WHISTLING DIXIE:
THE INVALIDITY AND UNCONSTITUTIONALITY OF COVENANTS AGAINST YANKEES

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Northerners are a people lost to all shame . . . cowards by nature, thieves upon principle, and assassins at heart. . . . The tiger that laps the blood and the beetle that gorges excrement, are but Yankees of the animal kingdom . . . our feelings towards [these] scarabi and vipers of humanity should be characterized neither by rage nor nausea, but by a fixed cheerful Christian determination to . . . curb their inordinate and bloody lusts by such adequate means as natural wit suggests; and, as a general thing, to kill them without idle question as to whether they are reptiles or vermin.

John Daniel, *Richmond Enquirer*, 1863[1]

The property shall never be leased, sold, bequeathed, devised or otherwise transferred, permanently or temporarily, to any person or entity that may be described as being part of the Yankee race. "Yankee" . . . shall mean any person or entity born or formed north of the Mason-Dixon line, or any person or entity who has lived or been located for a continuous period of one (1) year above said line.

. . .

The covenants and restrictions are necessary to ensure that the Yankees will never again own or control large tracts of land that rightfully belong in Southern hand and under Southern domination. They are intended to prevent Yankee ownership of property stolen or conscripted after the great war of Northern aggression after 1865 by the Yankee carpetbaggers and scalawags. Delta Plantation will once again be available to the true Southerners to view, camp, hunt, fish, use, enjoy and share as true Southerners are taught from birth. Thank you sir.

Henry Ingram, Deed Restrictions on Delta Plantation, 1998.[2]

One hundred thirty three years after the Civil War ended, there seems to be a (slight) softening of Southern attitudes towards Yankees. Henry Ingram attracted substantial attention recently by recording restrictive covenants on his South Carolina property, Delta Plantation, that

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[1] THE RICHMOND EXAMINER DURING THE WAR 65-68 (Frederick S. Daniel, ed., 1868) (reprinting editorial from January 26, 1863).

[2] *Yankee Restrictions*, ARKANSAS DEMOCRAT-GAZETTE at A-2 (Feb. 7, 1998).

purport to prohibit people who have lived north of the Mason-Dixon line for more than a year, from ever purchasing it. The covenants have generated amusing public interest stories in newspapers all over the nation.[3] They also raise some important issues in real property law.

Despite statements in newspaper stories suggesting that the covenants may be enforceable,[4] there are three distinct problems with the covenants. They probably violate the common law rules against restraints on alienation, may violate the Fair Housing Act, and almost certainly are prohibited by the equal protection clause of the United States Constitution. This Comment uses the amusing covenants to explore recent developments in real property law. Part I explains the covenants' provisions; Parts II and III examine various legal problems they raise.

I

"They're worse than fire ants."[5]

According to recent newspaper accounts, Henry Ingram recorded restrictive covenants that prohibit sale or lease of his property, the Delta Plantation, just north of Savannah, Georgia, to members of the "Yankee race."[6] Also prohibited are the sale or lease to anyone with the last name Sherman (or whose name may be spelled using the letters Sherman, if born "up North.")[7]

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[3] *See, e.g.*, *'Yankees, Stay Out,' Plantation Owner Says: Man Bars Visitors From Up North*, DAILY OKLAHOMAN at A-15 (Feb. 7, 1998); *Landowner Makes a Stand Against a Yankee Invasion*, CLEVELAND PLAIN DEALER (Feb. 7, 1998); *Owner Says No to Yanks in Dixie*, CHICAGO TRIBUNE (Feb. 15, 1998); *In Dixieland Owner Makes His Stand; No 'Scalawags' Need Try to Buy His Plantation*, WASHINGTON POST (Feb. 21, 1998); *Yankee Stay Home! Southern Hospitality on Hold*, ABA JOURNAL 14 (April 1998).

[4] *Plantation Owner Bars All "Yankees", No One with the Name of Sherman Allowed to Buy His Land, Either*, Charleston Gazette (Feb. 7, 1998).

[5] Plantation Owner Bars All "Yankees", *supra* note 4.

[6] The covenants are reprinted in part in the *Yankee Restrictions*, *supra* note 2.

[7] But wait, are they not already barred from ownership by the Mason-Dixon clause?

Moreover, no redwood lumber may be used on the property; apparently some redwoods are named after General Sherman.[8]

Mr. Ingram's motivation (besides publicity)[9] appears to stem from two sources. First, a generations-old grudge against General Sherman and a, perhaps, more recent grudge against Yankee investors.[10] Second, a concern that the influence of Northerners is changing the character of South Carolina and Georgia. "Slowly but surely they have taken over Hilton Head, they've taken over Beaufort Country. They're infiltrating Jasper County. . . . They're worse than fire ants."[11] Mr. Ingram has clearly stated his intent control the use of the property even after he has sold it. He told the *Beauford Gazette*, "Yankee development is ruining the South."[12] "This is the prettiest piece of land in the county, and I want to keep it that way. I want to make sure no one has access to it that I don't want to be there."[13]

The property has a colorful heritage. Delta plantation was established in 1829 by South Carolinian Langdon Cheves. One may think Ingram's restriction even more amusing when one considers that Cheves lived in Philadelphia from 1819 to 1829 while he served as President of the Bank of the United States. It is very possible that a buyer with Cheves' characteristics could

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[8] *Yankee Restrictions*, *supra* note 2.

[9] *See Old times there have been forgotten*, WILMINGTON STAR-NEWS A8 (Feb. 21, 1998) (calling Ingram "publicity hound").

[10] According to one newspaper story, Mr. Ingram spent time in jail for soliciting a "Yankee" investor for a prostitution business. That investor turned out to be an FBI agent. *See Yankee Green Favorite Color*, HERALD [Rock Hill, S.C.] 1E (Feb. 15, 1998).

[11] *Plantation Owner Bars "Yankees", supra* note 4.

[12] *Yankee Green Favorite Color*, *supra* note 10 (quoting Ingram).

[13] *Owner Says 'No' to Yanks in Dixie,* CHICAGO TRIBUNE, *supra* note 3.

not purchase the plantation. Cheves' Southern credentials should not, however, be questioned. He died in South Carolina, where he lived after leaving Philadelphia, and his daughter, Louisa McCord, was one of the most important proslavery theorists in the 1850s.[14] Ingram recites the purposes of the covenants in the deed: they are intended to "prevent Yankee ownership of property stolen or conscripted after the great way of Northern aggression after 1865 by the Yankee carpetbaggers and scalawags."[15]

Mr. Ingram has recently modified the covenants to allow Yankees to purchase the property if they take a "Southern oath" in which they promise that "when speaking of Yankees, I will refer to them as scalawags or carpetbaggers." Moreover, they must "whistle or hum 'Dixie' as a sign of my loyalty and as a token of [their] new outlook on life."[16]

II

Common Law Problems with the Covenant

The Limited Validity of Partial, Direct Restraints on Alienation

> "Thanks to Progress and the genius of American democracy, persons who used to be called carpetbaggers and persons who used to be called scalawags are now called Republicans."[17]

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[14] LOUISA S. MCCORD: POLITICAL AND SOCIAL ESSAYS 13, 22 (Richard C. Lounsbury, ed., 1995).

[15] *Yankee Restrictions*, *supra* note 2.

[16] *In Dixieland, Owner Takes His Stand*, WASHINGTON POST, *supra* note 3. The fact that scalawags refers to Southerners--not Northerners--and is, therefore, an inappropriate term for Yankees may demonstrate Mr. Ingram's own lack of Southern *bona fides*. *See* ERIC FONER, RECONSTRUCTION xix, 294 (1988) (defining scalawags as "unprincipled White Southerners" and "native Southerners who cast their lot politically with the freedmen"); *Old Times There Have Been Forgotten*, WILMINGTON STAR-NEWS, *supra* note 9. The inappropriate use of the term probably has no effect on the enforceability of the covenant.

[17] *Old times there have been forgotten*, WILMINGTON STAR NEWS, *supra* note 9.

Covenants that directly restrict the alienability of real property are generally suspect.[18] Mr. Ingram's covenants directly restrict alienation and are, therefore, unlikely to be enforced by South Carolina courts.

Mr. Ingram's covenants are promissory covenants, which purport to restrain a sale to Yankees.[19] While absolute restraints on alienation are prohibited, it is casebook law (as property professors like to say) that partial restraints "are sometimes upheld."[20] Partial restraints take several forms. First, they may limit all alienation for a period of time such as the lifetime of the grantee. Such limitations are usually invalid.[21] Alternatively, they may restrict the manner of alienation, such as requiring the permission of a condominium home owners' association. Such restraints are sometimes upheld.[22] Finally, they may attempt to limit the group of people who

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[18] This is not the easy case of a covenant that completely prohibits alienation. Such a prohibition is invalid. RESTATEMENT PROPERTY § 406 (b) (1944) (restraints on alienation are valid only if they are "qualified so as to permit alienation to some though not all possible alienees"); Stamey v. McGinnis, 88 S.E. 935 (Ga. 1916) (absolute restraint, even though for a limited time, void).

[19] RESTATEMENT PROPERTY §§ 404(1)(2), 404(1)(3); illustration 6. Because the deed apparently contains no provisions detailing the liability for violation of the covenants, the covenants will be construed as a promissory restraint, subjecting the violator to damages as well as an injunction, rather than either as a forfeiture restraint, which would terminate the conveyor's interest in the plantation, or as a disabling restraint. Disabling restraints require some statement that the transaction is voided if there is a violation of the covenant; the forfeiture restraint always appears as an executory limitation, a special limitation, or a condition subsequent. RESTATEMENT PROPERTY § 404, comment h; *id.* § 23.

[20] JOSEPH SINGER, PROPERTY 574 (2nd ed., 1997). *See also* CHARLES DONAHUE PROPERTY 468 (3rd ed. 1993); DUKEMINIER & KRIER, PROPERTY 224 (3rd ed., 1993).

[21] *See* Jackson v. Jackson, 113 S.E.2d 766 (1960) (restraint against sale to anyone "not a member of . . . Jackson family bearing Jackson name" invalid; estate becomes fee simple absolute in grantee); Stamey v. McGinnis, 226, 88 S.E. 935 (1916) (attempted restraint on grantee's sale during her life is ineffective; grantee held title in fee simple absolute); Kessner v. Phillips, 88 S.W. 66 (Mo. 1905), cited approvingly in Lynch v. Lynch, 159 S.E. 26, 31 (S.C. 1931) (absolute restraint on alienation of grantee's property during life invalid as restraint on alienation). *But see* Lynch v. Lynch, 159 S.E. 26, 31 (S.C. 1931) (upholding prohibition on sale during grantee's life).

[22] Aquarian Foundation, Inc. v. Shalom House, Inc., 448 So.2d 1166 (Fla. Dist Ct. App. 1984); ROBERT NATELSON, LAW OF PROPERTY OWNERS ASSOCIATIONS § 15.2 (1989); Curtis Berger, *Condominium: Shelter or Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

may purchase the property.[23] Direct, but partial, restraints on alienation may be upheld if they prohibit sale to only a small group of people, such as descendants from one branch of the family.[24]

Partial restraints are valid, according to the *Restatement of Property*, only to the extent that they are "reasonable under the circumstances."[25] As happens so often with the Restatements,

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[23] *Cf.* Riste v. Eastern Washington Bible Camp, 605 P.2d 1294 (Wash. Ct. App. 1980) (restraint on sale to people outside grantor's religion prohibited by both statute and common law).

[24] *See* Overton v. Lea, 68 S.W. 250, 261-62 (Tenn. 1902) (upholding grant that prohibits devise of property to grantor's sister). "It is well settled that any conditional limitation upon the power of alienation which is so restricted as not to be inconsistent with a reasonable enjoyment of the fee is valid." They may also be valid if land is granted conditioned on its being held within a family for a limited time. Blevins v. Pittman, 7 S.E.2d 662 (Ga. 1940).

In tracing the authority supporting partial, direct restraints on alienation, one quickly arrives at cases construing racially restrictive covenants. *See* Lynch v. Lynch, 159 S.E. 26, 30 (S.C. 1931) (citing Koehler v. Rowland, 205 S.E. 217, 220 (Mo. 1918); Los Angeles Inv. Co. v. Gary, 187 P. 596, 597 (Cal. 1919)). Those cases sometimes construe the covenant as a restriction on use, not on alienation. Restraints on use are more freely upheld than restraints on alienation. *See* Los Angeles Inv. Co. v. Gary, 186 P 596, 597 (Cal. 1919) (upholding racially restrictive covenant as restriction on use). The restriction on sale to Yankees is not phrased as a restriction on use; it is, moreover, different from typical use restrictions, such as those prohibiting "slaughterhouses, soap factories, distilleries, livery stables, tanneries, and machine shops." Cowell v. Springs Co., 100 U.S. 55, 57 (1879) (cited in *Lynch*, 159 S.E. at 30).

[25] RESTATEMENT PROPERTY § 406 (c). Or, as the South Carolina Supreme Court phrased it in *Lynch v. Lynch*, 159 S.E. 26 (S.C. 1931), "[t]he weight of authority clearly supports the view that a limited restraint upon alienation for a particular purpose is not repugnant to the grant of a fee simple estate." *See also* 10 POWELL ON REAL PROPERTY ¶ 843 (1997); THOMPSON ON PROPERTY ¶ 29.03 at 630 (David A. Thomas, ed., 1994).

South Carolina courts have freely drawn upon other states' decisions, treatises, and the *Restatement of Property* in fashioning the law of restrictive covenants. *See, e.g., Lynch*, 159 S.E. at 30; Marathon Finance Co. v. HHC Liquidation Corp., 483 S.E.2d 757, 764 (S.C. Ct. App. 1997) (dissenting from vacation of injunction based on covenant that restrained alienation; referring to the *Restatement of Property* and the *Restatement (Third) of Property* to argue for upholding a restraint on alienation); Hunnicutt v. Rickenbacker, 234 S.E.2d 887, 889 (S.C. 1977) (quoting *American Jurisprudence (Second)*). It is likely that the *Restatement*'s standards will prove persuasive in South Carolina.

Similarly, in South Carolina, as in other jurisdictions, equity will not enforce unreasonable covenants nor ones contrary to public policy. *See* Sea Pines Plantation Co. v. Wells, 363 S.E.2d 891 (1987) (denying enforcement of covenant requiring approval of architectural review board, *inter alia*, as contrary to public policy); Vickery v. Pouelli, 225 S.E.2d 856, 859 (S.C. 1976) ("[E]quity will not enforce a covenant when to do so would be to encumber the use of land, without at the same time achieving any substantial benefit to the covantee."); Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991) (interpreting restrictive covenant limiting property to "private residential use" narrowly to permit residential home for mentally impaired; enforcement would be "contrary to public policy"); Laguna Royale Owners Assoc. v. Darger, 119 Cal. App. 3d 670 (1981) (refusing to enforce servitude that is arbitrary).

the difficult task is defining "reasonable."[26] Reasonableness is determined in light of several factors. Factors that counsel in favor of reasonableness of restriction include:

1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;
2. the restraint is limited in duration;
3. the enforcement of the restraint accomplishes a worthwhile purpose;
4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;
5. the number of persons to whom alienation is prohibited is small . . .
6. the one upon whom the restraint is imposed is a charity.

Factors that counsel in favor of unreasonableness are:

1. the restraint is capricious;
2. the restraint is imposed for spite or malice;
3. the one imposing the restraint has no interest in land that is benefitted by the enforcement of the restraint;
4. the restraint is unlimited in duration;
5. the number of persons to whom alienation is prohibited is large . . . .[27]

When weighing those factors, the person seeking enforcement of the covenant must show that "the restraint is of sufficient social importance to outweigh the evils which flow from interfering with the power of alienation."[28] The *Restatement (Third) of Property* proposes a simpler (though perhaps no easier to apply) test of reasonableness: it balances "the utility of the purposes served by the restraint against the harm that is likely to flow from its enforcement."[29]

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[26] *See, e.g.*, RESTATEMENT (SECOND) TORTS § 826 (reasonableness in nuisance cases).

[27] RESTATEMENT PROPERTY § 406, comment i.

[28] RESTATEMENT PROPERTY § 406, comment a.

[29] RESTATEMENT (THIRD) PROPERTY, 3.4, comment c. The comments reminds us that enforcement has a number of costs, limiting the prospects for development, limiting mobility of landowners and would-be purchasers, and the "demoralization costs associated with subordinating the desires of current landowners to the desires of past owners, and frustrating the expectations that normally flow from land ownership." *Id.*

Applying those factors to cases helps draw the distinction between partial restraints that are enforceable and those that are not. Most commonly partial, direct restraints on alienation take the form of restrictions on manner of alienation and most of the recent cases in that area involve condominiums. Covenants requiring the permission of owners' associations are typically upheld as reasonable in light of the need to preserve the owners' investments,[30] as are restrictions on sale to a small class of potential purchasers, such as convicted sex offenders,[31] and retention of grantor's right to repurchase.[32] In other cases, such as a restriction on occupation by one family member,[33] oil and gas leases that give grantor right of consent to transfer,[34] and the retention of a right of first refusal to purchase a warehouse when it is not used for a specified purpose,[35] a partial restraint is unreasonable. Restraints on sale to a class of individuals are particularly suspect.[36]

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[30] *See, e.g.*, Gale v. York Center Community Cooperative, 171 N.E.2d 30, 33 (NY 1960) ("[R]estrictions on transfer of membership are reasonably necessary to the continued existence of the cooperative association."). RESTATEMENT PROPERTY at 2398, 2404.

[31] *See, e.g.,* TESTIMONY OF STUART ISHIMARU, BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, UNITED STATES SENATE JUDICIARY COMMITTEE (Sept. 5, 1996) (available on Nexis, News File) (suggesting that Fair Housing Act does not prohibit covenants barring sex offenders).

[32] *See* Wall v. Huguenin, 406 S.E.2d 347, 348-49 (S.C. 1991) (enforcing servitude that allowed repurchase of ancestral plantation held by family from the 1780s until debt forced sale in 1970s, noting in particular the "unique sentimental value" of the land).

[33] Casey v. Casey, 700 S.W.2d 46 (Ark. 1985).

[34] *See* Shields v. Moffit, 683 P.2d 530 (Okla. 1984). *See also* Davis v. Geyer, 9 So.2d 727, 729 (Fla. 1942) (restriction on alienation without consent of grantor void).

[35] *See* Proctor v. Foxmeyer Drug Co., 884 S.W.2d 853 (Tex. Ct. App. 1994) (applying RESTATEMENT (SECOND) PROPERTY (DONATIVE TRANSFERS)).

[36] Thus, when a covenant restricts sales to most potential buyers, it is usually held invalid. 10 POWELL, *supra* note 25, ¶ 843 at 77-28 ("When the provision purports to prevent an alienation to all but a few persons it is generally found to be invalid.") (citing, among others, Jackson v. Jackson, 113 S.E.2d 766 (Ga. 1960) (restricting sale of property to member of grantor's family, bearing family name invalid as against public policy). This is, moreover, not

The reader may balance for herself those factors. We respectfully submit that a court will likely focus upon the unlimited length of the restriction, the huge class of people who are prevented from purchasing; the divisive intent behind the restriction.[37] We suspect that reasonable minds may differ on the question whether the restrictions serve a "worthwhile purpose."[38] Applying those factors to the present case, there is substantial reason for believing that the covenants are invalid.[39] A significant percentage of the country are disabled from

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a case in which the grantor tries to restrain sale to "a person who is a citizen and resident of Russia." Restatement Property § 406, illustration 20. That restriction might be upheld, even though it excluded a great number of people, because it has little practical effect. We are now in a very different position from 1944, when Richard Powell, the reporter for the *Restatement of Property* counseled that:

> A promissory restraint or forfeiture restraint may be qualified so that the power of alienation can be freely exercised in favor of all persons except those who are members of some racial or social group, as for example, Bundists, Communists or Mohammedans. In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is reasonably appropriate for such exclusion and the enforcement of the restraint will tend to bring about such exclusion. . . . The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation.

RESTATEMENT PROPERTY, § 406, comment l. That statement was a correct assessment of the state of the law in 1944, when it was written. *See, e.g.,* Dooley v. Savannah Bank & Trust Co., 34 S.E.2d 522 (Ga. 1945); Lyons v. Wallen, 133 P.2d 555 (Okla. 1942). The current edition of Professor Powell's treatise concludes that the law has changed. 10 POWELL, *supra* note 25, ¶ 843 at 77-32. Moreover, enforcement of the covenant will not help maintain falling land prices; nor is there evidence that enforcement would avoid unpleasant racial or social relations.

[37] In assessing the balance, one might find useful the following comments from Southern newspapers: "The only thing worse than fire ants are discriminatory people like you, Mr. Ingram." *Yankee Goodness*, WILMINGTON STAR NEWS 6A (Feb. 18, 1998); "To apply the Mason-Dixon as the rule would have been ridiculous in 1865, let alone 133 years later in a highly mobile society." *Yankee Green Favorite Color*, *supra* note 10. And who can forget, "If malice and ignorance were brains, Mr. Ingram would be Einstein." MORNING STAR [Wilmington, N.C.] 8A (Feb. 12, 1998).

There are serious concerns about sectional tensions, which often appear as attacks on Yankees. Professor Richard N. Current, one of the leading American historians of the Civil War era, discusses his personal wrestling with such tension, beginning in the 1930s. *See* RICHARD N. CURRENT, NORTHERNIZING THE SOUTH 1-16 (1983).

[38] RESTATEMENT PROPERTY § 406, comment i.

[39] Even if the restriction is valid, there is the further question of the appropriate remedy. An injunction to undue a sale to a member of the Yankee race would be difficult to obtain because South Carolina courts deny injunctions upon a showing that the equities tip against the injunction. The South Carolina Supreme Court stated in *Hunnicutt v. Rickenbacker*, 234 S.E.2d 887, 889 (1977), in denying a request that a building violative of a restrictive covenant be removed: "Where a great injury will be done to the defendant, with very little if any [benefit] to the plaintiff, the courts will deny equitable relief." (quoting 20 AMERICAN JURISPRUDENCE (SECOND) § 328). Many of the same factors developed against the validity of the covenant would also counsel against enforcement of the covenant in

purchasing; there are no time limitations. The purposes supporting free alienability of property further demonstrate the reasons why the restraint on sale to Yankees should not enforced. The most commonly advanced justifications for free alienability are that free alienability fosters economic growth and commercial advancement.[40] Closely related to those justifications are the opposition to concentration of wealth in families, which is often the result of restrictions on sale of property.[41]

Mr. Ingram's offer to allow Yankees to purchase the property if they take a Southern loyalty oath may offer some hope of saving the covenant from invalidation due to its restriction on alienation. Even with the dispensation for those Yankees willing to take the oath, there is a direct restraint on alienation, which may be invalid in itself. That is, the oath may not sufficiently free the land from the covenant's restraint on alienation that it will be enforceable. It is difficult to police, which will counsel against enforcement through injunction.[42] The oath also smacks of a feudal oath of fealty, which is regarded with suspicion by American law.[43] Finally, it is unlikely that the oath "touches and concerns" the land: that the covenant "affect[s] the legal

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equity: the benefits from enforcement are small and the harm--interference with the marketability of the land--is great. Thus, a court might leave the holders of the dominant estate to legal damages, which poses proof problems.

[40] *See* Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484, 485 (S.C. 1990); DUKEMINIER, *supra* note 20, at 223; RESTATEMENT PROPERTY § 406 comment a at 2394 (referencing *id.* at 2129-33, 2379-80); 6 AMERICAN LAW OF PROPERTY § 26.3 (1952).

[41] *See* JOHN CHIPMAN GREY, RESTRAINTS ON THE ALIENATION OF PROPERTY 4-6 (2nd ed., 1895).

[42] *See, e.g.*, Walgreen Co. v. Sara Creek Property Co., 966 F.2d 273 (7th Cir. 1992) (noting that injunction may be denied when policing requires substantial court involvement).

[43] *See, e.g.,* 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *24-25 (12th ed., O.W. Holmes, ed., 1884) (noting that fealty has been "completely removed in New York"); Thomas Jefferson, *A Summary View of The Rights of British America* in THOMAS JEFFERSON: WRITINGS 118-19 (Merrill Peterson, ed., 1983) (arguing that lands in America are not subject to feudal incidents of the crown).

relations--the advantages and the burdens--of the parties to the covenant, as owners of particular parcels of land and not merely as members of the community in general, such as taxpayers or owners of other land."[44] It appears that the loyalty oath confers a merely personal benefit on Mr. Ingram. He has the pleasure of seeing others pay homage to him through their words and actions, but the oath itself has no connection to a particular parcel of land.[45] A covenant must "touch and concern" the land for it to be enforced against subsequent purchasers.[46] The provision that one

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[44] Neponsit Prop. Owners Ass'n v. Emigrant Indus. Savings Bank, 15 N.E.2d 793, 796 (NY 1938). In determining whether a covenant touches and concerns one looks to "the effect of the covenant on the legal rights which otherwise would flow from the ownership of land and which are connected with the land." Neponsit Prop. Owners Ass'n v. Emigrant Indus. Savings Bank, 15 N.E.2d 793, 79 (NY 1938). The *Restatement of Property* §537 provides that a covenant touches and concerns when:

> (a) the performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him; or
> (b) the consummation of the transaction of which the promise is a part will operate to the benefit and is for the benefit of the promisor in the physical use or enjoyment of land possessed by him . . .
> .

Under both the *Restatement* and *Neponsit* formulations, the benefit seems personal rather than appurtenant to the land.

One might argue that the oath limits the group of people who may occupy the property; limitations on use certainly touch and concern the land. [cite] Nevertheless, the oath itself does not touch and concern. Alternatively, the *Restatement (Third) of Property* proposes an elimination of the touch and concern requirement. In place of touch and concern, the *Restatement* counsels that a servitude is invalid if it "infringes constitutionally protected right, contravenes a statute or governmental regulation, or violates public policy." *See* RESTATEMENT (THIRD) PROPERTY § 3.1 (Tent. Draft 1991). One problem with the *Restatement Third*'s abandonment of the touch and concern requirement is that it may subject land to additional requirements, unconnected to the land. *But see* Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358-64 (1982) (criticizing touch and concern requirement because it interferes with private land use arrangements). Another criticism, with which Professor Epstein would agree, is that some uncertainty results from a covenant's susceptibility to a judge's interpretation of "public policy". A court will most likely conclude that the loyalty oath does not touch and concern the land, or, if it applies a reasonableness standard, that the oath is an unreasonable.

[45] There is no reason to suspect that the oath will affect the value of neighboring parcels, which itself suggests that the oath does not touch and concern the land. *See* ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK, & DALE A. WHITMAN, THE LAW OF PROPERTY §8.15, at 474-75 (2nd ed., 1993) (noting that Clark test for touch and concern relates to economic impact of benefit and burden).

[46] *See* Harbison Community Assoc. v. Mueller, 459 S.E.2d 860, 862 (S.C. 1995).

take an oath is unlikely to run to future purchasers.[47]

One factor might counsel in favor of the restraint. It could be argued (without much likelihood of success) that the restraint will help preserve the historic character of the plantation. As Professor Singer has observed:

> restraints on alienation may serve very useful social functions . . . . Under some market conditions, alienability may actually concentrate ownership in the hands of the wealthy since [they] are able to bid higher amounts for property and may thereby induce others to sell. Restraints on alienation of low-income housing, for example, may serve to ensure continued availability to poor families.[48]

Conservation servitudes, for example, provide substantial benefits and justify significant restraints on alienation, as well as departure from traditional requirements of servitudes.[49] The connection between Mr. Ingram's restrictions and historic preservation, however, is attenuated. There is no evidence that his prohibition of Yankees will help preserve the historic plantation nor that such blanket prohibitions are closely tailored to that purpose.[50] There are, in short, much

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[47] This raises a complex problem in the interpretation of the covenant. The oath might save the direct restraint on alienation, but it probably is itself invalid. It poses a problem of construing different clauses in the covenant. If they are construed together, the loyalty oath may be viewed as a way of mitigating the harsh results of the direct restraint on alienation; alternatively, the oath has no identifiable relationship to Delta plantation.

[48] SINGER, *supra* note 20, at 573.

[49] RESTATEMENT (THIRD) PROPERTY, § 3.4, comment i. *Compare* S.C. Code § 27-9-20 (excepting conservation servitudes in favor of government and selected environmental organizations from common law rules regarding privity and dominant estates); Ga. Code § 29-301 (excepting conservation servitudes from 20 year limitation that applies to other Georgia servitudes governing use). *See also* N.Y. Envtl. Conserv. Law § 49-0301 (McKinney 1992) (abrogating common law requirements for servitudes when used for historic preservation).

[50] When weighing reasonableness of the restriction, a court will look to the benefit from the restriction. Because the restrictions do not prevent development, Mr. Ingram can claim little benefit. On the other side of the equation, the broad prohibition causes significant losses. Thus, there is a need to tailor the covenant narrowly to achieve the legitimate goal of historic preservation without incurring the disadvantages of spite and restraint on purchase.

It is unlikely that Mr. Ingram could retain the power to approve subsequent purchasers of the land. *See* Northwest Real Estate Co. v. Serio, 144 A. 245 (NY, 1929). *A fortiori*, he ought not to be able to institute a blanket prohibition on "Yankee" purchasers, which is only tangentially tied to the preservation of the community.

better ways of preserving the plantation's historical character, which would infringe significantly less on the presumption against restraints on alienation. Given Mr. Ingram's desire to develop the land commercially, it appears that the servitude serves little purpose other than drawing distinctions between people based on their state of origin, a practice frowned upon by the courts.

III

Constitutional Problems with the Covenant

> It has been found that differences between individuals of the same race are often greater than differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.
>
> Justice Byron White, *St. Francis College v. Al-Khazraji*[51]

> They gaily dance the steps their African Slaves teach them, whilst pretending to an aristocracy they seem only to've heard rumours of. ... No good can come of such dangerous Boobyism. What sort of Politics may proceed herefrom, only He that sows the Seeds of Folly in His World may say.
>
> The Rev. Wicks Cherrycoke, *Spiritual Day-Book*[52]

Even though Mr. Ingram's restriction is a private contractual agreement, its enforcement by the judicial system would be subject to scrutiny under the U.S. Constitution. As long established by *Shelley v. Kraemer*, judicial action to enforce restrictive covenants bears the clear and unmistakable imprimatur of the State.[53] Should Mr. Ingram or his successors in interest attempt to enforce the terms of the Yankee covenant in state or federal court, the restriction would undoubtedly be struck down as violating Section One of the Fourteenth Amendment:

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[51] 481 U.S. 604, 610 n.4 (1986) (holding that Arab is a racial classification for the purposes of the Civil Rights Act).

[52] THOMAS PYNCHON, MASON & DIXON 275 (1997).

[53] 334 U.S. 1, 14 (1948).

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[54]

As an attempt to exclude "members of the Yankee race" from purchasing Mr. Ingram's plantation, the covenant is unconstitutional as an impermissible racial classification and as an impediment to the constitutional right to travel under the Equal Protection Clause of the Fourteenth Amendment. We address each of these claims in turn after a discussion of whether judicial enforcement of Ingram's covenants would constitute state action.

A. State Action?

In *Shelley v. Kraemer*, in an opinion signed onto by six justices (three justices not participating in the decision), Justice Vinson stated clearly that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by decisions of this court."[55] This proposition was supported by citation of cases establishing the removal jurisdiction of federal courts,[56] striking down racial bars to jury participation,[57] and numerous due process violations in judicial proceedings.[58] Under this broad reading, judicial

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[54] U.S. Constitution, Amendment 14, Section One.

[55] 334 U.S. at 14.

[56] *See* Virginia v. Rives, 100 U.S. 313 (1880).

[57] *See* Strauder v. West Virginia, 100 U.S. 303 (1880).

[58] *See, e.g.*, Frank v. Mangum, 237 U.S. 309 (1915) (overturning state convictions obtained under domination of mob); Twining v. New Jersey, 211 U.S. 78 (1908).

enforcement of Ingram's restrictive covenant would almost certainly constitute state action.

However, the broad reach of *Shelley* has been narrowed by subsequent case law in ways which may make the finding of state action even in the area of restrictive covenants far from certain. The Court has held that *Shelley* does not apply to the judicial enforcement of certain defeasible fees.[59] Furthermore, in a series of cases arising from constitutional challenges to arrest of sit-in protestors in the Sixties, the Court grappled with the reach of the *Shelley* decision, specifically to judicial enforcement of common law and statutory trespass law.[60] The sit-in cases involved arrests of African-American protestors under neutral trespass laws designed to protect property owner's right to exclude. As in *Shelley*, the issue was the use of the judiciary to enforce private rights in a manner that was discriminatory both in effect and in intent. Did *Shelley*'s holding that judicial enforcement of contracts constituted state action extend to judicial enforcement of rights under tort law? The answer given by the Court was a resounding maybe. The early cases sidestepped the *Shelley* issue, finding state action either in statutory law or

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[59] *See* Evans v. Abney, 396 U.S. 435 (1970) (holding that a restriction on trust property to be used as a park allowing use "for white people only" was purely private discrimination). In *Evans,* the Georgia court had held that the restriction was not possible to fulfill under common law and reverted the property to the settlor's heirs. The U.S. Supreme Court found no state action because the court's ruling was based on neutral state laws and the administration of a fee simple determinable, which reverts title automatically to the grantor upon failure of the conclusion. *See also* Charlotte Park & Recreation Commn. v. Barringer, 242 N.C. 311, 88 S.E.2d 114, *cert. denied*, 350 U.S. 983 (1956) (holding that enforcement of a fee simple determinable was not state action). *Cf.* Hermitage Methodist Homes of Virginia v. Dominion Trust Co., 239 Va. 46, 387 S.E.2d 740, *cert. denied*, 111 S. Ct. 277 (1990) (suggesting that judicial enforcement of a fee simple subject to a condition subsequent would constitute state action while that of a fee simple determinable would not).

Lower courts have held that enforcement of racial restrictions in a will was not state action. *See, e.g.*, Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955). However, the Court has held that a will establishing a trust administered in part by state officials to enforce racial restrictions constituted state action. *See* Pennsylvania v. Board of Directors of Trusts, 353 U.S. 230 (1957). The lower court, interestingly, found unconstitutional state action even after the state officials were replaced by private trustees. *See* Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968).

[60] The three principal cases are: *Peterson v. Greenville,* 373 U.S. 244 (1963); *Lombard v. Louisiana,* 373 U.S. 267 (1963); *Bell v. Maryland,* 378 U.S. 226 (1964).

practice of the police officers who arrested the protesters.[61] In *Bell v. Maryland*, the Court divided three ways, with the plurality opinion written by Justice Brennan ignoring *Shelley* entirely and overturning the conviction of the African-American protestors on procedural grounds.[62] Justice Douglas and two other justices in concurrence also ruled to overturn the convictions on the grounds that their conviction under state trespass law constituted state action in violation of the Fourteenth Amendment equal protection clause.[63] In dissent, Justice White and two other justices voted to stay the convictions on the grounds that conviction under neutral state trespass law did not constitute state action. Justice White urged cabining *Shelley* only to cases when racial discrimination was involved and application of state law would impede a transaction between a willing seller and a willing buyer.[64] Since *Bell,* the Court has not addressed the extent of the *Shelley* decision in constitutionalizing causes of action grounded in neutral state and common law.[65] Recently, in reviewing its state action jurisprudence, the Court held that state action under *Shelley* exists when "the injury caused is aggravated in a unique way

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[61] In *Peterson,* the Court found the background city ordinance requiring segregation sufficient to create unconstitutional state action in the enforcement of private trespass law. 373 U.S. at 243. In *Lombard,* the Court found the requisite state action in the spoken policies of the local police to prohibit African-Americans from desegregating lunch counters. 373 U.S. at 273.

[62] 378 U.S. at 237-241 (discussing the effect of a savings clause in Maryland's trespass statute which made racial discrimination in public accommodations unlawful under state law).

[63] 378 U.S. at 255-60 (arguing with supporting statistics that state enforcement of trespass laws against African-Americans motivated by purely private prejudice is state action).

[64] 378 U.S. at 331-2.

[65] In his dissent in *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993), Justice Souter relied on *Shelley* for arguing that abortion protestors prohibiting women from entering abortion clinics constituted state action for the purposes of the Civil Rights Act. Justice Scalia, writing for the majority that held such action to be purely private, dismissed Justice Souter's argument based on *Shelley*: "Any argument driven to reliance upon an extension of that volatile case is obviously in serious trouble." 506 U.S. at 282 n.14.

by the incidents of governmental authority."[66] Given *Shelley's* patched history, "unique" probably means "the very specific facts of *Shelley v. Kraemer*." It is clear from the Court's treatment of *Shelley* that it does not stand for the proposition that all judicial enforcement of private discriminatory conduct constitutes state action for Fourteenth Amendment purposes. It is unclear, however, what are the exact limits on *Shelley*.

Lower court interpretations of *Shelley* have also placed equally vague limits on its holding. Many courts for example have limited the applications of *Shelley* to the judicial enforcement of restrictive covenants. In *Ireland v. Bible Baptist Church*,[67] the Texas Court of Civil Appeals failed to find state action in judicial enforcement of a covenant restricting buildings to single-family residences. This covenant was challenged by a church as a violation of the Free Exercise Clause of the First Amendment. The court disagreed distinguishing *Shelley* as applying to discrimination based on race or color. In contrast,

> [the single-family residence] restriction which was enforced in the instant case applied equally to churches of all denominations and faiths. If the restriction applied only to Baptist churches while permitting those of other denominations, the rationale of *Shelley* would be more persuasive.[68]

The court's reasoning pertains to the constitutionality of the restriction as opposed to the existence of state action. What the court seems to be implying is that enforcement a restrictive covenant entails state action when the restriction is racially discriminatory. At least one court has followed this interpretation of the Ireland decision by also refusing to apply *Shelley* to a

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[66] Edmundson v. Leesville Concrete Co., 500 U.S. 614, 621 (1990).

[67] 480 S.W. 2d 467 (Texas 1972).

[68] 480 S.W. 2d at 470.

residential restriction because "the covenants considered in *Shelley* were racially discriminatory on their face."[69]

The *Ireland* case and its progeny offer tenuous guidelines in limiting *Shelley* in the context of restrictive covenants.[70] As suggested above, it is not entirely clear what limits these minority courts have placed on Shelley in the context of restrictive covenants. Given the vagueness of their reasoning, cases like *Ireland* and *Yeshiva* can best be understood as holding that assuming judicial enforcement of the covenant constitutes state action, the covenant is not unconstitutional.

Furthermore, several courts have extended *Shelley* to apply to the enforcement of covenants that are not racially discriminatory on their face but instead place restrictions on use and size. In *West Hill Baptist Church v. Abbate*,[71] a Ohio court ruled that judicial enforcement of a use restriction against a church would constitute state action in violation of the Free Exercise Clause. The court's principal authority was language from a law review article:

> [A] restriction of the free exercise of religion might be regarded as sufficiently analogous to the situation involved in Shelley v. Kraemer to justify characterizing the enforcement of the restrictive covenant as invalid state action.[72]

The court ruled that as applied to the church the covenant was a violation of the First Amendment because the terms of the restriction bore "no reasonable relationship to the public

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[69] Ginsberg v. Yeshiva of Far Rockaway, 358 N.Y.S. 2d 477, 482 (S.Ct. App.Div. N.Y. 1974).

[70] However many courts have placed limits on Shelley in the context of Free Exercise claims. Again, it is not clear whether these cases are addressing the state action issue or the constitutionality of the underlying covenant. As the text suggests, given the uncertainty the opinions are assuming state action and basing a finding of constitutionality on that assumption. *See* POWELL, REAL PROPERTY, *supra* note 25, § 60.06[3] nn. 78,79.

[71] 261 N.E.2d 196 (Ct. Comm. Pleas Ohio 1969).

[72] 261 N.E.2d at 201 (citing Note, *Churches and Zoning,* 70 HARV. L. REV. 1428, 1438 (1957)).

health, safety, morals, and general welfare."[73] Other courts have similarly found state action in the enforcement of restrictive covenants. In *Riley v. Stoves*,[74] an Arizona court held that enforcement of a covenant placing age restrictions on residents constituted state action but upheld the restriction as not violating the constitution. In *Franklin v. White Egret Condominium*,[75] a Florida court deciding a Petition for Rehearing held that state court action was involved in the judicial enforcement of a single family residence restriction. The Florida court stated that "the actions of state courts and of judicial officers performing in their official capacities have long been regarded as state action"[76] and that "other fundamental interests which fall within the penumbra of constitutional protection may also be infringed to varying degrees by the restrictive covenants,"[77] meaning that covenants can be subjected to constitutional scrutiny based on fundamental rights other than freedom from race based discrimination.

It is true that the outer limits of *Shelley* are unclear. No legal commentator would conclude that *Shelley* means that all private law causes of action raise constitutional issues.[78] On the other hand, *Shelley* has never been overruled. Despite some confusion cast by lower courts, *Shelley* does apply to its facts: judicial enforcement of a restrictive covenant constitutes state action. It will be difficult for defenders of Ingram's restrictions to escape constitutional

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[73] 261 N.E.2d at 202.

[74] 526 P.2d 747 (Ar. Ct. Apps. 1974).

[75] 358 So. 2d 1084 (Fl. Ct. Apps. 1978).

[76] Id. at 1088-9.

[77] Id. at 1089.

[78] *See generally* GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 938 (1997).

scrutiny by characterizing the covenant as purely private action. Is Ingram's restriction violative of the Constitution? The answer rests on what Ingram means by "Yankee race." We offer our interpretation below.

B. Improper Racial Classification?

The original purpose of the Fourteenth Amendment was to protect African-Americans from the persecution they faced by the state government pre-Emancipation. It may seem a stretch of history and reason to extend these same protections to the "Yankee race," however such a group is to be defined. Of course, such extensions would be perfectly consistent with a color-blind interpretation of the Constitution, a view largely adopted in many recent cases involving the constitutionality of remedial affirmative action programs.[79] Consistent with this line of cases may be the view that "white race" is a suspect classification only in the context of remedial actions but not otherwise. This conclusion would be erroneous, inconsistent not only with a color blind philosophy but also with language in Shelley. In dicta, the Shelley court addressed the homeowner's argument that the racially restrictive covenants did not violate the Equal Protection Clause because the covenants could be drafted just as easily to restrict whites as to restrict blacks:

The rights created by the first section of the Fourteenth Amendment are, by its

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[79] *See* Adarand Constructors, Inc. v. Pena, 518 U.S. ___, 115 S. Ct. 2097 (1995); Richmond v. J.A. Croson, Co., 488 U.S. 469, 109 S.Ct. 706 (1989). The "color blind" view of the Constitution has its roots in Justice Harlan's famous dissent in *Plessy v. Ferguson*, "Our Constitution is color-blind and neither knows nor tolerates classes among citizens." 163 U.S. 538, 559 (1896). What "color-blindness" means is of course a matter of dispute, especially if the default is white, capitalist culture. For discussions, see ANDREW KULL, **THE COLOR-BLIND CONSTITUTION** (1992) (tracing the development of the color-blind principle in U.S. political and constitutional history and arguing against the use of racial classifications for any purpose including remedial); and Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that the color-blind principle is antithetical to cultural and racial pluralism).

> terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.[80]

The language suggests that any restriction based on race or color would be unconstitutional under *Shelley* whether the restriction ran against whites or African-Americans.

The more difficult question is identifying when a restriction is racial. "Yankee race" is not a conventional racial category; it is one that encompasses white, blacks, Asians, Hispanics, and Native Americans if a member of such a group was born north of the Mason-Dixon line or lived there for more than a year. The category is not a blanket restriction against a racial or ethnic group but more appropriately a distinction within a group. African-Americans born south of the Mason-Dixon line and who had never ventured North for more than a year could purchase Mr. Ingram's property; as could Hispanics, Native Americans, and Asians. Despite Mr. Ingram's use of the word "race," the covenant may truly be color blind and not a restriction based on race or color that would be unconstitutional under *Shelley*.

What is troubling about the restriction is the use of the word race. The "r-word" in this context reeks of animus towards non- or faux- Southerners, animus fertilized by memories of the heated War of Northern Aggression and nostalgia for the genteel Southern plantation culture (albeit memories and nostalgia not derived in Mr. Ingram's case from any actual experience). Race based classifications which are facial are subject to strict scrutiny; classifications that have a disparate racial impact receive strict scrutiny upon a showing of discriminatory intent. Although the Supreme Court distinguishes between laws that entail facial classifications and

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[80] 334 U.S. at 22.

those that are facially neutral but discriminatory in effect, it is not completely clear what a facial classification means. Does the use of the word "race" alone place a law in the facial classification category? This solution would lead to the absurd conclusion that covenants which made restrictions based on the "left handed race" or "the race of old people" would subject the covenant to strict scrutiny when the classification itself involves a non-suspect category. Does the use of the word "Yankee" cure the discriminatory animus associated with the use of the word "race?" Not in light of cultural background to Ingram's restriction: anger and hostility festering since the Civil War over the loss of the right to treat certain groups as inferior and subordinate. As the Supreme Court held, in construing the meaning of "race" under Section 1981, racial discrimination means at the least discrimination against "an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgroup of homo sapiens."[81] By Yankee Mr. Ingram means something very specific; realistically, the category's meaning comes not from the potential purchaser's state of origin but his state of mind, as molded by cultural attitudes that are antithetical to Mr. Ingram's.

Professor Neil Gotanda has catalogued three distinct ways in which the Court discusses race in its jurisprudence: status-race, formal-race, and historical-race.[82] Each of these types are exemplified by Mr. Ingram's use of the phrase "Yankee race." Status-race rests on the fundamental belief that certain racial groups are inherently inferior. This interpretation of the Yankee race is supported by John Daniel's 1863 editorial excerpted at the start of this Article.

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[81] *St. Francis College v. Al-Khazraji,* 481 U.S. 604, 613 (1986) (holding that Arabs were protected under Section 1981).

[82] See Gotanda, supra note 79, at 37-40.

Yankee to a Southerner like Ingram means cowards, thieves, vermins: creatures to be subjugated and tamed by Christian tolerance. Yankee race also evokes a formal race category, a seemingly neutral category, like quadroon or poltroon, that is based not on any notion of hierarchy but on a need to categorize individuals in neutral and administratively helpful ways. Formal race, as Professor Gotanda demonstrates, is the basis for separate but equal, a categorization upheld by the Plessy court and one made suspect by Brown. If viewed as a formal-race category, Yankee race is emptied of its third connotation as a historical-race category. Again as Daniel's editorial demonstrates, the historical baggage surrounding the term Yankee is one of inferiority and difference based on place of birth. It is not a stretch and fully consonant with the original purpose of the Fourteenth Amendment to consider "Yankee race" a suspect classification for Equal Protection purposes.[83]

With this background, the restriction against the "Yankee race" should be as suspect as laws against miscegenation, struck down in *Loving v. Virginia*.[84] Even though the statute at issue, applied equally to whites and African-Americans, as Ingram's covenant does, the Court found that laws preventing cross-racial intercourse and marriage violated the Equal Protection Clause because "[t]here can be no question that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."[85] By race, the Court did not mean black or white alone, but distinctions based on cultural or ethnic identity. Equal protection does not mean that

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[83] Professor Gotanda also discusses culture-race, a view of race completely ignored by the Court and an important curative to the dangers of color blindness. Yankee race also fits into the culture-race category given the cultural bases for Ingram's animosity to those from North of the Mason-Dixon line. Gotanda, *supra* note 79, at 56-9.

[84] 388 U.S. 1 (1967).

[85] 388 U.S. at 7.

African-Americans and whites can be equally mistreated under the law; the rainbow coalition cannot revel in their common bond of burdensome laws based on racial stereotypes and caricatures. Even if Ingram's restriction prevents African-Americans and whites equally from purchasing the plantation, the fact that the restriction on its own terms by reference to the unconventional but clearly understood category of the "Yankee race" reflects racial and cultural stereotypes makes it violative of the Equal Protection Clause.

The restriction is suspect under a disparate impact theory of the Equal Protection Clause as well. Under *Washington v. Davis*, non-facially discriminatory laws are unconstitutional if there is evidence of discriminatory intent.[86] Even if Mr. Ingram's use of the phrase "Yankee race" does not place the covenant in the facially discriminatory category, the covenant could have a disparate impact on African-Americans largely because of recent migration patterns to the South. There has been an exodus back to the South of African-Americans during the Nineties.[87] The exodus is in response to boom economies in cities like Atlanta that have spilled over into neighboring localities. The return migration is motivated also by a desire among many affluent and successful African-Americans who have made their fortunes in the North to return south of the Mason-Dixon line to return to their roots within the United States. Many still have family in

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[86] 426 U.S. 229 (1976).

[87] "Record number of black Americans are migrating South from other parts of the United States. ... Sixty-five percent of the nation's black population growth between 1990 and 1996 occurred in the South. Southern cities such as Atlanta, Houston, Miami, Dallas, and Ft. Worth are experiencing much of the growth. A strong economy in the South is a major factor in this population shift." *Morning Edition: Black Migration* (NPR radio broadcast, Jan. 30, 1998). As demographer William Frey reports: "The major donor states are more in the eastern part of the country. New York is by far the biggest donor state for black migrants to the South, moving to the South Atlantic states rather than to Texas and to the Southwest." *Id.* (Frey to the Ingrams of the World: Watch Out!)

the South who did not partake of the great Northern migration during the first half of this century and after World War Two. Many have memories of families and stories that create connections with the South. Because the migration to the South has largely been by African-Americans, Ingram's anti-Yankee covenant though arguably racially neutral would disparately affect African-Americans.

Mr. Ingram's discriminatory purpose is reflected once again in his words. The covenant is intended to preserve a way of life that was based on state enforced limitations on individual freedoms based solely on the color of people's skin. Mr. Ingram is seeking to revive this lost world through his restrictive covenant. His purpose is clear; in light of the evidence as to the racial composition of who likely would constitute a Yankee seeking to buy property in South, the discriminatory impact is clear. Proof of discriminatory purpose and discriminatory impact is enough to support a violation of the Equal Protection Clause by a law that is facially neutral.[88] Even if Ingram's use of the word "race" is read neutrally, his covenant violates the Fourteenth Amendment.

C. Right to Travel

A constitutional lawyer defending Mr. Ingram's covenant would undoubtedly argue that the restriction based on being a member of the Yankee race is not a racial categorization but one based on state citizenship or residency. Since state citizenship is not a suspect classification for Equal Protection purposes, the covenant will be subject to rationality review and would be upheld (perhaps on the grounds of conservation). This argument is flawed. The State cannot

[88] *See* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that evidence of discriminatory intent not sufficient for Equal Protection Claim unless accompanied by evidence of discriminatory impact).

discriminate among individuals using certain categories such as race; in addition, it cannot make distinctions among individuals that would interfere with fundamental rights. If the covenant is recharacterized as a restriction based on state citizenship or residency, it becomes an abridgement on the fundamental right to travel under the Equal Protection Clause. As an abridgement on the fundamental right to travel, the covenant would be subject to strict scrutiny.[89]

The right to travel broadly several rights associated with interstate mobility in a federal system. Foremost is the right of outsiders to utilize instate legislative and judicial process, a right established in *Calder v. Nebraska* in 1867 prior to the passage of the Fourteenth Amendment. Since such a right was found by the Court prior to the Fourteenth Amendment's enactment, its source must be in the structure of the U.S. Constitution.[90] Challengers of Ingram's covenants cannot rely on this strand of the right of interstate mobility because legislative and judicial process is not at issue. Instead, the covenants violate an out of stater's purely private right to purchase property.

The analogy could be made to state requirements that out of staters reside in state for a certain duration before being entitled to welfare benefits. In *Shapiro v. Thompson*,[91] the Court held that durational residence requirements that condition the receipt of benefits on length of residence violate the fundamental right to travel. Although the right to purchase property is not an entitlement in the same sense that welfare benefits are, the Court has interpreted its precedent

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[89] See GUNTHER & SULLIVAN, supra note 78, at 905 *et. seq.*

[90] 73 U.S. (6 Wall.) 35 (1867) (striking down a discriminatory tax because it infringed on the citizen's "right to come to the seat of [the national] government").

[91] 394 U.S. 618 (1969).

set it Shapiro as holding residence requirements which penalize out of staters with respect to an entitlement unconstitutional.[92] Ingram's covenants penalizes out of staters analogously to the durational requirements struck down in *Shapiro*. Southerners who go north of the Mason-Dixon line for a year or more lose their right to buy Ingram's property. Although they can still buy other property in the South, the restriction on Ingram's plantation in essence penalizes Southerners who exercise their right to travel. Just as the restrictions on welfare eligibility struck down in *Shapiro* were designed to dissuade immigration into states with generous welfare benefits, Ingram's covenants serve to prevent emigration to the North. The restrictions in Ingram's deed are the obverse of the restrictions in *Shapiro*; they punish for not residing in the state for a certain duration.

The Court's jurisprudence on the fundamental right to travel is intimately linked with its jurisprudence on the dormant commerce clause and the Article IV Privileges and Immunities Clause. This connection is important because judicial enforcement of the covenant would also constitute an undue interference with interstate commerce and as discrimination against out of staters.[93] Although early Supreme Court cases held that "commerce" did not include movement of people, the Court held in *Heart of Atlanta Motel v. United States* that Congress' power to regulate commerce includes its power to regulate the interstate movement of people.[94] Since

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[92] *See* Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (holding that durational residency requirements that penalized out of staters were subject to strict scrutiny where existence of penalty was determined by reference to a burden on a necessity of life).

[93] *See* Edwards v. California, 314 U.S. 160 (1941) (striking down "anti-Okie law" as violating dormant commerce clause with reasoning in concurrence on Article IV Privileges and Immunities).

[94] 379 U.S. 241 (1964).

Congress' power to regulate interstate commerce is exclusive, a state's regulation that places a burden on interstate commerce is unconstitutional under the dormant commerce clause doctrine. The Court have distinguished however between state statutes that facially impose limits on commerce and statutes that merely adversely affect commerce; the first are subject to review under strict scrutiny, the second to intermediate scrutiny under a balancing test.[95] The argument can be made that Ingram's covenants facially restrict interstate commerce by disenabling those who live in the North from buying his property. Because of the facial discrimination against interstate commerce, the covenant must be closely tailored to a substantial state interest. More than likely, it will fail to meet such a high standard. In addition, such a restriction that facially discriminates against out of staters would violate the Privileges and Immunities Clause of Article IV of the Constitution.[96] Ingram's covenants does not meet constitutional standards whether from the perspective of the fundamental right to travel or from constitutional provisions that limit state burdening of interstate commerce.

D. Fair Housing Act

The Fair Housing Act sanctions both private and public discrimination based on race, ethnicity, religion, or national origin in the sale or rental of real property. Since the Act covers private actors, state action is not an issue and Ingram's covenants will be directly subject to the Act's provisions.[97] Since the Act prohibits the recording of deeds that impose racially restrictive

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[95] *See* GUNTHER & SULLIVAN, supra note 78, at 270-71.

[96] Id. at 328.

[97] Note that the recording of Ingram's covenants by the South Carolina Registrar of Deeds would constitute state action in violation of the U.S. Constitution. *See, e.g.*, Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972).

covenants, Ingram's deeds would violate the Act.[98] The only room for argument is that the restriction is not racial. On this point, we incorporate by reference our discussion on whether "Yankee race" constitutes a racial restriction from above.

IV

Conclusion

> "It's bad manners and probably unconstitutional to discriminate against people just because they don't eat grits and fried fatback for breakfast, and had the bad luck to be born north of the Mason-Dixon line."
>
> *Atlanta Journal and Constitution*[99]

For the reasons elaborated above, Mr. Ingram in the final analysis is surely whistling in the wind.

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[98] "It shall be unlawful---To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604(c). Ingram's deed would be such a notice or statement.

[99] Jim Mitner, *Northerners need education, not isolation,* ATLANTA JOURNAL AND CONSTITUTION I1 (Feb. 19, 1998).

Comment

WHISTLING DIXIE:

THE INVALIDITY AND UNCONSTITUTIONALITY OF

COVENANTS AGAINST YANKEES

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Professor Ghosh is primarily responsible for part III; Professor Brophy is primarily responsible for parts I and II.