptance of, the social interest in racial residential segregation, rather than from a development of the original policy premises of the common-law doctrines of free alienability. But the Federal courts, including those in the District of Columbia, should, at the very least, refrain from affirmative use of segre-

[63] To substantially the same effect, see McGovney, *supra*, at 8–9; Martin, *supra*, at 737–738; Ribble, *supra*, at p. 849; Miller, *Race Restrictions on Ownership or Occupancy of Land* (1947), 7 Law. Guild Rev. 99, 104–105; cf. Warren, *The Progress of the Law, 1919–1920: Estates and Future Interests* (1921), 34 Harv. L. Rev. 639, 653; Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation* (1927), 21 Ill. L. Rev. 704, 713; Note (1926), 26 Col. L. Rev. 88, 91–92; 2 Simes, *The Law of Future Interests*, sec. 460, pp. 301, 302; Manning, *The Development of Restraints on Alienation Since Gray* (1935), 48 Harv. L. Rev. 373, 379–380, 388–389.

[64] The Court of Appeals of the District of Columbia likewise makes no distinction. Nos. 290–291, R. 419–420; 162 F. 2d 233, 235. The covenants in the instant cases extend to renting, leasing, sale, transfer, or conveyance, and are not limited to use or occupancy. 162 F. 2d at 233.

gation policies in applying and developing the rules of real property or contract law. Cf. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203; *Korematsu* v. *United States*, 323 U. S. 214, 216. Thus, in determining whether the exclusion of such a large group as the Negro race constitutes an unlawful restraint, the courts of the District of Columbia might weigh the fundamental rationale of the common-law rule, its applicability to the present day, and the proper extent of allowable restrictions on alienees, but should be bound to consider the excluded group as if it were composed of an equal number of white, or white and colored, persons.

The racial factor apart, it would seem clear that a restraint which perpetually excluded at least a quarter of the population of the District of Columbia, and some 20,000,000 American citizens,[65] should not be upheld. The owner's freedom to convey would plainly be substantially impaired, and no adequate counterbalancing considerations could exist. The discussion in the pertinent portion of the Restatement of Property (section 406 and comments), much of which we have quoted, strongly tends toward the invalidation of restraints where "the number of persons

[65] The restriction in Nos. 290 and 291 applies to any "Negro or colored person," thus apparently including American Indians, Puerto Ricans, Hawaiians, Filipinos, Chinese, and Japanese, and many other persons of Latin American or Asiatic ancestry or nationality.

to whom alienation is prohibited is large" (p. 2407), and only exempts racial or social restrictions because of the presumed special social interest in segregation in certain States. When the "social importance" of the objective sought to be accomplished by the imposition of such a restraint is weighed against the "evils which flow from interfering with the power of alienation" annulment of the restriction is clearly required.[66] The main lines of authority, exclusive of the racial restraint cases, support this view, as the Restatement's codification sufficiently proves. See also, *Re Drummond Wren* [1945], 4 D. L. R. 674, 681 (Ont. High Ct.); Schnebly, *Restraints Upon The Alienation of Legal Interests* (1935), 44 Yale L. J. 961, 1186–1193; *supra,* pp. 106–7.[67] The many cases upholding nonracial building or

[66] The Restatement of Property states, with respect to restraints on what "otherwise would be an indefeasible legal possessory estate in fee simple" (Comment a to section 406, p. 2394): "To uphold restraints on the alienation of such estates it must appear that the objective sought to be accomplished by the imposition of the restraint is of sufficient social importance to outweigh the evils which flow from interfering with the power of alienation or that the curtailment of the power of alienation is so slight that no social danger is involved."

[67] Justice Field's dictum in *Cowell* v. *Springs Co.*, 100 U. S. 55, 57, is often cited (e. g., in *Mays* v. *Burgess*, 147 F. 2d 869, 872 (App. D. C.)) as supporting large-scale exclusion, but the opinion in that case merely notes that (a) conditions prohibiting alienation "*to particular persons*" are valid and (b) subjection of the estate to "*particular uses*,"—

use restrictions are not opposed, since in most instances the "curtailment of the power of alienation is so slight that no social danger is involved" (Restatement, Section 406, Comment A, p. 2394), and all involve a social value which may properly be encouraged by the courts at the expense of free alienability. Cf. Schnebly, *supra,* at 1388 et seq.; Clark, *Real Covenants and Other Interests which "Run With Land"* (2d ed. 1947), chap. VI.

B. Enforcement of the covenants would be inequitable

Respondents in Nos. 290 and 291 do not show themselves entitled to an injunction merely by proving their covenants valid at common law and enforceable under the Constitution. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven,* 320 U. S. 228, 235; *Hecht Co.* v. *Bowles,* 321 U. S. 321, 325. And courts of equity have traditionally refused their aid, either where "the plaintiff is using the right asserted contrary to the public interest," (*Morton Salt Co.* v. *Suppiger Co.,* 314

all the examples given being admittedly "for the health and comfort of whole neighborhoods"—is likewise permissible. *Potter* v. *Couch,* 141 U. S. 296, 315, likewise refers, in general dictum, to restraints on alienation "to *particular persons* or for particular purposes" as valid. [Italics supplied.]

U. S. 488, 492; *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 359–361) or where, all special public interest aside, "issuance of an injunction would subject the defendant to grossly disproportionate hardship." *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.,* 289 U. S. 334, 338. To enjoin petitioners and require their removal from their homes would breach both of these historic bulwarks which equity has erected against judicial injustice. As Mr. Justice Frankfurter has stated, *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 312 (dissent), "the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in disregard of moral and equitable principles which have been part of the law for centuries."

There is no doubt about the evil effect upon the housing conditions and welfare of Negroes of the systematic and wholesale residential segregation in the District of Columbia which racial covenants have produced. The sum of the matter is that "Negroes are increasingly being forced into a few overcrowded slums" and "the chief weapon in the effort to keep Negroes from moving out of overcrowded quarters into white neighborhoods is the restrictive covenant." Report of the President's Committee on Civil Rights (1947), p. 91. The prejudice to the general welfare thus created by the cumulative impact of this "net-

work of multitudinous private arrangements" plainly warrants a court of equity in staying its hand and leaving the covenantors to whatever strictly legal remedies they may have. Cf. Edgerton, J., dissenting below, 162 F. 2d at 237, and in *Mays* v. *Burgess,* 147 2d 869, at 873–874, and 152 F. 2d 123, at 125–126; Traynor, J., concurring in *Fairchild* v. *Raines,* 24 Cal. 2d 818, 831–835; Martin, *Segregation of Residence of Negroes* (1934), 32 Mich. L. Rev. 721, 724, 726, 738, 741; Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem* (1945), 12 U. of Chi. L. Rev. 198, 206–209. Application of established equitable doctrines in the field of racial restrictive covenants is hardly novel; courts have long refused injunctions when enforcement has been found to be injurious to the general interests of the covenanting property owners, even though certain individual owners may still desire to retain segregation. *Hundley* v. *Gorewitz,* 132 F. 2d 23 (App. D. C.); *Gospel Spreading Ass'n* v. *Bennetts,* 147 F. 2d 878 (App. D. C.)

The private harm to these particular colored grantees is also sufficient to outweigh any benefits which respondents may feel will accrue to them through continued residential segregation. These grantees purchased their homes only after many hardships and long-continued efforts to obtain adequate housing; several of the grantees

had been evicted from rented houses by owners seeking personal occupancy. In the District of Columbia there is undeniably an acute shortage of houses for Negroes, even at prices inflated beyond those which white persons would have to pay. Nos. 290 and 291, R. 216–219, 227–228, 241, 260–264, 309–310, 334, 339, 340, 364; cf. Edgerton, J., dissenting, 162 F. 2d at 243–245. If petitioners and other grantees of the same class are forced to move, they will probably face grave difficulties in finding adequate housing, one of the true essentials of life. If they are allowed to remain, respondents will at most suffer an invasion of the lesser social interest in privacy or choice of neighbors.

C. *This Court should determine these issues*

The Court should not hesitate, we believe, to decide these issues of restraints on alienation and the equitable right to an injunction. These are no longer local law matters, of peculiar concern to the District, which should be left to the courts of the District. Cf. *Fisher* v. *United States,* 328 U. S. 463, 476–477. The determination of these issues largely turns upon general social considerations of the greatest importance, and is intimately related to a federal public policy of which this Court, and not the District of Columbia courts, is the final arbiter. Nor are the questions presented for decision unique to the District, or governable by common-law developments special

to this area; their nation-wide significance is attested by the geographical distribution of the decisions sustaining racial covenants, as well as by the related cases now on this Court's docket.

Moreover, it cannot be said that on either issue the courts of the District of Columbia are enforcing a well-established rule, or one adopted after careful review. Decision on the application of the rule against restraints has come very late and almost by inadvertence. See *supra* pp. 103–4. The propriety of equitable relief appears never to have had full consideration, not even in the instant cases. As the highest court in the judicial system of the District, this Court should exercise its power to determine the controlling law for the Nation's capital.[68]

CONCLUSION

Statutory residential segregation based on race or color does not exist in this country because the Supreme Court struck it down as violative of the Constitution. Actual segregation, rooted in ignorance, bigotry and prejudice, and nurtured by the opportunities it affords for monetary gains from the supposed beneficiaries and real victims alike, does exist because private racial restrictions are enforced by courts. These covenants are inju-

[68] See *supra*, p. 104, fn. 53, for Mr. Justice Miller's reference, in *Mays* v. *Burgess*, 147 F. 2d 869, 873 (App. D. C.), to this Court as the "highest Court of the District of Columbia" with power of final determination of District law.

rious to our order and productive of growing antagonisms destructive of the integrity of our society. Inadequate shelter, disease, juvenile delinquency are some of the major evils directly traceable to racial restrictive covenants. Restraints on alienation of real property are generally regarded as contrary to the policy of the States; yet restrictive racial covenants have been upheld by State courts, some on the tenuous ground that a restriction against use or occupancy is somehow, in the eyes of the law, entitled to Constitutional approval although a restriction against ownership alone is condemned. There is no basis for such a distinction. The covenant restricting use and occupation works precisely the same evils as the covenant against ownership by the members of the proscribed race or color.

The areas controlled by restrictive racial covenants are rapidly expanding in urban centers, and the resulting danger to our free institutions is imminent. Courts judge the validity of statutes not merely by what is done under them but by what may be done under them. The same rule must be applied to these covenants in which the public interest has become enmeshed. Restricted areas could be expanded through covenants until whole groups of citizens, selected by race or color or creed or ancestry, could be exiled from this nation forever. Supposed freedom of contract may not be used to further such ends. This Court has

pointed out that the Constitution does not speak of freedom of contract. "It speaks of liberty and prohibits the deprivation of liberty without due process of law". *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391.

Race hostilities will not disappear when and if this Court determines that racial restrictive covenants are abhorrent to the law of the land. Neither will a measure of segregation, existing through the voluntary choice of the people concerned. But, as this Court said in *Buchanan* v. *Warley,* 245 U. S. 60, 80–81, the solution of the problem of race hostility "cannot be promoted by depriving citizens of their constitutional rights and privileges."

Respectfully submitted.

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Solicitor General.

DECEMBER 1947.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72, 87, 290, 291

J.D. SHELLEY, *et al., Petitioners,*

—v.—

LOUIS KRAEMER, *et al., Respondents.*

ORSEL McGHEE, *et al., Petitioners,*

—v.—

BENJAMIN J. SIPES, *et al., Respondents.*

JAMES M. HURD, *et al., Petitioners,*

—v.—

FREDERICK E. HODGE, *et al., Respondents.*

RAPHAEL G. URCIOLO, *et al., Petitioners,*

—v.—

FREDERICK E. HODGE, *et al., Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS AS AMICUS CURIAE

AMERICAN ASSOCIATION FOR THE UNITED NATIONS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY, *et al.*,

Petitioners,

v.

LOUIS KRAEMER, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 87.

ORSEL McGHEE, *et al.*,

Petitioners,

v.

BENJAMIN J. SIPES, *et al.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 290.

JAMES M. HURD, *et al.*,

Petitioners,

v.

FREDERICK E. HODGE, *et al.*

No. 291.

RAPHAEL G. URCIOLO, *et al.*,

Petitioners,

v.

FREDERICK E. HODGE, *et al.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS AS AMICUS CURIAE

MOTION OF THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Association for the United Nations respectfully requests this Court for leave to file a brief as *amicus curiae* in the above-captioned cases. We have received the consent of counsel to both petitioners and respondents in Nos. 87, 290, and 291. We have not received any answer to our letters to counsel in No. 72.

The American Association for the United Nations is a nationwide, non-profit organization whose members are vitally interested in adherence by this Government to the provisions and to the spirit of the United Nations Charter.

We have filed this brief because of the extraordinary importance of these cases, particularly with reference to the good faith of this country in observing the intent of the Charter. We believe that, if this Court were to uphold the decrees below enforcing racial restrictive covenants, the guarantees of fundamental human rights contained in the Charter would be vitiated and the international prestige of this country would be greatly impaired. We further believe, although this point will not be elaborated upon in our brief, that these decrees violate the Fifth and Fourteenth Amendments to the Constitution.

On the other hand, reversal of the decrees by this Court would be a magnificent affirmation of the principles to which this country has subscribed in the United Nations Charter and in the United States Constitution. The American Association for the United Nations, therefore, respectfully requests leave to file this brief *amicus curiae.*

BRIEF FOR THE AMERICAN ASSOCIATION FOR THE UNITED NATIONS AS AMICUS CURIAE

Opinions Below

The opinion of the Supreme Court of the State of Missouri in No. 72 (R. 153-159), is reported at 198 S. W. 2d 679. The opinion of the Supreme Court of the State of Michigan in No. 87 (R. 60-69), is reported at 316 Mich. 614. The opinion of the United States Court of Appeals for the District of Columbia in Nos. 290 and 291 (R. 417-432) is reported at 162 F. 2nd 233.

Jurisdiction

This Court's jurisdiction is invoked under 28 U. S. C. §344 (b) and §347 (a).

Question Presented

This brief will be primarily concerned with the question of whether by enforcing racial restrictive covenants (a) so as to preclude petitioners, as negroes, from purchasing and/or occupying realty, (b) so as to preclude other owners of realty from selling or leasing their property to negroes, and (c) so as to eject negroes from property already occupied by them, the Courts below violated Articles 55 (c) and 56 of the United Nations' Charter.

The second question discussed is whether the enforcement of racial restrictive covenants by the Courts below does not constitute improper interference with the public

policy enunciated in Executive Agreements and Declarations, made in the conduct of the foreign relations of the United States.

Summary of Argument

I. Enforcement of racial restrictive covenants is a violation of Article 55(c) and 56 of the treaty known as the United Nations Charter.

a. Interpretation of Articles 55(c) and 56.

b. The obligations of the United States under Articles 55 and and 56 are not qualified by Article 2, Paragraph 7 thereof.

II. As part of the "Supreme Law of the Land", treaties invalidate conflicting provisions of state common law or state statutes.

III. Both state and federal courts are prohibited from taking affirmative action which contravenes the declared foreign policy of the United States of eliminating racial and religious discrimination.

IV. Court orders enforcing racial restrictive covenants constitute governmental action.

I

Enforcement of Racial Restrictive Covenants Is a Violation of Articles 55(c) and 56 of the Treaty Known as the United Nations Charter.

A. Interpretation of Articles 55(c) and 56

Insofar as presently relevant, Article 55(c) of the United Nations Charter provides:

> "* * * the United Nations shall promote * * * uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion."

Article 56 of the Charter embodies the following commitment by the ratifying nations to implement the provisions of Article 55:

> "All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The United Nations Charter was ratified by the President of the United States, after consent had been given by the Senate pursuant to Article II, Section 2, of the Constitution. 51 *Stat.* 1031. Accordingly, the Charter is a "treaty made * * * under the authority of the United States" and is "the supreme law of the land."

Unless assured equal access to housing and shelter, minority groups are discriminatorially deprived of liberty and property. Hence it seems to us plain that the right to acquire and occupy property without discrimination be-

cause of race is one of the "fundamental freedoms" protected by Articles 55(c) and 56 of the Treaty. In particular, these provisions preclude all courts of the United States from entering any decrees which affirmatively support and enforce racial discrimination in the acquisition and occupancy of property.

(1) Recognizing that a scrupulous respect for international agreements is the bedrock upon which civilized international life is built, this Court has consistently held that such agreements must be broadly construed.

In *Tucker* v. *Alexandroff*, 183 U. S. 424, 437, the court quoted approvingly Chancellor Kent's famous doctrine: "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith" (1 Kent, *Commentaries*, p. 174).

In *Factor* v. *Laubenheimer*, 290 U. S. 276, 293, this Court held:

> "In choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements * * *. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, a more liberal construction is to be preferred."

This doctrine is equally applicable in the construction of treaties dealing with questions which, under our Federal system, might otherwise be confided to the jurisdiction of

the separate states.[1] For, as stated by Mr. Justice Stone in *Nielsen* v. *Johnson*, 279 U. S. 47, 52:

> "* * * as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation * * *."

See, also, *Valentine, et al.* v. *Neidecker*, 299 U. S. 5; *Jordan* v. *Tashiro*, 278 U. S. 123, 127-130.

(2) The decision of the Supreme Court of Michigan in No. 87, *McGhee & McGhee* v. *Sipes, et al.* (R. 60-69), asserted that the provisions of Articles 55(c) and 56 of the Charter are merely the statement of "an objective devoutly to be desired by all well-thinking people."

This interpretation is an unreasonable construction of these Articles. If the draftsmen of the Charter had possessed the limited intention ascribed to them by the Supreme Court of Michigan, they need only have inserted therein a general declaration that the promotion of human rights was one of the objectives of the organization.

Indeed, the first draft of the United Nations Charter—the so-called "The Dumbarton Oaks Proposals"—contained only the most nominal reference to the protection

[1] This statement is not to be taken as a concession that, apart from the existence of relevant international agreements, the determination of whether or not racial restrictive covenants should be judicially enforced is to be made solely in the light of the public policy of the several states. In our opinion, enforcement of such covenants is prohibited by the Fourteenth Amendment to the United States Constitution, for the reasons persuasively stated in the *amicus* briefs filed herein by the Department of Justice and by the American Civil Liberties Union.

of human rights and did not place any obligation upon the signatory powers for their protection. (See Stettinius, *Charter of the United Nations—Report to the President on the Results of the San Francisco Conference,* Dept. of State Publication 2349, Conference Ser. 71, pp. 25-27.)

However, at the outset of the San Francisco Conference, the United States Delegation proposed that the agreement be expanded to include guarantees of the fundamental freedoms "for all, without distinction as to race, sex, language or religion". The present language of Article 55(c) was drafted principally by the United States Delegation. Former Secretary of State Stettinius, in his Report to the President on the San Francisco Conference, stressed the significance of the word "observance" in the final version of that Article. *Ibid.*

The record of the San Francisco Conference further indicates that Article 56 was inserted in the Charter so as to make the pledge of observance of human rights contained in 55(c) a commitment binding upon the member nations.[2] As stated in a Committee report, the obligation imposed by Article 56 was three-fold: "To take separate action to implement the purposes of Article 55, to take joint action, and to cooperate with the Organization." See

[2] It is well established that the record of negotiations preceding the preparation of a Treaty is germane in construing the provisions of that Agreement. See *Terrace, et al.* v. *Thompson,* 263 U. S. 197, 223-4; *U. S. Shoe Machinery Company* v. *Duplessis Shoe Machinery Company,* 155 Fed. 842, 848 (C. C. A. 1st); *Lighthouses* case, Per. Ct. Int. Jus., Judgment, March 17, 1934, Ser. A/B, No. 62, p. 13, 3 Hudson, *World Court Reports* (1938) 368, 378; Lauterpacht, *Some Observations on Preparatory Work in the Interpretation of Treaties* (1935), 48 Harv. L. Rev. 549, 552, 571-3, 591; 2 Hyde, *International Law* (1945 Ed.) pp. 1468-70; McNair, *Law of Treaties* (1938) 185.

Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (1946), p. 192.[8]

Secretary Stettinius has stated that Article 56 was intended to constitute a pledge by the signatory powers to protect human rights, "to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes" Stettinius, *op. cit. supra,* p. 115.

In the federal structure of the United States, it is the especial responsibility of this Court to take appropriate action to protect, as against discrimination by local governmental bodies, including the state courts, those human rights to whose enforcement the United States Government is pledged by solemn international agreement.

(3) As previously pointed out, Article 55(c) was introduced into the Treaty at the insistence of the United States Delegation to the San Francisco Conference. It is therefore appropriate that consideration should be given, in interpreting this Article, to the traditional American definitions of fundamental human rights.

The right to use and occupy real property free of racial discrimination is one of those fundamental freedoms.

Congressional acceptance of this tenet is indicated by the Civil Rights Act of 1866, reading:

> "All citizens of the United States shall have the same right in every State and Territory as is en-

[8] See also United Nations Conference on International Organization, San Francisco 1945, Volume X, pp. 139, 140, and 160; Document 699, 11/3/40, May 30, 1945, and Document 747, 11/3/46, June 2, 1945.

> joyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." 8 U. S. C. §42.

In a series of decisions dating back to the 1870s, this Court has made it plain that racial inhibitions on the opportunity to occupy realty are prohibited by the Fourteenth Amendment. Thus in the *Civil Rights Cases,* it was held that the right "to hold property, to buy and to sell" without discrimination as to race could not be impaired by legislative, judicial or executive action by the states. 109 U. S. 3, 17.

In *Yick Wo* v. *Hopkins,* 118 U. S. 356,—the first case in which state action was invalidated under the Fourteenth Amendment—the unanimous Court barred enforcement of a municipal ordinance, which, despite its impartial language, had been applied so as to discriminate against the utilization of certain types of buildings by Orientals.

The thread of these and similar cases was firmly woven into the law of the land in *Buchanan* v. *Warley,* 245 U. S. 60, where it was stated that the right to buy, use and dispose of property on equal terms was a fundamental right of citizenship. In effectuation of this principal, it was held that a municipality could not constitutionally regulate the purchase and sale of property for occupancy, in terms of the color of the proposed occupant. See, also, *Harmon* v. *Tyler,* 273 U. S. 668; *City of Richmond* v. *Deans,* 281 U. S. 704.

(The statement of the majority in No. 290, *Hurd* v. *Hodge,* 162 Fed. (2d) 233 (App. D. C.), that the decision of this Court in *Corrigan* v. *Buckley,* 271 U. S. 323, insulates racial restrictive covenants against invalidation under the

Fourteenth Amendment is clearly erroneous. As pointed out in the dissenting opinion of Mr. Justice Edgerton in *Hurd* v. *Hodge,* all that the court held in *Corrigan* was that such covenants are not void *per se* under the Constitution and the Civil Rights Act. The contention that the Constitution and the Civil Rights Act prohibited enforcement of such covenants was not before this Court in that case.)

(4) Persuasive support for the conclusion that enforcement of racial restrictive covenants is prohibited by the United Nations Charter is provided by the views of authoritative commentators.

Thus, Edward Stettinius, Chief of the United States Delegation to the San Francisco Conference, has declared that the right to purchase and use property without discrimination because of race is one of the freedoms guaranteed by these sections. See Stettinius, *Human Rights in the United Nations Charter* (1946) 243 Annals of the American Academy of Political and Social Science, pp. 1-3.

Similarly, Article 17 of the Statement of Essential Human Rights prepared by the American Law Institute declares that

> "Everyone has the right to protection against arbitrary discrimination in the provisions and application of the law because of race, religion, sex or any other reason."[4]

This interpretation is further bolstered by the decision of the High Court of Ontario in *Re Drummond Wren* (1945), 4 Dominion Law Reports 674, (1945) Ontario Reports 778.

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[4] Article 14 of the Statement includes among the fundamental freedoms, the right of all individuals to "adequate housing".

This case arose upon an application, under a special statutory proceeding available in Ontario, to have the following restrictive covenant declared invalid: "Land not to be sold to Jews or persons of objectionable nationality."

The Ontario High Court found that the quoted covenant was invalid, since violative of the United Nations Charter and also of the public policy of the province. The relevant portion of the Court's decision is as follows:

> "First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. * * *
>
> "Under articles 1 and 55 of this Charter, Canada is pledged to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' * * *
>
> "Ontario and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying

well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good. * * *

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. *This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations* frowning on the type of discrimination which the covenant would seem to perpetuate" [(1945) Ontario Reports at 781-784]. (Italics supplied.)

B. The Obligations of the United States Under Articles 55 and 56 of the Charter Are Not Qualified by Article 2, Paragraph 7 Thereof

Article 2, paragraph 7 of the United Nations Charter provides:

> "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. * * *"

It is plain that this language is a limitation on the United Nations Organization itself and that it does not in any way modify the obligations assumed under the Charter by the several member States.

Article 56 embodies a specific commitment by all signatory nations to carry out the purposes of Article 55. It is arguable that sub-sections (a) and (b) of Article 55—pledging the promotion of "higher standards of living" and the solution of various international problems—are too vague and all embracing to compel specific action under

Article 56, or to affect the decisions of national tribunals. However, the more explicit language of sub-section (c) of Article 56 is a mandate to this Court (and the courts of all member nations) to protect all generally accepted "human rights and fundamental freedoms."

Article 56 imposes upon the United States the legal obligation to enforce the objectives stated in Article 55, in accordance with its "own political and economic institutions and processes." Stettinius, *op. cit. supra,* p. 115. At the very least, the courts of the United States are obligated to take no action which violates those "human rights and fundamental freedoms", which as demonstrated above, are protected under Article 55(c), against discrimination because of "race, sex, language and religion".

The argument of the preceding paragraphs is not intended to be a concession that the question of whether or not Negroes are protected against discrimination in the use of land is "within the domestic jurisdiction", as that phrase is used in Article 2, paragraph 7 of the Charter. A field of policy ceases to be essentially "within the domestic jurisdiction" of a state, if "the right of the state to use its discretion is * * * restricted by obligations which it may have undertaken toward other states." *Tunis-Morocco Nationalities Case,* 1 World Court Reports 156.

In so far as the United States has assumed obligations, under Articles 55(c) and 56 (and also under the Executive Agreements and Declarations referred to in Point III hereof), to protect "human rights and fundamental freedoms", these matters cease to remain "essentially within the domestic jurisdiction" of the United States.

II

As Part of the "Supreme Law of the Land", Treaties Invalidate Conflicting Provisions of State Common Law or State Statutes.

In No. 87, *McGhee & McGhee* v. *Sipes, et al.*, The Michigan Supreme Court implied that the provisions of a Treaty are not "applicable to the contractual rights between citizens when a determination of these rights is sought in a State court" (R. 67). This doctrine is contrary to the express language of the United States Constitution and to a half score of decisions of this Court, which make the provisions of treaties binding in all law suits brought in any court in the United States.

(1) Article VI, Section 2, of the Federal Constitution states:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

It has been held that Treaties (and other International Agreements) are superior to state law in all situations, which are "proper subject of negotiation between our Government and the governments of other nations * * *." *Geofroy* v. *Riggs,* 133 U. S. 258, 266. See also *Santovincenzo* v. *Egan,* 284 U. S. 30, 40.

As was recently stated by Professor Hyde, "the advancement of interests acknowledged to be of international

concern" has recently impelled the United States (and other nations) to place treaty "restrictions upon the conduct of individuals * * * in relation to activities which would appear normally to lack international significance * * *." 2 Hyde, *International Law* (1945 ed.), 1398. The foreign relations record, developed at length in Point III hereof, indicates beyond possibility of quibble that protection of human rights has in recent years become one of the important fields of negotiation in foreign relations.[5]

Moreover, it is plain that the Tenth Amendment does not in anywise limit the Treaty-making power of the Federal Government, even if used to accomplish results which Congress might be impotent to achieve directly. *Missouri* v. *Holland,* 252 U. S. 416, 432-3;[6] *University of Illinois* v. *United States,* 289 U. S. 48.

(2) In numerous cases, Treaties concluded by the United States and dealing with property or contract rights,

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[5] In any case the precedents of 150 years impel this Court to hold that the determination of whether a particular subject is within the sphere of international agreement is a political question—where the decision of the Executive and Senate is final. "What the President and Senate have deemed a proper subject of international agreement has never been otherwise regarded by the Supreme Court." 2 Hyde, *International Law* (1945 ed.) 1400. Cf. *Doe* v. *Braden,* 16 How. 635, 657; *Terlinden* v. *Ames,* 184 U. S. 270, 288; *Anchor Line* v. *Aldridge,* 280 Fed. 870, 876.

[6] As Judge Holmes stated in that case, Article 6, Section 2, of the Constitution proclaims as the primary law of the land, all treaties made "under the authority of the United States". See, also, the opinion of Mr. Justice White, in *Downes* v. *Bidwell,* 182 U. S. 244, 317; *Baldwin* v. *Franks,* 120 U. S. 678, 682; cf. Views of Thomas Jefferson, *American State Papers, Foreign Relations of the United States,* Vol. 1, p. 252; Comment attributed by Mr. Justice Story to Chief Justice Marshall, 5 Moore, *Digest of International Law,* 173.

ordinarily subject to control by the States, have been held to overrule contrary State laws.

Thus, in 1796, this Court held in *Ware* v. *Hylton,* 3 Dall. 199, that the 1783 treaty between the United States and Great Britain, which gave British creditors the right to recover debts contracted here before the treaty was ratified, notwithstanding that the debts may have been paid into the state public treasuries under state statutes, was "sufficient to nullify the law of Virginia, and the payment under it."

See also:

Chirac v. *Chirac,* 2 Wheat. 259;
Hughes v. *Edwards,* 9 Id. 489;
Carneal v. *Bank,* 10 Id. 181;
Hauenstein v. *Lynham,* 100 U. S. 483;
Geofroy v. *Riggs,* 133 U. S. 258;
Todok v. *Union State Bank,* 281 U. S. 449;
Nielsen v. *Johnson,* 279 U. S. 47;
Clark v. *Allen,* 67 Sup. Ct. 1431.

It is also clearly established that the relevant provisions of treaties are binding and final upon individual citizens, in all actions brought upon private contracts.

Kennett v. *Chambers,* 14 How. 38, was an application for specific performance of a contract to supply arms to Texan rebels against Mexico, made at a time when this country still recognized Mexican sovereignty over Texas. This Court held that no Tribunal in the United States could enforce a contract, whose terms were contrary to the national policy, as embodied in treaties with Mexico.

In *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C. S. D., Calif.), the Circuit Court refused to enforce a private covenant

not to rent property to Chinese persons, on the ground that the equal treatment provisions in the Chinese-American Treaty of 1880 made such provisions void. The court stated that when the legislatures were forbidden to discriminate against the Chinese by this treaty, it would be unthinkable to permit individual citizens to discriminate by contract enforcible in the courts.

(3) Article VI, Section 2 of the Constitution makes treaties (and other international agreements) superior to the decision or common law of the States.

For it can scarcely be doubted that the reference in that Section to the "Laws of any State" subsumes the common law of the various states as well as their statutes.

As was stated in *Erie Railway* v. *Tompkins,* 304 U. S. 64, 78, the law of a State may equally well be declared "by its legislature in a statute or by its highest court in decision * * *."[7]

This court has always held that treaties were superior to and invalidated inconsistent doctrines of State common law. Thus, in *Orr* v. *Hodgson,* 4 Wheat. 453, a treaty stipulation was held to overrule the common law of the state that intestate real property of an alien escheated to the sovereign.

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[7] In determining the extent of national responsibility to make reparations for the breach of an international obligation, it has always been the rule that the act of the highest court in a country constituted the act of that country's government. See statement of Secretary of State Kellogg, 5 Hackworth, *Digest of International Law,* 589; Research on International Law, *The Law of Responsibility* (Reprinted), 24 American Journal of International Law, Spec. Supp. (1929) 166, 178; 2 Hyde, *International Law* (1945 ed.) 931-34.

A similar decision was rendered in *Hauenstein* v. *Lynham,* 100 U. S. 483. While various provisions of the Virginia statutes were referred to in that case, it is clear that the decision of the Court of Appeals of Virginia, reversed therein by this Court, was predicated entirely upon the common law of the state. 100 U. S. 483, 484-5.

The same point was made in the following dictum of Mr. Justice Taney in *Kennett* v. *Chambers,* 14 How. 38, 51:

> "* * * certainly no law of Texas then or now in force could * * * compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract * * * was in conflict with subsisting treaties with a foreign nation."

The issue was most squarely raised as an aftermath of the so-called "Litvinoff Assignment" of 1933, whereby the Soviet Government transferred to the United States all its property claims against American nationals. Thereafter the United States claimed possession of all of the assets in New York of certain Russian companies, whose property had been expropriated by Russian Government decrees.

The New York Court of Appeals, the highest court in the State, held that such expropriatory decrees could not be recognized in New York, because violative of the public policy of the forum (*United States* v. *Pink,* 284 N. Y. 555, 32 N. E. (2d) 552). This Court reversed the decision of the Court of Appeals on the ground that the public policy of New York could not be enforced in the fact of the contrary provisions of the Litvinoff Assignment, stating in part:

> "And the policies of the States become wholly irrelevant to judicial inquiry when the United States,

> acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." (*United States* v. *Pink,* 315 U. S. 203, 233-4.)

A similar conflict between the public policy of New York and the provisions of the Litvinoff Assignment was presented in *United States* v. *Belmont,* 301 U. S. 324, where this Court stated in part:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning * * *. Within the field of its powers, whatever the United States rightfully undertakes it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." (301 U. S. 324, 331-2.)[8]

The Litvinoff Assignment was an executive agreement, which did not require and had not secured the consent of the Senate. (See *United States* v. *Pink,* 315 U. S. 203, 229.) If the pre-existing common law of a state cannot be enforced by the courts of that state against the contrary provisions of an executive agreement, *a fortiori* that common law cannot be enforced against the contrary provisions of a treaty.

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[8] This Court's decision in *U. S.* v. *Belmont, supra,* reversed the decision of the Circuit Court of Appeals for the Second Circuit, which, however, was admittedly based upon the common law of New York.

III

Both State and Federal Courts are Prohibited from Taking Affirmative Action Which Contravenes the Declared Foreign Policy of the United States of Eliminating Racial and Religious Discrimination.

Even conceding, *arguendo*, that Articles 55 (c) and 56 of the United Nations Charter are not self-executing, they nevertheless constitute an authoritative declaration of the foreign policy of the United States as committing this Government to the elimination of racial discrimination.

This policy has been reiterated in recent Executive Agreements and Declarations. Thus, one of the resolutions adopted on March 7, 1945, at the Chapultepec Inter-American Conference, committed the United States (as well as all other signatory powers) to "prevent * * * all acts which may provoke discrimination among individuals because of race or religion".[9]

Similarly Article 6 (c) of the Charter, ratified by the United States, establishing the Nuremberg International Militray Tribunal[10] stated that prosecutions on racial or religious grounds "whether or not in violation of the dominant law of the country where perpetrated," constituted a punishable international crime.

The Treaties of Peace between the Allied Powers (including the United States) and Italy, Roumania, Bulgaria and Hungary, all contain provisions whereby the latter na-

[9] Regulation XLI, reprinted in Report of the Delegation of the United States of America to the Inter-American Conference on Problems of War and Peace, Mexico City, Mexico, Department of State Publication 2497, pp. 39, 109.

tions agree not to impose any restrictions on their nationals for religious or racial reasons.[11]

Section III A 4 of the Executive Agreement between the United States, Russia, France and Great Britain, known as the Potsdam Declaration, provides for the abolition of all Nazi laws establishing racial or religious discrimination, "whether legal, administrative or otherwise."[12]

This Court may take judicial notice that in each of these instances the provisions for the protection of human rights were adopted primarily upon the insistence of the United States Government.

Former Under-Secretary of State Acheson has pointed out that "* * * discrimination against minority groups in this country has an adverse effect upon our relations with foreign countries." *Report of the President's Committee on Civil Rights* (1947), 146.

By treaty, executive agreement and declaration, the President and the Senate have committed this country to the firm policy of eliminating racial and religious discrimination, and, most particularly of eliminating governmental procedures which protect such discrimination. It is self-evident that enforcement by a governmental agency—a state court—of a covenant which denies to American citi-

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[10] Trial of War Criminals, Department of State Publication No. 2420, pp. 13, 16.

[11] See Department of State Publication 2743, European Series 21, Article 15 of the Italian Treaty; Article 2 of the Bulgarian, Hungarian and Roumanian Treaties.

[12] 13 Department of State Bulletin (No. 319—August 5, 1945) pp. 153-55.

ens because of color the right to occupy property cannot but embarrass the conduct of our foreign relations.[18]

Recent decisions by this Court have made it plain that the highest courts of the several states cannot, under the guise of declaring the public policy of their jurisdictions, interfere with contrary policy enunciated by the Federal Government, in its control of our foreign relations.

Thus in *Belmont* v. *United States,* 301 U. S. 324 and *United States* v. *Pink,* 315 U. S. 203, this Court reversed decisions based upon the admitted public policy of the State of New York as applied to certain types of extra-territorial judicial decrees, because of inconsistency between this policy and the inferences deduced by the Court from an Executive Agreement made by the President on his own responsibility.

In the *Belmont* case, *supra,* Mr. Justice Sutherland said:

> "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they

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[18] Breach of the obligations imposed upon this Government by Articles 55 (c) and 56 of the United Nations Charter and of the implied obligations imposed by the above stated Agreements would constitute an International Delinquency by the United States. See *Chorzow Factory Case,* Per. Ct. Int. Jus., Judgment, July 26, 1927, ser. a. No. 9, p. 21, 1 Hudson, World Court Reports (1934) 589, 602; *The Greco-Bulgarian Communities Case,* Per. Ct. Int. Jus., Advisory Opinion, July 31, 1930, ser. b. No. 17, p. 32, 2 Hudson, World Court Reports (1935) 640, 661; *The Free Zone Case,* Per. Ct. Int. Jus., Order, December 6, 1930, ser. a. No. 24, p. 12, 2 Hudson World Court Reports (1935) 448, 490.

> contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.' And while this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. * * * In respect of all international negotiations and compacts and in *respect of our foreign relations generally, state lines disappear.*" (301 U. S. 324, 331.) (Italics supplied.)

More recently, in *Bernstein* v. *Van Heyghen Frères Société Anonyme,* 163 Fed. (2d) 246 (C. C. A. 2d), Judge Learned Hand has intimated that a clear declaration of Federal policy as to the invalidity of racial confiscatory decrees enacted by the former Nazi Government of Germany would necessarily overrule conflicting provisions of the statutes and common law of the states and determine the title to property located therein. This is the inevitable conclusion to be drawn from the decisions of this Court in which it has been held that as "necessary concomitants of nationality", the Federal Government has plenary powers in the field of foreign relatons.

See:

United States v. *Curtiss-Wright Export Corporation,* 299 U. S. 304, 318;

Jones v. *United States,* 137 U. S. 202, 212;

Fong Yue Ting v. *United States,* 149 U. S. 698, 705.

It follows that this Court should reverse the decisions of the Supreme Courts of Missouri and Michigan in Nos. 72 and 87, as contrary to the express and binding foreign policy of the United States.

For the same reason, the decision of the Court of Appeals for the District of Columbia in Nos. 290 and 291 must be reversed. This Court has no occasion to concern itself with speculation as to the public policy of the State of Maryland at the end of the Eighteenth Century, when the District Cession Act was passed. For the public policy of the District is necessarily subject to constant modification, in accordance with relevant Federal action. It would be absurd to permit "local governmental bodies" in the Capital of the United States to create and enforce racial discriminations, which are contrary to the International policy of this government.

IV

Court Orders Enforcing Racial Restrictive Covenants Constitute Governmental Action.

The argument that the decree enforcing a racial restrictive covenant merely effectuates a contract between private parties and does not constitute "governmental" action cannot withstand analysis.

Judges cannot be reduced to the status of county clerks or land registrars the courts have always declined to enforce those contracts which they felt were "injurious to the interests of the public" and, therefore, "void on the grounds of public policy".[14]

In other words, implicit in every decision to enforce a contract is the premise that performance of that contract is not contrary to the public welfare. The frequently inarticulate premise of the law courts has been stated with great explicitness in the decisions of courts in equity, determining whether or not to enforce a formally valid contract by injunction or specific performance.[15]

The historical development of the law governing the enforcibility of restrictive covenants on the use and alien-

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[14] *Horner* v. *Graves*, 7 Bing 735, 743; see also 5 Williston, *Contracts* (1937 Ed.), pp. 4554-4568; Winfield, *Public Policy in the English Common Law* (1928), 42 Harv. L. Rev. 76.

[15] "In equity, * * * there must be the further inquiry whether it is against public policy to have the contract performed." 5 Williston, *Contracts* (1937 Ed.), n. 4 at p. 4001; see also, *Seattle Electric Co.* v. *Snoqualmie Falls Power Company*, 40 Wash. 380, 82 P. 713; *Cities Service Oil Co.* v. *Kuchuck*, 267 N. W. 322 (Wis.); *Rice* v. *D'Arville*, 162 Mass. 559, 39 N. E. 180; *Warner Brothers Pictures* v. *Nelson* (1937), 1 K. B. 209.

ability of land has always been characterized by constant reference to public policy. The running of the burden of restrictive agreements on land against subsequent purchasers and assignees was an invention of courts of equity in the middle of the nineteenth century. See *Tulk* v. *Moxhay*, 2 Phillips 774 (English Chancery, 1848). The judicial legislation embodied in this and similar decisions necessarily involved a conclusion that the objective obtained by the enforcement of restrictive covenants was of greater communal importance than preservation of the traditional policy of permitting owners freely to use their property in any lawful manner.

After the courts swept aside the doctrinal cobwebs, that restrictive covenants were enforcible only if they "touched and concerned" and/or if there was "privity of estate", they enunciated even more clearly the requirement that such restrictions could be enforced only if they promoted the wisest and best use of land. As stated by Justice Holmes in *Norcross* v. *James*:[16] "Equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement, every grant purporting to limit the use of land in favor of other land." The courts have been particularly cautious in enforcing covenants restraining alienation, because of the desire to insure maximum freedom of access to basic natural resources.

If further proof is required that the determination of whether or not to enforce restrictive covenants against

[16] 140 Mass. 182, 192; 2 N. E. 946. For an instructive general discussion of the law of restrictive covenants, see Clark, *Covenants and Other Interests Running with the Land* (2d Ed. 1947).

land is hedged about from start to finish with considerations of public policy, it is furnished in the decisions of the courts below.

Thus, the opinion of the Court of Appeals for the District of Columbia (in Nos. 290 and 291) expressly referred to the considerations of community policy, which, it was felt, made it desirable that the restrictions should be enforced.[17] Similarly, the Supreme Court of Michigan (in No. 87) and the Supreme Court of Missouri (in No. 72) expatiated upon the social benefits considered likely to result from maintenance of racial restrictions.[18]

The judge who enjoins the sale of realty or decrees the ejection of persons from their property pursuant to a racial covenant is performing a governmental function—as is revealed by an analysis of the consequences of such a decision.

If a land owner refuses to sell his land to a Negro, because of the prospective purchaser's color, it may be assumed that no question of constitutional law or treaty supremacy arises. Moreover, no question of affirmative governmental action is presented. Cf. *Civil Rights Cases,* 109 U. S. 3.

However, when one of the parties to a restrictive agreement or his assign sells land to a Negro (or an Indian, Chinese, Jew or Catholic) in violation of an agreement, and another party resorts to the courts in an attempt to prevent such violation—the agreement loses its essentially private character.

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[17] See R. 417-418.

[18] See R. 65-66 and R. 156-157, respectively.

Whether a court's jurisdiction is invoked by a public official or a private citizen, the judiciary is nonetheless an instrument of government. The decree of a court enjoining a Negro purchaser from occupying property, or its order ejecting him from property, constitutes more than ministerial action and carries with it the threat of enforcement by governmental sanction.

A sale made after the rendition of such a decree subjects the party against whom it has been directed to contempt proceedings—for defying the machinery of government. Moreover, in a case such as *Hurd* v. *Hodge* (No. 290), where the court orders the purchasers to evacuate their property, refusal by them to do so could result in their forcible dispossession by the local marshals.

Surely, it is immaterial that the courts below grounded their decisions upon their conceptions of the public policy of their jurisdictions. For no court in the United States has the right to enforce contracts which are palpably contrary to the terms and the spirit of International agreements entered into by the Federal Government.

It is plain that a state law or municipal ordinance establishing a racial restrictive zoning system would be illegal under Articles 55 (c) and 56 of the United Nations Charter, under the international Agreements referred to in Point III hereof, and under the Fourteenth Amendment. See *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C. S. D., Cal.); *Buchanan* v. *Warley,* 245 U. S. 60.

This Court cannot permit the judicial machinery of the United States to be used to protect a private ghetto system, which the state and municipalities (and even Congress) would be powerless to establish. For this Court has

repeatedly held that judicial action is equally the action of government and subject to constitutional and other limitations, whether it is based upon policy decisions implicit in the common law or policy decisions made explicit in statutes.

Thus, *Marsh* v. *Alabama,* 326 U. S. 501 involved an attempt by the State of Alabama to enforce its non-discriminatory trespass statute, at the instigation of a corporate property owner, who had barred a member of Jehovah's Witnesses from proselytizing on its premises. The state sought to justify its action, against invalidation for repugnance to the Fourteenth Amendment, on the theory that it was merely protecting a private land owner. This Court held that since the state, if it had been the owner of the property, could not constitutionally have restricted freedom of speech in this manner, it could not utilize its judicial power to effectuate a similar restriction imposed by a private owner.

See also:

Civil Rights Cases, 109 U. S. 3, 11, 17;
Ex Parte Virginia, 100 U. S. 339;
Steele v. *L. & N. Ry.,* 323 U. S. 192;
Cantwell v. *Connecticut,* 319 U. S. 296;
A. F. of L. v. *Swing,* 312 U. S. 321.

The decisions cited above have uniformly held that judicial rules of substantive law, including equity, are invalid when they conflict with the requirements of the Fourteenth Amendment.

By parallel reasoning, Article 6, Section 2 of the Constitution invalidates judicial rules of substantive law, in-

cluding equity, whether enunciated by the state or federal courts, when contrary to the provisions of Treaties or of Executive Agreements, made in the conduct of the Foreign Relations of the United States.

Through appropriate international agreements, the United States Government has condemned tribalistic theories of racial supremacy. The United States Government has firmly committed itself to the elimination of racial and religious discriminations affecting life, liberty and property. Hence the anachronistic decisions of the courts below should be reversed.

CONCLUSION

The decisions of the courts below should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

Nos. 72, 87, 290 and 291

J.D. SHELLEY, *et al., Petitioners,*
—v.—
LOUIS KRAEMER and FERN E. KRAEMER, *Respondents.*
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

ORSEL McGHEE and MINNIE S. McGHEE, *Petitioners,*
—v.—
BENJAMIN J. SIPES, *et al., Respondents.*
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

JAMES M. HURD, *et al., Petitioners,*
—v.—
FREDERIC E. HODGE, *et al., Respondents.*

RAPHAEL G. URICIOLO, *et al., Petitioners,*
—v.—
FREDERIC E. HODGE, *et al., Respondents.*
ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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IN WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of the American Civil Liberties Union

This brief is filed with the consent of the parties. The American Civil Liberties Union is a non-profit, non-partisan organization having a nation-wide membership of

persons of all racial origins and religious views, including citizens of Michigan and of Missouri, and residents of the District of Columbia. It is devoted to the preservation and protection of the fundamental liberties guaranteed citizens of this country by Federal and State constitutions.

We are filing a brief *amicus curiae* in these cases because the problem of racial discrimination in housing is a most serious threat to American civil liberties. In the development of a sound democracy it matters little whether the discrimination exercised be overt or discreet. In either event, basic freedoms guaranteed by the Bill of Rights are undermined.

Restrictive covenants of the character here in issue may on their face appear to be merely private expressions of intolerance. If they were merely such, they would not concern us, however deplorable the sentiments might be. When, however, the state is requested to enforce them to the injury of a minority, the problem becomes public and intimately involves the purposes for which this organization was established.

Statement of the Case

These are four suits, the common purpose of which is to enforce by injunction certain arrangements entered into by former owners of real property in the cities of St. Louis, Missouri, Detroit, Michigan, and Washington, D. C., pursuant to which such owners agreed, in the Missouri and Michigan cases, that the occupancy by Negroes of such property would not be permitted, and in the two cases involving property in Washington, D. C., that neither occupancy nor ownership by Negroes of such property would be permitted. In all these cases the purpose of the respective agreements was to maintain the respective com-

munities which they affected as white residential neighborhoods and to prevent Negroes from living in such communities.

In *Shelley* v. *Kraemer,* No. 72, the agreement was entered into in 1911, involved a St. Louis community, was to be effective for fifty years, and prohibited occupancy by any person not of the Caucasian race under penalty of forfeiture of the property.

In *McGhee* v. *Sipes,* No. 87, the agreement was entered into in 1934, involved a Detroit community, was to be effective for twenty-five years, and prohibited use or occupancy by any persons except those of the Caucasian race, without specifying a penalty. In this case, the instrument imposing the restriction recited that its purpose was "defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed." It was also provided that the restriction was not to become effective until at least eighty percent of the frontage on the block was subject to the restriction or a similar one.

In *Hurd* v. *Hodge* and *Urciolo* v. *Hodge,* Nos. 290 and 291, both cases involve the validity of the same restrictive deed covenant, involving a Washington, D. C. community, expressed in the following terms: "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars * * *, which shall be a lien against said property."

In all of these cases, through intermediate conveyances, title to the property in litigation became vested in a white person who sold to Negroes for occupancy by them. In each case, such a sale is attacked by another signer of the agreement (or a successor to his interest), or owner

of neighboring property, who has no property interest in the land sought to be transferred. In each case, the plaintiff demands that a state or local court issue an injunction to overturn the transfer and to evict the Negro purchaser from property for which he has paid and which he is now occupying.

In the St. Louis case, the defendant Negro purchasers were successful in the trial court on a non-federal ground, but the judgment was reversed on appeal and it was directed that the relief sought by the plaintiffs be granted. In the Detroit case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed on appeal, as was also done in the Washington, D. C., cases, where one Justice of the Court of Appeals for the District of Columbia dissented from the affirmance by that court.

POINT I

Enforcement by state or local court injunction of these racial restrictive covenants constitutes state action prohibited by the due process and equal protection clauses of the Fourteenth Amendment* and by the Civil Rights Laws passed by Congress in implementation thereof.

A. If such enforcement be deemed state action, it violates the due process and equal protection clauses of the Fourteenth Amendment, as well as the provisions of 8 U.S.C.A., §§41 and 42.

Congress enacted under the Thirteenth Amendment and re-enacted under the Fourteenth Amendment two

*Hereinafter, when general reference is made to the due process and equal protection clauses of the Fourteenth Amendment, it is to be understood as referring also to the due process clause of the Fifth Amendment, insofar as application to the two instant cases arising in the District of Columbia is concerned.

statutes which now appear as 8 U.S.C.A., Sections 41 and 42, which provide as follows:

> §41. Equal rights under the law.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> §42. Property rights of citizens.
>
> All 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.

This Court held in 1917 that a municipal ordinance which in substance forbade Negroes to occupy property in a predominantly White area, and forbade Whites to occupy property in a predominantly Negro area, was invalid as contravening the due process clause of the Fourteenth Amendment. *Buchanan* v. *Warley,* 245 U. S. 60. More specifically, the holding in the *Buchanan* case was that the Fourteenth Amendment protected the right to acquire, use and dispose of property free of restrictions on racial grounds, and in reaching this conclusion the Court relied upon the language of the statutes quoted above, particularly 8 U.S.C.A. §42.

This Court subsequently reaffirmed the principle of the *Buchanan* case, that state action discriminating against Negroes by segregating them as to housing facilities is

unconstitutional and in violation of the Civil Rights Laws. *Harmon* v. *Tyler,* 273 U. S. 668 (1927); *Richmond* v. *Deans,* 281 U. S. 704 (1930). It is true that these three cases all involved one particular form of discriminatory state action—*viz.,* legislation. We shall now turn to the problem of whether there is state action in the instant cases.

B. Such enforcement does constitute state action, and therefore is unconstitutional and invalid as contravening federal law.

What is here involved is judicial action. Such action, like any other governmental action, must be scrutinized in the light of the constitutional command. The enforcement by a court of substantive rules of common law in such a way as to deprive persons of civil liberties guaranteed by the Bill of Rights has repeatedly been held by this Court to be a denial of due process of law under the Fourteenth Amendment. *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769 (1942); *Bridges* v. *California,* 314 U. S. 252 (1941); *A. F. of L.* v. *Swing,* 312 U. S. 321 (1941); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).* Likewise, the action of a court in denying the equal protection of the laws is state action forbidden by the Four-

*Cf. *Corrigan* v. *Buckley,* 271 U. S. 323 (1926), discussed *infra,* where, in dismissing for want of jurisdiction an appeal from a decision of the Court of Appeals for the District of Columbia which had sustained the validity of a restrictive covenant, this Court implicitly recognized the obvious fact that the enforcement of such a covenant by a court of equity involves the application of substantive rules of common law. There the Court said: "* * * we cannot determine upon the merits the contentions earnestly pressed by the defendants in this Court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired." (271 U. S. 323, at 332.)

teenth Amendment. *Hysler* v. *Florida,* 315 U. S. 411 (1942); *Howard* v. *Fleming,* 191 U. S. 126 (1903).

The fact that the origin of the judicial action is a private covenant is wholly immaterial, since the covenant is not self-executing. As long as they remain mere private agreements, these racial restrictive covenants are not unconstitutional, but when the state acts to compel observance, it takes forbidden action.*

This Court has never decided the question whether state or local court injunctions enforcing racial restrictive covenants contravene constitutional guarantees.

Corrigan v. *Buckley,* 271 U. S. 323 (1926), which is pressed upon this Court as authority that the covenants in these cases can be enforced by injunction without transgressing constitutional guarantees, did not reach this question. It is submitted that the courts which have cited that case as such authority have misunderstood that decision and have accepted it as establishing a proposition of law which was not involved.

The only argument which the Court in the *Corrigan* case passed upon was that the covenant itself, as distinguished from the state action through which it was enforced, was unconstitutional under the Fifth, Thirteenth and Fourteenth Amendments. This the Court specifically stated:

> "Under the pleadings in the present case the only constitutional question was that arising under the assertions in the motion to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments." (329-30)

* See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Cal. L. Rev. 5, at 21 (1945).

The opinion of the Court further states clearly that the issue of state action was raised for the first time in the Supreme Court and was therefore not to be considered:

> "And, while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the court of appeals or in this court; and it likewise is lacking in substance." (331)

In such circumstances the statement that the contention "likewise is lacking in substance" is the clearest *dictum,* and should certainly not be binding upon this Court when the issue is properly presented. *Corrigan* v. *Buckley* was, of course, dismissed for want of jurisdiction, no constitutional question having been considered on the merits. Even for the narrow point decided, the case has been cited only once by this Court in the twenty years which have elapsed since its decision. *United States* v. *Johnson,* 327 U. S. 106, 113 (1946).

Moreover, the constitutional problem presented by restrictive covenants in the light of the fact that they are substantially zoning ordinances was not even mentioned, possibly because the fact situations which give rise to the constitutional question did not then exist and more probably because no substantial data had yet been collected on the subject. Twenty years ago, not only were

restrictive covenants far less prevalent than they are today, but the urbanization of the Negro was still a new social phenomenon and the problem was by no means so acute. See the dissenting opinion of Edgerton, J. in *Mays* v. *Burgess,* 147 F. (2d) 869, 876 *et seq.* (C.A.D.C., 1945), tracing the development of the problem in the District of Columbia alone since *Corrigan* v. *Buckley.*

The case was also decided before the importance of racial restrictive covenants was realized, and before the implications of a decision upholding such covenants could be fully understood. As late as 1922, the Report of the Chicago Commission on Race Relations, *The Negro in Chicago,* a study of the race riots in Chicago in 1919, which devoted some 125 pages (106-230) to the distribution of the Negro population and its housing problem, and discussed in some detail the methods used by property owners to exclude Negroes from White areas, did not seem to consider restrictive covenants worthy of mention as a factor in segregation. Evidently covenants were then not yet considered an important factor in this situation.*

The earliest reported case dealing with an anti-Negro restriction, *Queensborough Land Co.* v. *Cazeaux,* 136 La. 723, 67 So. 641, 1916B L.R.A. 1201 (1915) antedates *Corrigan* v. *Buckley* by little more than a decade. Less than half a dozen additional cases appear to have been

* The extent and importance of racial restrictive covenants today may be abundantly documented. We shall limit ourselves here to citing but three references: The recent Report of the President's Committee on Civil Rights, *"To Secure These Rights"*, U. S. Government Printing Office, Washington, D. C. (1947), pp. 68-70; dealing particularly with the situation in the District of Columbia, the dissenting opinion of Edgerton, J., in the Court of Appeals in two of the instant cases, *Hurd* v. *Hodge,* 162 F. (2d) 233, 242-246; and, perhaps most important, *"Social and Economic Aspects of Segregation and their Relations to Residential Race Restrictive Covenants"* (mimeographed publication, Sept., 1947), The American Council on Race Relations, 32 West Randolph St., Chicago 1, Ill. Chapter V of the last-mentioned publication, the most extensive recent study on the subject, deals specifically with the nature, extent, and operation of racial restrictive covenants.

reported in the period intervening.** And *Corrigan* v. *Buckley* was itself the first anti-Negro restriction case reported in the federal courts.

Furthermore, not only were the facts, as they were known at the time of *Corrigan* v. *Buckley,* too hazy to focus the constitutional problem of private racial zoning enforced by governmental authority as it is now presented, but the law with respect to state action constituting a violation of the Fourteenth Amendment was also far too little developed to present the question which is now before this Court. *United States* v. *Classic,* 313 U. S. 299 (1941), made necessary the reconsideration of *Grovey* v. *Townsend,* 295 U. S. 45 (1935), in the light of the cases which had previously upheld the rights of Negroes to vote. *Marsh* v. *Alabama,* 326 U. S. 501 (1946), discussed in detail *infra,* requires a first consideration on the merits, in the light of *Buchanan* v. *Warley,* of what *Corrigan* v. *Buckley* is alleged to have decided, but did not actually decide.

It is noteworthy that the earliest reported case in an American jurisdiction in which the validity of a racial restrictive covenant was considered, *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C., Calif., 1892), held that its enforcement by injunction would be in violation of the Fourteenth Amendment. That case appears to be the only federal case prior to *Corrigan* v. *Buckley* in which such a question was raised. There the restriction was directed against Chinese rather than Negroes, but the principles involved and the arguments presented were the same as

** *Koehler* v. *Rowland,* 275 Mo. 573, 205 S. W. 217 (1918); *Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680, 186 Pac. 596 (1919); *Title Guarantee and Trust Co.* v. *Garrott,* 42 Cal. App. 152 (1919); *Parmalee* v. *Morris,* 218 Mich. 625, 188 N. W. 330 (1922); *Porter* v. *Barrett,* 233 Mich. 373, 206 N. W. 532, 42 A.L.R. 1267 (1925), are the only such cases which counsel have discovered.

those in the anti-Negro cases. The usual "private action" argument to the effect that there was no legislation involved and hence that the Fourteenth Amendment did not apply was apparently pressed on the court. In answer the opinion stated:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, *which the courts may enforce.* Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by the contract of individual citizens than by legislation, *and the courts should no more enforce the one than the other.*" (Italics added.)

This case was, of course, decided almost a decade after the *Civil Rights Cases,* 109 U. S. 3 (1883), had established that the Fourteenth Amendment was protection only against governmental action and not against the activities of individuals in a private capacity. This makes even more clear what would have not been particularly doubtful from the language of the opinion alone, that the court did not rely on any mistaken interpretation of the Fourteenth Amendment, by reason of which the restrictive agreement could itself be void, but based the holding on a conclusion that judicial enforcement of the restriction would be prohibited governmental action. It is unnecessary to speculate on the question whether the court considered itself bound, in what may have been a

diversity case, by whatever restrictions would have been applicable to the action of state courts in the premises, for no different result could have been reached on the basis of the Fifth Amendment.

Gandolfo v. *Hartman* appears to have been overlooked in the decision of *Corrigan* v. *Buckley,* both in the Court of Appeals and in this Court. The persuasiveness of the views there stated, plus the fact that they seem to have been subsequently overlooked, is another reason for the reconsideration of the *Corrigan* v. *Buckley* dictum at this time.

Inasmuch as these covenants amount to racial zoning ordinances, the action of a state in enforcing them is prohibited state action regardless of the fact that the covenants do not originate through official action.

The constitutional problem presented by these cases is brought into focus only when the community function of racial restrictive covenants is recognized. These covenants are not simply agreements among individuals limiting the use of land owned by them; they are, in effect, racial zoning ordinances, an instrument through the use of which the exclusion of one or more races from living space in the community is sought to be achieved, and is in fact achieved. It is the application of the power of the state to accomplish this prohibited objective which, we urge, is unconstitutional state action. The constitutional issue is somewhat obscured when litigation is presented in the form of a single property owner seeking to enforce a covenant which perhaps extends only over a single block against a single Negro purchaser. Once it is recognized, however, that no plaintiff is, as a practical matter, interested merely in keeping a particular parcel from being occupied by a Negro family, and that

in the ordinary case the covenant would be at once abandoned if only such a limited objective could be achieved, it becomes apparent that in every case the plaintiff seeks through state action to establish and maintain a racial zoning ordinance. And thus the constitutional problem is unavoidably presented.*

Respondents urge that the enforcement of the covenants decreed below is distinguishable from what was condemned in *Buchanan* v. *Warley* because the restriction there was promulgated by public authority while in these cases it is the work of individuals. A short answer is that in both cases it is the machinery of government, and only the machinery of government, which makes the restriction effective. But in any event it is without legal consequence, in the determination of the constitutional issue, whether the discrimination is essentially that of private persons which the courts simply enforce or whether the state, by attaching the sanctions of its courts and officers to the covenants, is itself guilty of direct discrimination. The more recent decisions of this Court reveal an approach to the question of state action far too realistic to permit the court to be misled by the appearance of private action where essentially public matters are involved.

Marsh v. *Alabama,* 326 U. S. 501 (1946), is only the latest in a series of cases developing this approach. Such decisions have settled that the discriminatory use of public

* Although no exact figures seem to have been compiled to show the extent to which residential property in cities is covered by racial restrictive covenants, there appears to be an increased tendency toward the use of such covenants. See references cited in Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem,* 12 Univ. Chi. L. Rev. 198, 203-5 (1945). A recent study of the situation in an area constituting approximately two-thirds of the City of Chicago indicated that of the 155 sections contained in the area being studied, 70 were assigned to nonresidential use and, of the remaining 85, 30 were covenanted against Negroes. *American Council on Race Relations, op. cit. supra* note p. 9, at p. 106. Another recent survey found that of 315 subdivisions opened in the last ten years in Queens, Nassau, and southern Westchester Counties of New York State, 83% of all subdivisions of 75 houses or more are barred to Negroes. *Architectural Forum,* October, 1947, p. 16. Similar studies in other localities might be expected to result in similar findings.

or quasi-public powers by persons in whom such powers are vested either explicitly or implicitly is no less unconstitutional than direct legislation or other more obviously governmental action such as that under consideration in *Buchanan* v. *Warley.** In *Marsh* v. *Alabama,* it will be remembered, the proprietors of a company-owned town, who owned in fee all of the land in the town, including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. It had previously been held by this Court that the right to distribute such literature in the public streets was guaranteed by the First and Fourteenth Amendments. Marsh having refused to leave these "private" premises, she was convicted of violating a local statute which made trespass after warning a crime. This Court held that the conviction was state action in violation of the guarantees of the Fourteenth Amendment. In the light of the nature of the property in question and the purpose sought to be achieved through the exercise of the property rights, this Court held that Alabama was compelled by the Constitution to prefer the rights of freedom of press and of religion guaranteed by the Constitution to members of a community over rights flowing from ownership of property. In upholding Marsh's exercise of her constitutional rights on the "private" streets in question, this Court took the view that the property rights of the owners of a town, like the property rights of the owners of a highway dedicated to public use, are circumscribed by the constitutional rights of members of the public:

> "Whether a corporation or a municipality owns or possesses the town the public in either case has

* See Tefft, *Marsh* v. *Alabama*—A Suggestion Concerning Racial Restrictive Covenants, Vol. IV, National Bar J., No. 2, p. 133 (June, 1946).

> an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments of the Constitution." (326 U. S. 507-8)

The effect of this language is clear. When the state empowers members of the community to restrict the purposes to which their respective properties may be put and makes the powers of the state available for the enforcement of such restrictions, the members of the community are not justified in adopting for the entire community restrictions the effect of which is to deny constitutional rights. State law which enforces such action by punishing those who refuse to acquiesce in such a deprivation of constitutional rights violates the Fourteenth Amendment.

It is true that in *Marsh* v. *Alabama* this Court took cognizance of the fact that:

> "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." (326 U. S. 501, at 509).

It is also true that in that case the state had taken legislative action. On the other hand, in the instant cases the property interest asserted does not attain even the dignity of an interest in land. It is a mere covenant, and as such should be of little weight as against the constitutional guarantee here sought to be avoided in derogation of a right to housing, which Justice Holmes so aptly described as "a necessary of life." *Block* v. *Hirsh,* 256 U. S. 135, at 156 (1921).

It should be remembered, moreover, that the interests of plaintiffs in the instant cases are exceedingly remote, they seeking to enforce mere covenants as distinguished from interests in land, which covenants, moreover, cover land not their own.

In the *Marsh* case, the Court took pains to indicate that an important factor in its decision was that many persons live in such company-owned towns and that to uphold the view taken by the Alabama Supreme Court would tend to deprive all of such people of the constitutional guarantees of freedom of press and of religion (326 U. S. 508). Similar considerations are involved here, although we are dealing with different constitutional guarantees. Indeed, there is every reason to suppose that the number of persons affected by racial restrictive covenants far exceeds the number of the inhabitants of company-owned towns. To uphold the covenants in issue is not simply to deny the right to retain their property to the defendants in these particular suits. It is to permit in substance the promulgation of private laws, endowed with the most potent of governmental enforcing powers, and requiring the exclusion of an entire race and perhaps other races from housing facilities. And all this on the basis of the prejudices of individuals who have no property interest in the facilities so denied.

Having earlier in the opinion rejected the contention that the state action prohibiting and punishing the exercise of constitutional rights was justified because it had reference only to private property, with the statement that "Ownership does not always mean absolute dominion", this Court stated in summing up:

> "In our view the circumstances that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." (326 U. S. 509.)

Also relevant to decision in these restrictive covenant cases is the view taken by this Court in regard to state action in *Smith* v. *Allwright*, 321 U. S. 649 (1944). There it was also urged that effective discriminatory action by "private" agencies, permitted by a state, in a field in which the Constitution prohibits racial discrimination, was private action to which the guarantees of the Fourteenth Amendment had no relevance. There, it will be recalled, the case was that the Democratic Party of Texas had by resolution of its state convention excluded Negroes from membership and hence from participation in the Democratic primary. The Negro plaintiff was refused a Democratic ballot by the defendant election judges, and alleged that he had thereby been deprived of constitutional rights. The real question was whether it was state or private action that excluded Negroes from voting in the Democratic pri-

mary. Beginning with the proposition that the right to vote in primaries, as well as in general elections, is secured by the Constitution against denial on a racial basis through state action, this Court came to the conclusion that, where the state permitted the party to discriminate in the primary and then restricted the choice of the voters in the general election to the candidates so selected, the state by so adopting and enforcing the discrimination of the party made it state action. The Court said:

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. Lane *v.* Wilson, 307 U. S. 268, 275, 83 L. ed. 1281, 1287, 59 S. Ct. 872.
>
> "The privilege of membership in a party may be, as this Court said in Grovey *v.* Townsend, 295 U. S. 45, 55, 79 L. ed. 1292, 1297, 98 A.L.R. 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." (321 U. S. 664-5)

These restrictive covenant cases present a situation closely analogous to that before the Court in *Smith* v. *Allwright.* Here similarly it is clear, under the long-established and unquestioned rule of *Buchanan* v. *Warley, supra,* that the right to purchase and occupy property is protected by the Fourteenth Amendment against racial

discrimination through state authority. And here similarly it is urged that, although the state is implementing and enforcing the concerted acts of individuals, aimed at denying on racial grounds the right of ownership and occupancy of property, what is involved is essentially private action, with which the state has no concern. Yet here the state has not only, as in *Smith* v. *Allwright,* endorsed, adopted and enforced the discrimination practiced by individuals; it has effectuated the discrimination by the addition of sanctions of its own which it has superimposed on the discriminatory agreements created by the parties. As a practical matter, in the instant cases, it is only because such state sanctions have been imposed that these discriminatory arrangements are made effective. The power of the state imparts strength and vitality to discriminatory practices which might otherwise remain without force. That which the Constitution prevents the state from doing directly is accomplished by indirection if the state is permitted to seize upon the agreement of the parties as an excuse for the imposition of legal restraints which the parties without affirmative state intervention would be powerless to maintain.

True enough, in these cases the state has not by legislative action prohibited Negro use and occupancy of specific areas. It has not enacted an ordinance prohibiting such occupancy except with the consent of a specified number of persons of another race, as in *Harmon* v. *Tyler,* 273 U. S. 668 (1927). It has, however, vested the power to prohibit such occupancy in property owners for the time being, and this not simply as an ordinary incident of ownership of property, but regardless of such ownership and even in derogation of the ordinary property rights of other owners. It has permitted private persons to

make an essentially legislative determination effective for all time in the future, regardless of the wishes of subsequent owners of the land. Moreover, the state has by the action of its courts provided that, where Whites have agreed that Negroes should henceforth be excluded from a particular area, such an agreement once made shall have the force of a criminal sanction attached to a zoning law of similar purport. The power of the legislature to vest zoning functions in private groups or individuals has been closely limited. *Eubank* v. *Richmond,* 226 U. S. 137 (1912); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116 (1928). That it may be vested in private individuals to be used for purposes of implementing racial discrimination is, it is submitted, completely inconceivable.

This Court has recognized the existence of discriminatory governmental action in situations where the incidence of such action was far less direct than in these restrictive covenant cases. *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U. S. 192 (1944), involved a suit by a Negro railroad employee to enjoin the enforcement of a discriminatory agreement between a union and his employer. The Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member. The Supreme Court of Alabama affirmed a judgment dismissing the suit. This Court characterized the decision as follows:

> "It (the Alabama court) construed the statute, not as creating the relationship of principal and agent between the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working

> conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them." (323 U. S. 198) (parentheses added)

This Court, however, recognized that such a holding presented a constitutional question:

> "If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading."

It must be noted that the discrimination in the *Steele* case was far less clearly state action than that which is involved here. For in the restrictive covenant cases the discrimination cannot be effective, except through the intervention of the machinery of government. There was no showing in the *Steele* case that the union could not

have achieved its discriminatory purpose without the power specially conferred upon it by statute. Nonetheless, a construction of the statute as permitting the union to discriminate was conceived to be sufficient to raise a constitutional question. Far more obvious is the case where the discrimination is directly imposed by a state agency, without the aid of which private efforts to discriminate would be unavailing. If the Constitution prevents a labor union from imposing racial discrimination where the union is presumably capable of enforcing its policy without the aid of state action, it is difficult to understand how the Constitution can permit a court, itself the instrumentality of a state, to impose racial discrimination where the persons at whose behest the court acts are incapable of enforcing such a policy except with the aid of the court and the machinery of government which it sets in motion.

Of course, the Court in the *Steele* case, applying familiar principles of constitutional law, endeavored to avoid the constitutional question posed by Mr. Chief Justice Stone at the beginning of the opinion by construing the statute to require the union to use its bargaining powers in non-discriminatory fashion. But this result had to be reached through interpretation and despite the absence of specific language, so that Mr. Justice Murphy, concurring, suggested that such a construction could be justified only on the ground of necessity, because "otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment * * *" (323 U. S., at 208)

The right of individual property owners to dispose each of his own property as his individual interest or tastes may dictate, and to enforce such right through governmental aid, is not involved in these cases, and would not under ordinary circumstances raise any question of constitutionality.

The constitutional issue involved in these cases, although highly important, is nonetheless narrow. It must not be confused with the issue presented by the *Civil Rights Cases,* 109 U. S. 3 (1883) and the line of decisions following them. That issue would be presented if petitioners contended that the Constitution forbids an owner of land, acting individually, to refuse on racial grounds to permit a particular person to occupy or to purchase his property. The *Civil Rights Cases* hold that nothing in the Fourteenth Amendment prohibits such discrimination. Where the landlord resorts to judicial process to enforce his policy of racial discrimination, there is clearly state action and the doctrine of the *Civil Rights Cases* is not directly applicable. See Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 Lawyers Guild Rev. 627 (1946). But even such a case falls far short of presenting the constitutional issue raised when a racial restrictive covenant is enforced.

In each case it is necessary to strike a balance between the constitutional policies forbidding racial discrimination and the policies protecting the individual's free use and disposition of his private property. State action which enforces the preference of an individual in respect of his own parcel of land, where no substantial public interest is involved, may conceivably in such a balance be held free of the taint of unconstitutionality. Thus far, perhaps, the doctrine of the *Civil Rights Cases* may be pressed.

But even such a rule falls far short of sustaining racially discriminatory state action which prefers the exclusion of a race from a community to the non-recognition of the interest of an individual in his neighbor's or his neighbor's neighbor's property. The *Civil Rights Cases* clearly imply that a situation where the discrimination is established or enforced through state action falls within the ambit of protection afforded by the Fourteenth Amendment:

> "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 14th 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?*" (109 U. S. at 24; italics supplied.)

It cannot be successfully contended that these covenants may be enforced by the courts because they are contracts among private parties. The Negro defendants in restrictive covenant cases are not parties to the restrictions; indeed, in the cases before the Court, even their immediate grantors were not.

In any event, the contention that the courts must enforce these restrictions because they are contracts is question-

begging. The instances in which courts refuse to enforce contracts because of overriding rules of law which preclude enforcement are too numerous even to require illustration. The basic question in these cases is whether under the Constitution and in the circumstances surrounding these restrictive covenants, which give them scope and meaning, state courts are entitled to prefer notions of contract to Constitutional and statutory guarantees that property may be acquired without racial discrimination.

More specifically, granting *arguendo* the pertinence of the fact that in certain instances a party to a contract may surrender his own Constitutional right, the question is whether he can, by making a contract, surrender the Constitutional right *which someone else has in his freedom.* The excellent analysis of this question made recently by Professor Hale is particularly pertinent at this point:

> "It will be recalled that in *Truax* v. *Raich* (239 U. S. 33, 1915) it was said that the alien employee had 'manifest interest' in the freedom of the employer to employ him; and the state's destruction of that freedom was held to violate a constitutional right of the alien. And in *Buchanan* v. *Warley* a constitutional right of the white owner was held to be violated when the state denied freedom to a Negro to buy and occupy the property. By the same token, of course, if the state denied freedom to a white owner to sell to a Negro, it would violate the Negro's constitutional right to buy from a willing seller. The Negro has 'manifest interest' in the white owner's freedom to sell. But if the state court will compel the white man not to sell to a Negro, even though he is now willing to do so, because the white owner has covenanted with other white owners not to do so, the state is defeating the Negro's interest in the white man's freedom, to which the Negro is supposed to have a consti-

> tutional right. The state could not have done this to the Negro in the absence of the covenant. If it may do so by enforcing the covenant, the parties to the covenant have taken from him his constitutional right. He himself had no part in making the contract by virtue of which it has disappeared. The Negro has made no contract by which he has given up his constitutional right. The parties to the covenant have given up, not only their own constitutional rights, as they may well do, but also the constitutional rights of other people. * * *"
>
> Hale, *Rights under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals,* 6 Lawyers Guild Review 627, 633-4 (1946). (Parentheses added.)

Restrictive covenants may not be granted enforcement on the principle of reciprocity expressed to the effect that Negroes have an equal right to establish and enforce restrictive covenants barring White people from their areas. The allowance of such a theoretical right to exclude is no answer to a Negro family which cannot find a place to live. As Mr. Justice Cardozo, when Chief Judge of the New York Court of Appeals, said of another equalitarian provision of the Constitution (Article IV, Section 2):

> "We are not to whittle it down by refinement of exception or by implication of a reciprocal advantage that is merely trivial or specious."
>
> *Smith* v. *Loughman,* 245 N. Y. 486, 496, 157 N. E. 753, 757 (1927).

Furthermore, it may be noted, the immunity guaranteed by the equal protection clause of the Fourteenth Amendment is an individual one and may be claimed by an indi-

vidual regardless of how the restrictive power complained of affects other individuals. *McCabe* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 235 U. S. 151, 161, 162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1938).

POINT II

By virtue of the supremacy clause of the Federal Constitution, the United Nations Charter, a treaty of the United States which condemns racial discrimination, represents the overriding public policy of the United States. By virtue of this treaty, the restrictive covenants here in question must be stricken down by this Court as against the public policy of the United States.

A. The United Nations Charter, a treaty to which the United States was a party, establishes the public policy of the United States that there shall be no discrimination against individuals on account of race.

Under the Charter of the United Nations, ratified by the United States Senate, the United States solemnly undertook, together with the other signatories, to promote freedom for all, without distinction as to race or religion.

Thus, Article 55c of the Charter provides that:

> "* * * the United Nations shall promote * * * universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

And in conjunction therewith, Article 56 states:

> "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

The intention is clear.

This Court has never determined the validity of restrictive covenants in the light of the foregoing international commitments of the United States. Although not arising in the courts of the United States, a particularly pertinent case is *Re Drummond Wren,* 4 D.L.R. 674 (1945). That case is especially illuminating because in it the Supreme Court of Ontario held a restrictive covenant invalid on the ground, among others, that international pacts such as the Charter of the United Nations established a policy of non-discrimination.

The restrictive covenant involved in *Re Drummond Wren* was directed against Jews. In the instant case the covenant is directed against Negroes. The two types of covenants are equally repulsive and destructive of a free democratic society.

In that case Judge Mackay said:

> "My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate" (4 D.L.R., at p. 679).

It should be noted that Articles 55 and 56 of the United Nations Charter, above quoted, were specifically called to the attention of the Supreme Court of Missouri by petitioners in *Shelley* v. *Kraemer,* No. 72, in their Motion for Rehearing before that Court (Record, pp. 166 and 167).

B. By virtue of Article VI, clause 2 of the Federal Constitution, this public policy of the United States overrides any conflicting state or local policy rule.

Such undertakings by the United States in its international relations are declared by the Constitution to be the "supreme law of the land":

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Article VI, clause 2).

The overriding effect of treaties has been repeatedly and consistently demonstrated by decisions of this Court, since the early days of the Constitution. *Ware* v. *Hylton,* 3 Dall. 199 (1796); *Kennett* v. *Chambers,* 14 How. 38 (1852)*; *Hauenstein* v. *Lynham,* 100 U. S. 483 (1879); *Geofroy* v. *Riggs,* 133 U. S. 258 (1890); *Missouri* v. *Holland,* 252 U. S. 416 (1920); *Nielson* v. *Johnson,* 279 U. S. 47 (1929).

Special interest may attach to *U. S.* v. *Pink,* 315 U. S. 203 (1942), which involved something less than a treaty, and which declared New York law immaterial, in view of the Litvinov agreement between the United States and Russia, on the disposition to foreign creditors of the assets of a liquidated Russian insurance company; and to *Missouri* v. *Holland, supra,* upholding the Federal govern-

* This case was a principal basis of the decision in *Gandolfo* v. *Hartman,* 49 Fed. 181 (C. C., Calif., 1892), *supra,* denying enforcement of a covenant not to rent to Chinese persons. The court ruled that enforcement would violate the most favored nation clause of a treaty between the United States and China, whereby the United States Government promised that Chinese residing here would be treated with the same respect accorded to other peoples.

ment's right to enforce, as against the reserved rights of the states, the Migratory Bird Treaty Act enacted pursuant to treaty between the United States and Great Britain.

The history of *Missouri* v. *Holland* is instructive in its demonstration of a principle implicit in the cases cited above (particularly *Hauenstein* v. *Lynham*), namely, that the treaty-making power, unlike the legislative powers of Congress, is not limited by any concept of powers constitutionally reserved to the states. Before the Migratory Bird Treaty was signed, Congress had attempted regulation, purportedly under the commerce clause, and it was held to have exceeded its powers and violated states' rights. *U. S.* v. *Shauver,* 214 Fed. 154 (D. C., E. D. Ark. 1914); *U. S.* v. *McCullagh,* 221 Fed. 288 (D. C. Kans. 1915). But subsequently, in execution of treaty obligations, Congress could legislate on the same matter; the Migratory Bird Treaty Act was passed and sustained, in *Missouri* v. *Holland.*

It follows that this Court must void the restrictive covenants here in question as contrary to the overriding public policy of the United States.

Conclusion

The review by this Court of the instant cases is important and timely. The crucial importance for the individual of the right of access to housing on equal terms, without discrimination because of race, color, or creed, may be and has been extensively documented. We submit that it requires but little effort of the imagination, aided by what may be easily observed, to bring home to any fair-minded and thinking citizen what the moral and physical effects of such discrimination must be upon its victims. While we do not assert that the right of nondiscriminatory access to housing is as basic or entitled to as preferred a position as the freedoms of speech, press, assembly and religion, it is nevertheless clear, if the measure of relative importance to the individual and the community be applied, that this right must be placed not far behind.

It is appropriate that this Court be now asked to do here what it has recently done in other cases of comparable importance—to strip away the transparent mask of "private action" and to recognize the reality of effective governmental coercion underneath. Coming before this Court, as it does, at a time when all agencies of our Government have just been called upon to strengthen the enforcement of basic civil rights,* we are confident that this issue will be decided in a way to increase public confidence that such rights are now as ever the safe wards of those most directly concerned with their protection and support.

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* *"To Secure These Rights"*, Report of the President's Committee on Civil Rights, U. S. Government Printing Office, Washington, D. C. (1947). With particular reference to the extent and effect of racial restrictive covenants, see *id.*, pp. 68-70.

We respectfully submit that court enforcement by injunction of the restrictive covenants in question is plainly unconstitutional and in contravention of Federal law, and that the covenants themselves are void as contrary to the public policy of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72, 87, 290 and 291

J.D. SHELLEY, *et al., Petitioners,*

—v.—

LOUIS KRAEMER, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

ORSEL McGHEE, *et al., Petitioners,*

—v.—

BENJAMIN J. SIPES, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

JAMES M. HURD, *et al., Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

RAPHAEL G. URCIOLO, *et al., Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED BRIEF IN BEHALF OF American Jewish Committee, B'nai B'rith (Anti-Defamation League), Jewish War Veterans of the United States of America, Jewish Labor Committee, As Amici Curiae

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IN THE

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J. D. SHELLEY, et al., Petitioners,

v.

LOUIS KRAEMER and FERN E. KRAEMER, Respondents.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

No. 87

ORSEL McGHEE and MINNIE S. McGHEE, his wife, Petitioners,

v.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A COON and ADDIE A. COON, et al., Respondents.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

No. 290

JAMES M. HURD and MARY I. HURD, Petitioners,

v.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

No. 291

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, HERBERT B. SAVAGE, et al., Petitioners,

v.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, VICTORIA DeRITA, et al., Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

CONSOLIDATED BRIEF IN BEHALF OF

American Jewish Committee
B'nai B'rith (Anti-Defamation League)
Jewish War Veterans of the United States of America
Jewish Labor Committee
As *Amici Curiae*

Interest of the Amici

This brief is filed on behalf of the following organizations:[1]

American Jewish Committee
B'nai B'rith (Anti-Defamation League)
Jewish Labor Committee
Jewish War Veterans of the United States of America

Each of these organizations has among its fundamental tenets the preservation of the rights guaranteed every citizen by our Federal Constitution. Each has recognized that any invasion of the democratic right of any individual or group undermines the foundation of our democratic system.

Organizations dedicated to the defense of American democracy cannot stand by silently while the residential areas of our cities and towns are overrun by a spreading flood of restrictive covenants banning occupancy by members of specific racial or religious groups. The dangers to our democratic way of life arising from racial residential segregation are obvious. Organizations such as those sponsoring this brief cannot acquiesce in the application in America of discriminatory practices to so vital an aspect of our economy as housing.

In 1890 San Francisco sought to achieve racial zoning by adopting an ordinance barring Chinese from living in certain areas of the city. This was followed by the enactment of similar ordinances directed against Negroes in several southern and border cities. In 1917, however, a holding by this court that such ordinances were unconsti-

[1] A short description of each of the organizations is attached as an appendix to this brief.

tutional placed an insurmountable obstacle in the way of efforts to achieve racial residential segregation by legislation. Thereafter, those seeking to extend the pattern of racial segregation found a new and better means of achieving their goal. They seized upon the ancient and well established device of the private restrictive covenant barring from a neighborhood uses detrimental to the health or comfort of those residing in it, such as glue or soap factories, livery stables, charnel houses, and brothels. They adapted the private restrictive covenant to their needs, revising it to bar—instead of specified uses—occupancy by those racial, religious, or ethnic groups which they considered undesirable. The use of this new technique spread with ominous rapidity, primarily because many state courts upheld and enforced the new covenants; nearly always the courts failed to distinguish between a covenant barring an obnoxious use and a covenant barring residential occupancy by members of specific racial or religious groups.

The racial restrictive covenant is an instrument of bigotry giving aid and comfort to racial and religious prejudice. Implicit in such a covenant is the anti-democratic and false racist doctrine that undesirable social traits are an attribute not of the individual but of a racial or religious group. Such covenants classify an individual not on the basis of his behavior, but on the basis of his racial origin. They would deny the free choice of a home to a Carver, Cardozo, or Lin Yutang merely because of color or religion. They ascribe social objectionability to unborn generations.

Slums and overcrowding are the inescapable concomitants of restrictive covenants and racial segregation. Death, disease and crime are the notorious spawn of overcrowding. Inter-group stresses and tensions which threaten our democratic state arise inevitably when racial or reli-

gious groups find themselves isolated within the community and forced to live in circumscribed segregated areas. Clearly, the growing fusion of interest of America's varied racial, religious, and ethnic groups, the free interchange of varying cultural viewpoints, the development of mutual tolerance and confidence among our citizens—requisites for the strengthening and fulfillment of our democracy—are dangerously impeded by restrictive covenants. It is not surprising that the President's Committee On Civil Rights found that "segregation is an obstacle to establishing harmonious relationships among groups" and recommended vigorous action to outlaw restrictive covenants.

Although Negroes have suffered most from the widespread use of restrictive covenants, many other groups including Mexicans, Spanish Americans, Orientals, Armenians, Hindus, Syrians, Turks, Jews, and Catholics have found such covenants barring them from many residential areas in many cities. In a recent case in California a full-blooded American Indian was ordered by the court to vacate his home because of a limitation upon occupancy to Caucasians only. In a Maryland suburb of Washington, D. C., a group of home owners, seeking to enforce a restrictive covenant against Jews, petitioned the Maryland court for a decree directing a non-Jewish wife to oust her Jewish husband from their jointly owned home. This is the reductio ad absurdum to which racial restrictive covenants lead.

The impact of the racial restrictive covenant does not end at the water's edge. In many lands the prestige of American democracy suffers because our practice in the field of race relations does not always square with our ideals. Even now, democracy is engaged in a world-wide struggle to demonstrate its supremacy over contending political idealogies. The refusal of judicial support for

racial restrictive covenants will remove a powerful propaganda weapon from the hands of democracy's opponents.

The organizations sponsoring this brief are peculiarly alert to the dangers to democracy arising from racial or religious residential segregation. Jewish experience under European despotism gave rise to the word "ghetto". The threat of revival of that institution—implicit in the mushroom growth in almost every major American city of racial restrictive covenants—demands intercession in these cases.

All parties to the cases for review herein have given their consent to the filing of this brief *amicus curiae.*

Opinions Below

The opinion of the Supreme Court of Missouri in *Shelley* v. *Kraemer* (R. 153) is reported in 198 S. W. (2d) 679.

The opinion of the Supreme Court of Michigan in *McGhee* v. *Sipes* (R. 87) is reported in 316 Mich. 614, 25 N. W. (2d) 638.

The opinion of the United States Court of Appeals in *Hurd* v. *Hodge* and *Urciolo* v. *Hodge* (R. 417-432) is reported in 162 F. (2d) 233.

Jurisdiction

Jurisdiction of this Court of both *Shelley* v. *Kraemer* (No. 72) and *McGhee* v. *Sipes* (No. 87) is invoked under Section 237 of the Judicial Code (28 U. S. C., Sec. 344 (b)).

Jurisdiction of *Hurd* v. *Hodge* (No. 290) and of *Urciolo* v. *Hodge* (No. 291) is invoked under Section 240 of the Judicial Code (28 U. S. C., Sec. 347 (a)).

The judgment sought to be reviewed in *Shelley* v. *Kraemer* was entered by the Supreme Court of the State of Missouri on December 9, 1946. Motion for rehearing was filed on December 24, 1946, and denied on January 13, 1947. Petition for certiorari was filed in this Court on April 21, 1947, and was granted June 23, 1947.

The judgment sought to be reviewed in *McGhee* v. *Sipes* was entered in the Supreme Court of the State of Michigan on January 7, 1947. Application for rehearing was filed on January 23, 1947, and denied March 3, 1947. Petition for certiorari was filed in this Court on May 10, 1947, and granted June 23, 1947.

The judgments sought to be reviewed in *Hurd* v. *Hodge* and *Urciolo* v. *Hodge* were entered by the United States Court of Appeals for the District of Columbia on May 26, 1947. Motion for rehearing was denied June 23, 1947. Consolidated petitions for certiorari, filed on August 22, 1947, were granted on October 20, 1947.

Statement of Facts

There are four cases herein involving the validity of judicial enforcement of racial restrictive covenants: one originating in St. Louis, Missouri; one from Detroit, Michigan; and two consolidated actions from the District of Columbia. The purpose of the covenants was to preserve the respective neighborhoods for white residents only, and to prevent the occupation of the restricted property by Negroes.

In *Shelley* v. *Kraemer*, No. 72, the Missouri case, the covenant prohibiting ownership and occupancy was made in 1911 and was to run for fifty years. The trial court decided in favor of the Negro purchasers, but this judg-

ment was reversed on appeal with direction that a decree be entered holding the restrictions valid and granting the relief sought by the plaintiffs.

In *McGhee* v. *Sipes,* No. 87, the Michigan case, the covenant, made in 1934, was to run for twenty-five years. It prohibited use and occupancy by non-Caucasians, and was not to become effective until at least eighty percent of the frontage on the block was covered by the same or a similar restriction. The trial court granted the relief sought by the plaintiff, and the judgment was affirmed on appeal.

In *Hurd* v. *Hodge,* No. 290, and *Urciolo* v. *Hodge,* No. 291, the consolidated District of Columbia cases, the restrictions were against alienation to Negroes, and were perpetual. Urciolo, one of the petitioners, is white; the others are Negroes. The trial court rendered judgment, divesting the Negro purchasers of title, enjoining the white owners from renting, leasing, or conveying the property to Negroes, and ordering the Negro purchasers to vacate the premises. This was affirmed on appeal, with Mr. Justice Edgerton dissenting.

Summary of the Argument

These cases present to this Court squarely for the first time the validity of judicial enforcement of restrictive covenants that bar the sale to or the occupancy by Negroes of real property. The following arguments will be urged by this brief:

I. The decrees of the Missouri and Michigan Courts deprived the petitioners of their property without due process of law in violation of the Fourteenth Amendment

to the Constitution; and were in violation of Sections 1977 and 1978 of the Revised Statutes (8 U. S. C., Secs. 41, 42).

II. The decrees of the Missouri and Michigan Courts denied to the petitioners equal protection of the law in violation of the Fourteenth Amendment to the Constitution.

III. The decrees of the District of Columbia Court deprived the petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution; and were in violation of Section 1978 of the Revised Statutes (8 U. S. C., Sec. 42).

IV. The questions raised by the present cases have never been decided by this Court. The case of *Corrigan* v. *Buckley,* 271 U. S. 323, frequently relied on to sustain the constitutionality of racial restrictive covenants, did not decide the questions presented herein.

Inasmuch as the many more questions involved in these cases are fully covered in the main briefs submitted by the petitioners herein, we are confining ourselves in this *amicus* brief to the invalidity of judicial enforcement of racial restrictive covenants under the Fifth and Fourteenth Amendments of the Constitution, and under Sections 1977 and 1978 of the Revised Statutes (8 U. S. C., Secs. 41, 42).

I

The judicial enforcement of racial restrictive covenants in the Michigan and Missouri cases is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution; and of Sections 1977 and 1978 of the Revised Statutes (8 U. S. C., Secs. 41, 42).

A. The right of a citizen to acquire, own, enjoy and dispose of property without discrimination as to race or color is a federal civil right protected by the Constitution.

Section 1977, Revised Statutes (8 U. S. C., Sec. 41) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1978, Revised Statutes (8 U. S. C., Sec. 42) provides:

> All 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.

The statutes are a declaration by Congress of the right of all citizens to acquire and enjoy property without discrimination as to race or color. If a white man can make a valid contract to purchase real property, Congress says that a Negro can make the same contract. If a white man

has a right to acquire and own a particular piece of property the language of Section 1978 indicates that a Negro has the identical right.

These sections were derived from the Civil Rights Acts of 1866-75 which were under consideration in the *Civil Rights Cases,* 109 U. S. 3. In his opinion, Mr. Justice Bradley asserted that there were certain "fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential difference between freedom and slavery." Among the rights "which are the essence of civil freedom" is the right, the Court said, to "purchase, lease, sell and convey property" (p. 22).

These rights, the *Civil Rights Cases* held, cannot be protected by the federal government under the Fourteenth Amendment from infringement by individual action, "unsupported by state authority in the shape of law, customs, or *judicial* or executive proceedings" (p. 17). (Italics added.) They are, nevertheless, among the constitutional rights of all citizens of the United States. It will appear later that the infringement in the present cases was supported "by state authority * * * in the shape of * * * judicial * * * proceedings."

In *Buchanan* v. *Warley,* 245 U. S. 60, the City of Louisville, Kentucky, enacted a municipal ordinance that forbade any white person or Negro to reside on any city block in which the majority of houses were occupied by persons of the other color. This Court held that the ordinance violated the due process clause of the Fourteenth Amendment. It was declared in that case that the right to dispose of one's property without discrimination as to race or color is a civil right protected by the Constitution. The Court said (p. 81):

> The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person.
>
> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

It appears to be settled from the foregoing that the right to acquire, own, and dispose of property without discrimination as to race or color is a civil right that is an incident of national citizenship and is guaranteed by the Constitution.

In all cases herein the property involved had been deeded to the Negro petitioners.[1] In the *Missouri* and *District of Columbia* cases there were restrictions against ownership as well as occupancy; the purchasers held the property subject to being divested of title if the restrictions were upheld. In the *Michigan* case there was only a restriction against occupancy. In the *Michigan* case, therefore, the petitioner acquired valid, legal title, and was possessed of all the incidents of ownership. The property was residential property in a residential neighborhood, and its use as a home was a proper, legal use. He could have rented it to white occupants. He was forbidden, because of his color, to occupy it himself.

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[1] The petitioner Urciolo in *Urciolo* v. *Hodge*, No. 291, is white (R. 380). Hurd, in *Hurd* v. *Hodge*, No. 290, at the trial claimed to be a Mohawk Indian (R. 238), but was found by the court to be a Negro (R. 380).

In *Buchanan* v. *Warley, supra,* the City of Louisville sought to accomplish the same result by means of a municipal ordinance. The Court said, at page 74:[2]

> The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property * * * Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.

That the right to use one's property for a lawful, proper purpose is an incident of ownership, and as such is within the protection of the constitutional guaranty of due process, is conclusively settled. Particularly is this true of the right to use residential property for residential purposes.[3] This was clearly recognized in *Buchanan* v. *Warley, supra,* which stated that occupancy was an incident of the right of purchase or sale of real property (p. 75).

It is significant that all of the restrictions upon real property enforcible by the police power such as the "livery stables, brickyards, and the like," mentioned in *Buchanan* v. *Warley* as the legitimate subject of restrictive cove-

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[2] The due process clause was relied upon because the action was brought by a white vendor who was deprived by the ordinance of the right to dispose of his property. There can be no doubt that the same result would have been reached under the due process and equal protection clauses had the action been brought by a Negro purchaser.

[3] *Terrace* v. *Thompson,* 263 U. S. 197, 215 (citing *Buchanan* v. *Warley, supra,* 245 U. S. 60, and *Holden* v. *Hardy,* 169 U. S. 366, 391); *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge,* 278 U. S. 116, 121; *Sterling* v. *Constantin,* 287 U. S. 378; *Hall* v. *DeCuir,* 95 U. S. 485, 508; *Holmes* v. *Gravenhorst,* 263 N. Y. 148, 152.

nants, were restrictions upon use. They were burdens imposed upon the property not upon the occupants. A blacksmith, a glue maker, or a livery stable proprietor, may be lawfully restricted in the pursuit of his respective occupation in a particular neighborhood but no one will deny that he may live, without legal interference, where anyone else may live.

That this is one of the rights protected by the Fourteenth Amendment, and that cannot be taken away without denial of due process, seems to be settled beyond question. In *Allgeyer* v. *State of Louisiana*, 165 U. S. 578, the Court said (p. 589):

> The liberty mentioned in that amendment [the Fourteenth] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen * * * to live and work where he will.

This distinction between limitations on use and limitations on occupancy is important. The one imposes a servitude upon property which, at times, is legally permissible. The other imposes a servitude upon the individual which is repugnant to the basic concepts of the Constitution. It takes away from him, solely because of the color of his skin, a right which the *Allgeyer* case says is guaranteed to him by the Fourteenth Amendment—the right to live where he will. The language of this Court in *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192, 203, is equally pertinent to the present cases:

> Here the discriminations based on race alone are obviously irrelevant and invidious.

It may be claimed that the cases sustaining statutes prohibiting aliens from owning real property are in point here. Let us consider this for a moment.

The leading case is *Terrace* v. *Thompson,* 263 U. S. 197, in which the Court had under consideration a provision of the Constitution of the State of Washington that prohibited the "ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States." There was likewise involved a statute, the Anti-Alien Land Law, forbidding the use of property by a non-declarant alien.

Terrace, a citizen of the United States, wished to lease certain agricultural land to a Japanese. He, therefore, brought suit against the Attorney General to enjoin him from enforcing the Anti-Alien Land Law on the ground that it conflicted with the due process and equal protection clauses of the Fourteenth Amendment.

This Court overruled the contention, and in so doing made perfectly clear the rationale of its decision. The essential difference between aliens and non-aliens, insofar as legislation of this kind is concerned, lies in their respective obligation of loyalty to the government.

"The rights, privileges and duties of aliens differ widely from those of citizens," the Court said, "and those of alien declarants differ substantially from those of non-declarants" (p. 218). It then quoted the following with approval from the opinion of the court below:[4]

> It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens (pp. 220, 221).

[4] 274 Fed. 841, 849.

It is clear that the legislation was sustained as a justified protective measure. The classification into citizens, declarant aliens, and non-declarant aliens was reasonable and not arbitrary. A state has a right to impose standards of loyalty upon those who would hold land within its borders. It is not unreasonable to put into a particular category those aliens who have shown so little devotion to our institutions as to have refrained from seeking citizenship.

As to those who are barred from naturalization by congressional enactment, the Court said: "The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable."

There is no doubt that a law that makes reasonable, non-arbitrary classifications does not deny equal protection.[5] But discrimination based upon race or color does not come within that rule. Unless it can be determined that a man's loyalty can be measured by his ancestry or the color of his skin, classification based upon those considerations is unreasonable and arbitrary.

If the State of Washington statute, instead of prohibiting non-declarant aliens from owning or leasing property, had barred Negroes, it would have been unconstitutional under *Buchanan* v. *Warley*. This seems to be a complete refutation of the pertinency of *Terrace* v. *Thompson*.

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[5] *Truax* v. *Corrigan*, 257 U. S. 312, 337.

B. State action depriving a person of the ownership, use or occupancy of property solely because of his race or color is forbidden by the due process clause of the Fourteenth Amendment.

The issue in *Buchanan* v. *Warley,* 245 U. S. 60, was stated by the Court in these words (p. 75):

> The concrete question here is: May the occupancy and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?

And again, at page 78:

> In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting the occupation of it for the sole reason that the purchaser is a person of color, intending to occupy the premises as a place of residence?

The answer to these questions is emphatic and final:

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case, the ordinance cannot stand (p. 82).

The proposition that such discriminatory action by the states is forbidden is thus definitely settled by *Buchanan* v. *Warley.*[6]

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[6] *Harmon* v. *Tyler,* 273 U. S. 668; *Richmond* v. *Deans,* 281 U. S. 704; *Carey* v. *City of Atlanta,* 143 Ga. 192, 84 S. E. 456; *Jackson* v. *State,* 132 Md. 311, 103 A. 910; *Clinard* v. *City of Winston-Salem,* 217 N. C. 119, 6 S. E. (2d) 867; *Liberty Annex Corp.* v. *City of Dallas,* 289 S. W. 1067.

C. The decrees of the state courts were forbidden state action and therefore violated the due process clause of the Fourteenth Amendment.

(a)

Judicial action is state action.

Thus far we have shown that the right to buy, sell, and occupy real property without discrimination as to race or color is a civil right guaranteed and protected by the Constitution. It is also clear that any legislation that would take away that right would be forbidden state action and therefore unconstitutional.

To paraphrase the language of *Marsh* v. *Alabama,* 326 U. S. 501, 505, if the parties to these racial covenants "owned all the homes, and all the stores, and all the streets, and all the sidewalks, all those owners together could not have set up a municipal government with sufficient power to pass an ordinance" barring the ownership, use, and alienation of real property on the ground of color.

The question, therefore, is, can private parties, by making a contract, empower the judiciary to do that which is beyond the sovereign power of the state to do?

It has long been settled that the judicial action of a state court is the action of the state itself, and that when such action contravenes the Constitution it comes within the purview of the Fourteenth Amendment.

As far back as 1879 this Court said in *Virginia* v. *Rives,* 100 U. S. 313, 318:

> It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another.

In *Ex Parte Virginia,* 100 U. S. 339, the same year, the Court said (p. 346):

> They [the prohibitions of the Fourteenth Amendment] have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.

These were cases involving the right of Negroes to serve as jurors. This Court has not hesitated to set aside a determination of the highest Court of a state, either on matters of procedure or substantive law, when it manifestly violated the provisions of the Fourteenth Amendment, and when a far reaching deprivation of Constitutional rights was implicit in the decision.

In *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, an application for an injunction to restrain the collection of an alleged discriminatory tax was denied because the plaintiff had not exhausted his remedies before the tax commissioner. An earlier decision of the Missouri court had held that the tax commissioner was without power to grant the relief sought. This ruling was later reversed, but in the meantime plaintiff's time to file a complaint with the tax commissioner had expired, and he was deprived of his day in court. Mr. Justice Brandeis, writing the opinion of this Court, said, at pages 679, 680:

> If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious * * * The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid * * * state statute. The federal guaranty of due process extends to state action through its judicial, as

> well as through its legislative, executive, or administrative branch of government.

In *Powell* v. *Alabama,* 287 U. S. 45, the defendants had been convicted of rape without the proper assignment by the court of counsel. This Court reversed the judgment of the Supreme Court of Alabama affirming the conviction because by judicial action due process had been denied to the defendants by the State of Alabama.

In *Bridges* v. *California,* 314 U. S. 252, the defendant was convicted of contempt under the common law of the state. This Court reversed that sentence because the action of the California court denied to the defendant the right of free speech protected by the Fourteenth Amendment.

In *Cantwell* v. *Connecticut,* 310 U. S. 296, this Court likewise set aside a conviction because the defendant had been denied the right of free speech guaranteed by the Fourteenth Amendment. In that case the conviction was for the common law offense of inciting a breach of the peace, and this Court overruled the judgment of the Connecticut court in interpreting its own judge-made law.

The statement of the Court on this point in *Twining* v. *New Jersey,* 211 U. S. 78, has been widely quoted. In that case the question involved was the right of a trial judge in a criminal case to comment upon the failure of a defendant to testify in his own behalf. Although the Court decided that the comments did not constitute a denial of due process, it stated (pp. 90, 91):

> The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the state.

Due process of law means something more than mere compliance with the forms and rules of legal procedure.

A man might have a fair trial; the judge might be careful and accurate in his application to the case of the state law; yet, if the ultimate decision results in the denial of a constitutionally protected right there has been an infringement of the Fourteenth Amendment.

This was clearly expressed in *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, in which it was claimed that property had been taken from the railroad in condemnation proceedings by the City of Chicago without adequate compensation. The Court said (pp. 234, 235):

> But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form * * * the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the State within the meaning of that amendment.

(b)

The decrees herein are forbidden state action and therefore violate the Fourteenth Amendment.

We do not contend that the procedural rights of the litigants in these cases were not scrupulously protected, nor do we contend that the trial courts were without jurisdiction to adjudicate private contracts between individuals. It is the *result* of the adjudication that we challenge. The decrees deprived the petitioners of fundamental constitutional rights. They were, therefore, forbidden state action.

We do not claim that all state judicial action is reviewable by this Court, nor do we ask that the Court go beyond the issues presently before it. There is no necessity here further to extend "the vague contours" of the due process clause.[7] The Court said in *Strauder* v. *West Virginia*,[8] "The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible."

All that we are asking the Court to decide here is that *when a decree of a state court accomplishes a result forbidden to the state legislature, and deprives a person because of his race, color, or religion, of a fundamental right guaranteed and protected by the Constitution, it is forbidden state action and invalid under the Fourteenth Amendment.*

We submit that this is precisely the effect of the decrees in the present cases. We have shown that the right of a person to buy, sell, occupy, and enjoy property, and "to live and work where he will" is guaranteed and protected by the Constitution. It is apparent that the decrees herein take that right away.

It has been urged that the *Civil Rights Cases*, 109 U. S. 3, is controlling. The decision in those cases held that racial discrimination by individuals did not raise a reviewable federal question. The discriminatory acts, the barring of Negroes from inns and places of public amusement, were complete and self-enforcing; there was no need to invoke the aid of the government. The Court indicated clearly that if the discrimination, to be effective, needed the support of judicial action the situation would be different. Mr. Justice Bradley said, at page 17:

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[7] Holmes J., dissenting opinion in *Adkins* v. *Children's Hospital*, 261 U. S. 525.

[8] 100 U. S. 303, 310.

> 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.* (Italics added.)

If, as the above language indicates, the impairment of civil rights by individuals comes within the prohibitions of the Fourteenth Amendment when supported by judicial proceedings, it follows that the impairment of constitutional rights by the judicial enforcement of private contracts, such as these restrictive covenants, likewise comes under the ban.

There is a further consideration that should be mentioned. If individuals, by private agreement, can establish racially segregated areas, they are virtually performing a legislative act. This was the effect of the ordinance held unconstitutional in *Harmon v. Tyler.*[9]

In that case a New Orleans ordinance barred whites or Negroes from "any community or portion of the city * * * except on the written consent of a majority of the opposite race inhabiting such community or portion of the city."[10] In effect, it conferred local option upon the residents of New Orleans to establish racial zoning restrictions. It was held unconstitutional on the authority of *Buchanan* v. *Warley.* Surely the absence of such ordinance in the present case cannot confer greater power upon the contracting parties than they would have had under an ordinance.

The argument that a state cannot do by judicial action that which it is forbidden to do by legislation is succinctly

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[9] 273 U. S. 668.

[10] Quoted in *Tyler* v. *Harmon,* 158 La. 439, 440.

and convincingly stated by Mr. Justice Edgerton in his dissenting opinion in the court below in *Hurd* v. *Hodge*:[11]

> It is strangely inconsistent to hold as this court does that although no legislature can authorize a court, even for a moment, to prevent Negroes from acquiring and using particular property, a mere owner of property at a given moment can authorize a court to do so for all time. Either the due process clauses of the Constitution do not forbid governments to prevent Negroes from acquiring and using particular property, in which case they do not forbid courts to enforce racial restrictions which statutes have imposed; or these clauses do forbid governments to prevent Negroes from acquiring and using particular property, in which case they forbid courts to enforce racial restrictions which covenants have imposed. *Buchanan* v. *Warley* rules out the first alternative. As Judge Ross, the donor of the American Bar Association's Ross Essay Prize, said long ago in refusing to enforce by injunction a covenant against transfers to Chinese: "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it * * * to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce * * * The courts should no more enforce the one than the other."[12]

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[11] 162 F. (2d) 233, 240.

[12] *Gandolfo* v. *Hartman*, 49 Fed. 181, 182.

II

The judicial enforcement of racial restrictive covenants in the Michigan and Missouri cases is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

The equal protection clause of the Fourteenth Amendment, as was said in the recent case of *Fay* v. *New York*,[1]

> prohibits prejudicial disparities before the law. Under it a system which might be constitutionally unobjectionable if applied to all, may be brought within the prohibition if some have more favorable treatment.

It would seem to be beyond argument that to permit a white man to live in his own house and to forbid a Negro to live in his is a prejudicial disparity. To eject a Negro from his home solely because of his color, and to allow his white neighbor to remain unmolested certainly gives the white man "more favorable treatment."

We may add that it is a shocking prejudicial disparity for the law to interfere in a private arrangement between a willing seller and a willing purchaser of real property, and prohibit or annul the transaction because the purchaser is a Negro.[2]

The purpose of the Fourteenth Amendment was to prohibit precisely the sort of racial distinctions accomplished by the covenants in these cases. This was eloquently stated in *Strauder* v. *West Virginia*, 100 U. S. 303,

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[1] 331 U. S. , 91 Law Ed. Adv. Opinions 1517, 1530 (No. 377, decided June 23, 1947).

[2] All of these restrictive covenant cases involve transactions between willing vendors and willing purchasers. If that were not so, there could be no cases.

where, after summarizing the provisions of the Fourteenth Amendment the Court said, at pages 307, 308:

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

It is pertinent to consider for a moment the underlying purpose of these racial restrictive covenants. The tragic fact of race prejudice is so pervasive and so deeply rooted in our national life that this court can, without multiplication of illustrations, take judicial notice of it. A widespread belief in the specious "inferiority in civil society" of the Negro referred to in the *Strauder* case unquestionably exists.

This lamentable fact of race prejudice is, of course, seldom admitted, and various rationalizations have been advanced to justify these discriminatory covenants. The most frequent are that the restrictive covenants preserve real estate values and that they prevent interracial strife. Assuming *arguendo* that these contentions may have some validity, they cannot justify a contravention of the Constitution. Both of these arguments were summarily disposed of in *Buchanan* v. *Warley, supra,* pages 81, 82:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.
>
> It is said that such acquisitions by colored persons depreciate property owned in the neighborhood by white persons. But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results.

The truth of the matter is that some white people do not want Negroes as neighbors. This they cannot accomplish by legislation, so the racial restrictive covenant was devised to circumvent the ruling of *Buchanan* v. *Warley*. The very fact that fears are expressed in these cases that the presence of Negroes in a neighborhood will depreciate values and promote strife is in itself persuasive evidence of the basic reason for the discrimination,—racial antagonism.

That racial hostility is an important motive for these restrictions is recognized in *Buchanan* v. *Warley*, where the Court said, at pages 80, 81:

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration may be freely admitted.

The opinion then adds:

> But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

The language of this Court in *Korematsu* v. *U. S.*, 323 U. S. 214, 216, is therefore, squarely in point:

> It should be noted to begin with, that all legal restrictions which curtail the civil rights of a single

> racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; *racial antagonism never can.* (Italics added.)

Two arguments have frequently been advanced in support of the judicial enforcement of racial restrictive covenants. One is that the courts would, if called upon, enforce similar covenants by Negroes against whites, and consequently there is no denial of equal protection. The other is that to refuse to enforce these covenants would deny equal protection to the contracting parties. This was explicitly stated in the opinion by the court below in *Sipes* v. *McGhee.*[8]

The speciousness of these contentions is apparent. That Negroes are being herded in restricted slum areas with the concomitant result of disease, crime, and racial tension is well known. It is unrealistic to say that the whites, who have unrestricted access to all the habitable areas of the country, may perhaps be barred by Negroes from some of them by discriminatory covenants. It would ignore the obvious facts of contemporary life to imagine a desirable residential neighborhood inhabited by wealthy Negroes from which whites would be excluded. As Mr. Justice Cardozo said in *Smith* v. *Loughman,* 245 N. Y. 486, 496, of another constitutional provision:

> We are not to whittle it down by refinement of exception or by the implication of a reciprocal advantage that is merely trivial or specious.

However, the constitutional objection is not answered by supposing the possibility of reciprocal discrimination.

[8] 316 Mich. 614, 25 N. W. (2d) 638, 644.

A denial of a constitutional right to a Negro today cannot be sustained because a similar right may perhaps be denied to a white man in the hypothetical future. This is convincingly presented by Professor McGovney[4] who says:

> But in every case of state court enforcement of a restrictive agreement the blow falls upon an individual, not upon a group as such. The command of the Clause is that no state shall deny to any person the equal protection of the laws. The immunity granted is an individual one. When because of an agreement of one group a state ousts a Negro from residing in the home of his choice it does not square itself with the command of the clause by enforcing the agreement of another group by which a white man is barred from the home of his choice. Instead of complying with the Clause, the state commits two violations of it. Two individuals, one Negro and one white, has each been discriminated against because of his race. Under the Equal Protection Clause, as under Due Process Clauses, the Supreme Court, has several times pointed out that "the essence of the constitutional right is that it is a personal one * * * It is the individual who is entitled to the equal protection of the laws."[5]

The contention that refusal to enforce these covenants would deny equal protection to the contracting parties is equally unsound. If we balance rights conferred by private contracts against fundamental constitutional rights, there can be no question that constitutional rights must prevail.

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[4] McGovney, D. O., *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional,* 33 Calif. Law Rev. 5, 28, 29.

[5] See, also cases cited, *ibid.,* page 29: *McCabe* v. *Atchison, T & S. F. R. Co.,* 235 U. S. 141, 161, 162; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 351; *Mitchell* v. *U. S.,* 313 U. S. 80, 97.

In these cases the relative equities may be thus stated: On the one hand there are the contracting parties who in good faith believed that by joining in a covenant they could secure their property from the undesirable proximity of colored neighbors. On the other hand there is the Negro who, during an acute housing shortage is prevented from acquiring a home, or, having acquired it, is driven out of it solely because he is a Negro.

It has been made abundantly clear in the cases quoted above[6] that the right of a person to acquire property and remain unmolested in the enjoyment of it is a paramount constitutional right. This right is superior to any private contractual right, and all contracts are subordinate to it. As Mr. Chief Justice Hughes said in *Norman* v. *Baltimore and Ohio Railroad Co.*, 294 U. S. 240, 308:

> Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Mr. Justice Brewer said in *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 692:

> But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, or nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur.

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[6] See, also, cases cited in note 3, Point I, *supra* (p. 12).

The language of this Court in *Nebbia* v. *New York*, 291 U. S. 502, 523, is also in point:

> Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm.

It cannot be denied that the restrictive covenants herein were to the detriment of the Negro owners and worked them harm. If they had been white there would have been no such detriment or harm. It follows, therefore, that the judicial enforcement of these covenants, based solely upon the color of the skin, constitutes a denial of equal protection of the law.

It is our contention that judicial enforcement of these restrictive covenants would be unconstitutional even as to the original parties to the agreement. If one of the parties attempted to sell to a Negro, an injunction to restrain him would be prohibited state action.

But the facts in the cases at bar are stronger, for the victims of these restrictions are not parties to the agreements that create them. Their constitutional right to buy, sell, and enjoy property has been invaded without the slightest semblance of consent. A person may lawfully bargain away some of his constitutional rights. He can never bargain away the constitutional right of another.

It has been contended that the cases that uphold the constitutionality of "equal but separate" accommodations for Negroes in public conveyances are authority for the ra-

cial segregation created by restrictive covenants. There are two answers:

The first is that housing is unique. An agreement to purchase a particular piece of property is not satisfied by the offer of some other property.[7] During a housing shortage such as exists at the present time there may not be another house available. But in any event, two houses are not identical in the sense that two dining cars or two Pullman cars or even two schools are identical. A white man seeking a home has a constitutionally protected right to indulge in all the nuances and vagaries of taste. To refuse the same right to a Negro is to deny him equal protection which, as the Court said in *Hill* v. *Texas,* 316 U. S. 400, 404, "is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

But the complete and final answer to the "equal but separate" argument is that this Court has clearly and emphatically declared that it does not apply to racial segregation in housing. *Buchanan* v. *Warley,* page 81, says:

> As we have seen, this court has held laws valid which separated the races on the basis of equal accommodations in public conveyances, and courts of high authority have held enactments lawful which provide for separation in the public schools of white and colored pupils where equal privileges are given. But, in view of the rights secured by the Fourteenth Amendment to the Federal Constitution, such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraints of the Constitution. We think these limitations are exceeded in laws and ordinances of the character now before us.

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[7] *Baumann* v. *Pinckney,* 118 N. Y. 604, 612, 613, and authorities therein cited.

All that we said in the previous point concerning due process applies equally to the equal protection clause of the Fourteenth Amendment. Judicial action is state action, and a judicial decree that denies equal protection of the law is denial by the state.[8] It is forbidden state action, "odious to a free people whose institutions are founded upon a doctrine of equality." *Hirabayashi* v. *United States,* 320 U. S. 81, 100.

[8] In addition to cases cited under due process, in Point I, *supra,* see also, *Raymond* v. *Chicago Union Traction Co.,* 207 U. S. 20, 36; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 287, 288; *Carter* v. *Texas,* 177 U. S. 442, 447; *Snowden* v. *Hughes,* 321 U. S. 1, 16.

III

The judicial enforcement of the racial restrictive covenants in the District of Columbia cases violates the Due Process Clause of the Fifth Amendment and Section 1978 of the Revised Statutes (8 U. S. C., Sec. 42).

Section 1978 of the Revised Statutes, which is a congressional enactment, is the municipal law of the District of Columbia, *Civil Rights Cases* (*supra*).[1] The decrees which deny to Negroes "the same right * * * as is enjoyed by white citizens * * * to * * * purchase, lease, sell, hold and convey" real property is clearly in violation thereof.

It is well settled that the words "due process" have the same meaning in the Fifth and Fourteenth Amendment.[2] In *Twining* v. *New Jersey*,[3] discussing due process, it was said:

> If any different meaning of the same words as they are used in the Fourteenth Amendment [and in the Fifth Amendment] can be conceived, none has yet appeared in judicial decision.

All that we said above concerning due process under the Fourteenth Amendment, therefore, applies here. It would have been beyond the power of Congress to enact a racial residential segregation law for the District of Columbia. The judicial enforcement of the restrictive covenants is forbidden governmental action and consequently deprived the petitioners of their property without due process of law.

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[1] 109 U. S. 3, 19.

[2] *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Hurtado* v. *California*, 110 U. S. 516; *Bowles* v. *Willingham*, 321 U. S. 503, 518.

[3] 211 U. S. 78, 101.

IV

The case of *Corrigan* v. *Buckley* did not decide the questions presented herein.

The case of *Corrigan* v. *Buckley,* 271 U. S. 323, has been frequently relied upon by state courts and the courts of the District of Columbia to sustain the constitutionality of racial restrictive covenants. An examination of the opinion will show that the case has been misinterpreted, and that the questions presented here are still undecided.

Corrigan, Buckley and others made an agreement that no part of the restricted property, which was located in the District of Columbia, should be sold to or occupied by Negroes. Corrigan made a contract to sell a lot to a Negro, and a bill was filed to enjoin the sale. A motion was made to dismiss the bill on the ground that the covenant was void because it violated the Constitution and the Laws of the United States, and was against public policy. This motion was denied.

The case reached this Court on *appeal.* The defendants based their appeal on the sole grounds that the covenant was void because it violated the Fifth, Thirteenth, and Fourteenth Amendments, and Sections 1977, 1978, 1979, Revised Statutes.

The Court refused to entertain jurisdiction and dismissed the appeal because the record did not present a constitutional or statutory question substantial in character and properly raised in the lower court.

The attack in this case was solely upon the constitutionality of *the covenant.* The Court stated in its opinion that contracts between individuals did not come under the prohibitions of the Fifth, Thirteenth and Fourteenth Amendments, nor were they invalidated by Sections 1977, 1978 of the Revised Statutes. The Fifth Amendment, the

Court said, is a limitation upon the powers of the general government; the Thirteenth Amendment forbids involuntary servitude, but does not otherwise protect individual rights; and the 14th Amendment is a limitation upon state action, which was not involved in the case since it arose in the District of Columbia.

The constitutionality of the *decrees* of the lower court (as distinguished from the constitutionality of the covenants) was raised upon the argument in the Supreme Court, but was not in the record. On this point the Court said, page 331:

> * * * this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under Paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the court of appeals or in this court; and it likewise is lacking in substance.

It appears, therefore, that this point which is now raised in the present cases, that judicial enforcement of racial restrictive covenants is forbidden governmental action, "might have constituted ground for an appeal" if it had been properly raised.

Since the case was dismissed on jurisdictional grounds the statement "and is likewise lacking in substance" is dictum on a point which the Court stated was not before it.

Conclusion

For the reasons urged herein, we respectfully ask that the judgments of the courts below be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72, 87, 290, 291

J.D. SHELLEY, *et al., Petitioners,*

—v.—

LOUIS KRAEMER, *et al., Respondents.*

ORSEL McGHEE and MINNIE S. McGHEE, his wife, *Petitioners,*

—v.—

BENJAMIN J. SIPES, and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, *et al., Respondents.*

JAMES M. HURD and MARY I. HURD, *Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

RAPHAEL G. URICIOLO, ROBERT H. ROWE, ISABELLE J. ROWE, *et al., Petitioners,*

—v.—

FREDERIC E. HODGE, *et al., Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN JEWISH CONGRESS, AMICUS CURIAE

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ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

The American Jewish Congress, an organization consisting of thousands of Americans of Jewish faith and ancestry, respectfully submits this brief *amicus curiae* in the above entitled cases. Consent to the filing of this brief has been obtained from counsel for petitioners and respondents in all four cases.

Interest of the American Jewish Congress

The American Jewish Congress was organized in part "* * * to safeguard the civil, political, economic and religious rights of Jews everywhere" and "* * * to help preserve, maintain and extend the democratic way of life".

In the three decades of its existence the American Jewish Congress, on frequent occasions, has represented the democratic interests of the Jewish people before the courts, legislatures and administrative tribunals of the State and Federal governments. Its work, however, has never been confined to the interests of the Jewish people alone. It has believed, indeed, that Jewish interests are threatened whenever persecution, discrimination or humiliation are inflicted upon any human being because of his race, creed, color, national origin or ancestry.

A racial restrictive covenant imputes inferiority to the members of the racial or ethnic minority group covenanted against. An attempt to obtain what is in effect recognition of that imputation by suit for judicial enforcement of the covenant is of great moment to all minorities. For these reasons the American Jewish Congress is deeply concerned with the outcome of these cases and is impelled to submit this brief *amicus curiae.*

Statement

These are four suits, the common purpose of which is to enforce by injunction certain arrangements entered into by

former owners of real property in the cities of St. Louis, Detroit and Washington, D. C., pursuant to which such owners agreed to bar the sale to or occupancy by Negroes of such property. In all four cases the purpose of the respective agreements was to maintain the respective communities which they affected as white residential neighborhoods by preventing Negroes from living in such communities.

Shelley v. *Kraemer,* No. 72, involves a community located in St. Louis. The covenant was entered into in 1911 and was to be effective for fifty years. The agreement prohibited sale or occupancy by any person not of the Caucasian race under penalty of forfeiture of the property.

In *McGhee* v. *Sipes,* No. 87, the restrictive covenant prohibited use or occupancy of property in Detroit by non-Caucasians without specifying a penalty. Entered into in 1934 the agreement was to continue in effect for twenty-five years. The purpose of the restriction, as recited in the instrument imposing it, was "defining, recording and carrying out the general plan of developing the subdivision which has been uniformly recognized and followed".

Hurd v. *Hodge,* No. 290, and *Urciolo* v. *Hodge,* No. 291, involve property located in Washington, D. C. The covenant under attack in these cases prohibited sale to any Negro or colored person under penalty of forfeiture of $2,500. The agreement was entered into in 1906 and was perpetual.

In all cases, the property in litigation has been sold by white persons to Negroes for their use and occupancy. In each case an action to enjoin the use or occupancy by the Negro purchaser has been brought by another signer to the agreement or his successor in interest.

In the Missouri and District of Columbia cases, the plaintiffs demanded that the transfer be cancelled and that the Negro purchasers be restrained from occupying the premises. In the Michigan case, where the covenant prohibited use or occupancy only, plaintiffs demanded that the Negro owner be evicted from the property he had purchased.

In the St. Louis case, the defendant Negro purchasers were successful in the trial court on a non-federal ground but the judgment was reversed on appeal and it was directed that the relief sought by the plaintiffs be granted. In the Detroit case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed on appeal. In the Washington, D. C., case, the decree of the trial court granting the relief sought by the plaintiffs was affirmed by the Court of Appeals, Justice Edgerton dissenting.

The Issues to Which This Brief Is Addressed

Our brief is limited to the most fundamental question involved in these cases: whether enforcement of the covenants by courts of the District of Columbia and the States violates the due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the latter.

Summary of Argument

I. The constitutional restraints on governmental action apply to all branches of the government including the judicial. Judicial action has been held subject to constitutional restraint in both its procedural and its substantive aspects.

Enforcement of restrictive covenants involves the full authority of the State. The compulsion exercised differs in no constitutionally significant way from other forms of state action.

IIA. The Constitution creates a right against racial or religious discrimination by State or Federal governments. Although the right thus protected must be measured against other rights which conflict with it, the only superior right which this Court has ever recognized is the right of the nation in wartime to protect its existence.

IIB. The State and Federal governments, in their proper spheres, may prevent discriminatory acts by private individuals. So long as the discrimination remains in the

area of voluntary individual action, the Fifth and Fourteenth Amendments have no application. Where, however, the discriminatory decisions of individuals are effectuated by state action, constitutional restraints apply, since the Amendments prohibit state action, in any form, which compels discrimination by individuals against each other.

IIC. Not only the policy against government discrimination but also the policy of enforcing contracts are part of all State and Federal legal systems. The general law of contract enforcement may be and is limited in varying respects by each government. Hence, it makes no difference, from a constitutional point of view, whether restrictive covenants are enforced because of refusal by a State to make an exception from its general rule or because of a specific statute giving them validity. Similarly, no constitutional distinction can be made between enforcement pursuant to common law and enforcement under a statute. Finally, it makes no constitutional difference that the discrimination which is effected is initiated by an individual and put into effect by the court's application of a general rule. The decisive fact is that there is no effected discrimination until the court bases its decision on the race or religion of the parties before it.

IID. Familiar constitutional principles of accommodation supply the basis for resolving the conflict which exists here between the policy of governmental non-discrimination and the policy of enforcing contracts. The legitimate claims of the latter must be weighed against those of the former, taking into consideration not only the importance of each policy but also the extent to which each is threatened with impairment.

III. The restrictive covenant device has prevented normal expansion of minority groups into new neighborhoods and has thereby generated the social evils of crime, disease, prostitution and unrest. Accompanying these evils is a dangerous despair and disbelief in democratic values.

The wide use of restrictive covenants also has the effect of forcing white Christian buyers to accept a practice which may be repugnant to them. Thus the judicially enforced covenant, by establishing discriminatory patterns, breeds new prejudices which would not otherwise come to life.

Court enforcement of restrictive covenants has a direct effect on the excluded purchasers which is offensive to constitutional principles. Housing is a necessity of life without which all other constitutional rights lose their value.

Finally, in granting enforcement of restrictive covenants, courts sanction an even more effective discriminatory device than that which is prohibited in legislation.

In view of the evils which enforcement of restrictive covenants thus generates, the considerations in favor of general enforcement of contracts are clearly outweighed by the need for protecting the right of all men to be free of unjust racial and religious discrimination by State and Federal governments.

ARGUMENT

POINT I

The action of a court in enforcing a contract is government action which is subject to the limitations of the Fifth and Fourteenth Amendments to the Constitution.

In one of its earliest decisions implementing the broad principles of the Fourteenth Amendment, this Court held, in 1880, that the prohibitions of the Fourteenth Amendment "have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities." *Ex parte Virginia,* 100 U. S. 339, 346-347 (1880). Thereafter, in the *Civil Rights Cases,* 109 U. S. 3 (1883), in which the scope of the

Amendment was again carefully reviewed, this Court excluded from operation of the Amendment only those "wrongful acts of individuals, [which are] unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" (109 U. S. at 17). During the intervening 64 years this Court has on many occasions found it necessary to determine whether "state action" was present in a particular case before it determined whether the action invaded rights protected by the Fifth or Fourteenth Amendments.

All "procedural" actions of the judiciary have been held to be "state action". This includes both court rules of procedure (*Pennoyer* v. *Neff*, 95 U. S. 714 [1878]), and actual procedural steps taken in particular cases without benefit of court rule (*Powell* v. *Alabama*, 287 U. S. 45 [1932]).

On the substantive side, this Court has also held that judicial action in punishing for a contempt of court is "state action" (*Bridges* v. *California*, 314 U. S. 252 [1941]). Judicial punishment for a recognized common law crime has been declared "state action" (*Cantwell* v. *Connecticut*, 310 U. S. 296 [1940]), as has an injunction directed against a common law tort to protect *private* interests (*A. F. of L.* v. *Swing*, 312 U. S. 321 [1941]; *Milk Wagon Drivers* v. *Meadowmoor*, 312 U. S. 287 [1941]).

This Court has not, to counsel's knowledge, ever passed upon the question whether court action in enforcing a contract is "state action", the question presented in this case.[1]

[1] We do not discuss here the dictum of this Court in *Corrigan* v. *Buckley*, 271 U. S. 323 (1926), which is often cited in opposition to the position which we take. We consider the granting of the petitions for certiorari in these cases sufficient indication that this Court does not view that decision as being decisive of the present issue. We respectfully refer the Court to the dissenting opinion of Justice Edgerton in *Hurd* v. *Hodge*, ... F. 2d ..... (App. D. C., 1947), for an analysis of *Corrigan* v. *Buckley*. We respectfully urge further that, if this Court should find that any portion of the decision in the *Corrigan* case supports the position taken by respondents here, it should hold that, in the light of recent developments in the interpretation of the Constitution, that portion should be overruled.

We submit, however, that it does not require elaborate argument to support the conclusion that "state action" is present in such cases.

Restrictive covenant litigation does not arise until private persuasion of the owner of the subject property has failed. Plaintiffs' efforts here to obtain mandatory injunctions are in every sense attempts to coerce the property owners and the Negro purchasers by the fullest invocation of the State's compulsory machinery—injunction, contempt proceedings, jail or fine for contempt and probably forcible eviction by the sheriff as well.

Certainly the actions taken by the judiciary in the present cases differ in no constitutionally significant way from other forms of state action. The decrees enforcing the restrictive regulation are backed by the contempt powers of the court. The parties to whom they are addressed are compelled to comply by the threat of fines limited in amount only by judicial discretion and by imprisonment continuing indefinitely until compliance. This is a far more effective device for invoking the full powers of the government than that invoked in many of the cases, involving minor penal laws and even lesser regulations, in which this Court has granted protection under the Constitution.

In sum, where a State uses its power to compel or restrain acts by private individuals, it makes no difference which branch of the government exercises the compulsion. As we shall now show, the decisive question in these cases is whether the freedom from governmental discrimination which the court action infringes is of such a nature as to have a superior claim to protection over the right of governments under their plenary powers, to enable individuals to dispose of their own affairs by contract.

POINT II

The constitutionality of court enforcement of a contract requiring racial or religious discrimination must be determined by resolving the conflict between the considerations against such discrimination by governments and the considerations in favor of implementation by government of the freedom of action by private individuals.

A. The constitutional restraint on governmental racial and religious discrimination.

This Court held as early as 1886 that governmental discrimination prompted solely by "race and nationality * * * in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution" (*Yick Wo* v. *Hopkins,* 118 U. S. 356, 374 [1886]). This thought was vigorously restated by this Court with reference to the Fifth Amendment in *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943):

> 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.

Like all other constitutional rights, however, the right to be free from racial or religious discrimination by the State must be measured against other rights, where they conflict. Where the government itself initiates and imposes distinctions, it is our position that there is no situation in which any legitmate demand of the people on the State would justify distinctions based on race or religion. However, this Court did find such a justification in the *Hirabayashi*

case, *supra,* and in *Korematsu* v. *United States,* 323 U. S. 214 (1944), where it approved regulations restricting American citizens of Japanese ancestry because of an immediate wartime emergency. It found that there was a danger of sabotage and espionage which might assist an enemy invasion, a danger created by the existing social and legal restrictions placed on persons of Japanese ancestry which had prevented their complete integration as part of the general population. This Court made clear, however, that although "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can" (*Korematsu* case, 323 U. S. at 216). Short of such an unusual situation, regulations establishing "discriminations based on race alone are obviously irrelevant and invidious" (*Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, 203 [1944]).

In *Buchanan* v. *Warley,* 245 U. S. 60 (1917), this Court held that the Fourteenth Amendment, as well as 8 U. S. C. 42 (14 Stat. 27), forbids state action aimed at segregation of races in the use and enjoyment of land, and specifically rejected the argument that such state-imposed segregation was justified by the need to preserve the public peace. That case involved the validity of a municipal ordinance which in substance forbade Negroes to occupy property in predominantly white areas and *vice versa.* This Court held the ordinance void, saying (at 78-79):

> The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat. 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat. 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir,* 95 U. S. 485, 508.

It quoted with approval the conclusion, reached by a State court in a similar case, that (at 80):

> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to *acquire, enjoy, and dispose* of his property. Being of this character, it was void as being opposed to the due process clause of the constitution. (Emphasis added.)

The decision in the *Buchanan* case gave full weight to the argument that "there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration" (245 U. S., at p. 80). It was held nevertheless, that this consideration was insufficient to warrant "depriving citizens of their constitutional rights and privileges" (*id.*, at pp. 80-81).

Following *Buchanan* v. *Warley,* this Court brushed aside an attempt to circumvent that decision by combining voluntary private action with the state regulation.[2] It thereby clearly established the principle that States *may not impose racial segregation in housing upon property owners.*

B. The limited area of freedom of individuals to discriminate.

Both State and Federal governments have wide powers to prohibit discrimination by private individuals. Each, in its appropriate sphere, may make reasonable regulations curbing the freedom of individual choice in order to achieve legitimate public ends. Thus, States may prohibit discrim-

[2] *Harmon* v. *Tyler,* 273 U. S. 668 (1927). The case involved a New Orleans ordinance which barred whites or Negroes from any "community or portion of the city * * * except on the written consent of a majority of the opposite race inhabiting such community or portion of the city." (See *Tyler* v. *Harmon,* 158 La. 439, 441.) This ordinance was held unconstitutional by this Court in a per curiam opinion relying upon the authority of *Buchanan* v. *Warley.* See also *Richmond* v. *Deans,* 281 U. S. 704 (1930).

ination, for example, in places of public accommodation,[3] and the Federal government may also do so in the exercise of its power to regulate interstate commerce.[4]

Regulations such as those described above do not rest upon the prohibitions of the Fifth and Fourteenth Amendments. They deal with discriminatory activity in the area of voluntary individual action. This is the sole area which, under the decisions of this Court, lies outside the scope of the Amendments.

The *Civil Rights Cases,* 109 U. S. 3 (1883), which established the inapplicability of the Fourteenth Amendment to "private action", involved a Federal statute requiring nondiscriminatory treatment on account of race or color in specified types of public accommodations, with violations criminally punishable.

This Court struck down the statute because "it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, *without referring in any manner to any supposed action of the State or its authorities*" (109 U. S. at 14; emphasis supplied).

The area which was thus excluded from the operation of the Fourteenth Amendment was carefully delineated in the decision. It was held that the rights protected by the Amendment are "secured by way of prohibition against State laws and State proceedings affecting those rights" (at 11). The scope of the decision was narrowly limited to the situation where "the wrongful acts of individuals [are] unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" (at 17).

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[3] Many States have statutes prohibiting racial and religious discrimination by stores, restaurants, theatres and similar enterprises which serve the public generally. This Court has upheld a statute which prohibits racial and religious discrimination by labor unions in the admission of members. *Railway Mail Association* v. *Corsi,* 326 U. S. 88 (1945).

[4] *Mitchell* v. *U. S.,* 313 U. S. 80 (1941).

The Amendment was held inapplicable only where individual action was "not sanctioned in some way by the State, or not done under State authority" (*ibid.*). The individual was held free of the constitutional restraint on discrimination "unless protected in [his] wrongful acts by some shield of State law or State authority" (*ibid.*). See *Hale, Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals,* 6 Lawyers Guild Rev. 627 (1946).

But while the Fifth and Fourteenth Amendments do not restrain individual voluntary discrimination, they do restrain state action which requires individual acts of discrimination; under the Amendments, individuals may demand that the government refrain from compelling discrimination by others with whom they may deal. That was indeed the nature of the right defined by this Court in *Truax* v. *Raich,* 239 U. S. 33 (1915), and, somewhat less explicitly, in *Buchanan* v. *Warley,* 245 U. S. 60 (1917).

The *Truax* case was a successful suit by an alien to invalidate a State statute limiting the employment of aliens by private employers. This Court said (239 U. S. at p. 38): "The employé has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion * * *." When it held that the statute violated the equal protection clause, this Court was protecting the alien's right to an independent decision by the employer whether or not to hire him. The parallel with the sale of land is clear: the seller (employer) is free to but need not sell to (hire) the Negro or Jew (alien).

Buchanan v. *Warley* involved a city ordinance prohibiting Negroes from moving into blocks where the majority of homes were occupied by whites, and *vice versa.* This Court said (245 U. S. at p. 81): "The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person." Here the Court was protecting the

seller's right to make an independent decision, even though such a decision might have had the same ultimate effect as the ordinance—refusal to sell to a Negro.

In both cases, the constitutional right invaded was the right to freedom from a State-compelled discriminatory decision. This is the very right which is invaded by court decrees in restrictive covenant litigation.

This Court in first interpreting the Fourteenth Amendment could have held that it created an absolute right to non-discrimination and could have established a corresponding constitutional protection against "private action". Even as limited by the *Civil Rights Cases,* however, the thrust of the Amendment toward equal rights for all men was considerable. It struck down State *compulsion* of discrimination with its attendant imbedding of prejudice. True, the resulting rule leaves individual acts of prejudice untouched, but at least educational, economic and social forces have a chance to be more effective if individual decisions cannot be petrified by laws or courts. By requiring that each act of discrimination be a fresh act of prejudice, the Amendment forces individual prejudice to sustain itself.

C. The implications of governmental enforcement of private contracts.

The constitutional restraint upon racial and religious discrimination by governments is necessarily a part of the legal system of every State as well as the Federal union. Governments also have another policy embedded in their law, that of permitting individuals to make contracts concerning their property and affairs and of enforcing such contracts through the courts. Centuries of experience have justified this law. It is necessary to the functioning of our economy that individuals be empowered to plan their affairs jointly for the future, and to put such joint plans beyond the reach of unilateral amendment. This is indeed not only a legitimate but an essential objective of State action.

Like all general laws, the policy of enforcing contracts has its exceptions. States may and do declare some contracts unenforceable. They may be held contrary to public policy or general provisions of State constitutions. They may be excluded from the general enforcement rule by specific legislation.[5]

When a State so limits its general law it unquestionably makes a deliberate, *conscious* decision. To the same extent the State acts consciously when its legislature fails to exclude other types of contract from its general enforcement law, or when its courts, refusing to find that enforcement of such contracts is illegal or contrary to public policy, grants their enforcement.

Such enforcement is neither automatic nor purely administrative. If the restrictive covenants in these cases had been enforced pursuant to statutes specifically making such covenants enforceable, there could be no doubt about the existence of "state action". Enforcement in the absence of statute is "state action" to the same extent.

Determination of the consitutionality of a rule of law does not depend on whether it rests on statute or judicial decision. This Court has previously drawn no distinction for constitutional purposes between legislation and common law rules of similar purport. Enjoining picketing as a tort has been treated as "state" action whether the tort was governed by statute or common law. Cf. *AFL* v. *Swing,* 312 U. S. 321 (1941), and *Truax* v. *Corrigan,* 257 U. S. 312 (1921); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). We do not believe any different result would have been reached by this Court in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), discussed below, if the trespass had there been punished as a common law crime rather than as a statutory offense, or even if it had been dealt with in the State court by injunctive action or in a civil suit for damages.

[5] For example, a Minnesota statute (Minn. Stat. Ann., Sec. 507.18) provides that no instrument relating to real property may contain a restriction prohibiting conveyance to any person because of religion.

Finally, it makes no difference that the racial discrimination here was initiated by private individuals and was enforced by the courts below in accordance with general non-discriminatory law. The discrimination was ineffective without State aid. Not until the courts below looked at the race of the parties before them and based the outcome of the litigation on the result of that examination did there occur any interference with constitutional liberties. That is the essence of the governmental discrimination here challenged. "Delegates of the State's power have discharged their official functions in such a way as to discriminate invidiously between white citizens and black" (*Nixon* v. *Condon,* 286 U. S. 73, 89 [1932]).

The irrelevance of the private origin of discrimination which is imposed by the State is established by the decisions of this Court in *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Smith* v. *Allwright,* 321 U. S. 649 (1944), and *Steele* v. *Louisville & Nashville R. R. Co.,* 323 U. S. 192 (1944). Each of these cases involved the application of general, non-discriminatory and otherwise valid law in a manner which unconstitutionally effectuated the decisions of private agencies.

In the *Marsh* case, the proprietors of a company-owned town, who owned in fee all of the land in the town including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. Marsh, having refused to leave these "private" premises, was convicted of violating a local statute which, in general terms, made trespass after warning a crime. This Court held that the conviction was State action in violation of the guarantees of the Fourteenth Amendment.

The gist of this decision was that the legal system of Alabama must in some way permit religious freedom in company-owned towns. This Court was in no way hampered by the fact that the law under which the company's discrimination was made effective was a general one which made no specific reference to company-owned towns or to religious activities and which, in its ordinary applica-

tion, was unquestionably valid. By legislation or judicial decision, Alabama might have provided the freedom which this Court held essential or it might have specifically denied that freedom. Its disposition of the matter, instead, under general principles, did not prevent this Court from holding that that aspect of its law which enabled private citizens, with State aid, to limit freedom of speech or religion was unconstitutional.

In *Smith* v. *Allwright, supra,* the law of Texas provided that the ballot in state-conducted elections list the names of persons chosen by political parties and specified to some extent the manner in which the parties were to select these nominees. The State Convention of the Democratic Party of Texas excluded Negroes from its membership and hence from participation in the Democratic Party. This Court held that despite the Texas law and the action of the Democratic Party, a Negro could not be refused a ballot in the Democratic primary. It made no difference that there was nothing discriminatory about the State statute itself or that the discrimination originated with a private organization. It was decisive that operative effect was given to the private discriminatory membership rule by Texas law. By giving such effect in its electoral process to the choice made by an otherwise private agency, the State made that choice subject to constitutional restraint.

The application of this doctrine to discriminatory contracts was dealt with by this Court in the *Steele* case, a suit by a Negro railroad employee to enjoin the enforcement of a discriminatory agreement between a union and his employer. The general majority rule principle of the Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member and, by no more than implicit incorporation of the general law of contract enforcement, made the contract executed by that union enforceable against the minority in court. This Court held (323 U. S. at p. 198):

> If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract

> whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading.

Here again, the discrimination was private in origin and raised questions of constitutional restraint only because of the general non-discriminatory law which gave it effect.

Here, the governments whose actions are under review have in effect told the owners of land within their jurisdiction that they may adopt regulations, prompted by purely private considerations, which contain discriminatory restrictions on the future disposition of their land, and that, if they do so, the courts will give these regulations the effect of law, an effect which they could not have without state action. We submit that a law, however expressed, which embodies this policy, must necessarily be tested against the restraints imposed by the constitution on governmental action. Where private individuals engage in discriminatory conduct, and the State "enforces such action" (*Marsh* case, *supra*, at p. 508), or makes such action "part of the machinery" of its functioning (*Smith case, supra,* at p. 664), or requires other individuals to conform to the contractual discriminatory pattern thus established (*Steele* case, *supra*), the state action may be challenged.[6]

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[6] Of course, proceedings to enforce private contracts rarely raise constitutional issues. Just as the vast bulk of State and Federal regulatory legislation raises no questions under the Fifth or Fourteenth Amendments although it is manifestly "state action", so most judicial enforcement of contracts contains no indication of interference with constitutional guarantees. Moreover, contracts which would be likely to be held to violate a constitutional right rarely reach a decision on the constitutional question because courts invoke doctrines of "public policy" to refuse enforcement. If, however, a State court were willing, as a matter of public policy (purely a State question), to enforce a contract to commit a crime, it is most likely that this Court would hold such enforcement to be an unconstitutional denial of substantive due process, thus treating the enforcement of contracts as "state action". State public policy doctrines may obviate the need for dealing with the constitutional question in most such cases but they cannot affect the existence of residual constitutional protection.

D. The conflict between the policies of non-discrimination and contract enforcement.

The policy against governmental discrimination and the policy of enforcing private contracts may conflict, as they do here. Where such a conflict arises, familiar principles control the process of "weighing the two conflicting interests".[7] It is well established, for example, that freedom of speech, press, religion and assembly may be limited in favor of the right of the people to protect the state,[8] public order,[9] child welfare,[10] and morality.[11]. In such cases, the States in the first instance, and ultimately the courts reviewing their action, must perform the task of "balancing these interests against the interest of the community and that of the individual in freedom of discussion on matters of public concern".[12]

It is not only the relative importance of the objectives of the two policies which must be considered but also the extent of the threatened impairment of each. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, *unduly* to infringe a protected freedom." (Emphasis supplied.)[13] It is only those "in-

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[7] *Cantwell* v. *Conn.*, 310 U. S. 296, 307 (1940) (statute requiring prior approval of solicitation for religious purposes); *Martin* v. *Struthers*, 319 U. S. 141, 143 (1943) (prohibition of door to door distribution of circulars).

[8] *Schenck* v. *U. S.*, 249 U. S. 47 (1919) (conviction under Espionage Act for distributing literature obstructing draft); *Gitlow* v. *N. Y.*, 268 U. S. 652 (1925) (statute prohibiting advocacy of criminal anarchy).

[9] *Cox* v. *New Hampshire*, 312 U. S. 569 (1941) (application to religious procession of statute requiring permit for parades).

[10] *Prince* v. *Mass.*, 321 U. S. 158 (1944) (application to religious activity of statute regulating child labor).

[11] *Reynolds* v. *U. S.*, 98 U. S. 145 (1878) (polygamy).

[12] *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940) (statute prohibiting picketing).

[13] *Cantwell* case, 310 U. S. at 304. See also *Cox* v. *New Hampshire*, 312 U. S. 569, 574: "unwarrantedly abridged the right of assembly".

admissible" obstacles which "unreasonably obstruct" dissemination of views which are prohibited.[14] Thus, utterances may be barred where they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality".[15] "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[16]

Implementation of freedom of private contract is, as we have shown (*supra,* p. 14), a legitimate objective of government. But, as this Court has put it, "Ownership does not always mean absolute dominion" (*Marsh* case, *supra,* at p. 506). It is necessary to strike a balance between the constitutional policy forbidding racial discrimination and the policy protecting the individual's free use of his private property.

In the *Marsh, Smith* and *Steele* cases, *supra,* where public sanction for private discrimination was involved, the constitutional issues were resolved by just such a balancing of the conflicting considerations. Thus, in the *Marsh* case, this Court said (326 U. S. at p. 509):

> When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.

The conclusion reached by this Court in the three cases was that governments cannot rely on considerations in favor of freedom of private action, private association or

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[14] *Cantwell* case, 310 U. S. at 305.

[15] *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942) (statute prohibiting offensive or derisive language).

[16] *Schneider* v. *State,* 308 U. S. 147, 161 (1939) (statute prohibiting distribution of literature on streets).

contract as justification for substantial impairment of such basic constitutional freedoms as the right to espouse religious causes, the right to vote and the right to earn a living. In the instant cases, the courts below have sustained State and Federal enforcement of private discrimination which substantially impairs the right to dispose of, own and occupy property and particularly a home. We shall now show that in doing so they have sanctioned an unjustifiable impairment of a constitutionally protected right.

POINT III

The constitutional right to own and occupy property without racial or religious discrimination by State or Federal governments is impaired by judicial enforcement of racial and religious restrictive covenants.

These proceedings to enforce racial restrictive covenants are part of a nation-wide effort to maintain and extend ethnic patterns in the ownership and occupancy of homes. While ostensibly concerned with the ownership or occupancy of a single parcel of land, every restrictive covenant case involves directly the racial characteristics of a contiguous group of parcels, a city block, or even a major residential area. In the cases at bar, as in all restrictive covenant cases which counsel has examined, the decree is sought by the owners of neighboring property who seek to interfere with a sale by a willing seller to a willing buyer.

Plaintiffs are not merely seeking to regulate the occupancy of one piece of property but are seeking rather to preserve control over an entire area. Unless they can achieve dominion in an appreciable section, control over a single plot is worthless. Thus, an essential characteristic of the covenant device is its uniform application to multiple units of land; only such application can achieve the sole purpose of the covenant—establishment and preservation

of a racial or religious pattern for a neighborhood. Covenants thereby achieve the same objectives as a zoning ordinance, with the restrictions based not on the use to which the property may be put but upon the ethnic groups of the occupant.

If a court may not constitutionally enforce the covenant in question, the owner of the property will be free to sell or lease to whomever he chooses. He may or may not elect to sell to a member of the proscribed class. The Negro or Jewish buyer will be free to enter the market and his chance of obtaining housing will depend solely on his ability to influence a given seller. He may or may not succeed in persuading the seller but at least he will have a chance of success. The seller's neighbors will lose their power to censor the occupancy of the property and will lose whatever imagined psychological security they derive from not dwelling near members of the proscribed race. However, they, too, will now be free to sell or lease to members of the proscribed class.

If, however, a court may constitutionally enforce the covenant, owners of land will continue to have power to veto candidates for occupancy of property other than their own. The owner of the property will lose as potential customers the members of the proscribed class; the members of the proscribed class will lose all opportunity to acquire covenanted property from willing sellers. This impediment to their securing housing will increase directly as the covenanted area in a given community increases.

Because the restrictive covenant device is concerned with continuing and maintaining the racial characteristics of whole neighborhoods, the prevalence of such covenants has been a major factor in preventing the normal expansion of minority groups into new neighborhoods. In the past three decades, there has been a major migration of Negroes from the South to the cities of the North and West. As the Negro population of a community has grown, the prevalence of the covenant has kept step. The result has

been to force Negroes to enter and remain in segregated, overcrowded areas—in Harlems and other Black Belts.

The segregation and overcrowding which have resulted from the restrictions imposed by racial covenants have serious social consequences. It is today a commonplace that the major social evils of crime, disease, prostitution and unrest have deep roots in the ghetto system under which many of our minority groups are forced to live. The picture is graphically presented by the recent report of the President's Committee on Civil Rights, "To Secure These Rights" (Gov. Print. Off., 1947), pp. 68-69:

> Through these covenants large areas of land are barred against use by various classes of American citizens. Some are directed against only one minority group, others against a list of minorities. These have included Armenians, Jews, Negroes, Mexicans, Syrians, Japanese, Chinese and Indians.
>
> While we do not know how much land in the country is subject to such restrictions, we do know that many areas, particularly large cities in the North and West, such as Chicago, Cleveland, Washington, D. C., and Los Angeles, are widely affected. The amount of land covered by racial restrictions in Chicago has been estimated at 80 percent. Students of the subject state that virtually all new subdivisions are blanketed by these covenants. Land immediately surrounding ghetto areas is frequently restricted in order to prevent any expansion in the ghetto. Thus, where old ghettoes are surrounded by restrictions, and new subdivisions are also encumbered by them, there is practically no place for the people against whom the restrictions are directed to go. Since minorities have been forced into crowded slum areas, and must ultimately have access to larger living areas, the restrictive covenant is providing our democratic society with one of its most challenging problems.[17]

Accompanying these evils are a dangerous despair and disbelief in democratic values. "It is not at all surprising,"

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[17] The prevalence of restrictive covenants in the District of Columbia is discussed separately in the Report at pages 91-92.

says the President's Committee (at p. 146), "that a people relegated to second-class citizenship should behave like second-class citizens." In striking down restrictive covenants, this Court will be taking a major step toward amelioration and, it is hoped, ultimate ending of the evils resulting from segregated housing.

Less well recognized is the degree to which the covenant restricts the choice of the white buyer. As the use of the covenant grows in a given community, the white Christian buyer, like the Negro or Jewish buyer, can no longer find uncovenanted property. If he wants land, he must accept the covenant no matter how repugnant it may be to him. He cannot bargain about it.

The white Christian buyer thus finds himself saddled with a contract of exceptionally long duration. In one of these cases the covenant runs for fifty years; in another, twenty-five years; in the third and fourth it is perpetual. It is a contract, moreover, which leaves no room for frequent reappraisals of the original decision to exclude members of the proscribed race but which tends to freeze for many years ahead a decision once made. A small minority, sometimes a single landowner, can continue to veto occupancy regardless of the present attitudes of the majority of those living in the covenanted area.

The prevalence of restrictive covenants is therefore a very dubious index of the active prejudices of those who own covenanted property. The ultimate vice of the covenant is that it generates evils which might not otherwise arise. Of recent years many sociologists and psychologists have concluded that the practice of discrimination often creates more prejudice than it reflects. See, for example, Watson, *Action for Unity* (Harpers, 1947); McWilliams, *Race Discrimination and the Law,* 9 Science and Society 1 (Winter, 1945). The process is self-regenerative. The undemocratic patterns of living which restrictive covenants establish and maintain breed new prejudices which otherwise would never come to life.

Wholly aside from the indirect effect of discrimination in housing, we believe that the immediate impact on the individual of restrictive covenants, the state action which forbids him from occupying a home of his choice, is offensive to constitutional principles.

Certainly the right to obtain living space in the community, free of artificial restrictions based on race, color or religion, is as important as the rights of freedom of speech, press, religion and political activity which this Court has so jealously guarded. This is so both because of the inherent hostility of the Constitution to racial discrimination in any field and because of the fundamental importance of housing to the enjoyment of life and liberty. Indeed, other rights lose all significance where the right to the basic necessity of a place to live is denied.

Shortly after the adoption of the Thirteenth Amendment Congress recognized that the right to own land free of discrimination was a badge of the freedom which the Amendment was designed to secure. It provided that:

> All 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. (14 Stat. 27, R. S. Sec. 1978, 8 U. S. C. Sec. 42.)

This statute was reenacted (16 Stat. 144) after adoption of the Fourteenth Amendment.

This Court has recognized on more than one occasion that "Housing is a necessary of life." *Block* v. *Hirsh,* 256 U. S. 135, 156 (1921). This factor was held to be decisive in *Buchanan* v. *Warley, supra,* in disposing of the argument that the doctrine of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896), permitted regulations which left equal room for limitation on the use of land by Negroes and whites. Quoting with approval the decision of a State court in another case, this Court noted in the *Buchanan* case that where the "separate but equal" doctrine had been applied (245 U. S. at p. 80):

> In each instance the complaining person was afforded the opportunity to ride, or to attend institutions of learning, or afforded the thing of whatever nature to which in the particular case he was entitled. The most that was done was to require him as a member of a class to conform with reasonable rules in regard to the separation of the races. *In none of them was he denied the right to use, control, or dispose of his property,* as in this case. (Emphasis added.)
>
> * * * * * *
>
> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution.

The *Civil Rights Cases* leave the field clear for private owners of property to refuse to sell to any person or class of persons they deem objectionable. *Buchanan* v. *Warley,* on the other hand, prohibits the imposition of such restrictions by the State. Discrimination through enforcement of restrictive covenants is the worst of these three forms of racism.

The *simple refusal to sell or lease* can be terminated at any time by the will of the single property owner. As long as the discrimination retains this purely private nature, it can never have the restrictive effect which restrictive covenants seek. The law of supply and demand remains free at all times to work a change in the situation by persuading individual owners of greater benefits to be had by changing existing practices.

Even *direct State regulation,* if it were not prohibited, could only be invoked in the first place when the elected representatives of the people were persuaded that it was desirable.

The *restrictive covenant,* however, once imposed by private decision, cannot be changed for a long and sometimes indefinite period as long as a single land holder objects.

It remains in effect therefore regardless of the wishes of the majority, regardless of the pressure of economic and sociological changes,[18] and regardless even of the wishes of those who originally imposed it.

It is ironical that this Court's decision in *Buchanan* v. *Warley,* striking down discriminatory regulations emanating directly from the State, has led to resort to a far more effective device. A writer has recently commented: [19]

> The prevalence of these restrictions may perhaps be deemed a consequence of the ruling by the United States Supreme Court that ordinances and statutes providing for racial residential segregation are unconstitutional. Property owners have sought to accomplish the same result by private contract. They have done so, however, not only in southern States, but also in States where legislation of this character was never, *and probably never could have been, enacted.* (Emphasis added.)

We submit that no government subject to the restraints of our Constitution can hold that enforcement of the private whim of some of its citizens is justified in the face of the evils which enforcement of restrictive covenants are now known to generate.

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[18] States do, of course, recognize to some extent that covenants may become unenforceable because of changing circumstances. There is, however, no constitutional rule requiring them to do so and State policies in this respect are highly variable.

[19] Nassau, "Racial Restrictions on the Alienation and Use of Land", 21 Conn. Bar J., 123, 123-124 (1947).

CONCLUSION

The restrictive covenant is a pledge of future discrimination, "which is prejudice come to life" (Report of the President's Committee on Civil Rights, p. 135). The courts which enforce it compel acts of prejudice at a time when active prejudice has begun to weaken. It thereby casts over tomorrow the long shadows of the prejudices of yesterday and perpetuates indefinitely the system of segregation, overcrowding and social evils.

The decision of this Court in these cases will have a far greater geographical scope than the parcels of land under litigation. Restrictive covenants against all minorities have spread steadily and threaten to blanket urban and suburban areas throughout the country. This has been accomplished through a form of governmental edict at the instance of private individuals which is offensive to our democratic institutions.

Respectfully submitted,

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November 20, 1947.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1947

Nos. 72, 87, 290 and 291

J.D. SHELLEY, *et al.*, *Petitioners,*

—v.—

LOUIS KRAEMER, *et al.*, *Respondents.*

ORSEL McGHEE, *et al.*, *Petitioners,*

—v.—

BENJAMIN J. SIPES, *et al.*, *Respondents.*

JAMES M. HURD, *et al.*, *Petitioners,*

—v.—

FREDERIC E. HODGE, *et al.*, *Respondents.*

RAPHAEL G. URCIOLO, *et al.*, *Petitioners,*

—v.—

FREDERIC E. HODGE, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS AND BRIEF AMICUS CURIAE ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS.

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Congress of Industrial Organizations
United Steelworkers of America
United Railroad Workers of America.

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CASES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY, *et al.*, *Petitioners*,
v.
LOUIS KRAEMER, *et al.*
On Writ of Certiorari to the Supreme Court of Missouri

No. 87

ORSEL McGHEE, *et al.*, *Petitioners*,
v.
BENJAMIN J. SIPES, *et al.*
On Writ of Certiorari to the Supreme Court of Michigan

No. 290

JAMES M. HURD, *et al.*, *Petitioners*,
v.
FREDERIC E. HODGE, *et al.*

No. 291

RAPHAEL G. URCIOLO, *et al.*, *Petitioners*,
v.
FREDERIC E. HODGE, *et al.*
On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS AND BRIEF AMICUS CURIAE ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT:

Pursuant to the provisions of Rule 27 (9) of this Court, the Congress of Industrial Organizations and certain of its affiliated organizations made application to all of the parties to the instant cases for written consent to the filing of a brief *amicus curiae*.

The applicants have filed with the Clerk the written consent of counsel for Petitioners in Cases Nos. 72, 87, 290 and 291, and of counsel for Respondents in Cases Nos. 290 and 291. Applicants have received no response from counsel for Respondents in Cases Nos. 72 and 87. Special reasons for the granting of this application are contained in the accompanying brief.

INTEREST OF PARTIES FILING THIS BRIEF

The issues raised by the instant cases are of the most profound significance to applicants herein and their members. Article II of the Constitution of applicant Congress of Industrial Organizations states that the objects of the applicant organization are:

> "First. To bring about the effective organization of the working men and women of America *regardless of race, creed, color, or nationality*, and to unite them for common action into labor unions for their mutual aid and protection."

The Constitutions of its various constituent labor organizations, many of whom are applicants herein, likewise contain statements of fundamental policy against race discrimination and dedicate those organizations to the elimination of racial discrimination.

Since its formation in 1935, the Congress of Industrial Organizations has condemned the evil of racial discrimination and has actively instituted educational and legislative programs to end the evil of racial discrimination. In 1942, by action of the Executive Board of the Congress of Industrial Organizations, a Committee on Racial Discrimination was established charged with the responsibility of preparing programs for the elimination of racial discrimination.

Subsequent to the formation of the CIO Committee on Racial Discrimination, the Congress of Industrial Organizations adopted a resolution in convention restating its opposition to all forms of racial discrimination.

> "WHEREAS, Discrimination against workers because of race, religion or country of origin is an evil characteristic of our fascist enemies, we of the democracies are fighting fascism at home and abroad by welding all races, all religions and all peoples into a united body of warriors for democracy. Any discriminatory practices within our own ranks, against Negroes or other groups, directly aids the enemy by creating division, dissension and confusion. Such discrimination practices in employment policies hampers production by depriving the nation of the use of available skills and manpower; therefore be it
>
> "RESOLVED, That the CIO reiterates its firm opposition to any form of racial or religious discrimination and

> renews its pledge to carry on the fight for protection in law and in fact of the rights of every racial and religious group to participate fully in our social, political and industrial life."

The applicants herein have a direct interest in the problem presented by these cases. Many thousands of members of applicant labor organizations are Negroes. Restrictive covenants have imposed upon these Negro workers unbelievable hardships in obtaining adequate housing. Restrictive covenants have also imposed upon our Negro members enforced physical isolation from decent jobs and forced them to take undesirable employment.

The effect of these covenants upon our own members has not been confined to depriving them of adequate shelter at reasonable prices and endangering their livelihood. These covenants have forced our members into slum areas which breed vice, disease and delinquency.

Finally, the enforceability of such covenants presents questions of constitutional law respecting the extent to which the judiciary is limited by the Fifth and Fourteenth Amendments. The applicants have a deep concern in assuring that civil liberties are not invaded by any branch of the government.

ISSUE PRESENTED

The issue presented is whether, where owners of real property have entered into an agreement to exclude Negroes from occupancy of property in a community, the issuance by a court of an injunction prohibiting a Negro, under pain of contempt, from occupying real property purchased and owned by him, because a former owner of such property was party to such an agreement, is in contravention of the Constitution in that—

(1) It is state action which deprives the Negro purchaser of property without due process of law within the meaning of the Fifth and Fourteenth Amendments and denies to him the equal protection of the laws guaranteed by the Fourteenth Amendment, and

(2) It fails to enforce, as the supreme law of the land, in accordance with Article VI of the Constitution,

(a) the federal statute, R. S. §1978 (8 U.S.C. §42) declaring

that every citizen shall have the same right to purchase real property as white citizens, and

(b) the Charter of the United Nations (Articles 55c and 56) requiring the United States to promote observance of fundamental freedoms without distinction as to race.

ARGUMENT

The briefs by the Petitioners and by other *amici curiae* in these cases fully develop the legal issue involved. We concur in the analyses and legal conclusions presented therein and advert here only to those arguments and considerations which may not have already been urged upon the Court.

I.
THE NATURE OF THE RIGHT HERE INVOLVED

As part of the constitutional settlement of the Civil War, constitutional protection against state interference was extended to the right to purchase, use and dispose of property without discrimination on the basis of race. It must be emphasized that the right involved herein is a civil right. See *Buchanan* v. *Warley*, 245 U. S. 60. It is "one of those fundamental rights which are the essence of civil freedom." *Civil Rights Cases*, 109 U. S. 3, 22.

The evils which have flowed from the systematic suppression of this right through the judicial enforcement of restrictive covenants dramatically illustrates the basic character of this right. Where Negroes are denied the opportunity to purchase or occupy homes through legally enforced restrictive covenants a basic foundation is laid for the imposition of other forms of discrimination. Because restrictive covenants force Negroes to live in ghettos, Negro communities rapidly become prey to the whole invidious gamut of segregation and Jim Crow. Negroes who suffer enforced concentration in areas bounded by restrictive covenants inevitably find themselves trapped in a system of Jim Crow which pervades every aspect of their existence. The initial denial of the right freely to purchase a home upon the same basis as a white man ultimately produced far-reaching diminution and loss of political rights as the economic material supplied in Petitioners' briefs demonstrates.

The right to acquire and hold property as a home without discrimination because of race enjoys at least the same protection as freedom of speech, religion and the press. Other basic rights of the Negro cannot be protected if the right to acquire living space can be denied. Invasion of the right herein involved can only be sanctioned by the existence of a clear and present danger to a vital public interest. But our Nation was the theater of a bloody civil war in which thousands of lives were lost and countless treasure spent because of the conviction that the state itself could not survive consistently with the suppression of that right and the rights cognate to it.

II.

THE ACTION OF A STATE IN ENFORCING A RESTRICTIVE COVENANT OR PERMITTING IT TO BE ENFORCED IS PROHIBITED STATE ACTION REGARDLESS OF THE FACT THAT THE COVENANT DOES NOT ORIGINATE THROUGH OFFICIAL ACTION.

Respondents urge that the enforcement of the covenants decreed below is distinguishable from what was condemned in *Buchanan* v. *Warley, supra,* because the restriction there was promulgated by public authority while in these cases it is the work of individuals. A short answer is that in both cases, it is the machinery of government, and only the machinery of government which makes the restriction effective. But in any event it is without legal consequence, in the determination of the constitutional issue, whether the discrimination is essentially that of private persons which the courts simply enforce or whether the state, by attaching the sanctions of its courts and officers to the covenants, is itself guilty of direct discrimination. The more recent decisions of this Court reveal an approach to the question of state action far too realistic to permit the Court to be misled by the appearance of private action under such circumstances as are here involved.

March v. *Alabama,* 326 U. S. 501 (1946), is only the latest in a series of cases developing this approach. Such decisions have settled that the discriminatory use of public or quasi-public powers by persons in whom such powers are vested either explicitly or implicitly is no less unconstitutional than

direct legislation or other more obviously governmental action such as that under consideration in *Buchanan* v. *Warley*. See Tefft, *Marsh* v. *Alabama*—A Suggestion Concerning Racial Restrictive Covenants, Vol. VI National Bar J., No. 2 (June, 1946, p. 133).

These respective covenant cases fall squarely within the doctrine enunciated by this Court in *Marsh* v. *Alabama*. There, the proprietors of a company-owned town, who owned in fee all of the land in the town, including the streets, denied Marsh access to such streets when she sought to go upon them for the purpose of distributing religious literature. It had previously been held that the right to distribute such literature in the public streets was guaranteed by the First and Fourteenth Amendments. The proprietors, however, relied on the fact that their private property was involved and their contention that the streets were private property was upheld by the Supreme Court of Alabama.

Marsh having refused to leave these "private" premises, criminal proceedings were taken against her under the local statute which made trespass after warning a crime and she was convicted. This Court held, in reviewing the conviction, that it was state action in violation of the guarantees of the Fourteenth Amendment. In the light of the nature of the property in question and the purpose sought to be achieved through the exercise of the property rights, this Court held that Alabama was compelled by the Constitution to prefer rights guaranteed by the Constitution to members of a community over rights flowing from ownership of property. In upholding Marsh's exercise of her constitutional rights on the "private" streets in question, this Court took the view that the property rights of the owners of a town, like the property rights of the owners of a highway dedicated to public use, are circumscribed by the constitutional rights of members of the public:

> "We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a 'business block' in the town and a street and sidewalk on

> that business block. Cf. *Barney* v. *Keokuk*, 94 U. S. 324, 340, 24 L. ed. 224, 228. Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town. The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers appointed by the corporation cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments of the Constitution." (326 U.S. 507–8)

The same principles are applicable here. That the state has empowered members of the community to restrict the purpose to which their respective properties may be put and has afforded to the members of the community the powers of the state in the enforcement of such restrictions does not justify the members of the community in adopting for the entire community restrictions the effect of which is to deny constitutional right, and state law, declared by the courts, which enforces such action by punishing with substantially criminal sanctions those who refuse to acquiesce in such a deprivation of constitutional right similarly violates the Fourteenth Amendment.

As in this case, so in *Marsh* v. *Alabama* it was strenuously urged, and the view was accepted by the state courts, that the state action prohibiting and punishing the exercise of constitutional rights was justified because the prohibition had reference only to private property. But this Court said:

> "We do not agree that the corporation's property interests settle the question. [Footnote omitted.] The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion." (326 U.S. 505–6)

It is noteworthy that although the private corporation had

unquestioned and complete ownership in the sense of a fee simple title to the property in question, the Court nonetheless emphasized that "Ownership does not always mean absolute dominion." *A fortiori,* it would seem is the case where the property interest asserted does not attain even the dignity of an interest in land but is a mere covenant. The nature of the private interest in vindication of which state action is sought in these restrictive covenant cases is such that it can be of but little weight as against the constitutional guarantee which is sought to be avoided.

In the *Marsh* case, the Court took pains to indicate that an important factor in its decision was that many persons live in such company-owned towns and that to uphold the view taken by the Alabama Supreme Court would tend to deprive all of such people of constitutional guarantees. (326 U. S. 508. Precisely such considerations are involved here. Indeed, there is every reason to suppose that the number of persons affected by racial restrictive covenants far exceeds the number of the inhabitants of company-owned towns. To uphold the covenants in issue is, as has been pointed out, not simply to deny the right to retain their property to the defendants in these particular suits. It is to permit in substance the promulgation of private laws, endowed with the most potent of governmental enforcing powers, and requiring the exclusion of an entire race and perhaps other races from housing facilities. And all this on the basis of the prejudices of individuals who have no property interest in the facilities so denied.

In summing up in *Marsh* v. *Alabama,* the opinion states:

> "In our view the circumstances that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute. In so far as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." (326 U.S. 509)

It is to be noted that in *Marsh,* as in these cases, the denial

of constitutional right was effectuated only through the holding of a state court that a breach of requirements privately imposed constituted a violation of state law. It was only through the use of the state law and state law enforcement procedure that the unconstitutional purpose was achieved, and it was the action of the state in enforcing the private discrimination which was the subject of constitutional condemnation. So here it is the action of the states through their courts, in adding the sanction of fine and imprisonment to an agreement, the purpose of which is to achieve an unconstitutional discrimination, that must be struck down.

Also relevant to decision in these restrictive covenant cases in the view taken in regard to state action in *Smith* v. *Allwright,* 321 U. S. 649 (1944). There it was also urged that action by "private" agencies, permitted by a state, in a field in which the Constitution prohibits racial discrimination, was private action to which the guarantees of the Fourteenth Amendment had no relevance. There the case was that the Democratic Party of Texas had by resolution of its state convention excluded Negroes from membership and hence from participation in the Democratic primary. The Negro plaintiff was refused a Democratic ballot by the defendant election judges and alleged that he had thereby been deprived of constitutional rights. The real question was whether it was state or private action that excluded Negroes from voting in the Democratic primary. Beginning with the proposition that the right to vote in primaries, as well as in general elections, is secured by the Constitution against denial on a racial basis through state action, this Court came to the conclusion that, where the state permitted the party to discriminate in the primary and then restricted the choice of the voters in the general election to the candidates so selected, the state by so adopting and enforcing the discrimination of the party made it state action.

The following language was used in the opinion:

> "It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States* v. *Classic,* 313 U. S. at 314, 85 L. ed. 1376, 61 S. Ct. 1031; *Myers* v. *Anderson,* 238 U. S. 368,

59 L. ed. 1349, 35 S. Ct. 932; Ex parte Yarbrough, 110 U. S. 651, 663 et seq., 28 L. ed. 274, 278 4 S. Ct. 152. By the terms of the Fifteenth Amendment that right may not be abridged by any state on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color. . . ." (321 U. S. 661–2)

The opinion further states:

"The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson,* 307 U. S. 268, 275, 83 L. ed. 1281, 1287, 59 S. Ct. 872.

"The privilege of membership in a party may be, as this Court said in *Grovey* v. *Townsend,* 295 U. S. 45, 55, 79 L. ed. 1292, 1297, 97 ALR 680, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state." (321 U. S. 664–5)

These restrictive covenant cases present a situation closely analogous to that before the Court in *Smith* v. *Allwright.* Here, too, it is clear under the long-established and unquestioned rule of *Buchanan* v. *Warley,* 245 U. S. 60 (1917), that the right to purchase and occupy property is protected by the Fourteenth Amendment from racial discrimination through state authority. And here, too, it is urged that the action of the state in implementing and enforcing the concerted acts of individuals, purposed to deny on racial grounds the right of ownership and occupancy of property, is private action with which the state has no concern. Yet here the state has not only, as in *Smith* v. *Allwright,* endorsed, adopted and enforced the discrimination practiced by individuals; it has effectuated the discrimination by the addition of sanctions of its own which it superimposes on the discriminatory agreements created by the parties. Moreover, as a practical matter,

it is only because these state sanctions have been imposed that these discriminatory arrangements are made effective. The power of the state imparts strength and vitality to discriminatory practices which might otherwise remain without force. That which the Constitution prevents the state from doing directly is accomplished by indirection, if the state is permitted to seize upon the agreement of the parties as an excuse for the imposition of legal restraints, which the parties without affirmative state intervention would be powerless to maintain.[1]

This Court has recognized the existence of discriminatory governmental action in situations where the incidence of such action was far less direct than in these restrictive covenant cases. *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944) was a suit brought by a Negro railroad employee to enjoin the enforcement of an agreement between a union and his employer pursuant to which agreement discrimination against colored employees was required. The Railway Labor Act made the union the exclusive bargaining representative for the craft of which the plaintiff was a member. The Supreme Court of Alabama affirmed a judgment dismissing the suit. This Court characterized that decision as follows:

> "It [the Alabama court] construed the statute, not as creating the relationship of principal and agent between

[1]True enough, in these cases, the state has not by legislative action prohibited Negro use and occupancy of specific areas. It has not enacted an ordinance prohibiting such occupancy except with the consent of a specified number of persons of another race, as in *Harmon* v. *Tyler*, 273 U. S. 668 (1927). It has, however, vested the power to prohibit such occupancy in property owners for the time being and this not simply as an ordinary incident of ownership of property, but regardless of such ownership and even in derogation of the ordinary property rights of other owners. It has permitted private persons to make an essentially legislative determination effective for all time in the future, regardless of the wishes of subsequent owners of the land. Moreover, the state has by the action of its courts provided that, where members of the White race have agreed the Negroes should henceforth be excluded from a particular area, such an agreement once made shall have the force of a criminal sanction attached to a zoning law of similar purport. The power of the legislature to vest zoning functions in private groups or individuals has been closely limited. *Eubank* v. *Richmond*, 226 U. S. 137 (1912); *State of Washington* v. *Roberge*, 278 U. S. 116 (1928). That it may be vested in private individuals to be used for purposes of implementing racial discrimination is, it is submitted, completely inconceivable.

> the members of the craft and the Brotherhood, but as conferring on the Brotherhood plenary authority to treat with the Railroad and enter into contracts fixing rates of pay and working conditions for the craft as a whole without any legal obligation or duty to protect the rights of minorities from discrimination or unfair treatment, however gross. Consequently it held that neither the Brotherhood nor the Railroad violated any rights of petitioner or his fellow Negro employees by negotiating the contracts discriminating against them." (323 U. S. 198)

This Court, however, recognized that such a holding presented a constitutional question:

> "If, as the State court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading." (323 U. S. 198–9)

It must be noted that the discrimination in the *Steele* case was far less clearly state action than that which is involved in state court injunctions enforcing restrictive covenants. For in the restrictive covenane cases the discrimination cannot be effective, except through the intervention of the machinery of government. Yet there was no showing in the *Steele* case that the union there concerned could not have achieved its purpose of racial discrimination through collective bargaining, even without the status especially conferred upon it by statute. Nonetheless, that the statute gave the union such powers, regardless of whether they were necessary to achieve the discrimination, was conceived to be a sufficient basis for a constitutional question. Far more obvious is the case where

the discrimination is directly imposed by a state agency, without the aid of which private efforts to discriminate would be unavailing. If the Constitution prevents a labor union from imposing racial discrimination, where the union is capable of enforcing its policy without the aid of state action, it is difficult to understand how the Constitution can permit a court, itself the instrumentality of a state, to impose racial discrimination, where the persons at whose behest the court acts are incapable of enforcing such a policy, except with the aid of the court and the machinery of government which it sets in motion.

Of course, the Court in the *Steele* case, applying familiar principles of constitutional law, endeavored to avoid the constitutional question posed by Mr. Chief Justice Stone at the beginning of the opinion by construing the statute to require the union to use its bargaining powers in non-discriminatory fashion. But this result had to be reached through interpretation and despite the absence of specific language so that Mr. Justice Murphy, concurring, suggested that such a construction could be justified only on the ground of necessity because "otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment . . ." (323 U. S. 208).

III.

THIS COURT HAS NEVER DECIDED THE QUESTION WHETHER STATE COURT INJUNCTIONS ENFORCING RACIAL RESTRICTIVE COVENANTS CONTRAVENE CONSTITUTIONAL GUARANTEES.

Corrigan v. *Buckley*, 271 U. S. 323 (1926), which is pressed upon this Court as authority that the covenants in these cases can be enforced by injunction without transgressing constitutional guarantees, did not reach this question. It is submitted that the courts which have cited that case as such authority have misunderstood that decision and have accepted it as establishing a proposition of law which was not involved.

The only argument which the Court in the *Corrigan* case passed upon was that the covenant itself, as distinguished from the state action through which it was enforced, was

unconstitutional under the Fifth, Thirteenth and Fourteenth Amendments. This the Court specifically stated:

> "Under the pleadings in the present case the only constitutional question was that arising under the assertions in the motion to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments." (329–30)

The opinion of the Court further states clearly that the issue of state action was raised for the first time in the Supreme Court and was therefore not to be considered:

> "And while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the court of appeals or in this court; and it likewise is lacking in substance." (331)

In such circumstances the statement that the contention "likewise is lacking in substance" is the clearest dictum and should certainly not be binding upon this Court when the issue is properly presented. *Corrigan* v. *Buckley* was, of course, dismissed for want of jurisdiction, no constitutional question having been considered on the merits. Even for the narrow point decided, the case has been cited only once by this Court in the twenty years which have elapsed since its decision. *United States* v. *Johnson*, 327 U. S. 106, 113 (1946).

Moreover, the constitutional problem presented by restrictive covenants in the light of the fact that they are substantially zoning ordinances was not even mentioned, possibly because the fact situations which give rise to the constitutional question did not then exist and more probably because no substantial data had yet been collected on the subject. Twenty years ago restrictive covenants were not only far less prevalent than they are today but the urbanization of the Negro

was still a new social phenomenon and the problem was by no means so acute. See the dissenting opinion of Edgerton, J. in *Mays* v. *Burgess,* 147 F. 2d 869, 876 et seq (C.A.D.C., 1945), tracing the development of the problem in the District of Columbia alone since *Corrigan* v. *Buckley.*

The case was also decided before the importance of racial restrictive covenants was realized and before the implications of a decision upholding such covenants could be fully understood. As late as 1922, the Report of the Chicago Commission on Race Relations, *The Negro in Chicago,* a study of the race riots in Chicago in 1919, which devoted some 125 pages (106–230) to the distribution of the Negro population and to its housing problem, and discussed in some detail the methods used by property owners to exclude Negroes from White areas, did not seem to mention restrictive covenants as a factor in segregation. Evidently covenants were then not yet considered important.

Furthermore, not only were the facts, as they were known at the time of *Corrigan* v. *Buckley,* too hazy to focus the constitutional problem as it is now presented, but the law with respect to state action constituting a violation of the Fourteenth Amendment was also far too little developed to present the question which is now before this Court. As *United States* v. *Classic,* 313 U. S. 299 (1941) made necessary the reconsideration of *Grovey* v. *Townsend,* 295 U. S. 45 (1935) in the light of the cases which had previously upheld the rights of Negroes to vote, so *Marsh* v. *Alabama* requires a reconsideration of *Corrigan* v. *Buckley* in the light of *Buchanan* v. *Warley.*

It is noteworthy that the earliest reported case in an American jurisdiction in which the validity of a racial restrictive covenant was considered, *Gandolfo* v. *Hartman,* 49 Fed. 181 (Cir. Ct., Calif., 1892), held that its enforcement by injunction would be in violation of the Fourteenth Amendment. That case appears to be the only federal case prior to *Corrigan* v. *Buckley* in which such a question was raised. There the restriction was directed against Chinese rather than Negroes but the principles involved and the arguments presented were the same as those in the anti-Negro cases. The usual "private

action" argument to the effect that there was no legislation involved and hence that the Fourteenth Amendment did not apply was apparently pressed on the court. In answer the opinion stated:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce. Such a view is, I think, entirely inadmissible. Any result inhibited by the constitution can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other." (182)

This case was, of course, decided almost a decade after the *Civil Rights Cases,* 109 U. S. 3 (1883), had established that the Fourteenth Amendment was protection only against governmental action and not against the activities of individuals in a private capacity. This makes even more clear, what would have not been particularly doubtful from the language of the opinion alone, that the court did not rely on any mistaken interpretation of the Fourteenth Amendment, by reason of which the restrictive agreement would itself be void, but based the holding on a conclusion that judicial enforcement of the restriction would be prohibited governmental action. It is unnecesary to speculate on the question whether the court considered itself bound, in what may have been a diversity case, by whatever restrictions would have been applicable to the action of state courts in the premises for no different result could have been reached on the basis of the Fifth Amendment.

Gandolfo v. *Hartman* appears to have been overlooked in the decision of *Corrigan* v. *Buckley,* both in the Court of Appeals and in this Court. The persuasiveness of the views there stated plus the fact that they seem to have been subsequently overlooked is another reason for the reconsideration of the *Corrigan* v. *Buckley* dictum at this time.

IV.

CONSTITUTIONAL SANCTION FOR THE INJUNCTIONS IN ISSUE MAY RESULT IN DEPRIVING NEGROES THROUGHOUT THE COUNTRY OF ANY SUBSTANTIAL CHOICE OF HOME SITES.

In determining the questions presented in this case the Court cannot be blind to the effect of its decision on the availability of housing facilities to entire races of Americans as well as its effect on land usage generally. To uphold these covenants is to admit that the agreements of private individuals regarding the use of land by particular races may be given the force of zoning ordinances. It will thus become possible for private persons of one generation to bind future generations in the use of land and by so doing perpetually to exclude one or more races of citizens from the opportunity to acquire and utilize it.

This Court has already denied that such powers may be vested even in legislatures. Yet those who seek enforcement of the covenants in this case are in the position of demanding that such powers be vested in irresponsible private groups whose judgments are not even amenable to the political pressures which operate on legislators in a democracy. A zoning ordinance restricting the use and occupancy of land on a racial basis and enacted by a town counsel or state legislature is subject to repeal and reconsideration by the enacting authority as more mature consideration or later experience shows that the ordinance is unwise either on economic or on humanitarian grounds. Such a restriction is also subject to direct or indirect review at the polls. There is no such *locus penitentiae* in respect of these private zoning ordinances. Once adopted, and subject only to diverse mitigating rules differing in the various states and sometimes haphazardly applied (see note to *Kathan* v. *Stevenson,* 307 Mich. 485, 12 N.W. (2d) 332 (1943) in 42 Mich. L. Rev. 923 (1944) and 3 Tiffany, *Real Property* §§871-5 (3d ed. 1939)) they stand forever as statutes enforceable irrespective of changes of circumstances, development of public morals and movements of population if only a single individual remains in the community who desires enforcement.

The practice of including restrictions in the subdivision of new plots for residential uses appears to be spreading. A decision by this Court that state courts may add substantially criminal penalties to these private statutes will give impetus to this tendency. Moreover, as the proportion of restricted residential land increases, the probability that unrestricted land will be occupied predominantly by Negroes is also enhanced. Thus competition tends to force the adoption of discriminatory policies by subdividers and communities who might be loath to discriminate were they not faced with the apparent dilemma of either excluding Negroes completely or turning over the area to Negroes only. It may be forecast, if the judgments under review are upheld, that a large proportion of desirable residential land may thus be closed for various periods of time or perhaps in perpetuity to Negro occupancy.

On the other hand, if it were once and for all declared that the Constitution prohibits racial zoning, whether initiated by public officials or by individuals in the community, the penetration of Negroes into urban communities would tend to relate itself to the same economic and social factors as control the movements of other groups in cities. It is foreseeable that over a period of years the resultant diffusion and dispersion of the Negro population would eliminate any factual basis for the arguments of even those who justify restrictive covenants on policy grounds.

It should not be overlooked that the problem is not limited to Negroes alone. Restrictive covenants aimed at other races are common, especially in the West. And, if this type of covenant is to be given constitutional sanction, no reason is apparent why other bases of discrimination should not be selected. Bigotry may well feed on the opportunity for its exercise.

These are not idle speculations. The magnitude of the problem is by no means reflected by the data presented in the briefs and materials before the Court in respect of the prevalence of restrictive covenants. These petitioners have not the resources to underwrite the systematic study of re-

strictive covenants in urban communities which would be necessary for a definitive analysis. But enough data have been collected to show that even today the effect of covenants is to deny living space to Negroes in white communities.

Although it may present no constitutional law aspects, the problem of economic land usage which will be created if injunctions enforcing racial restrictive covenants are upheld should likewise not be overlooked. The natural expansion of cities tends to convert their central and older areas to business and industrial uses. Older residential areas become less desirable and therefore available to groups financially less able than the original occupants. Artificial restraints on such a transition, through the use of racial restrictive covenants, tends to make economic use of the land impossible and to work hardship on its owners. By the same tokens artificial limitations of areas of Negro occupancy tend to inflate rental income in such areas and prevents the removal of obsolete and undesirable structures and their replacement by buildings which would utilize the land to the best economic advantage.

Questions of economic land usage aside, the pattern of urban development is such that business and industrial uses tend also to encroach upon areas now available for Negro habitation. If a doctrine of constitutional law is promulgated permitting injunctive enforcement of racial restrictions, newer residential areas will in all likelihood be closed to Negroes. Ultimately, the result of the two tendencies would be the complete exclusion of the Negro from the community. It seems unthinkable that such a result can be accomplished under our Constitution, whatever the means invoked.

V.

RACE IS A VAGUE AND ABSTRACT CONCEPT AND CANNOT SERVE AS A BASIS FOR A RESTRICTIVE COVENANT WHICH A COURT OF EQUITY WILL ENFORCE.

It is commonplace that before a Court of Equity will enforce a restrictive covenant the conditions upon which the covenant is based must be clearly defined and objectively identifiable.

But the concept of race is a vague and fluid concept which cannot serve as an adequate basis for the establishment of rights or disabilities.

The range of physical variability in mankind has given rise to repeated attempts to classify peoples into groups with similar inherited characteristics. Yet these characteristics are not fundamentally distinct and are overshadowed by the essential uniformities of man morphologically. An individual's "race" cannot be determined with absolute certainty by his appearance. The variations in the physical appearance among "races" are not sharp and distinct but are a series of gradations.

Where people have in common several such physical variations, they are said to form a "race." (Other terms such as stock, breed, type, are sometimes used in making larger or smaller distinctions, but "race" is the most commonly understood word.) No one single trait is the basis of classification, nor the presence in any one individual of a certain number of traits; "race" is determined by the preponderance in the group of several such traits. Consequently "race" is really a biological abstraction, and cannot in practice be precisely defined. "Races" "are loose aggregates which precipitate out en masse." [8]

This difficulty in definition is evident in the different racial classifications that have been made. Classifications have varied in accordance with the series of traits selected as race criteria, with the significance assigned to small differences by the observer, and with other fluctuations in observation. One anthropologist has pointed out that races are "creations of the investigator, and creations with regard to which all the creators are by no means in agreement." [8]

There is much difference among anthropologists about the details of race and race classification. There is unanimity, however, on the point that "Anthropology provides no scientific basis for discrimination against any people on the ground

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[8] Krogman, W. M., "The Concept of Race," in the Science of Man and the World Crisis (Ed. Linton) Col. Univ. Press (1945, p. 53).

[8] Linton, Ralph, *The Study of Man*, Appleton-Century (1936, p. 39).

of racial inferiority, religious affiliation or linguistic heritage."[4]

The meager scientific facts with respect to the basic groupings of the peoples of mankind have been converted through ignorance and prejudice into rigid structures based upon "believed in" differences. These "believed-in" differences are a form of modern ethnocentricism, and assume the greatest importance in periods and places of conflict and competition. The pattern of belief about "races" is stirred into action when there is competition for housing, or for jobs, for example. Competition builds fears, and these fears seek expression in action against a scapegoat or a competitor who can be identified in some way—very often color—as belonging to another group.

Social concepts of race differ greatly, but are alike in being inconsistent and plastic. They do not classify in any ordered or systematic way, but assign to heterogeneous physical or homogenous cultural groups a fictitious common ancestry and fictitious mental or temperamental differences. Nationality groups, such as Italians, religious groups, such as Jews, and linguistic groups, such as Aryans, are often considered to be "racial" groups. And the definition of actual biological groups becomes socially arbitrary as different decisions are made about progeny of mixed ancestry. Thus, in the United States persons are considered to be Negro if they are known to have any Negro ancestry at all, even if they be straight haired, blue eyed and white skinned—biologically Caucasian. Not so far away, in the Caribbean, the reverse is true; any person with noticeable "white blood" is called white. In the case of these mixed persons, then, their "race" depends on their geographical location alone, and not on a set of scientific criteria.

Social concepts with respect to "race" are therefore even more capricious and treacherous than biological concepts. The latter vary with the scientist's system, methodology and observations. The former vary in accordance with local traditions or historic prejudice. Unless we are prepared to substitute for objectivity and scientific truth the trumpery of the Nurenberg laws and the Nazi "science" of *"blut und boden,"*

[4] Resolution of the American Anthropological Association of Dec., 1938, quoted in "Science," vol. 89, no. 2298, Jan. 19, 1939.

we must recognize that a court cannot permit itself to determine the rights and disabilities of individuals upon the basis of "race".

VI.

THE CONTENTION THAT RESTRICTIVE COVENANTS ARE NECESSARY TO PRESERVE PROPERTY VALUES*

Respondents in these cases will undoubtedly repeat the charge that Negroes are inferior tenants, neighbors and landlords and that it is therefore necessary to exclude them from certain properties in order to preserve the values of these and surrounding properties in the neighborhood. A short answer to this contention, of course, is that the suppression of the civil rights of minority groups is not justified because it is profitable.

As a matter of fact, the available experience refutes this attempted justification of the restrictive covenant. For example, surveys made in the public housing field demonstrate that Negro tenants when compared to other tenants in similar income groups are responsible rent payers to the same degree as are other tenants. Similarly, with respect to the property maintenance, the experience with public housing projects indicates that the projects occupied by Negroes are maintained fully as well as those occupied by Whites. Studies made by the Federal Housing Agency on the effect of public housing projects occupied by Negroes upon the values of rent-paying property occupied by Whites refute the contention that Negro occupancy lowers the value of property.

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*The material in this portion of the brief is based upon the following sources: Robert C. Weaver, "Race Restrictive Housing Covenants," 20 Journal of Land and Public Utility Economics 183 (Aug. 1944); National Housing Agency (Racial Relations Service), "Summary and Digest of the Orientation Conference for Racial Relations Advisers" (Oct. 28-Nov. 2, 1946, Washington, D. C.); National Association of Real Estate Boards, "News Release No. 78" (Nov. 15, 1944, Washington, D. C.); Corienne K. Robinson, "Relationship Between Condition of Dwellings and Rentals, By Race", 22 Journal of Land and Public Utility Economics 296 (Aug. 1946); Housing Management Bulletin (January 1943); James T. Daniels, "Public Housing As Seen By a Former Chamber of Commerce Manager," The American City (June, 1941); Alonzo Moron, "Where Shall They Live?", The American City (April, 1942).

Too frequently Negro residency is blamed for the deterioration of property values which have altogether different causes. Thus, in many instances it is the influence of the slum area which deteriorates the value of fringe properties not the fact that the slum areas are inhabited by Negroes.

Moreover, in a large number of cases it is a standing phenomenon in shifts in urban occupancy patterns that the change-over from white to Negro occupancy results not in the decrease of the value of the property but in an increase in its value.

It has now become a systematic practice of real estate management deliberately to bring Negro residents into an area for the purpose of reaping the higher profits resulting from exploitation of the Negro rental market. The results of this practice, reflected in increased occupancy density and higher rents per unit, with the final creation of a lucrative slum, is to be found in every urban community. Certainly in these cases, the value of property in terms of rental income is enormously enhanced by Negro residency.

The same is equally true where properties are made available to the Negro home purchasers' market.

The contentions which are raised with respect to the character of the Negro as a landlord or tenant present a familiar instance of the entire pattern which seeks to justify Negro discrimination. Negroes, through the operation of discriminatory practices, are isolated in a substandard environment and converted into second-class citizens. Those responsible for these attacks upon the rights of Negroes then not only blame the Negro for the environment into which he has been unwillingly forced and from which there is no escape but actually point to that environment to justify their own undemocratic and anti-social behavior.

CONCLUSION

Whether the Negro people in this country will have an opportunity in the future to obtain adequate housing or whether they will be forced to remain in the ghetto-slum areas which, for the most part, they now occupy depends upon

the Court's decision in these cases. We urge the Court to refute the racist principles upon which the restrictive covenants in these cases rest.

It is respectfully submitted that this Court for the reasons stated above reverse the judgments of the courts below.

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International Union of Mine, Mill & Smelter Workers

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72 and 87

J.D. SHELLEY, *et al., Petitioners,*

—v.—

LOUIS KRAEMER, *et al., Respondents.*

ORSEL McGHEE and MINNIE S. McGHEE, his wife, *Petitioners,*

—v.—

BENJAMIN J. SIPES and ANNA C. SIPES,
JAMES A. COON and ADDIE A. COON, *et al., Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS
OF THE STATES OF MISSOURI AND MICHIGAN

CONSOLIDATED BRIEF AMICUS OF EXECUTIVE COMMITTEE OF THE GENERAL COUNSEL OF CONGREGATIONAL CHRISTIAN CHURCHES OF THE U.S., THE BOARD OF HOME MISSIONS OF THE CONGREGATIONAL AND CHRISTIAN CHURCHES, THE COUNCIL FOR SOCIAL ACTION OF THE CONGREGATIONAL CHRISTIAN CHURCHES, THE COMMITTEE ON CHURCH AND RACE.

MELVILLE J. FRANCE,
Council for Executive Committee of the General Council of Congregational Christian Churches of the U.S., The Board of Home Missions of the Congregational and Christian Churches, The Council for Social Action of the Congregational Christian Churches, The Committee on Church and Race.

WM. KINCAID NEWMAN,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1947

J. D. SHELLEY, *et al.*, *Petitioners*, v. LOUIS KRAEMER, *et al.*, *Respondents.*	No. 72

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

ORSEL McGHEE and MINNIE S. McGHEE, his wife, *Petitioners*, v. BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, *et al.*, *Respondents.*	No. 87

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

Consolidated Brief *Amicus* of Executive Committee of the General Council of Congregational Christian Churches of the U. S., The Board of Home Missions of the Congregational and Christian Churches, The Council for Social Action of the Congregational Christian Churches, The Committee on Church and Race.

1. The Congregational Christian Churches of the United States with approximately 1,100,000 members and some

5800 local churches are on record through their representative national body known as the General Council, as follows:

> "We repent of the sin of racial segregation as practiced both within and outside our churches, and respond to the mandate of the Christian Gospel to promote with uncompromising word and purpose, the integration in our Christian churches and our democratic society of all persons of whatever race, color, or ancestry on the basis of equality and mutual respect in an inclusive fellowship.
>
> "We affirm as our own these words adopted by the Federal Council of Churches of Christ in America (meeting at Columbus, Ohio, March 5-7, 1946):
>
> > 'The Federal Council of Churches of Christ in America hereby renounces the pattern of segregation in race relations as unnecessary and undesirable and a violation of the Gospel of love and human brotherhood . . . As proof of their sincerity in this renunciation they will work for a non-segregated Church in a non-segregated society.' "

2. The above Resolution was adopted at Grinnell, Iowa in June of 1946. At this time a two-year program in race relations was set up throughout the denomination in order to forward the aims and objectives of the Resolution and to initiate long-term efforts in the direction of a truly integrated and inclusive Church as well as a non-segregated community. Such a Church and Community are the inevitable outgrowth of the principles and moral values which are both explicit and implicit in the Christian message. Segregation is a sinful denial of fellowship between men and women who are equally chosen of God whatever their color or national ancestry may be. Because of the evil conse-

quences of segregation—psychological, economic, sociological—this commonly practiced form of discrimination on the basis of race and creed denies the very basis of our democratic creed and undermines our moral influence in international affairs. We believe that racial restrictive covenants are unconstitutional, immoral, and against the public interest and welfare. They increase and perpetuate hostility between groups and are a persistent threat to peace and progress in our society. It is our conviction that a great moral victory would be achieved by this Nation if the constitutional and democratic principles of America were to be upheld by a decision of the Supreme Court of the United States invalidating these unjust and discriminatory agreements so far as they are now enforceable by court action.

3. For these reasons the aforementioned Boards and Agencies of the Congregational Christian Churches of the United States hereby request permission of this Court to appear as *amicus curiae* and to adopt the position taken and the brief filed in behalf of the petitioners in these cases.

Respectfully submitted,

MELVILLE J. FRANCE,
Counsel for Executive Committee of the General Council of Congregational Christian Churches of the U. S., The Board of Home Missions of the Congregational and Christian Churches, The Council for Social Action of the Congregational Christian Churches, The Committee on Church and Race.

WM. KINCAID NEWMAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY, ETHEL LEE SHELLEY, His Wife, and JOSEPHINE FITZGERALD, *Petitioners,*

—v.—

LOUIS KRAEMER and FERN KRAEMER, His Wife, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS

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Washington 5, D.C.
Attorneys for Amicus Curiae.

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No. 72.

J. D. SHELLEY, ETHEL LEE SHELLEY, his wife, and JOSEPHINE FITZGERALD, *Petitioners*,

v.

LOUIS KRAEMER and FERN KRAEMER, his wife, *Respondents*.

Brief of National Association of Real Estate Boards as Amicus Curiae.

JURISDICTIONAL STATEMENT.

This Court entertains jurisdiction of this cause as a result of the granting of a petition for writ of certiorari based primarily upon the claim that the judgment of the Supreme Court of Missouri deprived Petitioners of a privilege or immunity of a citizen of the United States, allegedly the right to own and occupy land in the City of Saint Louis, Missouri, deprived them of property without due process of law, or denied them the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE.

Respondents are privy to a signatory of a restrictive covenant entered into in 1911, by the terms of which Negroes are not permitted to acquire title or to occupy certain land situate in the City of Saint Louis, Missouri. One Fitzgerald, whose title had descended from another signatory of the said restrictive covenant, purported to deed to Petitioners

Shelley, who are Negroes, a piece of land subject to said covenant.

Respondents in the Circuit Court of Saint Louis, a regularly constituted Court within the Missouri State Court organization, sought enforcement of the covenant and an injunction against occupancy by Petitioners Shelley. The Circuit Court of Saint Louis held the restrictive covenants invalid. On appeal, the Supreme Court of Missouri reversed, *Kraemer* v. *Shelley,* 198 S. W. 2d 679 (1946).

INTEREST OF THE NATIONAL ASSOCIATION OF REAL ESTATE BOARDS.

The application of constitutional law principles to real property law is of utmost interest to those whose business it is to buy and sell land. In the making of sales, entering into of contracts, evaluation of real property, and in the making of decisions as to the soundness of investments in real estate, those in the real estate business are vitally interested, not only in the existing constitutional law, but also in the predictability of future judicial determinations of the validity of the various types of legal devices used as the everyday tools of the real estate man.

QUESTIONS RAISED.

The National Association of Real Estate Boards is interested, in particular, in the following questions raised by the petition for certiorari in the instant cause:

I.

Whether said restrictive covenant is void as in conflict with the Fourteenth Amendment, or Acts of Congress pursuant thereto?

II.

Whether said covenant is void as in conflict with an existing treaty of the United States?

III.

Whether said covenant is void as against the "public policy" of the United States?

IV.

Whether the rendition of a decision by the Supreme Court of Missouri, or any State Court, after full hearings and a trial free from procedural defects, is "State action" within the meaning of the Fourteenth Amendment?

V.

If the decision of a cause by a State Court without procedural defect is "State action" under the Fourteenth Amendment, did the Supreme Court of Missouri by its decision below

A. make or enforce any law which abridged the privileges and immunities of citizens of the United States so as to injure Petitioners,

B. deprive Petitioners of life, liberty or property without due process of law, or

C. deny Petitioners the equal protection of the law?

ARGUMENT.

I.

Covenants running with the land restricting the use or ownership of land by Negroes are not void because of conflict with the Fourteenth Amendment, or Acts of Congress passed pursuant thereto.

The Fourteenth Amendment applies to "State action" exclusively and could not void private covenants, which are the acts of individual citizens. This Court stated in *Corrigan* v. *Buckley,* 271 U. S. 323 at 330 (1926):

> "And the prohibitions of the 14th Amendment 'have reference to state action exclusively, and not to any action of private individuals.' *Virginia* v. *Rives,* 100 U. S. 313, 318; *United States* v. *Harris,* 106 U. S. 629, 639. 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment.' *Civil Rights Cases,* 109 U. S. 3, 11. It is obvious that

> none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The contention that the above quoted portion of *Corrigan* v. *Buckley* is dicta is unfounded. Even if the Fourteenth Amendment does not apply to the District of Columbia, this Court in that case did not base its decision upon that argument, but on the broader ground that the Fourteenth Amendment could not affect the covenant even were it applicable to the District of Columbia. The point was, therefore, essential to the reasoning used to support the decision in *Corrigan* v. *Buckley,* and was not dicta.

The *Corrigan* decision has been interpreted by the highest courts of many of our States as determinative of the validity of restrictive covenants in respect to the Fourteenth Amendment.

The Supreme Court of Colorado has said:

> "A person who owns a tract of land and divides it into smaller tracts for the purpose of selling one or more may prefer to have as neighbors persons of the white, or Caucasian race, and may believe that prospective purchasers of the tracts would entertain similar preference, and would pay a higher price if the ownership were restricted to persons of that race. Surely, it is not unreasonable to permit such a person to insert in his deeds a provision restricting not only the occupancy but also the ownership of the tracts conveyed by him.
>
> "Such a restriction would not violate any right protected by the Fourteenth Amendment to the Constitution of the United States. That amendment prohibits state action only; it has no application to discriminatory provisions in deeds or wills. *Civil Rights Cases,*

> 109 U. S. 3, 3 Sup. Ct. 18. In *Corrigan* v. *Buckley,* 271 U. S. 323, 46 Sup. Ct. 521, the court, referring to the Fifth, Thirteenth and Fourteenth Amendments, said: 'It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property.' " *Chandler* v. *Ziegler,* 88 Colo. 1 at 5, 291 Pac. 822 (1930).

In *Stewart* v. *Cronan,* 105 Colo. 393, 98 P. 2d 999 (1940) the Supreme Court of Colorado refused to overrule *Chandler* v. *Ziegler, supra.*

In 1942 the Supreme Court of Oklahoma in *Lyons* v. *Wallen,* 191 Okla. 567, 133 P. 2d 555 (1942) held a restrictive covenant not in violation of the Fourteenth Amendment, and more recently in *Hemsley* v. *Sage,* 194 Okla. 669 at 670, 154 P. 2d 577 (1944) pointed out the basic fallacy in Petitioners' argument in the instant cause in these words:

> "It is next urged on the strength of Allen v. Oklahoma City, 175 Okla. 421, 52 P. 2d 1054, that contracts such as this are void as offensive to our Constitution. However, defendants say that they recognize that the issue in that case differs from the issue here and the similar issue in Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555. This is correct. The difference lies in the Constitutional right of property owners to contract to impose restrictions on the sale, lease, or use of their real property (Lyons v. Wallen, supra; Corrigan v. Buckley, 271 U. S. 323, 70 L. ed. 969, and the annotation 114 A. L. R. 1237), and the lack of a right or power of a Government to legislate to like effect, Allen v. Oklahoma City, supra, and Buchanan v. Warley, 245 U. S. 60, 61 L. ed. 149. The trial court's judgment is correct in its applications of the law."

In 1945 the Oklahoma Court expressly refused to overrule *Lyons* v. *Wallen, supra,* and reiterated the proposition that a restrictive covenant is not in violation of the Fourteenth Amendment, *Hemsley* v. *Hough,* 195 Okla. 298, 157 P. 2d 182 (1945).

The Supreme Court of Wisconsin in *Doherty* v. *Rice,* 240 Wis. 389 at 396-7, 3 N. W. 2d 734 (1942) declared:

> "The defendants' counsel contends that the restriction as to sale is invalid because violative of the Wisconsin constitutional provision relating to conveyances in restraint of alienation and because violative of the Fourteenth Amendment of the United States constitution. They concede that as to the Fourteenth Amendment the weight of authority is against them. The confession is not only fully warranted, but is compelled. The only case supporting it is *Gandolfo* v. *Hartman* (C.C. S.D. Cal. 1892), 49 Fed. 181, 16 L.R.A. 277, a decision of the United States district court of California which is contrary to *Corrigan* v. *Buckley,* 271 U.S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969. The latter must be taken as finally settling that question. Even the cases that hold the restriction void for other reasons hold that it is not violative of the United States Constitution, as *Porter* v. *Barrett,* 233 Mich. 373, 206 N.W. 532, and *Los Angeles Inv. Co.* v. *Gary,* 181 Cal. 680, 186 Pac. 596, 9 A.L.R. 115. Among those cases directly holding restraints upon sales to non-Caucasians not violative of the United States Constitution are the following: *Queensboro Land Company* v. *Cazeau,* 136 La. 724, 67 So. 641 L.R.A. 1916B, 1201 An. Cas. 1916B, 1248; *Koehler* v. *Roland,* 275 Mo. 573, 205 S.W. 217; *Corrigan* v. *Buckley, supra.*"

The Supreme Court of Georgia in *Duley* v. *Savannah Bank and Trust Company,* 199 Ga. 353, at 364, 34 S.E. 2d 522 (1945) expressed a similar opinion.

The overwhelming weight of opinion in the lower state courts has been of similar tenor.

Lion's Head Lake v. *Brzezinski,* 23 N.J. Misc. 290, 43 A. 2d 729 (Dist. Ct. 1945)

Thornhill v. *Herdt,* 130 S.W. 2d 175 (Mo. App. 1939)

Stone v. *Jones,* 66 Cal. App. 2d 264, 152 P. 2d 19 (1944)

Burkhart v. *Loftin,* 63 Cal. App. 2d 230, 149 P. 2d 722 (1944)

Burke v. *Kleiman,* 277 Ill. App. 519 (1934) *appeal dismissed;* 355 Ill. 390 189 N.E. 372 (1934)

Mays v. *Burgess*, 79 App. D.C. 343, 147 Fed. 2d 868, 162 A.L.R. 168 (1945) *cert. denied* 325 U.S. 868 (1945)
Herb v. *Gerstein*, 41 F. Supp. 634 (D.C. D.C. 1941)

The statutes passed pursuant to the Fourteenth Amendment, 8 U. S. C. §§ 41-2 (1940), cannot void the covenant, as they do not extend further than the amendment they were intended to enforce, and are limited to "State action" exclusively.

Virginia v. *Rives*, 100 U. S. 313 (1879)
Civil Rights Cases, 109 U. S. 3 (1883)

The approval of restrictive covenants *per se*, implicit in the *Corrigan* decision and recognized and applied by the overwhelming weight of authority in the state courts, has, in effect, become a rule of property. Millions of dollars' worth of real property has changed hands at values computed in reliance upon *Corrigan* v. *Buckley* and the state authorities following it. The National Association of Real Estate Boards is vitally interested in this particular question, as evaluation of future land values, an essential part of the real estate business, entails an estimate of the permanence of constitutional law principles as applied by this Court to local real property law.

II.

Covenants running with the land restricting the use or ownership of land by Negroes are not void for conflict with an existing treaty of the United States.

It may be seriously doubted whether the Federal Government by means of a treaty can effect a change in local state law upon a subject outside the field of international affairs.

Roca v. *Thompson*, 232 U. S. 318 (1914)
Patsone v. *Pennsylvania*, 232 U. S. 138 (1914)
Heim v. *McCall*, 239 U. S. 175 (1913)

Compagnie Francaise v. *State Board,* 186 U. S. 380 (1902)

The common law as to the transfer, ownership and use of land are matters of local state law.

Green v. *Neal,* 6 Pet. 291 (U. S. 1832)
Case v. *Kelly,* 133 U. S. 21 (1890)
Port of Seattle v. *Oregon and W. R. Co.,* 255 U. S. 56 (1921)

The question is not before this Court at this time, however, as no treaty has been urged by Petitioners which purports to change the law of real property within the State of Missouri.

Articles 55 and 56 of the Charter of the United Nations relied upon by Petitioners read, in their entirety:

"*Article 55*

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

"*Article 56*

"All Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." 59 Stat. 1045 (1945)

The United States could not be considered, by the above treaty, to have changed any State law. It has agreed to

take steps *within its power as the Federal Government* to support vaguely stated economic and social ends. The Federal Government has, in fact, taken no such steps, even within its power; especially has it enacted no legislation purporting to change the real property law of the several states.

The case of In re *Drummond Wren*, 4 D. L. R. 674 (Ontario, 1945) is, of course, not controlling upon this Court. Nor does the court which rendered that decision stand, in the judicial structure of Canada, in a position analogous to this Court, but rather to the Supreme Court of Missouri. In such a position it felt free to examine international declarations of policy to assist it in determining the public policy of the Province of Ontario. There is little question that the Supreme Court of Missouri, standing in an analogous position, could similarly determine the public policy of the State of Missouri under which Missouri land contracts were to be construed. But there was no duty placed upon that Court that it give the Charter more weight than other expressions of public policy, state or Federal, or that it give the Charter any consideration whatsoever. See Argument III, *infra*.

Petitioners also rely upon the resolution against racial discrimination, *Department of State, Participation of the United States in International Conferences* (1947) 170, accompanying the *Act of Chapultepac of* 1945, 12 *Department of State Bulletin* 339 (1945). Neither the "Act" nor the resolution are treaties of the United States, 59 Stat. *passim*, nor do they purport to change the real property law of any state of the United States. They were, in effect, mere recommendations of action to the respective governments, recommendations of action within the power of the respective governments.

III.

Covenants running with the land restricting the use or ownership of land by Negroes are not void as against the "public policy" of the United States.

Courts may refuse to enforce contracts on the ground that they are in conflict with public policy. Public policy, however, is not a sociological attitude; it is part of the common law of the jurisdiction by which, by the rules of the conflict of laws, the contract is to be construed. It is found in the acts of the legislature and of public officials of such jurisdiction.

As Chief Judge Groner said in *Mays* v. *Burgess,* 79 App. D. C. 343 as 347, 147 Fed. 2d 869 at 873, 162 A. L. R 168 (1945) *cert. denied* 325 U. S. 868 (1945):

> "And the public policy of a State of which courts take notice and of which they give effect must be induced—in the main—from these sources [public laws and actions of public officials]. Surely it may not—properly—be found in our personal views on sociological problems."

The public policy by which a Missouri contract, of which a restrictive covenant running with Missouri land is one, is to be measured is the public policy of the State of Missouri, not of the United States. The Supreme Court of Missouri has determined in this cause what the applicable public policy is. Its action in so doing does not present a Federal question, and is not properly subject to review by this Court.

> *American Railway Express Co.* v. *Kentucky,* 273 U. S. 269 at 272-3 (1927)
> *Enterprise Irrig. Dist.* v. *Canal Co.,* 243 U. S. 157 at 165-6 (1917)

In re *Drummond Wren,* 4 D. L. R. 674 (Ontario, 1945) is not at variance with the proposition just stated. It might be cited to support the proposition that the Supreme Court

of Missouri, whose counterpart decided the *Wren* case, *could* look outside the public laws and acts of officials of Missouri to those of the United States, including international expressions of policy, but could hardly be cited to *require* that the Supreme Court of Missouri do so, and much less to *require* that such vague and unenforced expressions of aims must be given greater weight than the other evidence which a court may properly examine in determining the public policy of its jurisdiction.

Nor could it be said, even if there were any obligation placed by the Federal Constitution upon the Supreme Court of Missouri to apply Federal "public policy" to Missouri contracts, that the "public policy" of the United States is so clearly opposed to such restrictive covenants as to void them. If there is any place within the continental limits of the United States where Federal public policy is part of the common law, it is the District of Columbia, but Chief Judge Groner, in *Mays* v. *Burgess,* quoted *supra,* continued by stating:

> "As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons." 79 App. D. C. 343 at 347, 147 F. 2d at 873 (1945) *cert. denied* 325 U. S. 868 (1945)

Lest it be contended that District of Columbia officials are not Federal officers, it need only be pointed out that the legislature of the District of Columbia to which they are responsible is the national legislature, Congress. This Court may in addition take judicial notice of the similar establishment by the general Federal government of separate facilities for negro and white citizens in the armed forces and, most pertinent, in public housing.

IV.

The rendition of a decision, after a trial free from procedural defects, by the Supreme Court of Missouri that a restrictive covenant against ownership and occupancy by Negroes was valid and had created certain legal relationships which state courts must recognize was not "State action" within the meaning of the Fourteenth Amendment.

It is firmly established that the Fourteenth Amendment and Acts of Congress passed pursuant thereto, such as 8 U. S. C. §§ 41 and 42 (1940) are restrictions upon "State action" alone and not upon the acts of individuals.

Virginia v. *Rives*, 100 U. S. 313 (1879)
Civil Rights Cases, 109 U. S. 3 (1883)

This Court has recognized that the acts of state courts, of state judges and of state quasi-judicial bodies in denying *procedural* safeguards and privileges to litigants may constitute "State action" under the Fourteenth Amendment.

Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673 (1930) (Opportunity to present case)
Raymond v. *Chicago Traction Co.*, 207 U. S. 20 (1907) (Defective procedure in tax assessment)
Twining v. *New Jersey*, 211 U. S. 78 (1908) (Compulsory self-incrimination)
Ex Parte Virginia, 100 U. S. 339 (1880) (Selection of jurors)
Chicago, B. & Q. R. R. v. *Chicago*, 166 U. S. 226 (1897) (Condemnation procedure)
Alabama v. *Powell*, 287 U. S. 45 (1932) (Right to counsel)
Bridges v. *California*, 314 U. S. 252 (1941) (Contempt of court. *State* was a *party* to suit, also, as in other criminal cases relied on by Petitioners.)

The general statements made in these cases, upon which Petitioners rely to support the proposition that *any* state court judgment is "State action" under the Fourteenth

Amendment, must be restricted to *procedure*. This is indicated by the observations of former members of this Court in two of the above-cited cases.

In *Brinkerhoff-Faris Co.* v. *Hill, supra,* at 680, Mr. Justice Brandeis, speaking for the Court, said:

> "It is true that the Courts of a State have the supreme power to declare the written and unwritten laws of the State; that this Court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law or has overruled principles or doctrines established by previous decisions upon which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction upon this Court."

Although *Raymond* v. *Chicago Traction Co., supra,* concerned procedural, or objective law, Mr. Justice Holmes feared the opinion would be construed too broadly and would have preferred to deny the proposition altogether. In a dissenting opinion he said at pages 40-1:

> "We all agree, I suppose, that it is only in most exceptional cases that a State can be said to deprive a person of his property without due process of law merely because of the decision of a Court without more. The discussion in *Chicago, Burlington & Quincy R. R.* v. *Chicago,* 166 U.S. 226, concerned a judgment assumed to be authorized by a statute of the State, and in that case the judgment of the state court was affirmed, so that no very extensive conclusions can be drawn from it. So far as I know, this is the first instance in which a Circuit Court has been held authorized to take jurisdiction on the ground that the decision of a state tribunal was contrary to the 14th Amendment."

Nor are the other cases relied upon by Petitioners at variance with the proposition that all state court judgments are not "State action." *Cantwell* v. *Connecticut,* 310 U.S.

296 (1940) was a criminal action and the State was a *party,* so that "State action" was clear in any event. *Gandolfo* v. *Hartman,* 49 Fed. 181, 16 L.R.A. 227 (C.C. S.D. Cal. 1892) is not authority for the proposition that the judgment of a state court is "State action" under the Fourteenth Amendment, as plaintiff sought to enforce the covenant in a *Federal* court. The Fourteenth Amendment was only material if the District Judge felt it voided the covenant absolutely; otherwise he would have referred to the Fifth Amendment. District Judge Ross in that opinion at page 183 said, "Such a contract is absolutely void, and should not be enforced in any court,—certainly not in a court of equity of the United States." The actual holding in the case was, therefore, that the covenant was void; this Court's decision in the *Corrigan* case overrules that holding.

The proposition that a state court judgment is not, absent procedural defects in the trial, "State action" is amply supported by the opinions of this Court:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *Arrowsmith* v. *Harmoning,* 118 U.S. 194, 195; *Iowa Central Ry. Co.* v. *Iowa,* 160 U.S. 389, 393; *Tracy* v. *Ginzberg,* 205 U.S. 170, 177; *Bonner* v. *Gorman,* 213 U.S. 86, 91; *McDonald* v. *Oregon R. R. & Nav. Co.,* 233 U.S. 665, 669." *American Railway Express Company* v. *Kentucky,* 273 U.S. 269 at 273 (1927)
>
> "The errors here assigned are, first, that the judgment [of a state court] deprived the Defendants of their property without due process of law, contrary to the Fourteenth Amendment; . . .
>
> "A motion to dismiss is made by the defendant in error because the federal questions were too late, in that they were raised for the first time in petitions for rehearing which the court denied without opinion. The record does not sustain this ground in respect to the objection based on the Fourteenth Amendment, because that appears in the assignment of error filed on appeal from the District Court to the State Supreme Court. The assignment, however, has no substance in

it. The parties to this action have been fully heard in the state court in the regular course of judicial proceedings and in such a case the mere fact that the State Court reverse a former decision to the prejudice of one party does not take away his property without due process of law. This was expressly held in the case of *Central Land Co.* v. *Laidley,* 159 U.S. 103, 112." *Tidal Oil Co.* v. *Flanigan,* 263 U.S. 444 at 449-50

"It is elementary and needs no citation of authority to show that the due process clause of the Fourteenth Amendment does not control methods of state procedure or give jurisdiction to this court to review mere errors of law alleged to have been committed by a state court in the performance of its duties within the scope of its authority concerning matters non-Federal in character." *McDonald* v. *Oregon R. R. & Nav. Co.,* 233 U. S. 665 at 669-70 (1914)

As Mr. Chief Justice Waite said in *Arrowsmith* v. *Harmoning,* 118 U. S. 194 at 195-6 (1886):

"At most, this was an error of judgment in the court. The Constitutional provision is, 'nor shall any *State* deprive any person of life, liberty, or property without due process of law.' Certainly a State cannot be deemed guilty of a violation of this Constitutional obligation simply because one of its courts, while acting within its jurisdiction, has made an erroneous decision." (Emphasis is the Court's.)

Mr. Justice Cardoza's remarks in *Doty* v. *Love,* 295 U.S. 64 at 70-4 (1935) are inconsistent with the concept that the rendering of a decision in a contested action in which there was no defect of procedure is "State action" within the meaning of the Fourteenth Amendment. So also are:

Kryger v. *Wilson,* 242 U.S. 171 (1916)
Pennsylvania R. R. Co. v. *Hughes,* 191 U.S. 477 (1903)
Morrow v. *Brinkley,* 129 U.S. 178 (1889)

The lead of this Court has been followed in the Circuit Courts of Appeal.

The United States Circuit Court of Appeals for the 9th Circuit has held that a foreclosure in California courts of a deed of trust which ". . . if permitted, suffered, and/or condoned, would subject plaintiff to the deprivation of his property, without due process of law," could not raise any Federal question, since the Fourteenth Amendment did not apply to the acts of private individuals. *Davidow* v. *Lachman Bros. Inv. Co.*, 76 F. 2d 186 at 187-8 (C.C.A. 9th 1935). In *Reese* v. *Louisville Trust Co.*, 58 Fed. 2d 638 (C.C.A. 6th 1932) Circuit Judges Hicks, Hickenlooper and Simmons in a short *per curiam* opinion held that the decision of a case by a state court was not "State action" within the meaning of the Fourteenth Amendment.

Mr. Chief Justice Vinson, while sitting on the United States Court of Appeals for the District of Columbia, in respect to the parallel problem of what is "Governmental action" under the Fifth Amendment, said:

> "The only Governmental action in respect to the instant case consisted in the enactment of the Railway Labor Act and the functioning of the Board thereto. . . . In the election at hand a craft of 86 coach cleaners, 70 of whom were colored, by a vote of 42 to 35 chose as their collective bargaining agent or representative the Brotherhood of Railroad Carmen. It may be that certification of the Brotherhood will mean that white, rather than colored, men will represent the coach cleaners in negotiations with the carrier. If so, that condition will obtain because a majority of the coach cleaners voted for it, and not as a result of any Governmental action." *National Federation of Railway Workers* v. *National Mediation Board,* 71 App. D.C. 266 at 274-5, 110 F. 2d 529 at 537-8 (1940) *cert. denied* 310 U.S. 628 (1940)

If all state court judgments are "State action" within the meaning of the Fourteenth Amendment, it may be wondered whether a union shop agreement is enforceable lest it discriminate against non-union labor as a class, or whether any contract of hire is enforceable, lest it discriminate against those who were not hired. Similarly, one may

wonder whether a dealer-producer marketing agreement, the lease of an apartment, or any executory contract, could be enforced without an examination by the state court, and ultimately by this Court, to determine *whether the parties had treated all outside persons with that scrupulous regard for fairness and equality which the Fifth and the Fourteenth Amendments demand of those who enjoy the public trust as state and Federal officials.* It is almost too clear for comment that the drafters of, and certainly those who ratified, the Fourteenth Amendment, contemplated no such extension of its terms to cover all private contracts. It has been said that "There is no law without a sanction." When the judges in the many prior decisions said that the Fourteenth Amendment did not void contracts between individuals, they were saying and, more important, holding that such contracts were enforceable.

V.

If the decision in a cause tried in the state courts without procedural defects constitutes "State action" under the Fourteenth Amendment, the Supreme Court of Missouri by its decision in the instant case, nevertheless, did not:

A. "make or enforce any law" which abridged the privilege and immunity of a citizen of the United States so as to injure Petitioners,

The Supreme Court of Missouri did not make or enforce any *law,* at all. The term *law* as used in Section 10 of Article 1 of the Constitution in regard to impairment of the obligations of contracts has been firmly established as referring to acts of legislatures and quasi-legislative bodies exclusively.

Fleming v. *Fleming,* 264 U. S. 29 (1924)
Tidal Oil Co. v. *Flanigan,* 263 U. S. 444
Kryger v. *Wilson,* 242 U. S. 171 (1916)
Cross Lake Shooting and Fishing Club v. *Louisiana,* 224 U. S. 632 (1912)

New Orleans Water Works Co. v. *Louisiana,* 185 U. S. 336 (1902)
Saint Paul, M. & M. R. R. v. *Todd County,* 142 U. S. 282 (1891)

That the use of the term *law* in this clause of the Fourteenth Amendment was not inadvertent, and was not intended to cover all types of "State action," is indicated by the use of the term in this clause alone, in comparison with the prohibitions against "State action" in general in the remainder of Section 1 of the Fourteenth Amendment. The case of *Buchanan* v. *Warley,* 245 U. S. 60 (1917), relied upon by Petitioners, dealt with an ordinance passed by a quasi-legislative body, a *law* within the meaning of this clause, and therefore not in point in the instant cause.

Nor can the judgment of the Supreme Court of Missouri be held to abridge a privilege and immunity of a citizen of the United States. *Buchanan* v. *Warley, supra,* establishes merely that a citizen is immune from discrimination by public officials so that Negroes are systematically segregated from white citizens. The *Buchanan* case is not authority that Negroes, or any other citizen of the United States, have any privilege and immunity that *other private citizens* in the use and disposition of their own property must treat all citizens of the United States equally. There is no case urged by Petitioners which so holds. Such a holding could only lead to chaos in the commercial world. Nor do any citizens have any privilege or immunity to own or occupy property except in accordance with real property law.

B. deprive Petitioners of life, liberty or property without due process of law,

Petitioners have not shown in what respect they have been deprived of life, liberty or property. They are alive, and have not, as far as the record indicates, been restrained. In what respect have they been deprived of their property? The Supreme Court of Missouri has decided, according to the law of real property of Missouri, that the Petitioners had no good title to the said property nor the right to occupy the same. In other words, the land was not their

property prior to the decision. The state court decision merely declared what the existing legal relationships were. It deprived them of no interest in the land which they had prior to the decision. As this Court has said:

> "The Plaintiff also insists that by the judgment of the Supreme Judicial Court of Massachusetts he has been deprived of his property without due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. This proposition is without merit. Within the meaning of that amendment, the court, by its judgment, did not deprive the plaintiff of property without due process of law. He sought a decree adjudging that he was entitled to the money received by Ginzberg from O'Hearn. The court, proceeding entirely upon principles of general and local law, and giving all parties interested in the question an opportunity to be heard, decided that plaintiff had no right to that money. The decision of a State Court involving nothing more than the ownership of property with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. If we were of opinion, upon this record, that the money received by Ginzberg from O'Hearn really belonged to Tracy—upon which question we express no opinion—still it could not be affirmed that the latter had, within the meaning of the Constitution, and by reason of the judgment below, been deprived of his property without due process of law. Under the opposite view every judgment of a state court, involving merely the ownership of property, could be brought here for review—a result not to be thought of." *Tracy* v. *Ginzberg,* 205 U. S. 170 at 177-8 (1907)

Nor can it be said that the State Court did not act other than in accordance with due process of law. The trial, in all courts, as far as the record indicates, was fair in all respects. The trial was conducted in accordance with the procedures used in similar causes before the courts of Missouri. Petitioners do not urge any *specific* instance in which there was any lack of due process save that the

Supreme Court of Missouri did not decide the case in the way in which they had urged. This does not constitute a lack of due process.

Kryger v. *Wilson,* 242 U. S. 171 (1916)
Pennsylvania R. R. Co. v. *Hughes,* 191 U. S. 477 (1903)
Morrow v. *Brinkley,* 129 U. S. 178 (1889)

C. deny Petitioners the equal protection of the laws.

No instance has been cited by Petitioners in which they have been treated in any respect by the Supreme Court of Missouri in a different way than any other citizens would have been in a similar situation. It is not seriously contended by Petitioners that had Negroes agreed to restrict the use or ownership of their property to Negroes, the Missouri Courts would not have enforced such a covenant. The construction of the "equal protection of the laws" clause by this Court does not indicate any basis upon which Petitioners can urge that such has been denied to them. For example:

> "Counsel asserts that the rights claimed under the Constitution of the United States were the right to due process of law, and the right to the equal protection of the laws.
>
> "The right to the equal protection of the laws was certainly not denied, for it is apparent that the same law or course of procedure, which was applied to Tinsley, would have been applied to any other person in the State of Texas, under similar circumstances and conditions; and there is nothing in the record on which to base an inference to the contrary." *Tinsley* v. *Anderson,* 171 U. S. 101 at 106 (1898)

Power Co. v. *Saunders,* 274 U. S. 490, 493 (1927)
Traux v. *Corrigan,* 257 U. S. 312, 332-3 (1921)
Hays v. *Missouri,* 120 U. S. 68 (1887)
Plessy v. *Ferguson,* 163 U. S. 537 (1896)

A decision relied upon by Petitioners recognized this limitation of the "equal protection" clause.

> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional

right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *Plessy* v. *Ferguson,* 163 U. S. 537, 544; *McCabe* v. *Atchison, T. & S. F. Ry. Co.,* 235 U. S. 151, 160; *Gong Lum* v. *Rice,* 275 U. S. 78, 85, 86. Compare *Cumming* v. *Board of Education,* 175 U. S. 528, 544, 545." *Missouri* ex rel. *Gaines* v *Canada,* 205 U. S. 337 at 344 (1938)

CONCLUSION.

Inasmuch as the instant covenant is neither void as in conflict with the Fourteenth Amendment or Acts of Congress passed pursuant thereto, nor as in conflict with a treaty of the United States, and since the "public policy" of the United States does not control the validity of a Missouri contract and is, furthermore, not in conflict with the instant covenant, and inasmuch as the decision of the Supreme Court of Missouri, hereunder reviewed, is not "State action" within the meaning of the Fourteenth Amendment and, furthermore, cannot be said to make or enforce any law abridging Petitioners' privileges and immunities as citizens of the United States, to deprive them of their life, liberty or property without due process of law, nor to deny them the equal protection of the laws, the National Association of Real Estate Boards, as *amicus curiae,* respectfully urge that this Honorable Court either dismiss the writ of certiorari for failure to present a Federal question or, in the alternative, affirm the judgment below of the Supreme Court of Missouri.

Respectfully submitted:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1947

Nos. 72, 87, 290, 291

J.D. SHELLEY, *et al., Petitioners,*

—vs.—

LOUIS KRAEMER, *et al., Respondents.*

ORSEL McGHEE, *et al., Petitioners,*

—vs.—

BENJAMIN J. SIPES, *et al., Respondents.*

JAMES M. HURD, *et al., Petitioners,*

—v.—

FREDERICK E. HODGE, *et al., Respondents.*

RAPHAEL G. URCIOLO, *et al., Petitioners,*

—vs.—

FREDERICK E. HODGE, *et al., Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL BAR ASSOCIATION AS AMICUS CURIAE

EARL B. DICKERSON,
President, National Bar Association.

RICHARD E. WESTBROOKS,
Chairman, National Committee on Civil Rights and Liberties.

LORING B. MOORE, and
GEORGE N. LEIGHTON,
Counsel for Amicus Curiae.

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vs.
LOUIS KRAEMER, Et Al.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

No. 87.
ORSEL McGEE, Et Al., Petitioners,
vs.
BENJAMIN J. SIPES, Et Al.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

No. 290.
JAMES M. HURD, Et Al., Petitioners,
vs.
FREDERICK E. HODGE, Et Al.

No. 291.
RAPHAEL G. URCIOLO, Et Al., Petitioners,
vs.
FREDERICK E. HODGE, Et Al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION OF THE NATIONAL BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The National Bar Association respectfully prays leave to file a brief as *amicus curiae* in the above captioned cases. The applicant has filed with the clerk the written consent of counsel for petitioners in said cases and has in

writing requested the consent of counsel for respondents in each of said cases. No reply has, as yet, been received from counsel for respondents.

The National Bar Association is a membership organization composed of members of the Bar who are citizens of the United States, and is non-discriminatory in its membership as to race, color, creed or national origin. It was organized in the year 1925 for the purpose of "Advancing the science of jurisprudence; upholding the honor of the legal profession; to promote social intercourse among members of the Bar and to protect the civil and political rights of all citizens of the several states of the United States."

Each of these cases presents an issue which affects the civil and political rights of citizens of the United States. Here, judicial decisions of Courts of the States of Missouri, Michigan, and the District of Columbia give force, by State action, to the schematic segregation of citizens on the basis of race or color. This Court is asked to decide whether enforcement by the State Courts and the United States Courts for the District of Columbia of racial restrictive covenants violates the prohibitions of the Fourteenth Amendment to the Constitution, and enforces as a matter of State law restrictions against ownership and occupancy of land under guise of enforcement of mere private agreements between individuals. It is the view of the National Bar Association, as set forth in the written argument hereinafter, that the enforcement of such restrictions in the instant cases would be in effect to operate on behalf of the States and District of Columbia laws destructive of the civil rights of a large segment of the population of these States and the District of Columbia in violation of the prohibitions of the Fifth and Four-

teenth Amendments to the Constitution of the United States and the Federal Civil Rights Statutes, and would likewise enforce a public policy inconsistent with the established public policy of these States and of the United States as shown by their Constitutions, Statutes and Judicial Decisions.

EARL B. DICKERSON,
President, National Bar Association.
RICHARD E. WESTBROOKS,
Chairman, National Committee on
Civil Rights and Liberties.
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FREDERICK E. HODGE, Et Al.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE NATIONAL BAR ASSOCIATION AS AMICUS CURIAE.

Opinions Below.

The opinion of the Supreme Court of the State of Missouri No. 72 (Rec. 153-159), is reported at 198 S. W. 2d 679. The opinion of the Supreme Court of the State

of Michigan No. 87 (Rec. 60-69), is reported at 316 Mich., 614. The opinion of the United States Court of Appeals for the District of Columbia in Nos. 290 and 291 (Rec. 417-432), is reported in 162 F. 2d, 233.

Jurisdiction.

The jurisdiction of this Court is invoked under Sections 237 and 240 of the Judicial Code, 28 U. S. C. 344(b) and 347(a)).

Questions Presented.

Questions presented and argued in this brief pertain to the application of the Fourteenth and Fifth Amendments to judicial enforcement by the courts of States and of the District of Columbia of race restrictions. The questions presented and argued deal with the acts of courts in declaring null and void contracts and deeds of conveyance and the granting of specific performance of covenants by canceling and setting aside contracts and deeds of conveyance and enjoining violations, and especially where contract purchasers and grantees are not direct parties to the restrictive covenants, and where they are members of the class excluded by the restrictions.

Statement.

Facts in connection with the cases are set forth in Briefs of the Petitioners. As especially pertinent to this Brief, we add the following:

Nos. 290 and 291—The opinion of the Court quotes from *Hundley* v. *Gorewitz,* 132 F. 2d 23, 24, as follows:

> "In view of the consistent adjudications in similar cases, it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction."

The Court further says:

> "Similarly, restrictive covenants expressed in agreements between the owners of land have been upheld by this Court in the following cases" (citing cases):

The Court affirmed a decree declaring "null and void these four deeds to the Negro purchasers, ordered them to vacate the land and premises and permanently enjoined the renting, selling, leasing, transferring or conveying the said lots to any Negro or colored person."

No. 87 — The Court in this case, in its opinion, refers to the case of *Parmalee* v. *Morris,* 218 Mich. 625, 188 N. W. 330, and other cases of that state enforcing race restrictions, as a ruling case. The opinion also refers to the case of *Kathan* v. *Stevenson,* 307 Mich. 485, 12 N. W. 2d 332, as a case in which the Court was "urged to apply a racial restriction to the property under a claimed general plan" which it declined to do, but distinguishes as to "private agreements containing racial restrictive covenants." The Court affirmed a decree enjoining the defendants and Petitioners herein from occupying their property.

No. 72 — The Court, in its opinion, enforcing a race restriction agreement entered into in 1911, says as follows:

> "Agreements restricting property from being transferred to or occupied by Negroes have been consistently upheld by the Courts of this State as one which the parties have the right to make and which is not contrary to public policy." (Citing cases.)

The Court remands the cause for the granting of relief and providing that "the chancellor may retain jurisdiction of the case for the settlement of any claims between the defendants and others over the purchase of the property which may arise because of the enforcement of the restrictions.

ARGUMENT.

I. The Issues.

The practical issue raised by the questions presented is a social question, namely, Whether the States of the United States and the District of Columbia can declare, make, establish, and enforce ghettos for American citizens because of their race, religion, or color. This is clearly the issue because of the result of State Court enforcement of race restrictions which these cases exhibit. The legal questions arise from the practice of owners of real property, while owners, and under organized programs, impressing titles to real property with discriminatory qualifications restricting future ownership and occupancy on the basis of race, color, or religion. The extent of coverage of race restrictions in large metropolitan cities of Ohio, Michigan, Missouri, Illinois, California and the District of Columbia has been presented in the records and briefs of the Petitioners in these cases.

The legal issues arising under questions presented call for an examination of the nature of the general right to acquire, own, enjoy, and dispose of real property, and for an examination of the nature and extent of governmental limitations upon such rights. Public policy questions as pertain to restrictions as to the kinds of persons who may occupy and own real property, citizens or aliens, Jew, Catholic, or Protestant, or as to race or color, are presented. Such questions are presented notwithstanding the existence of constitutional and legal guarantees to the contrary. Public policy questions are presented as to equal protection of the laws under state public policies

unfavorable to unreasonable restraints on alienation and restrictions on the free use of property. We are concerned also with the modes of legal protection of property rights, legal and equitable, and with State and National safeguards of property and human rights. Interpretation of the Fourteenth and Fifth Amendments to the Constitution, the Federal Civil Rights Acts and the common law rights of the Petitioners, within the several States and the District of Columbia from which they come, to acquire, own, and enjoy real property, is involved.

II.

The enforcements of the contracts in the instant cases deprive the petitioners of the right to acquire, own, enjoy and dispose of real property in violation of the Fourteenth and Fifth Amendments to the Federal Constitution.

A. The general right to acquire, own, enjoy and dispose of real property exists for the petitioners by virtue of their State and National citizenship.

B. As citizens of the United States the right to acquire, own, enjoy and dispose of real property is secured to the petitioners by the Federal Civil Rights Acts (U. S. Rev. Stat. 1977, 1978.)

The due process of law clause of the Fourteenth Amendment, and as contained in the Fifth Amendment, embraces protection of the general rights of citizens. Before the adoption of the Fourteenth Amendment, the courts were called upon to define the privileges and immunities of citizens of the several states. In *Corfield* v. *Coryell,* 4 Washington Circ. Ct. 371, A.D. 1823, the court says:

> "The inquiry is what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those

> privileges and immunities which are fundamental; which belong of right to the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads; protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

After the adoption of the Fourteenth Amendment, this Court in the case of *Holden v. Hardy,* 169 U. S. 366, uses the following language:

> "As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

More recently this Court in the case of *Terrace* v. *Thompson,* 263 U. S. 197, affirmed the existence of such property rights upon the basis of *Buchanan* v. *Warley,* 245 U. S. 60, and the case of *Holden* v. *Hardy, supra.* In both cases the court is dealing with legislative acts of states and, in *Terrace* v. *Thompson,* states that:

> "If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Four-

> teenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to punish the owners, it does not follow that they may not appeal to equity for relief."

In the case of *Buchanan* v. *Warley,* a city ordinance controlling "the occupancy and purchase and sale of property of which occupancy is an incident" was held to be in violation of the Fourteenth Amendment to the Federal Constitution and the Federal Civil Rights Acts. In the case of *Terrace* v. *Thompson,* the court sustained the state act denying to aliens the right to own land within its border as an appropriate exercise of police power. The question in the two cases turns upon the identical question, appropriate exercise of police power by the state, with this distinction, however, that in *Buchanan* v. *Warley, supra,* the right to acquire, own, and enjoy property was held to be a right belonging to a citizen of the state and secured to him by the Federal Civil Rights Acts of which the state could not deprive him, while, in the case of *Terrace* v. *Thompson,* the court notes that an alien does not have a common law right to acquire real property and that the state can deny him such right. It is plain that the principle of decision in both cases is that the state may not deprive a person having such right of the right to acquire, own, and enjoy and dispose of real property.

It is our conclusion that the meaning of these cases is that the state cannot deprive a citizen of the general right to acquire, own, and enjoy and dispose of real property because citizens have such right and cannot deny others, and those who deal with them, of such privilege, except upon a sound practice of exercise of police power in which the equal protection clause of the Fourteenth Amendment would not be violated.

However, the general right to acquire, own, and enjoy and dispose of real property is subject to control by appropriate exercises of police power of the state. The court quotes in *Holden* v. *Hardy, supra,* from *Massachusetts* v. *Alger,* 7 Cush. 84:

> "We think it a settled policy, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well in the interior as that bordering on the tide waters, is derived directly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitation in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations by law as the legislature, under the government and controlling power vested in them by the constitution, may think necessary and expedient."

As indicated in the quotations above the state's power to delimit the right of its citizens to acquire, own, enjoy and dispose of real property functionally belongs to the

legislative branch. In the premises of the instant cases, it cannot be contended that the states have exercised the police power to delimit in any way this general right existing for their citizens, and it is equally obvious that such state legislation as to the Petitioners' rights here claimed would be unconstitutional, as decided in *Buchanan* v. *Warley,* 245 U. S. 60, and other cases. Where the state acting through its appropriate agency cannot destroy this general right existing in its citizens, certainly it cannot do so through its judicial branch. The Briefs submitted to this Court in the instant cases have demonstrated, by presentation of authorities, that the acts of the judiciary of a state are as much within the prohibitions of the Fourteenth Amendment, as are the legislative acts adopted by the exercise of legislative power. In this sense, it is pertinent to point out here that the language of the Fourteenth Amendment to the Federal Constitution provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; . . . " The term "any law", as used in the Fourteenth Amendment, includes not only legislative acts but those legal concepts and legal principles which are applied and in some cases conceived by the judiciary. These have been referred to in the language of the legal profession as "judge made law."

In the instant cases the enforcement of the race restrictive covenants involved is not predicated on any legislative enactment of the states in which these covenants were executed. It is conceded that these race restrictive agreements remain purely private compacts so long as they are honored and performed by the parties. These covenants, however, acquire vitality and unconstitutional force when the judicial power of a state is called upon

to enforce them contrary to the will of American citizens who choose, for private reasons, to refuse to conform to their requirements. It is at this point that the race restrictive covenants begin to impinge on the constitutionally guaranteed rights of the Petitioners. Petitioners herein as owners of the real estate subject to the restrictive covenants have, as we have demonstrated, the right under both Federal and State law to acquire, own, enjoy and dispose of real estate. The exercise of the injunctive power by the state courts enforcing these covenants destroys this fundamental right of citizenship.

If respondents contend that the same constitutional safeguards protect them in their right to make racial discriminatory provisions as to occupancy and disposal of properties adjacent to those which they currently own, and if they contend that they have the right also to control future ownership and occupancy of their property, it should be recognized readily that the rights which they assert have been limited by appropriate action of the Congress of the United States through the Federal Civil Rights Acts and by the decision of this Court in the case of *Buchanan* v. *Warley, supra.* The special right which they assert has been effectively controlled and sublimated which as good citizens they should submit to. It should be pointed out that the right to discriminate which they assert parallels the right of a person to sell to an alien in a state where by state law an alien is prohibited from taking title to real property, *Terrace* v. *Thompson, supra.* If the right of a citizen to sell real property to a member so proscribed by state law remains despite the exercise of legislative power, then that right should also remain inviolate despite the execution of a private agreement. In the instant cases the exercise of

state judicial power has gone beyond what this court has held cannot be allowed where there has been the exercise of legislative power, *Terrace* v. *Thompson, supra.*

After the decision of this Court in *Buchanan* v. *Warley,* 245 U. S. 60, and the pointed language in the case of *Corrigan* v. *Buckley,* 271 U. S. 323, it should hardly be expected that state courts would fail to recognize that judicial enforcement of race restrictions is contrary to the public policy of the United States as shown by these decisions, the Federal Civil Rights Acts, and the body of the law dealing with the Fourteenth and Fifth Amendments to the Constitution. The state courts and the appeal courts of the District of Columbia in the very decision under review recognize that the policy of judicial enforcement followed by the courts has produced a system of racial segregation unthinkable from the standpoint of our fundamental law and directly violative of the decision of this Court in the case of *Buchanan* v. *Warley, supra.* The social material set forth in briefs submitted in this cause, and otherwise contained in the records, establish the fact that racial segregation is maintained by judicial enforcement of organized private segregation schemes. The opinions in the instant cases also show that the policy of judicial enforcement adopted by them is violative of the state public policies against racial discrimination. They also show that judicial enforcement in the very cases before the court deny the Petitioners the equal protection of the laws of the respective jurisdictions as pertains to unreasonable restraints on alienation, unreasonable restrictions on the use of property, the right to acquire, own, and enjoy and dispose of real property, and the right to equal protection from the courts of these established state citizen-

ship rights. The courts arbitrarily established classifications of citizens for the enjoyment of real property rights. It is unnecessary to cite cases from the various jurisdictions showing that all of these rights in respect to real property belong to the Petitioners residing in the several jurisdictions. The opinion of the Michigan State Supreme Court in *Sipes* v. *McGee* details some of these. Indeed, the appeal courts, whose decisions are now on review, have gone so far as to establish an unconstitutional doctrine violative of the principle of decision in the case of *Buchanan* v. *Warley, supra,* and have congealed the unconstitutional acts of judicial enforcement into what is declared by the courts to be "a rule of property" thereby making a law establishing ghettos for American citizens and citizens living within their jurisdictions.

III.

The state courts and the United States Court of Appeals for the District of Columbia have declared, made and established laws providing for racial segregation and deprivation of liberty and property and unequal protection of the laws against the petitioners and others by establishing and asserting a rule of judicial enforcement of racial restrictive covenants as a rule of property in violation of the Fourteenth and Fifth Amendments to the Federal Constitution.

In the statement of the case contained in this Brief, it has been pointed out that the highest courts of the jurisdictions in which the Petitioners reside, and in which the rights of the Petitioners have been determined, the courts uniformly base their decisions upon "settled law", "a rule of property" and judicial precedents of the several jurisdictions. While the decisions purport to con-

sider due process of law provisions of the Federal Constitution and of the constitutions of the several states, the approach used in the consideration of controversies in litigation is the application of general rules of law said to obtain in the respective jurisdictions without consideration of the rights of Petitioners as individual litigants in the courts. Rights, privileges, and immunities in Anglo-American law inhere in individuals, and normally, procedures adopted in dealing with legal controversies provide that the courts shall consider the rights of the litigants in the particular premises brought before the tribunals. What the appeal courts in all of these cases have said is in effect as follows:

> "The plaintiffs are property owners. They have the right to contract in respect to their property. They have a right to use the courts for enforcement of their contracts. Restrictions on the use of property are as a matter of common law enforceable by specific performance. The practice of this Court is to enforce restrictions on occupancy and ownership on the basis of race or color. The plaintiffs are of such a class and *ipso facto* are entitled to the normal remedy against the defendants as members of a class."

Such an attitude clearly ignores and violates the individual rights of Petitioners to acquire, own, enjoy and sell real property; to seek protection of the courts in the enjoyment of these rights; to have the benefit of the common law; to enjoy the equal protection of the laws; to be free from the imposition of "judge made law" violative of public policy as set forth in state statutes and as established by common law; to exercise the right of litigation on an individual basis; and to have — above all else — the guaranties afforded by the federal constitution and by legislation enacted by Congress.

This court has on several occasions had presented to it the question we have discussed here. In *Mitchell* v. *United States,* 313 U. S. 80, the court had before it a case involving the right of a passenger to the enjoyment of facilities in a common carrier engaged in interstate commerce. In a complaint filed with the Interstate Commerce Commission it was alleged that the plaintiff had been denied equality of treatment while traveling from the City of Chicago to Hot Springs, Arkansas. This court declared that an argument that predicated a fundamental constitutional right on the volume of traffic of a racial group was untenable in the application of the Fourteenth Amendment. The constitutional right of citizens could not, in the opinion of this court, depend upon the number of persons who may be discriminated against since the essence of the right is personal. This court went on to say: "While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, who is entitled to the equal protection of the laws, — not merely a group of individuals, or a body of persons according to their numbers."

It should be noted that here the court's decision is in derogation of the separation statute of the State of Arkansas, a statute passed in the exercise of police power. In the instant cases, the invidious distinctions have no basis of classification under any legislative acts, but the classifications used by the court are as set forth by private individuals which the courts have accepted and enforced. The doctrine announced in *Mitchell* v. *United States, supra,* had been previously stated in well

considered decisions of this Court. See: *McCabe* v. *Atchison, Topeka, and Santa Fe Railroad,* 235 U. S. 141; *Missouri, ex rel Gaines* v. *Canada,* 205 U. S. 337.

In the Michigan decision under review, the Petitioner is given the benefit of the Michigan common law against unreasonable restraints on alienation, but is not given the benefit of the Michigan law which enforces a right of occupancy as a normal incident of the ownership of real property. The Michigan court refers to the public policy of that State recognizing the enforcement of restrictions against ownership and occupancy of property and cites authorities listed in 3 Callighan's Michigan Digest, 371-403. We have examined these cases and find that those dealing with the enforcement of restrictions that prohibit the use of real property for certain purposes are limited to physical uses having a regard for the safety, health, security and welfare of the community. So far as restrictions on the kind of people who exercise civil property rights are concerned, we find no history in Michigan court decisions except those of the type of the instant cases. In this regard we respectfully submit that the court has created a common law basis for the enforcement of restrictions as to the kind of persons who may enjoy property rights. This wrongful application of the common law of the State of Michigan by the Michigan Supreme Court constitutes a clear denial to the Petitioners in that case of the equal protection of the laws of Michigan. The Michigan Supreme Court alludes to the contractual rights of the plaintiffs as valuable property rights. The court ignores the right of the Petitioners to contract for, to acquire, own, enjoy, and dispose of real property which the Michigan Court decision under guise of enforcement of a contract takes away from the Petitioners. It is the basic right to contract that has sanctity,

not the contract itself. The court ignores that under Michigan law, in the cases cited by the court, judicial enforcement of contracts is not an absolute right, and that contracts will not be enforced when it is opposed to public policy of the state. Arbitrarily, the court denied the Petitioners the protection of the public policy of the State of Michigan against racial discrimination. The court failed to give the Petitioners the benefit of the declared policy announced by the Court, in *Mandlebaum* v. *McDonald,* 29 Mich. 78, of protecting the Petitioners in their right of property, including therein the right to occupy the real estate purchased by them, *Buchanan* v. *Warley, supra; Holden* v. *Hardy, supra;* and *Terrace* v. *Thompson, supra.* The Michigan Supreme Court applied against the Petitioners, when they asserted the right to have properly determined that they were members of the class restricted against, a decision of the Michigan Supreme Court, *People* v. *Dean,* 14 Mich. 406, 423, interpreting an election statute in the year 1866 before the passage of the Fourteenth Amendment abolishing racial and class distinctions in law, and accepted mere opinion of the plaintiff as a basis of determination.

The effects of the decisions from the other jurisdictions are the same in their failure to consider the individual rights of the Petitioners, and they apply an arbitrary doctrine of *stare decisis* in a manner to accomplish spoliation of the Petitioners' civil rights, in violation of the provisions of the Fourteenth and Fifth Amendments to the Constitution of the United States.

In considering the rights of the Petitioners, it should be observed that their secured right to acquire, own, enjoy, and dispose of realty is taken away from them by the device of enforcement of a private agreement to which they were not parties, and to which they could not have been

parties without surrendering this basic right, or by doing that which constitutionally they cannot do, or will not be permitted to do. It is, likewise, not in the power of any citizens or persons or contracting parties to deprive them of such right; nor is it in the power of the state courts to take away such basic right. This is a paramount civil property right which the courts in these cases have destroyed. State enforcement of contracts impinging upon this basic and paramount civil property right would in effect enable persons with the aid of the state to destroy the paramount civil rights of all. The ultimate result of this logic is to produce a condition of anarchy in which the rights of no man will be secure, and in which government through its own agency would destroy itself. Can the courts enforce contracts impinging upon and destroying this sacred right without violating that sound public policy which protects the security of the government and its citizens? It is obvious that a state by its public policy whether exhibited through its constitution, its statutes, or its judicial action, cannot destroy such rights in its citizens without violating the constitutional safeguards provided in the Fourteenth Amendment to the Federal Constitution. Such public policy of any state is a public policy prohibited by the Fourteenth Amendment to the Federal Constitution, the Federal Civil Rights Acts, and the decision of this court in *Buchanan* v. *Warley, supra.*

CONCLUSION.

In this Brief *Amicus Curiae,* The National Bar Association does not presume, or attempt to assume, the responsibility of counsel for the litigants in the cases accepted by this Court for review. We cannot, however,

refrain from exercising our responsibility of urging on this Court the gravity of the issues to be decided by the court. Social data of the highest significance have been presented to the court. These social data reflect the gravity of the effects of judicial enforcement of race restrictions by the courts in the several states in producing disunity, in hindering progress, and in destroying the happiness and welfare of our citizens. It must necessarily be remembered that the issues of human freedom demand a settlement that is based on justice and that the objectives of our constitutional democracy will inevitably be obtained.

In his dissenting opinion in *Plessy* v. *Ferguson,* 163 U. S. 537, Mr. Justice Harlan declared that:

> "In respect of civil rights, common to all citizens, the Constitution does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights."

He further observed, as follows:

> "I am of the opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the letter and the spirit of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law, would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the People of the United States, for whom, and by whom through representatives, our government is administered."

We respectfully urge, therefore, that this Court consider the guaranties of our Constitution and of our legal system as belonging to the individual without consideration of his race, his color, or his religion.

Respectfully submitted,

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RICHARD E. WESTBROOKS, Chairman, National Committee on Civil Rights and Liberties, National Bar Association.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 72, 87, 290 and 291

J. D. SHELLEY, *et al., Petitioners,*

—v.—

LOUIS KRAEMER, *et al., Respondents.*

ORSEL McGHEE, *et al., Petitioners,*

—v.—

BENJAMIN J. SIPES, *et al., Respondents.*

JAMES M. HURD, *et al., Petitioners,*

—v.—

FREDERICK E. HODGE, *et al., Respondents.*

RAPHAEL G. URCIOLO, *et al., Petitioners,*

—v.—

FREDERICK E. HODGE, *et al., Respondents.*

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF MISSOURI AND MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE

ROBERT W. KENNY, *President,*
O. JOHN ROGGE, *Chairman,*
National Committee on Civil Rights
and Liberties, National Lawyers Guild.

MOZART G. RATNER,
Counsel for Amicus Curiae.

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TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 72.

J. D. SHELLEY, ET AL., *Petitioners,*

v.

LOUIS KRAEMER, ET AL.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

No. 87.

ORSEL McGEE, ET AL., *Petitioners,*

v.

BENJAMIN J. SIPES, ET AL.

On Writ of Certiorari to the Supreme Court of the State of Michigan.

No. 290.

JAMES M. HURD, ET AL., *Petitioners,*

v.

FREDERICK E. HODGE, ET AL.

No. 291.

RAPHAEL G. URCIOLO, ET AL., *Petitioners,*

v.

FREDERICK E. HODGE, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

MOTION OF THE NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The National Lawyers Guild respectfully prays leave to file a brief as amicus curiae in the above captioned cases. The applicant has filed with the clerk the written consent of counsel for petitioners and for respondents in Nos. 290, 291 and No. 87. The applicant has in writing requested the consent of counsel for petitioners and for respondents in No. 72. No reply has as yet been received.

The National Lawyers Guild is an organization of members of the American Bar, devoted particularly to the protection of the fundamental civil rights guaranteed by the Constitution of the United States. It believes that the basic constitutional question presented in these cases is of major importance to the nation. It believes that the judgments below and the reasoning on which they are based seriously impair constitutional doctrines heretofore established by this Court and tend to subvert the protection accorded civil rights by the Fifth and Fourteenth Amendments. It conceives it to be its public duty, as an organization of members of the bar, to bring before this Court the reasons which impel its conclusion that the judgments below should be reversed. The National Lawyers Guild therefore respectfully requests leave to file a brief as amicus curiae.

BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

Opinions Below.

The opinion of the Supreme Court of the State of Missouri in No. 72 (R. 153-159), is reported at —— Mo. 2d ——, 198 S. W. 2d 679. The opinion of the Supreme Court of the State of Michigan in No. 87 (R. 60-69), is reported at 316 Mich. 614. The opinion of the United States Court of Appeals for the District of Columbia in Nos. 290 and 291 (R. 417-432) is reported in 162 F. 2d 233.

Jurisdiction.

The jurisdiction of this Court is invoked under Sections 237 and 240 of the Judicial Code (28 U. S. C. 344 (b) and 347 (a)).

Question Presented.

This brief will discuss only the question whether, by enforcing the racial restrictive covenants here involved in such manner as to preclude petitioners, because of their race, from owning or occupying real property, and to preclude owners of real property from selling or leasing such property to Negroes, the courts below violated the Fifth and Fourteenth Amendments.

Statement.

Nos. 290 and 291—Petitioners in No. 290 now occupy as their home, pursuant to a grant by deed from one Ryan and his wife, residential property in the 100 block of Bryant Street, Northwest, in the District of Columbia (R. 381-382). In No. 291, petitioners Rowe, Savage and Stewart are each grantees by deed from petitioner Urciolo, of a piece of improved property on the same block (R. 382). These cases arise out of suits filed by respondents, owners of four other lots in the same block, in the United States District Court for the District of Columbia, to secure a declaration that the deeds to the petitioner grantees are null and void, and an injunction ordering the grantees to vacate their homes and prohibiting the renting, sale, leasing or transferring of the residential property to any Negro or colored person.

The suits were predicated upon the fact that when the properties involved were transferred by deeds in or about the year 1906, there was included in the deeds a covenant which provided (R. 380), that the lots conveyed "should never be rented, leased, sold, transferred or conveyed unto any Negro or colored person". It was claimed that the grantee petitioners are Negroes or colored persons. It was further claimed that although the grantee petitioners acquired their respective properties from persons who were

themselves remote grantees from the original covenantors, they could acquire no rights in such property because of the existence of the covenant in the 1906 deed. The trial court sustained the action, found that the respective grantees were colored persons, and granted the relief prayed in full (R. 384-385). The decree required *inter alia,* that petitioners "remove themselves and all of their personal belongings from the land and premises now occupied by them" (R. 384-385), but made no provision for the return of the money which the grantees had paid for the property. (See R. 80, 219).

The United States Court of Appeals for the District of Columbia, Judge Edgerton dissenting, affirmed the decision below in reliance upon its prior holding in *May* v. *Burgess,* 147 F. 2d 869. The Court held that neither the policy of the common law against restraints upon alienation, nor the "changed conditions" doctrine pursuant to which a court of equity balances the benefits to be achieved through enforcement of such covenants against the danger that enforcement "would * * * create an unnatural barrier to civic development and thereby * * * establish a virtually uninhabitable section of the city" (*Hundley* v. *Gorewitz,* 132 F. 2d 23, 24), outweighed in these cases the policy of the law "that equity will enforce a proper contract concerning land, against all persons taking with notice of it". (R. 417-418; *Mays* v. *Burgess, supra,* at pp. 871, 872). The Court further held that judicial enforcement of the racial restrictive covenant did not violate the Fifth or the Fourteenth Amendments (R. 418; *Mays* v. *Burgess, supra,* at pp. 870-871).

No. 87—Petitioners now occupy as their home, pursuant to a deed executed by a grantee of one Ferguson and his wife, residential property in the City of Detroit, Michigan, identified as 4626 Seebaldt Avenue (R. 16, 19). In 1934, the Fergusons, while owners of these premises, executed, in consideration for the reciprocal agreement of neighboring property owners, a covenant providing, *inter alia* (R. 63), that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

This case arises out of a suit filed by respondents, neighboring property owners, to obtain injunctive relief restraining petitioners, on the ground that they are allegedly not of the Caucasian race, from using or occupying the property they have purchased and occupy (R. 16). The trial court found that petitioners are "of the colored or Negro race" (R. 74), and granted the injunctive relief prayed in full (R. 74-75).

The Supreme Court of the State of Michigan affirmed. The court concluded that since the public policy of the State of Michigan approved the creation and enforcement of restrictions upon the use and occupancy of land, though it disapproved the creation of, and denied enforcement to restraints upon alienation, the instant restriction upon occupancy by non-members of the Caucasian race should be enforced (R. 65-66). The court recognized that the question whether judicial enforcement of racial restrictive covenants was violative of the Fourteenth Amendment had not been decided by this Court in *Corrigan* v. *Buckley,* 271 U. S. 323 (R. 66). It nevertheless held that petitioner's objection to the action of the court below on constitutional grounds was without merit since "To accept this reasoning would also at the same time deny 'the equal protection of the laws' to the plaintiffs and prevent the enforcement of their private contracts" (*ibid.*).

No. 72—In 1911, 30 out of a total of 39 neighboring property owners in the City of St. Louis, Missouri, signed an agreement "for the benefit of all" providing that thereafter, for a term of fifty years, the property "fronting on Labadie Avenue and running back to the alley on the North and South sides of Labadie Avenue between Taylor and Cora Avenue" should not be occupied "by any person not of the Caucasian race" (R. 2, 19-20). Among the nine owners of property in the area described at the time the agreement was executed were five Negroes (R. 2-3). Years later petitioners purchased the property which they now occupy from a remote grantee of one of the signatories to the agreement (R. 1-3, 140).

The case arises out of a suit filed by respondents, neighboring property owners, in the Circuit Court of the City of St. Louis, to obtain an injunction ousting petitioners from residence on the ground that they are Negroes, and as such have no right to occupy the property (R. 4-8).

The trial court found that petitioners are Negroes, but declined to enforce the restriction on the ground that it had been the intention of the signers that the agreement become final and binding only upon the concurrence of all of the owners of the property described therein, and that since nine property owners had not joined in the agreement, leaving some of the property not covered, the agreement had never become final and was of no force and effect (R. 139-144).

The Supreme Court of the State of Missouri reversed. Looking to the surrounding circumstances to ascertain the purpose which the signers sought to achieve by the agreement, the court found that "Obviously it could not have been the intention of the parties to prevent any Negro occupancy at all because that already existed. It must have been their intention to prevent greatly increased occupancy by Negroes. And their plan has succeeded" (R. 156). The court pointed out that "If the purpose of a plan under which some property is restricted fails because other property in the district has not been likewise restricted, then equity will not enforce the agreement. The general purpose of a restrictive agreement must be achieved in order to justify a burden" (R. 157). The court concluded, however, that "since the purpose of the plan is being accomplished" its enforcement achieves a "benefit" (*ibid.*) consonant with public policy, and one sufficient to justify the burden imposed.

The court rejected petitioners' contention that judicial enforcement of the covenant violated the Fourteenth Amendment for reasons similar to those advanced by the United States Circuit Court of Appeals for the District of Columbia in Nos. 290 and 291, and by the Supreme Court of the State of Michigan in No. 87.

ARGUMENT.

I. The Nature of the Issues.

The central issue in these cases arises from an apparent conflict between principles heretofore unreconciled by this Court. On the one hand it is urged that the right of an individual to own, use and dispose of property, vests in property owners a right to discriminate among would-be buyers on racial grounds. It is further urged that this right, when coupled with the right to contract freely, vests in property owners the right to bind themselves by contract with other property owners to practice such discrimination in disposing of their property in the future. Allegedly, the action of the judiciary in compelling adherence to such agreements does not involve the application of a discriminatory racial policy by the state, but represents merely an application of a uniform policy against repudiation of valid private agreements. It is said that the state cannot be deemed to have been precluded by the Fourteenth Amendment from enforcing, on a non-discriminatory basis, such discriminatory private agreements.

On the other hand, it is clear that the right of persons to acquire, use, and dispose of property without discrimination on the basis of race, is a right guaranteed against state action by the Fourteenth Amendment. *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 668; *City of Richmond* v. *Deans,* 281 U. S. 704. Although the *Civil Rights Cases,* 109 U. S. 3, 17, held that the discriminatory denial of property rights by individuals was not of itself violative of the Fourteenth Amendment, that case also made it clear that such denials retained immunity only as long as they were "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." Immunity is lost the moment racial discrimination by individuals is "sanctioned in some way by the state" (*ibid.*).

Thus it has been held that although individual property owners may, by refusing to sell to Negroes, effectively exclude them from the community, a state may not, at their

behest, adopt or apply a policy of racial segregation in residential areas. *Buchanan* v. *Warley, supra; City of Richmond* v. *Deans, supra.* Moreover, although property owners may, without violating the Fourteenth Amendment, agree not to sell their property to Negroes without first securing the consent of a majority of their neighbors, it has been held that a state cannot constitutionally condition the right of occupancy of property by a Negro upon the approval of a majority of the white inhabitants of the community. *Harmon* v. *Tyler*, 273 U. S. 668.

The *Tyler* case makes it clear that the state cannot lend its powers to the support of a policy of racial segregation adopted by individuals. Cf. *Liberty Annex Corp.* v. *City of Dallas*, 289 S. W. 1067, aff'd., 295 S. W. 591, 19 S. W. 2d 845 (Texas). For, in the *Tyler* case it was not the ordinance, or any state policy, which decreed segregation; the ordinance merely permitted that result to be achieved if the private individuals who inhabited the community so desired.[1] It could, indeed, have been contended, as plausibly as it is in this case, that in honoring the will of the inhabitants, the state was interested only in applying an abstract principle of good government—majority rule—and was completely unconcerned with whether or not the inhabitants of the community discriminated against Negroes.

We believe it entirely fallacious therefore to contend, as respondents do, that state action which sanctions or supports denial of property rights on the basis of race may be held violative of the Fourteenth Amendment only if the state's action is itself motivated by discriminatory considerations based on race. We submit that whenever a state deprives a person, because of his race, of the right to acquire, use and dispose of property, the state violates the Four-

[1] Although the ordinance involved in the *Tyler* case made approval of the majority of residents a condition precedent to the Negroes' right of occupancy, there can be no doubt that the result would have been the same if the statute had instead given the majority power to defeat the Negroes' right of occupancy by voting against it. Cf. *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192.

teenth Amendment. We submit further that when a state, through its courts, issues an injunction to preclude the purchase or occupancy of property by a Negro because of his race, the state deprives the Negro of his rights under the Fourteenth Amendment. We believe that such deprivation can no more be justified as an incident of the state's policy of enforcing private contracts, than it could be justified as an incident of some other allegedly non-discriminatory state policy, such as majority rule. And finally, we contend that to hold such state court action violative of the Fourteenth Amendment would be to approve and follow, not reject, the doctrine of the *Civil Rights Cases,* upon which respondents must rely.

The same limitations which, under the Fourteenth Amendment, govern state action, are applicable to the federal government under the Fifth Amendment. *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Farrington* v. *Tokushige,* 273 U. S. 284, 298-299. The discussion below, therefore, has been framed in terms of the Fourteenth Amendment, and is applicable to the District of Columbia cases as well as to the cases presently before the Court which arise out of decrees issued by state courts.

II. By Enforcing Private Contracts Which Deprive Persons of Rights Guaranteed by the Fourteent Amendment the State Violates the Fourteenth Amendment.

A. The Nature of the Rights Guaranteed by the Fourteenth Amendment.

It is important to distinguish at the outset between civil rights on the one hand, which the Fourteenth Amendment protects, and so called "social rights of men and races in the community" which, in the *Civil Rights Cases,* 109 U. S., at p. 22, were held not protected. The right to purchase, use and dispose of *property* without discrimination on the basis of race is clearly one of the civil rights protected by the Fourteenth Amendment. *Buchanan* v. *Warley, supra.* In the *Civil Rights Cases* it was referred to as "one of those

fundamental rights which are the essence of civil freedom," 109 U. S., at p. 22. It is therefore inadmissible in discussing the scope of that right, and the nature of action which would impair it, to seek for analogies in such fields as the right to equal accommodation in inns, conveyances, or places of amusement. Whether or not denial of these latter rights would be deemed to run afoul of the Fourteenth Amendment, it is clear that opportunity to acquire and use property without regard to race is protected by the Fourteenth Amendment.

Nor is this right protected merely as a part of the guarantee of "property rights" or "liberty of contract" contained in the Fourteenth Amendment. For, if so, it could be denied whenever a legislature in the exercise of its wide discretion, found reasonable basis in the public interest for its abridgment. Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Norman* v. *Baltimore & Ohio Ry. Co.,* 294 U. S. 240, 307-308. Like the right to freedom of speech, and of the press, and freedom of religion, the right to acquire, use and dispose of property, *without racial discrimination,* is not subject to the police power of the state. "Discriminations based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, 203. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 528; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349-352. And therefore such discriminations cannot constitutionally be made to affect the right of individuals to acquire, use or dispose of property, regardless of the nature or substantiality of the public interest which a legislature may believe would be served thereby. *Buchanan* v. *Warley, supra; City of Richmond* v. *Deans, supra.* Only a showing of clear and present danger to the existence of government can justify abridgment of the civil rights of freedom of speech and of press, of assembly and of worship, *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624, 639; only such a showing could justify discrimina-

tion because of race. *Hirabayashi* v. *United States,* 320 U. S. 81, 100-102; *Ex Parte Endo,* 323 U. S. 283, 297, 302.

B. The Nature of the Duties Imposed by the Fourteenth Amendment.

The obligation to refrain from interfering with the exercise of civil rights protected by the Fourteenth Amendment is imposed only upon the states. That obligation extends, however, to every agency and officer of the state, executive, legislative, and judicial.[2] It applies to "State action of every kind" (*Civil Rights Cases,* 109 U. S., at p. 11), and it precludes the state from using any of its powers to "support" or "sanction" interference by individuals with the enjoyment of civil rights by other individuals (*ibid.,* at p. 17).

The Fourteenth Amendment, on its face, does not impose on individuals any duty to refrain from interfering with the enjoyment by others of the rights it guarantees. If, however, it were held that the Fourteenth Amendment imposed an obligation upon the states affirmatively to illegalize and punish such individual conduct, the result would have been precisely the same as if the Amendment had in terms imposed on individuals the same obligations which it imposed on the states. This, in the *Civil Rights Cases,* the Court refused to do. It distinguished sharply (109 U. S., at p. 17), between "acts of individuals unsupported by any [state] authority," which, though they interfere with the enjoyment of civil rights by the injured party, cannot be deemed violative of the Fourteenth Amendment, and protection accorded such acts "by some shield of state law or state authority," which does violate the Amendment.

The *Civil Rights Cases* did not proceed on the theory that there was in the individual any constitutional right to deprive others of civil rights guaranteed by the Constitu-

[2] *Civil Rights Cases,* 109 U. S. 3, 11, 17; *Ex Parte Virginia,* 100 U. S. 339; *Twining* v. *New Jersey,* 211 U. S. 78, 90-91; *Moore* v. *Dempsey,* 261 U. S. 86; *Powell* v. *Alabama,* 287 U. S. 45; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673.

tion; its holding followed rather from the fact that the Fourteenth Amendment did not impose prohibitions upon individuals as such. It was this fact which impelled the holding that private invasions of civil rights are *damnum absque injuria* under the Fourteenth Amendment when they are accomplished without the authority, support or sanction of the state. Nothing in those cases or any subsequent case in this court has suggested that such private denials of civil rights remain constitutionally unobjectionable when a state's powers are invoked to effectuate the denial. No case in this Court has even suggested that individuals or private groups have the right, despite the Fourteenth Amendment, to obtain state aid or assistance in carrying out acts of discrimination based on race. Quite to the contrary, this Court said in the *Civil Rights Cases* that the impact of the Fourteenth Amendment lay precisely in the fact that it destroyed the power of the state to render authorization, support or assistance to discriminatory acts of individuals based on race where such acts impinged upon rights guaranteed by the Amendment.

The *Civil Rights Cases* thus implicitly held that a state cannot be said to "sanction" or "support" acts of individuals which it merely does not render unlawful and punishable.[3] It is for this reason that the states are not required by the Fourteenth Amendment to punish a property owner who utilizes his control of property on which others work and live to bar communication between them and outsiders on religious matters and other questions of public concern. Cf. *Marsh* v. *Alabama,* 326 U. S. 501. It is for this reason that the states are not required by the Fourteenth Amendment to punish employers who discharge employees in

[3] This is not to say, of course, that the states remain free under the Fourteenth Amendment to deny protection to individuals injured by conduct which is illegal under state law simply because the illegal conduct results in impairment of rights guaranteed by the Fourteenth Amendment. Such a denial of redress, as the *Civil Rights Cases* clearly indicated, would amount to a denial of equal protection of the laws. It is with respect to individual deprivations of civil rights accomplished by means not independently illegal that the state may remain aloof.

reprisal against the exercise of their constitutional right to proselytize on behalf of a labor organization. Cf. *Thomas* v. *Collins,* 323 U. S. 516, 537, 540. And it is for this reason that the states do not violate their obligations under the Fourteenth Amendment merely by failing to illegalize and punish the making or voluntary performance by individuals of agreements which restrict the right to purchase, use and sell real property on the basis of race. Cf. *Corrigan* v. *Buckley,* 271 U. S. 323.

Once the state goes beyond this, however, the moment it forsakes the role of passive non-participant and lends to any such private infringements of civil rights the support or sanction of its policies or instrumentalities of government, the state violates the Fourteenth Amendment. Just as the state cannot support the property owner in the exercise of his rights, when that exercise invades the constitutional right of others freely to speak and to listen (*Marsh* v. *Alabama,* 326 U. S. 501), so the state cannot support the property owner who seeks to deny to others their constitutional right to acquire, use and dispose of property without discrimination on the basis of race. Almost contemporaneous recognition that this was indeed the holding of the *Civil Rights Cases* appears from the decision of Judge Ross in *Gandolfo* v. *Hartman,* 49 Fed. 181, 182-183 (1892), dismissing, on Constitutional grounds, a suit for enforcement of a racial restrictive covenant.

This does not transform the Fourteenth Amendment into an instrument for the regulation of individual discrimination based on race. The only effect of the rule is to deprive individuals of the power and privilege of invoking, in the performance of discriminatory acts, aid and protection which a state could accord them in the performance of non-discriminatory acts. That, of course, does not result in destruction of the power which respondents claim, i. e., their power as property owners to discriminate on racial grounds in disposing of their holdings, or to make and perform contracts to do so. *Marsh* v. *Alabama, supra,* does not imply that the Fourteenth Amendment has destroyed

the analagous power of property owners to deny access to their property to persons who wish to proselytize among tenants on behalf of a religious sect. Absent state law to the contrary, such conduct by the property owner is not illegal. All that is held is that these powers are not affirmatively protected by the Fourteenth Amendment, and that property owners have no cause to complain of the fact that the states are precluded from lending aid or assistance to their effectuation. It would be strange indeed to hear it said that the Fourteenth Amendment, which was enacted to secure civil rights, instead bound the states to sanction their infringement.[4]

Yet the argument of the Supreme Court of Michigan, that enforcement of racial restrictive covenants can be denied only at the price of denying to the parties to such agreements the "equal protection of the laws" (No. 87, R. 66), leads to just this conclusion. (Cf. No. 72, R. 158). The argument is that a court could not, without denying equal protection, refuse to enforce a racial restrictive covenant, while at the same time continuing to enforce other covenants restricting the use of land. The fallacy in this argu-

[4] With due deference, we cannot perceive the force of the argument which has been made repeatedly by the Court of Appeals for the District of Columbia that failure to enforce racial restrictive covenants would "destroy" * * * titles to valuable real estate made and taken on the faith of our decisions" (No. 290, R. 417-418; 162 F. 2d at 234). Whose titles? Certainly not those of the Negroes who are being evicted from their homes. Certainly not those of respondents; no one seeks to oust them from ownership. The most that can be said is that respondents, and others similarly situated, would be disappointed in their expectation that the state through its courts would aid them in compelling a willing property owner to refrain from selling or leasing his property to Negroes. If *Norman* v. *Baltimore and Ohio Ry. Co.*, 294 U. S. 240, *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, teach anything they teach that the expectations of a property owner, or of a party to a contract, concerning the availability of judicial aid for the enforcement of property or contract "rights" are not to be deemed inviolable even as against the police power of a state. It is incredible that such expectations should be permitted to stand in the way of securing to others civil rights guaranteed by the Constitution.

ment is exposed by mere reference to the innumerable cases in which courts refuse to enforce contracts, otherwise entirely valid, because the particular contracts are deemed violative of "public policy." No one, so far as we are aware, has yet suggested that when a court refuses to enforce a contract made on Sunday, yet enforces an identical contract made on Monday, it denies to the parties to the Sunday contract equal protection of the laws. Nothing in the Constitution requires a court to deny enforcement to Sunday contracts, for no constitutional rights would be impaired by their enforcement. But the Constitution does require that courts refrain from enforcing contracts which, as do racial restrictive covenants, deprive persons of civil rights guaranteed by the Fourteenth Amendment. Can there be any doubt that this fact, denial of civil rights, justifies a distinction, for purposes of enforcement, between such contracts and contracts restricting land use which are not open to objection on such grounds?

Implicit in the argument of the state courts below is the view that no state could by statute prohibit a property owner from discriminating among prospective purchasers on the basis of race in disposing of his property. By the same token it would follow that no state could by statute prohibit an employer from discriminating against prospective employees on the basis of race. Such statutes, however, would stand upon much the same basis as the Railway Labor Act of 1926, the National Labor Relations Act, and its counterparts in state laws. What was said by this Court in reply to employer contentions that these statutes unconstitutionally interfered with their rights as property owners freely to select their employees is equally applicable to the attack implicit in the opinions of the courts below upon statutes prohibiting racial discrimination in the sale or leasing of property. In *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570-571, the Court said:

> "The prohibition by Congress of interference with the selection of representatives for the purpose of negotia-

> tion and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both * * *. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.''

Property owners have no more constitutional right to discriminate against would-be purchasers because of their race, color, creed or union affiliation, than employers have to discriminate on such grounds against would-be employees. Cf. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177; *N. L. R. B.* v. *Waumbec Mills*, 114 F. 2d 226 (C.C.A. 1).

C. The Limitations Imposed by the Fourteenth Amendment Apply to State Action Which Flows from Policies Embodied in the Common-Law as Well as from Policies Embodied in Legislation.

Judicial action is no less action of the state, subject to the limitations of the Fourteenth Amendment, when that action flows from policies embodied in the common law of the state than when it flows from policies embedded in legislation. This principle has been applied often and uniformly by this Court. See, e. g., *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *California*, 314 U. S. 252; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769. Thus, the action of a state court in enjoining a white property owner from selling his property to a Negro would be equally violative of the Fourteenth Amendment whether the injunction was predicated on a common law policy of the state which held the ownership and occupancy of such property by a Negro to be a

"nuisance," or upon an identical policy declared by act of the state legislature. *Spencer Chapel Methodist Episcopal Church* v. *Brogan,* 104 Okla. 123, 231 Pac. 1074; *Crist* v. *Henshaw,* 196 Okla. 168, 163 P. 2d 214. A state court cannot constitutionally follow and apply a common law policy which the legislature could not constitutionally adopt and direct the courts to enforce.

D. Adoption and Enforcement by State Courts or Legislatures of a Policy Which Supports the Infringement by Individuals of Civil Rights Guaranteed by the Fourteenth Amendment is Unconstitutional.

For the reasons set forth above, it is entirely proper to test the validity of the policy adopted and applied by the state courts in these cases in terms of whether that policy is one which state legislatures could constitutionally enact into law. The question then becomes whether a state could by statute provide that covenants against sale to, or occupancy of certain lands by Negroes should be lawful and enforcible by injunction, not only against willing white sellers, but against Negro buyers.

Even some who find no constitutional infirmity in state court enforcement of restrictive covenants in cases such as those now before the Court, concede that such a statute would be invalid. As one such writer puts it, the statute would extend "the policy and sanction of the state beyond the mere protection of property or contract rights to the very act of discrimination." The same writer further admits that under such a statute "the discrimination itself [is] authorized and encouraged by the state."[6]

These concessions are indeed unavoidable, for the statute approves, authorizes and encourages discrimination precisely as did the statute held invalid in *Harmon* v. *Tyler,* 273 U. S. 668, discussed *supra,* p. 8.

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[5] Houston, John A., *State Court Enforcement of Race Restrictive Covenants as State Action Within Scope of Fourteenth Amendment, (Comment)*, 45 Mich. L. Rev. 733, 743.

[6] *Id.*

To hold such a statute valid would be to hold that a state could by statute define as a misdemeanor or even as a felony, the purchase by a Negro of property which the owner had contracted to sell only to whites. Moreover, since it is a familar doctrine that a state may normally, to promote the sanctity of contracts, provides penalties for inducing breach thereof (cf. *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71), such a holding would mean that a state could by statute make it a crime for a Negro to induce the sale to him of property which the owner is under covenant to sell only to whites, provided only the state avoids equal protection objections by finding that such racial restrictive covenants are the type of contracts most often broken as a result of deliberate inducement by third persons. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471-472; *United States* v. *Petrillo,* 331 U. S. 888. We believe that no one seriously contends that such statutes would be compatible with the Fourteenth Amendment.

The policy applied by the state courts in these cases, however, is exactly the same as that embodied in the hypothetical statutes discussed above, and must fall for the same reasons. To suggest, as the writer quoted above does,[7] that in recognizing the validity and decreeing the enforcement of restrictive covenants, a court, unlike a legislature, is unconcerned whether the obligations imposed therein comport with public policy, is to deny to the judiciary its acknowledged place in our governmental scheme. To assert that a court enforces racial restrictive covenants solely because they meet the formal requirements of a "contract" is to view the law in Mr. Justice Holmes' phrase, as a "brooding omnipresence in the sky." "A promise upon a promise will lie" is not a pernicious abstraction which decrees the enforcement of all reciprocal promises which do not themselves violate positive law. Sunday contracts, contracts in restraint of marriage, and dozens of others, which meet all

[7] Houston, *op. cit. supra,* note 5, at pp. 741, 742-743.

of the formal contract requirements and are not in themselves "void," are denied enforcement by state courts on the ground that they do not comport with public policy.[8] When a court enforces a contract it decides, impliedly if the question is not raised, expressly if it is, that the obligations undertaken by the parties may lawfully be assumed, and that performance of the contract accords with the public policy of the state.

Certainly this is true where a court of equity is asked to enforce a contract by injunction or specific performance. These remedies are never granted without inquiry into whether performance of the particular contract would comport with or contravene the public policy of the jurisdiction.[9] Indeed, the best illustration of this point is to be found in the historical development of the law governing realty covenants themselves. Restrictions on land use, contained in such covenants, were deemed appropriate by courts of equity to protect what they found to be socially desirable interests. It was in consequence of this determination that the courts gave binding effect to the restrictions, despite the general policy of the law which disapproved restraints upon the utilization of property by the owner. Enforcibility of restrictions upon land use by injunction flowed from a conscious determination by the courts that the objective attained by the restrictions was more important to society than the retention intact of the absolute freedom of property owners to utilize their property in any lawful fashion they might desire. When courts of equity assimilated restrictions upon racial occupancy and ownership to restrictions upon use, they made precisely the same policy determination concerning the advantages of such restrictions as they had earlier made with respect to restrictions upon use. The courts balanced the policy of the law against restraints upon alienation on the one hand, against the desirability

[8] 5 Williston on Contracts, (Rev. Ed., 1937), Sections 1628-1631, pp. 4554-4568.

[9] *Op. cit. supra,* note 8, Section 1429, pp. 4000, 4001, note 4.

of racial segregation on the other, and concluded that the latter interest should prevail. The same policy determinations and considerations which were at the foundation of the statutes held invalid in *Buchanan* v. *Warley,* 273 U. S. 668, *City of Richmond* v. *Deans,* 281 U. S. 704, and *Harmon* v. *Tyler,* 273 U. S. 668, constitute the rationale for judicial enforcement of racial restrictive covenants.

The very decisions of the courts below prove the point. The courts below did not automatically decree enforcement of the covenants merely because, as contracts, they were not "improper," and therefore fell within the rule "that equity will enforce a proper contract concerning land, against all persons taking with notice of it." *May* v. *Burgess,* 147 F. 2d 869, 872 (App. D. C.). On the contrary, the Court of Appeals for the District of Columbia applied that rule only after finding that enforcement would not "create an unnatural barrier to civic development and thereby * * * establish a virtually uninhabitable section of the city." *Hundley* v. *Gorewitz,* 132 F. 2d 23, 24 (App. D. C.), quoted with approval in *May* v. *Burgess,* 147 F. 2d 869, 871 (App. D. C.), on the basis of which the Court of Appeals for the District of Columbia affirmed the judgments below in Nos. 290 and 291 (R. 417-418; *supra,* p. 4). The Supreme Court of Michigan applied that rule only after finding that racial restrictions upon occupancy gave to society the same type of benefits as did restrictions upon use; that these benefits were more substantial than those flowing from restrictions upon alienation to Negroes, and that these benefits warranted the courts in enforcing restrictions upon occupancy, although restrictions upon alienation would not be enforced (No. 87, R. 65-66, *supra,* p. 5) . The Supreme Court of Missouri applied that rule only after finding that the plan of the covenantors "to prevent greatly increased occupancy by Negroes" was a worthy objective, one which warranted a court of equity in imposing burdens to aid in its achievement (No. 72, R. 156-157, *supra,* p. 6).

Can there be the slightest doubt then, that the courts below did not blind themselves to the objects and purposes

of the covenants before decreeing their enforcement? Can there be the slightest doubt, indeed, that the courts below made value judgments in terms of desirable social policy which differed not a bit from the value judgments made by legislatures in deciding to enact legislation approving and decreeing enforcement of contracts providing for residential segregation? Not only the motive, but the result, is in both cases the same. Because the state approves and the courts enforce, individuals are encouraged to enter into covenants barring Negroes from owning and occupying residential properties, covenants which often close to Negro occupancy whole sections of cities.

It is not valid, therefore, to assert that when a state court enforces a racial restrictive covenant "the conscious policy" applied by the court "ends with the enforcement of contractual undertakings or with the protection of property interests where the covenant is treated as an equitable servitude,"[10] or that the court's policy "looks no farther than to the protection of property and contract rights."[11] And, consequently, it cannot be said that when a court enforces a racial restrictive covenant, pursuant either to its own or the legislature's view that such covenants serve to protect a socially desirable interest, the court is enforcing a "non-discriminatory" principle of law.

E. *The Fourteenth Amendment precludes the states from supporting action by individuals which impedes the exercise of rights guaranteed in the Fourteenth Amendment, by applying thereto the same policies, principles and laws which govern lawful, non-discriminatory individual action.*

Even if it be conceded, however, for purposes of argument, that in enforcing racial restrictive covenants a court indeed "looks no farther than to the protection of property and contract rights," it would by no means follow that such

[10] Houston, *op. cit. supra,* note 5, p. 741.

[11] *Ibid.,* at p. 742-743.

action would not violate the Fourteenth Amendment. Neither state courts nor legislatures can constitutionally vest in individuals power to invoke the aid of government in infringing civil rights guaranteed by the Fourteenth Amendment. Neither state courts nor legislatures can evade this obligation on the plea that they protect infringements of the basic guarantees of the Fourteenth Amendment not because they are infringements but despite it. Neither can constitutionally protect every exercise of power flowing either from contract or from the ownership of property by pleading a callous disregard of whether the particular exercise of power involves an infringement of the civil rights of others. Government does not satisfy its obligations under the Fourteenth Amendment by devoting its attention single-mindedly to the protection of property and contract rights without concern for the effect of such protection upon civil rights.

Ample authority in the decisions of this Court supports this view. In *Marsh* v. *Alabama*, 326 U. S. 501, the State of Alabama sought to enforce its non-discriminatory trespass statute on complaint of a corporation which, in the exercise of its property rights, had barred a member of Jehovah's Witnesses from proselytizing on its premises. This Court held that such an application of the admittedly valid statute was an unconstitutional invasion of the visitor's right to freedom of speech. Since the state could not constitutionally have erected such a barrier to the entrance of Jehovah's Witness if it were the owner of the property on which others worked and lived (Cf. *Jamison* v. *Texas*, 318 U. S. 413, 415-416), it could in no way utilize its power to support the erection of a barrier by the private owner.[12] *Steele* v.

[12] Houston's attempted distinction of *Marsh* v. *Alabama* from the restrictive covenant cases, 45 Mich. L. Rev., at pp. 745-746, on the ground that that case involved a criminal statute whereas the instant cases involve only civil remedies is without merit. Certainly, if the Alabama statute had provided for enforcement only by injunction the effect of its application upon one who disregarded an injunction issued pursuant thereto would have been no wit different from the effect of application of the criminal statute. Cf.

Louisvile & Nashville Railroad Co., 323 U. S. 192, implied that government could not confer the power of majority rule upon private groups, even though that power was conferred without discrimination of any kind, unless there was coupled with that grant of power the duty to refrain from race discrimination in its exercise. In that case contracts between the representative of one such private group and employers were held unenforcible because they contained provisions discriminating against certain members of the group on the basis of race. The *Steele* case demonstrates two things: first, that a state cannot create legally enforcible rights in private persons without insuring that in exercising such rights the recipients will not trench upon civil rights guaranteed by the Fourteenth Amendment. This principle is as applicable to recognition of contract and property

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Thomas v. *Collins*, 323 U. S. 516, 534, 535, 540, 543. In any event, where constitutional liberties are involved, a state can no more "restrain or impede" their exercise by providing that proper indulgence should be the occasion for recovery of damages, than it can "prohibit" proper indulgence altogether. See *Thomas* v. *Collins, supra*, at p. 543.

Houston's second attempted distinction, *op. cit. supra*, at pp. 746-747, is likewise insubstantial. He completely misconstrues the reason that "the Court attached great significance to the fact that the corporation for its own advantage had opened its land to the public." This fact is relevant only upon the question whether any constitutional right of the Jehovah's Witness was involved at all. Of course, if no other persons resided on the corporation's property than the owners, and they did not wish to listen, the Jehovah's Witness would have had no constitutional right to enter the property and compel their attention. So much was established in *Martin* v. *Struthers*, 319 U. S. 141, 148. The residence of others on the property, who might wish to listen, was therefore crucial to the existence of Miss Marsh's right to enter and speak. So, in the restrictive covenant cases, the constitutional right involved must be established by the showing of a willing buyer and a willing seller. Once that fact is established, however, the state is precluded, as in the *Marsh* case, from interfering, because of the race of the participants, with the consummation of the transaction.

And, as the *Marsh* case also shows, such interference cannot be justified on the ground that the state is called upon to act by a private person whose claims to protection stem from property rights.

rights as it is to recognition of the right to majority rule.[13] Second, that courts cannot, consistent with the Fourteenth Amendment, blindly apply normal principles of contract enforcement to contracts which have race discrimination as their object.

The fact that the rule of law pursuant to which courts or legislatures enforce racial restrictive covenants may be deemed "non-discriminatory" is immaterial. No rule of law promulgated by an agency of government can attain "constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115. The principle is equally applicable to the civil right guaranteed by the Fourteenth Amendment, of acquiring, using and disposing of property without distinction based on race, for that right together with "freedom of press, freedom of speech, freedom of religion [is] in a preferred position." *Murdock* v. *Pennsylvania,* 319 U. S., at p. 115. *Civil Rights Cases,* 109 U. S. at p. 22; *Buchanan* v. *Warley, supra.* (See pp. 9-11, *supra.*) So a state cannot constitutionally act to preclude the ownership or occupancy of property because of race, merely because it has classified covenants which deny to members of one or more races the right to own or occupy property, along with commercial contracts, or contracts restricting the use of land, and enforces them all alike.

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[13] We have demonstrated above, pp. 18-19, that it is the state, not private persons, which creates the right to enter into legally binding contracts. Private persons could, without state aid, make mutual promises and abide by them. But without state aid, the mere existence of the promises could not compel a recalcitrant promisor to abide by his bargain. We have further demonstrated above, pp. 11-15, that the negative role played by the state toward the making and voluntary performance of promises differs in kind from the affirmative role played by the state in enforcing promises against recalcitrant promisors. And we have shown (*ibid.*), that under the doctrine of the *Civil Rights Cases,* the obligations of the Fourteenth Amendment apply whenever, as here, the state acts in the latter role.

The contention of those who would uphold state enforcement of racial covenants on this point is closely analagous to the contention raised by the employer in *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793. In that case, in the interests of efficient production, the employer had promulgated a plant rule prohibiting all solicitation by employees on plant property during non-working, as well as working time. An employee who violated the rule by soliciting union membership on plant property during his lunch hour was, in consequence, discharged. Charged with having thereby violated the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Sec. 151, et seq., which enjoins employers from interfering "by discrimination" with the exercise by employees of self-organizational rights, the employer defended on the ground that since the plant rule applied to all solicitation, not merely solicitation for unions, its enforcement against one who solicited union membership could not be deemed discriminatory. This Court rejected the contention holding that since the rule against solicitation was itself invalid insofar as it imposed restraints upon legitimate union activity, application of the rule to such activity was necessarily discriminatory (324 U. S., at p. 805).

The no-solicitation rule was held invalid despite the fact that the motive for its promulgation was not a desire to impede self-organizational activity, but rather a desire "to maintain discipline" in the factory (324 U. S., at p. 798). It was unquestioned that the employer had a right to promulgate rules for the attainment of this objective. This Court held, however, that the employer was not free to accomplish his purpose by the promulgation of rules which, in practical operation, impeded the exercise of self-organizational rights guaranteed by the Act.

The prohibition contained in the Wagner Act upon employer interference with self-organizational rights is no more sweeping in character than the prohibition contained in the Fourteenth Amendment upon state interference on racial grounds with the right to acquire, use and dispose of

property. The test of violation is in both cases the same. It is whether the state or the employer have so used their powers as to interfere with the exercise of the guaranteed rights. If so, the prohibitions are violated, regardless whether the state or the employer sought thereby to accomplish a wholly proper and legitimate objective, and drew no invidious distinction between activities protected against interference and those not protected.

At best, the objective of the state in requiring that binding promises be honored, is a legitimate governmental objective no different in kind from the raising of revenue by taxation (*Murdock* v. *Pennsylvania, supra*), or the protection of private property from invasion by unwanted strangers (*Marsh* v. *Alabama, supra; Martin* v. *Struthers, supra*) or the extension, for proper purposes, of the principle of majority rule (compare *J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332, 339 and *N. L. R. B.* v. *Medo Photo Supply Co.*, 321 U. S. 678, 684, with *Steele* v. *Louisville & Nashville Railroad Co., supra*). Government can no more constitutionally trample on civil rights guaranteed by the Fourteenth Amendment in pursuing that objective than it can in pursuing any of these other objectives. A state cannot place its policy of enforcing private agreements beyond the reach of the Fourteenth Amendment.

Adoption of any principle which would place enforcement of contracts above civil rights guaranteed by the Fourteenth Amendment would invite subversion of those rights. The rights guaranteed by the First Amendment and incorporated by the Fourteenth would be as much endangered as the right to sell and acquire property without distinction on the basis of race. Parties may by mutual contract bind themselves, for example, never to discuss openly matters of public concern, never to vote in elections where federal officials are to be selected, or never to practice any religion. Could it be doubted that state enforcement of obligations assumed by contract not to exercise these civil rights would violate the Fourteenth Amendment? Yet the rights dealt with by such contracts are on no higher con-

stitutional level than the right to sell property to Negroes which is bartered away in the covenants here at issue. Only if a state could by injunction restrain an otherwise qualified citizen from voting because he had by contract agreed not to vote, could a state by injunction restrain a property owner from selling property to a Negro because of his race.

These analogies suggest only the effect of judicial enforcement of contract obligations upon the civil rights of the parties themselves. To attain a true analogy to the instant case it is necessary to observe in addition the repercussions upon the constitutional rights of strangers to the contract. Thus, assume that two religious sects agreed by contract never to admit Negroes into their congregations. No doubt voluntary performance of such a contract would not fall within the ban of the Fourteenth Amendment. But suppose that, in a succeeding generation, one of the sects wished to recede from the pact. Could the state then, without making inadmissible inroads upon the freedom of religion of those Negroes who wished to join, and of the white persons who wished to have them, restrain them from doing so? This is the instant case. Petitioners, strangers to the contracts (*supra*, pp. 3-4, 5), have been enjoined by judicial decree from purchasing and occupying property because of their race.

F. *Petitioners cannot be held to have "waived" their rights under the Fourteenth Amendment.*

It is not open to respondents to argue that by becoming parties to the contract containing the discriminatory restrictions or by acquiring the property by deed containing such restrictions, petitioners have waived their rights under the Fourteenth Amendment. The Fourteenth Amendment, insofar as it confers civil rights upon individuals against the state, does so by depriving the state of power to utilize its executive, legislative or judicial agencies to require individuals to act, or not to act, in these matters against their will. Under the Constitution no person can, by consent in advance, confer upon government power to deprive him of civil freedom. No person can, by contract or otherwise, em-

power a state to compel him to work against his will. *Pollock* v. *Williams,* 324 U. S. 4.

The high privileges conferred upon individuals by the Constitution, may, it is true, be waived. No one is required to exercise his federal privilege against self-incrimination (Cf. *Burdick* v. *United States,* 236 U. S. 79); or "right" to counsel, or "right" to be secure against unreasonable searches or seizures. Nor is one required by the Constitution to speak out on public issues, or to vote, or to practice religion, or to refrain from discriminating among would be purchasers of property on the basis of race. But individuals cannot confer upon the federal government the power to compel them, against their will, to incriminate themselves, or to refuse counsel, or to consent to an unreasonable search; nor can they confer upon the states power to make them remain silent on public issues, or to refrain from voting, or practicing religion, or selling their property to Negroes. These latter powers are denied to the states by the Constitution; only by amendment of the Constitution could the defect of power be supplied. If this were not true it would mean, for example, that a state could validly enact an ex post facto law, or a law establishing a state religion, or prohibiting speech on public questions, if only the inhabitants of the state unanimously authorized such legislation. Neither individually nor collectively can the inhabitants of a state confer upon it powers denied by the Constitution.

It follows, we submit, that any consent or agreement which may be imputed to petitioners is wholly immaterial to the question here presented, whether, by enforcing the discriminatory covenant, the state has exceeded its powers under the Fourteenth Amendment.

Certainly it cannot be argued that petitioners have by any act waived the right to have that question determined in the courts. Not a word of the restrictions forecloses the right of any party thereto to test the validity of judicial enforcement of them in the courts. Thus, even if the petitioning seller in No. 291 was an original party to the agreement

he would retain the right to contend that enforcement of the agreement by the state violated his rights under the Fourteenth Amendment. Whether that right could effectively be waived by contract, and whether such a waiver could bind succeeding parties, such as petitioners in the instant cases, are themselves doubtful questions which need not be decided here. Suffice it to say that absent such a waiver the questions here urged are properly before this Court.

CONCLUSION.

For the reasons stated above it is respectfully submitted that the action of the courts below in enforcing the racial restrictions contained in the covenants violated the Fifth and Fourteenth Amendments.

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