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CONSTITUTIONAL LAW — THE 14TH AMENDMENT—
“STATE ACTION” OR “HELPFUL COOPERATION”

By a four to three decision, the Court of Appeals of New York has upheld the right of Stuyvesant Town Corporation, operating a \$90,000,000 housing project, to refuse to consider applicants as tenants because of their race or color. The Stuyvesant Town Corporation is organized under the Redevelopment Companies Law of New York¹ and is entirely owned by the Metropolitan Life Insurance Co. Both the Stuyvesant Town Corporation and the Metropolitan Life Insurance Co. were joined as defendants in this action instituted by Negro veterans and by a New York taxpayer². The majority opinion, in holding that a corporation may discriminate against Negroes by refusing to rent to them, reasoned that there was no “state action” involved which would contravene the 14th Amendment to the United States Constitution. The court stated that there was only “helpful cooperation” between the state and the corporation, and this helpful cooperation did not constitute state action. In the dissent Fuld, J., reasoned that a contract entered into by the Stuyvesant Town Corporation and the City of New York constituted the requisite state action. By the terms of the contract New York City agreed to condemn all of the land needed for the housing project, and agreed to grant the corporation tax exemption for twenty-five years. The dissent also pointed out that there was a city ordinance which ratified the discriminatory conduct of Stuyvesant Town.³ Thus the dissent said that the state itself had acted by aiding and sanctioning Stuyvesant Town.⁴

The great prohibitions of the 14th Amendment are applicable only to state action.⁵ Thus it has long been settled that a state

1. N.Y. Redevelopment Companies Law § 3401 (McKinney's Unconsolidated Laws).

2. Only the action brought by the Negro veterans will be discussed. Consideration of the taxpayer's suit is beyond the scope of this comment.

3. The New York City ordinance involved prohibited any housing project from discriminating against persons because of their race, color, or creed; the ordinance exempted all housing projects started prior to the passage of the ordinance. The only big housing project which came under the exception to the ordinance was the Stuyvesant project, the existence of which the New York City law-makers knew about. Thus the Stuyvesant Town Corporation was permitted to discriminate with the express permission of the New York ordinance.

4. *Dorsey et al. v. Stuyvesant Town Corp. et al.*, 87 N.E.2d 541 (N.Y. 1949).

5. *In re Civil Rights Cases*, 109 U.S. 3 (1883).

statute or a local ordinance imposing a racial restriction upon the purchase or occupancy or real estate is unconstitutional as violative of the "equal protection of the law" clause of the United States Constitution.⁶ However, a covenant inserted in a deed, forbidding the occupancy of land by Negroes, of and by itself, does not violate the Constitution.⁷ There is some authority for the proposition that if there is a restriction as to whom the fee holder of land may convey, this restriction is void as being a restriction upon alienation.⁸ But the greater weight of authority is otherwise.⁹ It has been generally held that restrictive covenants are not contrary to the public policy of the individual states.¹⁰ But in the recent case of *Hurd v. Hodge*¹¹ it was held that the enforcement of the restrictive covenant provisions in a deed by Federal Courts of the District of Columbia is contrary to the public policy of the United States.

Thus the state courts recognized early that the 14th Amendment imposed no shield against merely private conduct, no matter how discriminatory. That which is held to be violative of the Constitution must be state action.

The question arising in every restrictive covenant case or in any other case involving discrimination is whether or not the discrimination was founded on state action. In the *Stuyvesant* case the majority of the court felt that there was no action by

6. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Richmond v. Deans*, 281 U.S. 704 (1930). For a general treatment, see 10 AM. JUR. 908 and Note, 126 A.L.R. 638 (1940).

7. *Los Angeles Inv. Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 320 (1922). *But cf. Gandolfo v. Hartman*, 49 Fed. 181 (S.D. Cal. 1892).

8. This view has prevailed in a few states, including California, Michigan and West Virginia. See *Los Angeles Inv. Co. v. Gary*, *supra* note 7; *Porter v. Barrett*, 233 Mich. 373, 206 N.W. 532 (1925); *White v. White*, 108 W.Va. 128, 150 S.E. 531 (1929) (restriction involved was to endure for fifty years). *Contra: Wyatt v. Adair*, 215 Ala. 363, 110 So. 801 (1926) (implied covenant by a landlord not to rent to a Negro).

9. *Edwards v. W. Woodridge Theatre Co.*, 55 F.2d. 524 (D.C. Cir. 1931); *Chandler v. Zeigler*, 88 Colo. 1, 291 Pac. 822 (1930); *United Co-op. Realty Co. v. Hawkins*, 269 Ky. 563, 108 S.W.2d 507 (1937); *Kohler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918).

10. *Chandler v. Ziegler*, *supra* note 9; *Ridgway v. Cockburn*, 163 Misc. 511, 296 N.Y.S. 936 (Sup. Ct. 1937). For a general discussion concerning public policy, see Note, 3 A.L.R.2d (1949).

11. 334 U.S. 24 (1948). This case overruled *Corrigan v. Buckley*, 299 Fed. 899 (D.C. Cir. 1924), *appeal dismissed*, 271 U.S. 323 (1925). In the *Hurd* case, there was a suit by the owners in fee of certain real property to enforce the restrictive covenants in their deeds. To permit the enforcement of these covenants was held to be against public policy.

the state; the dissent felt that there was. Thus the main problem is what constitutes the necessary state action. It has been held that state statutes and city ordinances constitute the requisite state action.¹² In the so-called "racial covenant cases" state action within the meaning of the Constitution was the judicial enforcement of the restrictive covenants.¹³ Where a private corporation engages in discriminatory conduct, and the state enforces that conduct by statute,¹⁴ or makes such action part of the machinery of its functioning,¹⁵ or requires other individuals to conform to the contractual discriminatory pattern thus established,¹⁶ there is state action which may be challenged. Thus state action has grown conceptually since the statement in *Ex Parte Virginia*:

A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way.¹⁷

In the instant case the majority opinion states that there was no state action involved because the advantages accorded the corporation under the New York Redevelopment Companies Law did not subvert its status as a private organization. It is clear that there was no direct state action which discriminated as there was in all of the cases holding that a specific act was

12. See note 5 *supra*.

13. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *McGhee v. Sikes*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Urciolo v. Hodge*, 334 U.S. 24 (1948). These four cases constitute the "Restrictive Covenant Cases." The court went further than it had ever gone in saying what constituted state action. Judicial discrimination might very well have been found to be state action at any time after the decision in *Ex parte Virginia*, 100 U.S. 331 (1880). But the holding that judicial enforcement of discriminatory contracts was discriminatory "state action" was a step forward. In *Shelley v. Kraemer*, *supra* at 14 the court said: "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the 14th Amendment, is a proposition which has long been established by decisions of this court."

14. *Marsh v. Alabama*, 326 U.S. 501 (1946). In this case an entire town was owned by a private corporation. A Jehovah's Witness was arrested for distributing literature on the property of the corporation without its consent, and was charged under an Alabama statute which made it a crime to remain on another's premises after being warned not to do so. The upper court reversed the defendant's conviction, stating that the state allowed the corporation to use its property as a town, and therefore there was state action which violated the 14th Amendment. The court also based its decision on the fact that the state statute punishing criminally those persons who attempted to distribute religious literature clearly violated the 1st and 14th Amendments to the Constitution.

15. *Smith v. Allwright*, 321 U. S. 649 (1944).

16. *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944).

17. 100 U.S. 331, 347 (1880).

unconstitutional. The New York Court of Appeals in order to reach the contrary result would have had to hold that state action includes indirect as well as direct acts by a state or its agents. But this latter approach does not seem unreasonable. It is not stretching the concept of what constitutes state action too far to say that approval, acquiescence in, ratification of discriminatory acts, and financial assistance given to a corporation which discriminates, if done by a state, constitutes state action.

The state of New York, acting through its agent, New York City, did the very things mentioned above. But New York City was not the only agency through which New York state had acted. Both Stuyvesant Town and the Metropolitan Insurance Company are corporations. Corporations are in existence only with the consent of the state. Therefore, corporations are creatures of the state, and as such, act with state authority. Hence, it is at least arguable that, when a corporation discriminates, the state is discriminating. Corporate action can be said to constitute state action as stated in the 14th Amendment. It is conceded that the ancient doctrine of what constitutes state action would have to be amplified; but under the social conditions existing today, a contrary result in the *Stuyvesant* case would be desirable practicably and correct judicially. It is submitted that the phrase "state action" has proved sufficiently elastic in the past to bear the additional stretch necessary to make it cover such a situation.

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CRIMINAL LAW — MINNESOTA YOUTH CONSERVATION ACT—
VALIDITY UNDER CONSTITUTION

The defendant, Meyer, an eighteen-year-old youth, pleaded guilty to the crime of third degree burglarly. His objection to the imposition of sentence under the Minnesota Youth Conservation Act on the ground of its unconstitutionality was sustained, and that question was certified to the Minnesota Supreme Court. The appellate tribunal reversed the trial court, stating that the Youth Conservation Act is not an invasion or infringement of the constitutional powers of any branch of government nor a deprivation of any personal liberty or right guaranteed therein¹

1. *State v. Meyer*, 37 N. W. 2d 3 (Minn. 1949).