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TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 72.

J. D. SHELLEY, ET AL., *Petitioners,*

v.

LOUIS KRAEMER, ET AL.

On Writ of Certiorari to the Supreme Court of the State of Missouri.

No. 87.

ORSEL McGEE, ET AL., *Petitioners,*

v.

BENJAMIN J. SIPES, ET AL.

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No. 290.

JAMES M. HURD, ET AL., *Petitioners,*

v.

FREDERICK E. HODGE, ET AL.

No. 291.

RAPHAEL G. URCIOLO, ET AL., *Petitioners,*

v.

FREDERICK E. HODGE, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

MOTION OF THE NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

The National Lawyers Guild respectfully prays leave to file a brief as amicus curiae in the above captioned cases. The applicant has filed with the clerk the written consent of counsel for petitioners and for respondents in Nos. 290, 291 and No. 87. The applicant has in writing requested the consent of counsel for petitioners and for respondents in No. 72. No reply has as yet been received.

The National Lawyers Guild is an organization of members of the American Bar, devoted particularly to the protection of the fundamental civil rights guaranteed by the Constitution of the United States. It believes that the basic constitutional question presented in these cases is of major importance to the nation. It believes that the judgments below and the reasoning on which they are based seriously impair constitutional doctrines heretofore established by this Court and tend to subvert the protection accorded civil rights by the Fifth and Fourteenth Amendments. It conceives it to be its public duty, as an organization of members of the bar, to bring before this Court the reasons which impel its conclusion that the judgments below should be reversed. The National Lawyers Guild therefore respectfully requests leave to file a brief as amicus curiae.

BRIEF FOR THE NATIONAL LAWYERS GUILD AS AMICUS CURIAE.

Opinions Below.

The opinion of the Supreme Court of the State of Missouri in No. 72 (R. 153-159), is reported at —— Mo. 2d ——, 198 S. W. 2d 679. The opinion of the Supreme Court of the State of Michigan in No. 87 (R. 60-69), is reported at 316 Mich. 614. The opinion of the United States Court of Appeals for the District of Columbia in Nos. 290 and 291 (R. 417-432) is reported in 162 F. 2d 233.

Jurisdiction.

The jurisdiction of this Court is invoked under Sections 237 and 240 of the Judicial Code (28 U. S. C. 344 (b) and 347 (a)).

Question Presented.

This brief will discuss only the question whether, by enforcing the racial restrictive covenants here involved in such manner as to preclude petitioners, because of their race, from owning or occupying real property, and to preclude owners of real property from selling or leasing such property to Negroes, the courts below violated the Fifth and Fourteenth Amendments.

Statement.

Nos. 290 and 291—Petitioners in No. 290 now occupy as their home, pursuant to a grant by deed from one Ryan and his wife, residential property in the 100 block of Bryant Street, Northwest, in the District of Columbia (R. 381-382). In No. 291, petitioners Rowe, Savage and Stewart are each grantees by deed from petitioner Urciolo, of a piece of improved property on the same block (R. 382). These cases arise out of suits filed by respondents, owners of four other lots in the same block, in the United States District Court for the District of Columbia, to secure a declaration that the deeds to the petitioner grantees are null and void, and an injunction ordering the grantees to vacate their homes and prohibiting the renting, sale, leasing or transferring of the residential property to any Negro or colored person.

The suits were predicated upon the fact that when the properties involved were transferred by deeds in or about the year 1906, there was included in the deeds a covenant which provided (R. 380), that the lots conveyed "should never be rented, leased, sold, transferred or conveyed unto any Negro or colored person". It was claimed that the grantee petitioners are Negroes or colored persons. It was further claimed that although the grantee petitioners acquired their respective properties from persons who were

themselves remote grantees from the original covenantors, they could acquire no rights in such property because of the existence of the covenant in the 1906 deed. The trial court sustained the action, found that the respective grantees were colored persons, and granted the relief prayed in full (R. 384-385). The decree required *inter alia,* that petitioners "remove themselves and all of their personal belongings from the land and premises now occupied by them" (R. 384-385), but made no provision for the return of the money which the grantees had paid for the property. (See R. 80, 219).

The United States Court of Appeals for the District of Columbia, Judge Edgerton dissenting, affirmed the decision below in reliance upon its prior holding in *May* v. *Burgess,* 147 F. 2d 869. The Court held that neither the policy of the common law against restraints upon alienation, nor the "changed conditions" doctrine pursuant to which a court of equity balances the benefits to be achieved through enforcement of such covenants against the danger that enforcement "would * * * create an unnatural barrier to civic development and thereby * * * establish a virtually uninhabitable section of the city" (*Hundley* v. *Gorewitz,* 132 F. 2d 23, 24), outweighed in these cases the policy of the law "that equity will enforce a proper contract concerning land, against all persons taking with notice of it". (R. 417-418; *Mays* v. *Burgess, supra,* at pp. 871, 872). The Court further held that judicial enforcement of the racial restrictive covenant did not violate the Fifth or the Fourteenth Amendments (R. 418; *Mays* v. *Burgess, supra,* at pp. 870-871).

No. 87—Petitioners now occupy as their home, pursuant to a deed executed by a grantee of one Ferguson and his wife, residential property in the City of Detroit, Michigan, identified as 4626 Seebaldt Avenue (R. 16, 19). In 1934, the Fergusons, while owners of these premises, executed, in consideration for the reciprocal agreement of neighboring property owners, a covenant providing, *inter alia* (R. 63), that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

This case arises out of a suit filed by respondents, neighboring property owners, to obtain injunctive relief restraining petitioners, on the ground that they are allegedly not of the Caucasian race, from using or occupying the property they have purchased and occupy (R. 16). The trial court found that petitioners are "of the colored or Negro race" (R. 74), and granted the injunctive relief prayed in full (R. 74-75).

The Supreme Court of the State of Michigan affirmed. The court concluded that since the public policy of the State of Michigan approved the creation and enforcement of restrictions upon the use and occupancy of land, though it disapproved the creation of, and denied enforcement to restraints upon alienation, the instant restriction upon occupancy by non-members of the Caucasian race should be enforced (R. 65-66). The court recognized that the question whether judicial enforcement of racial restrictive covenants was violative of the Fourteenth Amendment had not been decided by this Court in *Corrigan* v. *Buckley,* 271 U. S. 323 (R. 66). It nevertheless held that petitioner's objection to the action of the court below on constitutional grounds was without merit since "To accept this reasoning would also at the same time deny 'the equal protection of the laws' to the plaintiffs and prevent the enforcement of their private contracts" (*ibid.*).

No. 72—In 1911, 30 out of a total of 39 neighboring property owners in the City of St. Louis, Missouri, signed an agreement "for the benefit of all" providing that thereafter, for a term of fifty years, the property "fronting on Labadie Avenue and running back to the alley on the North and South sides of Labadie Avenue between Taylor and Cora Avenue" should not be occupied "by any person not of the Caucasian race" (R. 2, 19-20). Among the nine owners of property in the area described at the time the agreement was executed were five Negroes (R. 2-3). Years later petitioners purchased the property which they now occupy from a remote grantee of one of the signatories to the agreement (R. 1-3, 140).

The case arises out of a suit filed by respondents, neighboring property owners, in the Circuit Court of the City of St. Louis, to obtain an injunction ousting petitioners from residence on the ground that they are Negroes, and as such have no right to occupy the property (R. 4-8).

The trial court found that petitioners are Negroes, but declined to enforce the restriction on the ground that it had been the intention of the signers that the agreement become final and binding only upon the concurrence of all of the owners of the property described therein, and that since nine property owners had not joined in the agreement, leaving some of the property not covered, the agreement had never become final and was of no force and effect (R. 139-144).

The Supreme Court of the State of Missouri reversed. Looking to the surrounding circumstances to ascertain the purpose which the signers sought to achieve by the agreement, the court found that "Obviously it could not have been the intention of the parties to prevent any Negro occupancy at all because that already existed. It must have been their intention to prevent greatly increased occupancy by Negroes. And their plan has succeeded" (R. 156). The court pointed out that "If the purpose of a plan under which some property is restricted fails because other property in the district has not been likewise restricted, then equity will not enforce the agreement. The general purpose of a restrictive agreement must be achieved in order to justify a burden" (R. 157). The court concluded, however, that "since the purpose of the plan is being accomplished" its enforcement achieves a "benefit" (*ibid.*) consonant with public policy, and one sufficient to justify the burden imposed.

The court rejected petitioners' contention that judicial enforcement of the covenant violated the Fourteenth Amendment for reasons similar to those advanced by the United States Circuit Court of Appeals for the District of Columbia in Nos. 290 and 291, and by the Supreme Court of the State of Michigan in No. 87.

ARGUMENT.

I. The Nature of the Issues.

The central issue in these cases arises from an apparent conflict between principles heretofore unreconciled by this Court. On the one hand it is urged that the right of an individual to own, use and dispose of property, vests in property owners a right to discriminate among would-be buyers on racial grounds. It is further urged that this right, when coupled with the right to contract freely, vests in property owners the right to bind themselves by contract with other property owners to practice such discrimination in disposing of their property in the future. Allegedly, the action of the judiciary in compelling adherence to such agreements does not involve the application of a discriminatory racial policy by the state, but represents merely an application of a uniform policy against repudiation of valid private agreements. It is said that the state cannot be deemed to have been precluded by the Fourteenth Amendment from enforcing, on a non-discriminatory basis, such discriminatory private agreements.

On the other hand, it is clear that the right of persons to acquire, use, and dispose of property without discrimination on the basis of race, is a right guaranteed against state action by the Fourteenth Amendment. *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 668; *City of Richmond* v. *Deans,* 281 U. S. 704. Although the *Civil Rights Cases,* 109 U. S. 3, 17, held that the discriminatory denial of property rights by individuals was not of itself violative of the Fourteenth Amendment, that case also made it clear that such denials retained immunity only as long as they were "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings." Immunity is lost the moment racial discrimination by individuals is "sanctioned in some way by the state" (*ibid.*).

Thus it has been held that although individual property owners may, by refusing to sell to Negroes, effectively exclude them from the community, a state may not, at their

behest, adopt or apply a policy of racial segregation in residential areas. *Buchanan* v. *Warley, supra; City of Richmond* v. *Deans, supra.* Moreover, although property owners may, without violating the Fourteenth Amendment, agree not to sell their property to Negroes without first securing the consent of a majority of their neighbors, it has been held that a state cannot constitutionally condition the right of occupancy of property by a Negro upon the approval of a majority of the white inhabitants of the community. *Harmon* v. *Tyler,* 273 U. S. 668.

The *Tyler* case makes it clear that the state cannot lend its powers to the support of a policy of racial segregation adopted by individuals. Cf. *Liberty Annex Corp.* v. *City of Dallas,* 289 S. W. 1067, aff'd., 295 S. W. 591, 19 S. W. 2d 845 (Texas). For, in the *Tyler* case it was not the ordinance, or any state policy, which decreed segregation; the ordinance merely permitted that result to be achieved if the private individuals who inhabited the community so desired.[1] It could, indeed, have been contended, as plausibly as it is in this case, that in honoring the will of the inhabitants, the state was interested only in applying an abstract principle of good government—majority rule—and was completely unconcerned with whether or not the inhabitants of the community discriminated against Negroes.

We believe it entirely fallacious therefore to contend, as respondents do, that state action which sanctions or supports denial of property rights on the basis of race may be held violative of the Fourteenth Amendment only if the state's action is itself motivated by discriminatory considerations based on race. We submit that whenever a state deprives a person, because of his race, of the right to acquire, use and dispose of property, the state violates the Four-

[1] Although the ordinance involved in the *Tyler* case made approval of the majority of residents a condition precedent to the Negroes' right of occupancy, there can be no doubt that the result would have been the same if the statute had instead given the majority power to defeat the Negroes' right of occupancy by voting against it. Cf. *Steele* v. *Louisville and Nashville Railroad Co.,* 323 U. S. 192.

teenth Amendment. We submit further that when a state, through its courts, issues an injunction to preclude the purchase or occupancy of property by a Negro because of his race, the state deprives the Negro of his rights under the Fourteenth Amendment. We believe that such deprivation can no more be justified as an incident of the state's policy of enforcing private contracts, than it could be justified as an incident of some other allegedly non-discriminatory state policy, such as majority rule. And finally, we contend that to hold such state court action violative of the Fourteenth Amendment would be to approve and follow, not reject, the doctrine of the *Civil Rights Cases,* upon which respondents must rely.

The same limitations which, under the Fourteenth Amendment, govern state action, are applicable to the federal government under the Fifth Amendment. *Heiner* v. *Donnan,* 285 U. S. 312, 326; *Farrington* v. *Tokushige,* 273 U. S. 284, 298-299. The discussion below, therefore, has been framed in terms of the Fourteenth Amendment, and is applicable to the District of Columbia cases as well as to the cases presently before the Court which arise out of decrees issued by state courts.

II. By Enforcing Private Contracts Which Deprive Persons of Rights Guaranteed by the Fourteent Amendment the State Violates the Fourteenth Amendment.

A. The Nature of the Rights Guaranteed by the Fourteenth Amendment.

It is important to distinguish at the outset between civil rights on the one hand, which the Fourteenth Amendment protects, and so called "social rights of men and races in the community" which, in the *Civil Rights Cases,* 109 U. S., at p. 22, were held not protected. The right to purchase, use and dispose of *property* without discrimination on the basis of race is clearly one of the civil rights protected by the Fourteenth Amendment. *Buchanan* v. *Warley, supra.* In the *Civil Rights Cases* it was referred to as "one of those

fundamental rights which are the essence of civil freedom," 109 U. S., at p. 22. It is therefore inadmissible in discussing the scope of that right, and the nature of action which would impair it, to seek for analogies in such fields as the right to equal accommodation in inns, conveyances, or places of amusement. Whether or not denial of these latter rights would be deemed to run afoul of the Fourteenth Amendment, it is clear that opportunity to acquire and use property without regard to race is protected by the Fourteenth Amendment.

Nor is this right protected merely as a part of the guarantee of "property rights" or "liberty of contract" contained in the Fourteenth Amendment. For, if so, it could be denied whenever a legislature in the exercise of its wide discretion, found reasonable basis in the public interest for its abridgment. Cf. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Norman* v. *Baltimore & Ohio Ry. Co.,* 294 U. S. 240, 307-308. Like the right to freedom of speech, and of the press, and freedom of religion, the right to acquire, use and dispose of property, *without racial discrimination,* is not subject to the police power of the state. "Discriminations based on race alone are obviously irrelevant and invidious." *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192, 203. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 528; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349-352. And therefore such discriminations cannot constitutionally be made to affect the right of individuals to acquire, use or dispose of property, regardless of the nature or substantiality of the public interest which a legislature may believe would be served thereby. *Buchanan* v. *Warley, supra; City of Richmond* v. *Deans, supra.* Only a showing of clear and present danger to the existence of government can justify abridgment of the civil rights of freedom of speech and of press, of assembly and of worship, *West Virginia State Board of Education* v. *Barnett,* 319 U. S. 624, 639; only such a showing could justify discrimina-

tion because of race. *Hirabayashi* v. *United States,* 320 U. S. 81, 100-102; *Ex Parte Endo,* 323 U. S. 283, 297, 302.

B. The Nature of the Duties Imposed by the Fourteenth Amendment.

The obligation to refrain from interfering with the exercise of civil rights protected by the Fourteenth Amendment is imposed only upon the states. That obligation extends, however, to every agency and officer of the state, executive, legislative, and judicial.[2] It applies to "State action of every kind" (*Civil Rights Cases,* 109 U. S., at p. 11), and it precludes the state from using any of its powers to "support" or "sanction" interference by individuals with the enjoyment of civil rights by other individuals (*ibid.,* at p. 17).

The Fourteenth Amendment, on its face, does not impose on individuals any duty to refrain from interfering with the enjoyment by others of the rights it guarantees. If, however, it were held that the Fourteenth Amendment imposed an obligation upon the states affirmatively to illegalize and punish such individual conduct, the result would have been precisely the same as if the Amendment had in terms imposed on individuals the same obligations which it imposed on the states. This, in the *Civil Rights Cases,* the Court refused to do. It distinguished sharply (109 U. S., at p. 17), between "acts of individuals unsupported by any [state] authority," which, though they interfere with the enjoyment of civil rights by the injured party, cannot be deemed violative of the Fourteenth Amendment, and protection accorded such acts "by some shield of state law or state authority," which does violate the Amendment.

The *Civil Rights Cases* did not proceed on the theory that there was in the individual any constitutional right to deprive others of civil rights guaranteed by the Constitu-

[2] *Civil Rights Cases,* 109 U. S. 3, 11, 17; *Ex Parte Virginia,* 100 U. S. 339; *Twining* v. *New Jersey,* 211 U. S. 78, 90-91; *Moore* v. *Dempsey,* 261 U. S. 86; *Powell* v. *Alabama,* 287 U. S. 45; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673.

tion; its holding followed rather from the fact that the Fourteenth Amendment did not impose prohibitions upon individuals as such. It was this fact which impelled the holding that private invasions of civil rights are *damnum absque injuria* under the Fourteenth Amendment when they are accomplished without the authority, support or sanction of the state. Nothing in those cases or any subsequent case in this court has suggested that such private denials of civil rights remain constitutionally unobjectionable when a state's powers are invoked to effectuate the denial. No case in this Court has even suggested that individuals or private groups have the right, despite the Fourteenth Amendment, to obtain state aid or assistance in carrying out acts of discrimination based on race. Quite to the contrary, this Court said in the *Civil Rights Cases* that the impact of the Fourteenth Amendment lay precisely in the fact that it destroyed the power of the state to render authorization, support or assistance to discriminatory acts of individuals based on race where such acts impinged upon rights guaranteed by the Amendment.

The *Civil Rights Cases* thus implicitly held that a state cannot be said to "sanction" or "support" acts of individuals which it merely does not render unlawful and punishable.[3] It is for this reason that the states are not required by the Fourteenth Amendment to punish a property owner who utilizes his control of property on which others work and live to bar communication between them and outsiders on religious matters and other questions of public concern. Cf. *Marsh* v. *Alabama,* 326 U. S. 501. It is for this reason that the states are not required by the Fourteenth Amendment to punish employers who discharge employees in

[3] This is not to say, of course, that the states remain free under the Fourteenth Amendment to deny protection to individuals injured by conduct which is illegal under state law simply because the illegal conduct results in impairment of rights guaranteed by the Fourteenth Amendment. Such a denial of redress, as the *Civil Rights Cases* clearly indicated, would amount to a denial of equal protection of the laws. It is with respect to individual deprivations of civil rights accomplished by means not independently illegal that the state may remain aloof.

reprisal against the exercise of their constitutional right to proselytize on behalf of a labor organization. Cf. *Thomas* v. *Collins,* 323 U. S. 516, 537, 540. And it is for this reason that the states do not violate their obligations under the Fourteenth Amendment merely by failing to illegalize and punish the making or voluntary performance by individuals of agreements which restrict the right to purchase, use and sell real property on the basis of race. Cf. *Corrigan* v. *Buckley,* 271 U. S. 323.

Once the state goes beyond this, however, the moment it forsakes the role of passive non-participant and lends to any such private infringements of civil rights the support or sanction of its policies or instrumentalities of government, the state violates the Fourteenth Amendment. Just as the state cannot support the property owner in the exercise of his rights, when that exercise invades the constitutional right of others freely to speak and to listen (*Marsh* v. *Alabama,* 326 U. S. 501), so the state cannot support the property owner who seeks to deny to others their constitutional right to acquire, use and dispose of property without discrimination on the basis of race. Almost contemporaneous recognition that this was indeed the holding of the *Civil Rights Cases* appears from the decision of Judge Ross in *Gandolfo* v. *Hartman,* 49 Fed. 181, 182-183 (1892), dismissing, on Constitutional grounds, a suit for enforcement of a racial restrictive covenant.

This does not transform the Fourteenth Amendment into an instrument for the regulation of individual discrimination based on race. The only effect of the rule is to deprive individuals of the power and privilege of invoking, in the performance of discriminatory acts, aid and protection which a state could accord them in the performance of non-discriminatory acts. That, of course, does not result in destruction of the power which respondents claim, i. e., their power as property owners to discriminate on racial grounds in disposing of their holdings, or to make and perform contracts to do so. *Marsh* v. *Alabama, supra,* does not imply that the Fourteenth Amendment has destroyed

the analagous power of property owners to deny access to their property to persons who wish to proselytize among tenants on behalf of a religious sect. Absent state law to the contrary, such conduct by the property owner is not illegal. All that is held is that these powers are not affirmatively protected by the Fourteenth Amendment, and that property owners have no cause to complain of the fact that the states are precluded from lending aid or assistance to their effectuation. It would be strange indeed to hear it said that the Fourteenth Amendment, which was enacted to secure civil rights, instead bound the states to sanction their infringement.[4]

Yet the argument of the Supreme Court of Michigan, that enforcement of racial restrictive covenants can be denied only at the price of denying to the parties to such agreements the "equal protection of the laws" (No. 87, R. 66), leads to just this conclusion. (Cf. No. 72, R. 158). The argument is that a court could not, without denying equal protection, refuse to enforce a racial restrictive covenant, while at the same time continuing to enforce other covenants restricting the use of land. The fallacy in this argu-

[4] With due deference, we cannot perceive the force of the argument which has been made repeatedly by the Court of Appeals for the District of Columbia that failure to enforce racial restrictive covenants would "destroy" * * * titles to valuable real estate made and taken on the faith of our decisions" (No. 290, R. 417-418; 162 F. 2d at 234). Whose titles? Certainly not those of the Negroes who are being evicted from their homes. Certainly not those of respondents; no one seeks to oust them from ownership. The most that can be said is that respondents, and others similarly situated, would be disappointed in their expectation that the state through its courts would aid them in compelling a willing property owner to refrain from selling or leasing his property to Negroes. If *Norman* v. *Baltimore and Ohio Ry. Co.*, 294 U. S. 240, *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 and *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, teach anything they teach that the expectations of a property owner, or of a party to a contract, concerning the availability of judicial aid for the enforcement of property or contract "rights" are not to be deemed inviolable even as against the police power of a state. It is incredible that such expectations should be permitted to stand in the way of securing to others civil rights guaranteed by the Constitution.

ment is exposed by mere reference to the innumerable cases in which courts refuse to enforce contracts, otherwise entirely valid, because the particular contracts are deemed violative of "public policy." No one, so far as we are aware, has yet suggested that when a court refuses to enforce a contract made on Sunday, yet enforces an identical contract made on Monday, it denies to the parties to the Sunday contract equal protection of the laws. Nothing in the Constitution requires a court to deny enforcement to Sunday contracts, for no constitutional rights would be impaired by their enforcement. But the Constitution does require that courts refrain from enforcing contracts which, as do racial restrictive covenants, deprive persons of civil rights guaranteed by the Fourteenth Amendment. Can there be any doubt that this fact, denial of civil rights, justifies a distinction, for purposes of enforcement, between such contracts and contracts restricting land use which are not open to objection on such grounds?

Implicit in the argument of the state courts below is the view that no state could by statute prohibit a property owner from discriminating among prospective purchasers on the basis of race in disposing of his property. By the same token it would follow that no state could by statute prohibit an employer from discriminating against prospective employees on the basis of race. Such statutes, however, would stand upon much the same basis as the Railway Labor Act of 1926, the National Labor Relations Act, and its counterparts in state laws. What was said by this Court in reply to employer contentions that these statutes unconstitutionally interfered with their rights as property owners freely to select their employees is equally applicable to the attack implicit in the opinions of the courts below upon statutes prohibiting racial discrimination in the sale or leasing of property. In *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway Clerks,* 281 U. S. 548, 570-571, the Court said:

> "The prohibition by Congress of interference with the selection of representatives for the purpose of negotia-

> tion and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both * * *. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."

Property owners have no more constitutional right to discriminate against would-be purchasers because of their race, color, creed or union affiliation, than employers have to discriminate on such grounds against would-be employees. Cf. *Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177; *N. L. R. B.* v. *Waumbec Mills,* 114 F. 2d 226 (C.C.A. 1).

C. The Limitations Imposed by the Fourteenth Amendment Apply to State Action Which Flows from Policies Embodied in the Common-Law as Well as from Policies Embodied in Legislation.

Judicial action is no less action of the state, subject to the limitations of the Fourteenth Amendment, when that action flows from policies embodied in the common law of the state than when it flows from policies embedded in legislation. This principle has been applied often and uniformly by this Court. See, e. g., *Cantwell* v. *Connecticut,* 310 U. S. 296; *Bridges* v. *California,* 314 U. S. 252; *American Federation of Labor* v. *Swing,* 312 U. S. 321; *Bakery Drivers Local* v. *Wohl,* 315 U. S. 769. Thus, the action of a state court in enjoining a white property owner from selling his property to a Negro would be equally violative of the Fourteenth Amendment whether the injunction was predicated on a common law policy of the state which held the ownership and occupancy of such property by a Negro to be a

"nuisance," or upon an identical policy declared by act of the state legislature. *Spencer Chapel Methodist Episcopal Church* v. *Brogan,* 104 Okla. 123, 231 Pac. 1074; *Crist* v. *Henshaw,* 196 Okla. 168, 163 P. 2d 214. A state court cannot constitutionally follow and apply a common law policy which the legislature could not constitutionally adopt and direct the courts to enforce.

D. Adoption and Enforcement by State Courts or Legislatures of a Policy Which Supports the Infringement by Individuals of Civil Rights Guaranteed by the Fourteenth Amendment is Unconstitutional.

For the reasons set forth above, it is entirely proper to test the validity of the policy adopted and applied by the state courts in these cases in terms of whether that policy is one which state legislatures could constitutionally enact into law. The question then becomes whether a state could by statute provide that covenants against sale to, or occupancy of certain lands by Negroes should be lawful and enforcible by injunction, not only against willing white sellers, but against Negro buyers.

Even some who find no constitutional infirmity in state court enforcement of restrictive covenants in cases such as those now before the Court, concede that such a statute would be invalid. As one such writer puts it, the statute would extend "the policy and sanction of the state beyond the mere protection of property or contract rights to the very act of discrimination." The same writer further admits that under such a statute "the discrimination itself [is] authorized and encouraged by the state."[6]

These concessions are indeed unavoidable, for the statute approves, authorizes and encourages discrimination precisely as did the statute held invalid in *Harmon* v. *Tyler,* 273 U. S. 668, discussed *supra,* p. 8.

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[5] Houston, John A., *State Court Enforcement of Race Restrictive Covenants as State Action Within Scope of Fourteenth Amendment, (Comment)*, 45 Mich. L. Rev. 733, 743.

[6] *Id.*

To hold such a statute valid would be to hold that a state could by statute define as a misdemeanor or even as a felony, the purchase by a Negro of property which the owner had contracted to sell only to whites. Moreover, since it is a familar doctrine that a state may normally, to promote the sanctity of contracts, provides penalties for inducing breach thereof (cf. *Liberty Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71), such a holding would mean that a state could by statute make it a crime for a Negro to induce the sale to him of property which the owner is under covenant to sell only to whites, provided only the state avoids equal protection objections by finding that such racial restrictive covenants are the type of contracts most often broken as a result of deliberate inducement by third persons. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471-472; *United States* v. *Petrillo,* 331 U. S. 888. We believe that no one seriously contends that such statutes would be compatible with the Fourteenth Amendment.

The policy applied by the state courts in these cases, however, is exactly the same as that embodied in the hypothetical statutes discussed above, and must fall for the same reasons. To suggest, as the writer quoted above does,[7] that in recognizing the validity and decreeing the enforcement of restrictive covenants, a court, unlike a legislature, is unconcerned whether the obligations imposed therein comport with public policy, is to deny to the judiciary its acknowledged place in our governmental scheme. To assert that a court enforces racial restrictive covenants solely because they meet the formal requirements of a "contract" is to view the law in Mr. Justice Holmes' phrase, as a "brooding omnipresence in the sky." "A promise upon a promise will lie" is not a pernicious abstraction which decrees the enforcement of all reciprocal promises which do not themselves violate positive law. Sunday contracts, contracts in restraint of marriage, and dozens of others, which meet all

[7] Houston, *op. cit. supra,* note 5, at pp. 741, 742-743.

of the formal contract requirements and are not in themselves "void," are denied enforcement by state courts on the ground that they do not comport with public policy.[8] When a court enforces a contract it decides, impliedly if the question is not raised, expressly if it is, that the obligations undertaken by the parties may lawfully be assumed, and that performance of the contract accords with the public policy of the state.

Certainly this is true where a court of equity is asked to enforce a contract by injunction or specific performance. These remedies are never granted without inquiry into whether performance of the particular contract would comport with or contravene the public policy of the jurisdiction.[9] Indeed, the best illustration of this point is to be found in the historical development of the law governing realty covenants themselves. Restrictions on land use, contained in such covenants, were deemed appropriate by courts of equity to protect what they found to be socially desirable interests. It was in consequence of this determination that the courts gave binding effect to the restrictions, despite the general policy of the law which disapproved restraints upon the utilization of property by the owner. Enforcibility of restrictions upon land use by injunction flowed from a conscious determination by the courts that the objective attained by the restrictions was more important to society than the retention intact of the absolute freedom of property owners to utilize their property in any lawful fashion they might desire. When courts of equity assimilated restrictions upon racial occupancy and ownership to restrictions upon use, they made precisely the same policy determination concerning the advantages of such restrictions as they had earlier made with respect to restrictions upon use. The courts balanced the policy of the law against restraints upon alienation on the one hand, against the desirability

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[8] 5 Williston on Contracts, (Rev. Ed., 1937), Sections 1628-1631, pp. 4554-4568.

[9] *Op. cit. supra,* note 8, Section 1429, pp. 4000, 4001, note 4.

of racial segregation on the other, and concluded that the latter interest should prevail. The same policy determinations and considerations which were at the foundation of the statutes held invalid in *Buchanan* v. *Warley,* 273 U. S. 668, *City of Richmond* v. *Deans,* 281 U. S. 704, and *Harmon* v. *Tyler,* 273 U. S. 668, constitute the rationale for judicial enforcement of racial restrictive covenants.

The very decisions of the courts below prove the point. The courts below did not automatically decree enforcement of the covenants merely because, as contracts, they were not "improper," and therefore fell within the rule "that equity will enforce a proper contract concerning land, against all persons taking with notice of it." *May* v. *Burgess,* 147 F. 2d 869, 872 (App. D. C.). On the contrary, the Court of Appeals for the District of Columbia applied that rule only after finding that enforcement would not "create an unnatural barrier to civic development and thereby * * * establish a virtually uninhabitable section of the city." *Hundley* v. *Gorewitz,* 132 F. 2d 23, 24 (App. D. C.), quoted with approval in *May* v. *Burgess,* 147 F. 2d 869, 871 (App. D. C.), on the basis of which the Court of Appeals for the District of Columbia affirmed the judgments below in Nos. 290 and 291 (R. 417-418; *supra,* p. 4). The Supreme Court of Michigan applied that rule only after finding that racial restrictions upon occupancy gave to society the same type of benefits as did restrictions upon use; that these benefits were more substantial than those flowing from restrictions upon alienation to Negroes, and that these benefits warranted the courts in enforcing restrictions upon occupancy, although restrictions upon alienation would not be enforced (No. 87, R. 65-66, *supra,* p. 5) . The Supreme Court of Missouri applied that rule only after finding that the plan of the covenantors "to prevent greatly increased occupancy by Negroes" was a worthy objective, one which warranted a court of equity in imposing burdens to aid in its achievement (No. 72, R. 156-157, *supra,* p. 6).

Can there be the slightest doubt then, that the courts below did not blind themselves to the objects and purposes

of the covenants before decreeing their enforcement? Can there be the slightest doubt, indeed, that the courts below made value judgments in terms of desirable social policy which differed not a bit from the value judgments made by legislatures in deciding to enact legislation approving and decreeing enforcement of contracts providing for residential segregation? Not only the motive, but the result, is in both cases the same. Because the state approves and the courts enforce, individuals are encouraged to enter into covenants barring Negroes from owning and occupying residential properties, covenants which often close to Negro occupancy whole sections of cities.

It is not valid, therefore, to assert that when a state court enforces a racial restrictive covenant "the conscious policy" applied by the court "ends with the enforcement of contractual undertakings or with the protection of property interests where the covenant is treated as an equitable servitude,"[10] or that the court's policy "looks no farther than to the protection of property and contract rights."[11] And, consequently, it cannot be said that when a court enforces a racial restrictive covenant, pursuant either to its own or the legislature's view that such covenants serve to protect a socially desirable interest, the court is enforcing a "non-discriminatory" principle of law.

E. *The Fourteenth Amendment precludes the states from supporting action by individuals which impedes the exercise of rights guaranteed in the Fourteenth Amendment, by applying thereto the same policies, principles and laws which govern lawful, non-discriminatory individual action.*

Even if it be conceded, however, for purposes of argument, that in enforcing racial restrictive covenants a court indeed "looks no farther than to the protection of property and contract rights," it would by no means follow that such

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[10] Houston, *op. cit. supra,* note 5, p. 741.

[11] *Ibid.,* at p. 742-743.

action would not violate the Fourteenth Amendment. Neither state courts nor legislatures can constitutionally vest in individuals power to invoke the aid of government in infringing civil rights guaranteed by the Fourteenth Amendment. Neither state courts nor legislatures can evade this obligation on the plea that they protect infringements of the basic guarantees of the Fourteenth Amendment not because they are infringements but despite it. Neither can constitutionally protect every exercise of power flowing either from contract or from the ownership of property by pleading a callous disregard of whether the particular exercise of power involves an infringement of the civil rights of others. Government does not satisfy its obligations under the Fourteenth Amendment by devoting its attention single-mindedly to the protection of property and contract rights without concern for the effect of such protection upon civil rights.

Ample authority in the decisions of this Court supports this view. In *Marsh* v. *Alabama,* 326 U. S. 501, the State of Alabama sought to enforce its non-discriminatory trespass statute on complaint of a corporation which, in the exercise of its property rights, had barred a member of Jehovah's Witnesses from proselytizing on its premises. This Court held that such an application of the admittedly valid statute was an unconstitutional invasion of the visitor's right to freedom of speech. Since the state could not constitutionally have erected such a barrier to the entrance of Jehovah's Witness if it were the owner of the property on which others worked and lived (Cf. *Jamison* v. *Texas,* 318 U. S. 413, 415-416), it could in no way utilize its power to support the erection of a barrier by the private owner.[12] *Steele* v.

[12] Houston's attempted distinction of *Marsh* v. *Alabama* from the restrictive covenant cases, 45 Mich. L. Rev., at pp. 745-746, on the ground that that case involved a criminal statute whereas the instant cases involve only civil remedies is without merit. Certainly, if the Alabama statute had provided for enforcement only by injunction the effect of its application upon one who disregarded an injunction issued pursuant thereto would have been no wit different from the effect of application of the criminal statute. Cf.

Louisvile & Nashville Railroad Co., 323 U. S. 192, implied that government could not confer the power of majority rule upon private groups, even though that power was conferred without discrimination of any kind, unless there was coupled with that grant of power the duty to refrain from race discrimination in its exercise. In that case contracts between the representative of one such private group and employers were held unenforcible because they contained provisions discriminating against certain members of the group on the basis of race. The *Steele* case demonstrates two things: first, that a state cannot create legally enforcible rights in private persons without insuring that in exercising such rights the recipients will not trench upon civil rights guaranteed by the Fourteenth Amendment. This principle is as applicable to recognition of contract and property

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Thomas v. *Collins,* 323 U. S. 516, 534, 535, 540, 543. In any event, where constitutional liberties are involved, a state can no more "restrain or impede" their exercise by providing that proper indulgence should be the occasion for recovery of damages, than it can "prohibit" proper indulgence altogether. See *Thomas* v. *Collins, supra,* at p. 543.

Houston's second attempted distinction, *op. cit. supra,* at pp. 746-747, is likewise insubstantial. He completely misconstrues the reason that "the Court attached great significance to the fact that the corporation for its own advantage had opened its land to the public." This fact is relevant only upon the question whether any constitutional right of the Jehovah's Witness was involved at all. Of course, if no other persons resided on the corporation's property than the owners, and they did not wish to listen, the Jehovah's Witness would have had no constitutional right to enter the property and compel their attention. So much was established in *Martin* v. *Struthers,* 319 U. S. 141, 148. The residence of others on the property, who might wish to listen, was therefore crucial to the existence of Miss Marsh's right to enter and speak. So, in the restrictive covenant cases, the constitutional right involved must be established by the showing of a willing buyer and a willing seller. Once that fact is established, however, the state is precluded, as in the *Marsh* case, from interfering, because of the race of the participants, with the consummation of the transaction.

And, as the *Marsh* case also shows, such interference cannot be justified on the ground that the state is called upon to act by a private person whose claims to protection stem from property rights.

rights as it is to recognition of the right to majority rule.[13] Second, that courts cannot, consistent with the Fourteenth Amendment, blindly apply normal principles of contract enforcement to contracts which have race discrimination as their object.

The fact that the rule of law pursuant to which courts or legislatures enforce racial restrictive covenants may be deemed "non-discriminatory" is immaterial. No rule of law promulgated by an agency of government can attain "constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115. The principle is equally applicable to the civil right guaranteed by the Fourteenth Amendment, of acquiring, using and disposing of property without distinction based on race, for that right together with "freedom of press, freedom of speech, freedom of religion [is] in a preferred position." *Murdock* v. *Pennsylvania,* 319 U. S., at p. 115. *Civil Rights Cases,* 109 U. S. at p. 22; *Buchanan* v. *Warley, supra.* (See pp. 9-11, *supra.*) So a state cannot constitutionally act to preclude the ownership or occupancy of property because of race, merely because it has classified covenants which deny to members of one or more races the right to own or occupy property, along with commercial contracts, or contracts restricting the use of land, and enforces them all alike.

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[13] We have demonstrated above, pp. 18-19, that it is the state, not private persons, which creates the right to enter into legally binding contracts. Private persons could, without state aid, make mutual promises and abide by them. But without state aid, the mere existence of the promises could not compel a recalcitrant promisor to abide by his bargain. We have further demonstrated above, pp. 11-15, that the negative role played by the state toward the making and voluntary performance of promises differs in kind from the affirmative role played by the state in enforcing promises against recalcitrant promisors. And we have shown (*ibid.*), that under the doctrine of the *Civil Rights Cases,* the obligations of the Fourteenth Amendment apply whenever, as here, the state acts in the latter role.

The contention of those who would uphold state enforcement of racial covenants on this point is closely analagous to the contention raised by the employer in *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793. In that case, in the interests of efficient production, the employer had promulgated a plant rule prohibiting all solicitation by employees on plant property during non-working, as well as working time. An employee who violated the rule by soliciting union membership on plant property during his lunch hour was, in consequence, discharged. Charged with having thereby violated the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. Sec. 151, et seq., which enjoins employers from interfering "by discrimination" with the exercise by employees of self-organizational rights, the employer defended on the ground that since the plant rule applied to all solicitation, not merely solicitation for unions, its enforcement against one who solicited union membership could not be deemed discriminatory. This Court rejected the contention holding that since the rule against solicitation was itself invalid insofar as it imposed restraints upon legitimate union activity, application of the rule to such activity was necessarily discriminatory (324 U. S., at p. 805).

The no-solicitation rule was held invalid despite the fact that the motive for its promulgation was not a desire to impede self-organizational activity, but rather a desire "to maintain discipline" in the factory (324 U. S., at p. 798). It was unquestioned that the employer had a right to promulgate rules for the attainment of this objective. This Court held, however, that the employer was not free to accomplish his purpose by the promulgation of rules which, in practical operation, impeded the exercise of self-organizational rights guaranteed by the Act.

The prohibition contained in the Wagner Act upon employer interference with self-organizational rights is no more sweeping in character than the prohibition contained in the Fourteenth Amendment upon state interference on racial grounds with the right to acquire, use and dispose of

property. The test of violation is in both cases the same. It is whether the state or the employer have so used their powers as to interfere with the exercise of the guaranteed rights. If so, the prohibitions are violated, regardless whether the state or the employer sought thereby to accomplish a wholly proper and legitimate objective, and drew no invidious distinction between activities protected against interference and those not protected.

At best, the objective of the state in requiring that binding promises be honored, is a legitimate governmental objective no different in kind from the raising of revenue by taxation (*Murdock* v. *Pennsylvania, supra*), or the protection of private property from invasion by unwanted strangers (*Marsh* v. *Alabama, supra; Martin* v. *Struthers, supra*) or the extension, for proper purposes, of the principle of majority rule (compare *J. I. Case Co.* v. *N. L. R. B.,* 321 U. S. 332, 339 and *N. L. R. B.* v. *Medo Photo Supply Co.,* 321 U. S. 678, 684, with *Steele* v. *Louisville & Nashville Railroad Co., supra*). Government can no more constitutionally trample on civil rights guaranteed by the Fourteenth Amendment in pursuing that objective than it can in pursuing any of these other objectives. A state cannot place its policy of enforcing private agreements beyond the reach of the Fourteenth Amendment.

Adoption of any principle which would place enforcement of contracts above civil rights guaranteed by the Fourteenth Amendment would invite subversion of those rights. The rights guaranteed by the First Amendment and incorporated by the Fourteenth would be as much endangered as the right to sell and acquire property without distinction on the basis of race. Parties may by mutual contract bind themselves, for example, never to discuss openly matters of public concern, never to vote in elections where federal officials are to be selected, or never to practice any religion. Could it be doubted that state enforcement of obligations assumed by contract not to exercise these civil rights would violate the Fourteenth Amendment? Yet the rights dealt with by such contracts are on no higher con-

stitutional level than the right to sell property to Negroes which is bartered away in the covenants here at issue. Only if a state could by injunction restrain an otherwise qualified citizen from voting because he had by contract agreed not to vote, could a state by injunction restrain a property owner from selling property to a Negro because of his race.

These analogies suggest only the effect of judicial enforcement of contract obligations upon the civil rights of the parties themselves. To attain a true analogy to the instant case it is necessary to observe in addition the repercussions upon the constitutional rights of strangers to the contract. Thus, assume that two religious sects agreed by contract never to admit Negroes into their congregations. No doubt voluntary performance of such a contract would not fall within the ban of the Fourteenth Amendment. But suppose that, in a succeeding generation, one of the sects wished to recede from the pact. Could the state then, without making inadmissible inroads upon the freedom of religion of those Negroes who wished to join, and of the white persons who wished to have them, restrain them from doing so? This is the instant case. Petitioners, strangers to the contracts (*supra,* pp. 3-4, 5), have been enjoined by judicial decree from purchasing and occupying property because of their race.

F. *Petitioners cannot be held to have "waived" their rights under the Fourteenth Amendment.*

It is not open to respondents to argue that by becoming parties to the contract containing the discriminatory restrictions or by acquiring the property by deed containing such restrictions, petitioners have waived their rights under the Fourteenth Amendment. The Fourteenth Amendment, insofar as it confers civil rights upon individuals against the state, does so by depriving the state of power to utilize its executive, legislative or judicial agencies to require individuals to act, or not to act, in these matters against their will. Under the Constitution no person can, by consent in advance, confer upon government power to deprive him of civil freedom. No person can, by contract or otherwise, em-

power a state to compel him to work against his will. *Pollock* v. *Williams,* 324 U. S. 4.

The high privileges conferred upon individuals by the Constitution, may, it is true, be waived. No one is required to exercise his federal privilege against self-incrimination (Cf. *Burdick* v. *United States,* 236 U. S. 79); or "right" to counsel, or "right" to be secure against unreasonable searches or seizures. Nor is one required by the Constitution to speak out on public issues, or to vote, or to practice religion, or to refrain from discriminating among would be purchasers of property on the basis of race. But individuals cannot confer upon the federal government the power to compel them, against their will, to incriminate themselves, or to refuse counsel, or to consent to an unreasonable search; nor can they confer upon the states power to make them remain silent on public issues, or to refrain from voting, or practicing religion, or selling their property to Negroes. These latter powers are denied to the states by the Constitution; only by amendment of the Constitution could the defect of power be supplied. If this were not true it would mean, for example, that a state could validly enact an ex post facto law, or a law establishing a state religion, or prohibiting speech on public questions, if only the inhabitants of the state unanimously authorized such legislation. Neither individually nor collectively can the inhabitants of a state confer upon it powers denied by the Constitution.

It follows, we submit, that any consent or agreement which may be imputed to petitioners is wholly immaterial to the question here presented, whether, by enforcing the discriminatory covenant, the state has exceeded its powers under the Fourteenth Amendment.

Certainly it cannot be argued that petitioners have by any act waived the right to have that question determined in the courts. Not a word of the restrictions forecloses the right of any party thereto to test the validity of judicial enforcement of them in the courts. Thus, even if the petitioning seller in No. 291 was an original party to the agreement

he would retain the right to contend that enforcement of the agreement by the state violated his rights under the Fourteenth Amendment. Whether that right could effectively be waived by contract, and whether such a waiver could bind succeeding parties, such as petitioners in the instant cases, are themselves doubtful questions which need not be decided here. Suffice it to say that absent such a waiver the questions here urged are properly before this Court.

CONCLUSION.

For the reasons stated above it is respectfully submitted that the action of the courts below in enforcing the racial restrictions contained in the covenants violated the Fifth and Fourteenth Amendments.

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