RACIAL RESIDENTIAL RESTRICTIONS AND

THE FOURTEENTH AMENDMENT

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THE FOURTEENTH AMENDMENT

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CHAPTER I

INTRODUCTION

Almost a full century has passed since this country became engaged in a great civil conflict which was to determine, among other things, the legal status of the Negro in America. The transition of the Negro from his position as a slave-chattel to that of a full-pledged American citizen enjoying all rights and privileges thereof has not been as rapid as had been expected by the liberal and sometimes radical humanitarians of the North.

Much progress has been made, however, from the days when a common belief held that the Negro had no soul and that his biological inferiority rendered him incapable of understanding the "white man's civilization." Not all vestiges of the slavery era have been removed, as has been shown expressly in the mass of civil rights litigation that has been before our courts, especially during the period from the end of World War II to the present.

Although this study will be concerned primarily with the Negro and legal issues involved in efforts to discriminate against the Negro race, a careful study of racial residential segregation will reveal that the imposed restrictions may be based on religion, nationality, or race. It is interesting to note that the first recorded court cases
challenging the two principal methods of residential segregation involved discrimination against Mongoloids, not against the Negro. However, because the mass of court decisions on residential segregation involve questions of discrimination against Negroes, a study of such decisions is necessarily concerned with Negro-Caucasian segregation.

The American Negro encounters vestiges of the slavery era in almost every portion of the United States. Racial discriminations apply in differing degrees to many fields of individual endeavor—employment, suffrage, education, recreation, housing, etc. Probably of all discriminations encountered by the Negro and other minority groups, none has proven more difficult to overcome than that discrimination which accompanies segregation in housing. Many Caucasian Americans have a sincere desire to see the Negro, or any other person, enjoy all the privileges of citizenship by being afforded equal rights and opportunities in employment, education, suffrage, and administration of justice. Yet at the same time, these same Americans simply will not tolerate the threat of certain non-Caucasians purchasing or occupying a house in their neighborhood. Many American Whites have an aversion to residing in close proximity to a Negro unless the Negro is in a position of menial servitude. This aversion is apparently so strong in the minds of many Americans that it overshadows their humanitarianism.
Americans have always desired to live in communities and geographic areas where they find people of their own relative economic and social level and race. Apart from this desire for a homogeneous community was, and still prevails, the belief that the intrusion of persons of "undesirable" color, religion, or nationality into a "respectable" neighborhood would result in the diminishing of property values throughout the community. Other property owners find their prejudice in a Biblical basis,¹ declaring that the departure of Noah's sons, Ham, Shem and Japheth into different parts of the then-known world meant that these three sons were the first of the Caucasoid, Mongoloid, and Negroid races. The conclusion is reached that God meant for the different races to remain separate. These or other justifications are unnecessary for the majority of racial-prejudiced Caucasians, however, as most of them need no justification other than their emotional reaction.

As a result of this prejudice, every attempt has been made, in many areas, to restrict all minority groups classified as "undesirable" into certain parts of cities. These restrictions, in the form of municipal ordinances and private agreements among property owners have had the effect of creating residential areas, in almost every city having a significant Negro population, that are either exclusively or primarily inhabited by Negroes. Usually these areas are

¹Genesis, X.
in the oldest part of town and located adjacent to the industrial sections of the cities. "Whatever the character of the general population even in the cities of the North and West where there are many different cultural and national groups, the Negro district stands out boldly and few Negroes may live outside of it."\(^2\)

Racial segregation in housing created little concern before the turn of the century. The economic advancement of many Negroes, especially during and following World War I made the situation more acute. The progress toward equality, particularly in the military service, made during the war helped to precipitate a period of racial tension during the early 1920's.

Another impetus to the drive for more and better housing came as a result of the double migration that occurred in the United States from approximately 1915 to 1935. The extent of Negro migration from the rural areas into urban centers is shown by the fact that in 1910, only 2,684,797 Negroes or 27.3 percent of the total Negro population were living in urban areas, while in 1940, some 6,253,588 or 48.6 percent of America's Negroes were urbanized.\(^3\) At the same time, Negroes were emigrating from the South to the North


\(^3\)Tom C. Clark and Philip B. Perlman, Prejudice and Property (Washington, 1948), p. 13.
and Middlewest. Because of Congressional limitation on immigration in the 1920's, the loss of a principal source of cheap labor created a demand for more laborers. At the same time, the rapidly expanding economy offered new economic opportunities in most industrial areas. Thus many Southerners, particularly Negroes, left the "Land of Cotton" to take advantage of the "golden" opportunities that appeared to present themselves in the industrial areas such as New York, Detroit, and Chicago. Approximately 1,750,000 Negroes made their exodus from the South during the period from 1910 to 1940. 4

The period during the Second World War presented even greater economic and cultural opportunities in the Northern industrial areas for the Southern Negro. The extent of the Southern Negroes' acceptance of the opportunities may be shown by the fact that some 50,000 Negroes migrated to Chicago alone, creating a critical housing shortage and requiring that housing for the Negro be expanded one way or another. 5 Following World War II, another mass exodus of Southerners, many of whom were Negroes, was made to the West Coast area.

No one would have been seriously affected by these migrations of Negroes, in so far as housing was concerned, if the amount of Negro housing available had been allowed to increase

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5 James O'Gara, "Divided City," Commonweal, L (May 6, 1949), 89.
in proportion to the Negro population of a given area. Such was not the case, however, for when Negroes tried to expand into adjacent housing or move into new "white" areas, they were confronted with everything from legal restrictions to violence. Thus the Negro districts of Chicago and other cities were bounded by White-owned property, most of which was restricted against Negro use and ownership by racial restrictive covenants and restrictions in deeds. When covenants, conditions in deeds, and municipal zoning ordinances were insufficient, violence and threats of violence were then, as now, sometimes used to "shore up" the holes that appeared in the defense against Negro encroachment into White neighborhoods.

With no other alternative available, Negroes were forced to "double up" on space and to pay high rents unreasonable in relation to the amount of space per individual. Apartment houses that once accommodated eight families were partitioned so as to accommodate twelve or sixteen. The overcrowded conditions were accompanied by a host of other problems, such as health and sanitation problems, which are prevalent in any critically congested residential area.

The overcrowded Negro districts in the large industrial centers of the Northeast and Midwest became known as "pressure areas," the most famous of which is the "lung block" in Harlem. Within this one block area reside 3,871 people. A comparable concentration for the entire population
would result in all the people of the United States living in an area one half as large as New York City.\(^6\)

One of the most effective solutions to the critical housing shortage has been the growth of public housing projects. These did extensively aid the majority of urban Americans, but here the Negro found the same aversion to Negroes' residing in close proximity to Whites. For example, Levitt and Sons built 33,700 homes in Levittown, Long Island, and Levittown, Pennsylvania, with no Negro occupants. Also, privately developed Lakewood, which is the fifteenth largest city in California, is "lily-white."\(^7\)

As yet the Supreme Court has not accepted a case in which the legality of discriminatory practices by private housing corporations has been questioned.

The history of racial residential restrictions in court proceedings dates back to 1890, when the City of San Francisco passed an ordinance which required all Chinese inhabitants to move from that portion of the city theretofore occupied by Chinese to another part of the city. The federal court held that the ordinance violated the Fourteenth Amendment and the treaty between the United States and China.\(^8\)


\(^8\)\textit{In re Lee Sing}, 43 F 359 (1890), cited in Charles S. Mangum, \textit{The Legal Status of the Negro} (Chapel Hill, 1940), p. 140.
Apparently the first reported case involving a racial restrictive covenant was *Gandolfo v. Hartman* in 1892 in which action was brought to obtain an injunction to restrain the defendant from leasing a certain piece of property to a Chinaman in violation of a covenant prohibiting sale or lease of this property to Chinese. The court refused to grant the injunctive relief sought, basing its decision on the Fourteenth Amendment and adding that the granting of injunctive relief sought would violate the treaty with China.

Although these two California cases were apparently the first judicial consideration of enforced residential segregation, these decisions apparently had little influence on other state courts in consideration of these restrictions when racial segregation devices came into common use some twenty years later. The municipal ordinances segregating the city were theoretically based on the states' exercise of police power which had been used effectively to prevent residential and commercial property from being encroached by industrial firms. It seemed a simple matter to exercise this same power to prohibit the Negro encroachments into White neighborhoods.

The restrictive municipal ordinances were of two types. One type set apart certain districts for each race. The

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San Francisco ordinance referred to above was of this type. The other type merely required that residential districts be allotted to each race according to principles which apply without discrimination to any racial group. Several ordinances of this type were declared valid by state courts.  

The racial restrictive covenant had a much wider application than did the restrictive municipal ordinances. Not only was the amount of property covered by these covenants much greater, but the restrictions were imposed against religious and nationality groups as well as racial minorities. Restrictive Covenants have been defined as
covenants which are frequently inserted in deeds by a person owning a body of land, who sells a portion thereof, which are inserted by him for the benefit of his remaining land and which in some manner restrict the use of the land conveyed or the improvements to be erected thereon. Such covenants run with the land if they are not opposed to public policy, but if they are so opposed they are only enforceable, if at all, as personal covenants.

The racial restrictive covenant is a type of the covenant described above in which the covenanter agrees to certain racial restrictions on (1) sale, lease, conveyance to, or ownership by, any member of an excluded group or (2) use or occupancy by any member of the "undesirable" group or (3) both ownership and use or occupancy by members of the

\[
10\text{Mangum, op. cit., p. 141.}
\]

\[11\text{James A. Ballentine, Law Dictionary with Pronunciations (New York, 1948), p. 1134.}\]
restricted group.\textsuperscript{12} Some covenants have even prohibited a member of the excluded group from "entering upon" the premises.\textsuperscript{13}

Not only have these covenants been precise in their limitation on use and ownership of restricted property, but they have also been applied to various minority groups. Although the majority have been directed toward the Negro, covenants have also been used to exclude Chinese, Mexicans, Armenians, Japanese, Jews, Persians, Syrians, Filipinos, and "other non-Caucasians."\textsuperscript{14}

The public interpretation of the term "Negro" and "other non-Caucasians" has been almost as varied as the state court interpretations of the term "Negro" in consideration of state anti-miscegenation statutes. The sale of property to one who "appeared to be Negro" or who "was heard to be Negro" or some other excluded group has given rise to legal action and in some cases violence.

Private racial residential restrictions may be imposed in a number of ways. First, the property owner may insert racial restrictions in the deed as he sells his property. This method has been used primarily in large housing developments where the land was originally owned largely by a single

\textsuperscript{12}Clark, \textit{op. cit.}, p. 11.

\textsuperscript{13}Norman Williams, Jr., "Anti-Negro Covenants," \textit{The American City}, LXII (August, 1947), 127.

\textsuperscript{14}Abrams, \textit{op. cit.}, p. 218.
individual or company. Secondly, neighboring property owners may voluntarily enter into a written recorded agreement for a common restriction in the use of their property. This method of restrictions has been used primarily in the older, established sections of our cities, particularly in the areas adjacent to minority group housing areas.

The third type of racial restrictive agreement is imposed when a subdivider or land developer executes and records a declaration of restrictions before selling parcels of his subdivision. These covenants do not become a part of the deed, but the signing of the covenant may be required before the sale will be consummated.\footnote{Encyclopedic Dictionary of Real Estate Practice (New York, 1955), p. 417.} In each of the three types, the restriction is perpetuated through the requirement that all future owners include these restrictions in all transfers of the property.

Although racial restrictive agreements are usually limited to a specific number of years, they may be unlimited in time. A time limit is usually imposed in order to avoid the possible result of having the restriction declared void as a restraint on alienation. Under English law, conditions in deeds were generally declared void if they were perpetual in duration. This idea has carried over to some extent in American law.

The Common Law rule for contracts states that ordinarily a valid contract may be judicially enforced. Injunctive
relief may be obtained to prohibit the breach of a valid contract, but if a party to an agreement does breach that contract, he is liable for damages suffered by the contractors by breach of the legal agreement.

Because most restrictive agreements are not perpetual, several methods for termination are recognized by law. A common method of termination is expiration of the agreed time limit of the restriction. All property owners of the restricted parcels of land may by mutual consent release the restriction. Thirdly, a radical change in the general character of the neighborhood may result in the restriction becoming inapplicable to the community.

The greatest invalidating force against racial restrictive covenants has been the decisions of the United States Supreme Court which held that such covenants are valid private agreements but that the courts may not be called upon to enforce them either through injunctive relief or by award of damages. A later discussion will cover this topic in greater detail.

Many learned men have presented arguments for and against racial restrictions. It has been argued that white people do not want Negroes for neighbors, nor do Negroes, for the most part at least, want white people for neighbors. As has been stated before, people of like race, economic standing, and social position ordinarily desire to live adjacent to people of their own status.
It has also been argued that a person should be allowed to dispose of his property to his best advantage and to the benefit of the city wherein his property lies. When inclusion of restrictions maintains market value of property, governmental prohibition becomes unwarranted intrusion. If other marketable valuables may be disposed of in the manner that would give the greatest return to the vendor, real estate, which is also a marketable commodity, should be allowed the same freedom of transfer.

Another argument for racial restrictive covenants is that these agreements are private concerns and are beyond the proper sphere of legislative as well as of judicial action. It is stated that attempts to abolish these agreements in the private relations of individuals would only serve to accentuate the difficulties which the present situation presents. The friction that has resulted from the Supreme Court's ruling on public school segregation bears out the truthfulness of this argument.

The Supreme Court's decision that these covenants are valid is, it is argued, legal recognition of the desirability of these covenants and a recognition of the court's belief "that the states' welfare is better served by allowing the validity of the restraint than by denying it."16

The arguments stated above generally accompany the principal argument that the value of property throughout a neighborhood will be diminished by the intrusion of Negroes into areas

where home owners have sought to have harmonious relations with neighbors of similar economic, social, religious and racial backgrounds.

Opponents of racial covenants attack the validity of this argument, stating that Negro ownership is apt to increase rather than decrease property values because Negroes will be willing to pay an extra premium for property in order to move into a more desirable location. Charles Abrams, New York State Rent Administrator and housing authority, stated that this is particularly true in rent districts and sometimes true in white owner-occupied houses.\textsuperscript{17} The truthfulness of this statement may be accepted for the industrial areas of the North, Midwest and West Coast area, but its application to small Southern cities is certainly open to question.

The racial covenants have been attacked on the grounds that they constitute a "clear case of restraint on alienation," an unreasonable limitation on the freedom to transfer property to anyone whom the owner might choose. This argument will be expanded in Chapter V, below.

The legal argument advanced against these covenants is that the state is prohibited by the Fourteenth Amendment from denying any person equal protection of the laws because of color or race. It is declared that "state action" is involved when the courts are called upon to enforce these agreements, \textsuperscript{17}

\textsuperscript{17}"How to Stop a Blockbuster," \textit{Fortune}, LI (April, 1955), 102.
thereby making applicable the Fourteenth Amendment. To allow judicial enforcement would make the court, and thus the state, a party to the discrimination.

The United States is obligated, says the desegregationist, to give protection and recognize each citizen as equal before the law. It is stressed that this is not a small matter, for the Negro minority alone constitutes one tenth of the nation's inhabitants. The number of persons of all minority groups of the territorial United States against whom alienation is sometimes prohibited includes approximately 20,000,000 American citizens.18

Sociological arguments against racial covenants have been used very successfully, particularly before the Supreme Court. These arguments point out the health, crime, cultural, and other problems that are found in the congested Negro slums. In the briefs presented to the Supreme Court in Shelley v. Kraemer,19 "all the ills of the Negro race were attributable to residential segregation which in turn was attributable to state enforcement of racial restrictive covenants."20

Another argument which has undoubtedly influenced the Supreme Court decisions very much is the social policy consideration. Our struggle against Hitler in World War II was to

19334 U.S., 1 (1948).
20Wattner, op. cit., p. 64.
terminate, among other things, Hitler's attempted annihilation of the Jews. Then after the war, participation in the United Nations pledged America, as had conferences and agreements with our Latin American neighbors, to do what she could to eliminate racial discrimination. This argument has been strengthened by the "cold war" struggle between democracy and totalitarianism. The United States is being looked to as the leader of the free world, and, as an actor performing upon the stage, the United States is now in the spotlight so that every facet of the American way of life is under the close scrutiny of all nations of the world. This is especially true of the Asian nations against whom the United States has maintained discriminating immigration policies for many years. To emphasize this point, it has been noted that United States' overseas libraries receive more requests for materials on America's racial problems than on any other subject. The appeal has been made through former President Truman's Civil Rights Committee and other agencies of the national government to take action to eliminate racial discrimination as an obstacle to mutual international understanding.

No one knows the extent to which the sociological and public policy briefs have influenced the decisions of the Supreme Court. America's form of government requires that the

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21To Secure These Rights, The Report of the President's Committee on Civil Rights (Washington, 1947), passim.
judicial department concern itself with legal interpretation of policy, not with the formulation of policy. Nevertheless, the Supreme Court has been cognizant of the social and diplomatic problems involved in rendering its decisions. Throughout the history of the United States, the Court has apparently been influenced to allow constitutional interpretations to change with the times in order that the federal government may cope with the problems confronting the nation.
CHAPTER II

RECONSTRUCTION AND THE FOURTEENTH AMENDMENT

The legal considerations of racial residential restrictions revolve primarily around the interpretation of the Fourteenth Amendment. Therefore, a thorough understanding of the application of that amendment to such restrictions requires an understanding of its historical background and its evolution through judicial interpretation. Certainly the Thirteenth, Fourteenth, and Fifteenth Amendments, which were enacted in the Reconstruction Period after the Civil War, form one of the most important parts of the Constitution.

It has been said that the country has been governed by three constitutions since 1789: the limited one drawn up at Philadelphia by the framers, the expanded one formulated by the judicial opinions of John Marshall, and the constitution as modified by the Reconstruction Amendments.

One of the factors which inspired the Fourteenth Amendment was the trial of Dred Scott by which the court declared, among other things, that the Negro servant of an army surgeon was not a citizen and therefore he had no standing in the court.¹

Securing citizenship for the Negro was only one of the purposes of the Amendment, for Congress wanted to make sure that the South did not deny the colored people full status of the freedom which the Civil War had, on theory, brought them. That this was Congress' intention is shown by the federal laws passed to enforce the provisions of the Amendment.

The Southern states were still legally outside of the Union. Under the leadership of Thaddeus Stevens, the House had refused to admit members of the "so-called Confederate States of America." The opinions in Congress of the legal status of these states were widely varied. Some congressmen thought of the states as conquered provinces, while others said the Southern states were dead. The third concept, "The Theory of Forfeited Rights," holds that the Southern states were in a coma but they might be revived by the ministrations of the stern physician whose prescriptions and mandates must be absolutely obeyed.²

One of the first pills prescribed by the not-too-liberal doctor was the Freedman's Bureau Bill of March 3, 1865, which purported to protect and support the freedmen who were within the territory controlled by the Union forces. On January 5, 1866, Trumbell introduced a second bill to the Thirty-Ninth Congress to enlarge the powers of the Freedman's Bureau.

This bill made it the duty of the President to extend military protection and jurisdiction over cases in which the civil liberties of the Negroes were denied. The bill was apparently a war measure, because the provisions of it were encompassed later by the Civil Rights Bill.³ By a strictly partisan vote, Trumbell's bill passed Congress; but on February 19, 1866, President Johnson vetoed it. As the gulf between the President and Congress widened, Congress passed the bill over his veto even before he had the veto message printed.⁴

The Civil Rights Bill was the result of much work by the Republican Congress, as it was meant to be the permanent protection of the Negroes' newly acquired rights. It made the Negro a citizen, counteracted the "Black Codes" of the Southern states, and effectuated the Thirteenth Amendment.⁵

The majority of Congress had felt that these reconstruction laws had been made constitutional by the "enforcement" clause of the Thirteenth Amendment, for Howard, a member of the Reconstruction Committee, said that his group had meant to do so. Now, a close reading of the Amendment revealed that the mere abolishment of slavery was the only legal change made by the Amendment.⁶ Before this time Congress reasoned

³Horace E. Flack, The Adoption of the Fourteenth Amendment (Baltimore, 1908), p. 12.
⁴Ibid., p. 19.
⁵Ibid., p. 20.
⁶Ibid., p. 23.
that the "enforcement" clause gave Congress the power to legislate against any action that even remotely hinted at involuntary servitude, but after the two major laws were passed, Congressmen began to question their constitutionality.

Thus, on February 26, 1866, Congress set about to place the constitutionality of the Freedman's Bureau and the Civil Rights Bill, particularly the latter, beyond a doubt. They desired to make the program, as expressed in these two bills, an inescapable obligation of the whole federal government.⁷

The first drafts of the Fourteenth Amendment gave Congress a positive grant of power to protect the rights of the Negro. The discussions of the Amendment were delayed by a motion which tabled the program until April, 1866. In the intervening period a number of events, notably the sharpening of the conflict between Congress and President Johnson, served to effect a swing in legislative and public opinion. The Committee on Reconstruction used this time to rephrase the Amendment into the same general form it now has as a part of the constitution. Thaddeus Stevens, Roscoe Conkling, and John A. Bingham were the chief influences in the drafting and passing of the Amendment.

Stevens' narrow line of development protected only citizens, while Bingham advocated a broader construction which

protected all persons by assuring them equal protection of the law. The modification consequent to the rephrasing was the change from an affirmative grant of power to Congress, as advocated by Bingham, to a negative prohibition of state action, as expounded by Thaddeus Stevens. Reintroduced in this modified version, it was accepted by both houses of Congress. After this acceptance on June 13, 1866, it was submitted to the states for ratification.

On June 22, 1868, a bill, passed over the President's veto, admitted Arkansas to representation in Congress, after that state had adopted a republican constitution and consented to the Fourteenth Amendment. Shortly after, North Carolina, South Carolina, Alabama, Florida, and Louisiana were admitted representation on similar grounds. Meanwhile, Ohio and New Jersey had withdrawn their consent. Nevertheless, on July 20, 1868, Secretary of State Seward, including among his list all of the above named states, announced that the necessary two thirds, or twenty-six, of the states had adopted the proposed amendment. On July 28, 1868, the formal announcement of the ratification of the amendment was made.

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Section One of the Amendment dealt with citizenship, making all persons born or naturalized in the United States, and subject to the laws thereof, citizens of the United States and of the state wherein they reside, owing allegiance to each government. This clause definitely set aside the States' Rights Theory, which held that the citizen had no contact with the national government and that he owed allegiance only to the state and the state dealt with the national government. By defining citizenship, this clause made the Negro a citizen. As was mentioned before, Dred Scott was refused protection of the courts because he was not a citizen.

The remainder of Section One denies the state the right to make or abridge the privileges or immunities of citizens of the United States, to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. By careful wording of the first section, Congress felt sure that it had encompassed all of the guarantees for the Negroes to enjoy the same opportunities and rights enjoyed by White citizens. The "due process," "equal protection," and "privileges and immunities" clauses were to be the primary basis for protection of these rights. Representative John A. Bingham, who was largely responsible for the wording of the Fourteenth Amendment, explained that the "privileges and immunities" clause was borrowed directly from Article IV of the

\[^{11}\text{Norton, op. cit., p. 236.}\]
Federal Constitution; and Senator Jacob Howard of Michigan, who presented the Amendment to the upper house, agreed that the clause incorporated the entire Federal Bill of Rights as a limitation on the state. Thus it was clear that the intended scope of the Amendment as visualized by the framers was much broader than the interpretation given by the courts a few years later.

Section Two based representation in Congress on the whole number of persons, obliterating the old method of counting all Whites and three fifths of the slaves. It enabled Congress to inflict punishment on any state which denies suffrage in federal elections to any person except Indians not taxed and persons guilty of rebellion or crimes. Congress could reduce the representation of that state in proportion to the disenfranchised group. Congress has never exercised its power in this manner. Occasionally, however, a Northern congressman, usually one seeking support from Negro constituents at home, has suggested such a reduction in representation of Southern states; but these proposals have not been taken seriously.

Section Three prohibited any former federal or state official who had engaged in insurrection or rebellion against the Constitution of the United States from holding a federal

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13 Ibid., p. 494.
or state office. The section also provided that Congress might, by a two-thirds vote of each house, remove this disability. This provision was to assure that leaders of the rebellion in the South would not be returned to office until Congress saw fit to allow it. Jefferson Davis said that this denial of his holding any office, national or state, superseded in his case the punishment for treason which Congress had fixed and that therefore the indictment charging him with treason should be dismissed. A Proclamation of Amnesty resulted in the indictment's being dismissed.\textsuperscript{14}

Congress passed a law effectuating this amendment, prohibiting anyone who had once led the army or navy of the United States and then left it to aid the Confederacy from ever holding a place in the army or navy again. It was not until March 31, 1896, that Congress repealed the act. On June 6, 1898, Congress passed the Act of Oblivion, and this disability imposed by the Fourteenth Amendment passed into history.\textsuperscript{15}

In Section Four, the debt of the United States was declared valid, which the debt of the Confederacy, which amounted to $1,400,000,000., was declared illegal and void. This section indicated the fear, or pretended fear, lest the Southerners and their Northern allies should get control of the central government and saddle the Southern debt upon the national

\textsuperscript{14}Norton, \textit{op. cit.}, p. 248.

\textsuperscript{15}\textit{Ibid.}
treasury. The debt of the Confederacy to France, England, and other countries was acknowledged and proportionally assumed by the Southern states.\(^\text{16}\)

Section Five reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." At the time of the drafting of the amendment, this section was thought to be probably the most important.

A similar provision was inserted in the Thirteenth Amendment, which abolished slavery. Under the power given by this section of the Thirteenth Amendment Congress proceeded to act on the ground that it had the power to prohibit any subjection or abuse of the Negro. Congress sought to do this through the enactment of the Civil Rights Bills. Doubts as to the constitutionality of this legislation were a major factor in the drafting and adoption of the Fourteenth Amendment. With the belief that the Amendment formed a solid basis for civil rights legislation, Congress enacted several more bills designed to prohibit discrimination against Negroes by private individuals as well as by governmental officials. One of these dealt specifically with property ownership. It read as follows: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by

\[^{16}\text{Ibid.};\text{ McLaughlin, op. cit., p. 657.}\]
white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The South did not relish this civil rights legislation, and individual resistance to the acts severely limited their application. A much greater limiting or nullifying force was soon to clear the way for the restoration of the old social order. This nullifying force was the Supreme Court. Beginning only five years after the ratification of the Amendment, the Supreme Court handed down the first of a series of decisions that were to bring radical changes to the scope of the Amendment as defined by its framers. Later decisions had the effect of destroying the intended affect of the Amendment by ruling that it applies only to discriminatory action of state officials.

The first decision requiring Supreme Court interpretation of the Fourteenth Amendment was handed down in 1873. The "Carpet bag" Legislature of Louisiana in 1871 passed a statute granting a monopoly of the livestock slaughtering business within certain parishes of New Orleans in favor of one corporation, The Crescent City Livestock and Landing Company. This law, promoted undoubtedly by corruption and bribery, deprived

17 Williams, loc. cit.

18 Slaughter House Case, 16 Wallace, 36 (1873).

over one thousand people of their right to continue in the
slaughtering business. They appealed to the courts, seeking
redress under the Fourteenth Amendment. 20

After two years of litigation, the Supreme Court handed
down one of the most controversial decisions it has ever
written. The Court was presided over by Chief Justice Chase;
but the dominant personality was Justice Miller, a physician-
lawyer who, like John Marshall, had decidedly less legal
training than the other members of the Court. 21 The Court
ruled that those privileges and immunities guaranteed by
Section One of the Fourteenth Amendment were those which a
person possesses as a citizen of the United States, not those
enjoyed by virtue of state citizenship.

After considering the history of the Fourteenth
Amendment, the evil it was designed to remedy,
and its "pervading spirit," the court held that
the Louisiana law did not violate the amendment
in any particular; that if the right claimed by
the plaintiff to be freed of a monopoly existed,
it was not a privilege or immunity of a citizen
of the United States as distinguished from a
citizen of a state; that the amendment, in de-
defining a citizen of the United States, did not
add any additional privileges and immunities to
those which inhered in such citizens before its
adoption,...that it was not intended to bring
within the power of Congress or the jurisdiction
of the Supreme Court, "the entire domain of civil
rights heretofore belonging exclusively to the
States;" that to hold otherwise would "consti-
tute the court a perpetual censor upon all legisla-
tion of the states on the civil rights of their
own citizens." 22

20Charles Warren, The Supreme Court in United States

21Ernest S. Bates, The Story of the Supreme Court (New

22Warren, op. cit., p. 259.
The five-to-four decision has been praised as an expeditious decision, but praise for its legal foundation is lacking. Both the New York Times and the New York Tribune among other leading papers praised the Slaughterhouse Case decision because it was expeditious, it cleared away a dense legal fog, and it showed that the Supreme Court did not want to increase its power. It was necessary for the sake of state autonomy.

As in the early years of our constitutional history, the Supreme Court had been a potent factor in protecting the then weak Union against the more powerful and aggressive States, so now it saved the victorious Unionists from being too hurried in their excitement and passion to a too great movement in the opposite direction, toward centralization. 23

Since the rights derived as a citizen of the United States were, according to the Supreme Court, few in number, this decision in effect nullified the Fourteenth Amendment. In his dissent, Justice Field said the Court's decision made the Amendment "a vain and idle enactment, which accomplished nothing and most unnecessarily excited Congress and the people on its passage." 24 Justice Swayne said, "Our duty is to execute the law, not to make it." 25

The decision was a reaction against the extreme centralizing tendency which the radical Republicans had generated.

25 Ibid.
Probably due to the quantity and variety of state enactments against the Negro, the Supreme Court docket was crowded with cases in which the states were charged with having deprived persons of life, liberty, and property without due process of law. 26

The Fourteenth Amendment was further denied its intended meaning in 1883. 27 One of the most important of the Civil Rights Laws enacted in the late 1860's and early 1870's contained the provision that all persons should be entitled to the full and equal enjoyment of the accommodations of inns, public conveyances and theaters and that any person depriving another person of these privileges would be subject to federal prosecution.

A Negro woman traveling from Norfolk to Boston on a ship was denied equal privileges. She appealed to the courts, and on April 15, 1883, Justice Bradley read the decision of the court, pointing out that the Amendment was a guarantee of protection against an act of the state itself and that it was not intended to restrain or punish individual offenders. The Negro, the Court held, must show that the invasion of rights was by the state or some officer clothed with state authority and acting under color of such authority. The law in question was declared invalid, thereby nullifying the force of most of


27 Civil Rights Cases, 109 U. S., 3 (1883).
the reconstruction period civil rights legislation. Thus, within fifteen years after its adoption, the Fourteenth Amendment was almost stripped of its intended meaning.

From 1873 to approximately 1890 the decisions of the Supreme Court reaffirmed and extended the Slaughterhouse Case decision. The period was one of reaction to the extreme nationalistic doctrines which prevailed in the opinions delivered during and after the Civil War. There was a marked tendency to uphold the powers of the states, particularly in cases involving the Fourteenth Amendment. Most states made quick use of their newly acquired regulatory freedom to enact discriminatory legislation. As an example, a California law, directed against Chinese laundrymen, prohibited commercial laundries from being operated at night.28 Pennsylvania dairymen lobbied a law through their legislature which suppressed the manufacture of oleomargarine.29 These laws were upheld as legitimate exercises of the states' police power, for the Court held that the Fourteenth Amendment was not designed to interfere with the states' power to legislate for the protection of health, peace, morals, education, and good order of the people.

The Court ruled that the "privileges and immunities" guaranteed by Section One of the Fourteenth Amendment were not those stated in the Bill of Rights.20 This ruling was contrary

30 Maxwell v. Dow, 176 U.S., 581 (1900)
to the purpose of the framers, but by this approach, the Court could by inclusion and exclusion gradually decide which rights the Court considered that the Amendment was intended to protect. The same procedure was used to determine the judicial meaning of the term "due process." By imposing these interpretations, the Supreme Court acted to restrain the effectiveness of the Fourteenth Amendment in accomplishing the drastic changes sought by the radical Republicans in behalf of civil liberties' protection.

The Court proceeded to follow the theory of "Presumed Validity." It would uphold a state law if the law had any legal basis, even though it had an ulterior motive that was unconstitutional. The Court also followed the rule to uphold state laws if they held any real or substantial relation to the states' right to exercise its police power. Most of the discriminatory legislation of the South was based presumably on the states' police power—the right to protect public health, morals, and safety.

Although the background of the Fourteenth Amendment indicates that the framers had in mind only the protection of rights of individual persons, specifically the Negro, the mass of court proceedings under the Amendment have been brought by corporations. These cases involve primarily the clause

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31 See footnote 12, supra.

Prohibiting a state from taking a person's life, liberty, or property without due process of law. The "due process" clause was put into the amendment by the corporation congressmen, Roscoe Conkling and John A. Bingham. Conkling argued later before the Supreme Court that he intended to protect rights of corporations as well as rights of persons. In 1882, he pointed out that individuals and joint stock companies were appealing to Congress for protection against invidious and discriminatory state and local taxes at the time of the ratification of the Amendment. Nevertheless, the Court held that corporations were persons but since they had been neither born nor naturalized, they were not citizens. Therefore the corporation is protected by the "equal protection of the laws" clause and the "due process" clause as both apply to persons, but the "privileges and immunities" clause applies to citizens and does not protect corporations. These cases brought against states and municipalities by corporations and individuals engaged in business centered around the "due process" clause. Treating this clause like the "privileges and immunities" clause and the "due process" clause of the Fifth Amendment, the Court chose to give the term a general and indefinite meaning. Refusing to define the term except by the gradual process.


of exclusion and inclusion, the Court held that it meant just "giving a square deal." Until 1900 the majority of the Supreme Court held generally that the term had reference to no particular law or legal principle in existence at the time of the adoption of the Constitution or the Fourteenth Amendment.\(^{35}\)

With the Granger Movement came vigorous control over commercial carriers. The most important case in this group was *Munn v. Illinois*,\(^{36}\) in which the Court ruled that private property devoted to public use becomes clothed with a public interest and may be controlled for the common good. The Court also stated that this power of the state and municipality might be abused, but "for protection from abuses by legislatures, the people must resort to the polls, not to the Court."\(^{37}\) The Supreme Court soon reversed itself in declaring that it was the duty of the courts to decide on the reasonableness of regulation.

Excepting commercial carriers, business interests enjoyed a wide range of freedom from state control until the turn of the century. In 1897, in *Allgeyer v. Louisiana*,\(^{38}\) the Court held that a state law regulating insurance companies was in violation of the "due process" clause. This decision might be

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\(^{36}\)14 U.S., 113 (1877).


\(^{38}\)165 U.S., 578 (1897).
pointed to as marking the climax of freedom from state regulation, for the swing toward industrial capitalism soon brought a new interpretation of the Fourteenth Amendment. In 1898, the pendulum of control began to swing the other way. Since then, business has made vigorous but futile efforts to retain the powers it then possessed.\textsuperscript{39} In many industrial states, state legislatures enacted laws which limited the length of a day's work, required payments to employees to be made in cash, established a minimum age for employment, set minimum wages, and prohibited unjust discrimination against aliens.

The industrial revolution opened a new chapter in American constitutional history. Although the Constitution was written for an eighteenth-century agrarian republic, the Supreme Court had adapted it in a few years to a modern urban industrial society with all the complex economic and social problems inherent in such a civilization.

CHAPTER III

CIVIL LIBERTIES UNDER THE
FOURTEENTH AMENDMENT

The strongest protections that a person in the United States has against federal and state encroachment of civil liberties are the Bill of Rights and the Fourteenth Amendment. Although the radical Republicans who sponsored the Reconstruction Amendments had meant to place the protection of all civil liberties guaranteed by the first eight amendments of the Constitution under jurisdiction of Congress, the Supreme Court served as a bulwark against the tendency toward centralization by handing down a long series of cases based on the "due process" and "equal protection of the laws" clauses which systematically pointed out individual liberties immune from governmental control or discrimination. The first eight amendments to the Constitution provide for each person the freedom of speech, religion, press, assembly, and petition, the right to trial by jury, indictment by a grand jury, right to counsel, etc. When the Court ruled that the limitations to secure these protections were not made applicable to the states by the Fourteenth Amendment, it became necessary to learn which guarantees, if any, were binding on the states.
The "due process" clause does not bind the state to have an indictment by grand jury. In *Hurtado v. California*\(^1\) the Court ruled thusly, saying that the clause in question was intended to secure only "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." A Utah court departed from the usual rule of trial by a jury of twelve men when a presumably impartial jury of eight men unanimously convicted a Utah citizen.\(^2\) The Supreme Court upheld this conviction, and in 1915 the Court ruled that a state may abolish jury trials in civil cases.\(^3\)

The Court has also ruled that a state may appeal the conviction of a person thereby placing him in jeopardy of his life twice for the same offense. In 1937, a man by the name of Palko was tried and convicted of second degree murder, and he was sentenced to life imprisonment. The State of Connecticut appealed to the Court of Errors on the grounds that the jury had not been instructed as to the difference between first and second degree murder. In the higher court, Palko was given the death penalty. The Supreme Court upheld this conviction even though the same conviction in a federal court would have violated the "double jeopardy" clause of the Fifth Amendment.\(^4\)

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\(^1\)110 U.S., 516 (1884).

\(^2\)Thompson *v.* Utah, 170 U.S., 343 (1900).

\(^3\)Frank *v.* Mangum, 237 U.S., 309 (1915).

The Fifth Amendment also provides that no person may be compelled to be a witness against himself. The Court ruled that in prosecutions by the state, the state may elect to end this exemption.\(^5\) In 1948, in a five-to-four decision, with Justices Black, Murphy, Rutledge, and Douglas dissenting, the Court ruled that the accused is not required to be given counsel if it can be shown that he had a fair trial.\(^6\)

In 1949, the Supreme Court ruled that in prosecution in a state court for a state crime, the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.\(^7\) State laws of New Jersey and California that, in a sense, forced the suspect to testify against himself were upheld by the Supreme Court.\(^8\) The California law stated that the defendant must explain or deny charges or his failure to do so may be commented on by the court and considered by the judge and jury. The majority of the court holds to the principle that the state is only required to "give a square deal."

Just as the rights in procedure have been questioned, the Supreme Court has often been called on to protect the individuals' personal liberties from his state and local governments.

The state cannot deprive a person of the right to go from one state to another,⁹ nor to send his children to either a state or parochial school.¹⁰ The state may, however, establish compulsory vaccination for smallpox.¹¹

One of the most important guarantees in the Bill of Rights is the freedom of speech. In 1923, a Nebraska law was declared by the court to be unconstitutional as a violation of the guarantee for freedom of speech because it prohibited the teaching in any language other than English in the first eight grades of the public schools.¹² During World War I, the Court adopted the principle that a person's speech must constitute a "clear and present danger" to the state or nation if the government is to limit it. In 1925, the Court held that freedom of speech was included in the guarantees of the Fourteenth Amendment, but that each state had a right to protect itself. A New York court convicted Gitlow of publishing his Left Wing Manifesto. The Supreme Court upheld the conviction.¹³ In 1931, the "clear and present danger" doctrine was called upon when a Minneapolis newspaper editor discredited the city government in Minneapolis by "excessively" charging city police officials with corruption.¹⁴

The right of people to assemble peacefully was declared to be a right existing long before the adoption of the Constitution.\textsuperscript{15} This reasoning allowed the Court to uphold the guarantee of freedom of assembly and, at the same time, to reaffirm that the Bill of Rights was not made applicable to the states by the Fourteenth Amendment. In this case as in many others, Justice Harlan stood alone in his dissent, trying to give the Amendment the force and scope intended by its framers. In 1939 the Court struck down a city ordinance of Jersey City which attempted to keep down unionization by controlling any assembly.\textsuperscript{16} In a Jehovah's Witnesses Case of 1941, however, reasonable regulation of an assembly was sanctioned by the Court.\textsuperscript{17}

On the separation of church and state, the decisions of the Supreme Court have been varied. In 1930 it unanimously consented to Louisiana's purchase of text books for parochial schools with public funds because a public purpose was involved.\textsuperscript{18} In 1947, a New Jersey law providing transportation for children attending parochial schools, except those operated for a profit, was brought before the Court. The law was sustained by a five-to-four decision.

\textsuperscript{15}\textbf{U.S. v. Cruickshank}, 92 U.S., 542 (1876).


\textsuperscript{17}\textbf{Cox v. New Hampshire}, 312 U.S., 569 (1941).

\textsuperscript{18}\textbf{Cochran v. Louisiana State Board of Education}, 281 U.S., 370 (1930).
The following year, the Court struck down an Illinois law which provided for ministers of Protestant, Catholic, and Jewish faiths to come into the school building each day to give Bible instruction. Justice Black wrote in the decision, "Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." This case also turned on the point that the state's compulsory attendance machinery was being used to force the student to attend. He was required by law to attend school; then he must either attend the Bible instruction or go to the study hall. The Court indicated that this too was unconstitutional.

In 1952, the Court reversed its decision in regard to this matter in upholding a school board ruling which established a "released time" program for the religious training of public school children. The religious training was held across the street from the school building but attendance of either the study hall or religious training was compulsory. The Court said in effect that a person has the right to be religious: the American people are a religious people, and the state ought not to stand in the way of religion. In each of these cases, the plaintiff was a taxpayer who protested that his taxes were being used to support religion or favor one above the other.

Religious freedom has enjoyed a wide range of freedom from state action. In 1940, Justice Douglas wrote in a court decision that religious freedom has three aspects.

1. The right to not be compelled to accept a given creed.

2. The right to exercise freely one's chosen religion.

3. The right to proselytize.21

Because freedom from the state in matters of religion is guaranteed by the First Amendment, the Court held that McCormick,22 South Carolina could not require that vendors of religious literature purchase a city license. Neither could Chickasaw, Alabama, use its police power to restrict the distribution of religious tracts in a company-owned town, even where the property was posted as private property and solicitation prohibited.23

Although the Supreme Court in 1940 upheld a school board ruling requiring each pupil to salute the flag, it completely reversed itself three years later by striking down a similar ruling.24 In the same year (1943) it struck down a Mississippi law making it a felony to encourage disloyalty to the United States or to encourage the refusal to salute the flag. A state may, however, ban conscientious objectors to military

service from admission to the state bar.\textsuperscript{25} In a fairly recent case, the Court ruled that a state may prohibit subversive action, and if a cleric violates the prohibition, he cannot hide behind either his robe or his pulpit.\textsuperscript{26}

The 1930's and 1940's saw the enactment of a number of state statutes directed toward the suppression of dissident and radical political minorities. American social order was seemingly threatened by economic crisis at home and by the rise of totalitarian nations abroad. The Supreme Court refused to be swept into hysterical acceptance of persecution of political radicals. In 1937 the Court said Oregon could not prosecute a man merely because he participated in a political meeting held under the auspices of the Communist Party.

Three months later, the Court invalidated a restrictive Georgia law under which a Communist Party organizer was convicted of possessing a variety of Communist literature advocating working class unity and, in particular, a pamphlet advocating the establishment of a Negro state in the "Black Belt" of the South. He had been convicted only because he was a member of the Communist Party and for the solicitation of party membership. This Georgia law punished persons for "bad tendencies." The Court later adopted the principle that a state may not limit political minorities unless they present a "clear and present danger."\textsuperscript{27}

\textsuperscript{25}\textit{In re Summers}, 325 U.S., 561 (1945).
\textsuperscript{26}\textit{Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America}, 344 U.S., 94 (1952).
From the preceding discussion, one may readily discover the important effect that the Fourteenth Amendment has had on the number and kind of limitations that a state may or may not impose upon "personal" rights. Although the material here covered deals largely with state power over individuals, this is not intended to obscure the Amendment's importance in legislation governing business. Indeed, its effect in determining the precise limits upon the states' regulation in this field is so large that time and space do not permit its presentation.

The framers of the Fourteenth Amendment have made it clear that the purpose of the Amendment was to remove from the Negro the badge of slavery and to give him equal rights and opportunities with the whites. Yet one writer, speaking some seventy years after its adoption, stated that the Amendment has been so inoperative in establishing or maintaining social equality that any discussion on the subject appeared unnecessary. "For fifty years or more, the relationship of the freedman to the Fourteenth Amendment has been practically lost to view."28

Only five years after the enactment of the Amendment, the Court ruled that the only protections offered the New Orleans businessmen, or any individual, were the rights which a person possesses by virtue of United States citizenship, not those inherent in state citizenship.29 The next great setback of its

28McLaughlin, op. cit., p. 727
29Slaughterhouse Case, 16 Wallace, 36 (1873).
original purpose came ten years later when the Court held that the Amendment gave Congress no authority to legislate against discrimination against Negroes by private individuals.  

The Court made a nominal concession to Negroes' rights in 1880 when it held that a state law barring Negroes from jury service was in violation of the "equal protection of the laws" clause. For all practical purposes this gain was made void when the Court, in the same year, ruled that mere absence of Negroes from a jury was not necessarily a denial of right.  

By cautious exercise of discretionary authority by local officials, Negroes were then practically excluded from juries.

In 1948, the Court ruled that the fact that there had been no Negro on a jury venire for thirty years was proof that Negroes had been deliberately excluded. The action of an all-white petit and grand jury against a Negro was, in this case, a denial of equal protection of the laws. Attempts to continue this exclusion by ulterior methods have been generally condemned by the Court.

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31 Strauder v. West Virginia, 100 U.S., 303 (1880); Ex Parte Virginia, 100 U.S., 339 (1880); Kelley op. cit., p. 497.

In regard to the right to counsel, the Court ruled in 1932 that the state of Alabama must appoint counsel for an ignorant Negro defendant charged with a serious crime. The principle established in this case was altered in 1948 by a five-to-four decision stating that the accused is not required to be given counsel if it can be shown that he had a fair trial.\textsuperscript{33} Throughout the cases involving procedural rights, Justice Black's contention for the protection of the Negroes' rights and for the rights of the individual is noteworthy.

The Fourteenth Amendment has played an important part in the struggle for Negro suffrage in the South. All of the cases involving exclusion of the Negroes from primary elections turned on the constitutional point of equal protection of the laws. A Texas statute prohibiting Negroes from participating in the Democratic primary was held to be in violation of this clause.\textsuperscript{34} From this point, the Court ruled and overruled itself until, in 1947, political parties were declared to be "in effect state institutions, governmental agencies through which sovereign power is exercised by the people."\textsuperscript{35} Action of party officials to bar Negroes from voting in primary elections was therefore in violation of the Fourteenth Amendment.

\textsuperscript{34}Nixon v. Herndon, 273 U.S., 536 (1927).
\textsuperscript{35}Rice v. Elmore, 165 F., 387 (1947).
In the latest case in this field the Court held that the exclusion of Negroes from the Jaybird Democratic Association, an organization functioning to select candidates for the Democratic Party primary, was in violation of the Fourteenth Amendment. The Court found "state action" was involved because of the failure or inaction of the state to assure a fair election and due to the fact that the Association operated as an "auxiliary of the local Democratic Party organization."\(^{36}\)

In the administration of the state educational system, the Court has held that the state may classify its citizen by race and prohibit a state or private school from educating white and Negro students together.\(^{37}\) The doctrine of "equal but separate" facilities for Negroes originated in Supreme Court decisions in 1896 when Plessy, who was one-eighth Negro, was convicted of violating a state law prohibiting Negroes from entering white train coaches and vice versa.\(^{38}\) Three years later (1899) the Court applied this principle to the public schools, stating that accommodations must be equal.

Following World War II, our highest judicial body handed down a series of decisions which have destroyed the legal


\(^{38}\) Plessy v. Ferguson, 163 U.S., 537 (1896).
foundation of the doctrine of "equal but separate" as applied in the field of education. Apparently the climax of this series of decisions came on May 17, 1954, when the Court ruled that all federal, state, or local laws requiring or permitting racial discrimination in public education must yield to the principle that such discrimination is unconstitutional as a violation of the Fourteenth Amendment.\(^\text{39}\)

Federal court decisions involving racial discrimination since the Brown v. Board of Education case generally follow the pattern of remanding the cases in question and directing that the lower court reconsider the cases in light of the Brown decision. How far the Supreme Court will go in protecting the Negroes' rights is not known. Three Supreme Court judges found state action and hence violation of the Fourteenth Amendment in the failure or "inaction" of the state of Texas to forbid individuals from holding a discriminatory election. Under this reasoning, the Fourteenth Amendment would at last take on the force that Stevens, Conkling, Bingham, and other framers intended it to have, namely the power to remove the badge of slavery from the Negro.

As the majority of the federal Civil Rights Acts are still on the statute books, the recent interpretations of

\(^{39}\text{Brown v. Board of Education of Topeka, 349 U.S., 294 (1955).}\)
the Fourteenth Amendment have caused a re-examination of these laws. One of these acts, passed in 1871, provided that

Whoever, under color of any law, statute, ordinance, regulation, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year or both.

A Florida sheriff named Screws was indicted under this law for killing a Negro prisoner. The case came to the Supreme Court but was remanded because the trial judge did not point out to the jury that the defendant could be found guilty only if he willfully violated the provisions of the Constitution. Screws was acquitted at the re-trial. This case points out the importance that potential application could give to the Federal Civil Rights Acts in the Negro's struggle for equality.

The preceding examination of Supreme Court decisions points up the manner in which the Court's interpretations have varied the significance of the Fourteenth Amendment. The strongest of the Reconstruction Amendments has, in fact,

been rendered of negligible importance to the Negro in accomplishing the status its framers intended for him. Just as the pendulum of judicial interpretation swung far in the direction of providing little or no additional protection during the first seventy years of the Amendment's enforcement, so now is that pendulum swinging to the opposite extreme of providing as much protection as public reaction and legal application will allow.

The recent trend in the Supreme Court's interpretation of the Fourteenth Amendment necessarily requires that prior decisions be overruled. Traditionalists voice objections to such reversals on the basis that established doctrines are overturned and the traditional element of predictability in the judicial system is threatened. Because the Supreme Court decisions now, as in the past, reflect the attitude of a majority of the public, the Court has tended probably more than ever before to look at the results of its decision rather than concern itself only with the law and the facts of the case.

The many complexities involved in the application of the Fourteenth Amendment make any change of interpretation a matter of great immediate as well as potential importance. Modifications and reversals by the Supreme Court through the years serve to emphasize the intricacies involved when social and legal issues become vitally interrelated. Universal acceptance and legal accomplishment for the intent of the Amendment's framers has been slow of realization, and an examination of
public and private residential restrictions designed to thwart this realization will but illustrate once more the general pattern judicial interpretation has drawn as the Negro has brought his case before the Court.
CHAPTER IV

RACIAL RESIDENTIAL RESTRICTION BY
MUNICIPAL ACTION

The struggle against racial discrimination in residential restrictions has not been aired to the public nearly so much as has the fight for suffrage and equality in education. Nevertheless, court decisions involving discrimination in housing have followed the same pattern as in voting and education.

The aversion of many Whites to living in close proximity to members of another race caused them to seek some legal means to prevent Negroes from moving into areas occupied by Caucasians. This protection was not deemed essential in areas occupied by Whites financially able to move to another neighborhood when a Negro moved into the area. Rather, the relief was needed to protect the Whites who, because of economic limitations, could not afford to move. To furnish this relief, municipal zoning laws were called on to establish a legal boundary for residence of the two races.

The zoning power of a municipality is not an exercise of the inherent power of the city. In fact, the municipalities have no power under which they could carry out zoning regulations. The granting of this power by the state is called an
"Enabling Act" which authorizes the municipalities to exercise their police powers for specific purposes.¹

The precise limits of the police power of a city is not known. The term is not susceptible of circumstantial precision. The Supreme Court ruled in 1912 that it extends not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.²

As the state regulation of business was being exercised to unprecedented heights around the turn of the century, the cities began to designate particular areas as industrial, commercial, and residential land-use zones in order to protect residential property values and promote public health and safety. Because the zoning of the cities into separate residential areas for members of the different races was theoretically designed to protect the public morals and safety, it was thought that racial zoning would come within the scope of the cities' police power.

The first instance of a race segregation ordinance came to a California federal court in 1890. The San Francisco ordinance required "all Chinese inhabitants to move from that


portion of the city theretofore occupied by them to another part of the city."\(^3\) The federal court held this ordinance void as a violation of the Fourteenth Amendment and the treaty with China.

The use of the race segregation ordinance against the Negro began around 1910 when Baltimore, quickly followed by Atlanta, Louisville, and other cities, sought to legalize racial residential segregation. The avowed purpose of these ordinances was to prevent friction between the races and to keep them from intermingling socially. Legal tests of the validity of such an extension of municipal police power were not long in coming before federal courts.

Brought before the bar in 1913, the Maryland law was invalidated when the court held that the city of Baltimore did not have authority to enact such an ordinance.\(^4\) A North Carolina court one year later ruled similarly, stating that the general welfare clause of the city's charter did not authorize such an ordinance. The Virginia Court took a more liberal view of the general welfare clause in Richmond's city charter and held that the segregation ordinance was a legal exercise of the city's police power.\(^5\) The Virginia Court declared that

\(^3\) Mangum, *op. cit.* p. 140.

\(^4\) *State v. Gurty*, 88 A., 546 (1913), cited in *ibid*.

\(^5\) *State v. Darnell*, 81 S.E., 338 (1914); *Hopkins v. City of Richmond*, 86 S.E., 139 (1915), cited in Mangum, *op. cit.*, p. 141.
an ordinance such as the one passed by Richmond is legal because it does not deny the equal protection of the laws guaranteed by the Fourteenth Amendment in that all persons and property under the same conditions and circumstances are treated alike. This ruling was probably more in line with other court decisions of the time involving segregation.

Thus confusion resulted as courts in different states held differently on the constitutionality of these ordinances. The Supreme Court was not long in endeavoring to resolve this legal confusion by accepting a Kentucky case which questioned the constitutionality of a Louisville ordinance entitled

An ordinance to prevent conflict and ill-feeling between the White and colored races in the City of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, so far as practicable, the use of separate blocks for residences, places of abode and places of assembly by White and colored people respectively.6

The ordinance made it unlawful for any colored person, or white person as the case might be, to move into and occupy as a residence or to establish a place of public assembly in any building upon any block in which the majority of the houses were already occupied by members of the other race.

The constitutionality of the ordinance was questioned by a white man who had contracted to sell to a Negro property located in a block in which the majority of the houses were

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6Quoted in Buchanan v. Warley, 245 U.S., 60 (1917).
occupied by whites. The Court ruled that the limitations imposed by the ordinance were an unauthorized restraint on alienation in that the property owner could not dispose of his land in the most advantageous manner or in the manner he might select. The Court circumvented the question of whether the ordinance would deny the Negro protection guaranteed by the Fourteenth Amendment, basing the decision on the white person's freedom to acquire, use, and dispose of property. Perhaps this decision may be best understood when it is remembered that it was made during the heyday of businessmen's resort to the "due process" clause in order to annul state laws that were, to business interests and to the Supreme Court, unreasonably interfering with private economic relations.

As soon as the Supreme Court handed down this decision, Southern municipal authorities began to seek other methods of enforcing residential segregation. A Maryland municipality enacted an ordinance forbidding the residence of members of one race in any block inhabited only by members of the other race. New Orleans forbid the establishment of residences by either race in certain districts unless the written consent was given by the majority of the property owners in the district involved.

A Maryland Court ruled that the Maryland ordinance was not substantially different from the Louisville ordinance and
that therefore it could not stand.\textsuperscript{7} The Louisiana Court made a distinction in the New Orleans ordinance from the Louisville Ordinance because of the "Consent" provision. The Court held that the ordinance was merely a zoning law and was therefore substantiated by the state's police powers. The United States Supreme Court refused to allow Louisiana to circumvent its ruling by specious reasoning and reversed the decision.\textsuperscript{8}

Still other attempts were made to enforce residential segregation by local enactment. Richmond, Virginia, attempted to base a segregation ordinance on the state's anti-miscegenation statutes which the Supreme Court had held valid. The ordinance forbade any two groups from residing in the same block if the intermarriage of these groups is forbidden by law. The Supreme Court ruled that there was no real distinction between this ordinance and the other segregation ordinances; therefore the ordinance was held void.\textsuperscript{9}

A different approach was used in Dallas when certain negro and white citizens voluntarily agreed to district the city so as to effect racial segregation. The city then enforced this agreement by passing an ordinance to punish anyone


\textsuperscript{8}\textit{Harmon v. Tyler}, 273 U.S., 668 (1927).

\textsuperscript{9}\textit{City of Richmond v. Deans}, 281 U.S., 704 (1930).
who violated the agreement. The Court of Civil Appeals of Texas held that, because a direct segregation ordinance is invalid, an ordinance punishing a person for breach of an agreement to accomplish segregation indirectly is also invalid. The Court also stated that the Dallas city ordinance which confirmed the segregation agreement between Whites and Negroes and required its enforcement through imposition of penalties was unconstitutional and beyond the city's police power because the right of any person to terminate any contract, subject only to civil liability for its breach, was a right guaranteed by the Fourteenth Amendment. 10

Another eager attempt to circumvent the Supreme Court ruling in Corrigan v. Buckley was made by Oklahoma when the Governor of the State sought to substantiate an Oklahoma City racial segregation ordinance by use of emergency military power. The Governor issued a proclamation declaring a state of martial law to exist when a tense racial situation was created as Negroes moved into areas populated predominately by Whites. Due to the emergency situation, the Governor sought to justify the Oklahoma City ordinance. The state court refused to accept this justification and declared the ordinance unconstitutional. 11

10Liberty Annex Corporation v. City of Dallas, 289 S.W., 1067 (1927); City of Dallas v. Liberty Annex Corporation, 19 S.W., 845 (1929), cited in Mangum, loc. cit.

A fairly recent case involving racial segregation came to the Circuit of Appeals for the Fifth Circuit.\textsuperscript{12} In 1950, a Birmingham, Alabama, ordinance established white and negro residential areas according to historically accepted boundary lines. Apparently the ordinance was being used to replace the restrictive covenant declared unenforceable in \textit{Shelley v. Kraemer}\textsuperscript{13} in 1948. The Court ruled that the ordinance was an unlawful exercise of the state police power and contrary to the Fourteenth Amendment, stating that the rights guaranteed by the Fourteenth Amendment include the right to use, acquire, and dispose of property.

As the body of interpretations defining municipal power to restrict residential privileges has grown, a parallel development has taken place. This development concerns the admission of Negroes to full use privileges on land acquired from or granted to the state or its municipalities.

One of the federal Civil Rights Acts of 1866 guaranteed the Negro equality and freedom from discrimination in acquiring, using, and disposing of property. The Kentucky Homestead Law of 1866 was held to be invalid in 1895 due to the fact that it excluded Negroes from the enjoyment of its benefits. An attempt was made in 1923 to enjoin officials of Durham,


\textsuperscript{13}334 U.S., 1 (1948).
North Carolina, from accepting a grant of land from a private citizen on the condition that it be used for Caucasians only. The argument was made that the Negroes must be given equal recreational facilities under the "equal but separate" rule established in 1896 and that to accept the grant of land on the condition that Negroes be excluded would be an unconstitutional action violating the Fourteenth Amendment. As it was not shown to the court that there would be an inequality in total municipal facilities, the court upheld the grant. Later, a Georgia court gave its approval to a private grant for use by Caucasians only.\textsuperscript{14} The question of constitutionality of these grants was supposed settled by the state courts of the South in the 1920's and 1930's, but the recent sharp change of trend in the interpretation of the Fourteenth Amendment invites speculation that these grants may be subject to examination in a different light and thereby declared void. More detailed consideration of conditional grants will be given in a later chapter.

As the Whites saw state and municipal segregation declared to be in violation of the Fourteenth Amendment, they sought some other legal means of accomplishing the same end. There has been, and still remains, particularly throughout most of the South, a tacit understanding that Negroes may not live in white districts unless they do so in order to perform menial tasks for the Whites. In order to give themselves a better

\textsuperscript{14}Mangum, \textit{op. cit.}, p. 146-147.
method of protection against colored encroachments, the
Whites began to include racial restrictions in deeds, some
of which limited only ownership, while others limited both
ownership and use.

Because the conditions and restrictions in deeds and
covenants entered into by neighboring property owners were
private affairs and not a policy or instrumentality of the
state, it was thought that these covenants were valid and
that the state courts might enforce these contracts or agree-
ments by injunction or reward of damages if the contract was
breached. Restrictive agreements had come into use before
the turn of the century and their use accompanied the enact-
ment of the municipal racial zoning ordinances. Southern
Whites were soon to see the value of these private restric-
tions over municipal racial zoning and the number of private
restriction devices increased as the courts voided municipal
segregation ordinances.
CHAPTER V

JUDICIAL ENFORCEMENT OF RACIAL
RESTRICTIVE COVENANTS

As municipal attempts to segregate the races were declared unconstitutional, segregation by individual property owners became more and more important. Just as the validity of the municipal ordinances had been challenged, restrictive covenants and conditional conveyances in deeds were attacked through court action. Attacks on the validity of these devices were made under the rule against restraints on alienation, the rule against perpetuities, and the "due process" clause of the Fourteenth Amendment.

Referring to the cases which arose during the Reconstruction Period, the courts generally agreed that private restrictive agreements or covenants do not violate the Fourteenth Amendment in that these agreements are private affairs and the state is not a principal actor in the discrimination.¹

The Amendment, as interpreted by the Court in the Civil Rights Cases,\(^2\) did not include prohibition of racial discrimination which was merely the "wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings."

In a California case involving residential segregation of Chinese,\(^3\) a federal circuit court held void a covenant not to rent property to Chinese, stating in its decision:

> It would be a 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.\(^4\)

Although this California case was apparently the first judicial consideration of a restrictive agreement, this precedent established by the federal court did not prevail years later in state court consideration of similar agreements. Regardless of the merit of this argument, it received scant consideration by the state courts. One writer suggests that the federal court's addition, as an after thought, of the opinion that the restrictive agreement also violated the treaty.

\(^2\)109 U.S., 3 (1883).

\(^3\)Gandolfo v. Hartman, 49 F., 181 (1892).

\(^4\)Martin, op. cit., p. 1185.
between the United States and China has caused state courts to ignore the federal court decision.\(^5\)

The charge was also made that restrictive covenants and conditional conveyances violate the rule of perpetuities. Although the rule is a policy which favors free alienability of property, it is "concerned only with property interests and would not be applicable insofar as a segregation device was regarded as a contract, creating only contractual rights."\(^6\)

Most of the attacks on private segregation devices have been based on the rule against restraints on alienation. This rule, based on English policies in the Middle Ages, encourages freedom from restrictions on sale or transfer of property. The rule is based on the idea that it would not be good for society if property were restricted from the commercial market for long periods of time. Thus, any provision placing an undue restriction on transfer of property is detrimental to society and therefore void. Because the rule represents a policy that is not susceptible to circumstantial precision, the Supreme Court has not established a policy of its own in opposition to policies of individual states.

The rule against restraints on alienation originally dealt primarily with restrictions imposed by a testator to prevent sale of an estate outside the family or to prevent

\(^5\)Heard, op. cit., p. 29.

\(^6\)Martin, op. cit., p. 1186.
sale to certain relatives. The lack of uniformity of state court decisions concerning the validity of such restrictions implies that no uniform criterion has been established. Although most courts have agreed that total restraint of sale was void, some courts have permitted total restraint that was limited in duration.\(^7\)

As a result, attempts to apply the rule to race segregation has precipitated a diversity of legal opinions. Ordinarily, the size of the excluded group is a determining factor in consideration of restraints on alienation. In cases restraining alienation to persons other than a racial group, the restriction will be held valid if the excluded group is not large in number. However, the courts of states having a comparatively small percentage of Negroes in their population have generally declared that restrictions against sale of property to members of a designated race were void. On the other hand, courts of certain states having a large Negro population have held that racial restraints on alienation are valid. California, Michigan, Ohio, and West Virginia have refused to uphold such restrictions,\(^8\) but Louisiana, the

\(^7\)Ibid., p. 1188.

District of Columbia, Alabama, Georgia, and Missouri sustain these racial restrictions.\textsuperscript{9}

Although several states have declared void restraints on sale of property to a minority race, some of these same states have upheld the validity of a similar agreement or conditional deed prohibiting use or occupancy by certain groups. Apparently the first court to recognize a material difference between restraints on occupancy and restraints on alienation was a California Court. In 1919, in a case presenting both types of restrictions, the state court enforced the provision prohibiting use or occupancy by any person other than a member of the Caucasian race, and at the same time it declared void the restraint on alienation of the property to the non-Caucasians.\textsuperscript{10}

Michigan courts also have recognized the distinction between restrictions on sale and covenants or conditions limiting use and occupancy. Restrictions on sale were held invalid as unreasonable restraints on alienation\textsuperscript{11} while covenants limiting use were enforced.\textsuperscript{12}

\textsuperscript{9}Queensborough Land Co. v. Cazeaux, 67 S., 641 (1915); Corrigan v. Buckley, 299 F., 899 (1924); Wyatt v. Adair 110 S., 801 (1926); Allmond v. Jenkins, 140 S.E., 879 (1927); Koehler v. Rowland, 205 S.W., 217 (1918), cited in Mangum, \textit{op. cit.}, p. 151.

\textsuperscript{10}Los Angeles Investment Co. v. Gary, 186 p., 596 (1919).

\textsuperscript{11}Porter v. Barrett, 206 N.W., 532 (1925).

\textsuperscript{12}Parmalee v. Morris, 188 N.W., 330 (1922).
In 1926, the Supreme Court was asked to review a case arising in the District of Columbia involving a restrictive covenant. 13 In 1921, thirty white owners of property situated in a certain block in Washington, D. C., entered into a mutual restrictive agreement prohibiting sale or use of their property to Negroes for a period of twenty-one years. One year later, Corrigan, one of the covenantors, agreed to sell her lot to a Negro named Davis. Buckley, one of the neighboring covenantors brought suit to enjoin Corrigan from breaching the covenant by selling part of the restricted property to a Negro. Because the case arose in the District of Columbia, Corrigan could not base her defense directly on the Fourteenth Amendment. Instead, she argued that the restrictive covenant was void ab initio under the Fifth, Thirteenth, and Fourteenth Amendments and the Civil Rights Act.

Corrigan's motions were overruled and the injunctive relief sought was granted. On appeal to the Court of Appeals for the District of Columbia, the court affirmed the decision of the lower court. Corrigan then appealed to the Supreme Court on the grounds that the case involved a question of constitutional interpretation. The Supreme Court dismissed the case for want of jurisdiction on the basis that "no substantial statutory or constitutional issue had been raised by

a contention that the covenants were void" in that they violated laws and the Constitution of the United States.¹⁴

In the opinion, the Court refused the assertion that the covenant violated the Fifth, Thirteenth, and Fourteenth Amendments, terming it a contention "entirely lacking in substance or color of merit." Although the Court indicated that it gave judicial sanction to enforcement by lower courts of racial restrictive covenants, some writers claim that Justice Sanford's opinion was not intended thusly.

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... 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.

Thus one writer¹⁵ suggests that in the Corrigan case the Court never really considered the validity of the restrictive agreement but dismissed the case on a lesser point. It should be noted that the appeal to the Supreme Court was concerned only with the validity of the racial restrictive agreement and not with the constitutionality of judicial enforcement of the agreement.

¹⁴Heard, op. cit., p. 31.
¹⁵Ibid.
State Courts accepted the Corrigan decision as authority for enforcement of such covenants. In Alabama, a white man had leased part of a house from the defendant. The lease contained no restriction on who might occupy the other part of the house, and the defendant rented it to a Negro. The plaintiff sued for damages on the basis that the custom not to rent to Negroes, premises having a toilet common to White people had been violated. The fact that the court allowed the plaintiff to recover in damages demonstrates the reception by this court of the Corrigan decision.

Illustrating the acceptance of state courts that restrictive agreements are valid, in the years between 1918 and 1948, the highest courts of Alabama, California, Colorado, Georgia, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, North Carolina, Oklahoma, Texas, West Virginia, and Wisconsin held or stated that racial restraints, when properly phrased, can be enforced. Decisions in the lower or appellate courts of Ohio, New York, New Jersey, and Illinois held the same way. Courts of the other twenty-nine states were apparently silent on this matter.

The silent acceptance of the validity of judicial enforcement for restrictive covenants was not broken until 1945.

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In that year, a District of Columbia Court upheld enforcement of a restrictive agreement. Two of the judges thought differently than did the majority of the court. "Justice Miller was less sure on the substantive questions but thought that as a lower court they were necessarily bound by the Corrigan precedent." 19

More significant was the fact that, in his dissent, Justice Edgerton gave the first elaborate judicial criticism of the old legalistic viewpoint. The dissent centered on the arguments first, that judicial enforcement of restrictive agreements was "state action" and therefore prohibited by the Fourteenth Amendment and, secondly, that restrictive covenants were restraints on alienation.

Justice Edgerton, in dissent from the majority of the court, stated that restrictive covenants are not self-executing due to the fact that the plaintiff must seek the aid of the courts in order to keep the defendant from selling to a Negro land covered by the restriction. If the negro purchaser refuses to vacate the premises in accordance with the judgment of the court, the court's power to punish for contempt will be exercised, resulting in the Negro's being imprisoned or fined and dispossessed by force if necessary. "The action that begins with

the decree and ends with its enforcement is obviously direct
government action."

Justice Edgerton thought it strangely inconsistent that
the court ruled that, although no legislative body "can author-
ize a court, even for a minute, to prevent Negroes from ac-
quiring and using particular property, a mere owner of property
at a given time can authorize a court to do so for all time." As all branches of government are subject to the restrictions
imposed in the Constitution, an action prohibited to the legis-
lative body would also be prohibited to the courts.

On consideration of the restrictive covenant as a restraint
on alienation, Justice Edgerton agreed with the American Law
Institute in their listing of reasons which, when present, tend
to make restraints on alienation reasonable and valid:

1. The one imposing the restraint has some
   interest in the land which he is seeking to
   protect by the enforcement of the restraint;

2. The restraint is limited in duration;

3. The enforcement of the restraint accom-
   plishes a worthwhile purpose;

4. The type of conveyances prohibited are
   ones not likely to be employed to any substantial
   degree by the one restrained;

5. The number of persons to whom the aliena-
   tion is prohibited is small . . . ;

6. The one upon whom the restraint is imposed
   is a charity."

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20Ibid.
21Ibid.
22Heard, op. cit., p. 36.
Considering these factors as the criteria for judging the validity of racial restrictions, Justice Edgerton declared in his dissent that racial restrictive covenants are an unreasonable restraint on alienation.

The Supreme Court refused to review the decision of the Appellate Court in this case, with Justices Murphy and Rutledge noting special dissents in that refusal. Perhaps these dissents demonstrate the change in thinking going on in many judicial minds at this time.

Several cases arose in lower courts after 1945 questioning the constitutionality of judicial enforcement of restrictive agreements. The dissent in Mays v. Burgess had undoubtedly stimulated the attack on these segregation devices. Probably equally important in influencing the minds of legalists was an article written in 1945 in which the writer advanced the same reasoning that was later embraced by the United States Supreme Court in declaring judicial enforcement of restrictive agreements invalid.23

Shelley v. Kraemer,24 which is one of four cases decided by the Supreme Court on May 3, 1948, reversed the decision of the Supreme Court of Missouri and declared state court enforcement of restrictive agreements unconstitutional. The Shelley


case concerned a restriction imposed in 1911 by thirty of
thirty-nine property owners of a certain tract of land in
St. Louis. The restriction, imposed for fifty years, pro-
hibited sale or use of any of the restricted property to
or by any person not of the Caucasian race. On October 9,
1945, Shelley, who is a Negro, bought one of the lots in
this area. He was apparently unaware of the racial restric-
tion. Kraemer, a neighboring property owner sought to
restrain Shelley from taking possession and to take the
title of the land away from Shelley and revest it to the
immediate grantor or in such other person as the court should
direct.

The trial court denied the relief sought on the grounds
that the restrictive agreement was not in effect, since the
restriction intended that all owners in the district sign
the agreement. Since five property owners in the restricted
tract were Negroes, it is doubtful that the agreement would
have received unanimous sanction.²⁵ The Supreme Court of
Missouri reversed the decision of the lower court and granted
the relief sought.²⁶

In a companion case before the United States Supreme
Court, the Supreme Court of Michigan had upheld the decision
of a lower court which evicted Orsel McGhee and wife, Negroes

²⁵Heard, op. cit., p. 33.

of Detroit, from restricted property they had purchased. The Michigan Court also stipulated that McGhee could not use or occupy the premises in the future. The covenant involved in this case prohibited use or occupancy of the property of persons not of the Caucasian race.

The legal fraternity became excited because of the policy arguments presented to the Supreme Court of Michigan in consideration of this case. A huge volume of social data and research and supplementary arguments was advanced in the amici curiae briefs presented for consideration. The counsel for the plaintiff declared that the restrictive covenant violated public policy, the Fourteenth Amendment, and governmental agreements in the field of international diplomacy.

The latter argument is based on the United Nations Charter and the Act of Chapultepec in which the United States pledged to do what she could to promote "uniform respect for, and observance of, human rights and fundamental freedoms for all, without distinctions as to race, sex, language and religion."29


28 Briefs were submitted by the National Bar Assn., American Jewish Congress (Detroit Chapter), National Lawyers' Guild (Detroit Chapter), Wolverine Bar Assn., United Automobile Workers (C.I.O.), and the Ardmore Assn.

29 United Nations Charter, Section 55 c.
The Supreme Court had already ruled that state policies must give way to provisions of treaties entered into by the United States and that action taken in the enforcement of treaties may be a constitutional action even though legislative provisions to accomplish the same result would be invalid. As a precedent for this principle's application to residential segregation, a decision handed down by the High Court of Ontario was cited in which a restrictive covenant was held void partly because it violated public policy by its inconsistency with the provisions of the United Nations Charter.

The Michigan Supreme Court refused to consider the argument based on international diplomacy, stating that these international agreements represented desirable ends but that they do not affect the enforcement of contracts between two individual citizens of the United States. Despite the multiplicity of arguments against restrictive agreements, the Michigan Court held that the plaintiff's constitutional rights had not been violated. The United States Supreme Court granted certiorari to the two cases discussed above, along with two other cases which arose in the District of Columbia where the enforcement of similar restrictive agreements had been upheld by the

30 *Missouri v. Holland*, 252 U.S., 416 (1920)
31 *Re Drummond Wren*, 4 D.L.R., 674 (1945), cited in *Williams*, op. cit., p. 103.
32 *Heard*, op. cit., p. 32.
Appellate Court of the District. Because the District of Columbia is not limited by the Fourteenth Amendment, petitioners of the latter two cases contended that enforcement of such restrictions violated the Civil Rights Act and the Fifth Amendment, which is a limitation on the federal government. These four cases were argued and presented at the same time, and thus they are referred to as the Restrictive Covenant Cases.

The presentation of the plaintiffs' arguments before the Supreme Court was somewhat unique. Thirty-three amici curiae briefs were filed before the Court in the Restrictive Covenant Cases, one of them by the Attorney General of the United States. These briefs urged that judicial enforcement of restrictive covenants violated the constitutional limitations imposed by the Fifth and Fourteenth Amendments. Twenty-one of these briefs stressed the sociological results of racial segregation and the "undesirable" aspects were attributed to state enforcement of racial restrictive covenants.

Much stress was placed on the international significance of segregation. Only three months before the Restrictive Covenant Cases were argued, former President Truman's Committee on Civil Rights had made its report denouncing judicial

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34 Tom C. Clark and Philip B. Perlman, Prejudice and Property (Washington, 1948), passim.
enforcement of these covenants and calling on the states to enact laws outlawing residential restrictions.

Other facts gave the forthcoming decisions even greater significance in the eyes of the nation. Newspapers all over the nation were carrying articles and editorials concerning residential restrictions. For a few years before 1948, each opinion of an Appellate Court enforcing a restrictive covenant was the subject of one or more law review notes. Most of these notes were critical of the results. "Even action by trial courts in these cases was usually reported by the wire services and the stories published throughout the country."35

All wire news services covered the arguments of the Restrictive Covenant Cases. Two embassies were represented by "official observers" who took notes on the arguments. Possibly due to the close observation by the public in these cases, Justices Reed, Jackson and Rutledge withdrew from the bench. Although no official reason was given, a rumor circulated that they withdrew because each of them owned property restricted by similar limitations.36

The amount of influence that the briefs and public concern had on the decisions of the Supreme Court is impossible to


36Ibid., p. 205.
ascertain. However, the presentation of social data for consideration by the highest judicial body is contrary to the established policy that the judicial branch interpret the law and allow the legislative branch to determine the necessity and the basis for the law.

The Supreme Court held that racial restrictive covenants are agreements between private property owners, and as such they are not invalid.

We concluded therefore that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated.37

The Court concluded, however, that when the judicial enforcement was invoked to carry out the aims of the restrictions, then the Fourteenth Amendment was violated in that the judicial enforcement made the state a party to the discriminatory action. Although the agreement was valid, judicial enforcement constituted a violation of the "equal protection of the laws" clause of the Fourteenth Amendment which guarantees each person freedom from state discriminatory action.

The cases involving covenants in the District of Columbia were decided in favor of the plaintiffs on the grounds that the residential restrictions violated provisions of Section 1978 of the Revised Statutes, which were derived from the

Civil Rights Act of 1866. The court also held that the covenants were contrary to public policy. Thus it became unnecessary for the Court to rule whether or not the District of Columbia restrictive agreements violated the Fifth Amendment.

Cases were cited, in substantiation of the Court's decision on *Shelley v. Kraemer*, to show that the Fourteenth Amendment applied to all three branches of state government. All of the references, however, are cases involving procedural rights or actions by policy-making groups. In this opinion, the Court extended to judgments by the courts the constitutional limitations which traditionally had been imposed only upon policy makers and the procedural acts of the interpreters. Prior to this decision, no known precedent for such an extension had been established.

With the decisions of the Restrictive Covenant Cases, the public generally regarded the matter of racial covenant enforcement as settled. Individuals determined to prevent desegregation were not to be easily persuaded, however. The *Shelley* decision was interpreted by many legalists as prohibiting only injunctive relief for breach of a restrictive covenant. The question of whether or not a covenantor could recover damages for breach of the agreement was apparently unsettled.

In 1948, Erma Leaon sold racially restricted property to a Negro. The Restrictive Covenant Cases had been decided

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38Virginia v. Rives, 100 U.S., 313 (1880); Ex Parte Virginia, 100 U.S., 313 (1880); Strader v. West Virginia, 100 U.S., 307 (1880).
only a short time prior to the sale, and Erma Leaon assumed that the decisions had invalidated the restrictions on her property. After the sale was concluded, eight neighbors filed suit against her and the Negro purchaser for $150,000 for loss of property values.

Although the trial court refused to award damages, the Missouri Supreme Court reversed the decision and held that damages for breach of a valid contract may be awarded. The court concluded that the Supreme Court decision in the Restrictive Covenant Cases prohibited only injunctive relief for racial restrictions.\(^39\) Two years later, the Supreme Court of Oklahoma interpreted *Shelley v. Kraemer* in the same manner when it held that a claim for damages may be maintained against a white seller, an intermediate Caucasian, and a non-Caucasian purchaser for a conspiracy to violate a restrictive covenant.\(^40\)

On the other hand, the Michigan Supreme Court denied the right of a property owner to recover damages against a property owner who breached a racial restrictive covenant by selling restricted property to someone of the excluded group. The Court held that the term "state action," as is applies to the Fourteenth Amendment, includes exertions of state power in all

\(^{39}\) *Weiss v. Leaon*, 225 S.W., 1054 (1949).

\(^{40}\) *Correll v. Earley*, 237 p., 1017 (1951).
forms.\textsuperscript{41} A District of Columbia Court also ruled that award of damages is not allowed under the \textit{Shelley} decision.\textsuperscript{42}

In order to settle this state of legal confusion, the Supreme Court granted \textit{certiorari} to \textit{Barrows v. Jackson},\textsuperscript{43} in which the Court was asked to decide whether or not a state court's award of damages for breach of a restrictive agreement constituted state action. In this case, Barrows sought $11,600 damages against Jackson because the defendant sold property covered by a restrictive agreement without incorporating the restriction in the deed and permitted non-Caucasians to move in and occupy the premises.

The Supreme Court ruled that a court's awarding of damages does constitute state action under the Fourteenth Amendment:

\begin{quote}
To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants. If the State may thus punish respondent for her failure to carry out her covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant. Thus it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages.
\end{quote}


\textsuperscript{43}346 U.S., 249 (1953).
Using this same type of reasoning, the Court concluded also that rights of non-Caucasians are violated by state courts' awarding of damages. This award of damages will cause the prospective vendor of restricted property either not to sell to non-Caucasians or to require non-Caucasians to pay a higher price for the property in order to cover the damages that the vendor might later be assessed. Thus the non-Caucasian, purely because of his race, is denied the right to use and own property on an equal basis with Whites.

In the Barrows decision, the Court departed from the doctrine of "standing." In establishing its rules for operation, the Court has made a series of procedural rules which shall apply to all of its judicial proceedings. The rule in question in the Barrows case was clearly stated in 1936\(^4\) when Justice Brandeis stated that "the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." In this case, the non-Caucasian was not a party to the covenant nor a party to the equity proceedings. Moreover, he was safely in possession of his property and had neither been nor would be denied rights guaranteed him by the Constitution, regardless of which way the court of equity ruled.

In meeting the questions involved in this argument, the Court cited a number of cases in which it declared that the

rights of third parties had been upheld by the Court. One writer carefully noted, however, that the cases cited by the Court could also have been interpreted as relying on the invasion of some constitutional right of the party complaining. This writer also cited numerous cases in which the Supreme Court had strictly adhered to the doctrine of "standing." The Court admitted that no certain person's rights would be violated by enforcement of suits for damages. The Court held, nevertheless, that the defendant could plead the rights of "unidentified but identifiable" non-Caucasians in that enforcement would deny equal protection of the laws to particular would-be users, total strangers to the defendant.

The charge was made that the Court's refusal to allow damages for breach of a valid contract would violate the impairment of the obligation of contracts clause in Article I, Section 10, of the Federal Constitution. The Court held that the clause referred to laws by state legislatures and not to court decisions. This ruling opposes the common law principle that a valid covenant or contract imposes an obligation on the covenants to abide by the terms thereof or suffer damages for breach of the covenant. Corbin states that "the chief feature of contract law is that by an expression of his will


today the promisor limits his future action by affording the stimulus described as compulsion. When the stimulus is removed, the contract or contract law no longer exists.

Thus in the Shelley and the Barrows cases, the Court has done indirectly what it says it has not done. Although the Court has maintained that racial restrictive covenants are valid in themselves, it has removed the stimulus or compulsion, thereby making the contract void for all practical purposes.

The Shelley and Barrows decisions represent a departure from traditional legal thinking. Chief Justice Vinson, in his dissent, spurned the Court for failing to respect the rule of "standing" and the states' right to enforce private contracts. He appealed to the Court to rest its decision on a constitutional basis, not on social expediency. As in any change of interpretation of law, the decisions in these two cases give rise to interesting questions in related fields in which the answer to such questions rests on the extent to which the Court will extend its current trends. A consideration of some of these questions will demonstrate the effect that the restrictive covenant decisions may have on future court decisions.

CHAPTER VI

INFLUENCE OF THE RESTRICTIVE COVENANT
DECISIONS IN RELATED FIELDS

As the Supreme Court modifies its interpretation of the Fourteenth Amendment, each decision assumes a peculiar significance in that its potential applications and effects may not be immediately foreseen. The body of law grows as every phrase of each decision is studied and each legal principle is expanded to its ultimate. An examination of the extension of the *Shelley v. Kraemer* decision into questions arising from segregation in public housing and cemeteries and from conditional grants of land should demonstrate this growth.

It might appear that discrimination in all housing would be prohibited under the *Shelley* and *Barrows* decisions. A closer investigation reveals that private housing projects are privately owned and operated and that governmental action is thus not necessarily involved in the building or maintenance of such projects. As no court action is called upon to enforce discriminatory practices here, the restrictive covenant decisions would not apply.

Arguments are advanced, however, that some private housing projects are built under state law and through the exercise of state authority. Because "state action" is involved, such
projects would be subject to the same prohibitions of discrimination as are imposed on the state. Another argument advanced is that, because private housing projects are serving a public function, they take on the color of a governmental activity and as such are subject to constitutional prohibitions against discrimination. An extension of this argument to its logical conclusion would result in all merchants' and businessmen's being subject to constitutional limitations.

The legal definition of "state action" as applied to private housing is not clear. In 1943, The Metropolitan Life Insurance Company announced plans to build a mammoth housing project in New York City to accommodate 25,000 people. New York City, as a principal actor in this project, exercised its power of eminent domain to secure the land. The city also granted exemption from taxes on the improved value of this land and conveyed to Metropolitan the land then used as streets. The company was authorized to determine the lay-out of the project and to designate the location of new streets. The purpose of this project, known as Stuyvesant Town, was to clear a slum area and provide low rent housing. Rates of $14.00 per room could not be increased without the approval of the city, and Metropolitan's profit was limited to six percent.

Three negro veterans brought a suit against Metropolitan Life Insurance Company and New York City for a judicial order
to prohibit segregation in Stuyvesant Town. In the trial
court, the defendants argued that "state action" is not in-
volved in every project receiving governmental assistance,
because hardly any major project, either by a corporation or
an individual, is undertaken without a federal loan or state
aid in some way.¹

The trial court dismissed the case, and the Court of
Appeals affirmed the decision, stating that the aid given
Metropolitan in this case was not sufficient to constitute
"state action."² The New York Supreme Court upheld the deci-
sion by a 4-3 vote. The United States Supreme Court refused
to accept an appeal of the case. This may have been due to
the fact that Negroes had been admitted to Stuyvesant Town
and that the state legislature had enacted a law prohibiting
segregation in private housing projects built in the future.

In Shelley v. Kraemer, the Supreme Court pointed the way
to possible future applications when it expanded the basis of
its reasoning apparently to include sociological and public
policy considerations. The Court in Brown v. Board of Educa-
tion continued this tendency in striking down the "equal but
separate" doctrine in the public schools and in implying that
the doctrine was generally invalid.

¹Joseph B. Robinson, "The Story of Stuyvesant Town,"
The Nation, CLXXII (June 2, 1951), 515-516.

²William Maslow and Joseph B. Robinson, "Civil Rights
Legislation and the Fight for Equality, 1862-1952," The
University of Chicago Law Review, XX (1953), 409.
An Ohio court in 1953 ruled that recent Supreme Court decisions showed that the "equal but separate" doctrine had no application to restrictions concerning ownership or occupancy of real property. Another Ohio case involved discriminatory practices in the allocation of housing units as between Negroes and Whites. The United States District Court issued a permanent injunction against discriminatory practices of the housing authority. The Court of Appeals affirmed the decision and remanded the case with directions that any reconsideration be in conformity with the Brown v. Board of Education decision.

In a Pennsylvania case, Negro plaintiffs brought suit against Levitt and Sons, Inc., the Federal Housing Administration, the Veterans Administration and others, seeking a declaratory judgment and injunctive relief, charging that the defendants had refused to sell them a house solely because of their race. The plaintiffs argued that governmental agencies (FHA and VA) have the power to end discrimination by Levitt and Sons, Inc., by refusing all mortgages unless Levitt ends

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his discriminatory practices. They contended further that failure of the FHA and VA to act in this case deprived the plaintiffs of rights guaranteed by the Fourteenth Amendment. It was also argued that governmental aid, in the form of guarantees to lending agencies sponsoring such projects, involves many requirements and thereby makes Levitt assume the role of a governmental agency.

The United States District Court held that the VA and FHA were not obligated to prevent discrimination in the sale of houses and that the governmental aid involved did not make Levitt and Sons, Inc., an agent of the government. Thus relief was denied with the statement that only Congress can grant the relief sought.

Apparent in these cases is the fact that "state action" in housing projects has not been defined by the courts. The Supreme Court has refused to attempt to establish a definition. The latter case above is especially significant in that the plaintiff charged governmental agencies with failure to act. In light of the number of Supreme Court judges who saw discrimination through "inaction" of state officials in Terry v. Adams, it would be interesting to know how the Supreme Court might have ruled in this case.

Another interesting field of legal opinion related to the Restrictive Covenant Cases concerns segregation of burial

6 345 U.S., 461 (1953).
places. One of the most interesting cases involves the Caucasian wife of an American Indian army sergeant killed during the Korean conflict.\textsuperscript{7} Evelyn Rice contracted with the defendant for the purchase of burial lots. Although the contract restricted the lots to Caucasians only, the plaintiff apparently ignored this fact. Rice's body arrived from Korea and was taken to the cemetery where graveside services were held. Later in the day when the defendant discovered that the deceased was an American Indian the cemetery officials notified the plaintiff that she could not lower the body into the grave. After some delay, former President Truman ordered the body interred in Arlington National Cemetery.

When Mrs. Rice sued for damages, the Iowa Court ruled that the restrictive clause in the contract was not void but was unenforceable as a violation of the Federal and Iowa Constitutions.

Nevertheless, it held that the clause "may be used as a defense" and that "the action of a state or federal court in permitting a defendant to stand upon the terms of its contract and to defend this action in court would not constitute state or federal action" contrary to the Fifth and Fourteenth Amendments.

The argument that the United Nations Charter had been violated was declared irrelevant and the case was dismissed.

The Supreme Court of Iowa upheld the decision of the lower court in declaring in effect that the right of freedom to contract contains the freedom to discriminate, a substantive holding previously struck down by the Supreme Court. An evenly divided United States Supreme Court affirmed the Iowa Court's decision with no opinion written. This equal division was possible due to Justice Jackson's death.

On a request for a rehearing, the Supreme Court dismissed the petition on a five-to-three vote because an Iowa law had been initiated to make it impossible for the question to arise again. Chief Justice Vinson and Justices Black and Douglas felt that the writ of certiorari should be granted even though the plaintiff was the only one whose rights may have been unconstitutionally denied.

The argument has been advanced that cemeteries are privately owned and operated organizations, but, because they are organized for a basic public service, they are subject to constitutional limitations. The service may be so basic to society that the organization acquires the characteristic of a state agency. This is the same argument that is made for the imposition of constitutional limitations on private

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housing projects, and is based on the theory expressed in Marsh v. Alabama in which the Court stated, "The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."9

An extension of this argument would almost obliterate the distinction between constitutional and statutory law. The argument was not used in the Rice case, but a California Court of Appeals has ruled on this point and held that a cemetery was not a place of public accommodation within the meaning of the state's equal rights laws.10 The Court cited a decision of the Illinois Supreme Court which held that "all other places of public accommodation and amusement" did not include cemeteries.

It is interesting to note that the belief that there is no segregation in Heaven may now be based on judicial authority. In his concurring opinion, Justice Dooling ruled thusly, denouncing such manifestations of prejudice as "a particularly stupid form of human arrogance and intolerance."11

The extension of the public function theory could easily be entered into other fields of activity. Would a decision

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10 Long v. Mountain View Cemetery Association, 278 P., 945
11 Ibid.
prohibiting segregation in cemeteries apply also to a church-owned cemetery restricted to members of a church? This question was raised in the *Rice v. Elmore* case by the defendant to show the effect that a decision against him would have on church-owned cemeteries. When a church desires to inter its members together and exclude other denominations, a type of discrimination occurs, but the right of freedom of religion should make this discrimination privileged.\(^{12}\) Under this reasoning, a private cemetery having no religious affiliation would not be privileged. Although a "constitutional" basis has apparently been established for the extension of the "public function" argument,\(^{13}\) its unswerving application by the courts is indeed doubtful, for its extension to its possible conclusion would result in constitutional "chaos."

A third field of social and legal concern affected by the restrictive covenant decisions is determinable fees, that is, conditional grants of land made generally to municipalities for a designated racial group. Such determinable fees are found primarily in the South, and the land conveyed has been used as public parks, golf courses, sites for libraries, etc.

The condition grants have become increasingly important as the Supreme Court continues to modify its interpretation


of the Fourteenth Amendment to give more protection to the Negro. It is expected that the Court will soon rule that all public recreational facilities must be used on a desegregated basis. When and if such a ruling is made, the lands granted for use by one racial group only will apparently revert to the grantor, even though costly improvements may have been made on these lands.

The prediction that the Supreme Court will soon prohibit racial segregation in the use of state and municipal recreational facilities is based on recent Supreme Court and lower court rulings. The Brown v. Board of Education case, which knocked down the "equal but separate" doctrine as it applies to public schools, has been received by many lower courts as authority to void the doctrine in all fields where segregation occurs.

A 1955 Supreme Court ruling in effect held that the city of Atlanta could not deny the use of municipal golf courses on the basis of race or color. In another case the Louisville Park Theatrical Association leased an amphitheater from the city of Louisville, Kentucky. The Association, a privately owned enterprise, provided its facilities for white citizens only. A negro plaintiff brought suit against the Association seeking a declaratory judgment of the rights of Negroes to use

the recreational facilities of the city parks which were leased to private concerns for certain performances. The Court of Appeals affirmed the trial court's ruling that the Association was guilty of no unlawful discrimination in denying admission to Negroes because the city did not participate either directly or indirectly in the operation of the private enterprise. The Supreme Court of the United States reversed the decision of the lower court and the case was remanded for further consideration in light of Brown v. Board of Education.\textsuperscript{15}

An extension of this case was made by the Federal District Court of Virginia which held that if the state leases its parks to private operators, the state must require that there be no racial discrimination in its operation.\textsuperscript{16} Likewise, in a case before the Supreme Court of Kansas, it was held that the City of Parsons could not deny plaintiff the use of a municipal swimming pool because of his race.\textsuperscript{17}

Thus, the question arises as to what may be the fate of property granted to municipalities on the condition that the property be used by Caucasians only. In seeking the answer to this question, Charlotte Park and Recreation Commission sought a declaratory judgment for determination of the validity of

\textsuperscript{15}Muir v. Louisville Park Theatrical Association, 347 U.S., 971 (1954), cited in \textit{ibid}.


\textsuperscript{17}Morton v. City Commissioners of Kansas, 285 P., 774 (1955), cited in \textit{ibid.}, p. 177.
the racial restriction in conditional grants. In this case a parcel of land was conveyed to the plaintiff upon the limitation that it be used by Caucasians only.\textsuperscript{18} If Negroes used the park, the deed conveying land for the park would cease and terminate by its own limitation, and the estate would revert to the grantor.

The Supreme Court of North Carolina affirmed the decision of the trial court that if land granted conditionally is not used for the purpose specified and if there is a provision for reversion, then the land will revert to the grantor. The Court cited numerous cases involving churches, schools, societies, etc. to substantiate the decision. The general rule noted, however, was that the expression of purpose of the grant was not alone sufficient grounds for reversion. It was necessary ordinarily that the grant expressly provide for reversion or forfeiture.

The court also held that if Negroes used this property, which included the city's only golf course, the failure to allow reversion to the grantor because of violation of the limitation in the deed would be to deny the grantor his property without adequate compensation and due process of law, a violation of the Federal and North Carolina Constitutions. Such action would in effect rewrite his deed by judicial fiat.

\textsuperscript{18} Charlotte Park and Recreation Commission \textit{v.} Barringer, 88 S.E., 532 (1955).
The court reasoned that because the reversion would be automatic, there is no "state action" involved and that thus the *Shelley v. Kraemer* decision would not apply. It was concluded that the discriminatory nature of the limitation would fall outside the ban of the Fourteenth Amendment on the theory that discrimination by private individuals, unsupported by state action, is legal.

This holding has been challenged by some who find that this reasoning raises more questions than it settles. When the limitation is breached, an action of ejectment is ordinarily appropriate for the grantor, who holds the title, to get possession from the grantee who holds the property. The action of ejectment, however, if favorable to the grantor, would constitute discriminatory "state action" and as such would be prohibited by *Shelley v. Kraemer*.

On this reasoning, the grantor would not be able to get possession of the property through judicial process. The only alternative is "self-help." To evict the possessor, the grantor in such a case would ordinarily have a right that can be enforced through judicial proceedings. The *Shelley* decision, however, prohibits the enforcement of legal proceedings whose results are contrary to the Fourteenth Amendment.

The question is also raised as to whether or not the mere fact that the court issued a declaratory judgment on the case would constitute "state action." Although no enforcement follows a declaratory judgment, the court has considered the
question in controversy and has issued a decree stating its position. This action is a function of the court and as such may be considered "state action."\(^{19}\)

Just as the final determination of the validity of limitations in conditional deeds has not been judicially determined, many other questions in other fields are likewise unsettled. Although this discussion has dealt only with three areas of social and legal conflict, these examples should demonstrate the magnitude of the legal problems involved as the Supreme Court adapts a major phase of our fundamental law so that it will most effectively, in the eyes of the Court, meet our current national problems.

This action by the Supreme Court is supplemented by a change in policies of the executive branch. For example, as a result of the suits against the FHA and VA to compel those agencies to exercise their powers to prohibit discrimination, the Federal Housing Administration will not issue a mortgage on any property on which a racial restriction has been imposed after February 15, 1950.\(^{20}\) Likewise, some cities and states have prohibited racial discrimination in private housing projects or in cemeteries. The legal basis for anti-discrimination policies has not yet been established. It would appear indeed, that governmental officials are in some cases "groping" for

methods to accomplish a "desirable" end, sometimes failing to envision, or perhaps even to consider, the consequences to potential applications of their reasonings.
CHAPTER VII

CONCLUSION

The concern of this investigation has been the constitutional issues which have arisen from attempts to perpetuate through legal means the social tradition of segregation of races. This perpetuation has been extolled as the means for maintaining community harmony and sustaining property values. In order to accomplish this, and in order to placate fears and prejudices against intrusion of "undesirables" into white neighborhoods, many municipalities, as well as individual property owners, have employed racial residential segregation devices. Examination of the cases cited illustrates that such restrictions are common not only to the Southern states but also are found wherever animosity exists toward minority racial, religious, or national groups.

A thorough understanding of court rulings concerning private and municipal impositions of racial segregation devices requires a knowledge of the history of the Fourteenth Amendment. It is under this constitutional limitation that most such rulings have been given. Competent historians have concluded that the Fourteenth Amendment, as intended by its framers, extended the power of Congress to protect the civil liberties of the Negro. The Supreme Court has enlarged this definition of intent to include civil liberties generally.

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Through the interpretation of the Fourteenth Amendment in the *Slaughterhouse Case* and *Civil Rights Cases*, the Supreme Court temporarily nullified, for all intents and purposes, the primary purpose of the Amendment. Through its interpretation of the Reconstruction Amendments, the Court permitted the Southern states to use legal and extra-legal devices to subjugate the Negro to white control.

As the society became more complex, the necessity arose for an increase in regulation of both business and individual relations. Contemporary with this increase in state regulation was a growing demand for federal protection of civil liberties. It was in response to these two developments that the Supreme Court set about defining, by the process of inclusion and exclusion, which of the rights and freedoms contained in the Bill of Rights were made applicable to the states by the Fourteenth Amendment.

Although the Amendment was designed primarily as a constitutional basis for Congress' protection of the Negroes' rights, its effect in accomplishing this purpose during the first three decades of its existence was negligible. As crises and near crises have arisen since World War I, a general reawakening of interests in individual rights has occurred. This has been promoted particularly by militant groups seeking to restrain the federal and state governments from acting too hastily or too harshly in attempting to eradicate or restrain
the spread of practices and ideologies contrary to the American way of life.

The reawakening of interest in individual liberties is reflected in the cases brought before the Supreme Court during recent years, particularly within the last decade. The Court has been called upon to define the freedoms of speech, press, religion, assembly, etc. in terms of freedom from state and federal interference. Procedural rights, such as trial by jury, self-incrimination, and use of evidence obtained by illegal means, have also been the subject of Supreme Court rulings in recent years.

The establishment of a Civil Rights Section within the Department of Justice in 1939 also reflects the interest in civil liberties. Partly due to the activities of this group, the Supreme Court has modified its interpretation of the Fourteenth Amendment. The modification permits the use of reconstruction era legislation, even in its attributing to the Federal Constitution the characteristics of criminal law.

This renewal of interest in civil liberties has been of immense importance to the Negro. The cases concerning the Negro included in this study serve to illustrate the new attitude that the Supreme Court has tended to take toward the Fourteenth Amendment in recent years. This newer interpretation serves to give to the Negro much of the protection which the Amendment's drafters envisioned. The broader application of
protections is evidenced importantly in the groups of cases involving residential segregation. The decisions in these cases have both resulted from and contributed to this new meaning which the Court has found in the words of the Amendment.

Examination of its decisions reflects that the Court's modifications manifest themselves in four different areas. This is evident generally, but it is especially true in the cases growing out of attempts to restrict ownership or occupancy of property.

Firstly, the Court has enlarged the amount of protection afforded the Negro by the Amendment. Secondly, the Court has enlarged the group against whom constitutional prohibitions against discrimination apply. Thirdly, the Common Law theory of contracts has been threatened as the Court has looked beyond the legal aspects of the contract and prohibited state courts from enforcing contracts if such enforcement resulted in racial discrimination. Fourthly, the Court has, through its interpretation, allowed the Constitution to be used as a basis of criminal law. This has been accomplished by allowing the use of reconstruction era statutes which forbid, under penalty of law, the willful deprivation of constitutional rights by state officials.

Examination of cases concerning Negroes included in this study indicates that the Supreme Court has, for the purpose of
eliminating racial discrimination, in effect, read into the Fourteenth Amendment the qualifying phrase, "because of race, color or previous condition of servitude." In cases involving procedural rights of Negroes, discriminatory practices of state courts, such as systematic exclusion of Negroes from jury venires, have been generally frowned upon by the Court. The Negro race has been recognized by the Court as a class of people and questions of denial of rights of any of this group have been closely scrutinized by the Court.

Perhaps the most important change in legal application toward realizing an enlargement of Negro rights came as the Court struck down its traditional doctrine of "equal but separate" educational facilities. The importance of the Court's holding in Brown v. Board of Education is not limited to its effect on public schools. The reversal of the traditional doctrine of "equal but separate" in public schools has generally been accepted as voiding the doctrine in all fields where segregation occurs.

By expanding the group against whom constitutional prohibitions apply, the Court has given the Negro protection from discrimination not only by state officers but also by any person acting as an agent of the state. The greatest extension of "state action" involved the issue of Negro exclusion from party primaries. The most significant case concerning primaries is Terry v. Adams. By extending the definition of
"state action" to include private political organizations, the Court established precedent for subjugating many other organizations to constitutional limitations.

Significant in the Terry case is the fact that three of the concurring judges saw "state action" in the "inaction" of the state in prohibiting a discriminatory act. Thus the Constitution, which was designed as a negative-type limitation principally on the federal government, is being applied as a positive law against state "inaction." Because the state has the power to prohibit discrimination in most fields, such reasoning would require each state to adopt laws prohibiting discrimination for any reason in every field in which the state had the power to act. Federal enforcement against the states would come from refusal to accept as valid any private action permitted by states through this type of "inaction." Such concepts were not envisioned by framers of our constitutional system of government.

One of the major modifications of interpretation of the Fourteenth Amendment arose from a case involving a racial restrictive covenant. The Supreme Court had held in 1917 that residential segregation by municipal ordinance was violative of the Fourteenth Amendment. Private residential segregation continued, however, through the imposition of restrictive covenants and conditions in deeds. In 1948, the Supreme Court removed the stimulus or compulsion from these contracts by
applying to court judgments the constitutional limitations imposed in the Fourteenth Amendment.

Common law requires that a valid contract is ordinarily enforceable in judicial proceedings. The enforcement includes injunctive relief to prohibit breach of the agreement or award of damages against the covenantor who breaches his agreement. In the *Shelley v. Kraemer* case, the Court deviated from precedent by looking beyond the face of the contract and considering its substantive provisions.

An extension of the *Shelley* rule would place private contractual relations under court surveillance. If the provisions or the effect of the contract were discriminatory, the contract would be unenforceable in the courts. Although the Court has repeatedly stated that a racial restrictive covenant is, within itself, valid, the Court has rendered it ineffective by prohibiting enforcement either in law or in equity.

The Court's decision in *Shelley v. Kraemer* indicates a radical departure from an established legal doctrine. The Court, in effect, held that a court may not by its decree support a discriminatory result which a state could not achieve by direct legislative action. It would then follow that whatever would be a violation of constitutional rights if done by statute would also be a violation of constitutional rights if accomplished by decree. This would be true even though the decree be issued to enforce an otherwise valid contract.
The Constitution is by nature a negative-type limitation on policy-making officials. The Court decisions during the first one hundred and fifty years of the government have imposed constitutional prohibitions only on the executive and legislative branches and the procedural policies of the judicial branch. The recent application of these limitations on the substantive aspects of the judicial function is significant.

If the Court made the Shelley case the governing rule, interesting consequences might follow. The Shelley decision held that no governmental action may support a discriminatory act. The only alternative to judicial proceedings is self-enforcement. Under this reasoning, what could have been done in the Rice v. Sioux City Memorial Park case if Evelyn Rice had lowered her husband's body into the grave and the defendant, in a resort to self-enforcement, had dug it up? Or, what action may be taken if a hotel owner refuses services to a Negro and the Negro refuses to leave? Ordinarily any right that is self-enforceable is also enforceable in judicial proceedings. The person possessing this right is not liable for damages when he personally enforces this right. However, the Supreme Court's ruling in Shelley v. Kraemer implied that any decree supporting a discriminatory action or result is unconstitutional. Thus, the protection generally afforded for self-enforcement is removed. When protection for self-enforcement is eliminated, so, implicitly, is the legal right to
self-enforcement. Therefore, the cemetery officials and the hotel owner will have lost their right to self-enforcement.

In Barrows v. Jackson the Court expanded the Shelley decision to prohibit enforcement of racial covenants by injunctive relief and by award of damages. In order to substantiate its decision in this case, the Court deviated from precedent in allowing the plaintiff to plead the rights of a third party who was not a party to the contract. Thus, the Court violated the precedent set by the Court itself when it had held that a person may not plead his case before the Court unless he personally is harmed by the action in question.

Another breach of precedent occurred in the Restrictive Covenant Cases when the Supreme Court allowed the presentation of voluminous social data for consideration by the Court. Public interest and social policy considerations, no doubt, affected the decision of the Court. The use of social data in arguments before the Court represents a departure from the rule that the Court concern itself with law, not sociology. This precedent also implies extensive opportunities in presentation of arguments in other fields.

Supreme Court decisions on questions of racial residential segregation follow, then, the same general pattern as do rulings on segregation in other fields. The lower courts have indicated through their decisions that they have accepted the Brown decision as authority to strike down the "equal but separate" doctrine in all fields. An exception to this rule
has been the refusal of the courts to establish a definition of "state action" as relates to governmental aid in private housing projects.

The reader is not to conclude that only the devices treated in this study are used to maintain racial segregation. Even when restrictive covenants were still enforceable by state courts, such agreements generally constituted the fourth line of defense against negro encroachment. Community pressure and social attitudes, lack of credit available for houses outside the "ghettos," and the "code of ethics" of real estate dealers were generally sufficient to maintain residential segregation.

*Barrows v. Jackson* did not mark the end of the use of racial restrictive covenants and conditions in deeds. Some property owners still use them as selling points for their property, thinking they are enforceable in court.

After the *Shelley* decision was given, many new devices were employed to maintain residential segregation. One such method establishes a limited estate which will revert to the grantor if the racial restriction is breached. Another method is to assure an individual or an association the first option for purchase of restricted property when it is transferred.

The devices designed to circumvent the Supreme Court's ruling are generally impracticable. The most effective ones would probably not stand up under the scrutiny of the Supreme Court.
In housing, as in other fields where segregation occurs, some "crutch" is needed by many race-conscious Americans who want to think they have protection from intrusion by Negroes. When this "crutch" is taken away, physical strife may ensue. New legal problems will, in turn, be the consequence.

Legal decrees will not obliterate the social and economic problems which have existed in our society for centuries. The effect of each Supreme Court decision cannot be immediately envisioned. The interrelation of social and legal issues in segregation presents a complex problem. Any social or legal change causes repercussions which may not be predicted. The pattern is inherently cyclical: just as social conditions are importantly determined by judicial opinion, so will future court decisions no doubt be necessitated by fluctuating social conditions. Indeed, the present tendency of the Court indicates potential use of social considerations as the accepted basis for its decisions. Traditional legal practice has required decisions be based on law alone. Only future developments will divulge whether this tradition has been permanently set aside. If it has, this modification, of all those discussed herein, could well become the most significant.
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