BENIGN QUOTAS: A PLAN FOR INTEGRATED PRIVATE HOUSING*

PROGRESS Development Corporation was organized to construct and sell racially integrated single occupancy housing in Deerfield, Illinois, an all white upper middleclass suburb of Chicago.[1] In April, 1959, and at subsequent dates, Progress acquired twenty-two acres of land on which it intended to erect fifty-one homes.[2] Because Negroes comprised approximately twenty per cent of the population in the greater Chicago area, the developer decided to sell from ten to twelve homes to Negroes.[3] In order to maintain the initial Negro-white ratio, Progress planned to request each purchaser to execute a resale agreement giving it the right to select subsequent purchasers.[4] The developer contemplated that these agreements would enable it to ensure that each parcel of property would remain occupied by a person of the same race as the original owner.[5]

In November of the same year, after Progress had partially constructed two model homes, it revealed its intention to sell to Negroes.[6] Strong objections arose in the community, resulting in the formation of an active resident opposition group.[7] A bond issue to raise funds for the purchase and construc-

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*Progress Dev. Corp. v. Mitchell, No. 59 C 2050, N.D. Ill., March 4, 1960.

1. Progress Development Corporation is a wholly owned subsidiary of Modern Community Developers, Inc. of Princeton, New Jersey. The latter is headed by Morris Milgram whose organization had previously constructed private integrated housing in New Jersey and Pennsylvania. See Dykeman & Stokely, *"The South" in the North*, N.Y. Times, April 17, 1960, § 6, p. 8, 83-86; Time, Dec. 7, 1959, p. 23; National Committee Against Discrimination in Housing, Trends in Housing, Vol. III, No. 6, Nov.-Dec. 1959, pp. 4-5; Progress Dev. Corp. v. Mitchell, No. 59 C 2050, N.D. Ill., March 4, 1960 [hereinafter cited as Progress opinion]. In July, 1960, the case was pending appeal to the 7th Circuit (Civ. No. 12976).

2. Progress opinion at 9-10.

3. *Id.* at 52.

4. *Id.* at 53. *But see* Brief for Appellant, p. 41, Progress Dev. Corp. v. Mitchell, No. 12976, 7th Cir., brief filed, June, 1960 (claiming that the use of such agreements was only "under consideration").

A similar method for maintaining the initial ratio was previously employed by Milgram in his Pennsylvania development, Concord Park:

> Concord Park has attempted to maintain the interracial character of the development through a technique which has been used by other developers to *prevent* their housing from becoming interracial. At the time of settlement, both Negro and white buyers are presented with a resale agreement in which the buyer agrees to give the builder first option to buy back his house in the event he wishes to resell. Signing of the agreement is not mandatory on the purchaser, but most sign.

GRIER & GRIER, PRIVATELY DEVELOPED INTERRACIAL HOUSING 208 (1960).

5. Progress opinion at 53-54.

6. *Id.* at 11.

7. *Id.* at 26.

tion of six new park sites, including Progress's land, was overwhelmingly approved in a December referendum.[8] Deerfield voters had previously defeated an August parks referendum in which the purchase of part of the developer's land had apparently been proposed.[9] Three days after the December referendum, the Deerfield Park District instituted proceedings to condemn Progress's land.[10] Progress thereupon brought suit under the Federal Civil Rights Act[11] seeking to enjoin the Park District from proceeding with the condemnation plan, which was alleged to be an abuse of the power of eminent domain.[12] Further allegations charged a conspiracy to deprive plaintiffs of their right to hold, sell, and convey real property.[13] The federal district court dismissed the complaint, finding that Progress had failed to prove bias or discrimination by the defendants in taking the action complained of, and that the December referendum had merely carried into effect a general plan for park acquisition made six months before Progress had disclosed its intentions.[14]

More important was the court's comment that under *Shelley v. Kraemer* the resale agreements which Progress planned to elicit from each purchaser would be unenforceable.[15] Later in the opinion, the court held that plaintiff's resale agreements were not only unenforceable but also that the act of making them was unlawful,[16] and that plaintiffs were therefore barred under the "clean hands" doctrine from claiming equitable relief.[17] The finding of unlawfulness was based upon the Supreme Court's decisions in *Hughes v. Superior Court*[18] and *Shelley v. Kraemer*.[19] Neither decision supports this finding. In *Hughes*, the Supreme Court held only that a California policy, enjoining picketing which seeks to bring about a racial quota hiring system, did not contravene federal guarantees of free speech; the Court did not hold quota systems unlawful as a matter of federal law.[20] And, as the district court

8. *Id.* at 31. On this occasion, in a record turnout of voters, the village decided 2,635 to 1,207 in favor of acquiring the land for parks. Dykeman & Stokely, *supra* note 1, at 84-85.

9. See Progress opinion at 24, 29. The court merely stated that all Progress's property had been incorporated in a prior park plan, and that one tract had not been included in the August referendum.

10. *Id.* at 31.

11. 14 Stat. 27 (1866), as amended, 16 Stat. 144 (1870), 42 U.S.C. §§ 1982, 1988 (1958); 16 Stat. 144 (1870), 42 U.S.C. § 1981 (1958); 17 Stat. 13 (1871), 42 U.S.C. §§ 1983, 1985 (1958).

12. Progress opinion at 15.

13. *Id.* at 18.

14. *Id.* at 29-30, 69.

15. *Id.* at 19-20.

16. *Id.* at 54, 71.

17. *Id.* at 71.

18. 339 U.S. 460 (1950).

19. 334 U.S. 1 (1948).

20. *Id.* at 466-67.

seemed to recognize earlier in its opinion,[21] the unconstitutional conduct found in *Shelley* was of necessity state action, the judicial enforcement of a discriminatory contract.[22] Progress, acting solely as a private citizen, was in this instance incapable of state action.[23] Furthermore, the district court misapplied the "clean hands" doctrine, for that doctrine is applicable only where the plaintiff's inequitable conduct affects the immediate defendant.[24]

Nevertheless, *Progress* is the first case in the private housing field to discuss the enforceability of a "controlled occupancy pattern"—commonly known as a "benign quota."[25] Despite its erroneous finding of unlawful conduct, the court's basic premise, that benign quota resale agreements are judicially unenforceable, might, if accepted, substantially hinder the development of private integrated housing.

Although presently comprising only a minute portion of the total complex of housing in the United States, over fifty privately developed interracial projects have been completed, varying in size from under 25 to over 300 units.[26] Experience with public interracial housing has indicated that "it is difficult to maintain a racially mixed pattern of living once the proportion of nonwhite tenants exceeds 40 to 60 per cent."[27] Thus, without enforceable quota controls an initially integrated development may eventually come to be occupied exclusively by members of the minority group. The failure of integrated housing might well impede the progress of integration in other areas of community activity. This relationship is most apparent where public school districts conform to residential patterns, but its effects are also felt elsewhere:

> In all regions of the nation, restriction of colored citizens to certain areas creates de facto separate neighborhoods and public facilities—including

21. Earlier, the court had stated that Progress was free to enter into restrictive agreements, commenting only that they could not be enforced. Progress opinion at 19-20.

22. 334 U.S. at 14-18.

23. Private groups may be held responsible for state action when performing activities in place of the state, see Smith v. Allwright, 321 U.S. 649 (1944) (Texas Democratic Primary), or when acting with governmental powers, *cf.* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by legislatures").

24. 2 POMEROY, EQUITY JURISPRUDENCE § 399, at 97 (5th ed. 1941).

25. A 'benign quota' is a system under which a fixed ratio is established in terms of race or ethnic origin for the occupancy of a housing development, *for the purpose* of achieving and maintaining integration.

Hartman & Leskes, Progress Development Corp. v. Mitchell (Joint Memorandum of The American Jewish Committee & The Anti-Defamation League) March 29, 1960, p. 3.

26. GRIER & GRIER, *op. cit. supra* note 4, at 12.

27. Weaver, *Integration in Public and Private Housing*, Annals, March, 1956, p. 86; see ABRAMS, FORBIDDEN NEIGHBORS 311 (1955). *But see* GRIER & GRIER, *op. cit. supra* note 4, at 205-08 (tending to dispute this conclusion). Grier's study, however, unlike those of Weaver and Abrams, deals exclusively with private integrated housing, the vast majority of which has been constructed since World War II. *Id.* at 10. Thus, even Grier acknowledges that "it is not yet possible to make firm generalizations on the long-run racial stability of interracial developments." *Id.* at 205.

> schools— thereby delaying participation and acceptance of nonwhites in the educational, political, economic, and social aspects of American life.[28]

Because of its far reaching effects, therefore, the *Progress* court's conclusion that controlled occupancy plans cannot be judicially enforced merits further examination. Progress's motives ostensibly distinguish their Deerfield plan from the restrictive covenants denied enforcement in *Shelley v. Kraemer*, and on that basis a variety of arguments may be advanced in opposition to the position taken by the district court.

Two distinctions between the *Shelley* and *Progress* cases are immediately apparent. *Shelley* involved an agreement signed by 30 of 39 property owners, which provided that *no non-Caucasions* should occupy any of the property so covered for a period of 50 years.[29] Notwithstanding this covenant, a Negro family obtained a warranty deed to a parcel of property and other parties to the covenant brought suit to divest them of title. The United States Supreme Court held that judicial enforcement of such a covenant would be "state action" in violation of the equal protection clause of the fourteenth amendment.[30] In contrast, a Progress-type resale agreement would probably make no mention of race, but would merely give the developer the right to choose future purchasers.[31] Thus, an evidentiary problem not present in *Shelley* is raised. The *Shelley* covenant showed exclusion because of race on its face; in a benign quota case, exclusion on this basis could not be shown without independent evidence. Such evidence might be especially difficult to obtain because of the biracial character of the development. And unless it can be shown that the developer is seeking to enforce the resale agreement for the purpose of racial exclusion, the *Shelley* doctrine will not apply.[32] The evidentiary problem may not be significant, however, since the developer of private integrated housing is unlikely to conceal the racial basis for enforcing his resale agreements.[33] Even if the developer's motives are not made public, evidence of

28. Weaver, *supra* note 27; see C. JOHNSON, PATTERNS OF NEGRO SEGREGATION 8 (1943); TENENBAUM, WHY MEN HATE 333 (1947):

> Anyone who has investigated the problem of group tensions has always ended up with the belief that nothing radical can be achieved until walls of segregated, hemmed-in, ghetto living have been destroyed.

29. 334 U.S. 1, 4-5 (1948).

30. *Id.* at 20.

31. Progress opinion at 53-54. To enforce the quota system, the developer need only have the power of selecting subsequent purchasers.

32. The *Shelley* holding was directed solely at "racially restrictive" covenants.

> It should be observed that these covenants do not seek to proscribe any particular use of the affected properties . . . . The excluded class is defined wholly in terms of race or color; "simply that and nothing more."

334 U.S. at 10.

33. Progress's parent corporation does not attempt to hide the fact that they feel a definite need for *racial* controls. See Wallace, The Techniques of Selling Integrated Housing, p. 2, reprinted from Journal of Intergroup Relations, July, 1958, by Modern Community Developers, Inc.

continued adherence to a quota system might be sufficient to establish a pattern of systematic exclusion.[34]

The benign motives of interracial developers may furnish a second and more important ground for distinguishing *Shelley*. The restrictive covenant in *Shelley* was designed to exclude Negroes,[35] whereas benign quota resale agreements are designed to maintain integration.[36] The builder seeks to prevent the development from becoming all-Negro by limiting, not excluding, members of *both* races. A court, however, may conclude that the developer's overall motives are not determinative. A party prevented from purchasing a home because the quota for his race has been filled may reply that, despite the developers good motives, he as an individual has been excluded solely because of his race, and that his right to equal protection of the laws, a personal right,[37] has therefore been violated. The fact that whites may also be excluded is irrelevant. As stated in *Shelley*, "the equal protection of the law which the Fourteenth Amendment affords is not achieved through indiscriminate imposition of inequalities."[38]

Developers might rely on *Barrows v. Jackson*,[39] however, to argue that a court should weigh the prospective interests of other members of the race against the personal rights of the excluded individual. In *Barrows*, one covenantor sought damages from another for breach of a restrictive covenant. If damages had been allowed, no one would have been denied the right to purchase a home because of his race, since the defendant had alrady conveyed his property to a Negro.[40] But according to the majority opinion:

> If a state court awards damages for breach of a restrictive covenant, a prospective seller of restricted land will either refuse to sell to non-Caucasians or else will require non-Caucasians to pay a higher price to meet the damages which the seller may incur. Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians.[41]

By considering the possible effects on persons not parties to the immediate suit, the Court, in effect, allowed one person to plead the civil rights of an unidentified group. If this was possible, the developer might argue, why

34. See, *e.g.*, Cassell v. Texas, 339 U.S. 282 (1950) (Negroes called to grand jury duty never exceeded ratio of Negroes to whites); *cf.* Norris v. Alabama, 294 U.S. 587 (1935).

35. 334 U.S. 1, 4-5 (1948).

36. See Brief for Appellant, pp. 40-41, Progress Dev. Corp. v. Mitchell, No. 12976, 7th Cir., brief filed, June, 1960.

37. See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Oyama v. California, 332 U.S. 633, 662-63 (1948) (concurring opinion); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. Ry. Co., 235 U.S. 151, 161-62 (1914).

38. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

39. 346 U.S. 249 (1953).

40. *Id.* at 252.

41. *Id.* at 254.

should not a court allow him to plead the interests of those persons who would benefit from the integrated housing afforded by his controlled occupancy plan? *Barrows*, however, makes clear that the individual cannot request state action which "results in the denial of equal protection of the laws to other individuals."[42] Consideration of nonlitigants' rights in *Barrows* did not offend this principle, but rather broadened the scope of the constitutional right protected.[43] In contrast, a court faced with the prospect of enforcing a resale agreement could give weight to the interests of the general group only at the expense of the particular individual being excluded.

The difficulty in securing enforcement of resale agreements is further demonstrated by the judicial reaction to systems of planned integration which have been implemented by state executive departments or legislatures. If the right to equal protection of the laws is violated by state action of this nature, it may also be violated if such action is taken by the judiciary.[44] *Banks v. Housing Authority*,[45] decided by a California district court of appeals, presented the question in its clearest form: "Does the distribution of public housing on the basis of the proportionate needs of racial groups . . . satisfy the requirement [of the fourteenth amendment] that individuals are entitled to equal protection of the law?"[46] The Public Housing Authority of San Francisco had established an administrative policy of apportioning public dwelling units to racial groups on a quota basis. The quota fixed for each project was designed to "maintain and preserve the same racial composition which exists in the neighborhood where a project is located."[47] This plan was unacceptable to the California court which held that the Housing Authority could not "observe, encourage, and foster a neighborhood racial pattern when . . . such a course of conduct results in unequal treatment of persons otherwise eligible to receive and obtain . . . housing accommodations."[48] Moreover, the court observed, the Authority's policy emphasized existing patterns of neighborhood segregation, patterns which might have been initiated through the same type of re-

42. *Id.* at 260, quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

43. Other cases which allow pleading of nonlitigants' rights also do so only to broaden the right protected. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Truax v. Raich, 239 U.S. 33 (1915); Quong Ham Wah Co. v. Industrial Acc. Comm'n, 184 Cal. 26, 192 Pac. 1021 (1920); *cf.* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Columbia Broadcasting Sys. v. United States, 316 U.S. 407 (1942).

44. See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1, 14 (1948); Mooney v. Holohan, 294 U.S. 103, 113 (1935); Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930); Prudential Ins. Co. v. Cheek, 259 U.S. 530, 548 (1922); Neal v. Delaware, 103 U.S. 370, 397 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1879).

45. 120 Cal. App. 2d 1, 260 P.2d 668 (Dist. Ct. App. 1953), *cert. denied*, 347 U.S. 974 (1954). It has been speculated that because the case was before the Supreme Court at the same time as Brown v. Board of Education, 347 U.S. 483 (1954), "consideration of the same issue in housing was not necessary." Note, 31 IND. L.J. 501, 505 (1956).

46. 120 Cal. App. 2d at 8-9, 260 P.2d at 673.

47. *Id.* at 5, 260 P.2d at 671.

48. *Id.* at 18, 260 P.2d at 678.

strictive covenants which *Shelley* held unenforceable.[49] The California court's observations are equally applicable to Progress's Deerfield plan, for the Deerfield plan perpetuates another kind of racial inequality. Chicago area Negroes, after years of limited opportunity to purchase adequate housing,[50] may require a greater percentage of new housing than their numbers in the community would indicate. By placing an arbitrary limit on the number of houses available to Negroes, the Deerfield plan perpetuates the existing discriminatory pattern. Thus the *Banks* opinion not only evidences disapproval of housing quotas, but also points out additional reasons for rejecting an apparently "benign" quota.

State action analogous to the *Banks* quota system occurred when, following the *School Segregation cases*,[51] the New York City Board of Education announced a plan to attain "racially integrated schools."[52] Although school segregation is illegal in New York,[53] residential patterns and the use of geographically defined school districts have caused a concentration of ethnic groups in certain schools. To alter this pattern, New York planned, first, to rezone these districts and, second, to consider integration as a relevant factor in selecting schools for those children whose assignment could more easily be changed because, in any case, they had to be transported to school.[54] In effect, the New York City Board of Education had interpreted the *Brown* decisions as approving a planned integrated school system. If the Supreme Court has ordered planned integration in schooling, Progress might argue, how can it be unconstitutional for a court to enforce a system of planned integration in housing?[55] Several federal courts, however, dispute this view of *Brown*.[56] Their decisions interpret that case as holding, not that the states must affirmatively integrate the schools, but that they must refrain from purposely segregating them.

> The Constitution as construed in the School Segregation Cases . . . forbids any state action requiring segregation of children in public schools solely

49. *Id.* at 17, 260 P.2d at 678.

50. See generally Frey, *"Freedom of Residence" in Illinois*, 41 CHI. BAR RECORD 9 (1959).

51. Brown v. Board of Education, 347 U.S. 483 (1954); Brown v. Board of Education, 349 U.S. 294 (1955) (second *Brown* decision).

52. See 2 RACE REL. L. REP. 231, 507, 1037 (1957); N.Y. Times, July 27, 1957, p. 1, col. 5.

53. N.Y. EDUC. LAWS § 3201.

54. See note 52 *supra*.

55. See Note, *Racial Discrimination in Housing*, 107 U. PA. L. REV. 515, 550 (1959) (discussing the use of quota systems in public housing).

56. Jones v. Alexandria School Bd., 28 U.S.L. WEEK 2554 (4th Cir. 1960); Shuttlesworth v. Birmingham Bd. of Education, 162 F. Supp. 372 (N.D. Ala.), *aff'd per curiam*, 358 U.S. 101 (1958); Evans v. Buchanan, 152 F. Supp. 886 (D. Del. 1957), *modified*, 256 F.2d 688 (3d Cir.), *cert. denied*, 358 U.S. 836 (1958); Avery v. Wichita Falls Independent School Dist., 241 F.2d 230 (5th Cir.), *cert. denied*, 353 U.S. 938 (1957); Briggs v. Elliott, 132 F. Supp. 776 (E.D.S.C. 1955). See also Note, 107 U. PA. L. REV. 515, 549 (1959).

> on account of race; it does not, however, require actual integration of the races.[57]

Active integration is required only where a state has deliberately perpetuated a segregated school system.[58] In the light of these holdings, the untested New York plan, later modified for other reasons,[59] was based upon an erroneous interpretation of the *Brown* decisions, and those cases cannot be relied upon to show approval of state attempts affirmatively to integrate the races.

Thus, the *Progress* court's disapproval of controlled occupancy plans seems proper under present law. Despite the intent to maintain integrated housing, such plans necessarily involve exclusion on the basis of race, and are therefore unenforceable under *Shelley*. The Supreme Court has repeatedly held that any affirmative governmental action—whether through the legislative, executive, or judicial branch—which recognizes racial differences is unconstitutional.[60] Only in the most exceptional circumstances has the Constitution not been "color blind."[61] Discrimination on the basis of ancestry was allowed in the *Japanese Exclusion Cases*,[62] but only because of the immediate danger of enemy invasion. In violating its own rule, the Court was careful to point out that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[63] The underlying "justification" for benign quotas does not meet the extreme standards of necessity set in the *Exclusion Cases*.

The question remains whether to create a new exception to existing law which would subordinate individual rights to an overall plan for maintaining integration in housing. Such a step, however, assumes the efficacy of a racial quota system. The *Banks* opinion, to the contrary, clearly demonstrates that such a system may perpetuate pre-existing patterns of racial inequality. Furthermore, as the *Progress* court noted,

> if a population quota of 80 to 20 founded upon unrecorded restrictive agreements is constitutional, then a quota of 50 to 50 or 99 to 1 or even 100 to 0 would be constitutional and *Shelley v. Kraemer* . . . would be circumvented.[64]

In order to prevent this abuse of the benign quota, a court would be forced to determine the reasonableness of the percentage allocation in each case.

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57. Avery v. Wichita Falls Independent School Dist., 241 F.2d 230, 233 (5th Cir. 1957).

58. Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C., 1955).

59. A new "open enrollment" policy permits students in Negro and Puerto Rican areas of the city to request transfers to "designated schools in predominantly white neighborhoods." N.Y. Times, Sept. 22, 1960, p. 29, col. 1.

60. See note 44 *supra*.

61. See Oyama v. California, 332 U.S. 633, 646 (1948).

62. Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

63. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

64. Progress opinion at 55.

Since reasonableness is a matter of opinion, a segregation-minded court might find "reasonable" a quota which served to propagate its particular social bias. Moreover, such determinations could not be reviewed unless the higher court adopted a general practice of reevaluating the discretionary conclusions of lower state and federal judges. Because the validity of the quota system is questionable, therefore, the incursion on fundamental rights which its acceptance would entail should not be countenanced.

The fundamental error of a quota system is its assumption that Negroes are different from other citizens and should be treated differently. In this respect it is no different than a system of planned segregation. For although a benign quota plan "may appear attractive to Negroes at the particular moment in a particular place, . . . it would constitute a strait jacket. It is but a mess of pottage offered in exchange for a birthright of equality."[65]

65. *Ibid.*