The Constitutionality of Restrictive Covenants

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CONSTITUTIONALITY OF RESTRICTIVE COVENANTS

The United States Supreme Court cases of Shelley v. Kraemer¹ and Hurd v. Hodge² are companion cases that effected a reversal in what generally had been conceived to be the law as to restrictive covenants forbidding the sale or use of real property to certain racial groups. Both cases involved similar agree-

1. 68 S.Ct. 836 (U. S. 1948).
2. 68 S.Ct. 847 (U. S. 1948).
ments along the familiar line, the Shelley case arising in a state and the Hurd case in the District of Columbia. The property owners of the vicinity had signed an agreement designed to prevent ownership or occupancy of any of the property by "any person not of the Caucasian race" in the state case and by "any Negro or colored person" in the District of Columbia case. In each case a sale was made to a Negro, and the other property owners sued to enforce the agreement. In the Shelley case the Supreme Court held that judicial enforcement of such restrictive covenants amounted to state action violating the equal protection clause of the Fourteenth Amendment. In the Hurd case, the constitutional question of due process under the Fifth Amendment was not decided. Judicial enforcement of the restrictive covenants was denied on the ground that it was prohibited by the Civil Rights Act of 1866.3 The District of Columbia is included within the meaning of the term "every State and Territory,"4 in Section 1978 of the Revised Statutes:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."5

These decisions simply state that the courts may not enforce the so-called restrictive covenants based on racial grounds wherever they may arise, but such agreements, however, are not invalid per se. As long as their purpose is achieved privately through voluntary adherence to their terms, there can be no court interference for there is no governmental action to invoke the Fourteenth Amendment and legislation enacted to effect its purposes.

The Court had no difficulty in distinguishing Corrigan v. Buckley,6 previously thought to be authority for the enforce-

6. 271 U. S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926). The court also distinguished Hansberry v. Lee, 311 U. S. 22, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Here again, the issue did not arise as to whether judicial enforcement of the covenant amounted to state action. The case held that the petitioners, who were suing to enforce the restrictive covenant, would be deprived of property without due process of law if they were held bound by an erroneous stipulation in a previous suit, termed a class suit, to which they had not been a party.
ability as well as the legality of such covenants.\footnote{7} In that case, where there was a restrictive covenant not to sell to Negroes for a period of twenty-one years, the Supreme Court refused to take jurisdiction as there was no substantial constitutional question, the appeal being based solely on the contention that the covenant itself was void because it violated the Fifth, Thirteenth and Fourteenth Amendments and the Civil Rights Act. The case, arising in the District of Columbia, could not conceivably be authority for the proposition that the Fourteenth Amendment is not violated by such covenants being judicially enforced, as that amendment applies only to states. Whether or not judicial enforcement amounted to state action was left undecided, for that question had not been raised by the petition for the appeal or by any assignment of error. On a jurisdictional point, therefore, the appeal was dismissed.\footnote{8} Thus the \textit{Corrigan} case decided only that these covenants in and of themselves do not violate the constitutional mandate and is not authority for the proposition that such a covenant is both valid and enforceable by injunction, although such covenants have been enforced on its authority.\footnote{9} The latter question had never been properly raised before the Supreme Court prior to the instant cases.

\textbf{Ordinances} and \textbf{statutes} designed to prevent Negroes from acquiring and using particular property have always been held invalid as they are too obviously prohibited by the Fourteenth Amendment, and attempts to justify them as a lawful exercise of the police power to prevent conflict and ill feeling between the races have failed.\footnote{10}


\footnote{8} \textit{Corrigan v. Buckley}, 271 U.S. 323, 331, 46 S.Ct. 521, 70 L.Ed. 969 (1926).


\footnote{10} \textit{Buchanan v. Warley}, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A.
In Louisiana the general rule is that building and use restriction clauses constitute real rights, not personal to the vendor, running with the land for the benefit of all other grantees under a general plan of development. The remedy of other grantees is by injunction to prevent a violation.11 This rule remains, of course, unaffected except as to the enforceability of racially restrictive covenants. The Louisiana decision of Queensborough Land Company v. Cazeaux,12 was the first in the United States holding that a restraint against the sale to any Negro was legal and enforceable. It distinguished between local and perpetual inalienability as compared with partial and temporary inalienability holding the latter valid and enforceable, the covenant in the case being for twenty-five years. The question as to judicial enforcement of the covenant amounting to state action was not raised. However, Justice Provosty, speaking for the court, said:

"The fourteenth amendment, in so far as prohibiting discrimination against the negro race, applies only to state legislation, not to the contracts of individuals. Civil Rights Cases, 109 U.S. 62, 3 Sup. Ct. 18, 27 L. Ed. 835."13

Had a broader view been taken as to what constituted state action, the decision might not have been reached so easily. In view of the instant cases, the Louisiana Supreme Court can no longer enforce a restrictive covenant based on race or color alone, despite the fact that such covenants have been held to constitute a dismemberment of ownership in the nature of a servitude and

Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 22 L.Ed. 257 (1948), declared a state law denying equal enjoyment of property rights to a certain racial group was not a legitimate exercise of the state's police power.

Louisiana courts have treated a restriction not to sell to a negro as a dismemberment of ownership operating as a servitude on the land. The right to alienate (abusus) has been held to be subdivided and only partially transferred to the new owner, there being withheld from him that part which would enable him to sell to a negro.
Art. 709, La. Civil Code of 1870, states: "Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order."
their breach to effect a resolutory condition or condition subsequent in the contract.\textsuperscript{14}

Employment of state action to enforce any agreement or arrangement (whatever it may be called) denying essential civil rights secured by the Fourteenth Amendment is now forbidden. The extent to which any system that might involve racial discrimination as to property rights will be scrutinized is indicated by the case of Harmon v. Tyler,\textsuperscript{15} where the United States Supreme Court held unconstitutional a New Orleans ordinance which barred whites or Negroes from any portion of the city except on the written approval of a majority of the persons of the opposite race inhabiting that particular portion of the city. This decision indicates that a discrimination is nonetheless invalid though counterbalanced by another of similar character.\textsuperscript{16}

The decision in the Shelley and Hurd cases came as no surprise to many,\textsuperscript{17} since it has long been settled that not only legislation and procedure, but judicially adopted rules of substantive law are invalid if they conflict with the Fourteenth Amendment.\textsuperscript{18}

Taking the premise that the courts cannot validly do that which is forbidden the legislature, and thus refusing to construe nar-
rowly the constitutionally guaranteed civil rights, a federal district court in California, in *Gandolfo v. Hartman,* 19 has refused to enforce a restrictive covenant against transfers to Chinese. The Civil Rights cases 20 had held that the Fourteenth Amendment applies to the action of state officers, executive or judicial, and to state laws and acts done under state authority, thus, the obvious proposition that the state may not, by any of its agencies, violate the Fourteenth Amendment. 21 The present decisions mark only one more step in the Supreme Court's efforts to validate the proposition stated in *Strauder v. West Virginia,* 22 that a state may not make the enjoyment of any civil right dependent upon race or color, and that all persons, whether colored or white, shall stand equal before the laws of the states. Especially included as a protected civil right is equality in the enjoyment of property, which was first seen as a prerequisite to other basic civil liberties in the *Slaughter-House* cases. 23 The decisions were no doubt influenced by the social interest in adequate Negro housing and the current national policy to eradicate all racial discrimination in order to accomplish a higher standard of living for the Negro. Their efficacy toward those ends remains to be seen. 24

The difficulty of finding a constitutional basis for holding that such a restrictive covenant was void in and of itself was perhaps one reason the court did not disturb its holding in the *Corrigan* case, 25 but the result leaves such covenants in a twilight zone, not void but not legally enforceable. Yet in the *Hurd* case, it was indicated that even had there been no statute, enforcement of such covenants in a federal court would be held contrary to the public policy of the United States, 26 again indicative of federal policy on all points involving racial issues. Future manifestations of this trend will be interesting, especially in the light of the existing acceptance of the principle set up by *Plessy v. Ferguson* 27 that segregation is valid so long as facilities are substantially equal.

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22. 100 U.S. 313, 25 L.Ed. 664 (1880).
23. 83 U.S. 36, 21 L.Ed. 394 (1873).