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Constitutional Law - Equal Protection - Racial Discrimination and the Role of the State

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COMMENTS

CONSTITUTIONAL LAW — EQUAL PROTECTION — RACIAL DISCRIMINATION AND THE ROLE OF THE STATE* — Constitutional history from the 1857 *Dred Scott* decision[1] to the 1954 *Brown* decision[2] records "a movement *from status to contract*"[3] for the American Negro. Although uncertainty clouds the definition of "state action,"[4] the civil rights of the Negro under the equal protection clause of the fourteenth amendment have been clearly established.[5] The Negro citizen has arrived;[6] the Negro minority group remains one of the gravest social problems[7] of twentieth century America. *De facto* school segregation,[8] limited

* This comment is a revision of a paper awarded second place in the 1960 Broomfield Essay Competition. — Ed.

1 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

2 Brown v. Board of Educ., 347 U.S. 483 (1954).

3 "[T]he movement of the progressive societies has hitherto been a movement *from status to contract.*" MAINE, ANCIENT LAW 141 (World's Classic ed. 1946).

4 Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Rice v. Sioux City Memorial Park Cemetery, Inc., 348 U.S. 880 (1954), *vacated,* 349 U.S. 70 (1955) (certiorari improvidently granted); Terry v. Adams, 345 U.S. 461 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948); Marsh v. Alabama, 326 U.S. 501 (1946). GREENBERG, RACE RELATIONS AND AMERICAN LAW 46-61 (1959); St. Antoine, *Color Blindness but Not Myopia: A New Look at State Action, Equal Protection, and Private Racial Discrimination,* 59 MICH. L. REV. 993 (1961); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler,* 108 U. PA. L. REV. 1 (1959); Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard,* 66 YALE L.J. 979 (1957); Shanks, *"State Action" and the Girard Estate Case,* 105 U. PA. L. REV. 212 (1956); Note, 47 VA. L. REV. 105 (1961); Comment, 52 NW. U.L. REV. 774 (1958).

5 *Cf.* GREENBERG, *op. cit. supra* note 4, at vii.

6 However, the problems of enforcing many of these rights such as the right to vote and right to attend public schools which are not discriminatorily segregated should not be minimized. See U.S. COMM'N ON CIVIL RIGHTS, REPORT (1959) [hereinafter cited 1959 REPORT]; GREENBERG, *op. cit. supra* note 4, at 208-74, 133-53. Nevertheless vindication of these rights seem inevitable despite the protest of those who have not accepted Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), much less *Brown.* See BLOCH, STATES' RIGHTS: THE LAW OF THE LAND (1958); KILPATRICK, THE SOVEREIGN STATES (1957).

7 "A social problem . . . [is] any difficulty or misbehavior of a fairly large number of persons which we wish to remove or correct. . . ." Frank, *Social Problems,* 30 AM. J. SOC. 462 (1925), in HALL, READINGS IN JURISPRUDENCE 1043 (1938).

8 *De facto* school segregation is segregation without legally-sanctioned discrimination. It results normally from the segregated housing pattern which exists in all cities. However, it would be naïve not to realize that administrators can achieve this result by deciding where to build schools or to draw districts. Although this latter action is unconstitutional

economic opportunity,[9] and inadequate housing[10] are problems not solved by invocation of the fourteenth amendment[11] or incantation of the Declaration of Independence.[12] Solution, if any there is to be, must come either through the activity of private interests in society or through the exercise of the police power of the state. In either event the fourteenth amendment, while remaining important as a conserver of values already established, will decline in importance as a creative force.[13] Through an analysis of a limited but important social problem — the lack of adequate[14]

if proved [Clemons v. Board of Educ., 228 F.2d 853 (6th Cir.), *cert. denied*, 350 U.S. 1006 (1956)], "the equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration. . . ." Borders v. Rippy, 247 F.2d 268, 271 (5th Cir. 1957). *Accord*, Avery v. Wichita Falls, Ind., School Dis., 241 F.2d 230 (5th Cir. 1957); Allen v. County School Bd., 249 F.2d 462 (4th Cir. 1957).

[9] In 1954 the median annual income among white families was $4,339 while among non-white families it was $2,410. U.S. Dept. of Commerce, Bureau of the Census, Current Population Report, Consumer Income Series, P-60, No. 20, at 11 (1955). Moreover, the discrepancy becomes greater among those with college education. GINZBERG, THE NEGRO POTENTIAL 38 (1956). However, from 1940 to 1950, the average Negro income increased three times as fast as white income. Gillette, *A Study of the Effects of Negro Invasion on Real Estate*, 16 AM. J. ECON. 151 (1957).

[10] In 1950 over ten million non-farm units were dilapidated or lacked running water. Negro sub-standard housing was six times as great as white. ABRAMS, FORBIDDEN NEIGHBORS 72-74 (1955). See generally 1959 REPORT, *supra* note 6, at 336-97 (1959). Moreover, there was less housing per capita in 1950 than in 1940 or 1900. BEYER, HOUSING: A FACTUAL ANALYSIS 57 (1958). From 1950 to 1956 only .6% of new housing built in New York City was occupied by Negroes and substantially the same percentages prevailed in the other major northern cities. FHA, TRENDS IN OCCUPIED DWELLING UNITS (1959), in McGhee & Ginger, *The House I Live In*, 46 CORNELL L.Q. 194, 250 n. 250 (1961).

[11] See, *e.g.*, "If certain Americans, because of their color [or] race . . . [are denied] equal opportunities to have good homes and good neighborhoods . . . the promise of the Constitution . . . is not really being fulfilled." Rockefeller in 1959 REPORT, *supra* note 6, at 335. See also, U.S. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 3 (1947).

[12] "The key [to the race problem] is in the Declaration of Independence." Wriston, *The Individual*, *in* U.S. PRESIDENT'S COMM. ON NATIONAL GOALS, GOALS FOR AMERICANS 35, 42 (1960). "Exclusion from residence area is, thus, a deprivation of a traditional American freedom. . . ." REPORT OF THE COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE 1 (1958). "The opportunity to compete for housing of one's choice is crucial to both equality and freedom." *Id.* at 3.

[13] To this rather bold statement two reservations must be made. If the Supreme Court were to overrule the state action limitation enunciated in the Civil Rights Cases, 109 U.S. 3 (1883), the fourteenth amendment might then be instrumental in removing private discrimination. Secondly, if the United States were to become more socialistic, the right to a job or house might become a privilege of federal citizenship. *Cf.* International Declaration of Human Rights Art. 23, 25, U.N. GEN. ASS. OFF. REC. 3d Sess. (1), Resolutions 71, (A/810) (1948).

[14] See note 10 *supra*.

interracial[15] housing for middle-class Negroes[16] — this comment will attempt to develop a rationale to justify the use of the state's police power[17] generally in solving social problems resulting from private race discrimination and to suggest a viable form in which that power may be exercised.

I. THE NATURE OF THE POLICE POWER

Orthodox legal theory regards the power of the state to make and enforce laws to be inherent in the nature of sovereignty.[18] The *raison d'etre,* but not the limit, of this power is to promote "the good and welfare of the commonwealth, and the subjects of the same."[19] Whatever limitation there may be on that power

[15] Even so astute an observer as Greenberg tends to blur the distinction between segregation and slums so that the evil in one justifies eliminating the other. GREENBERG, *op. cit. supra* note 4, at 275. More crusading writers equate the two. See, *e.g.,* REPORT OF THE COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE (1958). In addition to the logical inconsistency in the equation, the experience in Atlanta demonstrates that segregated housing may be other than the "dingy, overcrowded slum," of McGhee & Ginger, *supra* note 10, at 194. See 1959 REPORT, *supra* note 6, at 419-29. Also the statistic that 14.6% of new homes in Atlanta were occupied by Negroes as compared to .6% for New York, .7% for Philadelphia, and 1.4% for Detroit is revealing. McGhee & Ginger, *supra* note 10, at 250. Nevertheless, this comment is concerned only with finding realizable means to provide interracial housing because of its many advantages. For such advantages, see authorities cited above and those in 2 EMERSON & HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1197-262 (2d ed. 1958). Ultimately, however, the objection to segregation is that it "produces an artificial situation in which inferior standards of excellence and efficiency are set up. Since the Negro is not required to compete in the larger world and to assume its responsibilities and suffer its penalties, he does not have the opportunity to mature." FRAZIER, NEGRO YOUTH AT THE CROSSWAYS 290 (1940).

[16] The comment is limited to middle-class Negroes for two reasons: (1) Since they are financially able to buy adequate homes, improvement can be made within the framework of existing economic values. (2) Negroes who have gained economic security are not only the ones who chafe most at being segregated, but they also are generally "the emanciapted, the mobile, the restless, the lucky [and] the talented," who are most likely to meet the challenge of an interracial milieu. Lewis & Hill, *Desegregation, Integration, and the Negro Community,* 304 ANNALS 116, 120 (1956).

[17] There is, however, a type of state activity other than that discussed in this comment. Many Northern and Western states have passed anti-bias legislation which makes it unlawful for various classes of dealers in real estate to discriminate in employment or housing. In addition, state agencies are created to enforce these laws. There is much current literature devoted to the wisdom, constitutionality, operation, and efficacy of the laws and these agencies. See, *e.g.,* McGhee & Ginger, *supra* note 10; Notes, 74 HARV. L. REV. 526 (1961); 28 GEO. WASH. L. REV. 758 (1960); 107 U. PA. L. REV. 515 (1958-59). Most people concerned with the problem of Negro housing are enthusiastic and optimistic, but as yet the agencies "are not making many gains in housing itself." Abrams in 1959 REPORT, note 6 *supra,* at 403.

[18] License Cases, 46 U.S. (5 How.) 504, 583 (1847). For simplicity of analysis, textual treatment is confined to the states of the union. However, much of what is said concerning state action applies with equal force to the federal government, and authorities are sometimes taken from cases upholding federal action. Of course, orthodox theory attributes federal power to its delegation by the Constitution. See, *e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315 (1819).

[19] Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85 (1851); Barbier v. Connolly, 113

apart from that imposed by the federal constitution,[20] it is quite clear that the state's police power can not validate "laws or ordinances which deny rights created or protected by the federal constitution."[21] Therefore, any proposal which advocates the use of this power should show a situation in society which is properly the concern of the state and a plan of action which will at once ameliorate the situation and be consonant with the mandate of the constitution and more particularly its fourteenth amendment.

The scope of the police power is generally coterminous with the functions it is thought the state should serve.[22] In the late nineteenth century a "nightwatchman" concept of the state dominated political and legal thinking:[23] "The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."[24] In so far as this theory sought to restrict the power of the state over economic affairs and to prohibit any infringement of vested property interest, "all of this is now demolished and discredited doctrine."[25]

The function of the state, according to most contemporary American thinkers, is to act affirmatively to eliminate the conceived ills of society.[26] Thus maximum hour[27] and minimum wage[28] standards, social security,[29] price regulation of certain industries,[30] rent control,[31] regulation of economic competition,[32] zoning laws,[33] and laws to increase the supply of housing,[34] to

U.S. 27 (1885); Noble State Bank v. Haskell, 219 U.S. 104 (1911); Nebbia v. New York, 291 U.S. 502 (1934); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

20 See, *e.g.*, Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

21 Buchanan v. Warley, 245 U.S. 60, 81 (1917); Truax v. Corrigan, 257 U.S. 312 (1921).

22 National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949). Berman v. Parker, 348 U.S. 26 (1954).

23 For an attempted explanation of how Herbert Spencer's *Social Statics* was incorporated into the fourteenth amendment, see TWISS, LAWYERS AND THE CONSTITUTION (1942).

24 Budd v. New York, 143 U.S. 517, 551 (1892) (dissenting opinion of Justice Brewer).

25 Kauper, *Supreme Court; Trends in Constitutional Interpretation*, 24 F.R.D. 155, 175 (1959).

26 See, *e.g.*, ROSTOW, PLANNING FOR FREEDOM (1959).

27 See Muller v. Oregon, 208 U.S. 412 (1908); Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916).

28 See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

29 See Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

30 See, *e.g.*, Nebbia v. New York, 291 U.S. 502 (1934) (milk industry).

31 See Woods v. Miller Co., 333 U.S. 138 (1948).

32 See Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

33 See Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

34 See Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950).

name a few, are considered legitimate governmental responses to specific social problems. There is little likelihood that this conception of government will atrophy in the foreseeable future.

II. RACIAL DISCRIMINATION AS SOCIAL PROBLEM

In such an atmosphere no difficulty is incurred in demonstrating that lack of adequate housing for Negroes is a legitimate concern of the state. The existence and nature of the state's concern is summarized in the preamble to New York City's Fair Housing Ordinance:

> "[M]any persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils.[35] As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened."[36]

If due allowance is made for the traditional hyperbole of legislative preambles, the accuracy of these assertions is fully substantiated by intensive sociological investigation[37] and has not lately been a subject of serious dispute.

It is unfortunate, but not altogether surprising, that although there is virtual unanimity regarding the existence of the problem, proposed solutions are not received even with equanimity. Whether the proposal is for the construction of minority housing on the one hand,[38] or broad compulsory anti-bias legislation on the other,[39] debate is permeated with invectives, a priori absolutes and moralism[40] — a style reminiscent of early worker-capitalist

[35] Among other evils may be mentioned the decline of the inner core of the city and a possible shift in political power. See Grodzins, *Metropolitan Segregation*, Scientific American, Oct. 1957, p. 33.

[36] Preamble to New York City, N.Y., Code X41-1.0 (Supp. 1960).

[37] See 2 EMERSON & HABER, *op. cit. supra* note 15, at 1199-209 and authorities therein cited.

[38] The NAACP's reply to a proposal for a great increase in the supply of minority housing is characteristic: "We do not want jim-crow dwellings whether they are new or old." REPORT OF THE COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE 57 (1958).

[39] See, *e.g.*, Avins, *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, 6 N.Y.L.F. 13 (1960).

[40] See, *e.g.*, Vance, *Freedom of Association and Freedom of Choice in New York State*, 46 CORNELL L.Q. 290 (1961); Gruenberg, *Dixie Hate in Yankee Suburb*, 190 NATION 47 (1960). See generally, ABRAMS, FORBIDDEN NEIGHBORS *passim* (1955).

clashes[41] and even earlier religious denominational conflicts.[42] Despite the mace-clanking aura of contention, it seems disagreement may properly be reduced to two issues: what ultimate goal should the state strive to realize, and what effect has interracial housing on other recognized social values.

Even among the more serious works, debate over goals tends to revolve around the chicken-egg puzzle of prejudice and discrimination.[43] The puzzle divides the field into those who think it is necessary first to eliminate prejudice and those who think it is necessary first to prohibit discrimination.[44] In either case there seems to be agreement that elimination of the primordial cause, not patchwork improvement on the resulting social problem, is the proper goal of the state.[45]

To the political mind not otherwise addicted to radicalism,[46] another attitude should prevail. The goal of the state should not be the eradication of individual discrimination or prejudice, even if this were possible; the goal should be to neutralize the undesirable effects of private discrimination.[47] For the state, the evil of race discrimination inheres not in the moral flaw of the individual who refuses to sell his home to a Negro; the evil is the deprivation which results from the collective refusal of society to sell to Negroes.[48] If the housing needs of the Negro can be satisfied, the continued discrimination by and prejudice of some of the state's citizens are no longer a concern of the state, whatever their implications to the theologian or psychiatrist.

Most of the opposition to state-encouraged interracial housing springs from the belief that such activity will endanger other

41 See, *e.g.*, DAVID, THE HISTORY OF THE HAYMARKET AFFAIR (2d ed. 1958).

42 See, *e.g.*, SMITH, THE AGE OF THE REFORMATION ch. XIII (1920).

43 For a scholarly and illuminating discussion of the nature of and the interrelationship between prejudice and discrimination, see ALLPORT, THE NATURE OF PREJUDICE (1954). The answer is not entirely without relevance. Prospects for successful state intervention are heightened if it is true that discrimination is the cause of prejudice.

44 The latter goal seems currently to be the most fashionable. See generally GREENBERG, *op. cit. supra* note 4, at 1-30 and authorities cited in note 17 *supra*.

45 Put in such terms the resemblance to the nineteenth century debates between utopian and scientific socialism is striking. See, *e.g.*, LAIDLER, A HISTORY OF SOCIALIST THOUGHT 136 (1927).

46 "Radicalism" is used here "in its original and literal sense . . . to characterize an attitude of 'going to the root of the matter.'" POPPER, THE OPEN SOCIETY AND ITS ENEMIES 164 (2d ed. 1952). For an exposition of and attack upon "utopian engineering" and a defense of "piecemeal engineering," see *id.* at 157-68.

47 The existence of private property is a principal cause of slums, yet the attack by the state is on slums, not private property or even greed. *Cf.* Frank, *Social Problems*, 30 AM. J. SOC. 462 (1925).

48 *Cf.* Clark, *Social Control of Business* (1926), in HALL, READINGS IN JURISPRUDENCE 1014 (1938).

important values in society. Although it is characteristic of reformers to refute such a belief with a sneer, an appreciation of its force is necessary before effective and intelligent state action can be taken. For unless interracial housing can be achieved without serious disruption of the *status quo,* not only is it safe to predict that the institutional forces in sociey which support the existing housing pattern will bar effective state intervention, but also there is the very serious question whether the state should intervene.[49]

Among the values most prominently mentioned[50] as threatened by interracial housing are peaceful race relations,[51] stable property values,[52] social status,[53] and community continuity.[54] To this list perhaps should be added the values of free association and free use of private property which are often said to be threatened by state coercion in this area.[55] In recent years the substantiality of such fears has been hotly contested.[56] Despite a wealth of information, all that can be said is that these values need not be impaired by the presence of Negroes in a housing area, and under certain circumstances, they have not been. But for the foreseeable future, these fears are more than chimeras which vanish upon confrontation.[57] These conclusions are sobering, but they do offer hope that under certain conditions interracial housing can be achieved without disruption of society. The duty[58] of the state is to maintain such conditions.

49 Those who insist that, where the great principle of equal opportunity is involved, tawdry values such as property stability are irrelevant may be astute advocates but they have little appreciation of history or government. More realistic is the statement: "We can . . . continue to blow the trumpet for moral reaffirmations, but unless we can develop a program which recognizes the legitimate self-interest of the white communities, we have no right to condemn them morally because they refuse to commit hari-kiri." Alinsky, in 1959 REPORT, *supra* note 6, at 443.

50 See, *e.g.,* REPORT OF THE COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE 10-34 (1958); WEAVER, THE NEGRO GHETTO 214 (1948).

51 ABRAMS, FORBIDDEN NEIGHBORS 103-37 (1955); WEAVER, THE NEGRO GHETTO 97 (1948). But see GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING 194-219 (1960); WILNER, WALKLEY & COOK, HUMAN RELATIONS IN INTERRACIAL HOUSING (1955).

52 See LAURENTI, PROPERTY VALUES AND RACE (1960); Gillette, *A Study of the Effects of Negro Invasion on Real Estate Values,* 16 AM. J. ECON. & SOC. 151 (1957).

53 For a stinging criticism, see ABRAMS, *op. cit. supra* note 51, at 137-50. Nevertheless, the attitude is basic to society and can not be ignored. See GRIER, *op. cit. supra* note 51, at 78-94; Gruenberg, *Dixie Hate in Yankee Suburb,* 190 NATION 47 (1960).

54 WEAVER, THE NEGRO GHETTO (1948); 1959 REPORT, *supra* note 6, at 376.

55 Mayer, *Russel Woods: Change Without Conflict,* in STUDIES IN HOUSING AND MINORITY GROUPS 198 (1960).

56 See authorities cited notes 50 to 54 *supra.*

57 See, *e.g.,* Dodson, *Minority Group Housing in Two Texas Cities,* in STUDIES IN HOUSING AND MINORITY GROUPS 84, 102 (1960); Mayer, *supra* note 54.

58 The "duty" is of course not a constitutional one. See note 8 *supra.*

III. A PROPOSED SOLUTION

Preliminary studies[59] lend support to the following conclusions. Some of them can be stated with relative certainty; others are no more than tentative hypotheses. All of them need further investigation. The purpose of this comment is not to defend the conclusions but, assuming their validity, to examine some of their implications for effective state action.

1. In cities possessing a substantial Negro population, residential areas almost inevitably segregate on racial lines.[60] White residents, primarily as a result of fears of inundation, of decline in property values, and of loss of social status, tend to resist the intrusion of Negroes, occasionally to the extent of using violence. If the conclusion is reached that the Negro is in an area to stay, existing pressures in society tend to force that area, with varying speed, to become all-Negro.[61]
2. However, if the whites are assured that property values will remain stable and that they will remain the majority race in the area, opposition to living among Negroes diminishes considerably.[62] Many whites are even willing to purchase a home in an interracial area if the purchaser believes the house is a good bargain and the present racial composition of the area will not shift significantly.[63]
3. A significant percentage of Negroes desire and are financially able to buy housing in the $6,500 to $15,000 range.[64] Most of these Negroes would prefer interracial housing if the area

[59] See authorities cited in notes 60-66 *infra*.

[60] WEAVER, THE NEGRO GHETTO (1948); 1959 REPORT, *supra* note 6, at 354-74; ABRAMS, *op. cit. supra* note 51, at 1-81; Cohen, *The Case for Benign Quotas in Housing*, 1960 PHYLON 20; Grodzins, *Metropolitan Segregation*, Scientific American, Oct. 1957, p. 33.

[61] "Integrated" is a term used to describe "the period of time that elapses between the appearance of the first Negro and the community's ultimate and total incorporation into the Negro ghetto." Alinsky in 1959 REPORT, *supra* note 6, at 443. For an excellent analysis of the rationality of the white attitudes, see Wolf, *The Invasion-Succession Sequence as a Self-Fulfilling Prophecy*, 13 J. SOC. ISSUES 7 (1957). See generally authorities cited note 60 *supra*.

[62] GRIER, *op. cit. supra* note 51, at 58-77, 156-70; Hyman & Sheatsley, *Attitudes Toward Desegregation*, Scientific American, Dec. 1956, pp. 35-39; Weaver, *Integration in Public and Private Housing*, 304 ANNALS 86 (1956); Navasky, *The Benevolent Housing Quota*, 6 HOW. L. J. 30, 34-55 (1960); LAURENTI, PROPERTY VALUES AND RACE 57 *passim* (1960).

[63] RAPKIN & GRIGSBY, THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS: A STUDY OF THE NATURE OF NEIGHBORHOOD CHANGE (1960); GRIER, *op. cit. supra* note 51.

[64] Cole, *What is the Federal Government's Role in Housing?* in ABRAMS, FORBIDDEN NEIGHBORS 348 (1955). In 1950 5.4% of the Negro population had annual incomes of $5,000 or more. *Id.* at 172.

has at least a substantial Negro minority and if the Negro is assured of being well received.[65]

4. The reluctance of most financial institutions, building contractors, and realtors to participate in interracial housing springs from a conviction that such participation would not be financially profitable and would endanger the values mentioned earlier rather than from any morbid hatred of the Negro. If interracial housing could be made financially profitable and accomplished without threatening established values, these groups would respond.[66]

If these postulates can be sustained, the state should be able to increase the supply of housing available for middle-class Negroes by creating a milieu in which: (1) it is financially attractive for the prospective white purchaser, and the institutions responsible for the building and selling of homes to build, sell, buy, and own residential property in an interracial community; (2) it is continuously possible for the Negro to buy in these areas; and (3) finally, it is possible to establish and maintain a stable Negro-white ratio[67] in the area.

Little time need be devoted to the first two tasks. The governmental techniques through which they can be accomplished are well established and the constitutionality of such techniques is beyond question. Although the most helpful examples are provided by the activity of the federal government, there is no reason why the states could not adapt such techniques for their own use or cooperate with existing federal agencies. The Housing and Home Finance Agency (HHFA) has long sought through financing to increase the total supply of homes in the country.[68] Certain

[65] Very little statistical data is available as to what percentage of Negroes who could afford decent housing would prefer interracial housing to minority housing. Such statistics should be collected before a legislature is likely to be induced to act. Nevertheless, the authorities in the field are convinced that the statement in the text is true. See, *e.g.*, GRIER, *op. cit. supra note* 51, at 156-59.

[66] ABRAMS, FORBIDDEN NEIGHBORS 150-90 (1955); GRIER, *op. cit. supra* note 51, at 110-31; REPORT OF THE COMM'N ON RACE AND HOUSING, WHERE SHALL WE LIVE 22-34 (1958).

[67] "Tipping point" is a term much used in current literature to denote the percentage of Negroes a community will accept before the white owners will vacate the area. The figure is put variously from 20% to 50%. Without accepting the deterministic implications of the phrase, the figures are accepted as desirable guides in setting the ratio and resulting quotas. The Negro quota should be large enough to permit rapid fulfillment of the Negro needs without creating areas of exclusively minority housing. See GRIER, *op. cit. supra* note 51, at 60; Grodzins, *supra* note 60; Weaver, *Integration in Public and Private Housing*, 304 ANNALS 86 (1956); Jahoda, *Race Relations in Public Housing*, 7 J. SOC. ISSUES 132 (1951).

[68] See generally 1959 REPORT, *supra* note 6, at 457-505.

agencies, such as the Voluntary Home Mortgage Credit Program (VHMCP)[69] and the Federal National Mortgage Association (FNMA),[70] have been created primarily to aid minority groups by furnishing loans which private institutions would not grant. There is every indication[71] that by lowering the interest rates for both the builder and purchaser of interracial housing, sufficient response would be forthcoming to solve the housing problem for the middle-class Negro.[72] Additional governmental tools available to spur this type activity would be to guarantee, through insurance or subsidy, the success of a builder who undertakes to build interracial housing,[73] or to condemn land suitable for residences and offer to sell it at a low price to such a builder.[74] In arriving at the most feasible method of promoting interracial housing, much experimentation would be needed and many difficult practical problems would need to be resolved. Without in any way belittling such obstacles, they do not present significantly new legal questions and further discussion of them is outside the scope of this inquiry.

The third major task facing the state is to find some means of establishing and maintaining a stable Negro-white ratio in the planned interracial housing developments. The theoretical possibilities range from forceful, commune-like relocation of persons according to a prescribed plan to hortatory advertising.[75] Frequently mentioned as practical and acceptable methods are site-

69 "The realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family. . . ." Preamble to the Housing Act of 1949, 63 Stat. 413. See generally 1959 REPORT, *supra* note 6, at 457-505.

70 1959 REPORT, *supra* note 6, at 492-94.

71 GRIER, *op. cit. supra* note 51, at 110-30; 1959 REPORT, *supra* note 6, at 495; Letter to author from Morris Milgram, President of Modern Community Developers, Inc. November 29, 1960.

72 Still to be resolved, however, is the more challenging problem of the ubiquitous slums.

73 Those who would oppose the use of government funds for a special class, should ponder the words of Emil Keen testifying before the Civil Rights Commission:

"For one, I cannot accept and must reject in advance as unfactual and perhaps hypocritical the suggestion that for the federal government to encourage such open-occupancy developments is un-American and class-legislation. I believe such arguments are spurious and completely unjustifiable in light of the public policy with regard to housing which, for many years, has been giving preference in financing through VA to Armed Forces veterans, has been giving preference in financing terms through FHA to moderate-income families, has been giving preference in housing accommodations through public housing to low-income families and has aimed at decent, safe and sanitary housing for all American families." 1959 REPORT, *supra* note 6, at 496.

74 The Urban Renewal Program follows this practice at present to improve the inner core of the city. See U.S. HOUSING & HOME FINANCE AGENCY, FEDERAL LAWS AUTHORIZING ASSISTANCE TO URBAN RENEWAL (1959). A different social goal should hardly alter the constitutional validity. See Berman v. Parker, 348 U.S. 26 (1954).

75 For a discussion of the effectiveness of the latter, see, *e.g.*, GRIER, *op. cit. supra* note 51, at 171-81.

choosing[76] and price-fixing.[77] Another plan which has been the subject of some controversy in recent years is the use of quotas.[78] This controversy is occasioned in part by a disagreement as to the efficacy of quotas, but to a much greater extent it results from a basic split as to the constitutionality of a state using race as a criterion to solve a social problem. Examination, if not resolution, of these two issues will do much to delimit the proper role of the state in the area of race relations.

To illustrate more clearly how the state might plausibly use quotas to increase the supply of new middle-class housing open to Negroes and to provide that "impact of actuality"[79] thought necessary to carefully reasoned constitutional consideration,[80] a hypothetical[81] case has been constructed: Developer has received from the state a loan at two percent interest sufficient to cover eighty percent of the cost of building a 1,000 unit housing development at an average cost of $12,000 a unit. The site was acquired through the use of the state power of eminent domain. Moreover, the state has agreed to purchase at cost all houses which remain unsold after a certain date. In return, Developer has promised to sell twenty-five percent to thirty-three percent of the houses to Negroes in a manner which will achieve substantial integration. To maintain this ratio Developer is to acquire from each purchaser an option to repurchase should the purchaser desire to sell within fifty years. Developer then sold twenty-five percent of the homes to Negroes but declined to sell more to Negroes even though at the time of refusal 100 homes, subsequently sold to whites, were still unsold. Suit is brought by a Negro[82] whose offer to purchase

[76] Studies have indicated that the farther a housing development is from an existing Negro concentration, the less Negro demand there is. See Navasky, *supra* note 62, at 38.

[77] It hardly seems necessary to point out that effective Negro demand decreases rapidly as the unit price rises. See *id.* at 39.

[78] GRIER, *op. cit. supra* note 51, at 38-77; Navasky, *supra* note 62; Cohen, *supra* note 60; 1959 REPORT, *supra* note 6, at 443-46; Notes, 17 U. PA. L. REV. 515, 540-50 (1959); 70 YALE L.J. 126 (1960); 35 NOTRE DAME LAW. 563 (1960).

[79] Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1006 (1924).

[80] A "concrete factual setting . . . sharpens the deliberative process. . . ." United States v. International Union, UAW, 352 U.S. 567, 591 (1957).

[81] The hypothetical case draws on two actual litigated cases: Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541 (1949), *cert. denied*, 339 U.S. 981 (1950) (extensive state aid given to private developer to build large housing development) and Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681 (N.D. Ill. 1960), *modified and remanded*, 286 F.2d 222 (7th Cir. 1961) (dictum regarding enforceability of first option agreement to central Negro-White ratio in private housing development).

[82] Whether the Negro would be financed by the NAACP or a Neighborhood Protective Homeowners Association is an open question. It would be naïve, however, to ignore

a house was rejected. Meanwhile, two years after all the homes had been sold, the percentage of Negro owners had risen to thirty percent. Consequently, Developer has invoked his option against a white homeowner who is moving from the city and who intends to sell to a Negro. When the purchaser refuses, Developer brings suit to enforce his option, and the owner defends on the ground that the option in fact discriminates on the basis of color and is thus unenforceable under *Shelley v. Kraemer*.[83]

A determination of the effectiveness of this approach to solve the social problem is important both in deciding whether the state should take such action and in judging whether the state may. While it would be presumptuous to state categorically that such action would solve the social problem, there is a large and growing body of evidence which suggests a favorable conclusion.[84] Since space does not permit a review of the evidence the truth of the conclusion will *arguendo* be assumed.

Further, to facilitate analysis of the central constitutional issue, some other substantial legal questions will be avoided by making the following assumptions: Developer's refusal to sell to the Negro plaintiff involved state action within the meaning of the fourteenth amendment.[85] The option agreement does not violate the Rule Against Perpetuities,[86] or constitute an unlawful restraint on alienation.[87] Neither the refusal nor the option agreement violates the state's anti-bias statute.[88] Proof of Developer's intent in refusing the offer and invoking the option can be shown.[89] Left for con-

the fact that to challenge state action such as this, tremendous organizational activity would be required. See, *e.g.*, VOSE, CAUCASIANS ONLY (1959).

[83] 334 U.S. 1 (1948).

[84] Quotas can create interracial housing. See authorities cited in note 67 *supra*. Interracial housing is possible. WILNER, WALKLEY & COOK, HUMAN RELATIONS IN INTERRACIAL HOUSING (1955); Weaver, *Integration in Public and Private Housing*, 304 ANNALS 86 (1956). Quotas are necessary. Cohen, *The Case for Benign Quotas in Housing*, 1960 PHYLON 20. *Cf.* Wolf *supra* note 61; Rose, *Neighborhood Reaction to Isolated Negro Residents*, 18 AM. SOC. REV. 497 (1955); Note, *The Reshuffling Phenomenon*, 24 AM. SOC. REV. 77 (1959).

[85] See, *e.g.*, GREENBERG, *op. cit. supra* note 4, at 46-61, 295-97.

[86] To see how the Rule has been used in restrictive covenants cases, see Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721, 733 (1934). For general application of the rule to repurchase options, see SIMES & SMITH, LAW OF FUTURE INTERESTS § 1154 (2d ed. 1956).

[87] See Martin, *supra* note 86, at 734-41; Bowman, *The Constitution and Common Law Restraints on Alienation*, 8 B.U.L. REV. 1 (1928). SIMES & SMITH, *op. cit. supra* note 86, § 1244.

[88] See Navasky, *supra* note 62, at 43-45.

[89] See Note, 70 YALE L.J. 126, 129-30 (1960).

sideration is the question whether the rights of the Negro plaintiff[90] under the equal protection clause[91] of the fourteenth amendment have been infringed by the action of the state.

IV. RACIAL CLASSIFICATIONS AND THE EQUAL PROTECTION CLAUSE

The Supreme Court has recognized that the Nation's economic and social problems involve "pragmatic issues not appropriate for dogmatic solution."[92] Consequently, the Court has, with remarkably few exceptions,[93] refused to use the equal protection clause to invalidate state legislation even where such legislation creates classifications which impose unequal burdens on different individuals or classes of individuals.[94] The Court has not, to be sure, relinquished the right to review state legislation.[95] It continues to exist that the criteria used in any classification be reasonably designed to accomplish a legitimate purpose of the state.[96] However, in its readiness to presume the constitutionality of all legislative action and to assume any reasonably conceived

[90] The hypothetical situation involved two lawsuits to illustrate how the question might be raised. Since the application of the equal protection clause would be the same for both, subsequent analysis will assume just one case.

[91] The importance of the due process clause in the area of race relations should not be forgotten for it constituted the basis for the Court's rejection of racial zoning in Buchanan v. Warley, 245 U.S. 60 (1917). Nevertheless, while recognizing that the scope of due process and equal protection are not coterminous, Truax v. Corrigan, 257 U.S. 312 (1921), their application to race relations involves essentially the same considerations and for simplicity equal protection alone will be discussed. See, *e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954), where the Court invoked the fifth amendment's due process clause to declare unconstitutional separate-but-equal school laws in the District of Columbia. See also Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 9-11 (1959). Finally, frequent reference to due process cases are made to draw analogies applicable to equal protection considerations.

[92] AFL v. American Sash & Door Co., 335 U.S. 538, 552 (1949) (concurring opinion of Mr. Justice Frankfurter).

[93] For cases using equal protection to invalidate state classifications in the economic sphere, see Morey v. Doud, 354 U.S. 457 (1957); Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937); Smith v. Cahoon, 283 U.S. 553 (1931); Gulf, C. & S.F. Ry. v. Ellis, 165 U.S. 150 (1897); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902). See Tussman & tenBroek, *Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[94] Though uttered in dissent, Mr. Justice Frankfurter expressed the modern judicial attitude when he said: "Classification is inherent in legislation; the Equal Protection Clause has not forbidden it. To recognize marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic." Morey v. Doud, 354 U.S. 457, 472 (1957). See, *e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); Railway Express Agency v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[95] See cases cited note 93 *supra*.

[96] See Ransmeier, *The Fourteenth Amendment and the "Separate But Equal"* Doctrine, 50 MICH. L. REV. 203, 244-47 (1951); Tussman & tenBroek, *supra* note 93.

state of facts which would support the presumption,[97] the Court has declined the opportunity to monitor effectively state regulation of its internal economic and social problems.[98]

But as the South has learned to its consternation,[99] the Supreme Court does not exhibit any such docility where the basis of the classification is race or color. Any realistic interpretation of the equal protection clause must recognize that its historic purpose was to condemn "the existence of laws in the states where the newly emancipated Negroes resided, which discriminated with gross injustice and hardship against them as a class. . . ."[100] Although never seriously considered by the majority of the Court, Mr. Justice Harlan's expression "badges of servitude"[101] tersely describes the conditions which the fourteenth amendment was designed to eliminate.[102] The recent decisions of the Court regarding Negroes are perhaps best understood as revealing a belated acceptance by the Court of that purpose. For not only has the Court been unwilling to accept attempted justifications of racial classifications, but in expanding considerably the meaning of "state" as used in the fourteenth amendment,[103] as well as in relaxing procedural requirements of the party in interest,[104] the Court has demonstrated its basic hostility toward any scheme, whether "accomplished ingeniously or ingenuously,"[105] which seeks to perpetuate race discrimination. Teleology, not neutrality, marks the course of fourteenth amendment adjudication.[106]

97 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79 (1911); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 583 (1935).

98 Supreme Court reluctance to use the equal protection clause to control the legislature is generally attributed to "the deference to the political phases of the democratic process. . . ." KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 190 (1956).

99 See, *e.g.*, BLOCH, STATES' RIGHTS: THE LAW OF THE LAND (1958), where the author develops his case against the Supreme Court's opinions in the race cases by placing the opinions in juxtaposition with the Court's opinions rendered in upholding the right of the state to regulate economic activities.

100 The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872); Strauder v. West Virginia, 100 U.S. 303 (1880). See generally HARRIS, THE QUEST FOR EQUALITY (1960).

101 Civil Rights Cases, 109 U.S. 3, 37 (1883) (dissenting opinion).

102 Although Justice Harlan was actually interpreting the thirteenth amendment, he makes clear that his remarks would apply a fortiori to the fourteenth amendment. *Id.* at 37 and 43.

103 Shelley v. Kraemer, 334 U.S. 1 (1948); Smith v. Allwright, 321 U.S. 649 (1944); Screws v. United States, 325 U.S. 91 (1945).

104 NAACP v. Alabama, 357 U.S. 449 (1958); Barrows v. Jackson, 346 U.S. 249 (1953).

105 Smith v. Texas, 311 U.S. 128, 132 (1940).

106 "The equal protection clause of the fourteenth amendment should be read as saying the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. . . . Segregation is a massive intentional disadvantaging of the Negro race, as such, by state law. . . . That is all there is to the segregation cases." Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960). *Compare* Miller & Howell, *The Myth*

Such a generalization is quite helpful in so far as it reveals the Court's inarticulate major premise. However, a more thorough analysis of the cases is necessary to understand how that premise has been translated into legal doctrine.

That the Court will refuse to indulge any presumption in favor of the constitutionality of a racial classification is thoroughly established.[107] Ironically enough, the classic expression of this principle was enunciated in a case upholding a racial classification: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."[108] The principle has been invoked many times to nullify "sophisticated as well as simple-minded modes of discrimination"[109] when a complacent court might have been content to apply the traditional presumption. Although the propriety of adopting such a judicial attitude has been questioned with respect to race relations[110] as well as the first amendment freedoms,[111] it must be taken into account in determining the constitutionality of any legislative proposal.

More fundamental than its alertness in discovering the "evil eye and an unequal hand"[112] beneath the law "fair on its face and impartial in appearance"[113] is the Court's express rejection, as a justification for racial discriminations, of values whose preservation has traditionally been regarded as vindicating the existence of the state itself. To an assertion that a racial zoning law was enacted to preserve the public peace by preventing racial conflicts, the Court responded: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accom-

of Neutrality in Constitutional Adjudication, 27 U. CHI. L. REV. 661 (1960) *with* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959), *and* Pollak, *supra* note 91.

[107] The same attitude is evident in the cases involving first amendment freedoms. "[T]he usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the first amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, 323 U.S. 516, 529-30 (1945). See also Murdock v. Pennsylvania (City of Jeannette), 319 U.S. 105, 115 (1943); Saia v. New York, 334 U.S. 558, 562 (1948). See generally Givens, *The Impartial Constitutional Principles Supporting Brown v. Board of Education,* 6 How. L.J. 179 (1960).

[108] Korematsu v. United States, 323 U.S. 214, 216 (1944); Oyama v. California, 332 U.S. 633 (1948); Bolling v. Sharpe, 347 U.S. 497 (1954).

[109] Lane v. Wilson, 307 U.S. 268, 275 (1939).

[110] HAND, THE BILL OF RIGHTS (1958); Wechsler, *supra* note 106.

[111] Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (dissenting opinion of Mr. Justice Frankfurter); Kauper, *The First Ten Amendments,* 37 A.B.A.J. 717 (1951).

[112] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[113] *Id.* at 373.

plished by laws or ordinances which deny rights created or protected by the federal constitution."[114] A like reply has met the state's contention that the purpose of its classification was to protect property values[115] and natural resources,[116] to increase fire and health safety,[117] and to enforce historic legal rights.[118] Of late only the "pressing public necessity" of wartime security has been sufficient to warrant sustaining a racial classification.[119] It must be appreciated, however, that in each case condemning the classification, the effect of the classification was to place the minority at a substantial disadvantage. The Court has not yet been forced to decide a case where the effect of the classification is materially to benefit the minority group.[120]

An insistence on the absolute political equality of every individual is another concept which is conspicuously evident in the race cases. Where political rights and privileges are concerned, *noblesse oblige* is as much to be condemned as discrimination. "The basis of selection cannot consciously take color into account. Such is the command of the Constitution."[121] In such cases the Court seems far more concerned with paying homage to the axioms of representative government than it is with gauging the practical consequences a result would have on the minority. For example, it could reasonably be argued that a Negro would receive a fairer trial if a certain number of his race served as jurors. Yet the Court has held that not only is proportional representation not required,[122] it is not permitted.[123] On the other hand, while a mere

114 Buchanan v. Warley, 245 U.S. 60, 81 (1917).

115 *Id.* at 82.

116 Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948).

117 Yick Wo v. Hopkins, 118 U.S. 356 (1886).

118 Shelley v. Kraemer, 334 U.S. 1 (1948).

119 Korematsu v. United States, 323 U.S. 214 (1944).

120 It is true that the Court has held that a state may constitutionally "strike at the discrimination inherent in the quota system." Hughes v. Superior Court, 339 U.S. 460, 467 (1950). Although some observers have suggested the case stands for the proposition that quotas are unconstitutional [Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 709 (N.D. Ill. 1960), *modified and remanded,* 286 F.2d 222 (7th Cir. 1961)], such a conclusion is hardly justified. In the first place, the state prohibited only stranger picketing the object of which was to force a department store to hire on a proportional basis. The Court specifically limited the holding to the "circumstances of the case" and warned that "generalizations are treacherous." Hughes v. Superior Court, *supra* at 469. More importantly the decision purported only to uphold the right of the state to bar quotas. It made quite clear that if the state had decided to leave the "conflicting interests . . . unregulated" there would have been no constitutional objection to the quota system involved in the case. Hughes v. Superior Court, *supra* at 468.

121 Cassell v. Texas, 339 U.S. 282, 295 (1950) (concurring opinion).

122 Akins v. Texas, 325 U.S. 398, 403 (1945).

123 Cassell v. Texas, 339 U.S. 282, 287 (1950).

showing of the possible use of color as a criterion for selecting jurors will vitiate the trial,[124] if the state is able effectively to exclude Negroes from jury duty by selecting jurors only from the tax assessment roles,[125] condemnation is heard only in dissent.[126] This type of analysis has been frequently employed where the issue concerned the right to a fair trial,[127] to sit on a jury[128] or to vote.[129] In these areas of what might be called political rather than social rights, Harlan's plea for a color-blind Constitution appear to be realized.[130] However, it has been suggested that with the decision in *Brown* and its per curiam application,[131] the Supreme Court has clearly indicated an intent to apply this rationale to all state activities in the field of race relations. In short, it is asserted that now "all classification by race is unconstitutional *per se*."[132] Although the nobility of the aspiration and the simplicity of the application make such an extension attractive, neither the opinion nor the holdings seem to warrant such a conclusion.

Something can be said for the more rational expressions of the separate-but-equal doctrine as promulgated by southern apologists[133] — but not within the framework of a political philosophy which rejects a caste-oriented society. In holding that a state could not consciously segregate individuals on the basis of color, the Supreme Court accepted in 1954 what it would not in 1898: "Segregation of white and colored children in public schools has a

124 Avery v. Georgia, 345 U.S. 559 (1953).

125 Brown v. Allen, 344 U.S. 443, 467-77 (1953).

126 Brown v. Allen, 344 U.S. 443, 554 (1953) (dissenting opinion).

127 Powell v. Alabama, 287 U.S. 45 (1932); Moore v. Michigan, 355 U.S. 155 (1957); Moore v. Dempsey, 261 U.S. 86 (1923); See GREENBERG, *op. cit. supra* note 4, at 313-42.

128 Norris v. Alabama, 294 U.S. 587 (1935); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Avery v. Georgia, 345 U.S. 559 (1953).

129 Terry v. Adams, 345 U.S. 461 (1953); Schnell v. Davis, 336 U.S. 933 (1949); Smith v. Allwright, 321 U.S. 649 (1944); Lane v. Wilson, 307 U.S. 268 (1939). See generally GREENBERG, *op. cit. supra* note 4, at 133-53.

130 See Watt & Orlikoff, *The Coming Vindication of Mr. Justice Harlan*, 44 ILL. L. REV. 13 (1949).

131 Gayle v. Browder, 352 U.S. 903 (1956) (municipal transportation system); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf course); Mayor & City Council v. Dawson, 350 U.S. 877 (1955) (public bathing beaches); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city amphitheater and park facilities); Florida *ex rel.* Hawkins v. Board of Control, 347 U.S. 971 (1954) (higher education).

132 BLAUSTEIN & FERGUSON, DESEGREGATION AND THE LAW 145 (1957). See to the same effect KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 219 (1956); Currie & Schreter, *Unconstitutional Discrimination in the Conflicts of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 5 n.29 (1960); Black, *The Lawfulness of Segregation Decisions*, 69 YALE L.J. 421, 423 (1960). In fairness to the authors cited, it should be noted they were addressing themselves to the various applications of the "separate-but-equal" doctrine.

133 See, *e.g.*, Waring, *The Southern Case Against Desegregation*, Harpers, Jan. 1956, p. 39.

detrimental effect upon the colored children. The impact is greater when it has the sanction of the law: for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group."[134] Whatever doubts the limiting phrase "children in public school" may have raised as to the breadth of the *Brown* decision[135] were quickly dissipated by a series of per curiam opinions invalidating segregation legislation in a host of situations.[136] Separate-but-equal in any form no longer has "the sanction of the law." The *ratio decidendi* of the decisions, however, was not the irrationality per se of using race as a basis of classification; rather it was the conclusion as a matter of law that a racial classification which results in the separation of the races is arbitrary.[137] Such a rationale militates against holding as necessarily arbitrary a racial classification designed to encourage integration. Certainly, to insist cavalierly that the issue is foreclosed is untenable.

There is little point in laboring this question, for whatever the decision on the constitutionality of racial quotas in private housing, stare decisis will not be the controlling factor.[138] Rather, the Supreme Court must once again undergo the painful process of balancing conflicting values in American society.[139] It must decide whether the principle of equal protection may be realized only by a state which maintains a strict laissez-faire rectitude in every aspect of race relations, or whether it may also be realized by a state which seeks to intervene in society to alleviate the lot of the unfortunate minority even if such intervention requires the making of racial distinctions.

The proposition that "race [is] an irrational premise for government action"[140] seems to rest upon two widely held beliefs. One is that racial classifications are so susceptible to abuse that only by exorcising all such classifications can the abuses be pre-

134 Brown v. Board of Educ., 347 U.S. 483, 494. See Comment, 29 GEO. WASH. L. REV. 136 (1960).

135 See, *e.g.*, Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137, 1153 (1954).

136 See note 131 *supra*.

137 "Segregation in public education is not reasonably related to any proper governmental objective. . . ." Bolling v. Sharpe, 347 U.S. 497, 500 (1954). See generally Black, *supra* note 132.

138 See generally Miller & Howell, *supra* note 106.

139 *Cf.* Kauper, *Trends in Constitutional Interpretation*, 24 F.R.D. 155, 181 (1959). "The Court in the end chooses the values and interests that it thinks are important under the Constitution and behind which it will push its weight."

140 Brief for Appellants on Reargument, p. 23, Brown v. Board of Educ., 347 U.S. 483 (1954), in GREENBERG, *op. cit. supra* note 4, at 43.

vented. The other is that since the Negro possesses full political and civil equality any restraint placed upon him merely because of his color is an arbitrary interference with his rights as an individual.

The assertion that racial classifications should be unconstitutional per se because a more flexible standard can too easily become an instrument to limit rather than expand the opportunities of the minority group merits serious consideration.[141] With respect to the question of quotas in housing, the fear is expressed that either the principle would be abused to perpetuate the existing segregation, or changed circumstances would render inequitable a quota which initially may have been beneficial.

In recent dictum one lower federal court judge indicted all quotas in the following manner: "If a population quota of 80 to 20 . . . is constitutional, then a quota of . . . 99 to 1 . . . would be constitutional and *Shelley v. Kraemer* . . . would be circumvented."[142] Although hardly subtle, such language is a clear reminder of the danger that inheres in any relaxation of dogma. Because of "the tendency of a principle to expand itself to the limit of its logic,"[143] it can not be said to be an altogether idle fear. Nevertheless, it bespeaks both a lack of understanding of the nature of the housing problem and an unwarranted implication of impotence on the part of the judiciary.

In states now opposed to the principle of integration, token integration is probably regarded with as much repugnance as total integration.[144] Moreover, there are already means in society sufficient to maintain segregation in housing which are either constitutional or if unconstitutional are not subject to effective monitoring.[145] Under such circumstances devices which would encourage at least limited integration are not likely to be embraced widely. Furthermore, even states which purport to favor the principle of

141 Many observers have concluded such a possibility warrants rejection of all quotas. See Navasky, *The Benevolent Housing Quota,* 6 How. L.J. 29, 65 (1960); McGhee & Ginger, *The House I Live In,* 46 CORNELL L.Q. 194, 249 (1961); Note, 70 YALE L.J. 126, 133 (1960).

142 Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 707 (N.D. Ill. 1960), *modified and remanded,* 286 F.2d 222 (7th Cir. 1961), discussed in Note, 70 YALE L.J. 126 (1960).

143 CARDOZO, NATURE OF THE JUDICIAL PROCESS 51 (1921), cited in Korematsu v. United States, 323 U.S. 214, 246 (1944) (dissenting opinion of Mr. Justice Jackson).

144 See, *e.g.,* MARTIN, THE DEEP SOUTH SAYS NEVER (1957).

145 For methods available to private organizations, see Comment, *Constitutional Law: Circumvention of the Rule Against Enforcement of Racially Restrictive Covenants,* 37 CALIF. L. REV. 493; ABRAMS, FORBIDDEN NEIGHBORS 150-90 (1955). For methods available to local governing bodies, see *id.* at 205-27; GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING 78-94 (1960).

integration have been unable to cope effectively with those forces in society which in fact create a segregated housing pattern.[146] Finally, it must be appreciated that in these latter states, the state authority responsible for promoting interracial housing is not likely to condone sham quotas.[147] Indeed, is it too much to suggest that in light of the Supreme Court's well-known sensitivity to racial classifications that in the future those who would in fact discriminate against Negroes will not be so careless as to use color as the obstensible criterion?[148]

Objection must also be raised to the implication that if the Supreme Court approves the quota in the hypothetical case, stare decisis or judicial ineptitude would lead to approval of a sham quota. When a similar proposition was advanced with regard to the power to tax, Mr. Justice Holmes dissented in language which is apposite here: "Most distinctions of the law are distinctions of degree. . . . The power to tax is not the power to destroy while this Court sits."[149] The reports are replete with cases which demonstrate the vitality of Holmes' aphorism.[150] Although the Court has consistently recognized its duty to draw such distinctions in determining the constitutionality of all state and federal action,[151] such an attitude has especial relevance where the case involves an issue subject to "the most rigid scrutiny."[152] Here the slightest variance from an approved standard invites denunciation.[153]

146 See discussion note 17 *supra.*

147 It must be remembered that what is here sought to be upheld as constitutional is the right of the state to permit quotas, not the right of the individual to insist on them.

148 Greenberg says present discriminatory statutes use "Aesopian terms." GREENBERG, *op. cit. supra* note 4, at 19.

149 Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 224 (1928) (dissenting opinion).

150 The constitutional history of milk regulation provides a good illustration. In Nebbia v. New York, 291 U.S. 502 (1934), the Supreme Court sustained the right of the state to regulate the milk industry as a proper exercise of the police power. Then in Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 499 (1935), the Court held such regulation was not permissible if it burdened interstate commerce. Yet in Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939), the Court upheld the state's regulation while recognizing such regulations did impose incidental burdens on interstate commerce. Then in H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949), the Court held a state's police power could not sanction refusing a license to a dealer in interstate commerce in order to protect local markets. Finally, the Court held in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), that a state regulation was an unconstitutional burden on interstate commerce even though it conceded that had there not been other means available to protect the public health which interfered less with interstate commerce, the Court would have sustained the regulation in question.

151 See, *e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

152 Korematsu v. United States, 323 U.S. 214, 216 (1944).

153 *Compare* Terminiello v. Chicago, 337 U.S. 1 (1949), *with* Feiner v. New York, 340 U.S. 315 (1951), and *compare* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), *with* Zorach v. Clauson, 343 U.S. 306 (1952).

Related to the abuse argument, but perhaps more disturbing, is the argument that if a quota is upheld because initially it helps the Negro, changed circumstances may make it "a strait jacket."[154] Such a change may either be a percentage increase in the Negro population of the state so that the initial quota could not absorb all of the Negroes desiring housing,[155] or an improvement in the relative economic and social position of the minority group so that except for the quota the minority would be able to find adequate housing wherever he wants it.[156] While recognizing that the obvious solution to either eventuality is legislative correction, it should not be thought that the judiciary is helpless to provide relief under the Constitution. A classification results in dissimilar treatment of individuals. Such difference is justified only if the purpose is to promote the general welfare and if the classification used is appropriate to accomplish that purpose.[157] Even if the classification in question originally accomplished that result, if circumstances change so that it later had the opposite effect, the classification would become arbitrary and hence unconstitutional.[158] Such is the rationale by which the Court would be able to declare unconstitutional a quota previously sustained. To so argue is not to approve what Mr. Justice Roberts has called "good for this day and train only"[159] constitutional law, but it is merely to recognize that "reasonableness" of state action is meaningless without reference to the social context.[160]

Whether the ultimate justification for individual rights is conceived as natural, historical, or axiological, its importance in American juris-political thought is beyond question.[161] The voting

154 Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, 707 (N.D. Ill. 1960), *modified and remanded*, 286 F.2d 222 (7th Cir. 1961).

155 "Had a [quota] . . . been adopted in Chicago twenty years ago — when the Negro population was nearer 10 than to 20% of the whole — today's Negro population of that city would be hard put to find homes there." *Id.* at 708.

156 "[A]fter years of limited opportunity to purchase adequate housing, [Negroes] may require a greater percentage of new housing than their numbers in the community would indicate." Note, 70 YALE L.J. 126, 132 (1960).

157 See text accompanying notes 92-98 *supra*.

158 *Compare* Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909), *with* Newton v. Consolidated Gas Co., 258 U.S. 165 (1922) (rate regulations), and *compare* Block v. Hirsh, 256 U.S. 135 (1921), *with* Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924) (rent controls). See generally Morey v. Doud, 354 U.S. 457, 474 (1957) (dissenting opinion of Mr. Justice Frankfurter).

159 Smith v. Allwright, 321 U.S. 649, 669 (1944) (dissenting opinion).

160 See Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

161 See, *e.g.*, Harvey, *The Rule of Law in Historical Perspective*, 59 MICH. L. REV. 487 (1961); Harvey, *The Challenge of the Rule of Law*, *id.* at 603.

privilege, the substantive freedoms of speech, religion, and press as well as the procedural due process requirements reflect an immense concern for the dignity of the individual.[162] Although the formulation and protection of these rights has long been regarded as the special function of the Court, the last decades have seen the Court more than ever "intent on preserving the dignity and freedom of the individual by asserting his [right] . . . to have a voice in the determination of affairs and to be free from arbitrary interference with his personal liberty."[163] It would be foolish, therefore, to dismiss as rhetoric Mr. Chief Justice Vinson's dictum in *Shelley v. Kraemer:* "The rights established [by the fourteenth amendment] are personal rights. . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.[164] Although the immediate target of Vinson's wrath was the caviling suggestion that racial restrictive covenants were not a denial of equal protection because the state courts stood ready to enforce covenants excluding whites, there is the unmistakable conclusion that even legitimate "legislative efforts to deal with obstinate social issues"[165] can not ignore the individual.

The individual personal right[166] of a Negro to contract with other persons for the purchase of land wherever he desires is an important consideration, but perspective is needed to prevent using the expression to pervert the ideal. The Negro's "liberty of contract" is meaningless without a willing seller. To use the principle to render unenforceable restrictive covenants which have the effect of restricting the Negro to a limited and segregated area may be sound,[167] but to invoke it to prevent the growth of interracial housing which is the *sine qua non* of any realistic right is to expound the same wooden logic present in the Supreme Court opinions invalidating economic legislation in the first part of the twentieth century.

[162] See cases collected in 2 FREUND, SUTHERLAND, HOWE & BROWN, CONSTITUTIONAL LAW (1954).

[163] Kauper, *Trends in Constitutional Interpretation,* 24 F.R.D. 155, 180 (1959).

[164] 334 U.S. 1, 22 (1948). See also Sweatt v. Painter, 339 U.S. 629, 635 (1950); McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 641 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938).

[165] Beauharnais v. Illinois, 343 U.S. 250, 262 (1952).

[166] Care should be taken not to confuse the individual restraint or injury which must be shown in order to invoke the judicial process, Tileston v. Ullman, 318 U.S. 44 (1943), and Ashwander v. TVA, 297 U.S. 288, 341 (1935) (concurring opinion), with that which must be shown to demonstrate the arbitrary nature of the state action, Nixon v. Herndon, 273 U.S. 536 (1927). Even where the "preferred freedoms" are involved, the two are not the same. Dennis v. United States, 341 U.S. 494 (1951).

[167] Shelley v. Kraemer, 334 U.S. 1 (1948).

In *Adair v. United States,*[168] the Supreme Court overturned a legislative attempt to outlaw "yellow dog" contracts. Speaking ex cathedra Mr. Justice Harlan held: "The right of a person to sell his labor upon such terms as he deems proper, is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. . . . [T]he employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land."[169]

Similarly, in *Lochner v. New York*[170] the Supreme Court declared unconstitutional, as an infringement on liberty of contract, a maximum hour statute for bakers. The Court thought it self-evident that since "bakers as a class are . . . equal in intelligence and capacity to men in other trades or manual occupations"[171] it followed that they are therefore "able to assert their rights . . . without the protecting arm of the state, interfering with their independence of judgment and of action."[172] Although the conclusion has long been recognized as a *non sequitur* when applied to bakers, the same reasoning maintains an amazing tenaciousness when applied to Negroes.

In each case the syllogism rests upon the laissez-faire belief that restrictions upon or protection of certain individuals or classes in society is a negation of their political and civil equality.[173] When the Court advanced a similar proposition to invalidate a statute establishing minimum wages for women,[174] the caustic rebuke of one critic clearly revealed the tenuousness in language which loses none of its cogency applied to racial classifications:

> "Will the learned justices of the majority be pardoned for overlooking the cardinal fact that minimum wage legislation

168 208 U.S. 161 (1908).

169 *Id.* at 174-75.

170 198 U.S. 45 (1905).

171 *Id.* at 57.

172 *Ibid.*

173 *E.g.,* "In view of the great — not to say revolutionary — changes which have taken place . . . in the contractual, political and civil status of women, culminating in the nineteenth amendment, . . . these differences [the ancient inequality of the sexes] have now come almost, if not quite, to the vanishing point. . . . [Therefore] we cannot accept the doctrine that women of mature age, *sui juris,* require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances." Adkins v. Children's Hospital, 261 U.S. 525, 553, (1923).

174 Adkins v. Children's Hospital, 261 U.S. 525 (1923).

> is not and never was predicated upon political, contractual or civil inequalities of women? It is predicated rather upon evils to society, resulting from the exploitation of women in industry, who *as a class labor under a tremendous economic handicap*. The problem is one of economic fact, not of political, contractual or civil status."[175]

The retreat from the attitude prevalent in these early opinions of the Court is too familiar to need elaboration.[176] At least since the middle thirties the Court has not been willing to overturn comprehensive social and economic regulation merely because it can be shown, for example, that an individual woman is unable to work because no one is willing to pay her the minimum wage,[177] or that an individual worker is barred from making a contract to work for higher pay than that provided by a collective bargaining agreement.[178] This retreat did not occur because the Court lost interest in individual rights. Rather, it occurred because the Court was willing at least to tolerate the political philosophy that the individual rights of those most in need of protection would best be realized by state intervention.[179]

The extended reference to the changed judicial attitude toward economic problems is not to suggest that the problems created by racial discrimination are identical. It is intended, however, to illustrate the danger of making the facile assumption that the myriad problems created by race discrimination can be resolved by a simple formula. Specifically, it is intended to suggest that in determining the reasonableness of state interference with individual freedom, it is as unrealistic to assume that the housing problem created by race discrimination is simply a question of a Negro's right to buy a house on a particular lot as it is to assume that the nation's economic problem is a question of two "farmers haggling over the sale of a horse."[180]

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175 Comment, 11 CALIF. L. REV. 353, 357 (1922). See Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353 (1916); Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 553-73 (1924).

176 See, *e.g.*, MASON, THE SUPREME COURT FROM TAFT TO WARREN (1958).

177 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

178 J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

179 For an early exposition of such a philosophy, see Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEG. REV. 155 (1925). For a contemporary view, see ROSTOW, PLANNING FOR FREEDOM (1959).

180 Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).