Civil Rights Law and The Valley Swim Club: “Trouble the Waters” in the Age of Obama

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I. INTRODUCTION

The election and inauguration of Barack Obama to the U.S. presidency prompted some scholars and media pundits to contend that the United States had, at long last, achieved the realization of a post-racial society.1 According to this post-racial argument, if Americans were finally able to “overlook” race as an attribute that influenced or determined Obama’s fitness for occupying the highest, most important, and most revered public office in the United States, then racism as Americans knew it was surely poised for a complete collapse. Drawing this idea out to its logical conclusion, these scholars and pundits posited that race would simply no longer “color” public spaces in this country—that one’s color could not impose constraints on the places and positions one could occupy.

Less than a year later, one of the most disturbing recent examples of the phenomenon of the “colorization” of space occurred. In the summer of 2009, a group of students participating in the Creative Steps Day Camp were summarily ejected from an elite country club, whose swimming pool had been rented by the day camp. The students were African American and Hispanic; the country club membership and leadership were predominately Caucasian. In the aftermath of the event, which was picked up and parsed out endlessly by local and national media, the children and day camp staff members recalled that pool members and administrators made comments about the children’s unfitness for the pool and the country club that were unequivocally and unapologetically tied to the children’s racial identity. Given this incident, which is by no means an isolated

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anecdote, one must conclude that while the election of Barack Obama to the presidency
was inarguably significant, his rise to political prominence did not signal the beginning of
a post-racial era in which Americans suddenly became oblivious to race.

Using the Valley Swim Club as a framework, this paper will examine the legality
of discrimination in places of public accommodation.

II. EQUALITY THROUGH THE CONSTITUTION,
THE COURTS, AND CONGRESS

A. Overview

Although the Thirteenth and Fourteenth Amendments did much to end
discrimination, they were hardly enough to eliminate it, and questions remained as to
whether their protections extended to private rights and establishments. In cases such as
Shelly v. Kramer, the Supreme Court required extensive analysis to prove the Fourteenth
Amendment protected the rights of black families purchasing homes in white
neighborhoods with restrictive agreements. Through the Civil Rights Act of 1866, the
Civil Rights Act of 1964, and their applications to numerous cases of discrimination, the
illegality of exclusion from public and private places of accommodation because of race
became easier to prove.

B. The Constitution

The efforts to eliminate discrimination in places of public accommodation can be
traced to the passage of the Thirteenth and Fourteenth Amendments of the Constitution.
After the Civil War, Congress amended the Constitution to address past and future acts of
discrimination. The Thirteenth Amendment outlawed slavery, and gave Congress the
authority to enforce the prohibition.2 The Fourteenth Amendment provided, among other things, that those born or naturalized in the United States were citizens of the United States and the state in which they reside.3 The amendment also provided that all citizens were not to be deprived of “life, liberty, or property, without due process of law,” nor denied “the equal protection of the laws.”4 These amendments provided needed relief to many, but did not address all forms of discrimination.

In the Civil Rights Cases,5 the Court confirmed that the new amendments were to abolish slavery and limit the State’s power to deprive citizens of their rights, but they were not a limit on individual rights.6 The case was comprised of three separate incidents. One involved denial of accommodations at an inn or hotel; another involved privileges and accommodations of a black man attending an event at a theater; and the last involved denial of access to a ladies’ car on a passenger train because of the color of the passenger’s skin.7 The plaintiffs argued that the Fourteenth Amendment provided relief for the discrimination.8 The Court did not agree: “It is a state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment.”9 In other words, the Fourteenth Amendment does not prohibit individual discrimination; it prohibits discriminatory state action. The amendment “does not authorize congress to create a code of municipal law for the regulation of private

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2 U.S. Const., Amend. XIII.
3 U.S. Const. Amend. XIV.
4 Id.
5 109 U.S. 3 (1883).
6 Id. at 10-11.
7 Id. at 9.
8 Id. at 10.
9 Id.
With its decision, the Court took away any presumption that the Civil War amendments provided explicit prohibition against private discrimination. There was some relief, although not as broad as the plaintiffs in the Civil Rights Cases may have liked. Future cases confirmed this as well.

In Shelley v. Kramer, a black family in Missouri, and a black family in Michigan, purchased homes in white neighborhoods. Once the families begin to move in, neighbors argued that restrictive covenants barred the previous owners from selling their property to anyone other than white people. In both instances, the lower courts ruled that the black families should be restrained from legally obtaining the property, essentially voiding the agreements. The families argued that the restrictive agreements violated their Fourteenth Amendment rights and Acts of Congress addressing the Fourteenth Amendment.

The United States Supreme Court reversed the state’s decision, holding that judicial enforcement of the restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment. But it was not doctrinally simple to arrive at such a normatively attractive outcome. The chief obstacle in reaching this outcome was that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States" and "[the] Amendment erects no

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10 Id. At 11.
11 334 U.S. 1 (1948).
12 Id. at 6-7.
13 Id. at 5-6.
14 Id. at 6-7.
15 Id. at 7.
16 See id. at 21.
shield against merely private conduct, however discriminatory or wrongful." 17 In other words, the Fourteenth Amendment did not extend to private conduct. Thus, even though "restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance," 18 the restrictive covenant in Shelley did "not involve action by state legislatures or city councils." 19 The Court accordingly held that the covenants alone did not violate any rights guaranteed by the Fourteenth Amendment and hence were not themselves unconstitutional. 20

But the Court's analysis did not end there. Though the restrictive covenant itself was not an "action by the State" triggering the Fourteenth Amendment, 21 the Court ruled that "the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." 22 After all, "the full coercive power of government [was being used to] deny to petitioners, on the grounds of race or color, the enjoyment of property rights." 23 Furthermore, because enforcement orders came from courts, the "judicial action in each case bears the clear and unmistakable imprimatur of the State." 24

One analytical step remained. After establishing that a court's order to enforce a contract constituted state action, the Court needed to determine what aspects of the enforcement order were attributable to the state. Without explanation, the Court

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17 Id. at 13.
18 Id. at 11.
19 Id. at 12.
20 Id. at 13.
21 Id.
22 Id. at 14.
23 Id. at 19.
24 Id. at 19–20.
determined that the contract's substantive provisions themselves constituted state action. Hence, under Shelley's "attribution rationale," the question became whether a state could constitutionally enact the substantive provision of the contract into general law.  

Because the state could not have enacted the provision at issue in Shelley, it followed that court enforcement of the restrictive covenant also violated the guarantee of equal protection found in the Fourteenth Amendment.  

Shelley can plausibly be recast as a decision grounded in the Thirteenth Amendment. The Thirteenth Amendment's first section states, "neither slavery nor involuntary servitude . . . shall exist within the United States . . . ." In the Civil Rights cases, the Supreme Court provided a narrow construction of the first section, announcing that it "simply abolished slavery." Justice John Marshall Harlan famously disagreed, expressing his view in the case of Hodges v. United States that section one "by its own force ... destroyed slavery and all its incidents and badges, and established freedom." On this approach, the Court could have found the racially restrictive covenants in Shelley in violation of the first section of the Thirteenth Amendment if they were deemed "incidents" or "badges" of slavery. Although this is a defensible approach to reconceptualizing Shelley, stare decisis and institutional considerations make it

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25 See generally id. at 21.  
26 Id. at 20–21.  
27 U.S. Const. amend. XIII, § 1.  
28 109 U.S. 3, 23 (1883).  
29 Hodges v. United States, 203 U.S. 1, 27 (1906).  
30 It is true that the Court on more than one occasion has implied that it might be willing to revisit the Civil Rights Cases' narrow construction of section one, indicating that it would "leave that question open" of "whether section 1 of the Amendment by its own terms did anything more than abolish slavery." See City of Memphis v. Greene, 451 U.S. 100, 125–26 (1980) ("In Jones, the Court left open the question whether Section 1 of the Amendment by its own terms did anything more than abolish slavery. It is also appropriate today to leave the question open . . . ") see also Gen Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, n.17 (1982). Nonetheless, it seems likely that the stare decisis inertia that accompanies so hoary a case will
second best.

*Shelley* is more plausibly grounded in the legislative powers created by the second section of the Thirteenth Amendment, which provide that "Congress shall have power to enforce this article by appropriate legislation."\(^{32}\) The Court stated in the Civil Rights cases that Congress's enforcement powers under section two extend beyond abolition of slavery itself to include the power to address the "badges" and "incidents" of slavery.\(^{33}\) Furthermore, when Congress acts to "eradicate all forms and incidents of slavery and involuntary servitude," its regulations "may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not."\(^{34}\) This is particularly significant for present purposes, for this means that legislation, such as 42 U.S.C. § 1981, resist its being overruled. This conclusion is not inconsistent with this Article's effort at reconceptualizing *Shelley*. Overruling the Civil Rights Cases' interpretation of section one likely would suggest that the case's ultimate holding was wrong. This would do more violence to stare decisis and rule of law values than does reconceptualizing *Shelley* such that its ultimate holding (that courts cannot enforce racially restrictive covenants) remains intact.

\(^{31}\) In our era of judicial supremacy in constitutional interpretation, the institutional considerations relating to the scope of section one boil down to the question of whether courts or Congress are better suited to determining the "badges" and "incidents" of slavery. Cf. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480 (1990). Congress seems far better suited to such determinations, for what qualifies as a badge or incident of slavery likely turns on highly fact-sensitive considerations that are likely to change over time with shifts in communities' socioeconomic status and changes in cultural sensibilities. Such inconstant and context-sensitive matters by their nature seem to be more suited to congressional treatment via statute than court treatment via constitutional doctrine on account of legislatures' superior fact-finding mechanisms and the fact that legislatures are not constrained in the way that courts are by virtue of doctrines as stare decisis and other institutional characteristics Professor Koppelman seems to argue that even if Congress is generally better suited to defining the badges of slavery, there may be discrete constitutional determinations that the Court nonetheless is capable of rendering. See Koppelman, *supra*, at 499 & n. 87. It seems highly dubious, however, that the Court would so confine itself if it started down the road of making constitutional determinations as to what qualifies as an incident or badge of slavery. Accordingly, institutional considerations discourage reconceptualizing *Shelley* as a judicial determination that racially restrictive covenants themselves are unconstitutional badges or incidents of slavery. (This conclusion would not change if congressional determinations of badges and incidents were deemed to constitute congressional constitutional interpretation of section one of the Thirteenth Amendment and the Court were deemed to be institutionally incapable of making such determinations. Cf. Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219 n. 21 (1978)). Many thanks to Andy Koppelman for having pressed me on several of these points.

\(^{32}\) U.S. Const. amend. XIII, § 2.

\(^{33}\) *The Civil Rights Cases*, 109 U.S. 3, 20, 23 (1883).

\(^{34}\) *Id.*
enacted pursuant to section two of the Thirteenth Amendment is not limited to state actors, but instead can directly regulate individuals.35


Although the Court in Shelley did not find direct protection from private discrimination within its reading of the Fourteenth Amendment, it did find protection elsewhere. The Civil Rights Act of 1866, codified at 42 U.S.C. § 1981 reads:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The Court has stayed away from ruling whether there was implicit protection from private discrimination in section 1981. Instead, when presented cases dealing with the statute, the Court focused on the phrase, “to make and enforce contracts.”36

In Runyon v. McCrary,37 two black families in Virginia tried to enroll their children in a private school.38 Both families responded to advertisements they had received about the school.39 Both were later told that their children would not be admitted because the school accepted “only members of the Caucasian race,” and that the school was not integrated.40 The district court held, inter alia, that 42 U.S.C. § 1981 made the school’s racially discriminatory practices illegal.41 The Court of Appeals upheld the ruling, and when the cases appeared before the Supreme Court, the question was whether

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35 See infra section XX and XX
38 Id. at 164.
39 Id.
40 Id. at 165.
41 Id.
section 1981 prohibits private, commercially operated, non-sectarian schools from denying admission to prospective students because they are black.\textsuperscript{42} Based on earlier decisions – \textit{Johnson v. Railway Express Agency},\textsuperscript{43} \textit{Tillman v. Wheaton-Haven Recreation Assn.},\textsuperscript{44} and \textit{Jones v. Alfred H. Mayer}\textsuperscript{45} – the Court held that section 1981 was applicable because it “relates primarily to racial discrimination in the making and enforcement of contracts.”\textsuperscript{46} The Court wrote that it could not be clearer that section 1981 reaches “private acts of racial discrimination.”\textsuperscript{47}

\textbf{D. 42 U.S.C. § 2000a}

A companion to the Civil Rights Act of 1866 is the Civil Rights Act of 1964. Events in the 1950s and early 1960s led to its passage. In \textit{Brown v. Board of Education},\textsuperscript{48} the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund successfully challenged a previous United States Supreme Court ruling in \textit{Plessy v. Ferguson}\textsuperscript{49} that established the “separate but equal” doctrine.\textsuperscript{50} Persuaded by the NAACP in \textit{Brown}, the Court wrote that “education is perhaps the most important function of state and local governments,” and that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”\textsuperscript{51} The decision was followed by protests for more civil rights.

On February 1, 1960, four black students from A&T College in Greensboro,

\begin{itemize}
\item \textsuperscript{42} Runyon at 166-168.
\item \textsuperscript{43} 421 U.S. 454 (1975).
\item \textsuperscript{44} 410 U.S. 431 (1973).
\item \textsuperscript{45} 392 U.S. 409 (1968).
\item \textsuperscript{46} Runyon at 172 (citing Johnson at 459).
\item \textsuperscript{47} \textit{Id.} at 174.
\item \textsuperscript{48} 347 U.S. 483 (1954).
\item \textsuperscript{49} 163 U.S. 537 (1896).
\item \textsuperscript{50} \textit{Id.} at 552.
\item \textsuperscript{51} 347 U.S. at 493.
\end{itemize}
North Carolina went to a downtown Woolworth’s lunch counter and asked to be served.\textsuperscript{52} They were trying to provoke a reaction that would lead to a change in the segregation system in the public accommodations of their community.\textsuperscript{53} Days later, a group of high school students in High Point, North Carolina, met to plan similar demonstrations in their home town.\textsuperscript{54} Twenty-six high school students went to the local Woolworth’s lunch counter asking to be served. As expected, they were ignored, but they stayed. Eventually, after incidents of intimidation and violence, the lunch counter was closed, and black and white community leaders met to negotiate a way out of the situation. The lunch counter was closed for several months.\textsuperscript{55} Elsewhere in High Point, at the Paramount Theater, black students protested segregated seating that left them delegated to the balcony (four flights up) with no refreshments and wooden seats.\textsuperscript{56} The demonstrations lasted more than three years. These types of non-violent protests began to spread, and these types of “civil rights demonstrations and campaigns . . . helped create national support for federal civil rights legislation,”\textsuperscript{57} including the Civil Rights Act of 1964.\textsuperscript{58}

The Civil Rights Act of 1964, codified as 42 U.S.C. § 2000a, provides:

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

These provisions are specific to discrimination and expand the reach of protection to

\textsuperscript{52} Brenda Saunders Hampden, “Stony the Road We Trod”: Reflections on “50 Years After the Sit-Ins,” 18 Va. J. Soc. Pol’y & L. 3, 5 (Fall 2010).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 7.
\textsuperscript{56} Id.
patrons into privately owned establishments that provide public accommodations. In other words, a business providing services that fit into the definition of “public accommodations,” as provided in section 2000a, cannot discriminate on the basis of race, color, religion or national origin.\textsuperscript{59}

In \textit{Stout v. Young Men’s Christian Association of Bessemer, Alabama,}\textsuperscript{60} two young black men were denied membership and the opportunity to rent rooms at the YMCA building.\textsuperscript{61} The YMCA argued that it was a private club, and as such, exempt from provisions in the Civil Rights Act.\textsuperscript{62} The Court of Appeals did not agree. Under oath, a YMCA official stated that the YMCA never questioned renters about membership or whether they were from out of state.\textsuperscript{63} If there were rooms available, they would be rented.\textsuperscript{64} But when the two black men arrived asking for membership and rooms, the previous room-renting practice did not matter; they were not getting rooms. The court wrote that since the Act provides a “place of public accommodation” is an establishment that provides “lodging to transient guests,” and since the two men were denied lodging because of the color of their skin, the YMCA violated the Act.\textsuperscript{65} “Clearly,” the court wrote, “the Bessemer Y.M.C.A. is not . . . a private club,” and as such, must follow the statute.\textsuperscript{66}

In \textit{Olzman v. Lake Hills Swim Club,}\textsuperscript{67} a member of the swim club invited a

\begin{footnotesize}
\textsuperscript{59} 42 U.S.C. § 2000a(a)-(b) (2010).
\textsuperscript{60} 404 F.2d 687 (1968).
\textsuperscript{61} \textit{Id.} at 688.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Stout} at 689.
\textsuperscript{66} \textit{Id.} at 688.
\textsuperscript{67} 495 F.2d 1333 (1974).
\end{footnotesize}
business associate to bring a group of black children to the pool on a Saturday. After one day, the executive board of the Club met to discuss how to “deal with the problem of underprivileged children as guests.” The Club revised its bylaws to define “guest” as being limited to a friend or relative of a member, and even then, the guest had to have permission of the board to bring them in. The guest was then permitted to visit only twice a season. Around the same time, Camp Unity (the group hosting the children) formally requested permission to bring the kids to the club weekly over the summer. Again, Olzman asked if he could bring the kids in. The board said yes, but limited their use to two specific Mondays, and no more. Olzman did not respond, but instead filed suit.

Around the same time, in the Washington, D.C. suburb of Wheaton, Maryland, the Wheaton-Haven Recreation Association swim club rejected the membership application of a black family, the Presses, who lived a few blocks from the pool. Later that summer the Tillmans – a white couple with pool membership – brought their black friend Grace Rosner to the pool. Although the pool management eventually admitted Rosner, the incident was so upsetting to the all-white members that the association passed a guest policy allowing pool members to bring only their relatives. The Presses, Tillmans, and Rosner filed suit, “claiming that the club violated both the 1866 Civil Rights Act and

68 Id. at 1337.
69 Id.
70 Id. at 1338.
71 Id.
72 Id.
73 Id.
74 Olzman at 1338.
the more recent Civil Rights Act of 1964 by denying membership on the basis of race.” 75
The case’s central question was whether or not the Wheaton-Haven Recreation
Association was a private club. The pool management claimed it was a private
organization and could deny membership and entry as it wished. The families argued that
the pool functioned as a public facility and should legally be viewed as one.

The U.S. District Court of Maryland and U.S. District Court of Appeals for the
Fourth Circuit ruled that the club was private, using the prior refusal of membership to a
white family as evidence to justify the decision. When the plaintiffs appealed to the U.S.
Supreme Court, it found that the pool was a public facility – membership was open to all
white families living within three-quarters mile of the pool. The one white family that
had been denied membership lived further away.

This case played a role in the Olzman v. Lake Hills Swim Club decision. The
District Court found that the Swim Club was a private club, and as such, exempt from
section 2000a. The Court of Appeals, referring to the Tillman 76 decision by the United
States Supreme Court, reversed in favor of Olzman. 77 The court wrote that there were
two requirements to show that there was a violation of section 2000a: that the swimming
pool was a place of entertainment within the meaning of section 2000a(b)(3); and that the
club and its operation “affects commerce.” 78 On the first point, the court ruled that based
on Daniel v. Paul, 79 the swimming pool was a place of entertainment. As to the second

75 Wiltse, Jeff, Contested Waters: A Social History of Swimming Pools in America. Chapel Hill: The
76 410 U.S. 431 (1973), supra note 46.
77 Id. at 1335.
78 Id. at 1340.
point, based on *Katzenbach v. McClung*, the court ruled the club’s snack bar, serving food, affected commerce enough to meet the requirement.

In another swimming club case, *United States v. Lansdowne Swim Club*, the United States Court of Appeals for the Third Circuit provides another analysis for what is required in a government case against an establishment for violation of section 2000a. The government must prove that the business is a “place of public accommodation;” that the business “customarily presents . . . sources of entertainment which move in commerce;” and that there is a pattern or practice of discrimination. The court wrote that the government must show that the “discrimination” is more than “the mere occurrence of isolated or ‘accidental’ or sporadic discriminatory acts,” and it must be proven by a preponderance of the evidence. The court also wrote that to make its *prima facie* case, the government must prove that qualified black applicants applied and were rejected, and that subsequently, non-black applicants were admitted. In *Lansdowne*, the court agreed that there was a pattern of discrimination, and based on the club’s recruiting history, affirming the lower court’s ruling.

### III. LEGAL DISCRIMINATION – LIMITS OF THE LAWS

#### A. The First Amendment

A question that may arise in situations such as the Valley Swim Club incident is whether or not discrimination – excluding someone because of certain attributes – is

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81 The *Olzman* court also addressed violations §§ 1981, 1982 and 2000a, all in favor of the plaintiff.
82 894 F.2d 83 (1990). Lansdowne is also in a suburb of Philadelphia, approximately 20 miles north of Huntingdon Valley.
83 *Id.* at 86-8.
84 *Id.* at 88.
85 *Id.*
86 *Id.*
87 *Id.* at 89.
legal. In limited respects, it is. Some private organizations have successfully claimed the
right to limit association with their group is based on their First Amendment right to
peaceably assemble.\(^88\) The United States Supreme Court has ruled that freedom to enter
and carry on certain intimate or private relationships is a fundamental element of liberty
protected by the Bill of Rights.\(^89\) When determining whether an association is private or
personal enough, the court takes into account size, purpose, selectivity, and whether
others are excluded from central aspects of the relationship.\(^90\) In *Boy Scouts of America v. Dale*, the state of New Jersey applied its public accommodations law to the Boy Scouts,
requiring the organization to allow Dale, a homosexual, to remain as an assistant
scoutmaster.\(^91\) The United States Supreme Court ruled for the Boy Scouts, stating that
New Jersey’s law was a severe intrusion on the Boy Scouts’ right to freedom of
expressive association because the Boy Scouts did not allow homosexuality in its
membership.\(^92\) The Court recognized the connection between the philosophy of the
organization and the composition of its membership, and allowed for the selective
admission policy.

In *Runyon v. McCrary*,\(^93\) the Court acknowledged that at times the right of
association “for the advancement of beliefs and ideas” is to be fostered because it is
essential to “[e]ffective advocacy of both public and private points of view, particularly

88 Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise
thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to
assemble, and to petition the Government for a redress of grievances. U.S. Const., Amend. I.
92 Id. at 659.
controversial ones."\(^{94}\) In *United States v. Jaycees*, the Court wrote “[p]rotection of the association’s right to determine its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”\(^{95}\) Yet, the Court has also stated that the Constitution does not provide support for all forms of discrimination, even with First Amendment protections. In *Norwood v. Harrison*, the Court stated, “the Constitution . . . places no value on discrimination,” and “private discrimination . . . has never been afforded affirmative constitutional protections.”\(^{96}\)

**B. Restrictive Covenants**

In the years to follow, people found ways to discriminate in neighborhoods, despite *Shelley*.\(^{97}\) A *U.S. News and World Report* article written in May of 1948, immediately after the decision came down, helpfully listed a variety of such evasions:

Plans that have the effect of restricting neighborhoods and that apparently are within the law, under the ruling of the Supreme Court, already are in use here and there. . . . Any of these plans that prove practical as well as legally valid are expected to come into more general use. . . . Self enforcement of a covenant that limits property ownership in a neighborhood to the members of a racial or religious group in one such plan. . . . Requiring membership in a club or a co-operative as a condition for owning or occupying property in a second plan, already in use, by which sale of property is restricted to certain groups. In one type of club, the property is owned by the club itself. The householder-member simply owns shares of stock and is assigned certain property for occupancy. . . . Meanwhile, many real estate subdivisions probably will be platted and sold in connection with golf clubs, tennis clubs, gardening clubs, and a great variety of other clubs based on some common activity or interest.\(^{98}\)

\(^{94}\) Id. at 175 (citing Buckley v. Valeo, 424 U.S.1, 15 (1976)).


\(^{96}\) 413 U.S. 455, 469 (1973).

\(^{97}\) One way to evade *Shelley* was to sue the White seller-who sold to a Black buyer- for breach of contract. But by 1953, this was effectively outlawed by the Supreme Court in *Barrows v. Jackson*, 346 U.S. 249 (1953).

The concept of creating voluntary organizations, such as homeowner associations, to implement segregation through more devious means was widely discussed in the real estate industry. Charles Abrams quotes an attorney for the California Real Estate Association who proposed using homeowner associations to privatize racial discrimination and obviate the need for judicial enforcement:

A homes association could be formed, the members of which are the owners of building sites within the residential tract, and prohibiting the occupancy except to those persons or families, who hold an occupancy permit issued by the homes association. The issuance of the permit is discretionary and without reference to race or color but based entirely upon personal qualification as a good neighbor or in other words, cultural status. This is an extension of the idea that any club may regulate admission to its membership. Many a country club restricts occupancy of home sites on its grounds to its members. Religious colonies have long been established upon the same basis. This arrangement would likewise operate against undesirable Caucasians as prospective buyers.99

One other way for homeowner associations to exclude most people of color and other “undesirables” perceived as bad for property values, was to enforce private restrictive covenants that were not explicitly based on race. Rather, they would target the poor by prohibiting specific behaviors. This approach may have grown out of a proposal by Robert Weaver, who was executive director of the Mayor’s Commission on Race Relations in Chicago in 1944. At that time, Weaver had suggested replacing racial covenants with those that targeted certain objectionable practices. He argued that he did this not to maintain segregation, but to help protect property values without discriminating on the basis of race.

“If, instead of restrictions on account of race, creed, and color, there were agreements binding property owners not to sell or lease except to single families, barring excessive roomers, and otherwise dealing with type of

occupancy, property would be better protected during both white and Negro occupancy. This would afford an opportunity for the Negro who has the means and the urge to live in a desirable neighborhood and it would protect the ‘integrity of the neighborhood.’ It would also prevent, or at least lessen, the exodus of all whites upon the entrance of a few Negroes. But it would do more; it would become an important factor in removing racial covenants in other improved and vacant areas” (emphasis removed).100

Weaver’s idea was viewed by others as the next best thing to race restrictive covenants. “High occupancy standards, now in effect in many communities, are being used as means of maintaining the general character of a neighborhood and of indirectly achieving, to a high degree, the same ends sought by racial restrictions. Such requirements as the minimum cost of dwellings and numbers of occupants per room are considered legal and enforceable without any question.”101 A separate article in the same issue amplified that point by emphasizing that “the courts can still enforce covenants that are based upon other things than race and color. These might be covenants that limit the type, size and cost of homes built in a neighborhood, or the amount of ground around the homes.102

Zorita Mikva’s 1951 study of neighborhood associations showed that “occupancy standards and other substitute measures” were being adopted by neighborhood associations in 1948 because “they could be substituted for racially discriminatory agreements”:

Generally [the] purpose [of such agreements] is to introduce certain limitations on the use of property, such as limiting the number of persons per room, preventing conversions which create crowding and/or agreeing to certain maintenance standards for all building . . . . Conservation agreements have tried to meet the same problem [as race restrictive

100 ROBERT C. WEAVER, Race Restrictive Housing Covenants, J. OF LAND & PUB. UTILITY ECON. 20 (1944).
101 Real Estate, supra note 42, at 23.
by imposing limitations on the use of property, without regard to the race, religion, or nationality of the property owners.

Though this plan has been criticized for resulting in “one-class” neighborhoods, these agreements would, some believe, lower the racial barriers to an extent . . . Conservation agreements and strict enforcement of building and zoning laws would, it believed, allow wealthier Negroes to purchase homes in white communities, but would prevent the entrance of slum dwellers.103

In this manner, homeowner associations and restrictive covenants shifted their emphasis to class discrimination from race discrimination. Less affluent families, who might be able to afford a house only by pooling resources or renting out rooms, would be prohibited from buying. Lifestyle restrictions were justified with such familiar euphemisms as “preserving the character,” “integrity,” or “stability” of a neighborhood rather than by referring to race or class. Nonetheless, the principle is still the same: certain groups of people are considered a threat to property values and are excluded. The result is increased homogeneity, and, given economic disparities between white and nonwhite Americans, this approach inevitably contributes to continuing racial segregation.

Similarly, public pools followed a path from government-enforced (though not necessarily legal) segregation to segregation enforced through private clubs with membership based on high fees or residence in a particular neighborhood. Municipal pools trace their history to the late 1800s, when cities opened bath houses for working and immigrant classes whose only bathing means were swimming in rivers and lakes. Eventually, recreation became an acceptable use of pools, and throughout the early 1900s, pools were separated by class and gender, not race (at least in northern cities). But

after 1920, northern U.S. cities began building larger pools and exchanged racial segregation for gender segregation. Across the country, as blacks tried to enter pools, they encountered hostility, and in many cases, violence. Wiltse points to “. . . gender integration and the eroticization of swimming pools . . . [as the] most direct and crucial causes of racial exclusion and segregation at municipal pools in the North.”

As blacks struggled to integrate pools, they found little support from the police or government, both who frequently enforced segregation. Shortly after the passing of *Brown v. Board of Education*, the Baltimore NAACP lobbied the city to end pool segregation. Judge Roszell Thomsen upheld the practice, arguing that pools were “more sensitive than schools” due to the close physical contact in which pools brought men and women. When the U.S. Court of Appeals for the Fourth Circuit overturned the city’s ruling and ordered the pools to integrate, segregation continued, with city pools in black neighborhoods attracting mostly black swimmers, and those in white neighborhoods, white swimmers. As pools became segregated, they lost funding and began to fall into disrepair, because “. . . providing public recreation for the urban poor, especially black Americans, was not a priority during the postwar period.” Segregation continued as whites fled first to public pools located primarily in white neighborhoods, then to private club pools, and finally to pools in their own backyards.

IV. WADE IN THE WATER? NOT IN OUR POOL

105 *Id.* at 156.
106 *Id.* at 184.
107 “Wade in the Water” is the name of an African-American spiritual first published in New Jubilee Songs as Sung by the Fisk Jubilee Singers (1901) by John Wesley Work II and his brother, Fredericka J Work. The main chorus is:
Wade in the water.
It was a hot summer and the staff of the Creative Steps Day Camp just outside Philadelphia, Pennsylvania wanted to provide their young campers with relief and recreation. What better way to beat the mid-summer’s heat by taking a dip in the cool waters of a swimming pool? The day camp did not have its own swimming facility, so it entered into a business contract with the nearby Valley Swim Club of Huntingdon Valley. The agreement between the two entities was simple and clearly articulated: Creative Steps would pay Valley Swim Club $1,900 for access to the club’s swimming pool one day each week for the duration of the summer. The club, for its part, would ensure that the 60 campers had ample room to enjoy the pool for the time it was rented to them.

On the first day the Creative Steps campers exercised their right to the pool as agreed upon according to the terms of the contract, the club’s on-site administrator ejected the campers from the pool and the club’s property. Valley Swim Club simultaneously terminated the contract and refunded the Creative Steps’ payment in full.

According to the suit filed in United States District Court, Eastern District of Pennsylvania, the club administrators did not provide a verbal or written explanation regarding their rationale for canceling the contract.108 Though the fee was refunded, the terms of the contract were violated and legal issues were raised.

Campers and Creative Steps staff reported that their dismissal from the Valley

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Wade in the water children.
Wade in the water.
God's gonna trouble the water.

The chorus of “Wade in the Water” is a reference to the story of Moses and the Israelites leaving slavery in Egypt. In the Old Testament story, the Israelites and Moses arrive at the Red Sea. The pharaoh (ruler) of Egypt and his army are chasing them. God parts the Red Sea, and the Israelites cross the water (“wade in the water”) and cross to the other side. When the pharaoh and his army try to cross, the Red Sea closes in on them and kills all of them. Many internet sources and popular books claim that songs such as “Wade in the Water” contained explicit instructions to fugitive slaves on how to avoid capture and the route to take to successfully make their way to freedom.


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Swim Club was clearly motivated by club members’ racial anxieties, which were expressed overtly in their presence. In the complaint, the lawyers representing the plaintiffs cite multiple examples of reactionary behavior that was clearly racialized in nature. Specifically, the complaint noted the following examples:

[1.] . . . several white members of the VC [Valley Club] began to make disparaging racial remarks about the campers who are African American, Hispanic, and/or of other minority ethnicity;

[2.] . . . one of the children heard a white woman say: “What are all these black kids doing here? They might do something to my child”;

[3.] . . . other campers also heard racial comments and VC members making statements, including: “What are those black kids doing here?”;

[4.] . . . one of the members [of the country club] advised the Director of Creative Steps that she would see to it that the group of non-white students would not return;

[5.] . . . some of the members of VC began pulling their children out of the pool and were standing around with their arms folded. . . .[O]nly three members of VC left their children in the pool while the group of nonwhite students was swimming.

It is worth noting that the Valley Swim Club is a private club. Its members pay an annual fee for the privilege of access, facilities, and services. Nevertheless, the club’s membership and rules make no explicit statement about race being an exclusionary factor. Furthermore, the business contract drawn up and agreed to by the two parties—the Creative Steps Day Camp and the Valley Swim Club—made no mention of race as a barrier to access to the pool and its surrounding spaces.

The media continued to present the incident as an episode of unbridled racism. Headlines in print and television media did not fail to allude or outright reference race:

\[109\] Id. at 5-7.
Pool Boots Kids Who Might “Change the Complexion”\textsuperscript{109}; Racism Claims Surround PA. Swim Club: Specter Calls for Federal Investigation\textsuperscript{110}; Swim Club Accused of Racism Against Kids.\textsuperscript{111} News reports also emphasized the fact that children were the victims of such discrimination, and repeatedly ran photographs of the children who were affected. The media coverage compelled readers and viewers to question how and why the overt racialization of a pool could occur in 2009, when laws were supposedly in place to prevent such discrimination.

The press pursued Valley Swim Club director, John Duesler, who initially refused to make a public statement to the media.\textsuperscript{112} When he finally conceded, speaking to two Pennsylvania television stations, he stated “the children had changed ‘the complexion’ and ‘atmosphere’ of the club.”\textsuperscript{113} Duesler’s rhetoric stood in direct contradiction to a statement the Club had issued on its own website in an effort to perform damage control and respond to charges of racism: “Unfortunately, we quickly learned that we underestimated the capacity of our facilities and realized that we could not accommodate the number of children from these camps.”\textsuperscript{114}

Predictably, the response to Duesler’s “complexion and atmosphere” comment was one of shock and outrage. Acknowledging the blatant racism of Duesler and the Valley Swim Club, and reacting against the violation of the letter and spirit of desegregation laws, Senator Arlen Specter (D-PA) announced, ”The allegations against


\textsuperscript{111} Candiotti & Shin, supra note 2.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id.
the swim club as they are reported are extremely disturbing. I am reaching out to the parties involved to ascertain the facts. Racial discrimination has no place in America today.”

Recognizing that they had clearly overstepped the bounds of propriety—if not yet fully cognizant of the fact that they had certainly overstepped the bounds of legal obligations—the Valley Swim Club staff, as well as members and supporters, scrambled to defend Duesler and the Club’s decision. They also insisted on rectifying public perception of Duesler’s character, insisting that he was not a racist. No damage control efforts, however, could prevent the inevitable investigation into the Club’s actions. The Pennsylvania Human Relations Commission opened an investigation into the Club’s actions in the case of the Creative Steps Day Camp. Though the Commission ultimately exonerated Duesler himself of any racist wrongdoing, it did find that “‘racial animus . . . and the racially coded comments’ by club members at the Valley Club in Huntingdon Valley, Montgomery County, were the reasons the club revoked Creative Steps’ contract.’” Based upon their findings, the Commission “ordered Valley Club to pay a $50,000 civil penalty for their discrimination against one child whose parents had filed the complaint with the Commission. The club was also ordered to pay other damages, including legal expenses.”

In addition, two lawsuits were filed. One on behalf of the children, claiming violation of their civil rights under the Civil Rights Act of 1866, 42 U.S.C. § 1981; the

115 http://www.nbcphiladelphia.com/topics/?=United+States
117 Id.
other by the Department of Justice, citing a violation of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a.\textsuperscript{119} By November 2009, following the first lawsuit and a report from the Pennsylvania Human Rights Commission that found racial discrimination was involved in the Creative Steps Day Camp incident,\textsuperscript{120} the Valley Swim Club filed for bankruptcy.\textsuperscript{121} In May 2010, the Club was sold to Congregation Beth Solomon, a local synagogue, for $1.46 million.\textsuperscript{122}

V. ANALYSIS

Their complaint states, “[i]n terminating the contract with Creative Steps in a racially discriminatory manner, and for a racially discriminatory purpose, the Defendants have intentionally deprived Plaintiffs of the enjoyment of benefits, privileges, terms, and conditions of the contractual relationship to which they were entitled.”\textsuperscript{123} Based on precedent and the facts of the incident, the parents may have had legitimate grounds to sustain their complaint under Section 1981.

For a plaintiff to be successful in a case based on Section 1981, there must be evidence of purposeful racially motivated discrimination.\textsuperscript{124} In Patterson v. McLean Credit Union,\textsuperscript{125} the plaintiff sued her employer for what she contended to be racial

\textsuperscript{119} See Complaint, United States v. The Valley Club of Huntingdon Valley, January 13, 2010.
\textsuperscript{121} Id.
\textsuperscript{123} Patterson v. McLean Credit Union, 491 U.S. 164, 168 (1989).
harassment on the job. After arguments, the Court ordered reargument for the express purpose of reconsidering Runyon v. McCrary. The Court sustained Runyon but held that Section 1981 did not apply to conduct that occurred after contract formation and that complaints arising from performance were left to state law or to Title VII in cases of discrimination. Congress overruled the Patterson decision with the enactment of the Civil Rights Act of 1991; with one provision specifically amending Section 1981 to embrace the performance of contracts as well as the making of contracts.

Here, the Valley Swim Club at the time it canceled the contract with Creative Steps Day Camp, was silent regarding the purpose for the cancellation. It simply refunded the money to the Creative Steps Day Camp and disallowed further use of the facility. During the single use of the Valley Swim Club facility, racist comments by the members clearly demonstrated racial animus towards the non-white members of the Day Camp, with at least one Valley Swim Club member assuring the Director of Creative Steps that she would “see to it” that the non-white students would not return to Valley Swim Club. Later, the Valley Swim Club director – only after making his now-infamous statement about the change of “complexion” and “atmosphere” of the club – attempted to explain the actions by Valley Swim Club by stating that he had underestimated the capacity of the facility and discovered it would not be able to accommodate the numbers of children from Creative Steps. However, there was no evidence that the number of students coming from Creative Steps presented safety problems, violated fire codes or any other safety ordinance or prevented any other operation of Valley Swim Club during their attendance.

The remaining question is whether Valley Swim Club should have been exempt from enforcement of Section 1981 by its status as a private club. It is undisputed that Valley Swim Club was a private membership organization. Certainly, if the club had been reserved for exclusive private use of its members and their bona-fide guests and the students of Creative Steps Day Camp attempted to use the facility and were denied admission, Valley Swim Club could claim that they denied its use due to its status as a private club and reasonably avoided liability under Section 1981. The director, however, had the authority to enter into a contract with non-members for a fee for use of the facility. This demonstrates that Valley Swim Club permitted use of the facilities by arrangement and for a fee, thereby rendering the private club a place of public accommodation and subject to the anti-discrimination provisions of Section 1981.

Given the evidence of racial animus, the inability of Valley Swim Club to claim its status as a private club to exempts it from liability, a claim for discrimination based upon race under Section 1981 could be sustained by the parents of the students of the Creative Steps Day Camp.

**B. 42 U.S.C. § 2000a**

With the Valley Swim Club, this pattern of discrimination may not have been as strong. There is nothing in the Department of Justice complaint, the complaint filed by the families of the kids at Creative Day Camp, or anything in the media coverage, to indicate that the reported discrimination was part of a pattern or practice of Valley Swim Club. Further, there was no indication that a similar group successfully tried to use the Club after the incident in question. Although the parents’ case may have been sufficient to meet the required elements, the government’s case may not have been.
For reasons argued above, the Valley Swim Club would have met the standard for public accommodation and its snack bar would have brought it within the jurisdiction of the Civil Rights Act of 1964. Conversely, courts have not been anxious to find liability under section 2000a where the only proffered evidence by the government to establish a “pattern and practice” of discrimination is the alleged discriminatory act itself. There is little evidence that the Valley Swim Club regularly discriminated against non-whites that were otherwise eligible for membership.

C. First Amendment

With the Valley Swim Club, the freedom of association argument likely would not stand, as the Creative Steps incident had nothing to do with an expression of association. The complaints stemmed from the Club’s reaction to a group of minority youth entering the premises, not from an effort to define Valley Swim Club’s voice. Moreover, the allegations that the participation of the students from the Creative Steps Day Camp would change the “complexion” and “atmosphere” of the Valley Swim Club facility are unrelated to speech or expression. In this case, none of the statements that Valley Swim Club used to justify its actions had any relationship to justifying inherently discriminatory behavior; rather Valley Swim Club denied any discriminatory intent for its actions at all. Assuming, arguendo, that Valley Swim Club attempted any such alternative argument or justification, any claim for First Amendment protections would not have prevailed.

Certainly the Valley Swim Club is entitled to free expression and association, but that cannot extend to constitutional protections for discrimination. In NAACP v.
\textit{Alabama}, the Court recognized a First Amendment right “to engage in association for the advancement of beliefs and ideas . . . .”\textsuperscript{128} Moreover, associations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.\textsuperscript{129} The Court in \textit{Runyon v. McCrory} acknowledged that parents have a right to send their children to institutions that promote the belief that racial segregation is desirable and that children have a right to attend such institutions.\textsuperscript{130} The Court declined to extend that right to justify the practice of excluding racial minorities from such institutions. Relying upon \textit{Norwood v. Harrison}, the court noted that permitting admission of racial minorities would not limit the ability of the institution to promote its belief in racial segregation.\textsuperscript{131}

Should Valley Swim Club have attempted to argue that its members valued racial segregation and, inherent in that right of association, they were entitled to express their First Amendment rights by excluding non-whites from the Valley Swim Club, the Court would acknowledge the right of the members to belong to organizations that promote those beliefs. Assuming Valley Swim Club members and directors were unaware of the race of the Creative Steps Day Camp students at the time of entering into the contract, Valley Swim Club members would need to argue that their belief in racial purity necessarily extended to the exclusion of non-whites from the facility. Consequently, they were entitled to reject the Creative Steps Day Camp students based upon Valley Swim Club members’ First Amendment rights.

\textsuperscript{128} NAACP v. Ala. Ex rel. Patterson, 357 U.S. 449, 1488 (1958).
\textsuperscript{130} See Runyon, 427 U.S. at 196.
\textsuperscript{131} Id.
Given that neither the nature of Valley Swim Club’s organization nor its regular activity constituted the type of expressive activity that could be impaired, it would not likely find a safe haven for its discriminatory practices in the First Amendment. Moreover, extending the rationale in Runyon, the right to teach and promote segregation, does not extend to the actual practice of discriminating against non-whites in an institutional setting that is otherwise a public facility and does not engage in some degree of expressive activity.

VI. CONCLUSION

Candidate Barack Obama is now President Obama. On the United States Supreme Court, for the first time in its history, there is an African American, a Latina American, as well as three women. It is a very unique time in history. In some respects, it looks as though racial and gender discrimination is moving in a positive, new direction. Laws are in place because of efforts made by others -- Civil Rights marches, sit-ins, Brown v. Board of Education. Yet, there are still some places space is colorized - where the sight of young black kids leads to behavior that says little of tolerance, and less about respect.

Even in a country with such diverse cultures, ideas and points of view, the hope that racial discrimination would vanish after one event -- say, the election of a Black man to the highest post in the land -- is unrealistic. The election of President Obama did not change the racial composition of the United States Senate or the House of Representatives, which is still predominantly white and male. It did not change the complexion of the leaders of most of the major corporations in the United States, which is predominantly white and male. Some things are still in place. Yet, one would hope that with so many significant changes in laws, and the progress of people of color in positions
of authority, more would have understood the message that racial discrimination is not in the best interest of the country.

Some things have changed, to be sure. The response to the Valley Swim Club’s action were testament to this. From the families organizing to protest and sue, to United States Senator Arlen Specter requesting an investigation, to the Department of Justice filing a separate suit. The events at the Valley Swim Club touched a nerve. In the end, the concern may not lie with the law, but with the people the laws govern. Maybe Althea Wright, executive director of Creative Steps, had it right. “There is still a group of people that just don’t get it,” she said. “America is moving forward with or without them.”132

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