Several observations may be made concerning this paragraph. First, the assertion that the contention "likewise is lacking in substance" is either dictum or, at most, an alternative holding. Secondly, the reasons which the Court gives for finding the contention insubstantial make it highly doubtful whether the Court understood the appellants' contention and was addressing itself to that contention. The appellants had argued that judicial enforcement was constitutionally equivalent to a legislative enactment. If the Court wished to dispose of that contention, it could hardly have chosen words less apt. The Court referred merely to the fact that the defendants had been given a full hearing, that they were not denied any constitutional or statutory right, and that it could not be said that the decrees were "so plainly arbitrary and contrary to law as to be acts of mere spoliation." The Court also referred to the principle, not questioned by the appellants, that due process of law is not denied merely because a court makes an error of law. If the Court had been of the view that judicial enforcement of a private contract was not governmental action within the scope of the Constitution, that judicial enforcement did not convert the individual action of the private contracting parties into governmental action, there surely would have been some indication to that effect in the Court's opinion. The conclusion is almost inescapable,

therefore, that the Court did not deal with or in any way pass upon the contention which the appellants had made as to the constitutional validity of judicial enforcement. We submit, therefore, that the question has not been foreclosed by *Corrigan* v. *Buckley*. Surely this Court will not regard itself as bound, in deciding issues of such constitutional importance as these, by a "precedent" so cloudy and dubious.

II. ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS IS CONTRARY TO THE PUBLIC POLICY OF THE UNITED STATES

Whatever doubts may exist as to the scope of the ruling in *Corrigan* v. *Buckley,* 271 U. S. 323, there is no doubt that it leaves wholly open the question whether considerations of public policy bar the judicial enforcement of racial restrictive covenants.[40] We urge upon this Court that the enforcement of such covenants is inconsistent with the public policy of the United States and that upon this independent ground, the judgments in these cases cannot be permitted to stand. Since the public policy upon which we rely is derived from the Federal "Constitution and the laws, and the course of administration and decision" (*Li-*

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[40] "We cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant." 271 U. S. at 332.

cense Tax Cases, 5 Wall. 462, 469), that public policy should be controlling on state courts as well as those of the District of Columbia.[41]

"Public policy is to be ascertained by reference to the laws and legal precedents". *Muschany* v. *United States,* 324 U. S. 49, 66. Among these are the Fifth and Fourteenth Amendments, the legislation enacted by Congress thereunder, and the decisions of this Court construing and applying such provisions. They may be summarized as establishing most clearly that it is the policy of the United States to deny the sanction of law to racial discriminations, to ensure equality under the law to all persons, irrespective of race, creed or color and, more particularly, to guarantee to Negroes rights, including the right to use, acquire,

[40] "We cannot determine upon the merits the contentious *Mining Co.* v. *Montana Mining Co.*, 171 U. S. 650, 654–655, in which this Court treated as raising a federal question a contention based upon "The public policy of the Government." This Court has recognized the existence of "those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176, and cases there cited.

To the extent that an argument based on "public policy" is another way of saying that Congress has done implicitly what it might have done explicitly, we recognize the necessity of establishing the power of Congress in this field. We believe, however, that the Congressional power expressly to implement the guaranties contained in the Fourteenth and Fifth Amendments by proscribing the enforcement of racial restrictive covenants is too clear to require discussion.

and dispose of property, which are in every way equivalent to such rights which are accorded to white persons.

A. *Statutes.*—In addition to those provisions of the Civil Right Acts having particularly to do with equal property rights (see *supra,* pp. 69–71), the Civil War marked the beginnings of a series of Acts of Congress through which runs, to this day, a persistent thread of hostility to racial discriminations. Equality of opportunity with white citizens "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property" was required at an early date after emancipation.[42] The same enactment provided that persons other than white citizens "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." In the administration of the homestead laws, discrimination on account of race or color was forbidden,[43] and in 1870, the right to vote "without distinction of race, color, or previous condition of servitude" was generally guaranteed.[44] Racial factors were made irrelevant in determining upon qualifications for jury service by the Act of March 1, 1875.[45] And it is

[42] R. S. 1977 and 1978, 8 U. S. C. 41 and 42 and R. S. 1078, 28 U. S. C. 292, prohibiting the exclusion of any witness in the courts of the United States "on account of color."

[43] R. S. 2302, 43 U. S. C. 184.

[44] R. S. 2004, 8 U. S. C. 31.

[45] 18 Stat. 336, Section 4, 8 U. S. C. 44.

of particular significance that Congress has been held to have subjected to criminal penalties persons who conspire to deny to Negroes the right to lease and cultivate lands. Section 19 of the Criminal Code, 18 U. S. C. 51, as construed in *United States* v. *Morris,* 125 Fed. 322 (E. D. Ark.).

Those charged with the administration of Federal public works, relief, and employment have consistently been enjoined against racial discriminations,[46] and legislation enacted during World War II has included comparable restraints.[47]

B. *Executive Pronouncements.*—The parallel between the right to employment and the right to decent and adequate housing has already been pointed out. See *supra,* p. 73. In the light of this close relationship, the Executive Order of President Franklin D. Roosevelt, establishing a Committee on Fair Employment Practice, has

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[46] Act of June 28, 1941, 55 Stat. 361, 362, 42 U. S. C., Supp. V, 1533 (no discrimination in determining need for public works). See also 40 Stat. 1189, 1201. Relief generally: 48 Stat. 22, 23; 50 Stat. 352, 357; 53 Stat. 1147, 1148, 18 U. S. C. 61c; 53 Stat. 927, 937; 54 Stat. 611, 623; 55 Stat. 396, 405, 406; 56 Stat. 634, 643. Civilian Conservation Corps: 50 Stat. 319, 320, 16 U. S. C. 584g. National Youth Administration: 54 Stat. 574, 593; 55 Stat. 466, 491; 56 Stat. 562, 575.

Employment: 54 Stat. 1211, 1214, 5 U. S. C. 681 (e) (no discrimination in classified civil service); 60 Stat. 999, 1030, 22 U. S. C. A. 807 (Foreign Service); 40 Stat. 1189, 1201 (expenditure of funds for public roads).

[47] Congress banned discrimination because of "race, creed, or color" in the administration of the civilian pilot training and the nurses training programs. 53 Stat. 855, 856, 49 U. S. C. 752; 57 Stat. 153, 50 U. S. C. App. 1451.

particular significance here. In that order,[48] the President said:

> I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin.

This Governmental policy against racial discrimination in employment has been particularized with respect to civil service[49] and employment by Government contractors and subcontractors.[50]

It is not necessary to rely on the analogy between employment and housing, however, in order to establish a public policy directly relevant here. For both Presidents Roosevelt and Truman have spoken of "the right to a decent home" as part of "a second Bill of Rights",[51] and "of the basic

[48] Executive Order No. 8802, June 25, 1941, 6 F. R. 3109.

[49] Executive Order No. 2000, July 28, 1914; Executive Order No. 7915, June 24, 1938 (3 F. R. 1519); Executive Order No. 8587, November 7, 1940 (5 F. R. 4445).

[50] Executive Order No. 9346, May 27, 1943 (8 F. R. 7183).

[51] House Doc. No. 377, 78th Cong., 2d sess., p. 7.

rights which every citizen in a truly democratic society must possess." [52]

C. *International Agreements.*—The Charter of the United Nations (59 Stat. 1033), approved as a treaty by the Senate on July 28, 1945 (59 Stat. 1213), provides in its preamble, among other things, that:

> We the peoples of the United Nations, determined * * * to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women * * * and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance * * * have resolved to combine our efforts to accomplish these aims. (59 Stat. 1035.)

In Article 55 of the Charter, the United Nations agree to promote:

> universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (59 Stat. 1045–6.)

By Article 56,

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. (59 Stat. 1046.)

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[52] Address of President Truman, June 29, 1947, 38th Annual Conference of the National Association for the Advancement of Colored People, 93 Cong. Rec. A-3505.

The United Nations General Assembly, on November 19, 1946, adopted the following resolution:

> The General Assembly declares that it is in the higher interests of Humanity to put an immediate end to religious and so-called racial persecutions and discrimination, and calls on the Governments and responsible authorities to conform both to the letter and to the spirit of the Charter of the United Nations, and to take the most prompt and energetic steps to that end. (United Nations General Assembly Journal, 1st Sess., No. 75, Supp. A–64, p. 957.)

At the Inter-American Conference on Problems of War and Peace held at Mexico City in 1945, at which the Act of Chapultepec (March 1945) was agreed upon, the United States Delegation submitted a draft resolution, which was later adopted by the Conference, entitled "Economic Charter of the Americas." The following statement appears in this resolution (No. 51):

> The fundamental economic aspiration of the peoples of the Americas, in common with peoples everywhere, is to be able to exercise effectively their natural right to live decently * * * (Dept. of State Bulletins, March 4, March 18, 1945, pp. 347, 451; Report of the Delegation of the U. S. A. to the Inter-American Conference on Problems of War and Peace, Mexico City, February 21–March 8, 1945, at pp. 24, 120.)

Another resolution adopted by the Conference (No. 41) provides:

> Whereas: World peace cannot be consolidated until men are able to exercise their basic rights without distinction as to race or religion, The Inter-American Conference on Problems of War and Peace resolves:
>
> 1. To reaffirm the principle, recognized by all the American States, of equality of rights and opportunities for all men, regardless of race or religion.
>
> 2. To recommend that the Governments of the American Republics, without jeopardizing freedom of expression, either oral or written, make every effort to prevent in their respective countries all acts which may provoke discrimination among individuals because of race or religion. (Report of the Delegation of the U. S. A., *supra,* at p. 109.)

At the conclusion of this Conference, the Secretary of State issued a statement in which he said:

> * * * in the Declaration of Mexico and in other resolutions, we have rededicated ourselves at this Conference to American principles of humanity and to raising the standards of living of our peoples, so that all men and women in these republics may live decently in peace, in liberty, and in security. That is the ultimate objective of the program for social and economic co-

> operation which has been agreed upon at Mexico City.
> (Dept. of State Bulletin, March 11, 1945, p. 399.)

A particularly pertinent statement, also in the form of a Resolution, was made at and adopted by The Eighth International Conference of American States at Lima, Peru, in 1938. This Resolution, approved by the Conference on December 23, 1938, reads:

> The Republics represented at the Eighth International Conference of American States declare:
>
> 1. That, in accordance with the fundamental principle of equality before the Law, any persecution on account of racial or religious motives which makes it impossible for a group of human beings to live decently, is contrary to the political and juridical systems of America.
>
> 2. That the democratic conception of the State guarantees to all individuals the conditions essential for carrying on their legitimate activities with self-respect.
>
> 3. That they will always apply these principles of human solidarity. (Documents on American Foreign Relations, Vol. I, 1938–1939, World Peace Foundation, publisher, at p. 49.)

D. *Conclusion.*—In refusing to enforce a contract on grounds of public policy, this Court, in an opinion by Mr. Justice Holmes, said: "To com-

pel the specific performance of contracts still is the exception, not the rule, and courts would be slow to compel it in cases where it appears that paramount interests will or even may be interfered with by their action. * * * if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result''. *Beasley* v. *Texas & Pacific Railway Co.,* 191 U. S. 492, 497, 498. The legislative, executive, and international pronouncements set out above reflect a public policy wholly inconsistent with the enforcement of racial restrictive covenants. The public interest in racial segregation is at least as great as the public interest in whether a railroad station should be built in a certain place, the question involved in the *Beasley* case. There, as here, an attempt to limit the use to which land could be put by means of a restrictive covenant was involved. And the Court there, as we think it should here, refused the injunction sought, noting some reluctance in any event specifically to enforce such restraints, but resting on the paramount interests of the public as a controlling reason for denying equitable relief.

A public policy against enforcement of racial restrictive covenants is the ground upon which the High Court of Ontario has denied equitable relief in a recent decision. Re *Drummond Wren,*

[1945] 4 D. L. R. 674. After referring to similar principles of political conduct, the court said (p. 678):

> the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this Province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas.

The court then went on to note "the unlikelihood of such a policy as a legislative measure". In this country, we need not speculate about likelihoods; such a legislative measure would be unconstitutional. For that reason, we submit that even if the decrees below are not stricken on specific constitutional grounds, they may properly be set aside as being inconsistent with the public policy of the United States.

III. ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS CONTRAVENES SETTLED PRINCIPLES GOVERNING VALIDITY OF RESTRAINTS ON ALIENATION AND IS INEQUITABLE

A. *Racial covenants constitute invalid restraints on alienation*

In Nos. 290 and 291, the Court of Appeals for the District of Columbia held that racially restrictive covenants do not constitute illegal restraints on alienation in the District of Columbia. We contend, on the contrary, that the common law invalidates the effort to exclude, through restraints on alienation of real property, the members of groups based on race or color.

1. *The local decisions.*—It was not until *Hundley* v. *Gorewitz,* 132 F. 2d 23, 24, decided in December 1942, that the Court of Appeals of the District of Columbia for the first time noted the argument that "the covenant constitutes an undue and unlawful restraint on alienation." The issue was not discussed at that time, the court contenting itself with the statement that "in view of the consistent adjudications in similar cases, it must now 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" (132 F. 2d, at 24). The earlier District covenant cases, which the court cites as

conclusive, had not, however, passed upon the alienation issue. The matter was first canvassed on its merits in *Mays* v. *Burgess,* 147 F. 2d 869, 871–872, decided in January, 1945, in which the majority of the court held a racially restrictive covenant, limited in time, not to be invalid, because it was not a total restraint.[53] In the instant cases, the court below rests on the opinion in the *Mays* case, and extends its holding to a perpetual restriction. It is clear from this history that the District's view of the effect of the common law rules against restraints upon racial agreements, far from being long established or deeply rooted, is hardly sown.

2. *Common law rules against restraint on alienation.*—a. Post-medieval common law developed a general rule against restraints on the alienation of property owned in fee which has become part of the unwritten law of every Anglo-American jurisdiction. As the Restatement of Property puts it (vol. 4, pp. 2379–2380): "The underlying principle which operates throughout the field of property law is that freedom to alienate property interests which one may own is essential to the

[53] Justice Miller, concurring, felt that this Court and the Court of Appeals had previously "established the law for the District of Columbia as it is set out in the majority opinion and we are bound to follow it," but he pointedly referred to this Court as "the highest Court of the District of Columbia," with power to reinterpret the applicable law. 147 F. 2d, at 873.

welfare of society. The basis for the assumption that social welfare requires freedom of alienation * * * is * * * found to rest in part upon the necessity of maintaining a society controlled primarily by its living members, in part upon the social desirability of facilitating the utilization of wealth, and in part upon the social desirability of keeping property responsive to the current exigencies of its current beneficial owners. Restraints on alienation are from their very nature inconsistent with the policy of freedom of alienation. Thus, to uphold them, justification must be found in the objective that is thereby sought to be accomplished or on the ground that the interference with alienation in the particular case is so negligible that the major policies furthered by freedom of alienation are not materially hampered."[54]

It is fair to say that in the latter part of the last century, and the first two decades of this, the unfolding of this policy of free alienability tended toward the invalidation of substantial restraints on conveyances of real property. A few early

[54] Comment (a) to Section 406 states (p. 2394):

"This policy is particularly applicable when the restraint is imposed on what otherwise would be an indefeasible legal possessory estate in fee simple because the curtailment of the power of alienation of such estates, totally or partially, is the situation where the dangers of restraints on alienation were first encountered."

British cases,[55] and some isolated state decisions in this country[56] looked the other way, but they felt the great weight of judicial and professional disapproval. The modern cases and the views of the recognized authorities formulated the doctrine of freedom so broadly that one would have been justified in forecasting, in 1915, that conveyors' attempts to forbid subsequent transfer to any numerically significant group would be invalidated—if the announced policies supporting the rule against restraints were to control without dilution from different streams of social or political policy. If, for instance, a conveyor had attempted to prohibit future sale of his land to any New Englander, or college graduate, he would properly have been warned that the restraint would probably be invalidated because the excluded class was too large. Cf. 2 Simes, *The Law*

[55] *Doe d. Gill* v. *Pearson*, 6 East 173 (K. B. 1805), criticized in *Attwater* v. *Attwater*, 18 Beav. 330 (Rolls Ct. 1853); *Billings* v. *Welch*, 6 Ir. R. C. L. 88 (1871); *Mandlebaum* v. *McDonell*, 29 Mich. 78, 96–97 (a leading American case); Gray, *Restraints Upon the Alienation of Property* (2d ed. 1895), secs. 41–43; Sweet, *Restraints On Alienation* (1917) 33 L. Q. Rev. 236, 342–348; *Re MacLeay*, L. R. 20 Eq. 186 (1875), criticized in *Re Rosher*, 26 Ch. D. 801 (1884); *Manierre* v. *Welling*, 32 R. I. 104, 117, 123, 125–129, 142 (another leading case); Gray, Secs. 41–43, and Sweet, *ibid.*; *Mahony* v. *Tynte*, 1 Ir. Ch. R. 577 (1851) (exclusion, in Ireland, of "Papists," the court refusing to inquire what religion predominated in the community).

[56] See Gray, *supra*, secs. 52–54; 2 Simes, *The Law of Future Interests*, sec. 458.

of Future Interests, secs. 450, 456–460; Sweet, *Restraints on Alienation* (1917), 33 Law. Quar. Rev. 236, 243, 342–348; Warren, *The Progress of the Law, 1919–1920: Estates and Future Interests* (1921), 34 Harv. L. Rev. 639, 651–653; Gray, *Restraints on the Alienation of Property* (2d ed. 1895), secs. 31–44, 279; Schnebly, *Restraints Upon the Alienation of Legal Interests* (1935), 44 Yale L. J. 961, 972, 989, 1186–1193.[57]

b. It is doubly significant that the only cases in the United States upholding the exclusion of a social group of considerable size are the racial covenant cases, and, that, except for a single case from a non-common law jurisdiction (*Queensborough Land Co.* v. *Cazeaux,* 136 La. 724 (1915)), all these cases were decided after this Court had struck down legislative housing segregation in

[57] Simes states: "In the United States the courts have been slow to approve of conditions restraining alienation as to a class." 2 op. cit., p. 300. Warren's comment in 1921 on exclusion of large classes or groups was: "Happy is the jurisdiction whose court, uncontrolled by prior decisions, or under the protection of a code provision, may declare all such restraints on alienation invalid." 34 Harv. L. Rev. at 653; Chafee, *Equitable Servitudes in Chattels* (1928), 41 Harv. L. Rev. 945, 984, calls such racial restrictions "a clear case of restraint of alienation;" Gray, in 1895, cautiously wrote that "a condition or conditional limitation on alienation *to certain specified persons* can probably be attached to a fee simple or to an absolute interest in personalty; but how far a condition or conditional limitation on alienation *except to certain specified* persons can be so attached is doubtful." Gray, *supra*, sec. 279.

Buchanan v. *Warley*, 245 U. S. 60, in 1917.[58] The considerations which appear to have moved these courts may be gathered from the American Law Institute's treatment of racially restrictive restraints. As Justice Edgerton pointed out below (162 F. 2d 233, at 241–242), covenants against Negroes would seem to be marked as unreasonable, and therefore invalid, by the Restatement's

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[58] The state cases which explicitly hold at least some types of racial restraints not to contravene the common-law rule against restraints on alienation are *Chandler* v. *Ziegler*, 88 Colo. 1, 4; *Koehler* v. *Rowland*, 275 Mo. 573, 584–585; *Lyons* v. *Wallen*, 191 Okla. 567; *Kemp* v. *Rubin*, 188 Misc. 310 (N. Y. Sup. Ct., Queens County); *Lion's Head Lake* v. *Brzezinski*, 23 N. J. Misc. 290 (2nd Dist. Ct. of Paterson); *Meade* v. *Dennistone*, 173 Md. 295 (restraint against "use and occupancy" only); *Scholtes* v. *McColgan*, 184 Md. 480, 487–488 (same); *Los Angeles Inv. Co.* v. *Gary*, 181 Cal. 680 (same); *Parmalee* v. *Morris*, 218 Mich. 625 (same); *White* v. *White*, 108 W. Va. 128, 130, 147 (same); *Perkins* v. *Trustees of Monroe Ave. Church*, 79 Ohio App. 457, 70 N. E. 2d 487, app. dism. 72 N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term (same); cf. *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724 (broad restraint on sale or use permissible in Louisiana).

California, Maryland, Michigan, Ohio, and West Virginia hold the rule to be violated by restraints on sale or lease but not by similar restrictions on use or occupancy; Wisconsin apparently agrees as to restrictions on use or occupancy, but its Supreme Court has not decided the issue where a restraint on sale is involved. See, *infra*, pp. 112–114. The case in other jurisdictions sustaining racial restraints do not discuss this common-law point. In Canada, an Ontario court has held a racial covenant to violate the rule on restraints. *Re Drummond Wren* [1945] 4 D. L. R. 674, 681 (Ont. High Ct.).

For a compilation of most of the authorities see McGovney, *Racial Residential Segregation by State Court Enforcement*

stated criteria.[59] Nevertheless, the Institute has a specific provision upholding such restraints, "*in states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question*" (italics supplied), and the Restatement's full comment makes even plainer that the dominant influence is the achievement of racial or social segregation, where that is thought to be desirable, rather than the achievement of the policies historically underlying the rule against restraints. 4 Restatement, Property, sec. 406, comment l, pp. 2411–2412.[60]

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of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945), 33 Calif. L. Rev. 5, 8–11; Schnebly, *Restraints Upon Alienation* (1935), 44 Yale L. J. 961, 1186, 1189–1193; Martin, *Segregation of Residences of Negroes* (1934), 32 Mich. L. Rev. 721, 736–741.

[59] The six criteria of reasonableness are quoted and applied in the dissenting opinion below, 162 F. 2d at 241–242; the Restatement also lists the following five factors which "tend to support the conclusion that the restraint is unreasonable" (4 Restatement, Property, p. 2407):

1. the restraint is capricious;
2. the restraint is imposed for spite or malice;
3. the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint;
4. the restraint is unlimited in duration;
5. the number of persons to whom alienation is prohibited is large * * *

[60] "A promissory restraint or forfeiture restraint may be qualified so that the power of alienation can be freely exercised in favor of all persons except those who are members of some racial or social group, as for example, Bundists, Communists or Mohammedans. In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is

There are similar indications in various of the cases upholding racial restraints that the decisive factor has been judicial approval, or at least acceptance, of a policy of residential segregation as outweighing the requirements of free alienability. In the *Queensborough* case, *supra,* the first decision passing upon racial restrictions, the Louisiana court thought "that it would be unfortunate, if our system of land tenure were so hidebound, or if the public policy of the general government or of the state were so narrow, as to render impracticable a scheme such as the one in question in this case, whereby an owner

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reasonable and hence valid if the area involved is one reasonably appropriate for such exclusion and the enforcement of the restraint will tend to bring about such exclusion (see Comment *n* ["Application—change in circumstances"]). This is true even though the excluded group of alienees is not small and include so many probable conveyees that there is an appreciable interference with the power of alienation (compare Comments *j* ["Application—Excluded group of alienees a very small number or not probable conveyees"] and *k* ["Application—Permitte dgroup of alienees very small number"]. The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.

"The desirability of the exclusion of certain racial and social groups is a matter governed entirely by the circumstances of the state in which the land is located. The most important factor in solving this problem is the public opinion of the state where the land is located on the question of the racial or social group involved living in close proximity to the racial or social groups not excluded from the land."

has sought to dispose of his property advantageously to himself and beneficially to the city wherein it lies." 136 La. at 727; see also 729. In *Parmalee* v. *Morris,* 218 Mich. 625, 628, the court felt that "The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents."[61] Dean Ribble (*Legal Restraints on the Choice of A Dwelling* (1930) 78 U. of Pa. L. Rev. 842) pithily summarizes the attitude of the courts which up-

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[61] In *Meade* v. *Dennistone*, 173 Md. 295, 301, the court said: "The large, almost sudden, emigration of negroes from the country to the cities, with the consequent congestion in colored centers, has created a situation about which all agree something ought to be done. In Baltimore City, with a population of about 850,000, one-seventh is negro, occupying a relatively small portion of the city's territory, though the colored area has been, in the last several years, rapidly expanding. Since the decisions under the Fourteenth Amendment, *supra*, no public action can be taken to solve what has become a problem, and property owners have undertaken to regulate it by contract."

See also *Wyatt* v. *Adair*, 215 Ala. 363, 366; *Koehler* v. *Rowland*, 275 Mo. 573, 585; *Porter* v. *Johnson*, 232 Mo. App. 1150, 1156–1157, 1158, 1160; *Lion's Head Lake* v. *Brzezinski*, 23 N. J. Misc. 290, 291 (quoting the Restatement); *Perkins* v. *Trustees of Monroe Ave. Church*, 79 Ohio App. 457, 70 N. E. 2d 487, app. dism. 72 N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term.

hold substantial restraints: "Finally, it may be suggested that a court's finding that the restraint is reasonable, and consequently valid, is simply a way of saying that the court believes that the policies favoring the restraint outweigh the policies opposed to it, so that the state's welfare is better served by allowing the validity of the restraint than by denying it" (p. 847, and see also p. 853). Cf. Manning, *The Development of Restraints on Alienation Since Gray* (1935), 48 Harv. L. Rev. 373, 388–389.

The historical conception of improper restraints on alienation has had sufficient force to compel a number of state courts to invalidate racial restraints on *sales or leases* (*Los Angeles Investment Co.* v. *Gary,* 181 Cal. 680; *Scholtes* v. *McColgan,* 184 Md. 480, 487–488; *Porter* v. *Barrett,* 233 Mich. 373; *White* v. *White,* 108 W. Va. 128; *Williams* v. *Commercial Land Co.,* 34 Ohio Law Rep. 559; cf. *Perkins* v. *Trustees of Monroe Ave. Church,* 79 Ohio App. 457, 70 N. E. 2d 487, 491, appeal dismissed 72, N. E. 2d 97 (Ohio), pending on petition for writ of certiorari, No. 153, this Term), but these courts simultaneously uphold restrictions against *use or occupancy* by the excluded group (*Los Angeles Investment Co.* v. *Gary, supra; Wayt* v. *Patee,* 205 Cal. 46; *Meade* v. *Dennistone,* 173 Md. 295, 305–307; *Scholtes* v. *McColgan,* 184 Md. 480, 487–488; *Parmalee* v. *Morris,* 218 Mich. 625;

Perkins v. *Trustees of Monroe Ave. Church,* 79 Ohio App. 457, 70 N. E. 2d 487, 491, *supra; White* v. *White,* 108 W. Va. 128, 130, 147).[62] "Now it is apparent that, however a restraint upon occupancy may be classified in theory, in practice it is a restraint upon alienation in this type of case. Negroes and Asiatics, against whom the restriction is directed, are not likely to buy land which they themselves cannot occupy, and which they cannot even lease to members of their own race. The actual effect of the retriction is to exclude members of these races as potential purchasers of the land. Restraints upon occupancy, nevertheless, have been sustained in almost every case in which the problem has arisen. This state of the authority seems explicable only upon the supposition that the courts have believed the social interest to require the toleration of these restrictions, that they have felt precluded by supposed authority from upholding the restrictions when phrased directly as restraints upon alienation, but have eagerly seized upon the theoretical difference between a restraint upon alienation and a restraint upon occupancy to justify their conclusions." Schnebly, *Restraints Upon Aliena-*

[62] Wisconsin apparently upholds a restraint on use but the validity of a restriction on sale has not been determined by the Supreme Court, although it has been said to be "difficult of decision." *Doherty* v. *Rice*, 240 Wis. 389, 397–398.

tion (1935), 44 Yale L. J. 961, at 1192–1193.[63] The American Law Institute explicitly recognizes the identity of the two restrictions by providing the same rule for restraints on use by excluded groups as on sales. 4 Restatement, Property, sec. 406, Comment n, p. 2412.[64]

c. In short, the carving out of racial real estate limitations from the application of the common-law rule against restraints on alienation has largely resulted from intervention of sympathy with, or affirmative acceptance of, the social interest in racial residential segregation, rather than from a development of the original policy premises of the common-law doctrines of free alienability. But the Federal courts, including those in the District of Columbia, should, at the very least, refrain from affirmative use of segre-

[63] To substantially the same effect, see McGovney, *supra*, at 8–9; Martin, *supra*, at 737–738; Ribble, *supra*, at p. 849; Miller, *Race Restrictions on Ownership or Occupancy of Land* (1947), 7 Law. Guild Rev. 99, 104–105; cf. Warren, *The Progress of the Law, 1919–1920: Estates and Future Interests* (1921), 34 Harv. L. Rev. 639, 653; Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation* (1927), 21 Ill. L. Rev. 704, 713; Note (1926), 26 Col. L. Rev. 88, 91–92; 2 Simes, *The Law of Future Interests*, sec. 460, pp. 301, 302; Manning, *The Development of Restraints on Alienation Since Gray* (1935), 48 Harv. L. Rev. 373, 379–380, 388–389.

[64] The Court of Appeals of the District of Columbia likewise makes no distinction. Nos. 290–291, R. 419–420; 162 F. 2d 233, 235. The covenants in the instant cases extend to renting, leasing, sale, transfer, or conveyance, and are not limited to use or occupancy. 162 F. 2d at 233.

gation policies in applying and developing the rules of real property or contract law. Cf. *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 203; *Korematsu* v. *United States,* 323 U. S. 214, 216. Thus, in determining whether the exclusion of such a large group as the Negro race constitutes an unlawful restraint, the courts of the District of Columbia might weigh the fundamental rationale of the common-law rule, its applicability to the present day, and the proper extent of allowable restrictions on alienees, but should be bound to consider the excluded group as if it were composed of an equal number of white, or white and colored, persons.

The racial factor apart, it would seem clear that a restraint which perpetually excluded at least a quarter of the population of the District of Columbia, and some 20,000,000 American citizens,[65] should not be upheld. The owner's freedom to convey would plainly be substantially impaired, and no adequate counterbalancing considerations could exist. The discussion in the pertinent portion of the Restatement of Property (section 406 and comments), much of which we have quoted, strongly tends toward the invalidation of restraints where "the number of persons

[65] The restriction in Nos. 290 and 291 applies to any "Negro or colored person," thus apparently including American Indians, Puerto Ricans, Hawaiians, Filipinos, Chinese, and Japanese, and many other persons of Latin American or Asiatic ancestry or nationality.

to whom alienation is prohibited is large" (p. 2407), and only exempts racial or social restrictions because of the presumed special social interest in segregation in certain States. When the "social importance" of the objective sought to be accomplished by the imposition of such a restraint is weighed against the "evils which flow from interfering with the power of alienation" annulment of the restriction is clearly required.[66] The main lines of authority, exclusive of the racial restraint cases, support this view, as the Restatement's codification sufficiently proves. See also, ***Re Drummond Wren*** [1945], 4 D. L. R. 674, 681 (Ont. High Ct.); Schnebly, ***Restraints Upon The Alienation of Legal Interests*** (1935), 44 Yale L. J. 961, 1186–1193; *supra*, pp. 106–7.[67] The many cases upholding nonracial building or

[66] The Restatement of Property states, with respect to restraints on what "otherwise would be an indefeasible legal possessory estate in fee simple" (Comment a to section 406, p. 2394): "To uphold restraints on the alienation of such estates it must appear that the objective sought to be accomplished by the imposition of the restraint is of sufficient social importance to outweigh the evils which flow from interfering with the power of alienation or that the curtailment of the power of alienation is so slight that no social danger is involved."

[67] Justice Field's dictum in *Cowell* v. *Springs Co.*, 100 U. S. 55, 57, is often cited (e. g., in *Mays* v. *Burgess*, 147 F. 2d 869, 872 (App. D. C.)) as supporting large-scale exclusion, but the opinion in that case merely notes that (a) conditions prohibiting alienation "*to particular persons*" are valid and (b) subjection of the estate to "*particular uses*,"—

use restrictions are not opposed, since in most instances the "curtailment of the power of alienation is so slight that no social danger is involved" (Restatement, Section 406, Comment A, p. 2394), and all involve a social value which may properly be encouraged by the courts at the expense of free alienability. Cf. Schnebly, *supra,* at 1388 et seq.; Clark, *Real Covenants and Other Interests which "Run With Land"* (2d ed. 1947), chap. VI.

B. Enforcement of the covenants would be inequitable

Respondents in Nos. 290 and 291 do not show themselves entitled to an injunction merely by proving their covenants valid at common law and enforceable under the Constitution. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Meredith* v. *Winter Haven,* 320 U. S. 228, 235; *Hecht Co.* v. *Bowles,* 321 U. S. 321, 325. And courts of equity have traditionally refused their aid, either where "the plaintiff is using the right asserted contrary to the public interest," (*Morton Salt Co.* v. *Suppiger Co.,* 314

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all the examples given being admittedly "for the health and comfort of whole neighborhoods"—is likewise permissible. *Potter* v. *Couch,* 141 U. S. 296, 315, likewise refers, in general dictum, to restraints on alienation "to *particular persons* or for particular purposes" as valid. [Italics supplied.]

U. S. 488, 492; *United States ex rel. Greathouse* v. *Dern,* 289 U. S. 352, 359–361) or where, all special public interest aside, "issuance of an injunction would subject the defendant to grossly disproportionate hardship." *Harrisonville* v. *W. S. Dickey Clay Mfg. Co.,* 289 U. S. 334, 338. To enjoin petitioners and require their removal from their homes would breach both of these historic bulwarks which equity has erected against judicial injustice. As Mr. Justice Frankfurter has stated, *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 312 (dissent), "the function of the judiciary is not so limited that it must sanction the use of the federal courts as instruments of injustice in disregard of moral and equitable principles which have been part of the law for centuries."

There is no doubt about the evil effect upon the housing conditions and welfare of Negroes of the systematic and wholesale residential segregation in the District of Columbia which racial covenants have produced. The sum of the matter is that "Negroes are increasingly being forced into a few overcrowded slums" and "the chief weapon in the effort to keep Negroes from moving out of overcrowded quarters into white neighborhoods is the restrictive covenant." Report of the President's Committee on Civil Rights (1947), p. 91. The prejudice to the general welfare thus created by the cumulative impact of this "net-

work of multitudinous private arrangements" plainly warrants a court of equity in staying its hand and leaving the covenantors to whatever strictly legal remedies they may have. Cf. Edgerton, J., dissenting below, 162 F. 2d at 237, and in *Mays* v. *Burgess,* 147 2d 869, at 873–874, and 152 F. 2d 123, at 125–126; Traynor, J., concurring in *Fairchild* v. *Raines,* 24 Cal. 2d 818, 831–835; Martin, *Segregation of Residence of Negroes* (1934), 32 Mich. L. Rev. 721, 724, 726, 738, 741; Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem* (1945), 12 U. of Chi. L. Rev. 198, 206–209. Application of established equitable doctrines in the field of racial restrictive covenants is hardly novel; courts have long refused injunctions when enforcement has been found to be injurious to the general interests of the covenanting property owners, even though certain individual owners may still desire to retain segregation. *Hundley* v. *Gorewitz,* 132 F. 2d 23 (App. D. C.); *Gospel Spreading Ass'n* v. *Bennetts,* 147 F. 2d 878 (App. D. C.)

The private harm to these particular colored grantees is also sufficient to outweigh any benefits which respondents may feel will accrue to them through continued residential segregation. These grantees purchased their homes only after many hardships and long-continued efforts to obtain adequate housing; several of the grantees

had been evicted from rented houses by owners seeking personal occupancy. In the District of Columbia there is undeniably an acute shortage of houses for Negroes, even at prices inflated beyond those which white persons would have to pay. Nos. 290 and 291, R. 216–219, 227–228, 241, 260–264, 309–310, 334, 339, 340, 364; cf. Edgerton, J., dissenting, 162 F. 2d at 243–245. If petitioners and other grantees of the same class are forced to move, they will probably face grave difficulties in finding adequate housing, one of the true essentials of life. If they are allowed to remain, respondents will at most suffer an invasion of the lesser social interest in privacy or choice of neighbors.

C. *This Court should determine these issues*

The Court should not hesitate, we believe, to decide these issues of restraints on alienation and the equitable right to an injunction. These are no longer local law matters, of peculiar concern to the District, which should be left to the courts of the District. Cf. ***Fisher*** v. *United States,* 328 U. S. 463, 476–477. The determination of these issues largely turns upon general social considerations of the greatest importance, and is intimately related to a federal public policy of which this Court, and not the District of Columbia courts, is the final arbiter. Nor are the questions presented for decision unique to the District, or governable by common-law developments special

to this area; their nation-wide significance is attested by the geographical distribution of the decisions sustaining racial covenants, as well as by the related cases now on this Court's docket.

Moreover, it cannot be said that on either issue the courts of the District of Columbia are enforcing a well-established rule, or one adopted after careful review. Decision on the application of the rule against restraints has come very late and almost by inadvertence. See *supra* pp. 103-4. The propriety of equitable relief appears never to have had full consideration, not even in the instant cases. As the highest court in the judicial system of the District, this Court should exercise its power to determine the controlling law for the Nation's capital.[68]

CONCLUSION

Statutory residential segregation based on race or color does not exist in this country because the Supreme Court struck it down as violative of the Constitution. Actual segregation, rooted in ignorance, bigotry and prejudice, and nurtured by the opportunities it affords for monetary gains from the supposed beneficiaries and real victims alike, does exist because private racial restrictions are enforced by courts. These covenants are inju-

[68] See *supra*, p. 104, fn. 53, for Mr. Justice Miller's reference, in *Mays* v. *Burgess*, 147 F. 2d 869, 873 (App. D. C.), to this Court as the "highest Court of the District of Columbia" with power of final determination of District law.

rious to our order and productive of growing antagonisms destructive of the integrity of our society. Inadequate shelter, disease, juvenile delinquency are some of the major evils directly traceable to racial restrictive covenants. Restraints on alienation of real property are generally regarded as contrary to the policy of the States; yet restrictive racial covenants have been upheld by State courts, some on the tenuous ground that a restriction against use or occupancy is somehow, in the eyes of the law, entitled to Constitutional approval although a restriction against ownership alone is condemned. There is no basis for such a distinction. The covenant restricting use and occupation works precisely the same evils as the covenant against ownership by the members of the proscribed race or color.

The areas controlled by restrictive racial covenants are rapidly expanding in urban centers, and the resulting danger to our free institutions is imminent. Courts judge the validity of statutes not merely by what is done under them but by what may be done under them. The same rule must be applied to these covenants in which the public interest has become enmeshed. Restricted areas could be expanded through covenants until whole groups of citizens, selected by race or color or creed or ancestry, could be exiled from this nation forever. Supposed freedom of contract may not be used to further such ends. This Court has

pointed out that the Constitution does not speak of freedom of contract. "It speaks of liberty and prohibits the deprivation of liberty without due process of law". *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391.

Race hostilities will not disappear when and if this Court determines that racial restrictive covenants are abhorrent to the law of the land. Neither will a measure of segregation, existing through the voluntary choice of the people concerned. But, as this Court said in *Buchanan* v. *Warley,* 245 U. S. 60, 80–81, the solution of the problem of race hostility "cannot be promoted by depriving citizens of their constitutional rights and privileges."

Respectfully submitted.

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