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CONSTITUTIONALITY OF MUNICIPAL ZONING
AND
SEGREGATION ORDINANCES

GEORGE D. HOTT*

I

In the complex urban civilization of the United States of the twentieth century, one of the most insistent and vital problems challenging American municipalities is that of municipal zoning. At an earlier time in the history of our country, little thought was devoted to city planning and zoning, for municipalities were relatively few and of small size, and the vast bulk of the American people lived a simple rural life. It was an age believing in the maximum of individual liberty of conduct and the minimum of governmental control. Regulation was regarded as savoring of tyranny; and the doctrine of laissez-faire was extolled. But all this has changed, with the amazing urbanization of American life during the last few decades; and state supervision, in response to the popular demand, is being extended further and further into all fields of social, industrial, and political activity. The building of factories and other industrial establishments, the construction of apartment houses, the herding of humanity into crowded tenements, and the development of means of rapid transit by rail and by motor vehicle have resulted in an ever increasing need of city planning and zoning, primarily to "prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations,"1 but incidentally to enhance the aesthetic attractiveness of our urban communities.

Now, a question which immediately arises is this: How far can a municipality go in a program of zoning regula-

* A.M. 1924, LL.B., 1927, West Virginia University.
1 City of Aurora v. Burns, 819 Ill. 84, 149 N. E. 784 (1925).
CONSTITUTIONALITY OF MUNICIPAL ZONING

utions which tend, directly or indirectly, to promote municipal aesthetics. "Particularly to what extent may a city, under its so-called police power, legally beautify its buildings, streets and open spaces by zoning ordinances or otherwise? If a city's charter or a statute purports to authorize such municipal beautification, may the city legally divide its territory into 'residence districts,' 'business districts' and 'unrestricted districts,' and prohibit the building of business houses in residence districts, or unsightly houses, or unsightly advertising signs in any district? To illustrate, could a city prohibit the building of a public garage, or a gasoline filling station, or an apartment house in its exclusively residential zone?"

Aside from the possible use of the power of eminent domain, the only practical means by which a city may effectuate its aesthetic purposes would be by the exercise of the police power. But does the scope of the police power cover purely aesthetic considerations? It is generally recognized that the police power extends to all matters affecting the peace, order, health, morals, convenience, safety, and general welfare of the community. It is not so generally recognized that aesthetics fall within the police power; in fact, until recent years, the universally accepted belief has been that matters pertaining to city beautification are not properly subject to the exercise of the police power, and that is the view still held by many courts.

The West Virginia Supreme Court of Appeals has on more than one occasion denied the legality of zoning ordinances which have attempted to regulate the height of buildings, or to establish and enforce street building lines, when the object sought to be accomplished was purely of an aesthetic character. In Fruth v. Board of Affairs, the court decided that a municipal corporation could not establish a building line and prevent the property owners from building nearer to the street than that line,

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2 Lewis, EMINENT DOMAIN, 3rd ed., 271 (1909); Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77 (1899), sustaining an act of the Legislature of Massachusetts which limited the height of buildings around Copley Square in Boston and about the State House and provided compensation to the property owners affected.
4 Fruth v. Board of Affairs, 76 W. Va. 465, 84 S. E. 106, L. R. A. 1915C 981 (1915); McQuillan, MIN. CORPS. 889 (1915).
5 Fruth v. Board of Affairs, supra, n. 4.
because the purpose of the municipal regulation was purely aesthetic. And two years thereafter, in *State ex rel. Sale v. Stahlman*[^6], in which case a municipality, under an express grant of police power, attempted to prevent a property owner from erecting a one-story structure on a lot situated between comparatively high buildings, the Supreme Court held that the action of the city was not a permissible exercise of the police power, because the purpose of the municipal regulation was aesthetic and, such being the case, was not within the police power. During the ten years intervening since the Stahlman Case, there has been no further decision in this jurisdiction squarely in point, but the court, by way of dictum, in a case[^7] decided as recently as 1923, indicated that they would adhere to the view taken in their previous decisions. The basis of our court's ruling, in these cases, has been that "an aesthetic purpose, apparently because everybody doesn't appreciate an aesthetic purpose, is not protected under the police power, and therefore to limit the use of one's property to aesthetic uses would be to deprive the owner of property without due process of law."[^8]

However, in another rather recent case of a somewhat analogous character, the West Virginia Court seemed to be more liberally disposed toward aesthetic purposes. In that case, the property owners on a certain street in Huntington brought suit to restrain the city from repaving the street and charging the costs to the abutting owners, and alleged in their bill that the existing paving met the public need as well as the paving which the municipality was planning to lay, and that the proposed repaving was solely for the purpose of beautifying the city. The court, in sustaining a demurrer to the bill, held that these allegations were not sufficient to warrant an injunction restraining the proper municipal authorities from proceeding with the repaving.[^9] Perhaps this case may be indicative of a tendency on the part of the court to break away from the

[^6]: 81 W. Va. 335, 94 S. E. 497 (1917).
[^8]: Supra, n. 2.
strict construction put upon the scope of the police power in previous decisions.

But "law is a practical matter," and many courts are coming to recognize the practical need, under the conditions of our highly urbanized civilization of today, of zoning our cities, with the purpose of making them more healthful, quiet, attractive, and beautiful, and safer and better places in which to live. Some courts, which formerly denied the exercise of the police power as a means of fostering the aesthetic even incidentally, have come to grasp the significance of the conception of the law as a growing thing, and that with changing conditions there must be a changed conception in regard to the scope of the police power, a conception which keeps abreast of present needs and endeavors to secure the maximum of social and public interests, including perhaps a due regard for the aesthetic sensibilities of the community; and, in consequence, these courts have arrived at conclusions which are substantially contra in result to the West Virginia decisions which have been reviewed supra.

The California Court has taken the position that regulations governing municipal development under a comprehensive zoning plan tend to promote the general welfare of the community affected, and that the adoption and enforcement of such a plan, when fairly conceived and impartially applied, is within the scope of the city's police power; and that the establishment, as part of such comprehensive zoning program, of strictly private residential areas, from which are absolutely excluded tenements, apartments, general public enterprises, and similar structures, is a legitimate exercise of the police power, the creation of such strictly private residential districts being for the general welfare of the community, because it tends to "promote and perpetuate the American home."  

Oregon, likewise, has taken a broad view of the exercise of the police power, in sustaining local zoning ordinances enacted pursuant to legislative authority, governing the use of property for business purposes in a densely popu-

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lated city, and in holding that they do not violate the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution, unless they are clearly unreasonable and arbitrary and do not operate uniformly on all similarly situated in a particular district not arbitrarily established. In this case, the ordinance upheld was one prohibiting the erection in certain districts of creamery buildings. Here, it was judicially recognized that creameries, with their boilers, milk cans, delivery trucks, and the like, are subject to different regulation from that appropriate to private dwellings, and that an ordinance, forbidding their erection in certain localities, based on fair classification, applying to all alike within the entire city and depriving property owners of no part of their property interests, is valid.\footnote{Kroner v. City of Portland, 249 Pac. 536 (Ore. 1925).}

In a comparatively recent leading case on zoning,\footnote{In re Opinion of the Justices, 234 Mass. 597, 127 N. E. 525 (1920).} the Massachusetts Court, cited with approval an earlier case which stated the law on the point to be that: "The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely aesthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary."\footnote{Welch v. Swasey, 193 Mass. 364, 79 N. E. 745 (1907).} Another recent Massachusetts case has held that a zoning by-law, prohibiting the erection of business buildings within specified districts, but exempting from its operation existing business structures, and permitting additions, alterations, or enlargements upon cause shown, does not deny to one desiring to construct a new building the equal protection of the laws.\footnote{Spector v. Building Inspector of Milton, 260 Mass. 63, 145 N. E. 265 (1924).}

In the case of Lincoln Trust Company v. Williams Building Corporation,\footnote{263 N. Y. 818, 123 N. E. 269 (1920).} the New York Court of Appeals sustained as a proper exercise of the police power a resolution of the board of estimate and apportionment of New York City which divided the real estate into districts and regulated the size and height of buildings and the location of trades and industries.
CONSTITUTIONALITY OF MUNICIPAL ZONING

A liberal tendency has likewise been revealed by comparatively recent decisions in several other states, including Illinois, Texas and Louisiana. In the Illinois case of City of Aurora v. Burns, a state statute and the zoning ordinance of the City of Aurora enacted pursuant thereto were held not to deny the constitutional guarantees of due process and the equal protection of the law. In Texas, the court passed upon an ordinance enacted in San Antonio prohibiting the establishment of private meat markets within six blocks of the municipal market house, and sustained the ordinance as being a valid exercise of the police power under the city charter, which authorized the council to regulate meat markets and prevent the sale of meats in certain locations, and as not being in contravention of the Fifth and Fourteenth Amendments to the Federal Constitution.

State ex rel. Civello v. City of New Orleans was a case in which the relators claimed the right to establish "Piggly-Wiggly" grocery stores in certain locations, in violation of an ordinance which prohibited business establishments in designated residence streets and districts, but the Louisiana Court was of the opinion that such ordinance did not necessarily rest on aesthetic considerations, but might be sustained on grounds of public health, safety, comfort, or general welfare, in view of better police protection, economy in street paving, lessening of fire hazard, etc. In a later case, the same court held that an ordinance, requiring the removal of all oil stations from a certain street, and applying equally to all businesses similarly situated, was not violative of the United States Constitution, or of the Louisiana Constitution, as a denial of due process and the equal protection of the law. And in still a third case, the Louisiana Court has held a zoning ordinance not to deny due process and the equal protection of the law.

A comprehensive zoning ordinance applies to all sections of a municipality and "treats each section according to its

17 Supra, n. 1.
own peculiar needs, present and prospective."\(^{22}\) Under such a system, the land in each district would be benefited, for it would be zoned for its most valuable and appropriate use. Comprehensive zoning should be clearly distinguished from "piecemeal zoning," the latter applying only to a block, or a street, or other limited district. In fact, it has been suggested that it is a rather inaccurate use of words to designate block or piecemeal areas as "zones." While such so-called zoning regulations have in some instances been sustained by the courts, they have not infrequently been adjudged arbitrary and discriminatory and a denial of the equal protection of the laws, and such adverse decisions have been cited by unfriendly critics as proof of the unconstitutionality of any kind of zoning, comprehensive or otherwise. But this objection cannot in fairness be urged against truly comprehensive zoning, because its very comprehensiveness is such that "all the different neighborhoods similarly situated and of like character are treated in like manner."\(^{23}\)

"Though zoning is a recent movement it is no longer an experiment. On January 1, 1925, zoning ordinances were in effect in three hundred and twenty municipalities throughout the United States. Living within these zones were more than twenty-four million citizens \(^{* * *}\). To be constitutional there should be a good enabling act for zoning and reasonable regulations in the ordinance, based on the health, safety, morals, or general welfare. A properly framed ordinance, enacted under power delegated by the state should be constitutional \(^{* * * *}\). There seems to be no question as to zoning regulations for height or area if framed with some relation to access of light and air, fire protection or facility for fighting fire. The subject of use is today the only 'zoning battleground in the courts. Even there the courts are upholding zoning for use in nine cases out of ten.' \(^{24}\)

However, there are some courts which still confine the police power within more narrow limits, and, in consequence, arrive at a result which is substantially contra to that reached in the cases reviewed \(supra\). For example,

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\(^{22}\) Swan, "Law of Zoning," SUPPLEMENT TO NATIONAL MUN. REV., 524 (1921).

\(^{23}\) Supra, n. 22.

CONSTITUTIONALITY OF MUNICIPAL ZONING

the Georgia Court has recently held\(^2\) that a statute, authorizing the redistricting and zoning of Atlanta, violated the due process clause, to the extent to which it authorized the prohibition by ordinance of the erection of stores in residential districts, and that an ordinance enacted thereunder was void to such extent. This Georgia decision may be taken as fairly typical of the attitude of the minority of jurisdictions which tend to restrict the scope within which the police power may operate.

If any doubt remains as to the constitutionality of the exercise of the police power by a municipal corporation in effectuating aesthetic ends incidentally, when the primary purpose is to promote the peace, order, health, safety, and general welfare of its inhabitants, that doubt should be removed by the decision of the Supreme Court of the United States in the case of Village of Euclid, Ohio, et al. v. Ambler Realty Company,\(^2\) decided as recently as November, 1926. The village of Euclid, a municipality adjoining and practically a suburb of Cleveland, enacted an ordinance which divided the village into zones and regulated the uses to which the property in each zone might be put, the height of buildings, and the area of lots. The complainant, a realty company, owning land in “use” zones U-2, U-3 and U-6, brought suit to restrain the enforcement of the ordinance, on the ground that it deprived the complainant of liberty and property without due process of law and denied it the equal protection of the law, in derogation of the Fourteenth Amendment to the United States Constitution, and, in addition, violated provisions of the Constitution of Ohio. The District Court of the United States for the Northern District of Ohio held\(^2\) the ordinance unconstitutional and void, and restrained its enforcement. The Village appealed, and the United States Supreme Court, with three justices dissenting, reversed the decree of the District Court. Mr. Justice Sutherland, in delivering the opinion of the court, said, in part:

“There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height

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\(^2\) Smith v. City of Atlanta, 161 Ga. 709, 122 S. E. 69 (1926). In this case, a writ of certiorari was denied, City of Atlanta v. Smith, 46 Sup. Ct. Reptr. 486 (1926).

\(^2\) Ambler Realty Co. v. Village of Euclid, Ohio, 297 Fed. 367 (1924).
of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances * * * * *.

"We find no difficulty in sustaining [such] restrictions * * * * . The serious question in the case arises over the provisions of the ordinance excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken. The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it, and it is very apparent that there is a constantly increasing tendency in the direction of the broader view * * * *.

"As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way * * * * . 28

"These reports [of zoning commissions and experts], which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is

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28 As an instance in this "decided trend" in which a state court has reversed its "former decisions holding the other way," the Supreme Court cited a recent Minnesota case in which the Court of that state frankly stated: "We hold that a fair zoning ordinance, resulting in the exclusion of a four family flat from a designated residential district, is constitutional. This holding is not in harmony with our earlier decision. It is directly opposed to the result reached [in prior cases] * * * * * . So far as in conflict with the view now adopted, they are not to be followed." State ex rel. Beery v. Houghton, Inspector of Buildings, 164 Minn. 146, 204 N. W. 569 (1925).
greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes."

And, in conclusion, the court holds that "the ordinance in its general scope and dominant features, so far as its provisions are here involved, is a valid exercise of authority * * * ."

In this manner the highest court in the land has held that a general zoning ordinance creating a residential district and excluding therefrom apartment houses, business houses, retail stores and shops, etc., is a valid exercise of police power, and does not violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The problem involved in the case is clearly a Federal question, and consequently the decision is authoritative as a point of constitutional law, when the question in the future arises in the state courts, as it probably will in West Virginia, because the West Virginia Revision and Codification Commission has inserted in the proposed revised code a comprehensive municipal planning and zoning law. As it has been shown, the West Virginia cases have looked with disfavor upon any city zoning savoring of an aesthetic character; but it does not appear that there has been a decision squarely on the point, for the past ten years, and it is by no means certain that the strict view of the scope of the proper exercise of the police power, declared in the previous West Virginia decisions would now be followed, especially if the program of city planning and zoning, while incidentally tending to foster the aesthetic in municipal life, is primarily directed to the protection of the public health, safety, order, and general welfare.29

II

Another question, closely related to that of zoning for the purposes discussed supra, has to do with the constitutionality, by ordinance or otherwise, of the segregation of races in municipalities. Until within the last few years, the problem of dealing with a non-assimilable race existing in large numbers in the midst of a more highly developed civilization, was confined almost entirely to the South; but,
due to the pronounced northward migration of the negro, the problem has become national in scope. A considerable number of municipalities have attempted, with varying results, to lessen the difficulties incident to the situation by segregating the races. The objects sought to be attained have been to reduce friction and strife, prevent miscegenation, and protect property values from depreciation. In some instances, property owners have endeavored to effectuate these desires by covenants and conditions in conveyances, restricting the ownership and occupancy of the land affected, or by resort to the injunctive aid of courts of equity; another means employed has been by the enactment of municipal segregation ordinances.

In California, it has been held that a condition subsequent in a deed, that the property conveyed is not to be occupied by a person not of Caucasian birth, is not such a discrimination as is prohibited by the Fourteenth Amendment to the United States Constitution. In the case so holding, the plaintiff was an investment company which owned a tract of land containing one hundred sixty-seven lots, and which was selling the lots, with covenants inserted in the deeds that the grantees should not convey any of the said lots to persons not of the Caucasian race, nor permit their occupancy thereof. Here, the defendant, Gary, had acquired, after several mesne conveyances, one of the investment company's lots; with the intention of occupying it. The court decided that the provision in the deed that the property should not be sold to other than Caucasians was an undue restraint on alienation and invalid under the California alienation statute, but that the restriction upon its occupancy was merely a restraint on the use to be made of it, and therefore valid and not in violation of the equal protection clause, since the inhibition of discrimination in the Fourteenth Amendment is upon the states and does not apply to action by individuals—and the Court cites decisions of the United States Supreme Court to that effect.

More recently the Court of Appeals of the District of Columbia, in an appeal from the Supreme Court of the District, has held that the constitutional right of a negro

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*Los Angeles Inv.-Co. v. Gary, 181 Cal. 660, 186 Pac. 596 (1919).*
CONSTITUTIONALITY OF MUNICIPAL ZONING

343
to acquire, own, or occupy property does not carry with it the constitutional power to compel sale or conveyance to him of any particular private property, and that where the method adopted does not amount to denial of fundamental constitutional rights, the segregation of races, whether by statute or private agreement, is not against public policy. In this case, the plaintiff and twenty-nine others, owners of adjacent property, had covenanted not to convey any of the property, with regard to which the covenants were made, to negroes during a period of twenty-one years; and the complainant's bill was filed to restrain one of his twenty-nine co-covenantors from so conveying, and to restrain a negro defendant from going into the occupancy of the property sought to be conveyed.

In *Spencer Chapel M. E. Church v. Brogan*, white residents in a colored district attempted to enjoin a negro congregation from rebuilding their church on the site of their former church structure, which had been destroyed by fire. It had been an exclusively colored neighborhood, into which white persons had gone and had purchased property; nevertheless, the lower court granted the injunction on the grounds that the new church building would be a nuisance and would decrease the sale value of the plaintiffs' property. The appellate court reversed the decree, saying that that which was attempted here was not the preservation of a white community from being converted into a negro district, but the conversion of a black area into a white locality, but by preventing the rebuilding of the church around which negro social life naturally centered, and thereby causing the colored population to drift away.

Segregation ordinances have been sustained, in whole or in part, by the court of last resort in a number of states. In Louisiana, a municipal ordinance, which prohibited whites or blacks from establishing residences or places of abode in certain districts without the written consent of the inhabitants of the area, if a majority thereof were persons of the opposite race, has been held not to violate the Fourteenth Amendment; and that such an ordinance is not an actual race discrimination as to political and civil rights, but

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12 104 Okla. 123, 231 Pac. 1074 (1924); 98 Cent L. J. 93 (1925).
merely a recognition of the social distinction between the races, and an exercise of the police power.\textsuperscript{28}

The race segregation ordinance of Atlanta, which prohibited colored persons from occupying residences in blocks in which the greater number of houses were occupied as residences by white people, and vice versa, and excepting from its operation the right of occupancy of residences and places of abode acquired before the passage of the ordinance, was sustained, in \textit{Harden v. City of Atlanta},\textsuperscript{34} as not being a denial of the "equal protection of the laws" clause of the Fourteenth Amendment, nor in violation of the Bill of Rights of the State Constitution, declaring that "protection to person and property is the paramount duty of government, and shall be impartial and complete." This ordinance was considered not to be subject to the constitutional objection urged, and sustained, against an earlier ordinance of Atlanta, which, in undertaking to segregate the races, contained no exception as to rights in property acquired previous to its enactment. Subsequent to the passage of the present ordinance, the plaintiff, a negro, rented a house in a "white block"; and, in consequence of his failure to vacate the house when ordered so to do by the municipal authorities, he was summoned before the recorder's court to answer a charge of violating the ordinance, and was unsuccessful in his attempt to enjoin the enforcement of the ordinance.

In two cases,\textsuperscript{35} which were heard together, the Virginia Court declared that an ordinance for the segregation of races within a municipality does not deny to any person the equal protection of the laws. The ordinances in question made it illegal for individuals of either race to occupy residences, or to establish schools or places of public assembly in blocks where the greater number of residences were occupied by members of the opposite race. In the Hopkins Case, the plaintiffs in error, one a white man and the other a negress, did not own the property which they occupied, but moved into it, as renters, subsequently to the enactment

\textsuperscript{28} Tyler v. Harmon, 155 La. 489, 104 So. 200 (1925); 93 Cent. L. J. 292 (1925).

\textsuperscript{34} 147 Ga. 246, 93 S. E. 401 (1917).

\textsuperscript{35} Hopkins and Others v. City of Richmond and Coleman v. Town of Ashland, 117 Va. 682, 86 S. E. 199 (1915).
of the ordinance, and in violation thereof; and in the Coleman Case, the plaintiff, a negro, became the owner and occupier of property in a "white" district, after passage of the segregation regulations. By way of dictum, the court said: "In so far, and only in so far, as the enactments in question limit or restrict the right of any white or colored person to move into and occupy property of which he was the owner at the time such enactments went into effect, they are beyond the police power of the municipalities and are invalid and inoperative." It was contended that the provisions of the ordinances were inseparable and must stand or fall together, but the court held that it could divide them, and sustain the valid parts while disregarding the invalid clauses; nor was the court's power to "give effect to one feature of an ordinance when another feature thereof is void * * * affected by the mere matter of articulation and phraseology." Thus, the conclusion reached in the Virginia cases is in brief, that such an ordinance, in so far as it does not disturb vested rights, is within the police power of Virginia municipalities.

In 1913, the Maryland Court was of the opinion that a municipality might under its police power, enact an ordinance for the segregation of the white and colored races, where proper protection was given to persons who had previously acquired the right to the occupancy of buildings by devise, descent, purchase, lease, or other contract. In this case, the point in issue was the constitutionality of a Baltimore ordinance which made it unlawful for any colored person to move into or use as a residence or place of abode any house or building, or any part thereof, located on any block in which the houses, buildings, and the like, were used in whole or part as residences and places of abode by white persons, and vice versa. The defendant, a negro, was indicted for violation of the ordinance. The court declared the ordinance unconstitutional, because its provisions were applicable to property owned prior to, or at the time of, its enactment, and so, not being limited in its operation to after acquired property, it was "a taking away of vested rights." But "the object sought to be accomplished by this ordinance

* Staté c. Gurry, 121 Md. 634, 88 Atl. 228 (1913).
is [was] one which properly admits of the exercise of the police power," even though this particular piece of municipal legislation could not be sustained as drawn.

The last few cases discussed above are sufficient to indicate the quite decided tendency on the part of the state courts, particularly in the southern states, to sustain municipal regulations, unless clearly unreasonable or unless in gross disregard of property rights acquired previous to the enactment of the segregation ordinances. But the question, in like manner as that of municipal zoning for aesthetic and use purposes, is a question cognizable by the federal courts. And, indeed, the United States Supreme Court, in Buchanan v. Warley,87 has passed on the question and has arrived at a result contrary to that reached by most of the state courts which have had to consider the point. In that case, which was error from the judgment of the Kentucky Court,88 sustaining the Louisville ordinance which segregated the races and prevented negroes from occupying houses in blocks where the greater number of dwellings were occupied by white persons, and vice versa, the United States Supreme Court reversed the State Court, and held that colored persons are citizens of the United States and have the right to purchase property and enjoy the use of it without laws discriminating against them solely on account of color; and that an ordinance excluding negroes from the occupancy of houses in blocks where the greater number of houses are used as residences by white persons, in effect, prevents the sale of lots in such blocks to individuals of the African race, and is unconstitutional. The Court reasoned to this effect: A property owner, who has made an otherwise valid and enforceable contract to convey a piece of property to a colored person, for erection thereupon of a house to be occupied by the vendee, is deprived of property, in that he is denied the right to sell to a qualified purchaser; and, in a suit against the vendee for specific performance, the vendor may attack the ordinance as invalid under the Fourteenth Amendment. An ordinance excluding negroes from the occupancy of houses in

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which the greater number of residences are occupied by white persons, and likewise forbidding Caucasians to live in negro blocks, "and which bases the interdiction upon color and nothing more, passes the legitimate bounds of police power and invades the civil right to acquire, enjoy and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment." The ordinance, the constitutionality of which is here assailed, cannot be upheld merely because the purposes for which it was enacted were to lessen miscegenation, prevent deterioration of property owned and occupied by white persons, and promote the public peace, by keeping the races separate; nor does its impartial application to both races "relieve it from the vice of discrimination or obviate the objection that it deprives of property without due process of law." The Supreme Court distinguished this holding from their decision in Pleasy v. Ferguson,38 and in the Berea College Case.39

The decision of the United States Supreme Court, in the Buchanan Case, must be recognized as controlling, when the same question arises hereafter in the state courts; and, in fact, the Maryland Court has already yielded to the federal decision, in Jackson v. State,40 in which case the principle is recognized that the right of a citizen to acquire or use property cannot be validly restricted by a state or municipality on the ground of his color. In this case, an ordinance of Baltimore had been drawn so as to eliminate the constitutional objection which had arisen in State v. Curry,41 by being made applicable only to property acquired after the enactment of the ordinance, but, nevertheless, it was held invalid, on the authority of Buchanan v. Warley. The Maryland Court was of the opinion that, while the Louisville ordinance forbade the occupancy of a

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38 102 U. S. 537 (1886). In this case, the United States Supreme Court sustained a Louisiana statute, requiring railroad companies carrying passengers in that state to provide equal but separate accommodations for the two races, and imposing penalties upon passengers insisting on entering a coach reserved for individuals of the other race, holding that it did not violate the provisions of either the Thirteenth or Fourteenth Amendments.

39 211 U. S. 46 (1908). In this case, the Federal Supreme Court stated that the Kentucky statute authorizing the education of both whites and blacks by the same corporation, but in different places, and prohibiting their education together, "does not defeat the object of a grant to maintain a college for all persons;" nor does it violate the Federal Constitution.

40 182 Md. 311, 103 Atl. 913 (1918).
house by an individual of one race in a block in which the
*greater part* of the places of abode were occupied by per-
sons of the other race and the Baltimore ordinance was
operative only where a person of one race attempted to
live in a block in which members of the other race were the
*sole* occupants, the two regulations were so nearly alike
that there was no material difference between them. Al-
though there may be room to doubt whether the construc-
tion which the United States Supreme Court has placed
upon the Fourteenth Amendment in its application to se-
gregation ordinances will accomplish as socially desirable
a result as would have been attained by a contrary hold-
ing, the matter is a federal constitutional question, and so
doubtless the state courts will and must yield to its binding
authority. It seems to be the law now, at any rate, that
an ordinance forbidding negroes from living in blocks in
which a majority of the inhabitants are of the Caucasian
race, and vice versa, cannot be sustained.41

But is the result arrived at in *Buchanan v. Warley* de-
sirable? Admitting that the Fourteenth Amendment was
adopted for the purpose of protecting the political and eco-
nomic rights, and to secure the equal treatment before the
law, of an inferior, dependent race only recently freed from
bondage, it is submitted that it does not follow that it was
ever intended that the Federal Government should attempt
to put the two peoples, so different in characteristics and ap-
titudes, upon a social equality. Their racial dissimilarity
and non-assimilability, intensified by a totally different cul-
tural background and centuries of racial development,
make such an idea wholly unfeasible and impracticable.
“Law is a practical matter,” and so it should be recog-
nized that, while the two races should be accorded equal
treatment, the public welfare and the highest social inter-
ests of both Caucasian and African can best be secured by
preserving each people in its racial purity. Commingling
of the homes and places of abode of white men and black
men gives unnecessary provocation for miscegenation, race
riots, lynchings, and other forms of social malaise, existent
when a child-like, undisciplined, inferior race is living in

41 *Supra*, n. 86.
CONSTITUTIONALITY OF MUNICIPAL ZONING

close contact with a people of more mature civilization. As for the view that a segregation ordinance, excluding persons of one or the other race from a given block or district used for residences by the other race and thus, in effect, preventing the sale of property, in the area affected, to the excluded race, is a deprivation of property, the same objection should be equally applicable to municipal legislation restricting the location of shops and places of business in general. If a municipality can prevent the establishment of a “Piggly-Wiggly” store in a residential section, without violating any of the constitutional prohibitions, it should follow that an ordinance, excluding negroes from a “white” zone and vice versa, should, in the absence of infringement of existing property rights, be constitutional. As the law now is, such an ordinance is invalid; but, as Mr. Justice Holmes has said,42 “every opinion tends to become a law,” and it is to be hoped that public opinion may come to preponderate so strongly in favor of sustaining municipal race segregation ordinances, drafted so as to be reasonable and not to deprive of previously acquired property, that they will ultimately be held constitutional.

42 19 ILL. L. REV. 401 (1925).