Using Common Law Property Doctrine to Advance Social Justice

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INTRODUCTION

Cases involving estates in land and future interests might not qualify as part of the "dogs" and "crud" that members of the Supreme Court who got on the outs with Chief Justice Warren Burger were likely to be assigned.[1] But, they might seem unattractive to lawyers and judges who must make sense of a "monstrously complex and mysterious body of law."[2] That observation is not limited to matters involving the Rule Against Perpetuities, which the California Supreme Court once described as too difficult for lawyers exercising reasonable care to understand in dispatching a legal malpractice claim.[3]

Beyond technical complexity, some lawyers and judges might regard aspects of common law property doctrine as normatively objectionable, or even morally repugnant. For example, women enjoyed at best limited property rights under the common law, which allowed husbands to exercise dominion and control over their wives' earnings as well as real and personal property.[4] Common law property doctrine also countenanced racial

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[1] According to Justice Lewis Powell, "A dog is a case that you wish the Chief Justice had assigned to some other Justice." A deadly dull case, "a tax case, for example." Stuart Taylor, Jr., *Powell on His Approach: Ding Justice Case by Case*, N.Y. TIMES, July 12, 1987 (§ 1), at 1, 18. And as Justice Harry Blackmun explained, "If one's in the doghouse with the Chief, he gets the crud," by which he meant tax cases and sometimes Indian law cases. Stuart Taylor, Jr., *Reading the Tea Leaves of a New Term*, N.Y. TIMES, Dec. 22, 1986, at B14. A long-time colleague who specialized in tax and American Indian law often lamented that he did "crud and dogs." *See, e.g.*, Erik M. Jensen, *Of Crud and Dogs*, 58 TAX NOTES 1257 (1993).

[2] THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 2 (2d ed. 1984).

[3] Lucas v. Hamm, 364 P.2d 685, 690–91 (Cal. 1962).

[4] *See generally* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–85 (1994). Husbands had legal control over their wives' earnings in most states until at least the latter part of the nineteenth century. *See* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 53–54 (1998). Husbands also had legal control over real property that their wives obtained or brought into the marriage, husbands obtained control of personal property their wives brought into their marriage, and husbands exercised legal dominion over real property that married couples held as tenants by the entireties. *See id.* at 13–14; Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L.Q. 24, 24–26 (1951). *Cf.* Kirchberg v. Feenstra, 450 U.S. 455, 457 n.1 (1981) (explaining that the civil law system in Louisiana, which recognized community property and therefore was generally regarded as more favorable to women's property rights than the common law, designated the husband as "head and master" of the

discrimination. We can see this in such cases as *Corrigan v. Buckley*,[5] where the Supreme Court effectively upheld the validity of restrictive covenants by dismissing, as "entirely lacking in substance," a constitutional challenge to a private arrangement under which white landowners agreed to exclude Blacks from their neighborhood.[6] This was true despite the Court's ruling, nearly a decade earlier, that state and local governments could not enact laws requiring racially segregated neighborhoods.[7]And the Court's tacit approval of restrictive covenants encouraged their enormous expansion, which in turn contributed to extremely high levels of residential segregation.[8] Similarly, the doctrine of discovery, first systematically articulated in *Johnson v. McIntosh*,[9] devalued the long-standing presence of American Indians in what became the United States.[10] The Supreme Court has continued to recognize that doctrine in the twenty-first century.[11] The doctrine of adverse possession valorizes both the disruption and transformation of land at the expense of conservation and other values and is in tension with libertarian opposition to compelled transfers of land.[12]

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marital community and allowed him unilaterally to encumber the family residence, a provision that the Supreme Court in that very case held to violate the equal protection rights of wives).

Common law legal disabilities on women were not confined to the property context. The common law rule that severely limited the ability of married women to enter into legally binding contracts was the principal basis for the denial of Myra Bradwell's application for admission to the bar. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 131 (1873); *id.* at 141 (Bradley, J., concurring).

[5] Corrigan v. Buckley, 271 U.S. 323 (1926).

[6] *Id.* at 330. Although the covenant was a private agreement and therefore not subject to constitutional constraints, the Court later ruled that judicial *enforcement* of racially restrictive covenants did represent unconstitutional governmental action. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (finding that state court enforcement of such covenants violated the Equal Protection Clause of the Fourteenth Amendment); *see also* Hurd v. Hodge, 334 U.S. 24, 33–36 (1948) (holding that judicial enforcement of such covenants in the District of Columbia violates 42 U.S.C. § 1982 and public policy); Barrows v. Jackson, 346 U.S. 249, 253–54 (1953) (concluding that a state court's award of damages for breach of a racially restrictive covenant represents state action that violates the Fourteenth Amendment).

[7] Buchanan v. Warley, 245 U.S. 60 (1917).

[8] *See* JEFFREY D. GONDA, UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 15–54 (2015); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 77–91 (2017); RICHARD H. SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 69–76 (2018). On the high levels of residential segregation during this period, see DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 17–82 (1993); KARL E. TAEUBER & ALMA F. TAEUBER, NEGROES IN CITIES: RESIDENTIAL SEGREGATION AND NEIGHBORHOOD CHANGE 28–68 (1965).

[9] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–77, 581–84, 587–88, 591–92, 595 (1823).

[10] *See, e.g.*, NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 285–88 (2023); MARK CHARLES & SOONG-CHAN RAH, UNSETTLING TRUTHS: THE ONGOING, DEHUMANIZING LEGACY OF THE DOCTRINE OF DISCOVERY 13–23 (2019); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312–17, 322–23 n.132–33 (1990); Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 484–86 (2006).

[11] *See* City of Sherrill v. Oneida Nation of N.Y., 544 U.S. 197, 203 n.1 (2005).

[12] On the disruption of land, see, e.g., John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840–62 (1994); Eric T. Freyfogle, *The Construction of Ownership*, 1996 U. ILL. L. REV. 173, 173–80 (contending that the law encourages landowners to use their property

For whatever reason, courts have avoided or struggled with seemingly basic property concepts even when a focus on those concepts could have resolved disputes in a straightforward and entirely defensible manner. This article suggests that courts should embrace common law property doctrine despite whatever flaws it might contain when the doctrine is useful and provides a cogent basis for determining cases.[13] This position is analogous to the renewed interest in state constitutional law to protect individual rights,[14] as well as suggestions that progressive lawyers should pragmatically consider using formalist arguments that traditionally have been associated with conservative positions.[15] But the approach advocated in this article draws its main inspiration from the work of Charles Hamilton Houston (and later Thurgood Marshall) at the outset of what seemed like a quixotic challenge to segregation in education. They did not initially explicitly challenge the constitutionality of the notorious separate-but-equal doctrine but instead tried to use that doctrine to their advantage, changing their approach only when earlier victories undermined that doctrine and gave grounds for optimism that a direct attack could succeed. Note that the Houston-Marshall project involved an effort to change legal doctrine, whereas this article illustrates how established common law property doctrines sometimes can be used to promote socially desirable goals.

Part I considers a recent decision in which the Ohio Supreme Court rebuffed an effort to enforce deed restrictions on the property used by the Cleveland Botanical Garden. The court reached the correct result, but the main opinion focused more on "practical realities" than on the language of the deed conveying the property 140 years earlier.[16] Yet, interpreting the deed and applying traditional property doctrines would have reached the same result in a more satisfactory way.

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in socially and environmentally destructive ways). On the tension between libertarianism and adverse possession, see Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 723–25 (1986).

[13] For an analogous analysis of the use of common law contract doctrine to combat racial discrimination, see Steven J. Burton, *Racial Discrimination in Contract Performance:* Patterson *and a State Law Alternative*, 25 HARV. C.R.-C.L. L. REV. 431, 445–58 (1990) (criticizing the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which narrowly interpretated a Reconstruction statute forbidding racial discrimination in the making and enforcement of contracts that appears in what is now 42 U.S.C. § 1981(a), and explaining why a more careful attention to contract doctrine would have led to a different, and correct, result).

[14] Part of that interest arose from concern that the U.S. Supreme Court had interpreted individual rights more narrowly than critics thought appropriate. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495–98 (1977). Proponents of this approach have emphasized that state constitutions might provide a basis for more expansive rights protection and also that state constitutions protect rights that the U.S. Constitution does not address. *See*, *e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 22–172 (2018); Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

[15] The approach taken here is also analogous to suggestions that progressive lawyers should consider making formalist arguments, which are traditionally associated with conservative positions. *See*, *e.g.*, Katie Eyer, *Textualism and Progressive Social Movements*, U. CHI. L. REV. ONLINE, Mar. 12, 2024, 1; Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679 (2021).

[16] Clevland Botanical Garden v. Drewien, 216 N.E.3d 544, 550 (Ohio 2022).

The Ohio case might seem innocuous in that the case came out right despite the opinion's analytical weaknesses. Sometimes, though, avoiding careful analysis of the relevant property doctrines can lead to egregiously incorrect statements of law in situations where traditional doctrine would produce the right result for the right reason. Part II of the article will analyze a Colorado Supreme Court decision[17] that used tortured reasoning to eviscerate an obnoxious racial restriction on property when a careful analysis of the document at issue would have shown its invalidity under well-established property doctrine.

Part III will illustrate the article's claim with reference to a Virginia Supreme Court decision[18] that used technical property doctrine to prevent a segregation academy that had been established in the wake of *Brown v. Board of Education*[19] to continue to benefit from a large trust that contained a whites-only provision. The Virginia decision illustrates the article's claim that common law property doctrines can be used for social good.

Finally, Part IV returns to the work of Houston and Marshall at the outset of the litigation campaign that culminated in *Brown*, showing how they laid the foundation for that landmark ruling by proceeding incrementally and relying on existing doctrine to erode "separate but equal" to the point where it could no longer stand. The cases and issues discussed here are not as portentous as that, but the superb legal work that Houston and Marshall did can serve as a model for other lawyers and judges handling less cosmic matters.

I. THE INELEGANT OHIO CASE

In *Cleveland Botanical Garden v. Worthington Drewien*,[20] the Ohio Supreme Court rebuffed claims that the City of Cleveland had failed to maintain land that it had received in 1882 for park purposes. In reaching its substantially unanimous conclusion, the court failed to muster a majority opinion; there were three opinions subscribed to by six of the seven justices, while the holdout justice concurred only in the judgment without opinion.[21] Only one of the opinions identified the precise property interests at issue, and even that opinion failed to explain why the nature of those interests

[17] Capitol Fed. Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957).

[18] Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 387 S.E.2d 740 (Va. 1990).

[19] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[20] Clevland Botanical Garden v. Drewien, 216 N.E.3d 544 (Ohio 2022).

[21] Three justices subscribed to a plurality opinion announcing the judgment of the court. *Id.* at 545 (opinion of Brunner, J..). Two other justices subscribed to a concurring opinion. *Id.* at 553 (DeWine, J., concurring in judgement only). Another justice wrote only for himself, substantially agreeing with the decision except on one issue. *Id.* at 562 (Fischer, J., concurring in part and dissenting in part). The seventh member of the court, Justice Stewart, did not join any of those opinions, as she concurred in judgment only but did not write separately. *See id.* at 553.

mattered.[22] This oversight might have contributed to the analytical confusion.

In 1882, the industrialist and financier Jeptha Wade[23] conveyed 73 acres of land in the University Circle neighborhood of Cleveland, Ohio, to the city, subject to several restrictions. Most important, the city was to maintain the land as a park "to be open at all times to the public" and could allow its use "for no other purpose."[24] Wade specified that he was granting what would be called Wade Park to the city "forever in trust . . . upon the express conditions" stated in the instrument of conveyance.[25] The deed further provided that, should any of the restrictions be breached with respect to any portion of the property that Wade had conveyed, the land would "revert to [Wade] or [his] heirs forever."[26]

Beginning in the 1930s, the city allowed the Botanical Garden, a private nonprofit organization, to occupy part of Wade Park provided that this did not impede public access to the area. And in late 1964, the city formally leased a larger portion of Wade Park to the Botanical Garden, subject to Wade's restrictions that this would not result in preventing public access to any portion of the park and that the Botanical Garden not charge admission except for special programs.[27] In 2001, the Botanical Garden leased additional land in the park under which it constructed a garage.[28] Some of Wade's heirs eventually objected to the Botanical Garden's charging admission and parking fees and its closing on Mondays, among other things.[29] The Botanical Garden then sought a declaratory judgment that it was not violating Wade's deed restrictions. The objecting heirs counterclaimed but never tried to invoke their reversionary interest in the property.[30]

The Ohio Supreme Court virtually unanimously found that the Botanical Garden had not breached the restrictions in Jeptha Wade's 1882 deed, although the justices used different methodologies to reach that conclusion.[31] The plurality opinion subscribed to by three of the seven

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[22] *See id.* at 563–64 (Fischer, J., concurring in part and dissenting in part). The parties' briefs likewise neglected to identify the property interests at issue.

[23] Wade was a telegraph pioneer who helped to found and later led Western Union. He was an official of several banks and a director of numerous railroads. He also was involved in the founding of the Case School of Applied Science, which later became known as Case Institute of Technology before becoming part of Case Western Reserve University. *See* C.H. CRAMER, CASE INSTITUTE OF TECHNOLOGY: A CENTENNIAL HISTORY, 1880–1980, at 11–12 (1980); *Wade, Jeptha Homer I*, ENCYC. OF CLEVELAND HIST., https://case.edu/ech/articles/w/wade-jeptha-homer-i (last visited Mar. 18 2025).

[24] *Clevland Botanical Garden*, 216 N.E.3d at 546 (plurality opinion).

[25] *Id.* at 564 (Fischer, J., concurring in part and dissenting in part).

[26] *Id.* at 546–47 (plurality opinion).

[27] *Id.* at 547.

[28] *Id.*

[29] *Id.*

[30] *Clevland Botanical Garden*, 216 N.E.3d at 547–48 (plurality opinion).

[31] One justice partially dissented, concluding that the validity of the Botanical Garden's admission fees was not appropriate for resolution on summary judgment and should have been resolved at trial. *Id.* at 568–69 (Fischer, J., concurring in part and dissenting in part).

justices, without analyzing the deed's language in detail, emphasized the difficulty of operating "a beautiful and attractive park," as Wade called for in the deed, if the deed restrictions were read literally.[32] The principal concurrence, which was subscribed to by two justices, relied heavily on dictionaries that were extant when the conveyance took place in 1882 to find no breach of the restrictions.[33] And the partial concurrence emphasized "the plain language of the deed."[34]

The hasty focus on whether the Botanical Garden had violated the deed restrictions overlooked a logically prior, and potentially significant, question relating to the property interests that the deed created.[35] Jeptha Wade's 1882 deed conveyed Wade Park to the city "forever," suggesting a fee simple, but with the proviso that a breach of any of the deed restrictions would cause the property to "revert" to the grantor or his heirs.[36] This language appears to create a fee simple determinable, an estate in fee simple that automatically terminates when a specified event takes place.[37] The deed does contain an ambiguity with its reference to "express conditions" on the use of the land that became Wade Park.[38] This reference might suggest that Wade instead conveyed a fee simple subject to a condition subsequent, an estate in fee simple that allows the grantor or successor in interest to take steps to terminate the estate in the event of a breach of the condition.[39] Courts tend to construe an ambiguous conveyance as creating a fee simple subject to a

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[32] *Id.* at 550 (plurality opinion).

[33] *Id.* at 554–55, 557 (DeWine, J., concurring in judgment only).

[34] *Id.* at 565 (Fischer, J., concurring in part and dissenting in part). The court might have justified its failure to address the precise nature of the property interests created by Jeptha Wade's 1882 conveyance by explicitly stating that it need not resolve that question because there was no breach of any of the restrictions contained in that conveyance. But none of the opinions said anything like that.

[35] The court might implicitly have attended to that question in a separate portion of the case involving whether Ohio's Marketable Title Act extinguished the reversionary interests that the 1882 deed created, but the discussion of that question did not relate to the main points in dispute. The Marketable Title Act "extinguish[es] such interests and claims, existing prior to the effective date of the root of title," OHIO REV. CODE § 5301.47(A), including "possibilities of reverter, and rights of entry or powers of termination for breach of condition subsequent," *id.* § 5301.49(A). A possibility of reverter is the future interest attached to a fee simple determinable. RESTATEMENT OF PROP. § 154(3) cmt. g (AM. L. INST. 1936). A power of termination or right of entry is the future interest attached to a fee simple subject to a condition subsequent. *Id.* § 155. The court unanimously ruled that the root of title here was the Wade deed of 1882 and that the express terms of the Marketable Title Act preserved the heirs' reversionary interest in the property. *Clevland Botanical Garden*, 216 N.E.3d at 552 (plurality opinion); *id*. at 560 (DeWine, J., concurring in judgment only); *id.* at 562 (Fischer, J., concurring in part and dissenting in part).

[36] *Clevland Botanical Garden*, 216 N.E.3d at 546–47 (plurality opinion).; *id.* at 564 (Fischer, J., concurring in part and dissenting in part). The deed stated that city would hold the land "in trust," but both the plurality opinion and the partial concurrence agreed that a statute required the city to comply with the deed restrictions whether it was a trustee or the owner of the property. *Id.* at 551 (plurality opinion); *id.* at 563 (Fischer, J., concurring in part and dissenting in part). The principal concurrence did not address this question. In short, a majority of the court supported this conclusion, and no one explicitly disagreed.

[37] RESTATEMENT OF PROP. § 44 (AM. L. INST. 1936).

[38] *Clevland Botanical Garden*, 216 N.E.3d at 564 (Fischer, J., concurring in part and dissenting in part).

[39] RESTATEMENT OF PROP. § 45 (AM. L. INST. 1936).

condition subsequent rather than a fee simple determinable out of distaste for forfeiture; violation of a restriction under a fee simple determinable results in automatic forfeiture, whereas violation of the same restriction under a fee simple subject to a condition subsequent requires the grantor to exercise the power of termination in order to regain possession.[40]

But a closer look at the deed suggests that Wade conveyed a fee simple determinable: if a breach occurred, the property would immediately revert to Wade or his heirs without the necessity of taking formal action to assert the breach and recover the property. To be sure, the deed does not contain words such as "until," "so long as," or "during" to refer to the city's use of the land, which are common indicia of a determinable fee, but it does say that the property will revert to the grantor if any part of it is used in violation of the terms of the conveyance.[41] Still, the matter is not free from doubt.

Resolution of the nature of the property interests that the 1882 deed created could have implications for the resolution of the entire dispute.[42] If that deed created a fee simple determinable and the Botanical Garden breached any of the restrictions starting no later than 2003 when it began charging admission and parking fees along with limiting access to the grounds and closing on Mondays,[43] then the property immediately reverted to the heirs. Although some of the heirs consistently objected, they never took legal action to prevent those actions until they asserted their counterclaim in the Botanical Garden's 2013 declaratory judgment action.[44] Even then, they did not assert that they now owned the property pursuant to the terms of the original deed.[45] To the extent that the counterclaim effectively involved an assertion that the Botanical Garden was trespassing on the heirs' property, the assertion was untimely because the statute of limitations for trespass actions in Ohio is four years and the counterclaim

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[40] *Id.* § 45 cmt. m (suggesting that a provision that, "if" a stated contingency occurs, the property "shall revert back" to the grantor, "more commonly manifests an intent to create an estate in fee simple subject to a condition subsequent"); 1 JOHN A. BORRON, JR., SIMES AND SMITH, THE LAW OF FUTURE INTERESTS § 248, at 281 (3d ed. 2002) (observing that "if the language is such as to require a choice between a determinable estate (which automatically terminates upon the happening of the prescribed event) or an estate on condition subsequent (which terminates only by election of the transferor or his successors), the latter, being less drastic, is to be preferred"); 1 MICHAEL ALLAN WOLF & J. GORDON HYLTON, POWELL ON REAL PROPERTY § 13.05[2] (2024) (explaining that courts tend to prefer a fee simple subject to a condition subsequent over a fee simple determinable because "[a]n *optional* forfeiture is less objectionable than an *automatic* forfeiture"). *See, e.g.*, Storke v. Penn Mut. Life Ins. Co., 61 N.E.2d 552, 555 (Ill. 1945); Oldfield v. Stoeco Homes, Inc., 139 A.2d 291, 297 (N.J. 1958); Lawyers Tr. Co. v. City of Hous., 359 S.W.2d 887, 890 (Tex. 1962).

[41] RESTATEMENT OF PROP. § 44 cmt. l (AM. L. INST. 1936).

[42] The partial concurrence explained the difference between a fee simple determinable and a fee simple subject to condition subsequent, concluding that the Wade deed created a fee simple determinable, but that opinion never explained why the distinction might matter in this case. *Clevland Botanical Garden*, 216 N.E.3d at 563–64 (Fischer, J., concurring in part and dissenting in part).

[43] *See id.* at 547 (plurality opinion).

[44] *Id.* at 547–48.

[45] *Id.* at 548.

was asserted about ten years after the alleged breach of the deed restrictions.[46]

On the other hand, there would be no timeliness problem if the deed created a fee simple subject to a condition subsequent. In that event, the heirs would have had to take steps to effect the reversion of the property after the Botanical Garden breached the deed restrictions. The heirs did not do so, which means that the city still owned the land that it leased to the Botanical Garden and therefore the statute of limitations for any alleged trespass by the Botanical Garden had not begun to run against the heirs.

In short, attention to the common law property doctrines relating to defeasible fees could have clarified the issues in the dispute about the Cleveland Botanical Garden. Only if the conveyance created a fee simple subject to a condition subsequent would the court have needed to address whether the Botanical Garden had breached any of the deed restrictions. If Wade created a fee simple determinable, the court could have dismissed the heirs' counterclaim as untimely without addressing the claim of breach.[47]

II. THE MESSY COLORADO CASE

In *Capitol Federal Savings and Loan Association v. Smith*,[48] the Colorado Supreme Court ignored a doctrinally correct but complicated basis for rejecting a racially exclusionary arrangement and instead relied on unsound reasoning to get to an entirely supportable result. At issue was a 1942 agreement under which white landowners in a Denver neighborhood agreed not to sell or lease their property to Black people.[49] The signatories to the arrangement "covenant[ed]" to exclude Black people "from this date to January 1, 1990" and agreed that violators would forfeit their property to the remaining signatories who recorded a notice of claim.[50] In addition, violators were subject to damages and injunctive relief.[51] As we shall see, this wording was both clever and not clever enough.

Nearly fifteen years later, a group of Black plaintiffs who owned property subject to the exclusionary arrangement challenged its validity. White owners in the neighborhood sought to enforce the 1942 agreement and demanded that they be awarded possession of those properties. The trial

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[46] OHIO REV. CODE § 2305.09(A).

[47] In addition, the heirs' disclaimer of any effort to enforce their reversionary interest could have focused attention on exactly what would have satisfied them. The appropriate relief presumably would have been equitable. *See* RESTATEMENT OF PROP. § 193 (AM. L. INST. 1936). Whether the arrangement was a fee simple determinable or a fee simple subject to a condition subsequent, the heirs could not have obtained damages. *Id.* § 194. The heirs might have been willing to settle their counterclaim for a modest financial payment had the court found that the Botanical Garden breached any of the restrictions contained in Wade's 1882 conveyance to the city, but there is no direct evidence supporting this possibility.

[48] Capitol Fed. Sav. & Loan Ass'n v. Smith, 316 P.2d 252 (Colo. 1957).

[49] *Id.* at 253.

[50] *Id.* at 254.

[51] *Id.*

court ruled for the Black plaintiffs, finding that the arrangement was an unlawful cloud on their title.[52] The state supreme court affirmed in a poorly reasoned opinion.

The opinion treated the 1942 agreement as a restrictive covenant that was unenforceable in a state court under the reasoning of then-recent U.S. Supreme Court rulings.[53] Those rulings recognized that *Corrigan* had upheld the legality of racially restrictive covenants but held that judicial enforcement of those covenants represented a form of governmental action that contravened the Fourteenth Amendment.[54] The defendants sought to avoid the force of those rulings by asserting that the agreement in question was not a covenant but instead involved an executory interest.[55] They further argued that the remedy for violation of the racial restriction differed from those at issue in the Supreme Court's cases because the remedy for violation included forfeiture, not simply an injunction or damages.[56]

The Colorado Supreme Court was having none of that: "No matter by what ariose terms the covenant under consideration may be classified by astute counsel, it is still a racial restriction in violation of the Fourteenth Amendment to the Federal Constitution."[57] The opinion continued: "High sounding phrases or outmoded common law terms cannot alter the effect of the [1942] agreement . . . . While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's."[58]

The court's rhetorical flourishes failed to engage with relevant legal doctrines. The 1942 agreement might superficially have looked like a covenant, because it provided for damages and injunctive relief. Those are standard remedies for violation of a covenant.[59] But forfeiture is not a remedy for violation of a covenant.[60] The defendants were quite correct in arguing that the forfeiture provision took the arrangement out of the covenant category. They were further correct in claiming that the agreement's provision for automatic forfeiture to third parties involved an executory interest.[61] And they were correct yet again that the arrangement for automatic forfeiture meant that a state court would not be enforcing the racial restriction, which would have occurred immediately on breach. In this sense, a fee simple subject to an executory limitation is analogous to a fee simple determinable and differs from a fee simple subject to a condition

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[52] *Id.* at 253–54.

[53] *Id.* at 255.

[54] Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948); *see also* Barrows v. Jackson, 346 U.S. 249, 254, 258 (1953) (holding that a state court's awarding of damages for violation of a racially restrictive covenant was also state action prohibited by the Fourteenth Amendment); cases cited *supra* note 6.

[55] *Capitol Fed.*, 316 P.2d at 254.

[56] *Id.*

[57] *Id.* at 255.

[58] *Id.*

[59] RESTATEMENT OF PROP. § 528 (AM. L. INST. 1944).

[60] *See id.*

[61] *Id.* § 25(1) (1936); *see also id.* § 46(1)(b) (explaining a fee simple subject to an executory limitation).

subsequent, where the grantor must affirmatively effect the forfeiture, typically by resorting to judicial remedies that represent state action for constitutional purposes.[62]

But accurately describing the arrangement as an executory interest actually renders the 1942 agreement even more vulnerable than it would have been had it qualified as a racially restrictive covenant. Relying on common law property principles could have rendered the arrangement void, not merely unenforceable. Here is why: Executory limitations are subject to the Rule Against Perpetuities.[63] The Rule Against Perpetuities requires that any interest subject to the Rule must vest, if ever, within twenty-one years of a life in being when the interest was created.[64] The agreement at issue in *Capitol Federal* was to have been effective between 1942 and 1990.[65] It was therefore possible for the executory interest to vest outside the perpetuities period in someone who was not a life in being within twenty-one years of the agreement's adoption, and that possibility exists without regard to such imaginative scenarios as a fertile octogenarian or an unborn widow.[66] Accordingly, the court could and should have found that interest void from the outset and stricken it.[67]

In short, the Colorado court's apparent aversion to common law property principles obscured how those principles could have been used to eliminate and not simply to render ineffective an obnoxious racial restriction.[68] This option admittedly might not have been available had the drafter of the restriction taken more care. Whoever drafted the document might have cleverly sought to obscure the distinction between a covenant and an executory limitation, but that person apparently was not sufficiently clever to avoid the perpetuities problem.

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[62] *See* RESTATEMENT OF PROP. §§ 44, 45 (AM. L. INST. 1936).

[63] *See id.* §§ 370 cmts. g–i, o, 372, 374 (1944).

[64] *Id.* § 374 & cmt. b.

[65] *See* Capitol Fed. Sav. & Loan Ass'n v. Smith 316 P.2d 252, 254 (Colo. 1957).

[66] *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 cmt. h (AM. L. INST. 1983) (fertile octogenarian); *Id.* § 1.4 cmt. i (unborn widow).

[67] It is conceivable that invalidation of the executory interest would not have eliminated the racial restriction altogether. Someone might have argued that the forfeiture provision remained because the executory interest encompassed only forfeiture to third parties. On this view, a breach of the agreement would result in forfeiture to the grantor on the theory that this reflects the grantor's intent. *See* RESTATEMENT OF PROP. § 228 cmt. b (AM. L. INST. 1944). But that would not necessarily work in this situation. Excising the executory interest while retaining the racial restriction would probably mean that any property conveyed to a Black buyer would be forfeited to the conveyor, but it is difficult to understand why any potential individual conveyor would agree to such an arrangement. So even in the face of such an argument, a court could completely strike the racial restriction based on a judicial determination of the conveyor's preferred outcome. *See id.* § 402.

[68] Had this case arisen today instead of in 1957, the court could have disposed of the arrangement as a violation of the Fair Housing Act's ban on statements expressing a discriminatory preference based on race, color, religion, sex, familial status, or national origin, but that law was not adopted until 1968. *See* Civil Rights Act of 1968, 42 U.S.C. § 3604(c); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §§ 15:8–15:12 (2024).

III. THE SURPRISING VIRGINIA SEGREGATION ACADEMY CASE

A final example of the use of common law property doctrine to achieve a positive result comes from the Virginia Supreme Court's 1990 ruling in *Hermitage Methodist Homes of Virginia, Inc. v. Dominion Trust Co.*,[69] which arose as a late chapter in a dispute that had its roots in *Brown v. Board of Education*[70] and thwarted a segregation academy's possibly opportunistic effort to continue to benefit from a trust that contained a whites-only requirement. *Hermitage Methodist Homes* concerned the Prince Edward School Foundation, which was established in 1955 to run a private school for white children in Prince Edward County, Virginia, if and when a federal court ordered the local public schools to be desegregated.[71] Such an order seemed inevitable at that time, because the Prince Edward County school district was one of the original defendants in *Brown*,[72] and the Supreme Court had remanded the case to the district court with instructions to order desegregation "with all deliberate speed."[73] The desegregation order finally came in the spring of 1959.[74] Local officials promptly shut down the public schools, and the Foundation opened Prince Edward Academy, which enrolled virtually every white student in the county and hired most of the white teachers from the previously white public schools.[75] The Supreme Court eventually ordered the reopening of the public schools in 1964,[76] but the segregation academy continued to enroll most white children in the county for many years.[77]

Meanwhile, in 1956, Jack Adams, who lived about 50 miles west of Prince Edward County in Lynchburg, created a charitable testamentary trust that named the Prince Edward School Foundation as beneficiary. The trust document specified, however, that the Foundation would benefit from the trust only "[s]o long as [it] admits to any school operated or supported by it only members of the White Race."[78] In the event that the Prince Edward School Foundation breached the racial restriction by admitting any student

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[69] Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 387 S.E.2d 740 (Va. 1990).

[70] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[71] *See* BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE 11–15, 58–62 (1961); BOB SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA, 1951–1964, at 87–125 (1965).

[72] Davis v. Cnty. Sch. Bd., 103 F. Supp. 337 (E.D. Va. 1952) (three-judge court), *rev'd sub nom. Brown*, 347 U.S. at 483.

[73] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

[74] Allen v. Cnty. Sch. Bd., 266 F.2d 507 (4th Cir. 1959) (per curiam).

[75] JILL OGLINE TITUS, BROWN'S BATTLEGROUND: STUDENTS, SEGREGATIONISTS, AND THE STRUGGLE FOR JUSTICE IN PRINCE EDWARD COUNTY, VIRGINIA 34–37 (2011).

[76] Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964).

[77] *See* Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L. REV. 327, 393 (1997) (noting that 36% of white children were attending public schools by the end of the 1970s). Only seven white students enrolled in the overwhelmingly Black public schools in 1964 after the Supreme Court's reopening order. TITUS, *supra* note 75, at 165. In the early 1990s, about 80% of white children were attending public schools. CHRISTOPHER BONASTIA, SOUTHERN STALEMATE: FIVE YEARS WITHOUT PUBLIC EDUCATION IN PRINCE EDWARD COUNTY, VIRGINIA 245 (2011). And by 1997, about 40% of the public school students were white. Spreng, *supra*, at 401.

[78] Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 387 S.E.2d 740, 741 (Va. 1990).

who was not white, the income would be paid successively to either of three other educational institutions, all subject to the same whites-only requirement. And if all four of the educational institutions breached, the residual beneficiary would be a nonprofit assisted-living operator based in Richmond, which was not subject to any racial restriction.[79]

Prince Edward Academy operated on a whites-only basis for many years despite two significant legal setbacks. The more important setback was the loss of its federal tax exemption in 1978 under an Internal Revenue Service Ruling that denied favorable tax status to racially discriminatory private schools.[80] The Foundation unsuccessfully litigated the revocation of its tax-exempt status all the way to the Supreme Court, which declined to review the case despite three dissenting votes from Justices who thought the case worthy of plenary review.[81] The other setback came in a case holding that a Reconstruction-era civil rights law forbidding racial discrimination in the making and enforcement of contracts applied to the admissions policies of private schools.[82] The Foundation was legally bound by the latter ruling because an association to which it belonged had intervened in the litigation in the district court, but the ruling otherwise had little practical effect because no Black students had ever applied to the Academy at that time.[83]

The loss of the tax exemption did have serious consequences. It meant that donors could not take a tax deduction for contributions to the Foundation, which in turn put more pressure on the Academy to increase tuition to cover the development shortfall, which made it more difficult for parents to afford to send their children there.[84] The Foundation finally regained its tax-exempt status in 1986, assuring the IRS that it had a nondiscriminatory admissions policy and citing as evidence that it had previously admitted several Asian students, a fact that had been publicized in a national magazine article and the Academy's own newspaper.[85] The Foundation added a Black member to its board and admitted five Black students in the fall of 1986.[86]

These developments led the bank administering the Adams Trust to seek guidance from a state court about which beneficiary should receive the trust income. By then, not only Prince Edward Academy but all three of the alternative educational beneficiaries had admitted Black students and

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[79] *Id.* at 742.

[80] Rev. Rul. 71–447, 1971–2 C.B. 230, 231.

[81] Prince Edward Sch. Found. v. United States, 450 U.S. 944, 944–49 (1981) (Rehnquist, J., dissenting from denial of certiorari). The Supreme Court later upheld the IRS policy. Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

[82] Runyon v. McCrary, 427 U.S. 160 (1976) (interpreting Act of May 31, 1870, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981(a))).

[83] *See* Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 775 n.30 (1993).

[84] BONASTIA, *supra* note 77, at 245.

[85] Entin, *supra* note 83, at 795.

[86] BONASTIA, *supra* note 77, at 245; Entin, *supra* note 83, at 775 n.32.

therefore appeared to have breached the whites-only restriction.[87] The Foundation declared that it should continue to receive the income from the Adams Trust because the whites-only restriction was unconstitutional, an audacious claim given how the Foundation came into existence as part of Massive Resistance to *Brown*.[88]

Whatever the Foundation's audacity, its argument has a surface plausibility. When the Adams Trust was created, Virginia law required that any charitable gift for educational purposes be used to support only segregated instruction.[89] Consequently, the whites-only restriction was required by state law and therefore was the product of governmental compulsion.[90] But there are limits to that surface plausibility. The Foundation's argument assumes that both Adams, as the settlor, and the Foundation, as beneficiary, were either completely indifferent or at least neutral about racially mixed education and that they opted for whites-only instruction because of the state law. But we have every reason to believe that Virginia law reflected, rather than shaped, public opinion and behavior. Prince Edward County authorities litigated unsuccessfully all the way to the Supreme Court to preserve segregated schools, they closed the public schools in the face of a desegregation order, and Virginia was a hotbed of Massive Resistance in the wake of *Brown*.[91]

There was, however, a different constitutional analysis available, based on traditional property doctrines, although that argument might not have succeeded. The Foundation might have claimed that judicial enforcement of the Adams Trust's whites-only restriction was itself state action that violated the Fourteenth Amendment. This argument is analogous to the analysis that the Supreme Court used in the restrictive covenant cases.[92] But the argument might have foundered because of the nature of the common law property interests involved.

The whites-only restriction in the Adams Trust made the Prince Edward School Foundation a beneficiary "[s]o long as [it] admits to any school operated or supported by it only members of the White Race."[93] The trust document further provides that, in the event that the Foundation ever enrolls a student "who is not a member of the White Race," the income will go instead and in turn to several other educational institutions subject to the same restriction and then to Hermitage Methodist Homes.[94] Putting aside the

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[87] Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 387 S.E.2d 740, 742 (Va. 1990).
[88] *Id.* at 742–43.
[89] *Id.* at 742.
[90] *Id.* at 743.
[91] *See supra* notes 69–76 and accompanying text; *see generally* JAMES W. ELY, JR., THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE 30–107 (1976); *see also* NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950's, at 80–81, 110–15 (1999).
[92] *See supra* notes 53–54 and accompanying text; *see also supra* notes 5–6 and accompanying text.
[93] *Hermitage Methodist Homes*, 387 S.E.2d at 741.
[94] *See id.* at 742.

alternative beneficiaries and concentrating for the moment only on the language creating the Foundation's interest, we see that the language of duration—"so long as"—is what typically appears in a fee simple determinable.[95] And a fee simple determinable expires immediately and automatically on the occurrence of a specified event.[96] No further action is required for the grantee to lose any claim to the property. Of particular significance, the grantor need not invoke a state court or other governmental authority to effect the forfeiture; the reversion occurs automatically as a matter of law. This contrasts with a fee simple subject to a condition subsequent, where the grantor reserves power of termination and must act affirmatively to regain possession.[97] A typical method by which a grantor exercises the power of termination is resort to state court, which the restrictive covenant cases tell us is a form of state action for Fourteenth Amendment purposes.

The Adams Trust's whites-only restriction differs from both of the above examples in that the income would go to a third party rather than to the grantor or his successor in interest. Therefore, the arrangement looks like a fee simple subject to an executory limitation.[98] And a fee simple subject to an executory limitation, like a fee simple determinable, expires automatically "upon the occurrence of a stated event."[99] Automatic expiration means that the third party need not resort to a court to obtain the property, because the property has already vested in the third party on the occurrence of the forbidden event—in this instance, Prince Edward Academy's admission of Black students.

Of course, the artificial distinction between a fee simple determinable or a fee simple subject to an executory limitation on the one hand, where forfeiture of the property interest occurs automatically, and a fee simple subject to a condition subsequent on the other, where judicial action is needed, blinks reality. In any of these scenarios, the party who obtains the property as a result of the forfeiture almost certainly will resort to a judicial remedy to confirm that party's legal right to the property.[100]

The Virginia Supreme Court hesitated to wade into this doctrinal quagmire. The court assumed without deciding that the whites-only restriction was unconstitutional and instead focused on common law property doctrines to resolve the dispute.[101] If the Constitution barred enforcement of the whites-only restriction, could the restriction simply be excised or severed from the Adams Trust? Or did the Foundation's entire

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[95] RESTATEMENT OF PROP. § 44 cmt. l (AM. L. INST. 1936)

[96] *Id.* § 44(b).

[97] *Id.* §§ 45(b), 155.

[98] *See id.* § 46.

[99] *Id.* § 46(1)(b).

[100] Allison Dunham, *Possibility of Reverter and Power of Termination—Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215, 216 (1953).

[101] Hermitage Methodist Homes of Va., Inc. v. Dominion Tr. Co., 387 S.E.2d 740, 744 (Va. 1990) ("[W]e will agree with Prince Edward . . . on the [constitutional] issue for purposes of this decision.").

interest fail? The Foundation urged that the racial restriction be stricken, but the court concluded that the entire interest failed. This meant that none of the educational institutions could benefit from the trust and that Hermitage Methodist Homes, which had an interest that had no racial restriction, should receive the income from the trust.

The Foundation relied for its argument to excise the whites-only restriction on the 1916 decision in *Meek v. Fox*,[102] in which the Virginia Supreme Court voided a condition subsequent that operated as a restraint on a daughter's marriage and left her with a fee simple estate.[103] The arrangement was not a limitation because the restriction did not define the duration of the daughter's estate.[104] From this precedent, the Foundation should remain as the Adams Trust's beneficiary without regard to the void whites-only restriction.[105]

Too clever by half, the court in effect responded. Invoking an even older precedent, *Daniel v. Lipscomb*,[106] the court pointed out that the Adams Trust's whites-only restriction did not involve a condition subsequent but rather an executory limitation because the future interest belonged to a third party rather than the grantor or his heirs.[107] The restriction defined the outer limit of the Foundation's interest: only during the time that the Academy taught white students exclusively. When and if the Academy admitted students of another race, its interest "would terminate" in favor of a successor beneficiary that complied with any applicable racial restriction or Hermitage Methodist Homes.[108] This reasoning was consistent with *Meek*, the Foundation's preferred precedent, which suggested a legally significant distinction between a condition subsequent and a limitation.[109]

From these old cases, the court drew the following conclusion: If a condition subsequent is invalid, a court may sever the invalid condition while leaving the primary interest intact; but if a limitation on a property interest is invalid, the entire property interest fails. In other words, because the whites-only restriction is void, the Foundation's interest as beneficiary must fail and it is left with no claim on the Adams Trust. The same analysis defeats the claims of the other educational institutions, so only Hermitage Methodist Homes remains as a beneficiary.[110]

To close the circle, the court observed that the same result would follow even if the whites-only restriction were consistent with the Constitution. In that event, all of the educational institutions would have violated the restriction because all of them conceded that they had admitted Black

[102] Meek v. Fox, 88 S.E. 161 (Va. 1916).
[103] *Id.* at 162–63.
[104] *Id.* at 162.
[105] *Hermitage*, 387 S.E.2d at 745.
[106] Daniel v. Lipscomb, 66 S.E. 850 (Va. 1910).
[107] *Hermitage*, 387 S.E.2d at 745.
[108] *Id.* at 746.
[109] *Id.* (citing *Meek*, 88 S.E. at 162–63).
[110] *Id.*

students. So, Hermitage Methodist Homes would still be the last beneficiary standing.[111]

The court never mentioned *Brown*, the Prince Edward County school closure, or Massive Resistance, but the justices must have known the context in which the Prince Edward School Foundation and Prince Edward Academy arose.[112] Perhaps the court should have addressed that history.[113] At the same time, the court did not have to do so to frustrate the Foundation's opportunistic effort to keep receiving income from the Adams Trust. It was able to do so by relying on seemingly arcane old property doctrines to hoist the Foundation on its own petard. And that is an important takeaway. Those doctrines might not be glamorous or even easy to work with, but they can be useful to lawyers making progressive arguments and judges who appreciate the possibility of applying old law in new contexts.

IV. SOME LESSONS FROM CHARLES HAMILTON HOUSTON

The notion that progressive lawyers should consider the utility of traditional doctrinal arguments receives important support from the way Charles Hamilton Houston approached the NAACP's challenge to the legality of segregated education that culminated in *Brown*. When he started his work, which soon also involved his former student Thurgood Marshall, the law was abysmal. The Supreme Court had endorsed the so-called "separate but equal" doctrine in *Plessy v. Ferguson*,[114] a transportation case,

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[111] *Id.* The court had no occasion to address the Rule Against Perpetuities even though the executory interest in the Adams Trust might have vested more than 21 years after any life in being at the creation of the interest. *See supra* notes 63–67 and accompanying text. That was so because the Rule Against Perpetuities does not apply to an interest that transfers a benefit from one charity to another. RESTATEMENT OF PROPERTY § 397(1) (AM. L. INST. 1944). All of the beneficiaries of the Adams Trust were charities. *See Hermitage*, 387 S.E.2d at 741–42.

[112] We can infer the court's knowledge of the historical context of *Hermitage Methodist Homes* from the participation of retired Justice Albertis S. Harrison, Jr., in the decision. *Hermitage*, 387 S.E.2d at 741. Justice Harrison had spent more than a dozen years on the court after serving as attorney general and governor during Massive Resistance. He was hardly a civil rights advocate during those years, being aligned with and supported by the segregationist forces that dominated Virginia politics for decades. *See* ELY, *supra* note 91, at 165–66; TITUS, *supra* note 75, at 131, 136. He was, for example, the lead defendant in a case that challenged Virginia laws against champerty, maintenance, and barratry that were aimed at civil rights lawyers. The Supreme Court initially ruled that a federal district court should have abstained from addressing the merits of the constitutional challenge to those laws until the state courts had a chance to consider them. Harrison v. NAACP, 360 U.S. 167 (1959). The Supreme Court later struck down those laws after the state courts had upheld them. NAACP v. Button, 371 U.S. 415 (1963), *rev'g* NAACP v. Harrison, 116 S.E.2d 55 (Va. 1960).

Still, as attorney general, he helped to precipitate a test case in which the state supreme court struck down one of the statutes at the heart of the effort to preserve segregation; as governor, he cooperated with efforts to provide formal education to Black children during the final year of the closure of Prince Edward County's public schools. BONASTIA, *supra* note 77, at 90, 142–44; ELY, *supra* note 91, at 75–76, 138, 174; MUSE, *supra* note 71, at 103–06; SMITH, *supra* note 71, at 238–40. This does not mean that the court manipulated the decision. Retired Justice Harrison sat by designation in about a dozen other cases during the period when *Hermitage Methodist Homes* was argued, and he had been sitting by designation periodically since he retired from regular active service nearly a decade earlier. *See* Entin, *supra* note 83, at 800 n.128.

[113] *See* Entin, *supra* note 83, at 797–800.

[114] Plessy v. Ferguson, 163 U.S. 537 (1896).

and soon extended its approval of segregation to education.[115] Indeed, by 1927, just a few years before Houston began his project, a unanimous Court concluded that the constitutionality of segregated schools was essentially settled.[116]

Houston therefore developed a long-term strategy aimed ultimately at eliminating segregated education by trying to make it too expensive to run genuinely equal separate schools.[117] One prong of that strategy involved post-college education because virtually no states that operated segregated educational systems provided any opportunity for graduate or professional education to Black graduates.[118] If separate but equal meant anything, nothing for Black would-be-students could never be equal to something for whites students.[119] The first case that he brought to the Supreme Court, *Missouri ex rel. Gaines v. Canada*,[120] reflected such long-term thinking. *Gaines* challenged the whites-only admission policies at the University of Missouri Law School at least in part because Missouri, unlike other segregationist states, offered to subsidize the expenses of Black law students at out-of-state institutions.[121] Therefore, even if the NAACP lost the case, other segregating states would face pressure to afford Black law students some opportunity for publicly subsidized legal education elsewhere.[122]

Perhaps Houston's strategy implicitly recognized the legitimacy of segregation, something that idealists might have rejected for entrenching a

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[115] *See* Cumming v. Cnty. Bd. of Educ., 175 U.S. 528 (1899); Berea Coll. v. Kentucky, 211 U.S. 45 (1908).

[116] Gong Lum v. Rice, 275 U.S. 78, 85–86 (1927) ("Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of the state Legislature to settle, without intervention of the federal courts under the Federal Constitution.").

[117] MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 13 (1994).

[118] MICHEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 148 (2004); TUSHNET, *supra* note 117, at 13.

[119] MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 36 (1987).

[120] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[121] *See id.* at 342–43.

[122] *Gaines* built on Houston's successful challenge to a similar out-of-state subsidy program in Maryland. The state courts ordered a Black applicant, Donald Murray, admitted to the University of Maryland law school. Pearson v. Murray, 182 A. 590, 594 (Md. 1936). Murray successfully completed his program and was hired by the attorney general's office that had represented the state in his challenge to the university's whites-only admission policy. Jonathan L. Entin, Sweatt v. Painter, *The End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 19 (1986). *Gaines* had a more ambiguous outcome. Missouri declined to admit Lloyd Gaines to the all-white law school, opting instead to open a separate school for Black students that Gaines challenged as not substantially equal to the University of Missouri's school. Gaines disappeared during the pendency of those proceedings. TUSHNET, *supra* note 119, at 73–74. Nevertheless, *Gaines* laid the foundation for additional challenges to segregated graduate and professional education that culminated in two cases that effectively outlawed the practice in higher education. Sweatt v. Painter, 339 U.S. 629 (1950) (establishing a rigorous definition of equality for segregated law schools); McLaurin v. Okla. St. Regents, 339 U.S. 637 (1950) (forbidding the segregation of students within a graduate program). Those were the Supreme Court's last educational segregation decisions before *Brown*.

deeply objectionable practice.[123] But consider a purer approach. In light of the Supreme Court's approval of segregation just a few years earlier, a frontal assault on separate but equal had no chance of success. The choice was not between the perfect and the good; it was between the better and the worse.

CONCLUSION

As arcane as many common law property doctrines might seem, and as objectionable as some are, those doctrines can support positive results. *Cleveland Botanical Garden* properly rejected a far-fetched legal claim but failed both to generate a majority opinion or a satisfactory analysis of the relevant legal principles. *Capitol Federal* reached the right result, but the court offered an incoherent rationale for its decision. *Hermitage Methodist Homes* also came out correctly, even if the court failed to connect that dispute to Massive Resistance, and did so by connecting the result to apparently traditional legal concepts. American lawyers, frustrated by the complexities of common law property doctrines inherited from England where many of those doctrines have long since been superseded,[124] might agree with Justice Holmes's lament: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[125] Indeed, commentators in this country have long questioned the continuing vitality of some of the arcane property distinctions discussed in this article.[126] Whether we like it or not, though, those doctrines have largely persisted here. Pasteur often said that "chance favors only the prepared

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[123] Some critics suggested that equalization of the separate schools might have been a more promising approach than directly attacking segregation. *See, e.g.*, TUSHNET, *supra* note 119, at 107–08; W.E.B. Du Bois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935). *See also* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 357–408 (2011) (chronicling debate within Atlanta's Black community about the desirability of desegregation as opposed to community control of predominantly Black public schools); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 530–33 (1980) (suggesting that, whatever the original cogency of school desegregation, improving the quality of schools for Black children has become an important priority); *cf.* RACHEL LOUISE MARTIN, A MOST TOLERANT LITTLE TOWN: THE EXPLOSIVE BEGINNING OF SCHOOL DESEGREGATION 233–35 (2023) (summarizing the aftermath of the fraught experiences of the dozen Black students who desegregated a previously all-white high school in Clinton, Tennessee, in September 1956 following the first court order implementing *Brown*).

[124] *See* BERGIN & HASKELL, *supra* note 2, at 1.

[125] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

[126] *See, e.g.*, Verner F. Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 FORDHAM L. REV. 303, 320–21 (1962); Dunham, *supra* note 100, at 233–34; Milton I. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 274–75 (1940); Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533, 536–39 (1988); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 740–43, 753–54 (1972).

mind."[127] Lawyers should be prepared to make use of traditional doctrines when they can support good outcomes, and they should in any event expect courts to rely on traditional doctrines when those doctrines apply. These cases demonstrate why that makes sense.

[127] RENÉ J. DUBOS, LOUIS PASTEUR: FREE LANCE OF SCIENCE 101 (1960).