

BARNETT

No. 645

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

RAMSEY CLARK,

Attorney General,

ERWIN N. GRISWOLD,

Solicitor General,

STEPHEN J. POLLAK,

Assistant Attorney General,

LOUIS F. CLAIBORNE,

Assistant to the Solicitor General,

BRIAN K. LANDSBERG,

Attorney,

Department of Justice,

Washington, D.C. 20530.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Constitutional and statutory provisions involved.....	2
Questions presented.....	3
Statement of the case.....	3
Summary of argument.....	6
Argument:	
I. The Fourteenth Amendment, of its own force, prohibits the conduct described in the complaint....	9
A. The Fourteenth Amendment forbids State action supporting racial segregation in housing.....	9
B. The respondents exercise State power and perform governmental functions.....	12
C. The respondents are governed by the Fourteenth Amendment in their admission policy.....	18
II. The challenged conduct is also embraced by Section 1978 of the Revised Statutes.....	20
A. Section 1978 reaches any substantial "fencing out" of an entire racial class.....	27
1. The statutory text itself indicates a purpose to grant more than bare legal capacity to acquire real property.....	28
2. The legislative history and background of the statute confirm this broader purpose.....	29
3. The jurisprudence of this Court gives the statute a broader reach.....	35
B. Section 1978 reaches conduct not taken "under color of law.".....	38
1. Nothing in the text or context of the statute confines its reach to State action.....	39

(i)

Argument—Continued

II. The challenged conduct is also, etc.—Continued

B. Section 1978 reaches, etc.—Continued

1. Nothing in the text, etc.—Continued	Page
a. The original text of 1866---	40
b. The limited scope of Section 2 of the 1866 Act-----	42
2. The constitutional doctrines of the Reconstruction period would not have inhibited the attempt to reach wholly private action-----	48
3. No present constitutional barrier confines the reach of the statute to State action-----	51
a. The congressional power to implement the Thirteenth Amendment-----	52
b. The congressional power to define the privileges and immunities of national citizenship-----	54
c. The congressional power to enforce the Equal Protection Clause-----	55

C. Section 1978 reaches voluntary racial discrimination by landowners-----	57
--	----

Conclusion-----	61
Appendix-----	63

CITATIONS

Cases:

<i>Andrews v. Metropolitan Bldg. Co.</i> , 349 Mo. 927, 163 S.W. 2d. 1024-----	17
<i>Baldwin v. Franks</i> , 120 U.S. 678-----	43
<i>Barrows v. Jackson</i> , 346 U.S. 249-----	9, 11, 36, 59
<i>Bell v. Maryland</i> , 378 U.S. 226-----	11, 29, 30, 57
<i>Benson v. Henkel</i> , 198 U.S. 1-----	40
<i>Berea College v. Kentucky</i> , 211 U.S. 45-----	10
<i>Bowie v. City of Columbia</i> , 378 U.S. 347-----	25
<i>Bowlin v. Commonwealth</i> , 65 Ky. 5-----	53
<i>Brown v. Board of Education</i> , 347 U.S. 483-----	58
<i>Buchanan v. Warley</i> , 245 U.S. 60-----	9, 10, 26, 28, 35, 36, 59

Cases—Continued

<i>Burton v. Wilmington Parking Authority</i> , 365 U.S. 715.	13, 19
<i>Civil Rights Cases</i> , 109 U.S. 3-----	10,
	22, 34, 35, 40, 42, 43, 47, 49, 51, 55
<i>Clyatt v. United States</i> , 197 U.S. 207-----	49
<i>Collins v. Hardyman</i> , 341 U.S. at 659-----	21, 22, 35, 45, 52
<i>Corrigan v. Buckley</i> , 271 U.S. 323-----	37, 55
<i>District of Columbia v. Thompson</i> , 346 U.S. 100-----	23
<i>Donnell v. State</i> , 48 Miss. 661-----	34
<i>Evans v. Newton</i> , 382 U.S. 296-----	13
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339-----	28
<i>Georgia v. Rachel</i> , 384 U.S. 780-----	34
<i>Gong Lum v. Rice</i> , 275 U.S. 78-----	11
<i>Gray v. Sanders</i> , 372 U.S. 368-----	28
<i>Griffin v. Maryland</i> , 378 U.S. 130-----	19
<i>Hall v. DeCuir</i> , 95 U.S. 485-----	34
<i>Hamilton v. Rathbone</i> , 175 U.S. 414-----	40
<i>Harmon v. Tyler</i> , 273 U.S. 668-----	9, 36, 59, 60
<i>Hart v. Hoss & Elder</i> , 26 La. Ann. 90-----	53
<i>Hodges v. United States</i> , 203 U.S. 1-----	23, 47, 53
<i>Home Tel. & Tel. Co. v. Los Angeles</i> , 227 U.S. 278-----	12
<i>Hurd v. Hodge</i> , 334 U.S. 24-----	10, 11, 26, 28, 37, 38, 41, 59
<i>James v. Bowman</i> , 190 U.S. 127-----	43, 51
<i>James v. United States</i> , 366 U.S. 213-----	25
<i>Joseph v. Bidwell</i> , 28 La. Ann. 382-----	34
<i>Katzenbach v. Morgan</i> , 384 U.S. 641-----	54, 56
<i>Kentucky v. Dennison</i> , 24 How. 66-----	50, 55
<i>McCabe v. Atchison, Topeka & Santa Fe Railway Co.</i> , 235 U.S. 151-----	11
<i>McLaughlin v. Florida</i> , 379 U.S. 184-----	23
<i>Machinists v. Street</i> , 367 U.S. 740-----	13
<i>Marsh v. Alabama</i> , 326 U.S. 501-----	13, 14
<i>Missouri ex rel. Gaines v. Canada</i> , 305 U.S. 337-----	11
<i>Monroe v. Pape</i> , 365 U.S. 167-----	35, 41, 45
<i>Nixon v. Condon</i> , 286 U.S. 72-----	13
<i>Oyama v. California</i> , 332 U.S. 633-----	10, 22, 37
<i>Pace v. Alabama</i> , 106 U.S. 538-----	11
<i>Paul v. Virginia</i> , 8 Wall. 168-----	50
<i>Pennsylvania v. Board of Trustees</i> , 353 U.S. 220-----	19
<i>People v. Brady</i> , 40 Cal. 198-----	53
<i>People v. Washington</i> , 36 Cal. 658-----	53
<i>Plessy v. Ferguson</i> , 163 U.S. 537-----	11

Cases—Continued

	Page
<i>Prigg v. Pennsylvania</i> , 16 Pet. 539	50, 55
<i>Public Utilities Comm'n. v. Pollack</i> , 343 U.S. 451	13
<i>Railroad Trainmen v. Howard</i> , 343 U.S. 768	13
<i>Reitman v. Mulkey</i> , 387 U.S. 369	9
<i>Richmond v. Deans</i> , 281 U.S. 704	9, 36, 59
<i>Sauvinet v. Walker</i> , 42 U.S. 90	34
<i>Screws v. United States</i> , 325 U.S. 91	12, 19, 23, 25, 33, 41
<i>Shelley v. Kraemer</i> , 334 U.S. 1	9, 10, 11, 12, 19, 36, 37, 59, 60
<i>Slaughter-House Cases</i> , 16 Wall. 36	30, 49, 50, 54
<i>Smith v. Moody</i> , 26 Ind. 299	53
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301	56
<i>Steele v. L. & N.R. Co.</i> , 323 U.S. 192	13
<i>Strauder v. West Virginia</i> , 100 U.S. 303	23
<i>Syres v. Oil Workers</i> , 350 U.S. 892	13
<i>Takahashi v. Fish Comm'n.</i> , 334 U.S. 410	10, 46, 59
<i>Terry v. Adams</i> , 345 U.S. 461	13, 14, 20
<i>Tucker v. Texas</i> , 326 U.S. 517	15
<i>Turner, In re</i> , 24 Fed. Cas. 337 (No. 14247)	53
<i>United States v. Bowen</i> , 100 U.S. 508	40
<i>United States v. Classic</i> , 313 U.S. 299	23, 24, 25, 27, 28, 41
<i>United States v. Cruikshank</i> , 1 Woods, 308, 25 Fed. Cas. 707	47, 53
<i>United States v. Guest</i> , 383 U.S. 745	24, 25, 39, 47, 49, 55, 56
<i>United States v. Harris</i> , 106 U.S. 629	43, 51, 53
<i>United States v. Morris</i> , 125 Fed. 322	47, 53
<i>United States v. Mosley</i> , 238 U.S. 383	23,
	24, 27, 28, 33, 35, 40, 45
<i>United States v. Price</i> , 383 U.S. 787	23,
	24, 27, 33, 41, 45, 46, 47
<i>United States v. Reese</i> , 92 U.S. 214	43, 51, 52
<i>United States v. Rhodes</i> , 27 Fed. Cas. 785 (No. 16151)	53
<i>United States v. Saylor</i> , 322 U.S. 585	23, 28
<i>United States v. Williams</i> , 341 U.S. 70	12, 21, 41, 47
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649	23
<i>Viotor v. Arthur</i> , 104 U.S. 498	40
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365	16
<i>Virginia v. Rives</i> , 100 U.S. 313	12, 23
<i>Virginia, Ex parte</i> , 100 U.S. 339	12, 19, 43
<i>Wheeldin v. Wheeler</i> , 373 U.S. 647	25
<i>Williams v. United States</i> , 341 U.S. 97	23
<i>Yarborough, Ex parte</i> , 110 U.S. 651	28
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356	10, 22

Constitution of the United States:

	Page
Article I, § 8	54
Article IV, § 2	50, 54, 55
Article VI, clause 2	41
Thirteenth Amendment	2, 8, 47, 48, 49, 52, 53
Fourteenth Amendment	2, 3, 8, 9, 10, 11, 12, 18, 19, 20,
	21, 24, 34, 36, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56
Fifteenth Amendment	46, 52, 53
Federal Statutes:	
Act of April 9, 1866, 14 Stat. 27	10, 22, 29, 48, 52, 53, 54
§ 1	21, 41, 42, 43, 44, 46, 49
§ 2	23, 33, 41, 42
Act of May 21, 1866, 14 Stat. 50	49
Act of March 2, 1867, 14 Stat. 546	42, 49
Act of May 31, 1870, 16 Stat. 140, <i>et seq.</i> :	
§ 1	41, 42
§ 2	43
§ 3	43
§ 4	43, 45, 46, 51
§ 5	43, 45, 46, 51
§ 6	43, 45
§ 16	41, 42, 46
§ 18	10, 22, 45, 46
Act of February 28, 1871, 16 Stat. 433:	
§ 5	41
§ 6	41
§ 19	41
Act of April 20, 1871, 17 Stat. 13:	
§ 1	43
§ 2	43, 45
Act of March 1, 1875, 18 Stat. 335	22, 39, 43
Act of February 8, 1894, 28 Stat. 36	22
Civil Rights Act of 1964, Pub. L. 88-352, § 1, 78 Stat. 241	39
Revised Statutes of 1874-1878:	
§ 1977, 42 U.S.C. 1981	21, 22, 23, 42, 46, 47, 53
§ 1978, 42 U.S.C. 1982	2, 3, 8, 9, 20, 21, 23, 24, 25, 26,
	27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42,
	44, 47, 48, 50, 51, 53, 54, 55, 56, 57, 58, 60.
§ 2004	42
§ 5601	33
14 Stat. 74	33
19 Stat. 268	34

Federal Statutes—Continued	Page
18 U.S.C. 241	21, 24, 25, 34, 43, 45, 46, 47, 51
18 U.S.C. 242	23, 24, 33, 41
18 U.S.C. 243	43
18 U.S.C. 1581	49
18 U.S.C. 1583	49
28 U.S.C. 1443	34
42 U.S.C. 1971(a)(1)	42
42 U.S.C. 1983	25, 43
42 U.S.C. 1985	43, 45
42 U.S.C. 1985(3)	25
42 U.S.C. 1988	25
42 U.S.C. 1994	42, 49
State constitution and statutes:	
Louisiana Constitution of 1868, Article 13	34
Arkansas Laws of 1873	34
Florida Laws of 1873	34
Georgia Laws of 1870	34
Louisiana Acts of 1869	34
Louisiana Acts of 1870	34
Louisiana Acts of 1873	34
Mississippi Laws of 1873	34
Missouri Statutes:	
§ 64.060	4
§ 71.290	18
§ 71.340	15, 63
§ 71.370	64
§ 71.380	64
§ 72.040	16, 65
§ 80.180	15, 65
§ 80.260	15, 65
§ 80.470	65
§ 80.480	66
§ 80.490	67
§ 89.030	17, 68
§ 89.040	15, 17, 68
§ 90.010	15, 69
14 S.C. Stat. 179	34
St. Louis County Ordinances, Ch. 1005	4, 70
§ 1005.010	70
§ 1005.020	70
§ 1005.030	71

State constitution and statutes—Continued	Page
§ 1005.040	72
§ 1005.050	73
§ 1005.060	76
§ 1005.070	78
§ 1005.080	79
§ 1005.090	79
§ 1005.100	79
§ 1005.110	80
§ 1005.120	81
§ 1005.130	82
§ 1005.140	83
§ 1005.150	16, 18, 84
§ 1005.160	16
§ 1005.170	85
§ 1005.180	5, 6, 16, 85
§ 1005.190	89
§ 1005.200	91
§ 1005.210	92
Miscellaneous:	
Antieau, "Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four," 9 Wm. & M.L. Rev. 1	50, 55
Biographical Directory of the American Congress, 1774-1961	52
Commager, <i>Documents of American History</i> (6th ed. 1958), pp. 10-13, 21-22	14
Cong. Globe, 38th Cong., 2d Sess	52
Cong. Globe, 39th Cong., 1st Sess	21, 31, 33, 43, 44, 49, 52, 60
Cong. Globe, 40th Cong., 3d Sess	52
Cong. Globe, 41st Cong., 2d Sess	52
Cox, "Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91	57
Flack, <i>The Adoption of the Fourteenth Amendment</i> (1908), p. 277	52
2 Fleming, <i>Documentary History of Reconstruction</i> (1907)	32, 34
H. Ex. Doc. No. 118, 39th Cong., 1st Sess	30
H. Rep. No. 18, 53d Cong., 1st Sess	23

Miscellaneous—Continued

	Page
McPherson, <i>The Political History of the United States of America During the Period of Reconstruction</i> (1871), pp. 29-44	30
Morison and Commager, <i>The Growth of the American Republic</i> (1950), p. 17	30, 32
1 Morison and Commager, <i>The Growth of the American Republic</i> (1962), pp. 43-48, 52-53	14
1 Oberholtzer, <i>A History of the United States Since the Civil War</i> (1936), p. 129	30
Preface by Commissioner Boutwell to the 1878 Edition of the Revised Statutes, pp. v-vi	34
S. Ex. Doc. No. 2, 39th Cong., 1st Sess.	32
S. Ex. Doc. No. 6, 39th Cong., 2d Sess.	30, 32
Stampp, <i>The Era of Reconstruction, 1865-1877</i> (1965), pp. 83-86, 110-117	21, 45
Stephenson, <i>Race Distinctions in American Law</i> (1910), pp. 115-116	34

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 645

JOSEPH LEE JONES AND BARBARA JO JONES, PETITIONERS

v.

ALFRED H. MAYER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (A. 43-66¹) is reported at 379 F. 2d 33. The opinion of the district court (A. 15-41) is reported at 255 F. Supp. 115.

JURISDICTION

The judgment of the court of appeals (A. 42) was entered on June 26, 1967, and the petition for a writ of certiorari was granted on December 4, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1254.

¹ Our references are to the record "Appendix" filed by the petitioners, which is bound with a light-gray cover. Another, differently paginated, "Appendix," with a buff-colored cover, has been filed by one group of *amici*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Thirteenth Amendment provides:

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Sections 1 and 5 of the Fourteenth Amendment provide:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or 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.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 1978 of the Revised Statutes (42 U.S.C. 1982) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Relevant Missouri statutes and provisions of St. Louis County ordinances are printed in the Appendix, *infra*, pp. 63-92).

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment, of its own force, prohibits the developers of a large suburban community from refusing to sell homes in the subdivision to Negroes, solely on account of their race.

2. Whether Section 1978 of the Revised Statutes prohibits such a racial exclusion.

STATEMENT OF THE CASE

On September 2, 1965, petitioners, Joseph Lee Jones and his wife Barbara J. Jones, filed a complaint in the United States District Court for the Eastern District of Missouri, alleging a discriminatory refusal to sell them a home in the Paddock Woods community of St. Louis County because one of them is a Negro (A. 3-13). The defendants (respondents here) were: the Alfred H. Mayer Company, a corporation "engaged in the business of developing subdivisions, * * * operating as a construction company in building homes * * * to be resold to the public" (A. 5); the Alfred Realty Company, "the exclusive sales agent of the houses built by * * * Alfred H. Mayer Company;" Alfred H. Mayer, who "owns a controlling interest in both said corporations" (A. 3-4) and serves as their "managing officer and * * * guiding policy maker" (A. 5); and Paddock Country Club, Inc., a corporation controlled by the other defendants, which operates a golf course "for

the primary use and benefit" of the residents of Paddock Woods and neighboring subdivisions under the same control (A. 10).

According to the allegations of the complaint (which must be taken as true, since the case was dismissed at the pleading stage), Paddock Woods is planned as a complete suburban community (A. 9-11). When completed, the development will house 1,000 people and form part of an even larger complex of similar developments constructed in the area by the same developer, in some cases (not including Paddock Woods) with financing by the Federal Housing Administration (A. 9-10). This complex—which will house a total of some 2,700 families—will include recreational facilities (golf course plus tennis and bath club) built by the developer for the primary benefit of the residents (A. 10). The developer has laid out streets for the use of the residents and has undertaken to provide such community services as garbage collection, all controlled by a board of trustees appointed by him (A. 10-11). The board will also have the legal authority to levy assessments and to collect them through judicial action (A. 11).

In order to create this Paddock Woods community, the respondents were required to comply with the "Subdivision Regulations" embodied in Chapter 1005 of the St. Louis County Ordinances (App. *infra*, pp. 69 *et seq.*), and enacted pursuant to Section 64.060 of the Missouri Statutes. Under those regulations a subdivision may not be developed until the St. Louis County Planning Commission has approved

it. Section 1005.180 provides that there will be no final approval until the developer has either completed or filed a satisfactory surety bond to insure the completion of the following improvements to the land:

(1) Permanent markers showing all subdivision boundary corners and the four corners of all street intersections.

(2) Graded streets and surfaced roadways. All grading and surfacing shall be done under supervision of the County Highway Engineer and shall be subject to approval.

(3) Sidewalks constructed in accordance with St. Louis County specifications.

(4) Facilities for providing a water supply. The ordinance provides for construction of any water supply system under supervision of the County Health Department.

(5) Sewers. In this case the Metropolitan St. Louis Sewer District required an escrow arrangement to guarantee the proper construction of the sewer system and required that the sewers and related appurtenances and easements be dedicated to the sewer district.

(6) Street trees.

(7) Street signs installed under the supervision of the County Highway Engineer.

The regulations further provide for the deposit of a substantial sum in escrow to insure that these improvements are made, stipulating that if the developer fails to complete the improvements in two years, the County Planning Commission may itself use the

escrowed funds to finish the work (Section 1005.180). Various State agencies, including the Planning Commission, the Highway Division, and the Sewer District, are required to inspect the progress of the subdivision during the planning stages and as construction progresses (Section 1005.180).

The complaint particularizes that the petitioners, desiring to purchase a new home and prompted by a public advertisement in the St. Louis *Post-Dispatch*, inspected houses and lots in Paddock Woods; that they offered to buy from respondents a house and lot in the Paddock Woods development; and that the respondents refused to sell to them because petitioner Joseph Lee Jones is a Negro (A. 5-7). Petitioners sought a judgment requiring respondents to sell them a home of the type described in the complaint and enjoining further discrimination in the sale of homes (A. 13). There was also a prayer for actual damages of \$50.00 and punitive damages of \$10,000 (A. 13).

The district court sustained the respondents' motion to dismiss on May 18, 1966 (A. 14), holding that their action in refusing to sell a house to the petitioners was purely individual and not State action (A. 18-41). On June 26, 1967, the Court of Appeals for the Eighth Circuit affirmed (A. 42).

SUMMARY OF ARGUMENT

I

It is a commonplace of our society that the activities of government and private enterprise are frequently intertwined. This is particularly true of the

large scale planning and investment characteristics of a substantial housing development. Whole new communities are being erected in the suburbs of our cities pursuant to arrangements in which governmental authorities and private entrepreneurs are deeply and jointly involved. Accordingly, the first question in this case is whether there is such a degree of State involvement in the construction of Paddock Woods and its sister communities that its builders take on obligations, as well as privileges, associated with municipalities—more particularly, the obligation under the Fourteenth Amendment to refrain from fencing a minority race out of the community.

We begin with the familiar proposition that the State may not limit the availability of housing on the ground of race, whether by zoning ordinance, restrictive covenant, or the enforcement of segregation by any other means. It is, of course, equally well settled that such restrictions on State action apply as well to instrumentalities which, though private in form, are governmental in substance.

Applying these principles, we conclude that respondents, in operating their new community, act in much the same manner as a municipal corporation. They begin by establishing community boundaries, with the review and approval of the State. With State review and approval they establish streets, sewers, and recreational facilities—services the public has come to expect from its municipal governments. They establish rules which the residents of the community must follow and which the State enforces. They ap-

point a governing body, the board of trustees for Pad-dock Woods. They furnish continuing services, such as rubbish collection, and levy assessments—enforce-able by judicial process—to pay for the services. They enter into compacts with other governmental instru-mentalities such as the sewage districts. And these acts are done under the supervision of a complex structure of district, county and State agencies, under State law. In sum, respondents do not occupy the position of an individual property owner. They are clothed in significant measure with State authority, and that authority has served, again in significant measure, to create and sustain the community.

II

Alternatively, we argue that if the respondents' conduct cannot fairly be characterized "State action," governed by the Equal Protection Clause of its own force, it is nevertheless prohibited by Section 1978 of the Revised Statutes (42 U.S.C. 1982).

That statute, first passed in 1866 to enforce the Thirteenth Amendment and re-enacted in 1870 after the adoption of the Fourteenth Amendment, imple-ments both constitutional provisions. In our view, it reaches at least all measures, official or unofficial, which have the purpose and effect of wholly fencing out an entire racial class from a substantial residen-tial community. In those circumstances, we think it plain the excluded class is effectively deprived of the statutory guarantee that they shall have "the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * prop-erty."

Examination of the context and legislative history of the provision reveals no reason not to give the text its natural meaning. The provision was designed to grant more than mere legal capacity to hold real es-tate, as decisions of this Court make plain. Nor do we believe there exists any textual, historical, or consti-tutional obstacle to applying Section 1978, as its words suggest, to wholly private action—at least when the conduct involved threatens the right guaranteed as effectively as State action. And, finally, we submit the provision prohibits equally outside coercion against willing buyers and sellers and, as here, a vol-untary policy of fencing out Negroes.

ARGUMENT

I. THE FOURTEENTH AMENDMENT, OF ITS OWN FORCE, PROHIBITS THE CONDUCT DESCRIBED IN THE COMPLAINT

A. THE FOURTEENTH AMENDMENT FORBIDS STATE ACTION SUPPORTING RACIAL SEGREGATION IN HOUSING

It is of course well settled that the "Fourteenth Amendment * * * operate[s] to qualify and entitle a colored man to acquire property without state legis-lation discriminating against him solely because of color." *Buchanan v. Warley*, 245 U.S. 60, 79. See, also, *Harmon v. Tyler*, 273 U.S. 668; *Richmond v. Deans*, 281 U.S. 704. Nor is it only legislative measures that are reached. Judicial enforcement of racially restric-tive covenants is equally forbidden by the Amendment (*Shelley v. Kraemer*, 334 U.S. 1; and see *Barrows v. Jackson*, 346 U.S. 249), as are less compulsive forms of State action. *Reitman v. Mulkey*, 387 U.S. 369.

Thus, it is plain that the complete exclusion of Negroes from the community in suit—a fencing out of much more substantial proportions than was involved in the cases cited—would fall under the ban of the Fourteenth Amendment if the action of the corporate owner may properly be characterized as “State action.”

In approaching that question it is relevant to notice that the right to freedom from discrimination in housing has enjoyed a special status under the Fourteenth Amendment. Indeed, that Amendment was proposed, in part, to vindicate and place beyond repeal the Civil Rights Act of 1866 (14 Stat. 27), which already guaranteed citizens “of every race and color” the “same right * * * to inherit, purchase, lease, sell, hold, and convey real and personal property * * * as is enjoyed by white citizens.”² And the same provision was re-enacted as part of the very first measure implementing the Amendment. Act of May 31, 1870, § 18, 16 Stat. 140, 144 (see Point II, *infra*, pp. 20 *et seq.*).

Nor has this Court ignored the unique claim of this civil right under the Equal Protection Clause. The fact is that State-imposed residential segregation was held unconstitutional as early as 1917 (*Buchanan v. Warley*, *supra*) at a time when enforced segregation in public and private schools (*Berea College v. Ken-*

² See *Civil Rights Cases*, 109 U.S. 3, 22; *Yick Wo v. Hopkins*, 118 U.S. 356, 369; *Buchanan v. Warley*, *supra*, 245 U.S. at 78-79; *Oyama v. California*, 332 U.S. 633, 640, 646; *Shelley v. Kraemer*, *supra*, 334 U.S. at 10-11; *Hurd v. Hodge*, 334 U.S. 24, 32-33; *Takahashi v. Fish Comm'n*, 334 U.S. 410, 419-420.

tucky, 211 U.S. 45; see *Gong Lum v. Rice*, 275 U.S. 78, 85-87; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344, 349), transportation (*Plessy v. Ferguson*, 163 U.S. 537; see *McCabe v. Atchison, Topeka & Santa Fe Railway Co.*, 235 U.S. 151, 160), and in other activities (*e.g.*, *Pace v. Alabama*, 106 U.S. 583) was condoned. So, also, it is revealing that in the restrictive covenant cases (*Shelley v. Kraemer*, *supra*; *Hurd v. Hodge*, *supra*; *Barrows v. Jackson*, *supra*), the Court found prohibited “State action” in the apparently neutral judicial enforcement of private discriminatory agreements—invoking a doctrine which it has declined to follow elsewhere. See, *e.g.*, *Bell v. Maryland*, 378 U.S. 226, 328-333 (opinion of Black, J., dissenting). As was observed in *Shelley v. Kraemer*, *supra*, 334 U.S. at 10:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. * * *

We accordingly conclude that the Fourteenth Amendment’s injunction against discrimination is to be applied strictly to residential segregation and that it is indeed appropriate to search out State action which supports discrimination of this character.

B. THE RESPONDENTS EXERCISE STATE POWER AND PERFORM
GOVERNMENTAL FUNCTIONS

This Court early recognized that the Fourteenth Amendment's restrictions on action by the "State" extend to one who "acts in the name and for the State, and is clothed with the State's power * * *." *Ex parte Virginia*, 100 U.S. 339, 347. The restrictions cover "exertions of state power in all forms". *Shelley v. Kraemer*, *supra* at 20. The reason is clear: "This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it." *Ex parte Virginia*, *supra*. The words "No State shall" are "addressed, of course, to the States, but" the limitations of the Amendment were to extend "also to every person whether natural or juridical who is the repository of state power." *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278, 286. Thus it was said in *Virginia v. Rives*, 100 U.S. 313, that "the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by [its legislative, executive, or judicial authorities] or by another." 100 U.S. at 318 (emphasis added).

Following this consistent interpretation of the Amendment, this Court has found "State action" in a variety of instances: actions of a municipal corporation even though unauthorized (*Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278); actions of law officers contrary to State law (*Screws v. United States*, 325 U.S. 91; *Williams v. United*

States, 341 U.S. 97); actions of a private corporation with the characteristics of a municipality (*Marsh v. Alabama*, 326 U.S. 501); actions of a private political party carrying out the State function of determining voter eligibility for primary elections (*Nixon v. Condon*, 286 U.S. 72; *Terry v. Adams*, 345 U.S. 461); actions of a private restaurateur providing food service in a city-owned parking structure (*Burton v. Wilmington Parking Authority*, 365 U.S. 715); and actions of private trustees of a private city park which had formerly been held and maintained by the city (*Evans v. Newton*, 382 U.S. 296). Similarly, constitutional limitations have been held applicable to those who exercise essentially governmental power derived from federal law, whether a regulated public transit monopoly (*Public Utilities Comm'n v. Pollock*, 343 U.S. 451) or labor unions recognized as exclusive bargaining agents of a class of employees (*Steele v. L. & N.R. Co.*, 323 U.S. 192; *Railroad Trainmen v. Howard*, 343 U.S. 768; *Syres v. Oil Workers*, 350 U.S. 892; see *Machinists v. Street*, 367 U.S. 740).

In none of these cases were the condemned acts expressly authorized by law; in some, they were explicitly prohibited; and in several, the acts were committed by "private" parties. The one common denominator is that in each instance the actor was a repository of some aspect of State power. Because they possessed State power they were held to have assumed State obligations in its exercise.

The same principle, we believe, controls this case. To be sure, no State flag flies over Paddock Woods

and none of the respondents wears an official badge of State office. But, as *Marsh* and *Terry v. Adams* make clear, that is not critical. As we show presently, there are continuing legal ties between the State and the housing development in suit. Yet, even that formal connection is not essential. The controlling considerations in this case, it seems to us, are that Paddock Woods exists by virtue of a delegation of State powers, and that those who rule the community, although they wear no uniform and hold no official title, wield those powers to perform essentially governmental functions.

That is, in part, a consequence of size. To take extreme examples, we suppose no one would question the applicability of constitutional restrictions to the immense land holdings of the private stock companies and individual proprietaries of early America if they existed today. Indeed, although the Virginia Company (after 1609) elected its own governing board and managed its large domain without official aid or interference, and Lord Baltimore held Maryland as a private owner, it is obvious they were exercising governmental powers. See 1 Morison and Commager, *The Growth of the American Republic* (1962), pp. 43-48, 52-53; Commager, *Documents of American History* (6th ed. 1958), pp. 10-13; 21-22. So, here, albeit in much smaller compass, the managers of Paddock Woods must necessarily wield the authority of local governors because their community is, in most respects, a "town."

Indeed, in most essential respects, Paddock Woods is comparable to the company towns involved in *Marsh*

v. Alabama, supra, and *Tucker v. Texas*, 326 U.S. 517, which the Court held were subject to constitutional limitations applicable to municipalities. Here, as there, "the corporation's property interests [do not] settle the question" (326 U.S. at 505); that circumstance "cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations" (*id.* at 511, Frankfurter, J., concurring).

A review of the creation and maintenance of Paddock Woods shows that the existence of such a subdivision is made possible by the State; that the State expects (and in some cases requires) the managers of the new community to fill the gap that results from the absence of any formal municipal government in Paddock Woods; and that the State has invested them with the coercive tools for regulating and taxing the inhabitants of Paddock Woods so that they may fulfill these duties.

The creation of a whole suburban community raises problems unknown to the individual homeowner or the city apartment owner. The developer begins with a plot of land reflecting none of the characteristics of a modern community. A subdivision, however, must have public roads and sidewalks, sewers, parks, access to schools, police and fire protection. In Missouri, as in other States, these services and facilities are supplied by or on behalf of the State.³ The subdivider

³ See authority given political subdivisions by Mo. Stat. §§ 71.340 (construct and repair public roads), 80.180 (provide sidewalks), 90.010 (establish and maintain parks), 89.040 (zoning power to facilitate adequate provisions for schools), 80.260 (maintain peace), 71.380 (fire protection).

provides many of them: by obtaining State approval of his plans, by building streets and sewers and dedicating them to the State, by paying for fire protection, by transferring park land to trustees he appoints. He provides such services because business considerations and State law require it.⁴ On occasion, the State law requirement is contingent on there being no municipality which can perform the function.⁵

A subdivision developer must not only provide physical facilities and services; he must establish rules for governing the community. Restrictions, in essence zoning laws, must be placed on the use of the property. This essential State function (see *Village of Euclid v. Ambler Realty*, 272 U.S. 365) is delegated by the State to the subdivider.⁶ And the respondents

⁴ See St. Louis County Ordinances, Chap. 1005, § 1005.180 (markers, streets, sidewalks, water and sewage systems, fire protection, trees, signs), § 1005.160 (schools and parks).

⁵ St. Louis County Ordinances, Chap. 1005, § 1005.150 provides that maintenance for public facilities must be provided by the subdivision developer if no other public agency is available. It may be noted that Paddock Woods meets the qualifications set by Mo. Stat. § 72.040 for "cities of the fourth class" and, therefore, the residents could incorporate as a municipality if they elected to do so.

⁶ Section 1005.150 of the St. Louis County Ordinances provides:

The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of substandard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed subdivision and of adjoining property. Deed restrictions or

have utilized this authority to promulgate "zoning ordinances" in the form of restrictive covenants which, among other things, forbid homeowners from using their lots for commercial businesses, temporary structures, signs, livestock, poultry, and noxious or offensive activity.⁷ These covenants are, of course, enforceable in the State's courts. See, e.g., *Andrews v. Metropolitan Bldg. Co.*, 349 Mo. 927, 163 S.W. 2d 1024.

So, also, one of the main attributes of a municipal government is its power to levy assessments for cer-

covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily maintained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities.

Compare Mo. Stat. 89.040 setting out the purposes for which the municipal zoning power might be used and stating that "regulations shall be made with reasonable consideration * * * to the character of the district * * * and with a view to conserving the values of buildings * * *."

⁷ Compare Mo. Stat. 89.030 granting local legislative bodies a zoning power which may be used to "regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land."

tain limited public purposes. Respondents have that power to levy assessments for community improvements and, if necessary, to establish property liens to secure payment of the assessments.⁸ The new members of the community will also, in effect, pay a tax (in the form of a higher price for their homes) to defray the cost of establishing streets, sidewalks, sewers, a water system, and the other municipal facilities furnished by the respondents.

Thus, it is clear that the respondents, in activities essential to the development of the Paddock Woods community, are clothed with State authority, and daily perform governmental tasks, making and executing essentially governmental decisions. The claim is advanced, however, that the exclusion of Negroes from Paddock Woods is not a decision of that character, but, rather, the exercise of a private landowner's prerogative to sell or refuse to sell to anyone, on any ground. We turn to that argument.

C. THE RESPONDENTS ARE GOVERNED BY THE FOURTEENTH
AMENDMENT IN THEIR ADMISSION POLICY

The suggestion that respondents, as owners and operators of Paddock Woods, are repositories of State power—and therefore subject to the Fourteenth Amendment—for some purposes, but not with respect

⁸ It is so alleged in the complaint (A. 11), which must be accepted as stating the true facts. Presumably the power to levy assessments is incorporated in the trust instrument pursuant to the last sentence of Section 1005.150 of the St. Louis County Ordinances, quoted in note 6, *supra*. Compare Mo. Stat. § 71.290 giving Missouri towns and villages power to levy assessments for public improvements.

to their admission policy (see A. 36–37), does not withstand scrutiny. There is no basis for characterizing the racially exclusive policy followed here as a “private” decision, unrelated to respondents’ status as delegates of the State, exercising governmental functions.

There is no precedent for the suggestion that a State agency may avoid the mandate of the Constitution for some of its actions. Certainly, the State itself is no more free to discriminate when acting in a “proprietary” capacity than when performing a “governmental” function. Cf. *Burton v. Wilmington Parking Authority*, *supra*. So, also, a State officer, so long as he wears the clothes of office, is subject to the Fourteenth Amendment, although his acts are unauthorized by law (*Ex parte Virginia*, *supra*) or even contrary to State law (*Screws v. United States*, *supra*). Nor is that obligation avoided because the official is serving his own ends or other private interests, rather than those of the State. *Pennsylvania v. Board of Trustees*, 353 U.S. 220; *Griffin v. Maryland*, 378 U.S. 130. Cf. *Shelley v. Kraemer*, *supra*. Similarly, here, we see no basis to exempt the action of the managers of Paddock Woods in formulating and executing a policy of racial exclusion.

The fact is, moreover, that, both in origin and effect, the total fencing out of Negroes from a community of this size is itself an exercise of governmental power. Indeed, it is only by virtue of delegated authority from the State that this “private town” exists and that the municipal functions are controlled by a

single corporation. In these circumstances, the company's decision to adopt a policy of racial exclusion is not remotely like that of an individual landowner. The decision is made on behalf of the entire community, presumably motivated by the same public considerations that would influence a municipal government. Realistically viewed, it is an impermissible exercise of the zoning power.

And, of course, the effect is the same. Just as the State in *Terry v. Adams* could not "permit within its borders the use of any device that produces an equivalent of the prohibited election" (345 U.S. at 469), so, here, the respondents may not, by their exclusionary policy, produce the equivalent of a forbidden racial zoning ordinance.

II. THE CHALLENGED CONDUCT IS ALSO EMBRACED BY SECTION 1978 OF THE REVISED STATUTES

We have attempted to show that the Fourteenth Amendment, of its own force, outlaws the conduct revealed in the record. We believe that argument is fully sufficient to support the present complaint. Petitioners, however, have consistently contended that their case is also ruled by Section 1978 of the Revised Statutes, 42 U.S.C. 1982, which provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." This statutory argument raises a discrete set of issues. Although Section 1978, in our view, reaches both acts taken "under color of law" and wholly private action, we

invoke the provision, alternatively, only on the premise that the challenged conduct is not State action and accordingly is not governed by the Equal Protection Clause, *ex proprio vigore*.

At the outset, we note that Section 1978—unlike 18 U.S.C. 241—is not one of those "hastily adopted" products of "[s]trong postwar feeling [that] caused inadequate deliberation and led to loose and careless phrasing of laws relating to the new political issues" (*United States v. Williams*, 341 U.S. 70, 74, opinion of Frankfurter, J.). Nor was it—as has been said of 42 U.S.C. 1985—the work of extremist Radicals, "passed by a partisan vote in a highly inflamed atmosphere" (*Collins v. Hardyman*, 341 U.S. 651, 657). Section 1978 has an older and more authentic pedigree. Together with its companion, Section 1977 (42 U.S.C. 1981), it derives from Section 1 of the first Civil Rights Act, of 1866 (14 Stat. 27), passed, after full debate,⁹ in the relative calm of the 39th Congress which framed the proposal for the Fourteenth Amendment. The legislation was no aberration of the moment: it survived only because both the House and the Senate—neither yet dominated by Radical Republicans (See Stampp, "The Era of Reconstruction, 1865–1877" (1965), pp. 83–86, 110–117)—overrode a presidential veto by the requisite majorities (see Cong. Globe, 39th Cong., 1st Sess., pp. 1809, 1861), and it

⁹ The debates on the Civil Rights Act of the Act of 1866 cover some 134 pages in the Congressional Globe. See Cong. Globe, 39th Cong., 1st Sess., pp. 211–212, 474–481, 497, 507, 522–530, 569–578, 594–606, 1115–1125, 1151–1162, 1262–1272, 1290–1296, 1366–1367, 1413–1416, 1755–1761, 1775–1787, 1801–1809, 1832–1837.

was expressly re-enacted 4 years later (Act of May 31, 1870, § 18, 16 Stat. 140, 144) and codified in the Revised Statutes of 1874 and 1878. Indeed, in the landmark *Civil Rights Cases*, 109 U.S. 3, 16, 22, invalidating provisions of the Civil Rights Act of 1875, this Court contrasted that last measure of the Reconstruction series with the first, which was viewed as a model of constitutional legislation. It was there observed, with obvious approval, that in 1866 "Congress did not assume * * * to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." 109 U.S. at 22.

Nor have the provisions of the Civil Rights Act of 1866 remained a dead-letter since they were given their place in the Revised Statutes. As early as *Yick Wo v. Hopkins*, 118 U.S. 356, 369, Section 1977 was successfully invoked against racial discriminations with respect to property. No constitutional doubts have been expressed with respect to this first section of the 1866 Act, once it was "vindicated" by the Fourteenth Amendment (*Oyama v. California*, 332 U.S. 633, 640). Compare *Collins v. Hardyman*, *supra*, 341 U.S. at 659. And no one has ever suggested that it was repealed, impliedly or otherwise, by the Act of February 8, 1894 (28 Stat. 36), which was thought to have "wiped from the statute books" "every trace of the reconstruction measures" relating to the "purity in

elections" (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7). Compare Mr. Justice Lamar, dissenting, in *United States v. Mosley*, 238 U.S. 383, 389-391, and Mr. Justice Douglas, dissenting, in *United States v. Classic*, 313 U.S. 299, 334-335, and in *United States v. Saylor*, 322 U.S. 385, 390-392. On the contrary, since that time, Sections 1977 and 1978 have been cited in several cases in this Court in support of comparable rulings¹⁰—often in tandem with the Fourteenth Amendment, which is repeatedly recognized as having a special relationship to the contemporary statute (see note 2, *supra*). Compare 18 U.S.C. 252 (originally § 2 of the Civil Rights Act of 1866) which has reached this Court in only four cases since its enactment in 1866, for the first time in 1940 after an apparently total repose of 75 years (*United States v. Classic*, *supra*; *Screws v. United States*, 325 U.S. 91; *Williams v. United States*, 341 U.S. 97; *United States v. Price*, 383 U.S. 787). And see *District of Columbia v. Thompson*, 346 U.S. 100, rejecting the contention that a law of 1872 prohibiting discrimination in places of public accommodation in the District of Columbia, actually removed from the statute books, had lost its force by implied repeal or "desuetude."

¹⁰ We put to one side instances in which Sections 1977 and 1978 were cited in support of rulings banning racial discrimination in jury selection (e.g., *Strauder v. West Virginia*, 100 U.S. 303, 311-312; *Virginia v. Rives*, 100 U.S. 313, 317-318) or were unsuccessfully invoked against private discriminations in employment (*Hodges v. United States*, 203 U.S. 1). See, also, *United States v. Wong Kim Ark*, 169 U.S. 649, 675, 696-699; *McLaughlin v. Florida*, 379 U.S. 184, 192.

It is no ground of objection that present conditions suggest new applications for the old words. As Mr. Justice Holmes observed for the Court in *United States v. Mosley*, *supra*, 238 U.S. at 388, applying the broadly worded provision before him to circumstances far removed from those which prompted its enactment, "we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." That same approach was followed in *United States v. Classic*, *supra*, to reach the conclusion that Sections 241 and 242 of the Criminal Code punish conduct effectively denying the right to vote in primaries, an institution unknown when those provisions were written a century earlier. And it is the principle that informed this Court's unanimous decision two Terms ago in *United States v. Price*, *supra*, which, for the first time, applied Section 241 to vindicate rights guaranteed by the Fourteenth Amendment.¹¹ So here, we submit there should be no resort to "ingenious analytical instruments" to avoid giving Section 1978 "a sweep as broad as its language" (383 U.S. at 801)—even though its application in the present context, unfamiliar to the framers, has no established precedent. Indeed, there is less reason for concern here than there was in the criminal prosecutions just cited. The present suit for an injunction permits the Court to make a ruling which, if novel,

¹¹ So, also, *United States v. Guest*, 383 U.S. 745, ruled, for the first time, that Section 241 protects the right to travel interstate against wholly private conspiracies.

will operate only for the future, imposing no civil or criminal liability for the past without adequate notice.¹² Compare Mr. Justice Douglas, dissenting, in *United States v. Classic*, *supra*, 313 U.S. at 331-332, 336, 341; Mr. Justice Roberts, Mr. Justice Frankfurter and Mr. Justice Jackson, dissenting, in *Screws v. United States*, *supra*, 325 U.S. at 149 *et seq.*; Mr. Justice Harlan, concurring in part and dissenting in part, and Mr. Justice Brennan, concurring in part and dissenting in part, in *United States v. Guest*, *supra*, at 773-774, 785-786. See, also, *James v. United States*, 366 U.S. 213, 221-222 (opinion of the Chief Justice); *Bowie v. City of Columbia*, 378 U.S. 347.

Finally, we stress that the application of Section 1978 to the circumstances of this case does not attempt to make it do service as a comprehensive modern housing law. By its terms, Section 1978 bars only *race* and *color* discrimination; and, whatever its broader reach, we invoke the provision here only

¹² Since, by hypothesis, the present argument would apply Section 1978 to conduct not taken "under color of law," individual action violating the substantive guarantees of the provision would in no event subject the offender to civil damages under 42 U.S.C. 1983 or criminal penalties under 18 U.S.C. 242 (both of which reach only acts done "under color of law"). If damages may be recovered from a single violator, it is under the common law of the State (see 42 U.S.C. 1988) or by virtue of a remedy fashioned by the federal courts (see *Wheeldin v. Wheeler*, 373 U.S. 647, 660-667) (dissenting opinion of Mr. Justice Brennan). On the other hand, when "two or more persons" join in a conspiracy to violate Section 1978, whether or not they are acting "under color of law," federal statutes expressly makes them liable both to pay civil damages and to suffer criminal penalties. 42 U.S.C. 1985(3); 18 U.S.C. 241.

against a massive effort to exclude an entire ethnic group from a community. There is no occasion to decide in this case whether individual real estate transactions or occasional acts of discriminations are affected. Our present submission is confined to the proposition that Section 1978 comes into play when official or unofficial action has the practical effect of so severely restricting Negroes (or another racial class) from renting or buying homes in an area that it may fairly be said that they no longer "have the same right * * * as is enjoyed by white citizens * * * to * * * purchase [and] lease * * * real * * * property."

It is already well-settled that local zoning ordinances which "fence out" Negroes from chosen neighborhoods offend the statute. *Buchanan v. Warley*, 245 U.S. 60. And so does judicial enforcement of private restrictive covenants with the same purpose and effect. *Hurd v. Hodge*, 334 U.S. 24. Applying Section 1978 here would add only those relatively rare instances in which wholly private action can achieve discrimination on a comparable scale. Normally, that would require a perfect concert of action by a substantial number of property owners—perhaps an unlikely eventuality today. But, occasionally, as here, a single individual or corporation is in a position to control entry to an entire residential community. Our submission is only that, in those circumstances, Section 1978 is equally applicable although the result is accomplished without active governmental intervention.

It remains to demonstrate that Section 1978, fairly read, governs our case. We consider in turn three possible objections to such an application: (1) that the provision merely guarantees to Negroes (and other non-white citizens) the same abstract right to purchase, lease and hold property as is enjoyed by whites, free of measures (almost necessarily laws) which wholly disable or incapacitate them on account of their race; (2) that, at all events, Section 1978 reaches only "State action" or conduct taken "under color of law"—which, for the purposes of the present argument, we assume is not involved here; and, finally, (3) that (whatever its scope in other respects) the statute does not control a voluntary refusal to sell or lease, but combats only outside forces inhibiting the action of willing parties.

A. SECTION 1978 REACHES ANY SUBSTANTIAL "FENCING OUT" OF AN ENTIRE RACIAL CLASS

Because it was originally enacted in furtherance of the Thirteenth Amendment (before the adoption of the Fourteenth) and speaks in general terms of the "right * * * to inherit, purchase, lease, sell, hold, and convey" property, Section 1978 might be thought merely to lift the former total legal disability of slaves to acquire any interest in real property. But that would be a grudging reading of broad language, at odds with the teaching of *Mosley* and *Classic* and *Price* (*supra*, p. 24), which, moreover, would present some purely textual difficulties. Nor would such a construction faithfully reflect the setting of 1866 or subsequent history. And, at all events, confining Sec-

tion 1978 to that narrow scope would require repudiation of several decisions in this Court, including *Buchanan v. Warley* and *Hurd v. Hodge*, *supra*.

1. *The statutory text itself indicates a purpose to grant more than bare legal capacity to acquire real property*

On its face, Section 1978 certainly need not be read as merely granting the Negro legal capacity to hold property. To be sure, what is guaranteed is a "right" to inherit, purchase, or lease. But that is not necessarily a narrow term, wholly exhausted in the technical concept of "competence." A sufficient example is that of the "right to vote" which has been held to include not only official recognition of qualification, but the right actually to cast a ballot (*Ex parte Yarbrough*, 110 U.S. 651), to have it counted (*United States v. Mosley*, *supra*, 238 U.S. at 386; *United States v. Classic*, *supra*, 313 U.S. at 315), and not to have its effect diluted by illegal votes (*United States v. Saylor*, *supra*, 322 U.S. at 388-389) or other devices (*Gray v. Sanders*, 372 U.S. 368, 380). And, most relevantly, the "right to vote" without discrimination on account of race has been held to preclude measures which deliberately "fence out" from a constituency otherwise qualified voters—who remained free to vote elsewhere. *Gomillion v. Lightfoot*, 364 U.S. 339. So, here, there is no reason to suppose that Section 1978 makes an empty promise which is satisfied if Negroes are theoretically eligible to buy or rent a home, although, in fact, they are banned (by law or otherwise) from many or most communities. The more natural construction is that the "right" to acquire property

includes at least a guarantee against being absolutely "fenced out" from any substantial area.

What is more, any other result would be difficult to square with the precise wording of Section 1978. Indeed, the provision does not grant Negroes "the right" to acquire property, but, rather, "the same right * * * as is enjoyed by white citizens." Thus, there is a guarantee of equal treatment, which is violated if the Negro, although recognized as having capacity to hold property, is in any substantial respect disadvantaged in the enjoyment of his right. The most obvious instance of such an abridgment or dilution of the right is that in which the Negro is told: "You may buy or rent a house, but not in this community." Surely, in this hypothesis, the excluded class does not "enjoy" the "same right" as those who are free to reside anywhere.

2. *The legislative history and background of the statute confirm this broader purpose*

What the text itself suggests is confirmed by relevant history. The Civil Rights Act of 1866 was written against the background of the so-called "Black Codes" of the Southern States, then recently adopted to supplant the old slave codes which the Thirteenth Amendment made obsolete. These new laws—defining the rights and duties of both the recently emancipated former slaves and those who were already "free persons of color"—certainly did not accord the Negro equal treatment. Indeed, as has been noted here, in some cases they worked a practical re-enslavement of the race. See, *e.g.*, *Bell v. Maryland*, 378 U.S. 226,

247 (opinion of Mr. Justice Douglas), 303, n. 21 (opinion of Mr. Justice Goldberg); and see, *Slaughter-House Cases*, 16 Wall. 36, 70. But, however discriminatory they were, it does not appear that any of the Black Codes denied the capacity of the Negro to acquire and hold property, real or personal. On the contrary, one standard history, summarizing these laws, observes that they "conferred upon the freedmen fairly extensive privileges [and] gave them the essential rights of citizens to contract, sue and be sued, own and inherit property * * *" (Morison and Commager, *The Growth of the American Republic* (1950), p. 17, as quoted by Mr. Justice Douglas in *Bell v. Maryland*, *supra*, 378 U.S. at 247-248, n. 3). See McPherson, *The Political History of the United States of America During the Period of Reconstruction* (1871), pp. 29-44. Even South Carolina, reportedly one of the two least generous States on this matter (Morison and Commager, *op. cit. supra*; 1 Oberholtzer, *A History of the United States Since the Civil War* (1936), p. 129), expressly ordained in December 1865 that, "although [persons of color] are not entitled to social or political equality with white persons, they shall have the right to acquire, own, and dispose of property * * *." See Sen. Ex. Doc. No. 6, 39th Cong., 2d Sess., p. 202. Comparable provisions were common. See the laws of North Carolina and Georgia and the constitution of Texas, summarized in H. Ex. Doc. No. 118, 39th Cong., 1st Sess., pp. 3, 18, 33. Thus, the real problem for the Congress in 1866 was *not* to nullify local statutes which wholly

disabled the Negro with respect to property, or even to clarify his status on this score.

What, then, was the congressional purpose in securing to the freedman "the same right * * * as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property"? Were the legislators of 1866 knowingly indulging in a vain and empty gesture? Or were they ignorant of the true conditions of the South? The first suggestion would be an unworthy accusation against the great emancipators of the 39th Congress. They were realists, not theorists. We may take the word of Senator Trumbull, the Chairman of the Judiciary Committee and the sponsor of the Civil Rights Act of 1866, that he and his colleagues were not interested in declaring "abstract truths and principles," but, rather, in securing "practical freedom" for the Negro. Cong. Globe, 39th Cong., 1st Sess., p. 474. See, also, Senator Howard at *id.*, pp. 503-504. Nor is the vigorous opposition encountered in both Houses and the President's veto consistent with the view that the measure merely solemnized what no one contested, that the colored man was now legally competent to own and acquire property.

The actual problem was somewhat different: it was that many of the Southern States, while conceding the legal capacity of the Negro to hold all kinds of property and to engage in real estate transactions, severely limited the practical exercise of these new rights. Sometimes the theoretical right to purchase or lease a home was indirectly defeated by a requirement that

the freedman be employed by a white man and live on the master's property. Morison and Commager, *op. cit. supra*; see, *e.g.*, the Louisiana law reprinted in S. Ex. Doc. No. 6, *op. cit. supra*, at p. 181. Elsewhere, severe restrictions on freedom of movement must have had much the same effect. See, *e.g.*, the Mississippi Statute reprinted in S. Ex. Doc. No. 6, *op. cit. supra*, at 194. But there were also express provisions barring Negroes from living in certain areas, except as servants, by prohibiting them from renting or buying real estate there. Mississippi excluded them as landholders in the country. See S. Ex. Doc. No. 6, *op. cit. supra*, p. 193. In Louisiana, there were local regulations prohibiting Negroes from having their own homes or business premises in towns (see S. Ex. Doc. No. 2, 39th Cong., 1st Sess., pp. 92, 95), and comparable restrictions in some rural areas. See Fleming, *Documentary History of Reconstruction* (1906), p. 279. More limited handicaps were common also: freedmen were not permitted to own or operate certain businesses (see S. Ex. Doc. No. 6, *op. cit. supra*, at p. 204, 215) and their contracts with respect to property were encumbered with special formalities. See, *e.g.*, the laws of North Carolina and South Carolina, reprinted in Sen. Ex. Doc. No. 6, *op. cit. supra*, at pp. 198, 216.

This was the evil to which Congress was addressing itself: not the absolute disabling of the Negro, but the serious practical abridgments placed on his freedom to contract and his rights with respect to property. The examples we have given were cited again and again in the debates on the Civil Rights Bill and on

companion measures. Cong. Globe, 39th Cong., 1st Sess, pp. 39, 111, 474, 475, 516-517, 603, 1755, 1759. To be sure, there were occasional overstatements. The law of Mississippi was sometimes said to bar Negroes from holding real property anywhere in the State, (*e.g.*, *id.* at pp. 1160, 1759); but, as often, it was correctly represented as applying only to rural areas. *E.g.*, *id.* at pp. 39, 111. And provisions of local law nominally guaranteeing the Negro the right to acquire and hold property were brought to the attention of Congress. *E.g.*, *id.* at pp. 1755, 1785. In sum, the authors of the Civil Rights Act of 1866 were obviously well aware of the true legal status of the freedman in the South and were concerned to combat *discriminations*, not *disabilities*. Practical equality of right was the aim of their work. See *id.* at 1117-1118, 1293, 1413. It is, therefore, no accident that the law they framed is formulated in those terms: the Negro shall "enjoy" "the same right" as whites.

The true purpose of Section 1978 is sufficiently revealed in the circumstances of its original enactment in 1866. But, as already noted, the provision we know derives more directly from the Revised Statutes of 1874¹³ and the re-enactment of the Civil Rights Act

¹³ Although the congressional mandate was somewhat restricted (14 Stat. 74), the Revision of 1874, formally enacted into law (see R.S. § 5601), in fact worked important substantive changes in the prior statutes which have been accepted as effective. See, *e.g.*, the significant expansion of Section 2 of the Civil Rights Act of 1866, the progenitor of 18 U.S.C. 242, recognized in *Screws v. United States*, *supra*, 325 U.S. at 99-100, 120-125, and *United States v. Price*, *supra*, 383 U.S. at 802-803. See, also, *United States v. Mosley*, *supra*, 238 U.S. at 388 (in-

in 1870, after the adoption of the Fourteenth Amendment. Accordingly, it is relevant to note the conditions then prevailing which were deemed to require re-affirming the guarantee of non-discrimination with respect to the "right to purchase and lease real property."

The fact is that most, if not all, of the former Confederate States, now under the control of "reconstructed" legislatures, had by that time progressed so far as formally to ban racial discrimination even in privately-owned places of accommodation. *E.g.*, La. Const. 1868, Art. 13; La. Acts 1869, p. 37; La. Acts 1870, p. 57; La. Acts 1873, p. 156; 14 S.C. Stat. 179; Ga. Laws 1870, pp. 398, 427-428; Ark. Laws 1873, pp. 15-19; Miss. Laws 1873, pp. 66; Fla. Laws 1873, p. 25. And see, Stephenson, *Race Distinctions in American Law* (1910), pp. 115-116; 2 Fleming, *Documentary History of Reconstruction* (1907), pp. 285-288. And those laws were not wholly unenforced. See, *e.g.*, *Sauvinet v. Walker*, 92 U.S. 90; *Hall v. DeCuir*, 95 U.S. 485; *Joseph v. Bidwell*, 28 La. Ann. 382; *Donnell v. State*, 48 Miss. 661. Indeed, the premise of the decision here in the *Civil Rights Cases*, 109 U.S. 3, was that the federal public accommodations law enacted in 1875 was a needless intrusion because racial

volving the 1874 revision of what is now 18 U.S.C. 241); *Georgia v. Rachel*, 384 U.S. 780, 789-790 (involving the 1874 revision of what is now 28 U.S.C. 1443). On the other hand, the Revision published in 1878—clearly intended only to collect the laws then in force without changing their scope (19 Stat. 268; and see the Preface by Commissioner Boutwell to the 1878 Edition of the Revised Statutes, pp. v-vi)—is relevant only in that it did not drop Section 1978 as "obsolete."

discriminations in such facilities were then barred "by the laws of all the States." *Id.* at 25; see, also, *id.* at 19, 24. Thus, it is plain that in re-enacting the 1866 Act in the 1870's Congress could not have been concerned about any failure of local law to recognize the abstract right of the Negro to acquire or hold real property. As we shall presently show, the congressional focus, from 1870 on, was no longer fixed on hostile statutes. The new problem for the Congress was, rather, unofficial conduct—notably the doings of the Ku Klux Klan (see *United States v. Mosley*, *supra*, 238 U.S. at 387-388; *Collins v. Hardyman*, *supra*, 341 U.S. at 662)—and discriminatory acts of officials, taken independently of State law (see *Monroe v. Pape*, 365 U.S. 167, 174-183). These no doubt included efforts to fence out Negroes from certain areas—and it is in that light that we should appraise the renewed declaration of the broad guarantees announced in Section 1978.

3. The jurisprudence of this Court gives the statute a broader reach

We turn, finally, to the cases in this Court construing Section 1978. Significantly, each of them supports our submission that the provision does more than annul State laws which deny the Negro (or other non-white citizens) capacity to buy or rent a home.

The first direct application of Section 1978 to reach this Court was *Buchanan v. Warley*, *supra*, decided here in 1917. It was there expressly held that "the Fourteenth Amendment and these statutes [Section 1977 and 1978]" (245 U.S. at 79) invali-

dated a local ordinance which did not generally disable Negroes from buying or renting real estate within the city, but merely forbade either race to occupy a dwelling in a block where the other race predominated. That ruling was followed in two subsequent decisions involving comparable ordinances. *Harmon v. Tyler*, 273 U.S. 668; *Richmond v. Deans*, 281 U.S. 704. While the *per curiam* disposition of those cases did not afford occasion to invoke Section 1978 expressly, it is fair to suppose that the citation of *Buchanan v. Warley* as authority endorses the holding that the statute, as well as the Constitution, barred the discrimination.

At all events, the *Buchanan* ruling that Section 1978 reaches a discriminatory fencing out of Negroes from certain blocks, otherwise legally eligible to buy or rent a home in the area, is confirmed by the unanimous opinion in *Shelley v. Kraemer*, *supra*, where the Court treats the statute (which is fully quoted) and the Fourteenth Amendment as co-extensive in this respect. 334 U.S. at 10-12. Indeed, after setting forth the cases just cited, the Court is at pains to emphasize that they recognize not only the federal right of a white seller to sell or lease to Negroes notwithstanding local law restrictions but also the right of "those desiring to acquire and occupy property and barred on grounds of race or color." *Id.* at 12. See, also, *Barrows v. Jackson*, 346 U.S. 249, 254-255, 258-260.

These decisions, we submit, support our construction of Section 1978 as voiding measures which, without wholly denying the right of Negroes to purchase or lease real estate, substantially abridge the exercise

of that right by excluding the class from a particular area. We might also cite *Oyama v. California*, *supra*, which reads the statute broadly to condemn a State law severely handicapping the acquisition of real property by citizens of Japanese ancestry, although it recognized their right to acquire. But the dispositive holding on the point is *Hurd v. Hodge*, *supra*. In that case, the Court, expressly declining to decide the constitutional question presented (334 U.S. at 30), rested its decision, at least alternatively, on Section 1978. *Id.* at 30-34). The ruling was that the statute barred judicial enforcement of racially restrictive covenants with respect to certain city lots because that action—which would have nullified their contracts and compelled their eviction from the premises—denied the Negro purchasers "the same right 'as is enjoyed by white citizens * * * to inherit, purchase, lease, sell, hold, and convey real and personal property.'" *Id.* at 33-34.¹⁴ Since only two-thirds of the lots in a single block in the District of Columbia were covered by the covenants in suit (*id.* at 26), it could not be clearer that the Court there construed Section 1978 as reaching any substantial exclusion from housing on racial

¹⁴ We do not read the opinion dismissing reliance on Section 1978 in *Corrigan v. Buckley*, 271 U.S. 323, 330-331, to the contrary. That decision, as explained in *Shelley v. Kraemer*, *supra*, 334 U.S. at 8-9, 13, and *Hurd v. Hodge*, *supra*, 334 U.S. at 28-29, 31, merely held that a racially restrictive covenant of itself did not offend federal law. But see, *infra*, pp. 38 *et seq.* At all events, of course, those later decisions supersede any implication in *Corrigan* that Section 1978 is concerned only with general legal capacity to acquire and lease real property.

grounds—including, of course, the far more significant fencing-out involved in the present case.

Our previous discussion shows that ruling to be entirely faithful to the text of the statute and its legislative history. It remains, however, to show that Section 1978 annuls measures which have such an effect, although not in the shape of laws or official acts. The decisions invoked here do not go so far. Indeed, there is language to the contrary in some of the opinions. *E.g.*, *Hurd v. Hodge*, *supra*, 334 U.S. at 31. We now address ourselves to that separate question.

B. SECTION 1978 REACHES CONDUCT NOT TAKEN "UNDER COLOR OF LAW"

Before proceeding further, it may be well, once again, to stress the limited reach of our argument. Our concern is entirely with wholesale discriminations which have the practical effect of wholly excluding a racial class from a substantial area. As we have already noted, that result was once commonly accomplished by law. But the same "fencing out" can be achieved by concerted private action, or even, in rare cases, by the act of a single large landowner. That is, of course, a more acute problem today, residential segregation ordinances and judicial enforcement of restrictive covenants having been condemned. Yet, the potentiality always existed and we submit this alternative means to the same end is equally forbidden by Section 1978.

1. *Nothing in the text or context of the statute confines its reach to State action*

We begin with the text of the statute:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Nothing in this language suggests that Section 1978 reaches only laws, or official acts, or conduct taken "under color of law." On their face, the words plainly cover any conduct which prevents Negroes and other non-whites from enjoying an equal opportunity to rent or purchase a home.

Certainly, nothing to the contrary is to be inferred from the description of the guarantee as a "right." We have already shown that "right" in this context cannot be read to mean only "legal capacity." Nor does the choice of that term of itself imply that only an immunity from hostile State action is conferred. In the usage of the time, "rights," whether viewed as created or merely "secured" by law, did not run against the sovereign alone. And that remains true today. One need only consult the public accommodation laws of 1875 and 1964, which control only private action: the first is entitled "An act to protect all citizens in their civil and legal rights" (18 Stat. 335); the second, the "Civil Rights Act of 1964" (Pub. L. 88-352, § 1, 78 Stat. 241). And see the Court's opinion in *United States v. Guest*, *supra*, 383 U.S. at 757-760, which repeatedly refers to the constitutional "right" to travel from one State to another, good against both official and private interference.

If it were not for contrary intimations in opinions of this Court, and perhaps one holding, there might be no occasion to go beyond the words of the statute to assert that, in an appropriate case, it reaches private conduct—assuming, as we later show (*infra*, pp. 51–57), that there is no constitutional objection to so reading Section 1978. Under the circumstances, however, we shall briefly explore every possible objection to construing the provision as controlling action not taken “under color of law.”

We consider first the reasons suggested by an aside of the opinion in the *Civil Rights Cases*, *supra*, 109 U.S. at 16–17, for confining Section 1978 to State action. Although that decision is not directly concerned with our provision and construes it only tentatively in a digression, the importance of the precedent justifies consideration.

a. The original text of 1866. The initial point made in the opinion is that the original text of 1866 ended with the words “any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding,” dropped in the Revised Statutes. 109 U.S. at 16. It is of course contrary to the established rule governing the interpretation of the Revised Statutes of 1874 to go behind a clear text to an earlier version of the law. See *United States v. Bowen*, 100 U.S. 508, 513; *Vietor v. Arthur*, 104 U.S. 498, 499–500; *Hamilton v. Rathbone*, 175 U.S. 414, 419–421; *Benson v. Henkel*, 198 U.S. 1, 13; and see *United States v. Mosley*, *supra*.¹⁵ But, at all events, we submit that the quoted phrase in the

¹⁵ See note 13, *supra*.

original provision lends no support to the argument that the design was only to reach State action.

Read as words of limitation, the reference to local laws would make our provision inoperative whenever the State acted by executive or judicial proceedings independently of any legislative directive or authorization. That is, of course, directly contrary to the ruling in *Hurd v. Hodge*, *supra*, which holds Section 1978 applicable to judicial enforcement of private covenants wholly unrelated to any legislative declaration. And such a construction of Section 1 of the Civil Rights Act of 1866 would hardly be consistent with the scope given to Section 2 (now 18 U.S.C. 242) in *Classic*, *Screws*, *Williams* and *Price*, all involving unauthorized conduct of public officials. Cf. *Monroe v. Pape*, *supra*. But the basic fact is that the phrase “any law, etc., to the contrary, notwithstanding” was inserted for emphasis, not by way of limitation.

Indeed, it seems obvious that the quoted words merely declare the supremacy of the federal statute over inconsistent local laws, if “any” there be. The formula is borrowed from the Supremacy Clause of the Constitution itself. See Art. VI, cl. 2. And it was a common clause in the declaratory provisions of Reconstruction legislation. See, *e.g.*, Enforcement Act of May 31, 1870, §§ 1, 16 (16 Stat. 140, 144); Act of February 28, 1871, §§ 5, 6, 19 (16 Stat. 433, 434, 435, 440).¹⁶ To be sure, the reference to contrary State laws

¹⁶ Another equivalent formulation is illustrated by another provision of § 16 of the Enforcement Act of 1870: “and any law

suggests their probable existence, present or future. But it hardly follows that the federal right created was meant to be ineffective if it encountered no hostile State action. Clearly, the compilers of the Revised Statutes were fully warranted in deleting these words as wholly superfluous in 1874 when the supremacy of federal statutes implementing the post-War Amendments was more clearly understood.¹⁷

b. The limited scope of Section 2 of the 1866 Act. At least superficially more telling for the contention that Section 1978 controls State action alone is a wholly different point made by the opinion in the *Civil Rights Cases*: that Section 2 of the 1866 Act, enforcing the first section from which our provision is derived, punishes only conduct taken "under color of law." 109 U.S. at 16-17. Presumably, the suggestion is that if Section 1 had meant to prohibit wholly private acts of discrimination, the sanctions of Section 2 would have been made applicable to such conduct. In our view, however, that reasoning is not compelling.

In the first place, symmetry is not the hallmark of Reconstruction legislation. In fact, almost every measure of the period juxtaposes provisions which bear only against officials with others which control private

of any State in conflict with this provision is hereby declared null and void." See, also, the comparable clause in § 1 of the Peonage Abolition Act of March 2, 1867 (14 Stat. 546), preserved in the modern codification, 42 U.S.C. 1994.

¹⁷ The same deletion was made in R.S. § 1977, whose antecedents are § 1 of the Civil Rights of 1866 and § 16 of the Enforcement Act of 1870. Somewhat inconsistently, the phrase is retained in R.S. § 2004, now 42 U.S.C. 1971(a) (1).

action.¹⁸ That is sufficient reason to resist the temptation to construe one provision by the next, even in the same Act. But if that approach were followed here, it would seem to lead in the opposite direction. Indeed, why expressly limit the application of the penalty to deprivations "under color of law" if the right involved itself runs only against official action?

At all events, it would not be remarkable if the Congress of 1866 had deemed it appropriate to confine criminal sanctions to State officials, bound by oath and duty to support the supreme law, while allowing only civil remedies against ordinary citizens. Or it may have been thought unnecessary to impose federal penalties where there were no State laws condoning abridgment of the rights declared in Section 1 because, in that situation, it was assumed the State itself would punish the offender under local ordinances implementing the national law. See Cong. Globe, 39th Cong., 1st Sess., pp. 1758, 1785. Neither hypothesis

¹⁸ Thus, while Sections 2 and 3 of the Enforcement Act of May 31, 1870 (16 Stat. 140) reached only officers, Section 4 (invalidated in *United States v. Reese*, 92 U.S. 214), Section 5 (invalidated in *James v. Bowman*, 190 U.S. 127), and Section 6 (now 18 U.S.C. 241), reached private conspiracies as well. So it is with the Ku Klux Act of April 20, 1871 (17 Stat. 13): Section 1 (now 42 U.S.C. 1983) reached only acts done "under color" of State law, but Section 2 (the criminal portion of which was declared unconstitutional in *United States v. Harris*, 106 U.S. 629, and *Baldwin v. Franks*, 120 U.S. 678, the civil provision surviving as 42 U.S.C. 1985) encompassed private conspiracies. And the pattern is the same in the Act of March 1, 1875 (18 Stat. 335): Sections 1 and 2 (invalidated in the *Civil Rights Cases*, 109 U.S. 3) reached private action, while Section 4 (sustained in *Ex parte Virginia*, 100 U.S. 339, now 18 U.S.C. 243) reached only officials.

suggests that the potential scope of Section 1 was restricted to acts "under color of law."¹⁹

No doubt, initially, the penal section of the Civil Rights Act of 1866 was viewed as the most important, for, as we have seen, the principal concern at first was to combat the Black Codes and to punish those who implemented them. But long before the text of Section 1978 became settled in the Revised Statutes of 1874, the focus had substantially changed and the broader scope of Section 1 took on new significance. These developments are relevant both because the reenactment of our provision in 1870 and 1874 justifies a con-

¹⁹ At one point during the debates on the Civil Rights Bill, Representative Loan inquired of the Chairman of the House Judiciary Committee (Wilson of Iowa), who seemed to be in charge of the measure, "why the committee limit the provisions of the second section to those who act under the color of law. Why not let them apply to the whole community where the acts are committed?" The following colloquy ensued (Cong. Globe, 39th Cong., 1st Sess., p. 1120):

Mr. WILSON, of Iowa. That grows out of the fact that there is discrimination in reference to civil rights under the local laws of the States. Therefore we provide that the persons who under the color of these local laws should do these things shall be liable to this punishment.

Mr. LOAN. What penalty is imposed upon others than officers who inflict these wrongs on the citizens?

Mr. WILSON, of Iowa. We are not making a general criminal code for the States.

Mr. LOAN. Why not abrogate those laws instead of inflicting penalties upon officers who execute writs under them?

Mr. WILSON, of Iowa. A law without a sanction is of very little force.

Mr. LOAN. Then why not put it in the bill directly?

Mr. WILSON, of Iowa. That is what we are trying to do. Nothing in this exchange suggests that the scope of Section 1 was equally narrow.

struction in light of then prevailing conditions and because other related legislation of these later years furnishes an authoritative indication of the original congressional intent.

It is sufficiently known that by 1870 one of the most serious threats to the rights of Negroes in the South was the Ku Klux Klan, and other comparable organizations, usually operating wholly outside the law and often against the constituted local authorities. See, e.g., Stamp, *op. cit. supra*, at pp. 198-204. And, quite naturally, much of the congressional legislation of the time was aimed at these unofficial conspiracies. E.g., §§ 4, 5 and 6 of the Enforcement Act of 1870, § 2 of the Ku Klux Klan Act of 1871, *supra* n. 18. This concern is evident in two of the surviving provisions of the Acts of 1870 and 1871, Section 241 of the Criminal Code and 42 U.S.C. 1985. See *United States v. Mosley*, *supra*, 238 U.S. at 387-388; *United States v. Price*, *supra*, 383 U.S. at 804-805; *Collins v. Hardyman*, *supra*, 341 U.S. at 662; and see *Monroe v. Pape*, *supra*, 365 U.S. at 174-176, 200, 257. Against this background, it would be difficult to interpret the reenactment of the first section of the Civil Rights Act of 1866 as confirming rights only against governmental invasion. In fact, the available evidence is clearly to the contrary.

Of particular interest is 18 U.S.C. 241, derived from Section 6 of the 1870 Act—Section 18 of which re-enacted our provision. The reach of that provision extends to wholly private conspiracies directed against a "citizen" in the exercise of "any right or privilege granted or secured to him by the Constitution or laws

of the United States." As the relevant legislative history makes clear, the focus was on the "rights and immunities of American citizenship" as announced by the Fourteenth and Fifteenth Amendments and implementing legislation. See Appendix to opinion of the Court in *United States v. Price*, *supra*, 383 U.S. at 807-820.²⁰ But, constitutional guarantees aside, what were the statutory rights and privileges of citizens intended to be protected? Except for voting rights—already vindicated by Sections 4 and 5 of the 1870 Act—the only apparent legislative declaration of citizenship rights in 1870 was Section 1 of the Civil Rights Act of 1866, now expanded and re-enacted.²¹ Doubtless, one of the objects of the new law was to punish wholly private conspiracies directed against these rights, which, although good against all interference, had theretofore been protected by penal sanctions only from official invasion. That was of

²⁰ The Court's Appendix in *Price* reproduces the whole of Senator Pool's speech on sponsoring Sections 5, 6 and 7 of the Enforcement Act of 1870, which is characterized in the opinion as "the only statement explanatory of [18 U.S.C. 241] in the recorded congressional proceedings relative to its enactment" (383 U.S. at 805).

²¹ As already noted, Section 18 of the Enforcement Act of May 31, 1870, re-enacted the whole of the Civil Rights Act of 1866. In addition, Section 16 of the 1870 Act reiterates the rights declared in 1866, except those relating to property, adding new guarantees and expanding the coverage to encompass not only citizens, but all persons, including aliens. Section 1977 of the Revised Statutes, 42 U.S.C. 1981, carries forward this expanded provision. See *Takahashi v. Fish Comm'n*, *supra*, 334 U.S. at 419.

course the necessary premise of the ruling in *United States v. Morris*, 125 Fed. 322 (E.D. Ark.), that 18 U.S.C. 241 (then R.S. § 5508) would punish a wholly private conspiracy of hostile whites seeking to prevent a Negro from exercising his right under Section 1978 to lease a farm in the area, and of Mr. Justice Bradley's *dictum* to the same effect in his opinion, on circuit, in *United States v. Cruikshank*, 1 Woods 308, 319, 25 Fed. Cas. 707, 712.²² Thus, it is apparent that the Congress of 1870—presumptively faithful to the original understanding—viewed the rights declared in 1866 and later codified in Section 1978 as something more than mere immunities from hostile State action.

²² The fact that 18 U.S.C. 241 has not been invoked against a private conspiracy directed at the exercise of rights secured by Section 1978 since 1903 does not weaken our argument as to the congressional understanding of 1870 or 1866. Indeed, so far as we are aware, there has likewise been no prosecution under Section 241 for invasion of such rights by public officials, whether implementing a local racial zoning ordinance or acting on their own authority. One explanation is that the 1906 ruling in *Hodges v. United States*, 203 U.S. 1, dismissing an indictment under 18 U.S.C. 241 against private conspirators charged with invading rights secured by Section 1977, cast doubt on the constitutional validity of Section 1978 as Thirteenth Amendment legislation. As Fourteenth Amendment rights, the guarantees of Section 1978 were deemed beyond the scope of 18 U.S.C. 241 under *United States v. Williams*, 341 U.S. 70, until that decision was repudiated two Terms ago in *United States v. Price*, *supra*. And, at all events, until *United States v. Guest*, *supra*, the characterization of Section 1978 as Fourteenth Amendment legislation was thought to confine its reach to conduct taken "under color of law", pursuant to the doctrine of the *Civil Rights Cases*, *supra*.

2. *The constitutional doctrines of the Reconstruction period would not have inhibited the attempt to reach wholly private action*

It remains only to inquire whether constitutional limitations oppose a construction of the statute that would make it effective against wholly private action. There are two aspects to the question: the first is whether the constitutional doctrines prevailing in the Congresses of 1866, 1870 and 1874, which originally enacted or re-enacted our provision, were such as to preclude them from attempting to reach private conduct in this area; the second is whether there are, in fact, constitutional obstacles to so reading Section 1978—whatever the views entertained in the Reconstruction period.

There is no basis for supposing that constitutional doubts inhibited congressional efforts to reach private action against Negro property rights during the Reconstruction decade. Of course, when the Civil Rights Act of 1866 was passed, the "State action" theory, premised on the language of the Fourteenth Amendment, not yet framed, had not been developed. There were, to be sure, some who doubted whether the Civil Rights Act was fully authorized by the Thirteenth Amendment, which was repeatedly invoked as the principal source of congressional power to enact the measure. But those objections—held by only a minority—had nothing to do with our problem. No one suggested that Thirteenth Amendment legislation could not constitutionally reach private action. On the contrary, the very next month, the Thirty-Ninth Congress passed a statute against kidnapping with a view

to enslavement which plainly governed wholly private conduct (Act of May 21, 1866, 14 Stat. 50, now 18 U.S.C. 1583), and, at the following session, it enacted the Anti-Peonage law with a comparable scope (Act of March 2, 1867, 14 Stat. 546, now 18 U.S.C. 1581 and 42 U.S.C. 1994). See *Clyatt v. United States*, 197 U.S. 207, 216–218. Nor has this Court ever questioned the proposition that laws implementing the Thirteenth Amendment may operate against individuals acting on their own authority. See *Slaughter-House Cases*, 16 Wall. 36, 78, 80; *Civil Rights Cases*, *supra*, 109 U.S. at 20, 23; *Clyatt v. United States*, *supra*.

Although the invocation of the Thirteenth Amendment is fully sufficient to show that the Congress of 1866 entertained no doubt of its power to reach private action by the first section of the Civil Rights Act, we advert to an additional reason supporting that conclusion. The debates on the measure confirm the indication of the text that Section 1 was viewed as declaring rights of American citizenship. See Cong. Globe, 39th Cong., 1st Sess., pp. 41, 474–475, 1119, 1294, 1757, 1835–1836. As such, these rights could of course be implemented by "primary and direct" legislation protecting them against all interference, public or private. See *Slaughter-House Cases*, *supra*, 16 Wall. at 78; *United States v. Guest*, *supra*, 383 U.S. at 757–760.²³ To be sure, one can debate the assump-

²³ Obviously, if Congress may punish a private conspiracy interfering with the exercise of rights and privileges of American citizenship, it may also declare them by positive law.

tion of 1866 that the right freely to acquire and hold property is a right of *national*, rather than State, citizenship (see *Slaughter-House Cases*, *supra*, 16 Wall. at 76–78). So, also, *Paul v. Virginia*, 8 Wall. 168, and later cases undermine the reliance of the 39th Congress on the Privileges and Immunities Clause of the original Constitution (Art. IV, § 2) as a source of power to define and secure federal citizenship rights. But see, Antieau, “Paul’s Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four,” 9 Wm. & M.L. Rev. 1. Right or wrong, however, it is enough that these views prevailed in the Congress of 1866 and that, under then settled authority (*Prigg v. Pennsylvania*, 16 Pet. 539, 615–620; *Kentucky v. Dennison*, 24 How. 66, 104–105), they authorized legislation protecting the rights involved against private interference.

So much for the Congress of 1866. But what of the Congress of 1870 which re-enacted our provision after the passage of the Fourteenth Amendment? Assuming it once reached further, was Section 1978 necessarily confined to State action when it became Fourteenth Amendment legislation? The point is quickly disposed of.

In the first place, there is no indication that a majority in either House doubted the constitutionality of the Civil Rights Act before the adoption of the Fourteenth Amendment. The later reenactment was for good measure, without repudiating anything done before. Nor is it to be supposed that the Congress of 1870, if it entertained doubts about its power to

reach private action under the Fourteenth Amendment, meant to forego other sources of power when it re-enacted the 1866 statute. But, as a matter of fact, it is clear that most of the legislators of 1870 saw no such difficulty. Other measures they enacted provide sufficient proof that they did not share the limited view of Section 5 of the Fourteenth Amendment later articulated in the *Civil Rights Cases*. Indeed, as already noted, the very Enforcement Act of 1870 which re-enacted the statute of 1866 contains at least three sections unquestionably embracing private conduct, including what is now 18 U.S.C. 241 and two provisions invalidated by this Court partly on that ground. See *United States v. Reese*, 92 U.S. 214 (holding unconstitutional § 4 of the Act); *James v. Bowman*, 190 U.S. 127 (§ 5). And, as subsequent enactments make plain, that view of congressional power to enforce the Fourteenth Amendment prevailed beyond the codification of Section 1978 in the Revised Statutes of 1874. See the Ku Klux Act of April 20, 1871, partly invalidated in *United States v. Harris*, 106 U.S. 629, and the Civil Rights Act of March 1, 1875, struck down in the *Civil Rights Cases*, *supra*.

3. *No present constitutional barrier confines the reach of the statute to State action*

We turn, finally, to the question whether Section 1978 would overstep constitutional boundaries, as presently understood, if it were construed to reach wholly private action. It is, of course, relevant that those who wrote the provision thought not. To be sure, that consideration is not dispositive, as the fate of much Re-

construction legislation in this Court, from the decision in *Reese* in 1875 to *Collins v. Hardyman* in 1951, attests. Yet, the opinion of the contemporary legislators remains relevant because they were also the framers of the Thirteenth, Fourteenth and Fifteenth Amendments and must be assumed to have known, and observed, the limitations there announced.²⁴ See Flack, *The Adoption of the Fourteenth Amendment* (1908), p. 277. At all events, however, recent decisions of the Court make clear that there is no constitutional obstacle to our reading of Section 1978.

a. *The congressional power to implement the Thirteenth Amendment.* Before invoking the modern cases construing Section 5 of the Fourteenth Amendment as applied to the Equal Protection Clause, it is worth noting that this Court has never expressly disap-

²⁴ Thus, 35 of the 50 Senators who were sitting when the proposition for the Thirteenth Amendment was approved were present when the Civil Rights Act of 1866 was passed (Biographical Directory of the American Congress, 1774-1961, pp. 178-181, 182-185), and all but three of these who had voted in favor of the Amendment likewise voted in favor of the implementing statute (Cong. Globe, 38th Cong., 1st Sess., p. 1490; Cong. Globe, 39th Cong., 1st Sess., pp. 606, 1809). So, also, all 15 Senators who had voted in favor of the Fourteenth Amendment in 1866 and who remained when the Enforcement Act of 1870 came before the Senate voted in favor of that measure (Cong. Globe, 39th Cong., 1st Sess., p. 3042; Cong. Globe, 41st Cong., 2d Sess., p. 3809). Equally relevant to the question of the power of Congress to reach private action is the fact that, of the 39 Senators who had supported the Fifteenth Amendment (worded, like the Fourteenth, as a negative injunction addressed to the States), 28 remained and all voted in favor of the 1870 Act, which also purported to enforce that Amendment against wholly private conduct (Cong. Globe, 40th Cong., 3d Sess., p. 1641; Cong. Globe, 41st Cong., 2d Sess., p. 3809).

proved the view of the Thirty-Ninth Congress that the provision which became Section 1978 was authorized as legislation implementing the Thirteenth Amendment and, also, as an exercise of the congressional power to define and vindicate the rights and privileges of national citizenship.

Although most of the lower courts, federal and State, which had considered the question, had upheld the Civil Rights Act of 1866 before the adoption of the Fourteenth Amendment,²⁵ the question received little attention after 1868. There is, however, some later judicial support for the view that the 1866 Act was valid Thirteenth Amendment legislation reaching private action. We have already adverted to the ruling in *United States v. Morris*, *supra*, and the opinion on circuit in *United States v. Cruikshank*, *supra*. We should also note the *dictum* by this Court in *United States v. Harris*, *supra*, 106 U.S. at 640. In *Hodges v. United States*, *supra*, it is true, this Court held that the right to contract for employment, claimed under Section 1977, could not constitutionally be protected from a private conspiracy because it was not sufficiently related to the Thirteenth Amendment.²⁶ But, even assuming the continuing vitality of that holding,

²⁵ *United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16,151); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247); *Smith v. Moody*, 26 Ind. 299; *Hart v. Hoss & Elder*, 26 La. Ann. 90. Contra, *People v. Brady*, 40 Cal. 198 (compare *People v. Washington*, 36 Cal. 658; *Bowlin v. Commonwealth*, 65 Ky. 5).

²⁶ It is noteworthy, however, that the Court apparently construed Section 1977 as intending to reach private action. Else, there would have been no occasion to decide the constitutional question.

it does not necessarily follow that the right not to be wholly fenced out from a community, supported by Section 1978, is on the same footing. It is at least arguable that the right invoked in the present case is more fundamental, and that the discrimination outlawed is more obviously a vestige of slavery.

b. The congressional power to define the privileges and immunities of national citizenship. So, also, no authoritative ruling forecloses the argument that Congress may define rights of national citizenship and that Section 1978 is an appropriate exercise of this power. The dictum of the *Slaughter-House Cases*, *supra*, 16 Wall. at 76, apparently classifying "the right to acquire and possess property of every kind" as a privilege of State citizenship, does not resolve the issue, the Court having had no occasion there to consider the power of Congress to promote the right to a privilege of national citizenship.²⁷ So far as we are aware, the Court has never directly addressed itself to the question. But no reason appears why Congress may not, within proper bounds, legislate to give content to United States citizenship, whether by virtue of Section 5 and the Citizenship Clause of Section 1 of the Fourteenth Amendment (cf. *Katzenbach v. Morgan*, 384 U.S. 641), or by invoking the Necessary and Proper Clause (Art. I, § 8, Cl. 18) to implement the Privileges and Immunities Clause of Article IV

²⁷ Four members of the Court apparently believed that result had been achieved by the Civil Rights Act of 1866. See the dissenting opinion of Mr. Justice Field, which Chief Justice Chase, and Justices Swayne and Bradley joined, 16 Wall. at 96-97.

of the original Constitution (if, as has been persuasively argued, *Antieau, op. cit. supra*, the latter provision deals with rights of national citizenship). Cf. *Prigg v. Pennsylvania*, *supra*; *Kentucky v. Dennison*, *supra*. Nor is there any ground here for confining Congress to combatting hostile State action.²⁸ Cf. *Slaughter-House Cases*, *supra*, 16 Wall. at 78; *Prigg v. Pennsylvania*, *supra*; *Kentucky v. Dennison*, *supra*; *United States v. Guest*, *supra*, 383 U.S. at 757-760; and see note 23, *supra*.

c. The congressional power to enforce the Equal Protection Clause. In our view, however, the clearest constitutional foundation for Section 1978, construed as reaching private action, is the Equal Protection Clause. To be sure, although it was not the view of the Reconstruction Congresses, the opinion was long held here that Congress could not enforce that Clause against wholly private action (*e.g., Civil Rights Cases*, *supra*). That was, no doubt, the ground of the ruling in *Corrigan v. Buckley*, 271 U.S. 323, 330-331, that Section 1978 did not reach private restrictive covenants. But, whatever the doctrine of another day, it is

²⁸ The Citizenship Clause of the Fourteenth Amendment, unlike the other provisions of Section 1, is not in terms addressed to the States or worded in the form of a prohibition; it is an absolute declaration, stated affirmatively: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." So, also, the Privileges and Immunities Clause of Article IV is not worded merely to guarantee immunity from hostile State action, but, rather, as a positive grant of right, good against all interference: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

now settled that Section 5 of the Fourteenth Amendment authorizes the Congress to implement the Equal Protection Clause by "appropriate legislation" which controls private conduct. See *United States v. Guest*, *supra*, 383 U.S. at 761-762 (concurring opinion of Mr. Justice Clark), 774-784 (separate opinion of Mr. Justice Brennan). That is not to say, of course, that the power is wholly unconfined: there must be some relation to the goals of the Equal Protection Clause, itself viewed as affording equality only in matters regulated by local law. But Congress has a broad discretion in determining what measures are appropriate to achieving the constitutional objective of equal treatment by the State. *Katzenbach v. Morgan*, *supra*, 384 U.S. at 648-651, 653-656; *South Carolina v. Katzenbach*, 383 U.S. 301, 326. It is enough if one can "perceive a basis" for the conclusion that the means selected would serve to promote equal protection. *Katzenbach v. Morgan*, *supra*, 384 U.S. at 653, 656.

Judged by this standard, there can be no doubt that Section 1978, insofar as it bars any substantial fencing out even by wholly private action, is "appropriate legislation." Indeed, it is obvious that those excluded from a community will be deprived of whatever governmental benefits are enjoyed there—whether public schools, parks and recreational facilities, employment in State managed or financed activities, municipal services, or other financial aids provided for any purpose by government. Nor is it always true that equivalent public advantages will be available in the neighboring community to which the excluded class is al-

lowed entry. There is more than a colorable basis for the assumption that a fencing out on racial grounds often reserves for the residents of the area a more desirable neighborhood, favored with better schools, more spacious parks, more efficient services, better zoning, and more modern public facilities. And, at all events, it may be enough if Congress concludes that the practical and psychological handicap imposed by any massive housing segregation measure, even without official sanction, would carry over to disadvantage the victims in their relations with government. Certainly, there is here a sufficient basis to sustain barring wholesale private discrimination in housing as an incident to enforcing the mandate of equality before the law. See Cox, "Foreword: Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, at 118, 119-121.

C. SECTION 1978 REACHES VOLUNTARY RACIAL DISCRIMINATION BY LANDOWNERS

One further objection requires brief consideration. It is the suggestion that Section 1978 prohibits only *outside* interference with a transaction between a willing seller and a willing buyer, and that, indeed, far from compelling an unwilling owner to sell or lease, the statute protects his right to refuse, even on purely racial grounds. See Mr. Justice Black, dissenting, in *Bell v. Maryland*, *supra*, 378 U.S. at 329-332. This reading, to be sure, does not absolutely confine the operation of the provision to official acts or measures taken pursuant to local law, since private individuals, acting on their own authority, may attempt to inter-

vene between a willing buyer and seller by threats or violence. But, under the suggested construction, Section 1978 would not reach a voluntary conspiracy among landowners wholly to exclude Negroes from the housing they control, no matter how large an area was involved.

This view, we respectfully submit, is at odds with the congressional objective in enacting the provision. Nor is the exclusive focus on the right to dispose consistent with the text, which expressly grants a "right to * * * inherit, purchase [and] lease." In practical effect, this approach converts a Negro's right to buy or rent a home free of racial discrimination into a white man's right to deal, or refuse to deal, with whom he pleases. Surely, it needs no demonstration at this late date that such a rule is altogether one-sided: only by blinking reality can one speak of the "equal" right of the Negro to sell or refuse to sell to a white man, as he chooses. Cf. *Brown v. Board of Education*, 347 U.S. 483. Certainly, the Reconstruction Congress was not concerned with any such problem. The conditions of the time—not entirely changed even today—precluded any consideration of the wholly academic question whether the Negro should be free to sell his house to a white man: the practical objective was to permit the new freedmen to buy or lease housing.

Nor was the focus of those who enacted Section 1978 on the right of the white citizen to sell or rent to a Negro, free of prohibitions ordained by law or even community pressures. The typical victim of discrimination during the Reconstruction decade was not the

willing white seller who was prevented by outside forces from dealing with the Negro. Indeed, although language in opinions of this Court suggests otherwise,²⁹ there is some doubt whether Section 1978 was meant to confer any rights on whites. On the face of the statute, the guarantee runs only to the newly declared citizens who are to have the "same right * * * as is enjoyed by white citizens." See *Barrows v. Jackson*, *supra*, 346 U.S. at 254. And, as we have seen, the text accurately translates the congressional objective to assure the Negro an equal opportunity to establish his home or his business whenever he chose.

At all events, nothing in the decisions of this Court under Section 1978 compels restricting its operation to the situation of willing parties. To be sure, that was the fact in the cases adjudicated here. But the rationale of the opinions does not seem to turn on that circumstance. One doubts, for instance, whether the result in *Shelley v. Kraemer* or *Hurd v. Hodge* would have been different if the restrictive covenant had been invoked by the seller defending against enforcement of a sales contract which he executed without knowing the buyer's race and now wished to treat as void. Certainly, it did not save the New Orleans ordi-

²⁹ See *Buchanan v. Warley*, *supra*, 245 U.S. at 81, speaking of "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color * * *." It is noteworthy, however, that in all the decisions here after *Harmon v. Tyler*, *supra*, the right to non-discrimination was invoked by, or on behalf of, non-whites. See *Richmond v. Deans*, *supra*, as explained in *Shelley v. Kraemer*, *supra*, 334 U.S. at 12; *Hurd v. Hodge*, *supra*; *Takahashi v. Fish Comm'n*, *supra*; *Barrows v. Jackson*, *supra*.

nance involved in *Harmon v. Tyler, supra*, that exclusion of Negroes could be waived upon the consent of a majority of the white residents of the area. See *Shelley v. Kraemer, supra*, 334 U.S. at 12.

Undoubtedly, a uniform rule of exclusion imposed by outside compulsion is often more effective in maintaining residential segregation. But, however rare the occurrence, the same result is equally offensive when achieved by the voluntary action of property owners. In 1866 there was probably no distinction to be drawn between the two situations because the white landowners—alone eligible to vote and holding all political power—simply passed a law excluding Negroes from the area. See, *e.g.*, Cong. Globe, 39th Cong., 1st Sess., pp. 1124, 1160.³⁰ Today that alternative is clearly foreclosed. We submit Section 1978 should not be read to condone the identical fencing out accomplished by other means.

³⁰ While the references are to the right to contract for labor, the statement of Congressman Cook is revealing (at *id.* p. 1124):

Any combination of men in his neighborhood can prevent him from having any chance to support himself by his labor. They can pass a law that a man not supporting himself by labor shall be deemed a vagrant, and that a vagrant shall be sold. * * *

On the other hand, it is noteworthy that Congressman Windom, speaking on the same subject, does not expressly advert to the enactment of a law in the following passage (*id.* at 1160):

Planters combine together to compel them to work for such wages as their former masters may dictate, and deny them the privilege of hiring to any one without the consent of the master; and in order to make it impossible for them to seek employment elsewhere, the pass system is still enforced. * * *

CONCLUSION

For the reasons stated, the judgments below should be reversed and the case remanded for trial.

Respectfully submitted.

RAMSEY CLARK,
Attorney General.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

BRIAN K. LANDSBERG,
Attorney.

JANUARY 1968.

APPENDIX

MISSOURI STATUTES ON ORGANIZATION OF MUNICIPALITIES AND SUBDIVISIONS

71.340. Construction and repair of public roads etc.— annual appropriation

The mayor and city council of any city or the chairman and board of trustees of any incorporated town or village shall have the power to annually appropriate and pay out of the treasury of such city or incorporated town or village a sum of money, not to exceed ten per cent of the annual general revenue thereof, for the purpose of constructing, building, repairing, working, grading or macadamizing any public road, street and highway and any bridge thereon leading to and from such city or incorporated town or village; and such appropriation shall be made by ordinance and the money so appropriated shall be applied under the supervision and direction of the engineers of such city or incorporated town or village, and of the county highway engineer of the county in which such city, town or village is located, or of some competent person selected by such city, town or village and approved by the county highway engineer, who shall make a report thereof, in writing, to the mayor and city council of such city, or to the chairman and board of trustees of such incorporated town or village; but this privilege shall not extend to a greater distance than five miles from the corporate limits of such city, town or village, and shall not be construed so as to allow any obstruction to or inter-

ference with the free use of any such public road, street or highway by the public, except so far as may be necessary while such work is being done, and further shall not be construed to affect the liability of such city, town or village, which liability shall be the same as if such roads, streets and highways were inside the city limits.

71.370. Contracts for fire protection between incorporated cities

Any incorporated city in this state having a fire department may contract to furnish fire protection to any other incorporated city or cities in this state, whether or not such other incorporated city or cities have a fire department.

71.380. Fire protection contracts.

Any two or more incorporated cities wishing to take advantage of sections 71.370 to 71.390, may, by ordinance duly enacted in each of such cities, agree upon the terms upon which such fire protection shall be furnished, and such agreement may, where two or more such cities have fire departments, include an interchange of the service of such fire departments upon such terms as is agreed upon; or such agreement may provide for the payment of a stated sum per month or per year, or a stated sum per fire, or any other method of compensation for such fire protection that is agreed upon by the two or more incorporated cities entering into such contract; provided, that any contract for a longer period than five years shall have no binding force until ratified by a majority of the qualified voters voting at an election called for that purpose in each of the cities entering into such contract.

72.040. Cities of fourth class.

All cities and towns in this state containing five hundred and less than three thousand inhabitants, and all towns existing under any special law, and having less than five hundred inhabitants, which shall elect to be cities of the fourth class, shall be cities of the fourth class.

80.180. Trustees—powers as to sidewalks

Such board of trustees of any incorporated town or village in this state shall have power, by ordinance, to cause the owner or owners of any property or lot adjacent to any street or alley in said town or village to build, pave, construct, improve or repair any sidewalk along the side of said property or lot in such town or village.

80.260. Chairman of board—duties

The chairman of the board of trustees shall be a conservator of the peace, and shall have exclusive original jurisdiction to hear and determine all offenses against the ordinances of the town. He shall keep a docket in which he shall enter every cause commenced before him. He shall provide, at the expense of the town, a suitable room in which to hold his court, and his office shall be open every day, except Sunday, for the immediate trial, unless continued for good cause, of offenses against the ordinances of such town. He shall, at the expense of such town, procure a suitable docket, and shall transmit said docket and books and papers pertaining to his office, to his successor in office.

80.470. Additional levies—maximum rates

In addition to the levy aforesaid for general municipal purposes, all towns and villages in this state may levy annually not to exceed the following rates of taxa-

tion on all property subject to its taxing powers for the following special purposes: For library purposes in the manner and at the rate authorized under the provisions of sections 182.140 to 182.280, or amendments thereto; for hospital, public health and museum purposes, twenty cents on the one hundred dollars assessed valuation; and for recreation grounds in the manner and at the rate authorized under the provisions of sections 90.500 to 90.570.

80.480. Assessment and collection of revenues

All assessments on real and personal property within the limits of such town, which may be certified and transmitted to the board of trustees, from time to time, as provided in section 80.460, shall be taken and considered as the lawful and proper assessment on which to levy and collect the municipal taxes of the town, and the payment of all taxes authorized by this chapter shall be enforced by the collector in the same manner and under the same rules and regulations as may be provided by law for collecting and enforcing the payment of state and county taxes, and for that purpose it shall be the duty of the board of trustees to require the collector, annually, to make out and return, under oath, a list of delinquent taxes remaining due and uncollected on the first day of January of each year, to be known as the delinquent list. It shall be the duty of the board of trustees, at the next meeting after such delinquent list shall be returned, or as soon thereafter as convenient, carefully to examine the same, and if it shall appear that all property and taxes contained in said list are properly returned as delinquent, they shall approve such list and cause an order of approval to be entered on the journal, and the amount of taxes in such list to be credited on the account of the collector; and shall

also cause said delinquent list or a certified copy thereof, with the bills therefor, to be placed in the hands of the county collector, who shall give a receipt therefor and proceed to collect the taxes due thereon, in like manner and with the same effect as delinquent taxes for state and county purposes are collected. The said collector shall pay over the taxes collected to the city treasurer, at the times and in the manner provided by law for the payment of county taxes to the county treasurer, and shall make the same statements and settlements for such taxes with the board of trustees, and at the same time as may be provided by law for statements and settlements with the county court for county taxes, and all taxes shall bear the same rate of interest, and the same penalties shall attach to the nonpayment thereof when due, as may be provided by law in cases of county taxes. A certified copy of any tax bill included in the delinquent list, approved by the board of trustees, shall in all cases be prima facie evidence that the amount therein specified is legally due by the party against whom such tax bill is made out, and that all provisions of the law and ordinances have been duly complied with, and that the same is a lien on the property therein described.

80.490. Trustees—taxing powers

The board of trustees shall also, from time to time, provide, by ordinance, for the levy and collection of all other taxes and licenses, including poll taxes, wharfage and other dues, and to fix the penalties for neglect or refusal to pay same, which now or hereafter may be authorized by law or ordinance. All able-bodied male persons, between the age of twenty-one and fifty years, who may have resided within the corporate limits of such village thirty

days next preceding the levy of any poll tax for any given year, shall be liable to work on the streets and alleys of such village not to exceed three days, or to pay such sum in lieu thereof as may be provided by ordinance, not in any case, however, to exceed the sum of three dollars; and upon failure to pay such poll tax, either in cash or by labor, when notified so to do, according to law and the ordinance of such village, it shall be the duty of the town marshal, when ordered so to do by the board of trustees of such village, to bring suit before some magistrate, if there be any in such village, and if not, then before some magistrate nearest such village, and proceedings shall be had thereon the same as in other civil cases; and no property shall be exempt from seizure and sale upon any execution issued upon any judgment rendered for such poll tax.

89.030. Zoning districts

For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of sections 89.010 to 89.140; and within such districts may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.

89.040. Purpose of regulations

Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentra-

tion of population; to preserve features of historical significance to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality.

90.010. Parks—establishment, maintenance

Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of alderman of such city is hereby authorized and empowered to acquire property for such purposes by gift, purchase or condemnation of lands in such city or within one mile thereof, and for that purpose may borrow money and issue bonds in payment thereof, and shall by ordinance describe the metes and bounds of such lands to be purchased or condemned. Lands owned by such city may by ordinance be converted, set aside or appropriated for parks or pleasure grounds. Such city may levy an annual tax not to exceed two mills on the dollar for the maintenance of such parks or pleasure grounds, and such tax shall be levied and collected in like manner with other general taxes of such city and shall be known as the park fund.

ST. LOUIS COUNTY ORDINANCES

Chapter 1005 Subdivision Regulations

Section

- 1005.010 Adoption of regulations, plans and orders
- 1005.020 Purposes of regulations
- 1005.030 Definitions

- 1005.040 Approval of subdivision plats
- 1005.050 Preliminary plan
- 1005.060 Final plat
- 1005.070 Acre subdivision
- 1005.080 Relation to adjoining street system
- 1005.090 Streets in relation to railroads, superhighways and parkways
- 1005.100 Street and alley width
- 1005.110 Blocks
- 1005.120 Lots
- 1005.130 Exceptions in neighborhood unit developments
- 1005.140 Building lines
- 1005.150 Character of development
- 1005.160 Parks, school sites, etc.
- 1005.170 Easements along streams
- 1005.180 Improvements
- 1005.190 Inspection and permits
- 1005.200 Variations and exceptions
- 1005.210 Administration and amendment

1005.010 Adoption of Regulations, Plans and Orders.—The existing Subdivision Regulations adopted January 19, 1943, the Order Establishing Building and Setback Lines Along Major Highways in the Unincorporated Area of St. Louis County, made and entered by the County Court at its May term 1943, the Major Highway Plan adopted December 8, 1942, as amended, and the Comprehensive Major Airport Plan adopted by the St. Louis County Planning Commission on April 23, 1943, together with all amendments thereof and all regulations and rules now in force pertaining thereto, are hereby declared to be in full force and effect in St. Louis County and are hereby approved and ratified. (O. No. 429, s.1)

1005.020 Purposes of Regulations.—In order to promote the health, safety, convenience and general welfare of the inhabitants of St. Louis County, and to guard against the creation of slums, blighted areas

or deficit districts by assisting in bringing about the co-ordinated, efficient and economical development of the unincorporated portion of the county the following regulations and minimum standards have been adopted by the St. Louis County Planning Commission.

General: It is suggested that each subdivider of land confer with the Commission, its Committee on Highways and Subdivisions or its staff, before preparing the preliminary plan, in order to become thoroughly familiar with subdivision requirements and with the proposals of the official master plan affecting the territory in which the proposed subdivision lies.

1005.030 Definitions.—1. For the purpose of these regulations, a subdivision of land is: (1) The division of land into two or more tracts, sites or parcels of three acres or less in area; (2) the division of land into tracks of more than three acres where the proposed lot frontage is less than 300 feet; (3) dedication or establishment of a road, highway or street through a tract of land regardless of area, and (4) resubdivisions of land heretofore divided or platted into lots, sites, or parcels, containing one acre or more or a total area of one acre or more.

(Note: Any sale or contract of sale or agreement to purchase any lot or division of land either by lot description or by metes and bounds as defined in the preceding portion of this section shall constitute a subdivision of land and require, prior to any sale or contract of sale or agreement to purchase and before the delivery of a deed the submission of a plat to the Commissioner as required by law; provided, however, that this shall not apply to land in subdivisions previously recorded, to sales of land used or to be used for orchards, forestry or the raising of crops, upon

certification by the Commission or to the sale or exchange of small parcels of land to or between adjoining property owners, where such sale or exchange does not create additional lots, or upon certification which must be granted by the Commission.)

2. Major Highway—A highway shown on the Major Highway Plan adopted by the Commission on December 8th, 1942, or a revision thereof.

3. Superhighway—A Highway shown on the Major Highway Plan adopted by the Commission on December 8th, 1942, or any revision thereof, which highway has an existing or proposed width of one-hundred-and-sixty feet or more.

4. Parkway—A route intended to be used primarily by passenger vehicles which may have a varying width of right-of-way and which right-of-way is or is intended to be developed with a park-like character.

5. Whenever the word "Commission" is used in these rules and regulations, it shall be deemed to refer to the County Planning Commission of St. Louis County, Missouri.

1005.040 Approval of Subdivision Plats.—Every subdivision of land within the unincorporated area of St. Louis County shall be shown upon a plat and submitted to the Commission for approval or disapproval. Any plat which has been approved by the Commission and its approval endorsed therein in writing shall be submitted to the County Court for its consideration, approval or disapproval. If the Commission does not approve the plat or if the legislative body or an incorporated area files a written protest with either the Commission or the County Council against any plat within one-and-one-half miles of its border it may then be approved by the County Council only in accordance with the provisions of Section 64.070, RSMo. 1949. No

plat shall be recorded in the office of the Recorder of Deeds and no lots shall be sold from such plat unless and until approved as hereinabove provided. Upon written request of the legislative body of any incorporated area in which there is no municipal planning commission, the Commission will pass upon subdivision plats within said incorporated area, and such plats shall be subject to all the appropriate provisions of these regulations.

1005.050 Preliminary Plan.—1. In seeking to subdivide land into building lots, or to dedicate streets, alleys, or land for public use, or to subdivide land into building lots, together with the dedication or reservation of public or private streets respectively, the owner shall submit seven black-and-white copies of the preliminary sketch plan to the Commission before submission of the final plan. Plats containing three lots or less may be exempted from the provisions of this section. The preliminary plan is to be drawn to a scale of 100 feet to the inch, but if the subdivision contains more than 160 acres the plan may be at a scale of 200 feet to the inch, and shall show:

(1) The location of present property, section, U.S. Survey and congressional township lines and lines of incorporated areas, sewer districts, public water supply and drainage districts, school districts and other legally established districts, streets, buildings, water courses, tree masses and other existing features within the area to be subdivided and similar facts regarding existing conditions on land immediately adjacent thereto.

(2) The proposed location and width of streets, alleys, lots, building and set-back lines and easements.

(3) Existing sanitary and storm sewers, water mains, culverts and other underground structures

within the tract or immediately adjacent thereto. The location and size of the nearest water main and sewer or outlet are to be indicated in a general way upon the plat.

(4) The title under which the proposed subdivision is to be recorded and the name of the subdivider platting the tract.

(5) The names and adjoining boundaries of all adjoining subdivisions and the names of record owners of adjoining parcels of unsubdivided land.

(6) Contours with intervals of five feet or less referred to sea level datum.

(7) North point, scale and date.

(8) Any zoning district or districts that affect the property to be subdivided.

(9) Grades and profiles of streets and plans or written and signed statements regarding the grades of proposed streets, and the width and type of pavement, location, size, type of sanitary sewers or other sewage disposal facilities, water mains and hydrants and other utilities; storm water drainage facilities and other proposed improvements, such as sidewalks, planting and parks, and any grading of individual lots.

2. Preliminary Plan. (1) Preliminary plans not containing all of the above data will not be approved by the County Planning Commission. Approval of the preliminary plan does not constitute an acceptance of the subdivision by the Commission. One copy of the approved preliminary plan, signed by the Chairman of the Commission, shall be retained in the office of the Commission. One signed copy to be given to the subdivider. Receipt of this signed copy is authorization for the subdivider to proceed with the preparation of plans and specifications for the minimum improve-

ments required in Section 1005.180 of these Rules and Regulations and with the preparation of the final plat. Prior to the construction of any improvements required in Section 1005.180 or to the submission of any bond, the subdivider shall furnish the commission all plans, information and data necessary for said improvements. These plans shall be examined by the Commission and will be approved if in accordance with the requirements of Section 1005.180 of these Rules and Regulations. Following this approval construction can be started or the amount of a bond determined. If the final plat conforms to the approved preliminary plat and if the necessary improvements are constructed in accordance with the approved plans therefor or a satisfactory bond or a satisfactory escrow agreement submitted assuring or guaranteeing their construction in accordance with the approved plans, the final plat will be approved by the Commission.

(2) The escrow agreement, hereinbefore provided, shall:

(a) be prepared or approved by the County Counselor;

(b) be executed by the Planning Director subject to the approval of the County Council;

(c) guarantee the improvements set forth in the approved preliminary plan by providing for a deposit with a qualified escrow depository of that sum of lawful money of the United States of America with the Planning Director shall reasonably estimate as the cost of said improvements;

(d) provide that the escrowed sum shall be held in special escrow account by the escrow holder, subject to the audit of the Planning Director.

3. The escrowed sum shall be held by the escrow holder, as in the agreement provided, until such time as the Planning Director shall, by written authorization addressed to the escrow holder, release the escrow sum. The Planning Director shall release the escrow sum for disbursement by the escrow holder for the payment of labor and materials used in the construction and installation of the improvements guaranteed, as the work progresses and when approved by the Planning Director. In no case shall the Planning Director authorize the release nor shall the escrow holder release more than 70% of the escrow sum until said improvements and installations have been completed in a satisfactory manner in accordance with the Subdivision Regulations and approved by the St. Louis County Planning Commission. (O. No. 1447)

1005.060 Final Plat.—1. The final plat on tracing cloth and five black-and-white prints thereof together with copies of any deed restrictions where such are too lengthy to be shown on the plat, and three prints of certified plans showing the improvements that have been constructed within the subdivision (or a bond assuring construction of said improvements in accordance with plans previously approved) shall be submitted to the Commission. Before approving the plat of all or part of a proposed subdivision the Commission will require proof that the improvements and revisions thereof required in Section 1005.180 have been satisfactorily completed. The Commission shall act upon the final plat within thirty days after it has been submitted unless the subdivider agrees to an extension of this period. The approval of the Commission shall be shown on the plat with the date of such approval and over the signature of the Chairman of the Commission.

2. The final plat is to be drawn at a scale of 100 feet or less to the inch from an accurate survey and on one or more sheets whose maximum dimensions are 29 inches by 34 inches. In certain unusual instances where the subdivided area is of unusual size or shape, the Commission may permit a variation in the scale or size of the final plat. If more than two sheets are required, an index sheet of the same dimensions shall be filed showing the entire subdivision on one sheet together with all areas shown on other sheets.

3. The final plat shall show:

(1) The boundary lines of the area being subdivided with accurate distances and bearings; also all sections, U.S. Survey and congressional township lines and the boundary lines of incorporated areas, sewer, school and other legally established districts within or adjoining the subdivided area.

(2) The lines of all proposed streets and alleys with their width and names.

(3) The accurate outline of any property which is offered for dedication for public use.

(4) The line of departure of one street from another.

(5) The lines of all adjoining lands and the lines of adjacent streets and alleys with their width and names.

(6) All lot lines and an identification system for all lots and blocks.

(7) Building lines and easements for rights-of-way provided for public use, services or utilities with figures showing their dimensions.

(8) All dimensions, both linear and angular, necessary for locating boundaries of subdivisions, lots, streets, alleys, easements for building lines, and of any other areas for public or private use, the linear

dimensions are to be expressed in feet and decimals of a foot.

(9) Radii, arcs and chords, points of tangency, central angles for all curvilinear streets, and radii for all rounded corners.

(10) All survey monuments and bench marks together with their descriptions.

(11) Name of subdivision and description of property subdivided, showing its location and extent, points of compass, scale of plan, and name of owner or owners or the subdivider.

(12) Certification by a reputable civil engineer or surveyor to the effect that the plan represents a survey made by him and that all the necessary survey monuments are correctly shown thereon.

(13) Private restrictions and trusteeships and their periods of existence. Should such restrictions and trusteeships be of such length as to make the lettering of same on plat impracticable and thus necessitate the preparation of a separate instrument, reference to such instrument shall be made on the plat. Plats shall contain proper acknowledgments of owners and the consent by the mortgagee to said plat and restrictions.

(14) Before it is recorded a certificate shall accompany the final plat, showing that all taxes payable shall have been previously paid in full.

1005.070 Acre Subdivision.—Whenever the area is divided into lots containing one or more acres and there are indications that such lots will eventually be resubdivided into smaller building plots, consideration must be given to the street and lot arrangement of the original subdivision so that additional minor streets can be opened which will permit of a logical arrangement of smaller lots.

1005.080 Relation to Adjoining Street System.—1. The arrangement of streets in new subdivisions shall make provision for the continuation of the principal existing streets in adjoining areas (or their proper projection where adjoining land is not subdivided) in so far as they may be deemed necessary by the Commission for public requirements. The width of such streets in new subdivisions shall not be less than the minimum street widths established herein. The street and alley arrangement must also be such as to cause no hardship to owners of adjoining property when they plat their own land and seek to provide for convenient access to it. In general, provisions should be made for through streets at intervals of approximately one-half mile or less. Offset streets should be avoided.

2. Streets that are obviously in alignment with others already existing and named shall bear the names of the existing streets. The proposed street names shall be checked against duplication of street names and approved by the Post Office Department.

1005.090 Streets in Relation to Railroads, Superhighways and Parkways.—When the area to be subdivided adjoins or contains, for a considerable distance, a railroad right-of-way, a superhighway or a parkway, a street should be dedicated approximately parallel to the side of such right-of-way and in determining the distance of such parallel street from the right-of-way of the railroad, superhighway or parkway, consideration should be given to the distance required for approach grades to future grade separations.

1005.100 Street and Alley Width.—1. The minimum width for major highways shall be the smallest width designated on the County Major Highway Plan,

as adopted by the Planning Commission on December 8, 1942 and ratified by Section 1005.010 SLCRO, and any subsequent amendments and additions thereto.

2. The minimum width for minor streets shall be fifty feet, except that in cases where the topography or special conditions make a street of less width more suitable, the Commission may waive the above requirements. When streets adjoin unsubdivided property a half-street not less, however, than thirty feet in width may be dedicated and whenever the subdivided property adjoins a half-street the remainder of the street shall be dedicated.

3. The minimum width of an alley in a residential block shall be fifteen feet, but such alleys are not recommended except under unusual conditions. Alleys will be required in the rear of all business lots and shall be at least twenty feet wide. A five-foot cut-off shall be made at all acute angle alley intersections. Adequate provision for off-street parking is to be made in connection with all platted business lots and in such other places where there may be such a concentration of vehicles that congestion of adjoining streets will result.

4. Where alleys are not provided, easements of not less than five feet in width shall be provided on each side of all rear lot lines, and along side lot lines where necessary, for poles, wires, conduits, storm and sanitary sewers, gas, water and heat mains. Easements of greater width may be required along or across lots where necessary for the extension of main storm and sanitary sewers and other utilities, and where both water and sewer lines are located in the same easement. (A. O. No. 2346)

1005.110 Blocks.—1. No block shall be longer than fifteen hundred feet between street lines. Blocks over

seven hundred and fifty feet in length shall have a cross-walk near the center of the block. The right-of-way for such walks shall not be less than ten feet in width.

2. In platting residential lots containing from six thousand square feet to fifteen thousand square feet, it is recommended that the depth of the block not exceed three hundred feet.

3. Where it is desirable to subdivide a tract of land, which because of its size or location, does not permit an allotment directly related to a normal street arrangement, there may be established one or more "Places". Such a place may be in the form of a court, a deadend street, or other arrangement; provided, however, that proper access shall be given to all lots from a dedicated place (street or court). If such a place is more than two hundred and fifty feet in length it shall terminate in an open space (preferably circular) having a minimum radius of fifty feet. Except in unusual instances no dead-end street or place shall exceed one thousand feet in length.

1005.120 Lots.

(a) All side lines of lots shall be at right angles to straight street lines, or radial to curved street lines unless a variation to this rule will give a better street and lot plan. Lots with double frontage should be avoided.

(b) Except as provided in Section 1005.130 and 1005.30 hereof, the average minimum width of residential lots shall be fifty (50) feet at the building line and a rectangular or irregular shaped lot that is to be used for residential purposes shall contain an area of not less than six thousand (6,000) square feet; provided, however, that where the lot area regulations of any zoning ordinance or order require a larger lot

area, then the requirement of such zoning ordinance or order shall govern.

(c) Where corner lots rear upon lots facing the side street, the corner lots shall have extra width sufficient to permit the establishment of front building lines on both the front and the side of the lots adjoining the streets. Extra width should be provided on all corner lots irrespective of whether they rear upon lots facing the side streets.

(d) Lots on major highway intersections and at all other acute angle intersections which, in the opinion of the Commission, are likely to be dangerous to traffic movement shall have a radius of twenty (20) feet at the street corner. On business lots a chord may be substituted for the circular arc. Where grade separation structures are proposed at the intersection of major highways, the lots and improvements in the subdivision shall be arranged so as to make adequate provision for such structures.

(e) Residential lots shall conform to the following minimum frontage requirements:

1. All lots containing an area of ten thousand (10,000) square feet or more but less than twelve thousand (12,000) square feet shall have a minimum frontage of seventy-five (75) feet.

2. All lots containing an area of twelve thousand (12,000) square feet or more but less than fifteen thousand (15,000) square feet shall have a minimum frontage of eighty (80) feet.

3. All lots containing an area of fifteen thousand (15,000) square feet or more but less than twenty thousand (20,000) square feet shall have a minimum frontage of ninety (90) feet. (O. No. 1179, s. 2).

1005.130. Exceptions in Neighborhood Unit Developments.—Whenever a subdivision is developed as a

modern neighborhood unit, wherein adequate park or playground area is provided, through traffic is adequately cared for and the majority of the minor streets are of the cul-de-sac type the Commission may vary the requirements of Sections 1005.100, 1005.110 and 1005.120 in order to allow the subdivider more freedom in the arrangements of the street and lots, but at the same time protect the convenience, health, welfare and safety of the probable future residents of the subdivision as well as the character of the surrounding property and the general welfare of the entire county. In no case, however, shall the average lot area per family requirement be less than is required in any zoning regulation applying to the property, or in the absence of any zoning regulations, the average lot area per family shall not be less than six thousand square feet for single family residences or less than four thousand square feet per family for lots upon which residences are to be erected for more than one family.

1005.140 Building Lines.—Building lines shall be shown on all plats of lots intended for residential use of any character, and on commercial or industrial lots immediately adjoining residential areas. Such building lines on lots adjacent to major highways shall not be less than the building and setback lines established by any order of the County Court or County Council. In all cases, building lines shall not be less than required by any zoning regulation applying to the property. Where the subdivided area is not under zoning control the subdivider shall establish building lines in accordance with the needs of each addition, but in no case shall such building lines be less than thirty feet from the right-of-way of the street or highway upon which the lot fronts, except where all the frontage on one side of the street between two intersecting streets is to

be used for commercial or industrial purposes the minimum building line shall not be less than twenty feet from the right-of-way lines of the streets adjoining said commercial or industrial area. Restrictions requiring buildings to be set back to such building lines shall either be shown on the plat or shall be contained in a separately recorded instrument and referred to on the plat. Restrictions shall also be made and either shown on or referred to on the plat, requiring all buildings used for residential purposes to be set back not less than five feet from the side lot lines, except on corner lots, and not less than twenty-five feet from rear lot lines.

1005.150 Character of Development.—The Commission shall confer with the subdivider regarding the type and character of development that will be permitted in the subdivision and may agree with the subdivider as to certain minimum restrictions to be placed upon the property to prevent the construction of substandard buildings, control and the type of structures, or the use of the lots which, unless so controlled, would clearly depreciate the character and value of the proposed subdivision and of adjoining property. Deed restrictions or covenants should be included to provide for the creation of a property owners' association or board of trustees for the proper protection and maintenance of the development in the future, provided, however, that such deed restrictions or covenants shall not contain reversionary clauses wherein any lot shall return to the subdivider because of a violation thereon of the terms of the restrictions or covenants. Where the subdivision contains sewers, sewage treatment plants, water supply systems, park areas, street trees or other physical facilities necessary or desirable for the welfare of the area or that are common use or benefit which are not or cannot be satisfactorily main-

tained by any existing public agency, provisions shall be made by trust agreement made a part of the deed restrictions, acceptable to any agency having jurisdiction over the location and improvement of such facilities, for the proper and continuous maintenance and supervision of such facilities.

1005.160 Parks, School Sites, etc.—In subdividing property, consideration shall be given to suitable sites for schools, parks, playgrounds and other common areas for public use so as to conform to the recommendations of the Commission in its adopted master plan or portion thereof of the County. Any provision for schools, parks and playgrounds should be indicated on the preliminary plan in order that it may be determined when and in what manner such areas will be dedicated to or acquired by the appropriate taxing agency.

1005.170 Easements Along Streams.—Whenever any stream or important surface drainage course is located in an area that is being subdivided, the subdivider shall dedicate an adequate easement along each side of the stream, for the purpose of widening, deepening, sloping, improving or protecting the stream or for drainage, parkway or recreational use.

1005.180 Improvements.—Plans for improvements required in this section shall be prepared by an engineer, duly registered in accordance with Chapter 327 RSMo. 1959. The improvements listed below in subdivisions (1), (2), (3), (4), (5), (6), and (7) of this section shall be installed prior to the approval of the final plat, which is prepared for recording purposes. In lieu of actual completion of such improvements, the subdivider may file with the Commission a surety bond to secure to the County the actual construction of such improvements in a manner satisfactory to the County Council and within a period

specified by the Commission, but such period shall not exceed two years. Such bond shall be in the amount and with surety and conditions satisfactory to the County Council and shall be accompanied by signed statements from the Commission that the amount of the bond is adequate to cover the cost of the improvements. The owner of the tract may prepare and secure tentative approval of a final subdivision plat of the entire area and may install the above improvements only in a portion of such area, but the improvements must be installed in any portion of the area for which a final plan is approved for recording, and the owner may sell or lease or offer for sale or lease lots only in the improved portion of said property; provided, however, that trunk sewers and sewage treatment plants be designed and built to serve the entire area or designed and built in such a manner that they can easily be expanded, or extended, as the case may be to serve the entire area.

(1) Permanent Markers: All subdivision boundary corners and the four corners of all street intersections shall be definitely marked with permanent monuments. A permanent marker shall be deemed to be concrete with a minimum dimension of four inches extending below the frost line or steel pipe firmly imbedded in concrete which extends below the frost line. Should conditions prohibit the placing of monuments on line, off-set marking will be permitted, provided, however, that exact off-set courses and distances are shown on the subdivision plat. A permanent bench mark shall be accessibly placed, the elevation of which shall be based on the City of St. Louis directrix, and accurately noted on the subdivision plat.

(2) Street Improvements: All streets shall be graded and the roadway improved by surfacing. Roadway surfacing shall be in accordance with the St.

Louis County standard specifications. The Zoning Enforcement Officer shall approve subdivisions with lots of 100 foot frontage when the developer installs paving with a width of 20 feet including a 16 foot bituminous macadam pavement with 2 foot concrete gutters on each side of the 16 foot bituminous macadam pavement, but sodded gutters shall not be considered after August 19, 1949 because of absence of specifications for said sodded gutters. All grading and surfacing shall be done under supervision of the County Highway Engineer and shall be subject to approval. The treatment of the intersection of any new street with a State highway shall be approved by the Division Highway Engineer.

(3) Sidewalks: (a) Sidewalks shall be required along both sides of all streets including major highways, collector streets and minor streets located in all residential zoning districts regardless of lot size, except that sidewalks shall not be required along controlled access highways. The requirements for sidewalks as herein provided may be waived by the Planning Commission on petition of the subdivider where not deemed essential for the public safety by the Planning Commission. (b) Sidewalks shall be constructed in accordance with the St. Louis County Standard Specifications. (O. No. 3419—Adopted 11/5/64)

(4) Water Lines: (a) Where an approved public water supply is reasonably accessible or procurable, the subdivider shall connect with such water supply and make it available for each lot within the subdivided area. Fire hydrants shall also be installed by the subdivider in accordance with the requirements of the Fire Underwriters when the subdivision lies in an area that is served by an established fire department. (b) Pending availability of a public water

supply, the subdivider shall construct wells or a private water supply system in such a manner that an adequate supply of potable water will be available to every lot within the subdivision. The information furnished and the approval of same shall comply with the requirements of the State Board of Health. The water supply system shall be constructed under supervision of the County Health Department and the plat shall not be recorded until the regulations of the State Board of Health are complied with.

(5) Sewers: (a) Where a public sanitary sewer is reasonably accessible, the subdivider shall connect with such sanitary sewer and provide adequate sewer lines accessible to each lot. Sewer connections and subdivision sewer systems shall comply with the regulations of the State Board of Health, and shall be constructed under the supervision of the County Health Department and shall be approved by said Department. (b) Where a public sanitary sewer is not reasonably accessible, but where plans for installation of sanitary sewers in the vicinity of the subdivision have been prepared and approved by the State Board of Health, the subdivider shall install sewers in conformity with such plans, although a connection to an existing main may not be immediately practicable. In such cases and until such connection is made with the sewer system of the district the use of a sewage treatment plant will be permitted, provided such disposal facilities are constructed in accordance with the regulations and requirements of the State Board of Health; constructed under the supervision of the County Health Department and approved by said Department. (c) Where no sewers are accessible and no plans for same have been prepared, the subdivider shall either install sewer lines and a disposal system in accordance with the require-

ments of the preceding paragraph, or if the subdivided lots have a minimum width of one hundred feet and contain an average area of twenty thousand square feet or more he may install individual sewage disposal devices for each lot, but all such individual disposal sewage systems shall be erected in accordance with the regulations and requirements of the State Board of Health, and under the supervision of and approved by the County Health Department and the County Board of Plumbing Supervisors. (d) Adequate provision shall be made for the disposal of storm water subject to the approval of the Commission.

(6) The subdivider should plant trees on all streets in new residential subdivisions that are not located in wooded areas. Before the trees are planted, the subdivider should submit a plan of such planting to the Commission for its study and recommendation, to prevent the planting of certain species that would become nuisances because of insects or disease or because of their roots unduly interfering with sewer mains or other underground utilities.

(7) Street signs bearing the name of the street as designated on the final plat shall be placed at all street intersections. The location and installation of such signs shall be done under the supervision of the County Highway Engineer. The size, height, and type of sign shall be in accordance with the specifications of the County Highway Engineer. (A. O. No. 2627)

1005.190 Inspection and Permits.—1. Periodical inspections by the Planning Commission staff shall be made of the subdivision areas during the planning stages and as construction progresses. The Highway Division of St. Louis County shall inspect all streets and improvements within the street right-of-way and all storm sewers outside the Metropolitan St. Louis Sewer District during the progress of construction.

In the case of private streets in a subdivision, the Highway Division shall make its inspections as aforesaid, as the official representative of the Planning Commission and shall promptly report all defects and substandard work or materials to the Commission. A registered professional engineer shall prepare specifications for each subdivision and the improvements therein, in accordance with the requirements of St. Louis County.

2. No land shall be subdivided or re-subdivided by plat or deed without securing a subdivision permit from the Planning Commission. The fees for subdivision permits shall be as follows:

1 to 3 parcels, tracts or lots (Total area of original tract as of January 19, 1943, 3 acres or less in area) --	Exempt from fee.
1 to 3 parcels, tracts or lots (which are further subdivision of original tract with a total area as of January 19, 1943, of more than 3 acres) -----	\$1.00 per lot.
4 to 10 parcels, tracts or lots -----	\$10.00.
10 to 20 parcels, tracts or lots -----	\$10.00 plus 1.00 per lot.
Over 20 parcels, tracts or lots -----	\$25.00 plus 1.00 per lot.

No construction shall commence without first obtaining a subdivision construction permit from the Planning Commission and without first giving 48 hours notice of the work proposed to be done. The cost of such permit shall be 1% of the estimated cost of such improvements, including paving, and storm sewers and sanitary sewers and sewage disposal plants outside of the Metropolitan St. Louis Sewer District, and such other improvements as may be provided or required, and if the persons applying for such construction permits have paid the subdivision permit fees as above required the amount thereof shall be credited on the cost of the construction permit. Subdivision fees and construction fees hereunder shall be

accounted for by the Planning Commission at the end of each month.

3. The Planning Commission shall also collect at the time that the construction fees are paid, inspection fees for the account of the Highway Division at the rate of \$4.00 per hour, or \$32.00 per day, based upon the Highway Engineer's estimate of time required to inspect storm sewers and other drainage structures outside of the Metropolitan St. Louis Sewer District, and the streets, public or private, including paving. The Highway Division shall be entitled to full compensation for the time consumed in making such inspections. If the estimated fee is inadequate, the necessary additional fees shall be collected by the Planning Commission upon notice from the Highway Division, and if the estimated fee is in excess of the amount actually expended, the balance shall be refunded by the Highway Division. Claims for such refunds shall be made to the Highway Division and shall be paid when audited and approved by the Highway Engineer.

4. In addition to all fees provided for herein, the persons developing the subdivision shall pay for and arrange for inspections by the Plumbing Department and Health Department as may be required by other ordinances and regulations of St. Louis County.

5. The Planning Commission shall at the end of each month account for the inspection fees collected for the account of the Highway Division and shall pay the same into the Road and Bridge Fund of St. Louis County. (A. O. No. 3057)

1005.200 Variations and Exceptions.—Whenever the tract to be subdivided is of such unusual size or shape or is surrounded by such development or unusual conditions that the strict application of the

requirements contained in these Regulations would result in real difficulties and substantial hardships or injustices, the Commission may vary or modify such requirements, so that the subdivider is allowed to develop his property in a reasonable manner, but so, at the same time, the public welfare and interest of the County are protected and the general intent and spirit of these Regulations are preserved.

1005.210 Administration and Amendment.—The Commission may, from time to time, adopt, amend and publish rules and instructions for the administration of these Regulations to the end that the public be informed and that approval of plats be expedited. These regulations may be changed or amended by the Commission after public hearing, due notice of which shall be given as required by law.