

1956

CONSTITUTIONAL LAW-EQUAL PROTECTION-RACIAL RESTRICTIVE COVENANT IN DEED OF CEMETERY LOT AS DEFENSE TO DAMAGE ACTION

Lawrence N. Ravick
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Civil Rights and Discrimination Commons](#), [Fourteenth Amendment Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Lawrence N. Ravick, *CONSTITUTIONAL LAW-EQUAL PROTECTION-RACIAL RESTRICTIVE COVENANT IN DEED OF CEMETERY LOT AS DEFENSE TO DAMAGE ACTION*, 52 MICH. L. REV. 907 (1954).

Available at: <https://repository.law.umich.edu/mlr/vol52/iss6/11>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW—EQUAL PROTECTION—RACIAL RESTRICTIVE COVENANT IN DEED OF CEMETERY LOT AS DEFENSE TO DAMAGE ACTION—Plaintiff brought a damage action¹ against a private cemetery² for its refusal to permit the interment of her Indian husband in a burial lot which she had purchased from the defendant cemetery under a contract restricting burial privileges to members of the Caucasian race. *Held*, reliance upon a restrictive covenant to deny recovery does not constitute state action in violation of the equal protection clause of the Fourteenth Amendment of the Federal Constitution. *Rice v. Sioux City Memorial Park Cemetery*, (Iowa 1953) 60 N.W. (2d) 110.³

It has long been held that state legislation requiring racial segregation in the ownership and possession of land is unconstitutional.⁴ Conversely, a state itself has been able to make such discrimination illegal by civil rights statutes.⁵ But it remained for the landmark *Restrictive Covenant Cases*⁶ to hold that racial restrictive covenants in a deed of land could not be enforced by injunction in equity against a purchaser because such enforcement would constitute state action denying equal protection of the laws in violation of the Fourteenth Amendment.⁷ However, the language in *Shelley v. Kraemer*⁸ to the effect that the restrictive covenant itself was not invalid and that no one's rights under the Constitution were violated by the covenantor's voluntary adherence thereto left open many questions. One of these was answered in

¹ Plaintiff asked judgment for \$20,000 damages as a direct result of the breach of the contract due to humiliation, ridicule, and mental pain and suffering. In addition, the plaintiff asked for \$40,000 in punitive damages for willful breach of the contract. It is questionable, if recovery were allowed at all, whether exemplary damages would be assessable. See McCORMICK, DAMAGES §81 (1935).

² The mere exemption of a cemetery from taxation by the state does not fix its character as a quasi-public one. *Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219 (1913), cert. den. 238 U.S. 606, 35 S.Ct. 602 (1915). Cf. *Kerr v. Enoch Pratt Library*, (4th Cir. 1945) 149 F. (2d) 212, cert. den. 326 U.S. 721, 66 S.Ct. 26 (1945). See also 52 MICH. L. REV. 153 (1953).

³ The United States Supreme Court granted certiorari in this case on April 12, 1954. 22 U.S. LAW WEEK 3256.

⁴ *Buchanan v. Warley*, 245 U.S. 60, 38 S.Ct. 16 (1917).

⁵ State statutes are cited and digested in MANGUM, THE LEGAL STATUS OF THE NEGRO, c. 3, pp. 26-77 (1940). The Constitution allows the states to refrain from passing such legislation, however. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18 (1883). An Iowa statute specifically exempts private church and fraternal cemeteries from those cemeteries which may not deny the privilege of interment solely because of the race or color of the deceased person. Iowa Acts (1953) c. 84, §§1, 8. Since this statute denies to the directors of some cemeteries the power to discriminate while allowing others freedom of action, its constitutionality might be questioned as violating the equal protection clause of the Fourteenth Amendment.

⁶ *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948); *Hurd v. Hodge*, 334 U.S. 24, 68 S.Ct. 847 (1948).

⁷ It has been held since an early date that the action of state courts and judicial officers in their judicial capacities was to be regarded as action of the state within the meaning of the Fourteenth Amendment. *Ex parte Virginia*, 100 U.S. 339 (1879).

⁸ Note 6 supra.

the recent case of *Barrows v. Jackson*.⁹ The United States Supreme Court held that such a restrictive covenant could not be enforced at law by a damage action against a co-covenantor who allegedly broke the covenant. The Court reasoned that to allow damages would be just as much a denial of equal protection to the purchaser as would be specific enforcement of the restrictive covenant. In the principal case, however, the victim of the discrimination, rather than the discriminator, brought the damage action for breach of contract. The defendant contended that the racial restrictive covenant in the contract justified his breach. Is the court's decision upholding the defense state action in enforcing the restrictive covenant? The Iowa court answered this question in the negative,¹⁰ concluding that only when the state court takes affirmative action by granting injunctions, specific performance, and other active aids, is it state action within the Fourteenth Amendment. But as the Supreme Court in *Barrows v. Jackson* pointed out, action which indirectly aids discrimination is just as clearly a denial of equal protection as specific enforcement of a restrictive covenant. In *Clifton v. Puente* a Texas court said: "It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out. No valid distinction can be predicated upon the position of a party . . . as a plaintiff or as a defendant."¹¹ If the Iowa court's refusal to allow damages constitutes state action in upholding the restrictive covenant, then in light of the Supreme Court cases¹² dealing with a state's denial of equal rights based upon an individual's race or color, the conclusion is inescapable that such action is a violation of the equal protection clause of the Fourteenth Amendment. In the principal case, the only basis¹³ for the court's denying the plaintiff recovery for breach of

⁹ 346 U.S. 249, 73 S.Ct. 1031 (1953), noted 52 MICH. L. REV. 293 (1953).

¹⁰ *Accord*, *Gaskill v. Forest Home Cemetery Co.*, note 2 *supra*.

¹¹ Tex. Civ. App. 1949) 218 S.W. (2d) 272 at 274. Plaintiff, in possession of land, brought an action in trespass to try title to the realty. Defendant, a purchaser seeking to enter the land, filed a cross-action. In the cross-action the plaintiff's defense was based on the fact that in the defendant's chain of title was a deed containing a restrictive covenant and forfeiture provision, and since the defendant was a member of the restricted class, his action could not prevail. It was held that to allow such a defense would constitute state action violative of the equal protection clause of the Fourteenth Amendment. Cf. *Claremont Improvement Club v. Buckingham*, 89 Cal. App. (2d) 32, 200 P. (2d) 47 (1948), where the court refused to issue a declaratory judgment to the effect that a restrictive covenant to forfeit the sale of land, standing alone, was valid since this would be using a state agency to enforce a restrictive covenant.

¹² *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Buchanan v. Warley*, note 4 *supra*; *Shelley v. Kraemer*, note 6 *supra*; *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848 (1950); *Barrows v. Jackson*, note 9 *supra*.

¹³ If the clause was held to be unconstitutional, estoppel could not be invoked since that doctrine cannot aid a contract which is prohibited by a constitutional provision. *American Nat. Bank v. Somerville*, 191 Cal. 364, 216 P. 376 (1923); *Deer Creek Highway Dist. v. Doumeq Highway Dist.*, 37 Idaho 601, 218 P. 371 (1923); *Awotin v. Atlas Exchange Nat. Bank*, 295 U.S. 209, 55 S.Ct. 674 (1935); *United States v. Golden*, (10th Cir. 1929) 34 F. (2d) 367.

the contract was that there was no breach since under the contract's terms no non-Caucasian could be buried in the cemetery. The opinions in *Shelley v. Kraemer* and *Barrows v. Jackson* call for a decision that the Iowa court's ruling constitutes state enforcement of a restrictive covenant.¹⁴ To hold otherwise would be to sanction discriminatory state action.

Lawrence N. Ravick

¹⁴ "The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." *Shelley v. Kraemer*, note 6 supra, at 19. See also language in Ming, "Racial Restrictions and the Fourteenth Amendment," 16 *UNIV. CHI. L. REV.* 203 at 234-235 (1949).