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Equal Protection and the Racial Restrictive Covenant: A Reevaluation

EQUAL PROTECTION AND THE RACIAL RESTRICTIVE COVENANT: A RE-EVALUATION

Racial restrictive covenants are private agreements between property owners not to sell to members of a prohibited race. For thirty years after the decision by the United States Supreme Court invalidating discriminatory zoning ordinances,[1] the states recognized these private agreements; and this recognition became instrumental in the continuation of residential segregation.[2] Their validity was questioned recently by the Court in *Shelley* v. *Kraemer,*[3] but the full scope of the holding has not been generally recognized. A new evaluation of the *Shelley* case in light of more recent developments becomes necessary.

Before any constitutional question is raised under the Fourteenth Amendment it is necessary to find state action.[4] It is now accepted that a judicial decision determining state policy is state action within the meaning of that Amendment,[5] but the analysis should not be limited to a determination of the existence of state action without reference to the nature of the state policy involved. It is axiomatic that implicit in judicial action is an underlying determination of a substantive right; the grant or denial of a remedy is merely a manifestation of the substantive finding.

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1. Buchanan v. Warley, 245 U.S. 60 (1917). This case held that segregation achieved by municipal zoning constitutes discriminatory state action prohibited by the Fourteenth Amendment.

2. For a discussion of the various rationales by which the courts upheld these covenants during this period see McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 CAL. L. REV. 5, 7 (1945); Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values,* 24 NOTRE DAME LAW. 157, 160 (1948); Yi-Seng Kiang, *Judicial Enforcement of Restrictive Covenants in the United States,* 24 WASH. L. REV. 1, 6 (1949); Note, 1 BAYLOR L. REV. 20, 27 (1948).

3. 334 U.S. 1 (1948).

4. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1. "[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." Shelley v. Kraemer, 334 U.S. 1, 13 (1948). The finding of state action is in a sense jurisdictional, for if the court finds no state action, it cannot proceed with the determination of the substantive rights under the Fourteenth Amendment.

5. "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the state." Twining v. New Jersey, 211 U.S. 78, 90 (1908). See also Shelley v. Kraemer, 334 U.S. 1, 14 (1948). One writer discussing this matter stated: "There is equally state action where a state court founds a judgment upon a rule of substantive law which it 'finds' in the common law, or judge-made law of the state. Since a rule so made and applied is produced by state action it is subject to the same test of its validity under the Fourteenth Amendment as it would be if made by that other form of state action, enactment by the state legislature." McGovney, *supra* note 2, at 23.

In *Shelley* v. *Kraemer*[6] the plaintiff sought and was granted an injunction to prohibit a Negro from taking possession of premises subject to a racial restrictive covenant. The Supreme Court, in reversing the state court, held that the freedom to execute a real estate contract could not, consistently with equal protection, contain a legal right to practice racial discrimination; and, where a state court recognizes this discrimination through its decisions, it must be reversed.[7] To the extent that the freedom to contract conflicted with the constitutional provision, the former had to yield. Three steps were involved in the *Shelley* case. The Court had to find state action, then determine whether the lower court's substantive determination was contrary to the equal protection clause;[8] and, finally, if the Court ascertained that the state law did conflict with the Fourteenth Amendment, it was compelled to strike any remedy granted by the lower court pursuant to its unconstitutional substantive holding.

The more conservative courts attempted to limit the *Shelley* rule to a prohibition of injunctive relief in the restrictive covenant cases.[9] This is the narrowest possible construction of the case, overshadowing its broader, more significant meaning. Under this narrow interpretation

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6. 334 U.S. 1 (1948). The *Shelley* case arose in Missouri and involved a restrictive covenant limiting use and occupancy of certain realty to members of the Caucasian race for fifty years. Shelley, a Negro, purchased the land without actual notice of the restriction. The suit to enjoin him from taking possession was brought by the co-covenantors.

The court of Missouri ruled that: "[The racial] restriction does not contravene the guarantees of civil rights of the Constitution of the United States." Kraemer v. Shelley, 355 Mo. 814, 823, 198 S.W.2d 679, 683 (1946).

7. For an analogous situation see American Federation of Labor v. Swing, 312 U.S. 321 (1941) in which a state court announced a policy permitting picketing only by striking employees. The United States Supreme Court determined that freedom of speech extended to non-employees the right to picket. This was a reversal of the state policy enunciated by the state court to the extent that the state policy conflicted with the constitutional right of freedom of speech.

8. The Court in the *Shelley* case pointed out that it has ". . . established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy." Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

9. In Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949) the court interpreted the *Shelley* decision to hold that ". . . specific performance of a racial restrictive agreement by judicial decree is a violation of the Fourteenth Amendment although the agreement itself is constitutionally valid." *Id.* at 1060, 225 S.W.2d at 130. The court concluded that an award of damages against the Negro's grantor would not constitute a violation of the Fourteenth Amendment.

Correll v. Earley, 205 Okla. 366, 237 P.2d 1017 (1951) involved a conveyance of property by two white owners to an insolvent grantee who then transferred the property to Negroes in violation of a racial covenant. In an action for damages alleging conspiracy to breach the covenant on the part of the original owners, the court held that damages could be granted.

Some courts recognized the broader rule established in the *Shelley* decision and refused to grant damages for breach of a racial covenant. Roberts v. Curtis, 93 F.Supp. 604 (D.C. 1950); Barrows v. Jackson, 112 Cal. App.2d 534, 247 P.2d 99 (1952); Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952).

the question soon arose whether damages could be obtained by the covenantors against the person who breached the agreement. To settle the confusion on this point among state courts, the Supreme Court granted certiorari in the case of *Barrows* v. *Jackson.*[10] The Court, looking through the fact that no direct judicial remedy was sought against the member of the race in question, held that a state policy favoring racial restrictive covenants and thus contravening the mandates of the equal protection clause is as effectively enunciated by a grant of damages against covenantors as by directly discriminatory judicial action.[11] There was actually no new question presented in the *Barrows* case,[12] and the Court, to be consistent with its holding in *Shelley,* was compelled to affirm the decision of the lower court denying the relief sought.

The *Barrows* decision seemed to substantiate the belief of many writers that the *Shelley* rule spelled the end of the racial restrictive covenant.[13] There was sufficient doubt left, however, for those courts which

10. 346 U.S. 249 (1953). The Court refers to the cases in note 9 as posing the problem to be decided. For discussion of *Barrow* v. *Jackson* see Notes, 48 NORTHWESTERN U.L. REV. 495 (1953); 23 TENN. L. REV. 330 (1954); 42 GEO. L.J. 161 (1953).

11. The Court stated that to allow damages for breach of a restrictive covenant ". . . would be to encourage the use of restrictive covenants. To that extent, the State would act to put its sanction behind the covenants . . . Thus, it becomes not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages. The action of a state court at law to sanction the validity of the restrictive covenant here involved would constitute state action. . . ." Barrows v. Jackson, 346 U.S. 249, 254 (1953).

12. Mr. Chief Justice Vinson did question whether the Court should decide the issue since no member of the restricted race was asserting his rights before the Court. The Chief Justice dissented on the ground that since neither of the parties before the Court could claim violation of their constitutional rights, there could be no relief granted. *Id.* at 260.

The majority of the Court, in spite of this argument, found it necessary to protect the underlying constitutional rights of the prohibited race. "If a state court awards damages for a breach of a restrictive covenant a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." *Id.* at 254.

13. "The [Shelley] decision sounds the death knell for all racial restrictive covenants and related superficially legal schemes as effective weapons in enforcing racial discrimination. . . ." Scanlan, *supra* note 2, at 190; see also Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. OF CHI. L. REV. 203, 224 (1949); Note, 1 BAYLOR L. REV. 20, 44 (1948). One authority expressed doubt as to how much farther the Court would extend the theories of state action. See Frank, *The United States Supreme Court: 1947-48,* 16 U. OF CHI. L. REV. 1 (1948). Professor Frank stated that a limitation in the racial restrictive covenant cases is in prospect since ". . . the Court went out of its way to reaffirm the *Civil Rights* cases and to declare that the Fourteenth Amendment 'erects no shield against merely private conduct, however discriminatory or wrongful. . . .'" *Id.* at 24.

Frank also recognized the possible extension of the restrictive covenant cases to hold that a court may not by its decree achieve a discriminatory result which a state could not order by direct legislative action. "If we take the interpretation of the restrictive covenant cases assumed above, then . . . it can rationally follow that the entire realm

interpreted these decisions on the narrow grounds of the type of judicial action involved. Since in both *Shelley* and *Barrows* the parties sought an affirmative enforcement of the covenants, the question remained for the conservative state court whether a defendant should be allowed to use a racial covenant as a defense to an action for breach of contract. A Texas court found no difficulty ruling against the use of such a defense in *Clifton* v. *Puente*,[14] a case decided two years before the Supreme Court's *Barrows* ruling. There a covenant prohibited the sale of land by a covenantor, his grantees or assigns to any "persons of Mexican descent," and provided that any land sold in contravention of the agreement was to revert to the original grantor. Puente, a person of Mexican descent, purchased the land; but, before he could obtain possession, the original grantor, acting under the covenant, sold the property to Clifton, who took possession. Clifton then brought action against Puente to try title to the land, and the latter filed a cross action for title and possession of the property. The Texas court held that the racial agreement relied upon by Clifton was not a valid defense to this cross action.[15]

This was not the final word on the problem, however, for the issue was presented again in the recent case of *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*[16] In that case a Caucasian widow of an Indian

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of common law interpretation by a state will be subject to federal judicial review. It is doubtful that the Court meant to go so far. . . ." *Ibid.*

McGovney, *supra* note 2, would take the opposing view. Federal review of decisions rendered by a state court based on the common law of the state is not an innovation and has been rather prevalent in the due process cases. American Federation of Labor v. Swing, 312 U.S. 321 (1941) (discussed *supra* note 7); Bridges v. California, 314 U.S. 252 (1941) (the Court set aside a common law contempt sentence); Cantwell v. Connecticut, 310 U.S. 296 (1940) (the Court set aside the affirmation by the state supreme court of a common law conviction of the offense of inciting a breach of the peace). Although the Court had no power to redefine the common law of the state, it did have the power to set aside a state judgment on the ground that it infringed the right of freedom of speech. In order to have such power the judgment rendered by the state court must constitute state action.

McGovney reasoned that: "The absence of decisions of the Supreme Court squarely in point on the Equal Protection Clause is doubtless due to the rarity with which state courts have made common law rules of procedure or substantive law that are so discriminatory as to constitute denial of equal protection." McGovney, *supra* note 2, at 24. This void must surely have been filled with the pointed language in the *Shelley* case. See note 8 *supra*. Also, see the language in the *Barrows* case, *supra* note 11.

If the Supreme Court may review state court decisions based on the common law, the test for such review under the equal protection clause of the Fourteenth Amendment should be the same as in the ordinary case involving statutory discrimination.

14. 218 S.W.2d 272 (Tex. Civ. App. 1948).

15. The Texas Court indicated that no valid distinction could be predicated on the position of a party as a plaintiff or as a defendant. "[J]udicial recognition or enforcement of the racial covenant involved here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment." Clifton v. Puente, 218 S.W.2d 272, 274 (Tex. Civ. App. 1948).

16. 60 N.W.2d 110 (Iowa 1953), *aff'd per curiam*, 348 U.S. 880 (1954).

who was killed in the Korean conflict had purchased a cemetery lot subject to a contract which limited burial privileges to members of the Caucasian race. When the cemetery would not allow the burial of her husband,[17] she brought an action for breach of contract on the theory that the part of the agreement restricting burial privileges to Caucasians was invalid. In defense, the cemetery asserted the limiting provision. The trial court ruled for the defendant cemetery corporation, and, on appeal, the Supreme Court of Iowa, asserting neutrality, dismissed on the ground that the parties were merely being left to their agreement.[18] The Iowa court ruled, in effect, that the right of freedom of contract contains the freedom to discriminate against a race—the same substantive holding that was struck down as discriminatory by the Supreme Court—and then the court *acted,* in the full sense of that word and in spite of claims of neutrality, to enforce that right to discriminate.

An equally divided Supreme Court recently affirmed the judgment of the Iowa court without opinion.[19] This result is even more surprising in view of the almost unanimous decisions in *Shelley* and *Barrows.*[20] It may be asked why the Court could not, consistently with those rulings, overrule the state's affirmation of this contractual discrimination. The Court may have been bothered in this case by the fact that the petitioner entered into a contractual agreement fully cognizant of the limiting racial clause. The Supreme Court of Iowa emphasized this fact in ruling that the petitioner should not be entitled to a remedy of damages.[21] In the

17. When the body arrived from Korea, it was taken to the cemetery where graveside services were held. Later in the day the cemetery notified petitioner that it could not lower the body into the grave. The body of the Indian was interred in Arlington National Cemetery by order of President Harry S. Truman.

18. The Iowa courts position is summed up in the following words from its opinion: "While we must recognize an evolution of our society as disclosed by these recent decisions [racial covenant cases], all of the previous decisions may be distinguished from our present case in that they disclose the exertion of governmental power *directly* to aid in discrimination. . . . Certainly, that factor is not presented here where the state has maintained neutrality." Rice v. Sioux City Memorial Park Cemetery Inc., 60 N.W.2d 110, 115 (Iowa 1953).

19. 348 U.S. 880 (1954). The even split in the Court was made possible by the death of Mr. Justice Jackson. When the vacancy caused by this death is filled, the petitioner may be entitled to a rehearing. See, *e.g.,* Gray v. Cowell, 312 U.S. 666 (1941), 313 U.S. 596 (1941).

20. Mr. Chief Justice Vinson's dissent in the *Barrows* case was the lone vote against the Court's stand in these cases.

21. The Supreme Court of Iowa saw the claims of the petitioner as extending beyond the scope of the United States Supreme Court decisions: "She [the petitioner] is asking more. She asks us to reform the contract voluntarily agreed to with another private party. She asks that we remove the restrictive covenant in her contract which she repudiates and permit her to recover damages from the other party." Rice v. Sioux City Memorial Park Cemetery Inc., 60 N.W.2d 110, 115 (Iowa 1953).

The Iowa court added that the petitioner would have it ". . . extend the theory announced in . . . Shelley v. Kraemer . . . to indirect as well as direct support of private

Puente case the party asking relief was a member of the race being discriminated against; he sought possession and use of the land. This was factually like the *Shelley* case, making it relatively easy for the Texas court to refuse the defense of the racial restrictive covenant even though Puente should have had actual or constructive knowledge of the covenant. It is submitted that the Supreme Court could have, without difficulty, followed the reasoning in the *Barrows* case to extend damages to the petitioner in the *Rice* case. In all the cases, the controlling factor is the discriminatory state policy arising from the courts' rulings. The denial of damages in the *Rice* case will do as much to encourage the restrictive covenant as would have a denial of damages in the *Barrows* case.[22] The

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agreements containing restrictive covenants. . . ." *Ibid.* This further language of the court indicates that it possibly overlooked the *Barrows* decision even though the latter case was decided in June of 1953, three months before the *Rice* decision. The *Rice* case was probably being argued before the decision in *Barrows* came down. This lends weight to the argument that the *Rice* case was incorrectly decided.

On appeal to the United States Supreme Court both parties cited the Barrows case. The petitioner in her brief on the merits pointed out that this case was intended to prevent persons from accomplishing ". . . indirectly what . . . could not be accomplished directly. . . ." Brief for Petitioner, p. 13, Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880 (1954).

The respondent cemetery company concluded that "[i]t does not follow from the fact that the restrictive covenant cannot be enforced by an injunction in a State Court . . . nor that a *breach* of the contract cannot be punished by damages . . . that one of the parties who freely entered into the contract can recover damages from the other party because such other party refuses to perform a wholly different contract." Brief for Respondent, p. 17, Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880 (1954). The issue was thus squarely presented the Court.

22. Although the argument was not presented to the court, the *Rice* case could turn on the fact that organizations which are privately owned or operated but which are organized for a basic public service are subject to state control. Examples are public utilities, and railroads. The service rendered may be so basic to society that the organization acquires the characteristics of a state function. The organization must then comply with those constitutional controls which regulate state acts. "The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Marsh v. Alabama, 326 U.S. 501, 506 (1946).

The Supreme Court has not been hesitant in preventing discrimination by private groups carrying on a public function. See Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941). The *Terry* case involved a private association which each year conducted a primary election to select candidates to run for nomination in the official Democratic primary. Negroes were not permitted to vote. The elections were not governed by state laws nor was the state elective machinery or funds utilized. The Supreme Court held that to keep Negroes from voting in the elections was discrimination under the Fourteenth Amendment even though the organization was private. Terry v. Adams, 345 U.S. 461 (1953). The function of primary elections are basic to political institutions while functions of cemeteries are basic to cultural and social institutions. Primary elections are now generally state controlled, and cemeteries in many instances are municipally or nationally owned. Cemeteries are often granted tax exemptions, and although these exemptions do not necessarily make a private organization public, it is evidence of a basic public service. Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 535, 87 N.E.2d 541, 551 (1949). For examples of statutes giving tax benefit to cemeteries see IND. ANN. STAT. 64-201 (Burns

Supreme Court's refusal to strike out the racial clause as a defense brings added confusion into this area which is heightened by the lack of a guiding opinion by the Court. The Court had never before ruled on the availability of the racial covenant as a defense and this will permit questioning of the validity of the *Puente* case as a precedent.

If it is once recognized that state policy cannot contain a right to discriminate against any race through realty contracts, the racial restrictive covenant will no longer be a legal problem. A racial covenant in a deed or contract no longer has legal significance since the substantive right to contract gives no such privilege. The fact that covenantors incorporate such restrictions in their deeds does not make the covenant legally valid. What was meant by the dictum of the Court in the *Shelley* case that a racial restrictive covenant is valid so long as it is enforced only by voluntary adherence[23] is not clear but probably stems from the Court's wrestling with the concept of state action; it is clear that the Court did not mean to establish the legal right to utilize these covenants.[24] Certainly, there is no anomaly here of a right without a remedy, as some writers suggest,[25] since state policy can no longer recognize the right to

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1933); IOWA CODE ANN. § 427.1 (1946).

Whether a decision denying cemeteries the power to discriminate would affect the numerous church-owned cemeteries now restricted to members of a church is doubtful. The argument was made in cemetery's brief in the *Rice* case that an adverse holding would deny church owned cemeteries the right to limit burial privileges to members of the church. Brief for Respondent, p. 7, Rice v. Sioux City Memorial Park Cemetery, 60 N.W.2d 110 (Iowa 1953). When a church desires to inter its members together and exclude other denominations, a type of discrimination results, but a countervailing right of religious freedom should make it privileged. The cemetery in the *Rice* case has no church affiliation. Its only restriction is that a non-Caucasian cannot be buried, and this restriction has no basis in religion. It should follow, therefore, that the cemetery is not privileged.

23. Shelley v. Kraemer, 334 U.S. 1, 9 (1947).

24. Compare the use of the word "validity" in the quotation from the *Barrows* case in note 11 *supra*. This indicates lack of "legal" validity of the covenants. A distinction must be drawn between a legal right to utilize these racial covenants and the physical power to agree in this manner. The physical power to commit murder does not make that act a right. A gambling contract is illegal, but such contracts are agreed upon frequently. So long as a gambling contract is not dependent on state authority—judicial, police, etc.—their provisions may be enforced by "voluntary adherence." The fact that they may be and are voluntarily adhered to does not give them legal significance.

One commentator states: "Put another way, though the parties to the restrictive agreement had taken all the steps they could to make it binding, application of the Fourteenth Amendment nullified their acts." Ming, *supra* note 13, at 229.

25. Several writers have worried over the problem of a valid racial covenant without a corresponding remedy. "[I]t seems that the inseparability of validity and remedy has been destroyed; the Constitution has been invoked to deprive citizens of the use of their Courts for the enforcement of valid contracts." Crooks, *The Racial Covenant Cases*, 37 GEO. L.J. 514, 525 (1949).

Another writer states: "The rule, that all judicial assistance is within prohibited state action and still the contract is good as to private action thereunder is an anomaly resulting from the language in the amendment and its application to judicial assistance to covenantees." Comment, 6 LOYOLA L. REV. 52, 56 (1951). See also Note, 5 MERCER L.

use a racial covenant.

The substantive holding in *Shelley* should not mean that all contracts containing a racial restrictive covenant will be invalid when recognition is sought from the court. Only when the racial covenant becomes an essential element of success on the part of one of the parties will recognition of that covenant become prohibitory state action under the Fourteenth Amendment. Therefore, when the racial covenant is not in issue, the court may enforce other provisions of the contract. When the racial covenant is in issue, there is no legal reason why it should be upheld no matter what form the judicial action may take.

When considering any racial problem the social, economical, and cultural aspects must be taken into account.[26] It is generally acknowledged that even if racial restrictive covenants are given no legal effect, segregated housing will survive for some time.[27] The restrictive covenants are generally the fourth line of defense against integrated housing,[28] and new defenses may conceivably be proposed.[29] If the legal impediments could be removed, however, it would seem an important step in the right direction.

REV. 206 (1953).

These arguments are invalid since there is no remedy because there is no legal right to use racial restrictive covenants. Conversely, of course, the courts are still open to enforce actual rights of the citizens.

26. For a fine analysis of the Southern racial problems see MYRDAL, AN AMERICAN DILEMMA (1942).

27. One commentator points out: "Unfortunately, this does not mean that we are now on the verge of achieving real democracy in real estate opportunities. Community prejudice, re-enforced by voluntary adherence to written and unwritten agreements or customs, will, perhaps, continue to make America safe for hypocrisy." Scanlan, *supra* note 2, at 190. See also Note, 1 BAYLOR L. REV. 20, 43 (1948).

28. Frank lists three other pressures which will tend to maintain residential segregation: the (1) "code of ethics" of real estate dealers forbid them to sell property to a Negro outside certain areas, (2) the inability for a Negro to obtain credit for a mortgage even if he has a willing seller outside the marked area, and (3) if the sale is direct from a white owner to the Negro with ready cash, community pressure against the white seller when the proposed sale becomes known would be so great that it would probably not be consummated. Frank, *supra* note 13, at 25.

29. For already attempted or established methods of maintaining residential segregation see Scanlan, *supra* note 2, at 182; Ming, *supra* note 13, at 216.