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CONSTITUTIONAL LAW-STATE COURT ENFORCEMENT OF RACE RESTRICTIVE COVENANTS AS STATE ACTION WITHIN SCOPE OF FOURTEENTH AMENDMENT

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COMMENTS

CONSTITUTIONAL LAW—STATE COURT ENFORCEMENT OF RACE RESTRICTIVE COVENANTS AS STATE ACTION WITHIN SCOPE OF FOURTEENTH AMENDMENT—The current housing shortage with the overcrowded living conditions and substandard accommodations which it imposes on the most numerous classes of society has made particularly significant in the competition for housing areas the discriminations generally enforced against negroes and other racial minority groups. Both normal population growth and the suspension of new construction during the great depression and the late war have contributed to an emergency in which the circumstances of our negro population are ma-

terially worse than those of any other group.[1] Aggravating this result has been the shift in negro population occasioned by the wartime demand for industrial labor, bringing large numbers of colored people from rural areas to factory centers when the demands of the war effort have made an adequate housing adjustment impossible. There can be no doubt that their relative poverty is the basic explanation for the dilapidated, congested and unsanitary living quarters in which apparently most of the negroes in the country are forced to live.[2] But a factor in this result, not the less important because it cannot be weighed exactly, is the discrimination against negro purchase or occupancy of land in more modern and better built districts and the determined opposition which meets any attempt to expand the areas of negro occupancy in the larger cities. The attitude of white property owners is in part simply race prejudice expressed in an unwillingness to have negroes as neighbors; but, more practically, it reflects the fear of a depreciation of property values produced by the white population's abandonment of any sections where negroes begin to settle.

To the unascertainable extent that this discrimination is implemented solely through social pressure no legal questions are involved; and in so far as it is achieved simply by the refusal of white property owners to lease or sell to negroes, it is no more than an exercise of their undoubted right to retain their holdings or dispose of them to purchasers of their choice. But the protection of real estate values which are deemed to depend on the exclusion of a particular race from the area clearly calls for some method of enforcing compliance with the

[1] The following periodical references are to articles which describe the national housing situation in general terms: Blandford, "Wanted: 12 million New Houses," 34 NAT. MUN. REV. 376 (1945); "Needed: Five Million Homes," N.Y. TIMES MAGAZINE, Dec. 16, 1945, p. 10-11; "Mr. Wyatt's Shortage," 34 FORTUNE MAGAZINE 105 (April, 1946).

The development leading to the present crisis in negro housing is indicated in a sketch of the problem as it existed in the early thirties in Martin, "Segregation of Residences of Negroes," 32 MICH. L. REV. 721 at 723 ff. (1934). Recent periodical treatments are contained in Kahen, "Validity of Anti-Negro Restrictive Covenants," 12 UNIV. CHI. L. REV. 198 at 202 (1945) and Weaver, "Housing in a Democracy," 244 ANNALS 95 (1945). Important books which discuss the problem are: STERNER, THE NEGRO'S SHARE 185 ff. (1943); JOHNSON, PATTERNS OF NEGRO SEGREGATION (1943); MYRDAL, AN AMERICAN DILEMMA 375 ff. (1944). Velie, "Housing: Detroit's Timebomb," COLLIERS (Nov. 23, 1946) p. 14, is a dramatic description of the current negro housing situation in a city where it has become especially serious.

[2] This is more or less admitted by every writer on the subject. Kahen, "Validity of Anti-Negro Restrictive Covenants," 12 UNIV. CHI. L. REV. 198 at 206 (1945); Weaver, "Housing in a Democracy," 244 ANNALS 95 (1946); McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements," 33 CAL. L. REV. 5 at 37 (1945). A dissent with respect to the Detroit area is recorded by Velie, "Housing: Detroit's Timebomb," COLLIERS (Nov. 23, 1946) p. 14.

discrimination by process of law, for a single sale to a colored person by a proprietor who perhaps has no further interest in the neighborhood will jeopardize the values of all the remaining properties. It is when the discrimination is sought to be given the force of law binding the individual landowners that important legal and constitutional problems arise.

An attempt to compel residential segregation on the basis of race by an act of legislature was considered by the United States Supreme Court in the landmark case of *Buchanan v. Warley*,[3] decided in 1917. This case concerned a zoning ordinance of the city of Louisville, Kentucky. Buchanan, a white property owner, sought specific performance of a contract for the sale of land to Warley, a negro, who defended on the grounds that the land was situated in a district where by the zoning ordinance he was forbidden to live. In the opinion of the court the ordinance contravened the Fourteenth Amendment in depriving the white landowner without due process of law of the valuable right to dispose of his property to whomever he wished. There was also the suggestion that the negro purchaser was denied the equal protection of the laws in being restricted in his choice of a place to live, but the proposition first stated is recognized as the rule of the case. Since that decision, zoning ordinances, however devised, that prescribe a plan of segregated occupancy based on race have received short shrift from the courts.[4]

As an alternative to the forbidden zoning ordinance in achieving the solidarity among white landowners necessary to afford any lasting protection to their properties, increasing resort has been had to restraints on sale to or occupancy by negroes imposed by conditions or covenants in deeds or by agreements voluntarily adopted by neighborhood associations. An initial difficulty with the enforcement of private restrictions on leasing or resale is the common law policy against restraints on alienation; but every appellate court in the United States which has considered the question has committed itself to the enforceability, when properly phrased, of restraints on alienation to negroes or on their use or occupancy, which amounts to the same thing.[5] The

[3] 245 U.S. 60, 38 S. Ct. 16 (1917).

[4] See for example Clinard v. Winston-Salem, 217 N.C. 119, 6 S.W. (2d) 867 (1940).

[5] Perhaps the best brief review of the common law status of private residential restrictions as related to the present question is contained in McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements," 33 CAL. L. REV. 5 at 9 ff. (1945). Professor McGovney indicates that the dozen jurisdictions in this country that have declared themselves are equally divided between those which permit an absolute restraint on alienation to negroes and those which allow only a restraint on their use or occupancy. A starting point for an exploration of the subject is 5 TIFFANY, REAL PROPERTY, 3d ed., § 1345 (1939). See also GRAY, RESTRAINTS ON

particular method employed in creating a restriction seems to make no substantial difference in its legal validity, and its obligation will equally run to bind future grantees of the land. The present discussion will be limited to the restrictive covenant where the grantee of real property undertakes expressly in his deed not to sell the deeded premises to or permit its occupancy by negroes; for this is perhaps the enforcement device most frequently encountered, and apart from an occasional detail, conclusions concerning it apply equally to the others.[6]

THE ALIENATION OF PROPERTY, 2d ed., §§31-44 (1895). One of the best longer discussions from the aspect of negro segregation is MANGUM, THE LEGAL STATUS OF THE NEGRO 148 ff. (1940). Bruce, "Racial Zoning by Private Contract," 21 ILL. L. REV. 704 (1927), and Martin, "Segregation of Residences of Negroes," 32 MICH. L. REV. 721 (1934), contain comprehensive treatments. Cases on the subject that are noteworthy for their review of the law are White v. White, 108 W. Va. 128, 150 S.E. 531 (1929), and Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938). See also the annotation to the latter case in 114 A.L.R. 1287 (1938).

[6] The legal and specifically the constitutional problems raised by the enforcement of race restrictive covenants have been the subject of a considerable amount of literature as the titles cited in the preceding footnotes indicate. The outstanding recent discussions are the law review articles of Kahen and McGovney. Any interest there may be in the present comment lies in the fact that it points to a different conclusion from that reached by those writers.

The importance of covenants in achieving residential segregation of negroes and other minorities is a much mooted question on which a word may be appopriate at this point. There are few authoritative studies of the relative amount of residential property which is restricted, and even if this were known the question would remain whether the covenants do more than ornament a structure which derives its central supports from social pressure and economic inequality. A now out-dated but still much cited investigation is MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENTS, published by the Institute for Research in Land Economics and Public Utilities (1928). Representing an examination of eighty-four typical lot deeds from better residential districts throughout the country, this study does not attempt to show the extent to which residence property was covered by race restrictive covenants; but an indication of the increasing use of race restrictions appears from the fact that of the forty deeds in the sample containing such provisions, thirty-eight were among the more recent. An article appearing in the Negro periodical, "Iron Ring in Housing," 27 THE CRISIS 205 (July, 1940), reported that 80 per cent of the city of Chicago is covered by race restrictive agreements. Though this estimate has achieved a wide currency, nothing has ever been advanced to prove that it is more than a guess. See Kahen, "Validity of Anti-Negro Restrictive Covenants," 12 UNIV. CHI L. REV. 198 at 205 (1945). Velie, "Housing: Detroit's Timebomb," COLLIERS (Nov. 23, 1946) p. 14, conveys the impression that most of Detroit is restricted but offers no figures. That economic and social forces play the dominant role in enforcing residential segregation has already been suggested. McGovney acknowledges that elimination of the covenants "will not solve the pressing need," "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements," 33 CAL. L. REV. 5 at 36 (1945); and Myrdal, reputedly the final authority on the Negro problem in America, states, AN AMERICAN DILEMMA 622 (1944), "Probably the chief force maintaining residential segregation of Negroes has been *informal* [sic] social pressure from the whites."

I

The relief ordinarily demanded by landowners seeking to prevent one of their neighbors from aliening or leasing to a negro in violation of a covenant is the equity injunction; and the decree, which under the threat of contempt proceedings evicts the colored purchaser if he has taken possession and cancels his deed while at the same time restraining his white grantor from further dealings with him, has come to represent, in the eyes of those most impressed with its unfairness, the enforcement of a discrimination by agency of law which, if cast in the form of a legislative enactment, would be admittedly unconstitutional.

There are several ways in which by an appeal to familiar equity principles, a court can sometimes be pursuaded to stay its hand.[7] Thus if the protected area or its environs has been infiltrated by colored occupiers so that its attractiveness to white purchasers has already been impaired, enforcement of the restrictions may be denied on the ground that it imposes a hardship on the owner proposing to sell without securing any real benefit to the complainant.[8] Sometimes a finding that the parties seeking the injunction have acquiesced in earlier violations, or that they themselves have violated the restrictions, or that the restriction does not form part of a general plan effectively protecting the district, will bar relief. The occasional case still arises where a covenant will be shown to have been drafted in terms which violate the rule against restraints on alienation as it is applied in the particular jurisdiction.

So far no American court has been persuaded by the argument that the covenants are contrary to public policy,[9] though the suggestion is frequently made, reflecting the feeling no doubt that the racism they manifest is out of context in a democratic society. More importantly, however, the accepted interpretation of the Fourteenth Amendment

[7] See generally 5 TIFFANY, REAL PROPERTY, 3d ed., §§ 877-87 (1939) and discussions in McGovney, id. 12 and 13, Kahen, id. 203, and Miller, "Race Restrictions on the Use or Sale of Real Property," 2 NAT. B. J. 24 at 29 ff. (1944).

[8] Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932) (relief denied because of changed conditions); Grady v. Garland, 67 App. D.C. 73, 89 F. (2d) 817 (1937) (question considered but conditions found not sufficiently changed); Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944) (case remanded for more definite findings on the character of the neighborhood).

[9] Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Chandler v. Ziegler, 88 Colo. 1, 291 P. 822 (1930); Ridgway v. Cockburn, 163 Misc. 511, 296 N.Y.S. 936 (1937); Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938); Mays v. Burgess, 79 App. D.C. 343, 147 F. (2d) 869 (1945). The language of the court in Ridgway v. Cockburn, at p. 942, is typical: "I know of no public policy which bars any group of individuals from contracting among themselves for the exclusive enjoyment of their own private property." See also the extended discussion in the recent case of Sipes v. McGhee, 316 Mich. 614, 25 N.W. (2d) 638 at 642-43 (1947).

forbidding the enforcement of residential race segregation by zoning legislation has stimulated those who most strongly oppose restrictive covenants to seek to have them brought within the same constitutional prohibition.[10] The early case of *Gandolfo v. Hartman*,[11] decided in 1892 by a federal Circuit Court for the Southern District of California is cited with reverence by the anti-covenant writers, for the court there held with disarming matter-of-factness that to enforce a covenant forbidding the leasing to Chinese would be to deny this minority the equal protection of the laws. No appeal was taken from this decision. In the course of its opinion, the court declared that "Any result inhibited by the constitutions can no more be accomplished by contract of individual citizens than by legislation, and the courts should no more enforce the one than the other,"[12] and thereby seemed to indicate that the Fourteenth Amendment should be binding on the acts of individuals. The rationale of the holding, however, is not clear. It was, of course, well settled by that time that the Fourteenth Amendment applies only to the states, and no court has since found its way to the result suggested by the *Gandolfo* case.

Corrigan v. Buckley[13] is the outstanding decision on the constitutional status of restrictive covenants. The case arose in the District of Columbia when Buckley sought to enjoin Corrigan from selling to Curtis, a negress, in violation of an indenture entered into by all the property owners of the neighborhood. A decree of the District Court for the District granting an injunction was affirmed by the court of appeals, and the defendants then sought review by the Supreme Court claiming that the action of the lower court had violated guarantees of the Fifth, Thirteenth and Fourteenth Amendments. Apart from the Thirteenth Amendment which the Court dismissed summarily as irrelevant, the theory of the appeal was that the injunction enforcing the covenant, not the agreement itself, denied the defendants either due process of law or the equal protection of the laws. Since, again, the Fourteenth Amendment has reference only to action by the states, which the Court tersely pointed out, the defendants' argument must have sought to ascribe to the injunction the quality of action by the federal government within the meaning of the due process clause of the Fifth Amendment and its equal protection implications. It must be conceded the opponents of restrictive covenants that this specific ques-

[10] McGovney and Kahen are leading exponents of this movement and their theory is endlessly echoed by other writers on the subject. See for example, 3 NAT. B. J. 364 (1945), 21 IND. L. J. 223 (1946); Weaver, "Housing in a Democracy," 244 ANNALS 95 at 102 (1946).

[11] (C.C. Cal. 1892) 49 F. 181.

[12] Id. at 182.

[13] 271 U.S. 323, 26 S. Ct. 521 (1926).

tion was not treated in the opinion. Dismissing the appeal for lack of jurisdiction, the Court found that the defendants had been given an adequate hearing and saw no basis "for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation."[14] But the defendants had sought to clothe court enforcement of a race restrictive covenant with the same constitutional significance as legislative enactment of a racial zoning ordinance, so that neither its reasonableness nor the fairness of the hearing which preceeded it could on their theory save it from constitutional invalidity.

The *Corrigan* case, however, has been taken generally to have settled any constitutional questions relating to the enforceability of race restrictive covenants.[15] There is hardly a reported case in which the application of the Fourteenth Amendment is not put in issue, although ordinarily quite imperfectly pleaded, but that the matter is dismissed by the courts with hardly a phrase.[16] The present aim of colored groups and sympathetic opinion among the whites is to carry a case to the United States Supreme Court properly presenting the question whether action of a state court in enforcing a race restrictive covenant is state action within the meaning of the equal protection or due process clause. The case of a federal court decree would present the question under the Fifteenth Amendment, but presumably a holding in either situation that the decree was governmental action would call for a similar result in the other. Support for the theory is claimed from a variety of the Supreme Court's decisions, in particular, some handed down in recent years, and it is the purpose of this discussion to examine these precedents critically to determine whether they can be so interpreted.

2

Those seeking to establish that court enforcement of a race restrictive covenant contravenes the Fourteenth Amendment have assumed that a central element of their case was to demonstrate that action by one of its courts amounted to action by the state. They therefore mar-

[14] Id. at 331-32.

[15] Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1928); Mays v. Burgess, 79 App. D.C. 343, 147 F. (2d) 869 (1945). But see the recent Michigan case of Sipes v. McGhee, 316 Mich. 614, 25 N.W. (2d) 638 at 643-44 (1947), where it is recognized apparently for the first time in the reported cases that the Corrigan decision is not an authority on this question. State courts had already reached the result of Corrigan v. Buckley in Queensborough Land Co. v. Cazeaux, 136 La. 723, 67 S. 641 (1915); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925).

[16] An exception is found in the case of Sipes v. McGhee (footnote 15, supra) where the court considers with some understanding the contention that state court enforcement of the covenants is state action within the scope of the Fourteenth Amendment, concluding, however, that it is not.

shall in support of their thesis a number of cases, some decided not long after the passage of the Fourteenth Amendment, which affirm this proposition. One of the earliest of these was *Ex parte Virginia*[17] where the judge of a state court was indicted under federal law for excluding colored citizens from the jury list. The accused sought habeas corpus from the Supreme Court on the theory that the statute on which his indictment was founded was invalid. The Court in denying the petition held that if the allegations of the indictment should be proved, the petitioner had acted for the state even though it appeared that the discrimination with which he was charged was equally in violation of state law. The equivalence of judicial action to a legislative enactment was underlined by the decision in *Strauder v. West Virginia*,[18] announced the same day, where the Court held invalid a statute of West Virginia which also barred negroes from jury service. In the later case of *Twining v. New Jersey*,[19] while the Court denied that the defendant in a criminal cause had been deprived of due process of law by an instruction to the jury permitting it to draw a prejudicial conclusion from his failure to testify, yet it admitted that "The judicial act of the highest court of the state, in authoritatively construing and enforcing its laws is the act of the state."[20] *Moore v. Dempsey*[21] and *Powell v. Alabama*[22] are well-known criminal cases where state courts were held to have denied the defendants due process of law in violation of the Fourteenth Amendment. In *Brinkerhoff-Faris Co. v. Hill*[23] a state supreme court denied the plaintiff relief on the grounds that it should have exhausted an administrative remedy which, under previous decisions of the court, had never been open to it, and resort to which had since become barred by limitations. Holding that the state court's action was a denial of due process, the United States Supreme Court declared: "The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."[24]

There probably was never any difficulty in proving that judicial action by one of its courts is action by the state. The reports are full of statements to that effect, as the cases noted indicate. But the task of those who would establish that state court enforcement of race restrictive covenants is action by the state has not been completed when they

[17] 100 U.S. 339 (1879).
[18] 100 U.S. 303 (1879).
[19] 211 U.S. 78, 29 S. Ct. 14 (1908).
[20] Id. at 90-91.
[21] 261 U.S. 86, 43 S. Ct. 265 (1923).
[22] 287 U.S. 45, 53 S. Ct. 55 (1932).
[23] 211 U.S. 78, 29 S. Ct. 14 (1908).
[24] Id. at 680.

have shown that the issuance of an injunction or the cancelling of a deed is state action. It must be possible, rather, to attribute the discrimination to the state; and this is a different matter. In the cases just discussed, the discriminations constituting a denial of equal protection in the case of *Ex parte Virginia* and the denial of due process in the *Moore, Powell* and *Brinkerhoff-Faris Co.* cases were acts of the state because what the court did or failed to do in each set of facts was the essence of the offending conduct. In the case of court enforcement of race restrictive covenants, however, the total transaction constituting the discrimination is a series of acts of which the injunction is the last, occurring after its direction has been defined by the contract rights of private litigants. Clarifying the comparison: when, as was alleged in the facts of *Ex parte Virginia,* Judge Coles arbitrarily excluded negroes from the jury list, he made use of an official position in the state judiciary and the powers derived from it to deprive colored persons of their lawful rights; his conduct was a combination of deed and conscious purpose that could have had no other result that it did. But court enforcement of a covenant reflects no prejudice against colored persons on the part of the court and is not the use of any powers of the state to discriminate against them; the court in such a case has only the administrative task of enforcement which would follow in the same way if the covenants imposed building restrictions instead of a plan of segregated racial occupancy.

It is perfectly true that the covenants take life from court enforcement and that without it the discrimination they implement would wholly fail. But it is imprecise analysis to conclude that the discrimination has therefore been lent the authority of the state. State action cannot properly be conceived of as extending beyond its conscious policy and the policy in these facts ends with the enforcement of contractual undertakings or with the protection of property interests where the covenant is treated as an equitable servitude. The discrimination of an individual landowner who, as a matter of personal choice, refuses to sell or lease to a negro owes as much to the authority of the state as that of a land-owner who enforces a restrictive covenant against another.[25] In

[25] This significant point, which should occur to anyone writing on the constitutionality of court enforcement of race restrictive covenants, has in fact seldom been made in discussions of the subject. The language used in Martin, "Segregation of Residences of Negroes," 32 MICH. L. REV. 721 at 731 (1934), well states the argument: "In as much as the discrimination of one individual against another may depend for its effectiveness on the laws and sanctions of the state it is difficult to determine when the activity of the state is so secondary as not to be within the constitutional interdiction." The point is also emphasized in a note in 35 YALE L. J. 755 (1926) to Torrey v. Wolfes, (App. D.C. 1925) 6 F. (2d) 702, a run of the mill restriction case, and Keltner v. Harris, (Mo. 1917) 196 S.W. 1 is cited as pertinent authority. In the latter case a white agent acting for a negro purchaser, knowing that the vendor would

the latter case state action takes the dramatic form of an injunction, but the discrimination in the former depends on police protection and the remedies of trespass and ejectment. The logic of those who attribute the discrimination effected by race restrictive covenants to the state would require them to argue that, in protecting the property rights of one who refused to sell to a negro, the state was denying the negro the equal protection of the laws.

3

Regarded by the opponents of race restrictive covenants as favorable auguries for the success of their cause have been several decisions of the Supreme Court in recent years where the common law of various states as interpreted by their highest courts has been found to infringe the right of free speech in violation of the Fourteenth Amendment. The relevance of these decisions to the question at hand is founded on the assumption that the enforceability of the covenants can be deemed a substantive provision of the common law, it then following necessarily that giving effect to any such provision is state action. In *Cantwell v. Connecticut*[26] a conviction for inciting to riot and in *Bridges v. California*[27] a conviction for contempt of court, common law offenses of those jurisdictions, were held by the Supreme Court to inhibit free speech unjustifiably in the particular circumstances of each case. *American Federation of Labor v. Swing*[28] involved a labor injunction sanctioned by an interpretation of the common law of Illinois to prohibit peaceful picketing of an employer unless his own employees were in dispute with him. The common law so interpreted was held similarly to conflict with the Fourteenth Amendment. But the application of these cases to the constitutionality of enforcing race restrictive covenants depends upon the initial assumption, which is fallacious. The difficulty of attributing the discrimination effected by the covenants to the enforcing tribunal is not to be escaped by pretending that it forms an element of the common law from which the right to enforcement is derived. The common law is simply the policy of the state in certain of its aspects, and, as was observed previously, that policy as seen in respect to these facts looks no farther than to the protection of property

not willingly have conveyed to a negro, fraudulently represented himself as the vendee and obtained a deed for his principal. Decreeing cancellation of the deed, the court declared (at p. 2) that ". . . no man is bound to sell his property to a proposed purchaser, whose presence is unsatisfactory to him as a neighbor, whether he be white, black or any other color." See also People v. Forest Home Cemetery Co., 258 Ill. 36, 101 N.E. 219 (1913).

[26] 310 U.S. 296, 60 S. Ct. 900 (1940).

[27] 314 U.S. 252, 62 S. Ct. 190 (1941).

[28] 312 U.S. 321, 61 S. Ct. 568 (1941).

and contract rights. It is as unreal to represent the lawfulness of an agreement prohibiting the sale or leasing to negroes as a specific provision of the common law as it would be to so describe the lawfulness of any other bargain which private individuals may make.

Suggested by this misconstruction of the common law, the theory has been advanced that a test of the validity of court enforcement of the covenants would be afforded by a statute embodying the supposed common law provision in an express enactment that covenants against sale to, or occupancy by, particular races should be lawful and enforceable. When the weakness of this interpretation of the common law has been perceived, however, it is clear that it would not be inconsistent with the validity of enforcing the discriminatory covenants to admit that the hypothetical statute might be unconstitutional.[29] Such a statute would differ from the common law in extending the policy and sanction of the state beyond the mere protection of property or contract rights to the very act of discrimination, and as such it might be held inconsistent with a theory of government which notices no distinction between citizens based on race and with the expression of that theory in the Fourteenth Amendment. It might then be said that the discrimination itself was authorized and encouraged by the state; but because the results in a particular fact situation would be the same it does not become permissible to disregard the substantial difference between the state's responsibility under the hypothetical statute and the situation where it simply enforces a private contract.

4

The case of *Steele v. Louisville & Nashville Railroad Co.*[30] and the Texas primary decisions from *Nixon v. Herndon*[31] to *Smith v. Allwright*[32] have also been enlisted by some of the anti-covenant writers in support of their cause.[33] It is argued that these cases, interpreted to broaden the concept of government action to include that of private individuals in certain circumstances, establish beyond dispute that there is state action when a court, one of its official agencies, enforces a discriminatory covenant. In *Steele v. Railroad* a railroad brotherhood had discriminated against colored employees in a collective agreement it

[29] However, Bowman in a consideration of this hypothesis in his early article, "The Constitution and Common Law Restraints on Alienation," 8 BOST. UNIV. L. REV. 1 (1928), concludes that the suggested statute would be constitutional on the authority of Corrigan v. Buckley.

[30] 323 U.S. 192, 65 S. Ct. 226 (1944).

[31] 273 U.S. 536, 47 S. Ct. 446 (1927).

[32] 321 U.S. 649, 64 S. Ct. 757 (1944).

[33] This theory is one argued by Kahen, "Validity of Anti-Negro Restrictive Covenants," 12 UNIV. CHI. L. REV. 198 at 210 ff. (1945).

had made with defendant company. The Supreme Court interpreted the Railroad Labor Act to forbid such discrimination, holding that if the act could be said to authorize it, constitutional issues under the Fifth Amendment would be raised. Since the union derived its power to represent the employees from the statute, it is to be expected that it should be bound by the same limitations that apply to the empowering government. *Smith v. Allwright* is famous as the last of four cases dealing with attempts by the Democratic party of Texas to withhold the party ballot at primary elections from colored voters. Overruling *Grovey v. Townsend*,[34] the Court decided that the action of the Texas Democratic convention in denying negroes the primary ballot was a discrimination attributable to the state because of a statutory scheme imposing responsibilities and regulations on the party which made it "an agency of the state in so far as it determines the participants in a primary election."[35] The difference between this case and *Steele v. Railroad* is that the question had become constitutional rather than statutory as the result of a state supreme court's holding that the party action was in conformity with state law, but since this was the case there is no difficulty in the court's determination that the state should be held responsible for the discrimination made by an instrumentality employed to effect a governmental purpose.

Steele v. Railroad and *Smith v. Allwright* have no significant bearing on the constitutionality of enforcing race restrictive covenants. Authority is not needed to prove by analogy that the action of a court in issuing an injunction is action of the state; that proposition is more than sufficiently supported by decisions directly in point. The unsolved problem of those opposed to the covenants is how to ascribe their discriminatory effect to the enforcing instrumentality, and on this vital issue the *Steele* and *Smith* decisions are of no assistance. The regulation of collective bargaining and the conduct of primary elections are examples of government business directed to a purpose which specific policy defines. It is to be anticipated that constitutional limitations on the state should extend to the farthest reach of its policy by whatever means that policy is implemented. But the state has no policy which is served when a court enforces a private agreement forbidding the sale or lease of real estate to colored persons.

5

In the case of *Marsh v. Alabama*,[36] decided in 1946, the opponents of race restrictive covenants have the precedent most nearly supporting

[34] 295 U.S. 45, 55 S. Ct. 622 (1935).

[35] Smith v. Allwright, 321 U.S. 649 at 663, 64 S. Ct. 757 (1944).

[36] (U.S. 1946) 66 S. Ct. 276. The case of Tucker v. State of Texas, (U.S. 1946) 66 S. Ct. 274, decided the same day, arose from similar facts and is equally in point.

their position. A state statute of Alabama made it a criminal offense for one to enter or remain on private property after having been warned by the owner not to do so. Grace Marsh, a member of Jehovah's Witnesses, sought to distribute religious literature in a company town owned by the Gulf Shipbuilding Corporation and refused to cease her activity and depart when requested by company officials. Her conviction under the statute followed and was affirmed by the Supreme Court of Alabama which found that the Shipbuilding Corporation had not dedicated its property to the public and was entitled to the protection of the statute. On appeal to the United States Supreme Court, the conviction was reversed on the ground that the state statute on the particular facts unconstitutionally deprived the defendant of freedom of speech. Since the town managers representing the private interest of the corporation had forbidden the defendant to continue her distributions on the premises, and since it was at their instance that the machinery of the criminal law had been put in motion, it was not long before an analogy was claimed between the facts of the *Marsh* case and the enforcement at the instance of private persons of a race restrictive covenant. While the Court had in fact condemned a criminal statute, one writer could say it had "...concluded that even though the company had retained title to all of the land within the community, its attempt to prohibit the distribution of religious pamphlets in the streets of the town was an invasion of rights guaranteed by the First and Fourteenth Amendments." [87] Although the quoted statement is a patent misinterpretation of *Marsh v. Alabama* in representing that the Court found action of a private corporation to violate the Fourteenth Amendment, it is not necessary for the anti-covenant group to go so far as to use the *Marsh* decision in their brief. There is no need to reconstrue the Fourteenth Amendment to apply to the acts of private persons if the enforcement by a court of a discriminatory covenant can be construed to be state action. It is certainly arguable that the *Marsh* case is a finding of state action in an analogous fact situation, for there a criminal statute was held unconstitutional when its sanction was extended to the discrimination of a private landowner seeking to evict a trespasser.

A careful reading of *Marsh v. Alabama*, however reveals an element in the Court's emphasis which points a distinction between the facts of that case and that of a race restrictive covenant. The Court clearly sought a justification for its result in the fact that the sanction of a criminal statute was invoked against the defendant. The issue stated was "whether a state consistently with the First and Fourteenth Amendments, can impose criminal punishment on a person who under-

[87] Taft, "Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants," 4 NAT. B. J. 133 at 133-134 (1946).

takes to distribute literature on the premises of a company owned town contrary to the wishes of the town's management."[38] The same language is echoed in the conclusion, and it is an allowable inference that the Court would have reached a different result if a civil action for trespass had been all that was involved. In terms of constitutional theory the Court might have felt that the enforcement of a criminal statute was state action in circumstances where the enforcement of civil remedies would not be. There is a sound basis for the distinction. The theory of civil remedies is that the interest of the state in the protection of property and contract rights is ordinarily secondary to that of the individual citizen, that the extent to which the protection of the law is obtained for them is largely discretionary with him, and that the sanction of private damages adequately safeguards them. As compared with the implementing of civil remedies, a criminal statute is an expression of state policy of a much higher order. In theory the state pursues purposes of its own in criminal legislation and is itself chiefly offended when such statutes are violated. Thus it could easily be said that where a criminal statute is turned to the service of what are usually classified as private rights it adopts as the policy of the state the motives of the private interests which call for its enforcement. Some reasoning such as this could well be the explanation for *Marsh v. Alabama*. In so far as the state had armed the town managers with a criminal penalty for securing company property against trespassers, it reached out and embraced what the managers sought to effect by means of the penalty; and one of their purposes was to inhibit free speech.

The Court in *Marsh v. Alabama* probably based its decision, however, on another element in that case which distinguishes it from the restrictive covenant situation. Though unable to contest the Alabama Supreme Court's denial that the Shipbuilding Corporation had made a public dedication of its property, still the Court attached great significance to the fact that the corporation for its own advantage had opened its land to the public and felt that its rights as a private landowner were circumscribed by the civil rights of the people it accommodated. Thus whether the state trespass statute would be held unconstitutional if invoked by a private householder against a trespassing Jehovah's Witness was not decided, and the meaning of the decision in the race restrictive covenant context is again cast into doubt.[39] Therefore, although the *Marsh* case could be used as a precedent for holding that state court enforcement of a restrictive covenant is action by the state, it developed

[38] Marsh v. Alabama, (U.S. 1946) 66 S. Ct. 276 at 277.

[39] Of importance in this connection is the indication of the Supreme Court in Martin v. Struthers, 319 U.S. 141 at 148, 63 S. Ct. 862 (1943), that a statute would not be invalid which imposed punishment on a solicitor trespassing on the premises of a private householder after a warning to stay off.

from a materially different situation and in fact no more than suggests that possibility.

What is action by the state and where it ceases is an interesting speculation in political philosophy.[40] In a final sense, state action permeates society, for the existence of any thing and the action of any individual or group is permitted, commanded or forbidden by the state: it can be fairly said that everything in the social organism takes character from its relation to the central collective purpose manifested by the government. But a distinction is made in the common understanding between action by the state and the action of private persons and it is in terms of this distinction that the Fourteenth Amendment has been held to speak. Perhaps the only logical principle on which to found the distinction is to attribute that action to the state which embodies a purpose of the government or of one entrusted with its authority which is separable from the purposes of private individuals. It may be difficult in particular cases to say whether action by the state or a private person is primarily responsible for a result; but every concept blends into others at some point in the melange of the law, and what we must treat in practice as vitally different ideas owe their singularity at least to a distinction between borderline cases. If it should be held that court enforcement of race restrictive covenants is state action, the basis for this distinction would be obscured; and on the theory that the state is sanctioning final consequences whenever it protects a citizen in the exercise of any of his property or contract rights, the Fourteenth Amendment would emerge with unforseeable implications for our daily lives.

A safer way to eliminate race restrictive covenants would be to deny them enforcement on the ground that they are contrary to public policy.[41] This should be a possibility at least in certain northern states where public policy is expressed in civil rights acts which forbid segregation and require equal treatment of all races in places of public accommodation.[42] So far, however, as has been observed, the courts have refused to take this position.

[40] See the valuable discussion in Hale, "Force and the State," 35 COL. L. REV. 149 (1935) particularly at 199, with reference to some of the ideas suggested in the paragraph that follows.

[41] A Canadian court has so decided in Re Drummond Wren, (Ont. H.C.) [1945] 4 D.L.R. 674, where, on the application of a landowner, a covenant in his deed by which he had agreed not to convey to Jews or "persons of objectionable nationality" was declared void as in conflict with the public policy expressed in Dominion and Provincial legislation.

[42] Civil rights legislation is discussed in MANGUM, THE LEGAL STATUS OF THE NEGRO 34 ff. (1940) where it is reported that eighteen states have acts plainly directed to the problem of racial discrimination. That such legislation has no direct application

The striking fact about the attack on court enforcement of race restrictive covenants is the unlikelihood that a statute outlawing such covenants could be obtained in any jurisdiction in the country.[43] This stamps the current agitation as a conscious plea for judicial legislation. As a comment on method this suffices in itself, but more significantly it glimpses the limitations that public opinion imposes on the efficacy of any reform.

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to the legality of race restrictive covenants was held in Ridgway v. Cockburn, 163 Misc. 511, 296 N.Y.S. 936 (1937).

[43] Unsuccessful attempts in the Illinois legislature to ban race restrictive covenants by statute are related to Kahen, "Validity of Anti-Negro Restrictive Covenants," 12 UNIV. CHI. L. REV. 198 at 210 (1945). It is argued in Miller, "Race Restrictions on the Use or Sale of Real Property," 2 NAT. B. J. 24 (1944) that legislative reform is inadequate because it could not constitutionally be retroactive and would leave existing restrictions in force.

The concurring opinion of Justice Traynor in Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2) 260 (1944), cited in footnote 7, supra, is an enlightened discussion of the considerations that should weigh with a court presented with a suit to enforce a race restrictive covenant. Displaying a broad and sympathetic understanding of the negro problem, Justice Traynor stresses the pertinence of "all the factors that affect the public interest" (p. 834); but he also emphasized that "The problem of race segregation cannot be solved by the courts alone, for it involves emotions and convictions too deeply embedded in the social outook of men to be uprooted overnight by Judicial pronouncements." (P. 833.)