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RESTRICTIVE COVENANT CASES REVIEWED

RICHARD C. BAKER*

Three years ago the United States Supreme Court decided the celebrated cases of *Shelley v. Kraemer* and *Hurd v. Hodge*.¹ These cases dealt with certain restrictive covenants in conveyances, which were directed against the ownership and use of land by Negroes in the states and in the District of Columbia. The Court held that the covenants themselves were valid, but that an effort to enforce them by the judiciary was void. It maintained that such an attempt by a state court would constitute a denial of the equal protection of the law, while similar action by a federal tribunal in the Capital area would be contrary to the public policy of the national government.

It is charged by many that these decisions really represented the sociological predilections of the justices rather than the prevailing opinion of a constitutional majority of the people.² The allegation is that the court disregarded public sentiment in the matter, and imposed on the nation a mode of conduct which it had not sought. If the court, it is argued, had shown a decent respect for the long established customs and practices of the populace, an almost unbroken line of previous court rulings and the consistent attitude of the legislative bodies, it would never have tampered with racial covenants.

Agreements of this nature have been used in the United States since 1872,³ and probably longer, though it was not until after World War I that they came before the courts in considerable numbers. In one of the few pre-war cases,⁴ a United States Circuit Court had held that the enforcement of such stipulations contravened the equal protection clause, but this decision stood alone and never became a precedent. Subsequent federal courts⁵ invariably supported both the covenants and their judicial enforcement.

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1. 334 U. S. 1 (1948); 334 U. S. 24 (1948).

2. Generally speaking, a constitutional majority of the people is one which expresses itself through a two-thirds vote in each house of congress and majority votes in each chamber of three-fourths of the state legislatures. It would be possible for this majority actually to represent a minority of the people, but on most occasions it has reflected the opinion of a major segment of the population.

3. *Anthony v. Stephens*, 46 Ga. 241 (1872).

4. *Gandolfo v. Hartman*, 49 Fed. 181 (C. C. Cal. 1892).

5. *Corrigan v. Buckley*, 271 U. S. 323 (1925); *Torrey v. Wolfes*, 6 Fed. 2d 702 (D. C. Cir. 1925); *Castleman v. Avignone*, 12 Fed. 2d 326 (D. C. Cir.

The state tribunals likewise had been in the habit of sanctioning these contracts. One group of state courts sustained those which applied to the use of real property,⁶ while another upheld the type which pertained to both use and ownership.⁷ Several judicial groups of the first category probably would have approved covenants relating to ownership also, had the question of their validity been pleaded. Three state benches⁸ acknowledged the legality of racial limitations against use but ruled out those barring ownership as being unlawful restraints upon alienation. All told, the judiciaries of about 20 states

1926); *Russell v. Wallace*, 279 U. S. 871 (1929); *Cornish v. O'Donahue*, 279 U. S. 871 (1929); *Edwards v. West Woodbridge Theatre Co., Inc.*, 55 Fed. 2d 524 (D. C. Cir. 1931); *Grady v. Garland*, 302 U. S. 694 (1937); *Hundley v. Gorewitz*, 132 Fed. 2d 23 (D. C. Cir. 1942); *Mays v. Burgess*, 147 Fed. 2d 869 (D. C. Cir. 1945); *Hurd v. Hodges*, 162 Fed. 2d 233 (D. C. Cir. 1947).

6. *Wyatt v. Adair*, 215 Ala. 365, 110 So. 810 (1926); *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Janss Investment Co. v. Walden*, 196 Cal. 753, 239 Pac. 34 (1925); *Forest Lawn Association v. de Jarnette*, 79 Cal. App. 601, 250 Pac. 581 (1926); *Wayt v. Patee*, 205 Cal. 46, 269 Pac. 660 (1928); *Littlejohns v. Henderson*, 111 Cal. App. 115, 295 Pac. 95 (1931); *Letteau v. Ellis*, 122 Cal. App. 584, 10 Pac. 2d 496 (1932); *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 146 Pac. 2d 720 (1944); *Stone v. Jones*, 66 Adv. Cal. App. 313, 152 Pac. 2d 19 (1944); *Fairchild v. Raines*, 24 Adv. Cal. App. 812, 151 Pac. 2d 260 (1944); *Meade v. Dennistone*, 173 Md. 302, 196 Atl. 330 (1938); *Parmalee v. Morris*, 218 Mich. 625, 188 N. W. 330 (1922); *Shultes v. Starks*, 238 Mich. 102, 213 N. W. 102 (1927); *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. 2d 638 (1946); *Thornhill v. Herdt*, (Mo. App. 1939) 130 S. W. 2d 175 (1939); *Kraemer v. Shelley*, 355 Mo. 814, 198 S. W. 678 (1946); *Ridgway v. Cockburn*, 163 Misc. 511 (1937), 296 N. Y. S. 936; *Phillips v. Wearn*, 226 N. C. 290, 37 S. E. 2d 895 (1946); *Doherty v. Rice*, 240 Wisc. 389, 3 N. W. 2d 734 (1942).

7. *Chandler v. Zeigler*, 88 Colo. 5, 291 Pac. 822 (1930); *Stewart v. Cronan*, 105 Colo. 392, 98 Pac. 2d 999 (1940); *Dooley v. Savannah Bank and Trust Co.*, 199 Ga. 353, 34 S. E. 2d 522 (1945); *Burke v. Kleiman*, 277 Ill. App. 519 (1934); *Lee v. Hansberry*, 372 Ill. 369, 24 N. E. 2d 37 (1939); *Clark v. Vaughan*, 131 Kan. 438, 292 Pac. 783 (1930); *United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 108 S. W. 2d 507 (1937); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Koehler v. Rowland*, 275 Mo. 573, 205 S. W. 217 (1918); *Porter v. Johnson*, 232 Mo. App. 1150, 115 S. W. 2d 529 (1938); *Porter v. Pryor*, 164 S. W. 2d 353 (1942); *Swain v. Maxwell*, 355 Mo. 448, 196 S. W. 2d 780 (1946); *Lion's Head Lake v. Brzezinski*, 23 N. J. Misc. 290, 43 A. 2d 729 (1945); *Dury v. Neeley*, 69 N. Y. S. 2d 677 (1942); *Kemp v. Rubin*, 188 Misc. (N. Y.) 310, 69 N. Y. S. 2d 680 (1947); *Vernon v. Realty Co.*, 226 N. C. 58, 36 S. E. 2d 710 (1946); *Lyons v. Wallen*, 191 Okla. 567, 133 Pac. 2d 555 (1942); *People's Pleasure Park Co. v. Rohleder*, 109 Va. 439, 61 S. E. 794 (1908); *Perkins v. Trustees of Monroe Ave. Church of Christ*, 79 Ohio App. 457, 70 N. E. 2d 487 (1946), app. dism. 147 Ohio St. 537, 72 N. E. 2d 97 (1947); *Crump v. Perryman*, 193 S. W. 2d 233, (Civ. App. Tex., 1946). See D. O. McGovney, *Racial Residential Segregation*, 33 CALIFORNIA LAW REVIEW 4 (1945); Isaac N. Groner and David M. Helfeld, *Racial Discrimination in Housing*, 57 YALE LAW REVIEW 426 (1947).

8. California, Michigan and West Virginia. See *Los Angeles Investment Co. v. Gary*, *supra*; *Title Guarantee & Trust Co. v. Garrott*, 42 Cal. App. 152, 183 Pac. 470 (1919); *Stratton v. Cornelius*, 99 Cal. App. 8, 277 Pac. 893 (1929); *Foster v. Stewart*, 134 Cal. App. 482, 25 Pac. 2d 497 (1933); *Porter v. Barrett*, 233 Mich. 373, 206 N. W. 532 (1925); *White v. White*, 108 W. Va. 128, 150 S. E. 531 (1929).

sanctioned racial bans in deeds and leases in one form or another, whereas only one, that of Pennsylvania,⁹ condemned all such restrictions regardless of the kind of tenure involved.

Prior to the 1948 decisions, the state legislatures, like the courts, had showed a strong disposition to accept racial covenants. All forty-eight, except perhaps that of the Quaker State, inferentially recognized such provisions by failing to declare them void. A number gave added evidence of their approval of this particular species of discrimination by prohibiting many other forms but leaving this one untouched. In New Jersey, for example, as noted by one of its courts in 1945,¹⁰ the lawmakers had banned color discrimination as to jury service, employment practices, labor on public works and hiring in defense industries, but had declined to interdict those in covenants.

The New York courts found an analagous situation in the Empire State. They discovered that over a period of years the legislature had enacted a series of laws condemning certain racial barriers, but had never proscribed the use or enforcement of covenants which drew the color line.¹¹ The closest that body ever came to doing the latter occurred in 1945, when it forbade racial and religious discriminations by low-cost housing groups obtaining state financial aid.¹² During the next three years, however, it turned down bills to prevent similar discriminations in redevelopment projects handled by private companies which received assistance from the state through its condemnation powers.¹³ Moreover, it rejected in 1947 a proposal to amend the state's Civil Right Laws to make it read: "The opportunity to purchase and to lease real property without restriction because of race, creed, color or national origin is hereby recognized and declared to be a civil right".¹⁴ Since the constitution of 1938¹⁵ provided that no person should discriminate against another

9. *Ellsworth v. Stewart*, 9 *ERIE CO. LAW JOURNAL* 305 (1928); *Yoshida v. Gelbert Improvement Co.*, 58 Pa. D. & C. 321 (1946).

10. *Lion's Head Lake v. Brzezinski*, note 7, *supra*.

11. *Kemp v. Rubin*, note 7, *supra*; *Dorsey v. Stuyvesant Town Corporation*, 190 Misc. (N. Y.) 187, 74 N. Y. S. 2d 220, 299 N. Y. 517, 87 N. E. 2d 541, 339 U. S. 981 (1950); *Pratt v. La Guardia*, 182 Misc. (N. Y.) 462, 268 A. D. 973, 294 N. Y. 842.

12. *MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK*, Book 44-A, PUBLIC HOUSING LAW, § 223; *Pratt v. La Guardia*, note 12, *supra*.

13. *MCKINNEY'S UNCONSOLIDATED LAWS OF NEW YORK*, Book 65, § 3401; *Groner and Helfeld*, note 7, *supra*; *Dorsey v. Stuyvesant*, note 12, *supra*; *Pratt v. La Guardia*, note 12, *supra*; *Kemp v. Rubin*, note 7, *supra*.

14. *Groner and Helfeld*, note 7, *supra*; *Kemp v. Rubin*, note 7, *supra*.

15. *NEW YORK STATE CONSTITUTION*, Article I, § 11. The text of the section reads: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any

in his civil rights on the grounds of race, the passage of the above amendment would have invalidated all racial covenants.

Of equal importance in indicating the public sentiment of New York state towards this sort of contract was the attitude of the 1938 constitutional convention. Several attempts were made to induce that assembly to include in the new basic law clauses denying state or local aid for slum clearance to any public corporation or public limited dividend housing company which should discriminate against a tenant on account of race, color or creed;¹⁶ but all of these efforts proved futile. Still more noteworthy was the unwillingness of the convention to adopt a section which would have declared unqualifiedly that racial covenants were contrary to the public policy of the state and hence unenforceable. "No person shall because of race, color or creed," ran this proposal, ". . . be denied the right to own, possess and enjoy any dwelling, room, or other premises . . . Any provision in any deed, agreement, or promise contrary to any of the provisions of this section shall be deemed contrary to the public policy of the state and void, and shall not be enforceable in any court . . ." ¹⁷

The legislature of Illinois handled the matter in a manner similar to that of the New York legislature. It, too, in the past, had banned racial discriminations in certain fields,¹⁸ but, save in one minor respect, had always refrained from interfering with those in covenants. As late as 1941 and 1943, it had declined to adopt several measures, some of which would have rendered illegal racial segregation in public housing, and others of which would have voided deeds and leases forbidding ownership or occupancy of real estate on grounds of race or color.¹⁹ It did, in 1947, put on the statute books the Blighted Area Development Act, one section of which decreed that "no deed of conveyance by the Land Clearance Commission or any subsequent owner shall contain a covenant running with the land or any other provisions prohibiting occupancy of the premises by any person because of race, creed or color".²⁰ But, as is quite evident,

person, or by any firm, corporation, or institution, or by the state or by any agency or subdivision of the state".

16. NEW YORK STATE CONSTITUTIONAL CONVENTION, 1938, Proposed Amendments: Proposals Nos. 10, 18, 203, 691. See note 12 for statute denying state financial aid to groups indulging in racial discrimination.

17. *Ibid.*, Proposals Nos. 49, 675.

18. ILLINOIS REVISED STATUTES, 1949, chap. 38, §§ 125, 128h-128k, also chap. 36-11.

19. Harold L. Kahen, *The Validity of Anti-Negro Restrictive Covenants: a Reconsideration of the Problem*, 12 UNIVERSITY OF CHICAGO LAW REVIEW, 210, footnote 50.

20. ILLINOIS REVISED STATUTES, note 18, *supra*, chap. 67½, § 82.

this provision applied solely to occupancy and not to ownership, and related only to those conveyances to which the state was a party in some respect.

A situation somewhat parallel to the ones just mentioned existed in Michigan and Minnesota. In Michigan, there were various statutes on the subject of race bias such as those outlawing discrimination in public educational and mental institutions, in places of accommodation and amusement and in the matter of issuing insurance policies, but none had ever been passed annulling racial covenants.²¹ In Minnesota, the law²² strongly denounced discrimination in real property transactions based on religious faith or creed but omitted any reference to those grounded in race.

A state's attitude on the subject of restrictive covenants is indicated to a considerable extent by its general feeling toward racial segregation. As is common knowledge, on the eve of the covenant decisions, all of the southern and a few of the border states had been requiring for years the separation of the races on a fairly broad scale. But, more significantly, a number of northern states had been following a similar course, though to be sure to a somewhat lesser degree. Those in the latter group stressed mostly their opposition to interracial marriages and to mixed schools.²³ Some states, no doubt, would also have decreed residential segregation had they not been restrained by the somewhat incongruous Supreme Court decision of *Buchanan v. Warley* of 1917,²⁴ which prohibited this practice.

21. *Sipes v. McGhee*, note 6, *supra*. See also note 8 for Michigan's attitude toward covenants which were restraints upon alienation.

22. MINNESOTA STATUTES, Annotated, § 507.18. Subdivision one of this section provides: No written instrument hereafter made, relating to or affecting real estate, shall contain any provision against conveying, mortgaging, encumbering or leasing any real estate to any person of a specified religious faith or creed, nor shall any such instrument contain any provision of any kind or character discriminating against any class of persons because of their religious faith or creed. . .

23. California, Idaho, Indiana and Oregon, to mention a few northern states, voided marriages between white and colored people. See CIVIL CODE OF CALIFORNIA, 1941, §§ 60, 69, also CODE OF 1949; IDAHO CODE, § 32-206; BURNS INDIANA STATUTES, Annotated, § 10-4222; OREGON COMPILED LAWS, Annotated, § 63-102. Arizona compelled racial separation in primary grades, and placed it on a permissive basis in high schools. New Mexico, Wyoming, Kansas and Indiana gave local school boards authority to establish separate schools for Negroes. See Maurice R. Davie, *Negroes in American Society*, McGraw Hill, 1949, p. 145. In 1949, local school boards of Indiana lost the power to segregate children in schools. See BURNS INDIANA STATUTES, § 28-5104.

24. 245 U. S. 60. In this case, the Supreme Court had voided as a violation of due process a city segregation ordinance enacted under the city's police power. The Court here was particularly solicitous about protecting the property right to buy and sell real estate without restriction, and threw the police regulation out because it conflicted with this right. But it is difficult to understand why if the police power could be invoked constitutionally, as it had been time and time again, to prevent race friction in public conveyances, it could not be

The question might be asked at this point, why racial covenants had not been wiped out by statute a long time ago. Perhaps the best answer is that the legislators knew that their constituents did not want them eliminated. Arnold Forster, civil rights director of the Anti-Defamation League of B'nai B'rith, recently conducted a poll among college students, which would seem to lend support to this explanation. According to his survey, "an encouraging number" of students did not want to set any limits, short of actual inter-marriage, to their associations with minorities. Furthermore, nearly 80 per cent of the non-Jewish seniors said that it would make no difference to them if a member of a minority group worked beside them, while 70 per cent declared that they would be willing to entertain any of them in their homes. Mr. Forster admitted, however, that "when it was proposed to move a minority group into a neighborhood, the shoe really began to pinch", though even here he found that "47 per cent said they would not object".²⁵ But if this last figure is correct for college students, who are generally credited with a high degree of tolerance, the percentage for the less educated groups would doubtless be well below the 40 mark.

Stymied in their efforts to get the legislators, and more particularly the courts, to declare racial covenants void, the opponents of these covenants pursued a new tack. They undertook, and were able, to persuade the Supreme Court to hold that the judicial enforcement of such covenants constituted a type of state action which fell under the ban of the equal protection clause. To buttress their position, both they and the court cited a number of former Supreme Court decisions as precedents.²⁶ But what all of these people, including the justices, failed to recognize was that those decisions dealt with the judicial enforcement of the state's own public policy and not that of purely private contracts. Where public policy is in question, the state is a primary actor and has what might be called a "personal" interest at stake, while in the case of a valid agreement such as a restrictive covenant, it merely assumes the role of a neutral third

used for the same purpose in residential areas. Moreover, it is hard to see why the right to purchase a particular piece of real property should be given such a higher degree of protection than the right to occupy a specific unused seat in a bus or school.

25. Arnold Forster, *A Menace to Freedom*, Look Magazine, April 11, 1950, p. 13.

26. Arthur T. Martin, *Segregation of Residence*, 32 MICHIGAN LAW REVIEW 721 (1934); Edward F. Waite, *The Negro in the Supreme Court*, 30 MINNESOTA LAW REVIEW 219 (1946); D. O. McGovney, note 7, *supra*; Harold L. Kahen, note 19, *supra*; Shelley v. Kraemer, note 1, *supra*.

party, which enforces the agreement without any concern for the racial or other factors that might be involved.²⁷

A case often quoted by the anti-covenanters on this point was *Virginia v. Rives*,²⁸ decided in 1879. They stressed that portion of the opinion in which the Supreme Court had said: "It is doubtless true that a State may act through different agencies either by its legislature, its executive, or its judicial authorities; and the prohibition of the amendment extends to all actions of the State denying equal protection of the laws, whether it be action by one of these or by another". But the situation which prompted the court to make this observation was concerned entirely with the public policy of the state, and had nothing to do with private discrimination. Two Negroes under indictment asked the trial court in Virginia to modify an all-white panel so that one-third of it would consist of colored men. Otherwise, they claimed, they would be deprived of equal protection. The Virginia Judge, however, denied their motion, declaring in effect that it would be contrary to the state's policy to apportion jurors on a racial basis. The Supreme Court held with him since it was unable to find any intentional discrimination against the Negroes.

In the well-known case of *Twining v. New Jersey*,²⁹ a defendant took exception to the judge's charge that the jury might consider the failure of the accused to take the witness stand in his own defense. The defendant argued that the state, acting through the court, was thus denying him the right of exemption from self-incrimination, which right was protected by the Fourteenth Amendment. Regardless of the merits of this contention, it is quite obvious that all that the judge was doing was voicing the policy of the state as he saw it; as in the previous case, he was not trying to enforce a private contract. The Supreme Court, incidentally, rejected the defendant's plea and sustained the judge.

Another case put forth by this group was *Brinkerhoff-Faris Trust and Savings Company v. Hill*.³⁰ Here, a lower court denied a taxpayer an injunction to prevent the collection of an alleged discriminatory assessment by a tax board. The court asserted that the petitioner had been guilty of laches in that he had failed to file a complaint against the discrimination with the state tax commission before the tax books had been sent to the collector. The highest court of the state, however, had ruled prior to the *Brinkerhoff-Faris* case

27. Note, 45 MICHIGAN LAW REVIEW 733, 741 (1947).

28. 100 U. S. 313 (1879).

29. 211 U. S. 78 (1908).

30. 281 U. S. 673 (1929).

that the commission had no authority to receive or act on such a complaint, but later, after the filing time in this case had expired, had reversed itself and found that this body possessed the necessary power. In short, the upper court had declared the policy of the state to be one thing on one occasion and something else on another, thereby making it impossible for the petitioner to comply with the required procedure. This type of judicial action, said the Supreme Court, was a denial of due process.

The other cases³¹ dealing with this question also pertained to the enforcement of the public policy of the state. Not one of them involved a private agreement. In these instances, a state court was either barring Negroes from juries, denying a defendant counsel or abridging a person's freedom of speech.

The opponents of restrictive covenants also maintained and succeeded in convincing the Supreme Court that even though the law permitted Negroes to discriminate against Caucasians in real estate matters to the same extent that Whites might take like action against colored people, the equal protection requirement was not satisfied. They reasoned that the right which each Negro had in this respect was a personal one, which could not be made to depend upon the right of others of his race to discriminate or be discriminated against. Among those to employ this argument was Chief Justice Vinson, who used it in the *Kraemer* decision. "The rights created by the first section of the Fourteenth Amendment," he averred, "are, by its terms guaranteed to the individual. . . The rights established are personal rights."³²

The Chief Justice called in support of his thesis the opinion of the Court in the case of *McCabe v. The Atchison, Topeka and Santa Fe Railroad Company*.³³ Here Justice Charles Evans Hughes, on behalf of the court, had asserted in 1914 that the essence of the constitutional right of a colored person to have railroads furnish him with equal accommodations "is that it is a personal one". "It is," wrote Hughes, "the individual who is entitled to the equal protection of the laws". Standing by themselves, these quotations would appear to have substantiated Vinson's position, but when placed in their proper setting they actually did nothing of the sort.

31. *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Moore v. Dempsey*, 261 U. S. 86 (1920); *Powell v. Alabama*, 287 U. S. 45 (1932); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Bridges v. California*, 314 U. S. 252 (1941); *American Federation of Labor v. Swing*, 312 U. S. 321 (1941).

32. *Shelley v. Kraemer*, note 1, *supra*.

33. 235 U. S. 151 (1914). Hughes acknowledged that it was not an infraction of the 14th amendment for a state to require separate but equal accommodations for the two races.

This case grew out of an Oklahoma law, which, while requiring railroads to provide equal but separate accommodations for colored and white people in coaches at all times, nevertheless relieved them from furnishing chair and Pullman car service for one of the races if the amount of travel by its members did not warrant the use of this mode of conveyance. Taking advantage of this exception in the law, the Sante Fe Railroad denied a Negro³⁴ a Pullman seat for the reason that he was the only colored man calling for one. However, he appealed this denial to the Supreme Court, alleging that his individual right in the matter did not rest upon the exercise of a similar right by others of the African race, and won his point. But what the Negro did not claim, yet what he would have had to claim and receive judicial sanction of, in order to make the *McCabe* case authority for the *Kraemer* case was that he was entitled not merely to equal Pullman accommodations whenever he desired them but to the use of any such facilities, whether set apart for Black or White, as long as he paid his fare. This important distinction was not explained in the *Kraemer* decision.

If the principle of the *Kraemer* case is correct, it is difficult to see how a state logically has the power to deny to a member of either race the right to take any unoccupied seat in a train, bus or school room. Under the *Kraemer* theory, the right of an individual to occupy an unused seat apparently is a personal one, which no segregation law can affect. Yet the Supreme Court has shied from making such a sweeping rule up to the present date.³⁵

When the question of racial covenants in the District of Columbia came before the Supreme Court, that tribunal found little difficulty in convincing itself that these covenants should not be enforced. There was no need to consider any constitutional issue, it concluded, for congress had long since outlawed the enforcement of such agreements as a matter of public policy.³⁶ The statement of that policy was contained in Section 42 of the Civil Rights Law, first enacted in 1866, which provided: "All citizens of the United States have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property".³⁷

But one of the defects in this argument is that there is no proof

34. There were actually five Negroes bringing this action.

35. *Plessey v. Ferguson*, 163 U. S. 537 (1896); *Henderson v. The Interstate Commerce Commission and The Southern Railroad Company* 339 U. S. 816 (1950).

36. *Hurd v. Hodge*, note 1, *supra*.

37. 8 U. S. C. A., § 42, 2 F. C. A., Title 8, § 42.

that congress ever meant Section 42 to apply to the District of Columbia. If the national lawmakers had wanted it extended to that area, all that they would have had to do was to have added the words "and in the District of Columbia" to the phrase "in every state and territory". Furthermore, congress generally placed all provisions dealing with real estate in the nation's capital in the real property section³⁸ of the Code of the District of Columbia, but there is none in there banning restrictive covenants. Then too, it is not without significance that in Title 48 of the United States Code, which is entitled "Territories and Insular Possessions," the District of Columbia is not listed as a territory along with Alaska, Hawaii and our other possessions. However, Section 1432 of this Title does provide that "deeds and other instruments affecting land situated in the District of Columbia or any territory of the United States may be acknowledged in the islands of Guam and Samoa before any Notary Public . . ." ³⁹ Here, at least, congress did not regard the District to be a territory but rather a separate and distinct subdivision.

But, if for the sake of argument, it is admitted that Section 42 was intended to include the District, still there is nothing to show that congress had planned through it to interdict the enforcement of valid private contracts such as racial covenants. Undoubtedly, all that it ever had in mind in enacting the section was to prevent the various federal subdivisions from denying a Negro any rights which they gave to a Caucasian, evidence of which is to be found in congress' attitude toward these covenants in the years following the passage of this law. Soon after 1866, property owners began placing racial restrictions in deeds,⁴⁰ and as time passed this practice was accelerated. And when efforts were made to contest such agreements, the federal courts, as previously shown,⁴¹ were almost unanimous in upholding them and their enforcement. Congress was certainly aware of the positions of the courts and the property owners on the subject, and had it felt that the former were misconstruing its design or that the latter were acting under a misconception of the law, it could easily have remedied the situation either by making the Civil Rights Law more explicit or by adding an appropriate provision to the real property section of the Code for the District, mentioned in the preceding paragraph. That the national legislature took neither of these steps, can only be construed to mean that it had accepted both the courts' and the owners' interpretation of its intention.

38. CODE OF THE DISTRICT OF COLUMBIA, § 45.

39. 48 U. S. C. A., see § 1432.

40. See note 3, *supra*.

41. See note 5, *supra*.

The Chief Justice went on to hold in the *Hurd* case that even without Section 42 the Court could not enforce these covenants because to do so would be against the public policy of the United States for another reason. "It is not consistent with the public policy of the United States," he declared, "to permit federal courts in the nation's capital to exercise general equitable powers to compel action denied the state courts where such action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser compassion for the protection of basic rights against discriminatory action of the federal courts than against action taken by the courts of the states."⁴² The public policy of the United States, of which the Chief Justice spoke here, is generally determined by congress, provided it has not already been fixed by the constitution. That body decides what type of procedure,⁴³ equitable and otherwise, shall be employed in the federal jurisdictions, quite apart from the kinds the states might use or be permitted to use in their jurisdictions. In the case of restrictive covenants, if congress' attitude toward enforcing them could be gauged by its reactions to pertinent court decisions, it has long since accepted the equitable method of making them effective.

Two previous court rulings dealing with this class of covenants caused the court considerable annoyance in the *Hurd* case; one of them was especially troublesome to the Chief Justice. In *Hundley v. Gorewitz*,⁴⁴ a 1942 case, the Circuit Court of Appeals for the District of Columbia had under consideration the enforcement of a covenant which provided that certain property should not be rented, sold, transferred or conveyed to a Negro. The Court, in this particular instance, denied an injunction to restrain a colored man from taking title or occupancy, but, at the same time, left no doubt that, as a general rule, it would enforce such agreements in equity. "But in view of the considered adjudications in similar cases," stated the court, "it must be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction." The interesting aspect of this decision is that Chief Judge Groner's opinion was accepted apparently in its entirety by Associate Judge Fred M. Vinson, the same jurist who, later

42. *Hurd v. Hodge*, note 1, *supra*.

43. CODE OF THE DISTRICT OF COLUMBIA, Title 11-306,325,326.

44. 132 Fed. 2d 23 (D. C. Cir. 1942). What the Circuit Court of Appeals actually did was to refuse to disturb the District Court's denial of the injunction. The ground for the denial was that conditions had changed since the making of the covenant due to the fact that other Negroes had been allowed to move into the area in question.

from the Supreme Court bench, was to hand down the *Kraemer* and the *Hurd* rulings. Wiley Rutledge, the third justice, on the other hand, was not so certain of the Chief Justice's law; he was ready to concur in the decision but wanted to reserve opinion as to whether this specific covenant was valid.

Another case, *Mays v. Burgess*,⁴⁵ which came before this same court in 1945, dealt with a similar covenant against sale and use. The district court had cancelled a deed given in violation of the restriction and had enjoined a colored man from using the property. The Negro had appealed from this ruling to the Circuit Court of Appeals, arguing that the judgment should be set aside as being contrary to public policy. But the higher tribunal rejected his plea, stating that "rights created by covenants such as these have been so consistently enforced by us as to become a rule of property and within the accepted public policy of the District of Columbia".⁴⁶ The defendant then asked the Supreme Court for a writ of certiorari in order to bring the case up to that tribunal but his request was denied with Justices Stone, Black, Douglas, Frankfurter and Roberts, according to the record, voting to refuse issuance of the writ, and only Justices Murphy and Rutledge favoring the granting of it. Justices Reed and Jackson did not participate.⁴⁷ While it is not clear just why the Court denied the writ, conceivably it might have done so on purely technical grounds. However, it is more likely that it felt that the issue involved either was not of enough significance to warrant its attention or presented no legal question for it to review.

A consistent adherence to the Supreme Court decisions in the covenant cases may lead to some unforeseen and perhaps unsought consequences. Let us suppose, for instance, that a property owner enters into an agreement with a prospective buyer by telephone to sell his property. All of the terms and conditions are entirely satisfactory to both parties. The only delay in the consummation of the transaction is a request by the owner to see the purchaser in person before transferring the deed. But on meeting the buyer and dis-

45. *Mays v. Burgess*, 325 U. S. 868 (1945). The personnel of the court has changed since the *Hurdley* case.

46. *Ibid.*, p. 872. The court went on to say in its opinion: "The proposition is not new and was unsuccessfully urged in the *Corrigan* case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The constitution is the same now as then, and we are cited to no new public laws nor indeed to any other source or practice of Government officials, which the *private* action of the original owners of the block in question contravenes. And the public policy of a state of which the courts take notice and to which they give effect must be deduced—in the main—from these sources. Surely, it may not—properly—be found in our personal views on sociological problems". (Italicized portion is found in the text.)

47. *Mays v. Burgess*, 325 U. S. 868 (1945).

covering that he is a Negro, the seller refuses to convey. If the Negro should then ask the court for a decree of specific performance, alleging that there was mutuality in every respect save the one based on color, the failure of the court to grant the decree would, under the *Kraemer* rule, apparently have to be labeled state action founded on race discrimination. In such a case, the right of a person to refuse to sell directly to a person because of color, which even those who oppose restrictive covenants admit is a valid one, might not mean a great deal [assuming that the Statute of Frauds is not involved].

A troublesome problem may also arise in connection with covenants which forbid the erection of buildings costing less than a certain amount. A covenant of this nature might easily work against a person of small means, who, although able to acquire a plot of ground, perhaps through inheritance, would be foreclosed from building on it due to a lack of funds to meet the covenant cost limitations. An attempt to enforce such a restriction would have to fail because a court would scarcely want to be put in the position of prohibiting a discrimination in this type of matter against a colored man but permitting it in the case of a poor person.

The Fourteenth Amendment, it should be remembered, does not give a preferred status to people because of their color. The authors of that part of the constitution could easily have written that preference into it, but refused to do so.⁴⁸ Moreover, the courts, except in the early days of the amendment, have never hesitated to allow it to be invoked in cases other than those in which a colored party was interested. And certainly labor organizations, Jehovah Witnesses and other groups which have so often sought refuge in it would be the last to acknowledge that anyone else had a prior claim to its protection.

A perplexing situation would result if a proprietor should decline to rent his property to a certain Negro solely because of the latter's race, but the Negro should gain access to the premises without the former's consent. The owner perhaps could collect damages in trespass, but what about his chances of success in an eviction proceed-

48. Benjamin R. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction*, Columbia University, 1914; Charles McLaughlin, *The Court, the Corporation and Conklin*, 46 *AMERICAN HISTORICAL REVIEW* 45, October, 1940; L. B. Boudin, *The Truth and Fiction About the Fourteenth Amendment*, 16 *NEW YORK UNIVERSITY LAW QUARTERLY REVIEW* 19, November, 1938; Howard J. Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 *YALE LAW JOURNAL* 371, December-January, 1937-1938.

ing? Could the court entertain such a proceeding without being charged with violating the equal protection injunction?⁴⁹

Leaving the realm of real property and turning to a different field of law, we might be confronted with another interesting circumstance. A white person, we will say, is injured in an accident in which there are ten joint tort-feasors, evenly split between white and colored people. Under the law of that state the plaintiff may sue any or all of these. He brings his action, however, against the Negroes alone, who thereupon demand that the white tort-feasors be brought in as party defendants. In this case, as in the other hypothetical ones, the unwillingness of the court to grant a motion to this effect would have to be construed a denial of equal protection on the ground of color, if it could be shown that the plaintiff had been actuated entirely by race prejudice.

When placed against their proper background, the Supreme Court's rulings in the recent covenant cases unquestionably constitute bad law. The employment of such covenants for generations both in the states and in the District of Columbia, the refusal of a single state legislature, except in a few minor instances, to nullify them, the silence of congress for years in the face of their widespread use, and the uniform sanctioning of them and their enforcement in equity by state and federal courts alike make any other conclusion unrealistic. Where the Court erred in the *Kraemer* case was in holding that there was involved a question of constitutional rights, which it concededly would have had authority to adjudicate, rather than merely one of public policy, which the lawmakers alone should resolve.⁵⁰ The Court erred in the *Hurd* case by attributing to a congressional law an intent which its authors undoubtedly never had in mind.

There is a sizable school of thought in the country which embraces the notion that when the people or their representatives lag in their social thinking, the judiciary should bring them up to date. Some such idea apparently motivated the Supreme Court in deciding the restrictive covenant cases. But this doctrine is a pernicious one for it allows the courts to become creators of public policy, contrary to the principles and the traditions on which our constitutional system is based. The task of formulating that policy has been confided to a constitutional majority of the people or to the legislative

49. William R. Ming, Jr., *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 UNIVERSITY OF CHICAGO LAW REVIEW, p. 234 (1949); 45 MICHIGAN LAW REVIEW, note 27, *supra*.

50. It is the author's belief that even if the covenant decisions had never been rendered, racial covenants in most instances should be eliminated, but by legislative action, with ample time being given to property owners to adjust themselves to the new conditions which are certain to arise.

branches of government,⁵¹ and should continue to rest exclusively in them.

In this land, a constitutional majority is the final arbiter of the nation's destiny, and in that capacity has the legal authority to pursue any course it sees fit,⁵² even though that course might be imprudent and unjust. Regrettable and reprehensible as its action might be, it could repeal the entire bill of rights and then establish a state church or provide for censorship of the press. Yet, in this and in similar situations, the Court's part in our scheme of government should remain as it has always been, namely, to construe and give effect to the wishes and intent of this majority. Its function should never be to rectify this group's mistakes or to amend its shortcomings.

The advocates of the kind of judicial legislation found in the *Hurd* and *Kraemer* decisions are playing at a dangerous game which conceivably could be turned against them in a devastating fashion. It would have been possible, for example, for a state legislature to have declared racial covenants invalid as being contrary to public policy, but for the Supreme Court to have held such a statute void on the ground that it denied a person the right to dispose of his property on the terms he desired. In that event, this type of legislation would have been placed beyond the reach of the lawmakers and could have been restored to their control only through the tedious amending process or by a radical change in the personnel of the court. The champions of the covenant decisions were fortunate in having their cause heard by justices who were sympathetic to their philosophical point of view; but on another occasion, they may not be so fortunate.

51. In some fields, it is true that the executive determines public policy. For example, in the national area, the President decides in a large measure what our foreign policy shall be.

52. This majority is probably foreclosed from taking from a state its equal representation in the United States Senate. See Constitution of the United States, Art. V.