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DEFEASIBLE FEES, STATE ACTION, AND THE LEGACY OF MASSIVE RESISTANCE

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The Supreme Court of Virginia recently upheld the validity of a whites-only provision in an educational trust. The decision in Hermitage Methodist Homes of Virginia, Inc. v. Dominion Trust Co. would be noteworthy for that reason alone. It is important for three other reasons, however. First, this was not an ordinary property dispute; it arose directly from Brown v. Board of Education. The restriction at issue applied to a segregation academy in Prince Edward County, the most recalcitrant of the defendants in Brown. The academy was established to provide private education for whites when the county closed its public schools rather than comply with an order to desegregate. Remarkably, the segregation academy was the party challenging the racial restriction.

Second, the result turned explicitly upon the formal distinction between limitations and conditions subsequent, an especially arcane aspect of the law of defeasible fees. The logic of the opinion suggested that racial restrictions embodied in limitations might be immune from constitutional attack, whereas identical restrictions embodied in conditions subsequent would be infirm. It is troubling that this essentially semantic distinction, which has long been criticized by commentators on other grounds, could be used to afford a constitutional safe harbor for perpetrators of racial discrimination.

Third, the case illustrates the sometimes mischievous allure of constitutional argument when less glamorous, but more serviceable, principles from traditional property and trust law would have disposed of the controversy in a more satisfactory fashion. Although these analytical deficiencies probably did not affect the

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outcome in this instance, at least one major recent civil rights case, *Patterson v. McLean Credit Union*,\(^3\) might have been lost because the parties paid insufficient attention to common law legal theory.\(^4\) The lessons of *Hermitage Methodist Homes*, then, could have broader application.

The discussion proceeds as follows. Part I gives an overview of the law of defeasible fees and the limitation-condition distinction that loomed so large in the *Hermitage Methodist Homes* case. Part II critically analyzes that case, suggesting an alternative approach based upon a unified law of defeasible fees that would have led to the same outcome without the troubling implications contained in the state supreme court’s opinion. Part III explores the constitutional implications of the elusive distinction between limitations and conditions subsequent and suggests some appropriate features for a unified law of defeasible fees. Part IV examines alternative arguments based upon traditional property and trust law principles that were neglected by the parties and the court in *Hermitage Methodist Homes*. Finally, Part V concludes that this case, despite (or perhaps because of) its atypical factual setting, can promote clearer understanding of the problems of defeasible-fee law.

I. **Defeasible Fees and the Limitation-Condition Distinction**

The basic principles of the law of defeasible fees can be illustrated through the following example. Suppose that \(O\) owns Blackacre in fee simple absolute. If \(O\) conveys the property “to \(A\) and her heirs so long as tobacco is not used on the premises,” \(A\) will have acquired fee simple determinable\(^5\) and \(O\) will have retained a possibility of reverter.\(^6\) The no-tobacco restriction will be called a special limitation.\(^7\) On the other hand, if \(O\) conveys the property “to \(A\) and her heirs on the express condition that tobacco is not used on the premises,” \(A\) will have acquired fee simple subject to a

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5. Reformation of Property § 44 (1936).
6. Id. § 154(3).
7. Id. § 23.
condition subsequent\(^8\) and \(O\) will have retained a power of termination.\(^9\) The restriction in this instance will be called, unsurprisingly, a condition subsequent.\(^10\)

Other than nomenclature, how do these conveyances differ legally? The traditional answer has to do with what happens if \(A\) were to violate the no-tobacco restriction. Her fee simple determinable would end at the instant she lit a cigarette, whereas her fee simple subject to condition subsequent would end only when \(O\) or his successor chose to invoke the power of termination.\(^11\)

As Professor Allison Dunham pointed out forty years ago,\(^12\) this traditional answer rests upon an implausibly bifurcated view of \(A\)'s behavior. As holder of fee simple determinable, \(A\) would meekly surrender her interest to a startled \(O\) and voluntarily leave Blackacre; as holder of fee simple subject to condition subsequent, she would seek to conceal her smoking from an ever-vigilant \(O\) lest he force her off the property. In fact, \(O\) and \(A\) are likely to act in the same way whatever labels are attached to their interests.\(^13\) Finding that these legal labels reflect no important differences and that courts frequently misapply the labels in any event, Professor Dunham recommended that the formal distinction between fees simple determinable and fees simple subject to condition subsequent be

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8. Id. § 45. Although this section of the Restatement suggests that the conveyance must explicitly provide for termination by the grantor or his successors in interest, the language in the text is sufficient to create a fee simple subject to condition subsequent. Id. cmt. l. I have chosen this particular wording for ease of exposition. The analysis would not differ if the conveyance were “to \(A\) and her heirs on condition that tobacco is not used on the premises, but if tobacco is ever used there \(O\) or his successors in interest shall have the right to enter and terminate the estate herein granted.”

9. Id. § 155. Under earlier terminology, \(O\)'s retained interest might also be called a right of entry or right of reentry for condition broken. Id. § 24 cmt. b, special note; 1 American Law of Property § 4.6, at 419 (A. James Casner ed., 1952). The earlier terminology still enjoys wide currency. Thomas F. Bergin & Paul G. Haskell, Preface to Estates in Land and Future Interests 59 n.8 (2d ed. 1984).

10. Restatement of Property § 24. There is a third variety of defeasible fee, the fee simple subject to executory limitation, in which the property is automatically forfeited to a third party upon breach of the restriction. Id. § 46. The interest at issue in Hermitage Methodist Homes was a fee simple subject to executory limitation. See infra notes 18-24 and accompanying text.

11. Restatement of Property §§ 44(b), 45(b).


13. Id. at 215-16.
abandoned. 14 Numerous commentators have agreed with this recommendation. 15

There is one potentially significant difference between these defeasible fees that has not received much attention. Because a fee simple determinable expires automatically, no governmental action is required to give effect to O's possibility of reverter should A violate the special limitation. By contrast, a fee simple subject to condition subsequent continues until the power of termination is exercised, typically by O's filing suit in response to A's breach. Judicial enforcement of the condition is a form of governmental action that might raise constitutional concerns.

On closer examination, however, the limitation-condition distinction lacks coherence. If Professor Dunham was correct, O probably will ask a court to decide that A's violation of the no-tobacco restriction entitles him to possession of Blackacre; O is most unlikely to engage in self-help regardless of how the parties' interests are denominated. It is a mere formality that in one case the court will rule that O was entitled to possession from the instant A breached and in the other will rule that O may take possession upon the entry of final judgment on the merits. Until the court makes its decision, A will retain possession in either scenario. 16 Constitutional questions should not turn upon such an evanescent distinction, especially when that distinction has so little to commend itself on other grounds. The Hermitage Methodist Homes decision serves as a reminder that this is not a purely hypothetical point.

14. Id. at 233-34.


Two states have adopted legislation embodying this recommendation. See infra note 89.

16. One possible difference between a fee simple determinable and a fee simple subject to condition subsequent relates to the time from which O may recover mesne profits. This difference is more theoretical than real in many jurisdictions. Dunham, supra note 12, at 219. In any event, it is not significant enough to justify preserving the limitation-condition distinction. Id. at 233.
II. The Hermitage Methodist Homes Litigation

The Virginia litigation involved a conveyance by a man named Jack Adams to the Prince Edward School Foundation "[s]o long as [it] admits to any school, operated or supported by it, only members of the White Race." The conveyance provided for gifts over to three other educational institutions, all subject to the same racial restriction, and ultimately to a nursing home; the provision for the nursing home said nothing about race.

As a preliminary matter, this conveyance differed from the hypothetical defeasible fees described earlier in that the future interest was held by a third party rather than the grantor. The conveyance is akin to one from "to A and her heirs so long as tobacco is not used on the premises, and if tobacco is used on the premises to B and her heirs." Such language creates neither a fee simple determinable nor a fee simple subject to condition subsequent, but rather a fee simple subject to executory limitation. Upon a breach of the restriction, A's interest terminates automatically and the property is forfeited directly to B. This automatic-forfeiture feature makes a fee simple subject to executory limitation analogous to a fee simple determinable; the catalogue of defeasible fees con-

17. For a more detailed analysis of the events discussed in this section, see Jonathan L. Entin, The Shifting Color Line in Prince Edward County, paper presented at the annual meeting of the Law and Society Association (May 28-31, 1992) (on file with author).
19. Id. at 742.
20. Another difference between this conveyance and the hypothetical defeasible fees described above is that the conveyance involved a sum of money to be held in trust rather than a legal interest in land. This difference does not affect the present discussion.
21. The future interest in this example ordinarily would violate the Rule Against Perpetuities because the no-tobacco restriction might be breached more than 21 years after the end of all lives in being at the creation of the interest. See, e.g., Proprietors of the Church v. Grant, 69 Mass. (3 Gray) 142, 152-53 (1855). The Rule Against Perpetuities does not apply to the situation in Hermitage Methodist Homes, however, because all of the relevant interests were held by charitable organizations. See Restatement of Property § 397(1) (1944).
22. Restatement of Property § 46 (1936).
23. The analogy is imperfect in other respects, however. For example, the Rule Against Perpetuities applies to executory interests in fees simple subject to executory limitation but not to possibilities of reverter in fees simple determinable (or, for that matter, to powers of termination in fees simple subject to condition subsequent). Restatement of Property §§ 370 & cmt. e, 372 (1944). The Rule did not apply to the executory interest in Hermitage Methodist Homes, however. See supra note 21.
tains no counterpart to a fee simple subject to condition subsequent under which a third party must invoke something like a power of termination upon the breach of a restriction.\textsuperscript{24}

The background to the creation of the Adams trust resonates deeply in modern American history. The Prince Edward School Foundation was founded in June 1955 to establish private schools for white pupils in the event that the federal courts ordered the public schools of Prince Edward County to desegregate. Such an order seemed certain because the county school board was one of the defendants in \textit{Brown v. Board of Education}.\textsuperscript{25} The order finally came in 1959.\textsuperscript{26} Local officials responded by shutting down the public schools. At the same time, the Foundation opened a private school known as Prince Edward Academy that enrolled almost every white student in the county.\textsuperscript{27} The Academy continued to enroll a large majority of the county’s white pupils for some years after the Supreme Court ordered the public schools reopened on a desegregated basis in 1964.\textsuperscript{28}

The Foundation adhered to a whites-only admissions policy for almost thirty years despite two important legal setbacks.\textsuperscript{29} The more serious of these was the loss of its federal tax exemption

\textsuperscript{24} A power of termination may exist only in the grantor or his successor in interest. \textit{RESTATEMENT OF PROPERTY} § 24 cmt. d (1936). One commentator has suggested that a court might uphold an interest in a third party analogous to a power of termination but cited no example in which this had occurred. Paul G. Haskell, \textit{Contractual Devices to Keep “Undesirables” out of the Neighborhood}, 54 \textit{CORNELL L. REV.} 524, 528 (1969). More recently, a Massachusetts court interpreted a statute as allowing the creation of such an interest in a third party, but the court made clear that the existence of the statute was essential to its ruling. Oak’s Oil Serv., Inc. v. Massachusetts Bay Transp. Auth., 447 N.E.2d 27, 30-31 (Mass. App. Ct.), \textit{appeal denied}, 451 N.E.2d 1166 (Mass. 1983).


\textsuperscript{26} Allen v. County Sch. Bd., 266 F.2d 507 (4th Cir.) (per curiam), \textit{cert. denied}, 361 U.S. 830 (1959).

\textsuperscript{27} Smith, \textit{supra} note 25, at 167; Raymond Wolters, \textit{The Burden of Brown} 95 (1984).

\textsuperscript{28} Griffin v. County Sch. Bd., 377 U.S. 218 (1964). For accounts of events during the school closing, see Smith, \textit{supra} note 25, at 151-259; Wolters, \textit{supra} note 27, at 94-114.

\textsuperscript{29} A handful of children of Asian origin enrolled at the Academy at various times. This fact was not mentioned in the \textit{Hermitage Methodist Homes} litigation. \textit{See infra} notes 112-17 and accompanying text.
in 1978 under an Internal Revenue Service ruling that denied favorable tax status to racially discriminatory private schools. The federal courts upheld the revocation after protracted litigation. Several years later, when enrollment at the Academy had fallen to half its earlier high levels and most white pupils were attending public schools, the Foundation sought to regain its tax exemption. In the fall of 1986, soon after the exemption was restored, Prince Edward Academy enrolled five African-American students.

The bank administering the Adams trust thereupon filed an action in state court seeking guidance as to which party was entitled to receive the trust income. By then, the three educational institutions that had received gifts over also had violated the racial re-


32. Sandra Evans, Era Ends at Once-Segregated Va. School; Prince Edward Academy Admits Blacks, but Some Question Motives, Wash. Posr, Dec. 15, 1986, at A1. The Foundation's tax exemption was initially restored in August 1985 after the board of directors announced for the first time that the Academy had a nondiscriminatory admission policy. The restoration of the school's tax exemption provoked widespread criticism and led the IRS to reconsider its decision. See, e.g., 1985 Hearing, supra note 30. The IRS finally restored the exemption after the Foundation added a black member to its board of directors and established a small fund for minority scholarships. That decision also generated controversy. See, e.g., 1986 Hearing, supra note 30, at 34-35.
The trial court voided the restriction as unconstitutional and held that the Foundation should continue to receive the income from the trust. The state supreme court reversed, ruling that the trust should be enforced as written and that the nursing home, which had never been subject to the restriction, was now the proper beneficiary.

The Virginia Supreme Court finessed the constitutional issue, concluding that the nursing home should prevail regardless of the validity of the whites-only provision. The opinion instead focused upon the semantic distinction between limitations and conditions. The language of the racial restriction included the words "[s]o long as," classic indicators of a limitation. Assuming that the limitation was constitutional, all of the educational institutions had forfeited their rights by admitting blacks, so the nursing home was entitled to the income by the express terms of the trust. Conversely, if the limitation were unconstitutional, the court could not excise part of the Foundation's interest—the racial restriction—but would have to strike all of it. The same reasoning applied to the other educational institutions, leaving the nursing home as the sole eligible beneficiary.

Although the Virginia Supreme Court had previously downplayed the significance of the limitation-condition distinction, the opinion in *Hermitage Methodist Homes* made clear that classifying the racial restriction as a limitation was crucial to the outcome. Under this approach, a limitation is integral to the estate conveyed, whereas a condition is not. If a limitation fails, so must the rest of the estate. On the other hand, if a condition subsequent

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34. *Id.* at 743.
35. *Id.* at 747.
36. *Id.* at 745. This is, of course, the traditional view. See, e.g., *Restatement of Property* § 44 cmt. l & illus. 17 (1936).
37. *Hermitage Methodist Homes*, 387 S.E.2d at 746. This analysis presumes that racial restrictions are legally problematic only if they are unconstitutional. There were, however, other grounds for attacking the restriction. See infra Part IV.
39. *Sanford v. Sims*, 66 S.E.2d 495, 497 (Va. 1951) ("Technically, perhaps, there is a distinction between a possibility of reverter and a [power of termination] for breach of a condition subsequent; but the distinction is usually not observed and possibility of reverter and [power of termination] are treated as the same.").
fails, the rest of the estate survives. Very different conclusions follow from these premises if the racial restriction fails. Because the restriction in the Adams trust was a limitation, all of the provisions relating to the educational institutions had to be removed; only the nursing home's unencumbered interest remained intact. By contrast, had the whites-only provision appeared in a condition subsequent, the Foundation's beneficial interest in the trust could have been saved by simply excising the offending language.\(^{40}\)

In support of this conclusion, the court relied upon a gloss on dictum in *Meek v. Fox*,\(^ {41}\) an obscure case that might have misconstrued a limitation as a condition and, in any event, had made virtually no previous impact.\(^ {42}\) *Meek* does not mention the blanket rule for which it was cited, nor does American law more generally endorse that approach.\(^ {43}\) Even if there were more direct prece-

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41. 88 S.E. 161, 162-63 (Va. 1916).
42. *Meek* involved the validity of a restraint on marriage. The court held that the restraint was embodied in an illegal condition subsequent and struck the restriction, leaving the grantee with an interest in fee simple absolute. *Id.* at 164. It is not clear that the court correctly classified the restraint, however. The conveyance was “to my daughter . . . forever, except she should marry, then at her death I desire that it shall revert to her legal heirs.” *Id.* at 161 (emphasis added). The future interest, which was in the grantee's heirs rather than the grantor's, might have been seen as an executory interest instead of a condition subsequent. See Restatement of Property § 24 (1936).


*Meek* had also been cited in a few secondary sources, but none of those sources treated it as authority for the proposition that an illegal special limitation invalidates the estate to which it applies. See, e.g., 6 American Law of Property, supra note 9, § 27.12, at 647 n.27; 3 Lewis M. Simes & Allan F. Smith, The Law of Future Interests § 1514, at 399 n.7, 402 n.14 (2d ed. 1956); Annotation, Conditions, Conditional Limitations, or Contracts in Restraint of Marriage, 122 A.L.R. 7, 23 n.1, 64 n.5, 95 n.8 (1939).

dents, the court's purely semantic methodology was unsound. Commentators have almost universally condemned the limitation-condition distinction and advocated similar treatment for all unlawful restrictions. The grantor's intent should determine whether illegality defeats the entire conveyance or only the unlawful restriction, whether the restriction is embodied in a limitation or in a condition.

To be sure, there is authority for treating unlawful restrictions embodied in conditions subsequent differently from those embodied in special limitations. That authority does not, however, support the blanket rule adopted in *Hermitage Methodist Homes*. Instead, it suggests that illegal conditions subsequent be excised, leaving the rest of the conveyance intact; invalid limitations or conditions precedent could result in excising either the offending restriction or the entire conveyance, depending upon the grantor's intent. See, e.g., *Restatement (Second) of Trusts* § 65 & cmts. e-f (1959); 4 *George G. Bogert & George T. Bogert, The Law of Trusts and Trustees* § 211, at 130-32 (3d ed. 1990); 1A *Austin W. Scott & William F. Fratcher, The Law of Trusts* §§ 65, 65.2, at 379, § 65.3, at 382 (4th ed. 1989).

There also is authority for the view that unlawful restrictions, whether embodied in limitations or conditions subsequent, should be stricken. That would leave the grantee with an unfettered interest. E.g., *Restatement (Second) of Property: Donative Transfers* §§ 6.1(1), .2 (1983); *Restatement of Property* § 424 cmt. d (1944). Of course, this approach also is inconsistent with the one taken by the Virginia Supreme Court in *Hermitage Methodist Homes*.


45. *See 6 American Law of Property, supra note 9, § 27.23; Browder, supra note 43, at 765-67; Dunham, supra note 12, at 223. Other commentators who have advocated the abolition of the distinction between fees simple determinable and fees simple subject to condition subsequent have not addressed the consequences of finding a restriction unlawful. See supra note 15. Nothing in their discussion suggests that they would preserve the limitation-condition distinction for this purpose when they would abandon it for all others, however.

The grantor's intent is not the only possible basis for deciding how to remedy an unlawful restriction, of course. Courts could follow either of two alternative uniform rules: 1) invalidate the entire conveyance, or 2) strike only the unlawful restriction. Both of these uniform rules are undesirable because they conflict with the cardinal principle of property law that seeks to interpret conveyances so as to uphold the intent of the grantor. See, e.g., *Motes/Henes Trust v. Motes*, 761 S.W.2d 938, 939 (Ark. 1988); *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 989 (Cal. 1972); *Bibo v. Bibo*, 74 N.E.2d 808, 810 (Ill. 1947); *Clark v. Strother*, 385 S.E.2d 578, 581 (Va. 1989); *Chesapeake Corp. v. McCreery*, 216 S.E.2d 22, 25 (Va. 1975); *First Nat'l Exchange Bank v. Seaboard Citizens Nat'l Bank*, 107 S.E.2d 408, 411 (Va. 1959); cf. *Restatement of Property* §§ 228-229 (1936) (stating that the validity of remaining interests upon failure of prior or subsequent interest should be assessed in terms of the grantor's intent).

The argument against an across-the-board rule that ignores the grantor's intent receives analogical support from judicial practice in cases involving unconstitutional legislation.
We cannot be certain how a long-dead testator would have revised her will had she known that courts would invalidate one of its terms. The best indicator of the grantor's intent is the language of the conveyance. The structure of the Adams trust strongly suggests that the whites-only provision was meant to be inextricably intertwined with the Foundation's interest. Not only that interest but also the gifts over to the other three educational institutions were subject to this restriction; only the gift over to the nursing home made no reference to race. These features show the obduracy of the grantor's commitment to segregated schooling and his complete unwillingness to subsidize racial mixing in the classroom.

The circumstances surrounding the conveyance ought to dispel any doubt about the centrality of the whites-only provision to the Foundation's interest. The Adams trust was part of a will that was originally drafted in 1956 and revised in 1964. During this period, there was no more salient political issue in Virginia than school desegregation. The state pursued a campaign of Massive Resistance to Brown for several years beginning in 1955.

When addressing that problem, the Supreme Court has avoided the kind of mechanical approach that would, in this context, either invalidate every infected conveyance or always strike out only the unlawful restriction. For example, the Court has held that impermissibly underinclusive statutes may be either invalidated in their entirety or interpreted so as to confer benefits on the class that had been excluded. See, e.g., Heckler v. Mathews, 465 U.S. 728, 740 (1984); Stanton v. Stanton, 421 U.S. 7, 17-18 (1975); Welsh v. United States, 398 U.S. 333, 361-65 (1970) (Harlan, J., concurring in the result); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931). See generally Ruth Bader Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. 301, 316-24 (1979). Similarly, when dealing with a partially unconstitutional statute, the Court must decide whether the offending provision is severable from the whole measure. It does so by seeking to determine if the rest of the bill would have passed had the legislature known that it could not enact the unconstitutional provision. See, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-87 (1987); INS v. Chadha, 462 U.S. 919, 931-32 (1983); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 239, 247 (1932).

Reliance upon one of these uniform rules might be appropriate when the grantor's intent is undiscoverable. This notion is similar to the use of rules of construction that disfavor partial intestacy or permit resort to the doctrine of cy pres to prevent a trust from failing. See, e.g., Restatement (Second) of Trusts § 399. None of these problems was presented in Hermitage Methodist Homes, however.

46. See supra notes 18-19 and accompanying text.
Massive Resistance collapsed at the state level, Prince Edward County closed its public schools for five years to avoid desegregation.\textsuperscript{49} It is inconceivable that the testator, who resided near Prince Edward,\textsuperscript{50} was unaware of these events.\textsuperscript{51} In short, the historical background to the conveyance lends credence to the view that the meticulously crafted racial restriction was intended as an essential ingredient of the interests conveyed to the Foundation and the other educational institutions. Regardless of the label attached to the whites-only provision, therefore, the invalidity of the restriction should have defeated the entire gift to the educational institutions.

All of this assumes that the limitation in the Adams trust was indeed unconstitutional, a question that the state supreme court scrupulously avoided. This avoidance strategy may have been defensible in traditional jurisprudential terms,\textsuperscript{52} but it would have been unavailable had the trust been written somewhat differently. Suppose, for example, that the trust contained no gift over to the nursing home. This alternative scenario is not entirely speculative, because conveyances of defeasible fees containing racial restrictions became relatively common by the beginning of the twentieth century.\textsuperscript{53}

In this scenario, the reversionary interest, held by the grantor or his successors, might be either a possibility of reverter or a power of termination. The reversionary interest in \textit{Hermitage Methodist Homes} was held by a third party and so could only have been an executory interest.\textsuperscript{54} In our hypothetical example, by contrast, the limitation-condition distinction could be dispositive. If the arrangement were a fee simple determinable, the court could equivoc-

\textsuperscript{49} See \textit{supra} notes 25-28 and accompanying text.

\textsuperscript{50} Adams resided in Lynchburg, which is approximately 50 miles from the Academy. \textit{Hermitage Methodist Homes}, 387 S.E.2d at 741.

\textsuperscript{51} Cf. \textit{Tinnin v. First United Bank}, 502 So. 2d 659, 668 (Miss. 1987) (finding it "difficult to hold" that a whites-only restriction in an educational trust was "idly inserted" in light of widely publicized "racial turbulence" over recent desegregation of the University of Mississippi when the will creating the trust was written).

\textsuperscript{52} The standard citation for this proposition is \textit{Ashwander v. Tennessee Valley Auth.}, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).


\textsuperscript{54} See \textit{supra} notes 20-24 and accompanying text.
cate on the constitutionality of the special limitation just as it fi-
nessed the constitutionality of the executory limitation. On the
other hand, if the arrangement were a fee simple subject to condi-
tion subsequent, the court would have to rule on the validity of the
condition in order to decide whether the Foundation would retain
its interest free of the racial restriction or forfeit its interest be-
cause of the breach. The next section therefore considers the con-
stitutional question.

III. DEFEASIBLE FEES AND THE CONSTITUTION

Until recently, most private racial restrictions on the possession
or use of property were regarded as legally unproblematic.55 For
that reason, few cases specifically address the state-action issue in
the defeasible-fee context. The cases that bear on the question sug-
gest that limitations embodying racial restrictions do not implicate
the Fourteenth Amendment, but that the same restrictions con-
tained in conditions subsequent can run afoul of the Constitution.
This tentative conclusion has unfortunate implications that will be
explored below.

A. Special Limitations

The constitutionality of race-based special limitations was ex-
amined most fully in Charlotte Park & Recreation Commission v.

55. See, e.g., Corrigan v. Buckley, 271 U.S. 323, 330-31 (1926) (finding no constitutional
violation in privately created restrictive covenants); 2 LEWIS M. SIMES, THE LAW OF FUTURE
INTERESTS § 460, at 302-03 (1936) (discussing cases upholding racial restrictions on occu-
pancy or use). One indication of the traditional view is that, until 1950, the code of ethics of
the organization now known as the National Association of Realtors provided that “[a]
Realtor should never be instrumental in introducing into a neighborhood . . . members of
any race or nationality . . . whose presence will clearly be detrimental to property values in
that neighborhood.” ROSE HELPER, RACIAL PRACTICES AND POLICIES OF REAL
ESTATE BROKERS 201 (1969); see LUIGI LAURENTI, PROPERTY VALUES AND RACE 17 (1960).

Although private racial restrictions were generally accepted, at least some governmental
ones were not. See, e.g., Buchanan v. Warley, 245 U.S. 60 (1917) (invalidating a race-based
occupancy ordinance). Nevertheless, federal policies played an important role in promoting
housing segregation until well after World War II. See, e.g., CHARLES ABRAMS, FORBIDDEN
NEIGHBORS 227-43 (1955); KENNETH T. JACKSON, CRABGRASS FRONTIER 197-203, 208-15
(1985); Leonard S. Rubinowitz & Elizabeth Trosman, Affirmative Action and the American
Dream: Implementing Fair Housing Policies in Federal Homeownership Programs, 74 NW.
Barringer. The owners of three contiguous parcels conveyed their land to a municipality for use as a whites-only park; the deeds provided for forfeiture should the racial restriction be breached. The state courts had no difficulty in finding that the deeds gave the city fee simple determinable in the land. Because the forfeiture would occur instantaneously when nonwhites used the park, the fee would terminate by operation of law. The state itself would not be directly involved, so the governmental action required to trigger the Fourteenth Amendment was missing.

The Supreme Court reached a similar conclusion in Evans v. Abney, which arose in a slightly different context. The issue there

57. Id. at 117.
58. Id. at 122-23. It is not entirely clear that one of the deeds conveyed a determinable fee. That deed required, as a "condition precedent to the reversion of [this] land" if nonwhites were permitted to use the park, that the grantor or his successors in interest pay the city a fixed sum of money. Id. at 117. The requirement of prior payment suggested that this parcel would not automatically return to the grantor upon a violation of the racial restriction. Automatic forfeiture is the hallmark of determinable fees. RESTATEMENT OF PROPERTY § 44(b) (1936). At the same time, a restriction can be a special limitation even if one of its elements involves "an exercise of the volition of the conveyor." Id. § 44 cmt. h. The resolution of this question does not affect the analysis that follows.
59. Barringer, 88 S.E.2d at 123. Even if this general principle applies to determinable fees, it is not clear that Barringer was correctly decided. An exception to the principle exists when the government is pervasively intertwined with a private actor. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). In Barringer, a municipal body was the grantee of land that was subject to a whites-only special limitation. That municipal body maintained a park and golf course on the property and strictly enforced the racial restriction. Barringer, 88 S.E.2d at 117-18. This represented even greater governmental involvement than occurred in Burton, where state action was found on the basis of a municipal agency's lease of restaurant space to a private operator who practiced discrimination. Burton, 365 U.S. at 725. The continuing vitality of the Burton exception is uncertain. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 547 n.29 (1987); Rendell-Baker v. Kohn, 457 U.S. 830, 839-43 (1982).

Whether or not a forfeiture for violation of the special limitation in Barringer implicated state action, however, it was clear the city could not constitutionally operate the park and golf course on a segregated basis. Evans v. Newton, 382 U.S. 296 (1966) (parks); New Orleans City Park Improvement Ass'n v. Deliege, 358 U.S. 54 (1958) (per curiam) (same); Gayle v. Browder, 352 U.S. 903 (1956) (per curiam) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches). The dispute over the park in Barringer was ultimately resolved when the city acquired the possibility of reverter from the grantors and a state court ordered the admission of blacks to the park. Elias Clark, Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard, 66 YALE L.J. 979, 992 n.48 (1957).
concerned the validity of a racial restriction on land conveyed in trust for use as a municipal park. When continued operation of the park on a segregated basis became impossible, the state court ruled that the trust had failed and that the land had automatically reverted to the grantor's heirs. The Supreme Court found no violation of the Fourteenth Amendment. The return of the property had occurred according to racially neutral principles of state trust law. Whatever racial prejudice led to the forfeiture decision reflected the views of private parties, not the government, and therefore was constitutionally unobjectionable.

This reasoning does not sweep as broadly as that in Barringer. The Evans decision nonetheless implies that an automatic forfeiture for breach of a racial restriction in a fee simple determinable will not run afoul of the Fourteenth Amendment. Taken together, these cases suggest that a special limitation relating to race is probably constitutional even though it is morally repugnant.

B. Conditions Subsequent

The validity of racially restrictive conditions subsequent is much more problematic. Although there appears to be no case directly on point, the Supreme Court's treatment of restrictive covenants sheds important light on the issue. In Shelley v. Kraemer, the Court held that a purely private restriction was constitutionally valid because it involved no governmental action. At the same time, any judicial enforcement by way of injunction would represent state action and hence would violate the Fourteenth Amendment.

61. The conveyance did not use defeasible-fee language and made no provision for what would happen if the whites-only provision were breached. Id. at 443 n.2.
63. Abney, 396 U.S. at 444-45.
64. Despite the traditional judicial tolerance of formally private racial restrictions on occupancy or use, see supra note 55, one court refused to enforce a whites-only condition subsequent under the theory of changed conditions. Letteau v. Ellis, 10 P.2d 496, 497 (Cal. Dist. Ct. App. 1932); cf. Meade v. Dennistone, 196 A. 330, 335-36 (Md. 1938) (suggesting that a racially restrictive covenant can expire due to changed conditions); Pickel v. McCawley, 44 S.W.2d 857, 861 (Mo. 1931) (finding that a restrictive covenant had expired due to changed conditions).
65. 334 U.S. 1 (1948).
Amendment.\textsuperscript{67} This reasoning was extended to damage awards in \textit{Barrows v. Jackson}.\textsuperscript{68}

If judicial enforcement of racially restrictive covenants is unconstitutional, judicial enforcement of similar restrictions embodied in conditions subsequent is almost certainly improper. Although the restrictions themselves might be permissible as purely private arrangements, exercise of the power of termination typically requires resort to litigation.\textsuperscript{69} If a court may not grant an injunction or award damages for violation of a race-based restriction, it surely may not order a forfeiture. Courts generally seek to avoid imposing that drastic remedy for breach of obviously lawful conditions subsequent.\textsuperscript{70} There is no reason to believe that they would be recep-

\textsuperscript{67} Shelley, 334 U.S. at 14-21; accord Hurd, 334 U.S. at 31-34 (holding that federal court enforcement of a racially restrictive covenant violated the Fifth Amendment).

\textsuperscript{68} 346 U.S. 249, 253-54 (1953).

\textsuperscript{69} Dunham, supra note 12, at 216. The high likelihood of litigation exists because the holder of a power of termination need not actually enter onto the property to reclaim possession following breach of a condition subsequent. 1 \textit{American Law of Property, supra note 9, § 4.9, at 424; Roger A. Cunningham et al., The Law of Property § 3.5, at 101 (1984); Dunham, supra note 12, at 230.}

Litigation is not the only means of exercising a power of termination, however. The power may be asserted "by any appropriate manifestation . . . of [the holder's] intent thereby to terminate the interest in question." \textit{Restatement of Property} § 24 cmt. b, special note (1936). It is not clear what constitutes an appropriate manifestation of intent, although the traditional physical entry upon real property presumably would suffice. 1 \textit{American Law of Property, supra note 9, § 4.9, at 424. If a power of termination were exercised by way of an actual entry, the fee on condition would terminate immediately upon the entry, just as the determinable fee would terminate immediately upon the breach. Any subsequent quiet-title action would merely declare the parties' rights that had arisen by operation of law, so there would be no state action to trigger constitutional scrutiny of the restriction.}

It bears emphasis that this scenario is exceedingly unlikely and that powers of termination typically are exercised through court action. This is so because the law provides powerful disincentives for the exercise of self-help to recover possession of property. For example, many jurisdictions prohibit a landlord from engaging in self-help to recover possession from a holdover tenant when speedy judicial remedies exist. \textit{Restatement (Second) of Property: Landlord & Tenant} § 14.2 (1977). Even when such alternatives are not available, the landlord's self-help must be peaceable, which proscribes not only actual but also reasonably foreseeable breaches of the peace. \textit{Id.} § 14.3. Similarly, in commercial law, which explicitly authorizes self-help in some circumstances, a secured creditor "may proceed without judicial process [only] if this can be done without breach of the peace." U.C.C. § 9-503 (1990). Again, not only actual but threatened breaches of the peace are forbidden. See \textit{James J. White & Robert S. Summers, Uniform Commercial Code} § 25-6 (3d ed. 1988); \textit{Special Project, Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845, 916-19 (1984).}

\textsuperscript{70} \textit{See} Korngold, supra note 15, at 549 & nn.84-90 (collecting cases).
tive to forfeitures in situations where less draconian sanctions are constitutionally unavailable. 71

C. Executory Limitations

Apparently no court has directly considered the constitutionality of a racially restrictive executory limitation. 72 Recall, though, that a fee simple subject to executory limitation is functionally identical to a fee simple determinable. The only difference is that the forfeiture is to a third party rather than to the grantor. There is no analogue to the fee simple subject to condition subsequent for a third party; breach of a whites-only restriction embodied in an executory limitation results in automatic forfeiture. 73 Hence, it is likely that courts would treat executory limitations the same way they have treated special limitations.

In sum, the traditional semantic approach suggests the following tentative conclusion: racial restrictions embodied in special or executory limitations probably are constitutional, whereas the same restrictions expressed in conditions subsequent probably cannot be enforced. This conclusion suggests that the court in Hermitage Methodist Homes, had it addressed the issue squarely, would have rejected the Prince Edward School Foundation’s claim that upholding the whites-only provision in the Adams trust violated the Fourteenth Amendment. 74 Upon further reflection, however, the traditional approach is troublesome.


72. The restriction in Capitol Federal Savings & Loan Ass’n v. Smith, 316 P.2d 252 (Colo. 1957), was an executory limitation, but the court, without explanation, treated it as a covenant. See infra notes 81-85 and accompanying text.

73. See supra note 24 and accompanying text.

74. Perhaps in recognition of this problem, the Foundation made a different state-action argument. It claimed that, when the trust was created, Virginia law required the inclusion of the racial limitation. This legal requirement rendered the whites-only trust provision either unenforceable or unconstitutional. Hermitage Methodist Homes of Va., Inc. v. Dominion Trust Co., 387 S.E.2d 740, 744 (Va.), cert. denied, 498 U.S. 907 (1990). This argument emphasized that the only basis for creating an educational trust in Virginia was a statute originally passed in 1839 which had been construed by the state courts as recognizing only those educational trusts that provided for racially segregated schooling. Triplett v. Trotter, 193 S.E. 514, 516 (Va. 1937), cited in Hermitage Methodist Homes, 387 S.E.2d at 742.
D. Another Look at State Action and the Limitation-Condition Distinction

The difficulty with the traditional approach can be seen in two ways. This section first reconsiders the substantive differences between the fee simple determinable and the fee simple subject to condition subsequent, then compares those interests with the fee simple subject to executory limitation. The next section urges that all three estates be treated analogously.

1. Determinable Fees and Fees on Condition

At one level, the notion that a fee simple determinable expires without any governmental involvement is consistent with the Supreme Court's approach to the problem of state action under the Fourteenth Amendment. Merely promulgating a rule that controls the conduct of private parties generally does not represent state action for constitutional purposes. Because a determinable fee

The Foundation's argument implies that state law rather than personal beliefs led the grantor to include the restriction in the conveyance. The argument is unpersuasive. First, the language creating the Adams trust and the circumstances surrounding its establishment strongly suggest that the grantor included the whites-only provision out of personal conviction. See supra notes 46-51 and accompanying text. Moreover, state law did not demand that the document creating an educational trust include an express provision for racially separate instruction. In fact, the instrument establishing the trust at issue in the case that construed the Virginia educational-trust statute as requiring segregation did not include such a provision, but the court upheld the trust anyway. Triplett, 193 S.E. at 515-16. In other words, this was not a situation in which a reluctant testator was forced to include an objectionable clause by virtue of a state law. Instead, the restriction seems to reflect the testator's own social philosophy. There is no plausible evidence that he was "persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by [Virginia's] trust statutes." Evans v. Abney, 396 U.S. 435, 445 (1970).

75. E.g., Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978) (holding that governmental acquiescence in a private party's statutorily authorized sale of entrusted goods did not constitute state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354-59 (1974) (concluding that a private utility company operating under a government-awarded monopoly was not a state actor and therefore was not required to afford procedural due process to customers); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-77 (1972) (finding that a liquor license awarded to a private club did not make the club's racial discrimination a form of state action).

expires automatically upon the breach of a special limitation, no state action is involved when forfeiture occurs.

At another level, however, this notion is unrealistic. In a fee simple determinable, the government does more than just provide general rules to structure a private relationship. The parties to a determinable fee are likely to resort to litigation to resolve whether a restriction has been breached and whether a forfeiture has occurred. Courts therefore must decide whether the conveyance in question was a fee simple determinable or a fee simple subject to condition subsequent. In many instances, courts confuse the two estates, thereby creating powerful incentives for parties to litigate in every dispute over a defeasible fee. The distinction between judicial confirmation that forfeiture had occurred automatically and judicial enforcement of powers of termination is too fragile to support different constitutional conclusions. No matter what labels are used, the dynamics of the situation are essentially the same, and the law should reflect that reality.

2. Fees on Executory Limitation

If the substantive differences between special limitations and conditions subsequent are evanescent, they disappear completely with executory limitations. No matter what language a grantor uses to create a restriction, automatic forfeiture to a third party will result upon a breach. As noted earlier, there is no analogue to a power of termination when a third party, rather than the grantor, holds the future interest in a defeasible fee. The traditional doc-

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30 S. CAL. L. REV. 208 (1957). Resolving that controversy is not essential to the present discussion.

76. Dunham, supra note 12, at 216.

77. Id. at 216-17 & n.5 (collecting cases); Korngold, supra note 15, at 538 & nn.29-30 (collecting more recent cases). Another factor encouraging litigation is that many persons involved in creating defeasible estates do not appreciate the technical differences between determinable fees and fees on condition subsequent. Olin L. Browder, Jr., Defeasible Fee Estates in Oklahoma: The Civic Center Cases, 4 OKLA. L. REV. 141, 153 (1951).

78. Viewed realistically, the idea that these situations are different in any important sense rests on a legal fiction that is "so preposterous that only small children believ[ ] it and only constitutional lawyers debat[e] it." EARL BLACK & MERLE BLACK, POLITICS AND SOCIETY IN THE SOUTH 84 (1987) (discussing the notion that there was no state action in white primaries).

79. See supra note 24 and accompanying text.
trine therefore assures the absence of state action whenever a gran-tor has the foresight to provide for a forfeiture to someone other than himself. A rule of law that can be so easily evaded by artful drafting has little to commend it.\(^{80}\)

**E. Toward a Unified Law of Defeasible Fees**

The preceding discussion suggests that the form of the restriction should not control its constitutionality. One example of judicial refusal to be bound by purely semantic considerations is *Capitol Federal Savings & Loan Ass'n v. Smith*,\(^{81}\) which concerned an agreement that committed the signatories and their successors in interest not to sell or otherwise allow their property to be occupied by nonwhites.\(^{82}\) Violation would result in forfeiture to those other signatories (or their successors) who recorded a notice of claim; the agreement also authorized damages and injunctive relief. When blacks purchased several lots that were subject to this restriction, a group of whites claimed to have gained title under the forfeiture clause.\(^{83}\)

The principal issue in the case was the proper characterization of the agreement. The defendants sought to avoid constitutional difficulties by claiming that the automatic forfeiture provision made the restriction an executory limitation that gave them title to the disputed lots by operation of law.\(^{84}\) The court rejected this technical argument and held that the arrangement was, in substance if not in form, a racial restriction that was unenforceable under the logic of *Shelley* and *Barrows*.\(^{85}\)

*Capitol Federal* is not a strong precedent for those who advocate a unified law of defeasible fees. First, the opinion was inadequately reasoned, resting upon little more than disdain for the arcana of

\(^{80}\) Other rules of law that lend themselves to evasion through clever draftsmanship have been abandoned. A notable example is the Rule in **Shelley's Case. BERGIN & HASKELL, supra** note 9, at 98; see RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 30.1(3) & statutory note (1983).
\(^{81}\) 316 P.2d 252 (Colo. 1957).
\(^{82}\) Id. at 253.
\(^{83}\) Id. at 254.
\(^{84}\) Id.
\(^{85}\) Id. at 255; see supra notes 65-68 and accompanying text.
traditional property doctrine. Second, it is clear that this ruling was not intended to consolidate the law of defeasible fees. Colorado courts have never cited this case, and they continue to treat the limitation-condition distinction as dispositive in some circumstances.

Nevertheless, the court's refusal to allow labels to control analysis has much to commend it. Functionally equivalent private controls on property should receive substantively analogous judicial treatment. If courts may not issue injunctions or award damages for violations of racial restrictions, they should not be permitted to

86. The court explained its conclusion in the following language:

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. . . . High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is definitely Jacob's. We cannot give our judicial approval or blessing to a contract such as is here involved.

**Capitol Federal,** 316 P.2d at 255.

The court's dismissal of "outmoded common law terms" blinded it to an alternative basis for decision that could have rendered the forfeiture clause void, not merely unenforceable. The defendants were correct that the clause involved an executory limitation rather than a covenant because violation of the restriction would result in forfeiture, not damages or injunctive relief, and the forfeiture would be to someone other than the conveyor. **RESTATEMENT OF PROPERTY** §§ 25, 46 (1936). That fact was less important than the defendants believed. Executory interests are subject to the Rule Against Perpetuities. See supra note 23.

The agreement was to be effective between 1942 and 1990. **Capitol Federal,** 316 P.2d at 254. It was thus possible for the executory interest to vest outside the perpetuities period. Therefore, that interest was void from the outset and should have been stricken. This reasoning alone would not have eliminated the racial restriction, because striking an executory interest under the Rule Against Perpetuities does not necessarily void the forfeiture provision. The court then must determine what the parties would have done had they known that their original agreement was partially invalid. Ordinarily, the forfeiture provision survives; the future interest is left in the grantor (as a possibility of reverter or power of termination, depending upon the precise language of the conveyance) after the defective executory limitation is removed. **RESTATEMENT OF PROPERTY** § 228 cmt. b, illus. 2 (1936); see, e.g., City of Klamath Falls v. Bell, 490 P.2d 515, 517-19 (Or. Ct. App. 1971). This situation is different, however. Excising the executory interest would mean that any property conveyed to a nonwhite would be forfeited to the conveyor. It is unlikely that any owner would have agreed to such an arrangement. (A developer might have done so, but no developer was involved in this arrangement.) Accordingly, the court could have stricken the racial restriction altogether using traditional common law principles. **RESTATEMENT OF PROPERTY** § 402 (1944).


order the even more drastic remedy of forfeiture. More important, the validity of a judicial ruling enforcing a forfeiture should not turn upon evanescent conceptual distinctions arising from the use of essentially equivalent words that have no real consequences for the behavior of the parties. A restriction should not be insulated from constitutional challenge simply because it is denominated a limitation rather than a condition subsequent when a judicial order will probably be required to effect the forfeiture in any event.

If the limitation-condition distinction were abolished, questions would remain about the features of the generic defeasible fee. That estate should be patterned after the fee simple subject to condition subsequent. Under this model, the holder of the future interest—whether the grantor or a third party—would have to take some direct action to effect forfeiture upon breach of a restriction; property would not be automatically forfeited. At the same time, the fee simple determinable and the fee simple subject to executory limitation would be eliminated. 89

This choice reflects the traditional constructional preference for the fee on condition over the determinable fee. 90 That preference rests upon the law's special distaste for forfeiture, which, as a potentially draconian remedy for comparatively minor breaches, may well discourage productive use of property. 91 Forfeiture is less likely to occur with a fee simple subject to condition subsequent than with a fee simple determinable or a fee simple subject to ex-

89. This recommendation goes beyond current law in almost every American jurisdiction, but it builds upon efforts in the only two states that have passed legislation to unify the law of defeasible fees. Both measures significantly reduce opportunities for automatic forfeiture. They originally applied only to determinable fees and fees on condition, transforming possibilities of reverter into powers of termination. Cal. Civ. Code §§ 885.010, .020 (West Supp. 1993); Ky. Rev. Stat. Ann. § 381.218 (Baldwin 1988). A recent amendment in California also converts executory interests into powers of termination held by third parties, thereby eliminating all automatic forfeitures except in mineral leases. Cal. Civ. Code § 885.015; see Montana-Fresno Oil Co. v. Powell, 33 Cal. Rptr. 401, 409 (Dist. Ct. App. 1963) (noting special rules of construction that traditionally have applied to oil and gas leases). See generally Dunham, supra note 12, at 228-29.


91. Jost, supra note 53, at 736; Korngold, supra note 15, at 551-52; see also 1 Simes & Smith, supra note 42, § 258, at 310.
ecutory limitation because a power of termination must be affirmatively asserted; there can be no automatic forfeiture with a fee on condition.92

One possible objection to this approach is that it would subject all property restrictions to constitutional scrutiny under the state-action doctrine. Federal law would put in jeopardy numerous arrangements heretofore regarded as entirely private. More specific to the racial context, measures designed to benefit rather than exclude blacks might be thwarted because judicial enforcement would cause these measures to run afoul of equal protection standards.93

This concern is legitimate, but it should not be exaggerated. A finding of state action does not lead ineluctably to a conclusion of unconstitutionality.94 Many restrictions promote a sufficiently powerful countervailing interest or impose such modest limits that they can survive legal challenge. For example, the no-tobacco provision discussed in Part I probably can survive any constitutional attack. So, too, might some restrictions on marriage. Although the right to marry has been characterized as fundamental,95 the Supreme Court has made clear that restrictions that “do not significantly interfere with decisions to enter into the marital relationship” will pass muster.96 That criterion strongly resembles the traditional common law standard for assessing restraints against

92. See supra notes 11, 69 and accompanying text.
93. See Clark, supra note 59, at 1001. The concern is particularly acute in the context of trusts, which are authorized and pervasively regulated by government. Id. at 1003-08; cf. In re Estate of Wilson, 452 N.E.2d 1228, 1233-34 (N.Y. 1983) (emphasizing concern that a finding of state action in a males-only educational trust would necessarily invalidate programs to assist females).
marriage, which disfavors absolute prohibitions but upholds more reasonable limits.97

On the other hand, the type of whites-only restriction at issue in Hermitage Methodist Homes almost certainly would be rejected. At the same time, not every racial distinction will fail the constitutional test. Some arrangements that favor minorities have been approved.98 Similar standards presumably would apply to race-related provisions embodied in defeasible fees. To the extent that this approach might create doctrinal untidiness and public uncertainty, the problem arises not from the triggering presence of state action but rather from the more general difficulty of defining the legal significance of race.99 Unifying the law of defeasible fees as recommended here would focus attention upon the substantive questions raised by property restrictions rather than upon artificial conceptual distinctions that enable decisionmakers to avoid addressing the real issues raised by those restrictions.

IV. BEYOND THE CONSTITUTION

The limitation-condition distinction remains largely intact, however. It is therefore curious that the challenge to the whites-only restriction in the Adams trust rested exclusively upon constitutional grounds. At least two alternative contentions, one statutory and the other common law, were also available. These arguments might not have changed the outcome. Indeed, this section suggests that they should not have done so. Nevertheless, there was enough authority supporting these nonconstitutional arguments that they must be regarded as worthy of serious consideration.

97. For example, absolute restraints against first marriages are generally invalid. More limited restraints that afford a reasonable opportunity for first marriages are usually permissible, however. Restatement (Second) of Property: Donative Transfers §§ 6.1-.2 (1983); Restatement of Property §§ 424-425 (1944).


As its first alternative contention, the Foundation might have claimed that the restriction violated a federal civil rights statute which prohibits racial discrimination in the acquisition and holding of both real and personal property.\(^{100}\) That Reconstruction law protects whites who are penalized for associating with blacks.\(^{101}\) Moreover, the statute prohibits purely private discrimination.\(^{102}\) The argument would proceed as follows: the Adams trust conferred a property interest upon the Foundation; the whites-only provision seeks to prevent the Foundation from treating blacks equally with whites; hence, giving effect to the whites-only provision would deprive the Foundation of its property interest in the trust solely because of the race of some of the students enrolled in the private academy. Whether or not the forfeiture resulted from state action, therefore, it would violate the statute.\(^{103}\)

If this argument failed, the Foundation might have advanced another one based squarely upon venerable property and trust law concepts. Traditional doctrine holds that some property restrictions that do not violate the Constitution nevertheless can be unlawful as contrary to public policy. For example, many restraints on alienation and marriage are invalid under common law principles without regard to constitutional or statutory considerations.\(^{104}\)

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100. 42 U.S.C. § 1982 (1988) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").


Of particular significance, "restraints [upon property] designed to enforce racial segregation in a jurisdiction where such segregation is deemed adverse to the public interest" fell into the category of invalid restrictions well before the creation of the Adams trust. 105 Although segregation was legally mandated in Virginia for a considerable period, those laws have long since been repealed or overturned. 106 Indeed, the trust was established in reaction to, if not in defiance of, Brown v. Board of Education, 107 which rejected legally mandated segregated schooling. Today, then, a powerful argument can be made that a whites-only restriction on an educational institution offends "deeply and widely accepted views of elementary justice" and therefore violates "fundamental public policy." 108 The argument gains added force because the restriction at issue in Hermitage Methodist Homes applied to what purported to be a charitable trust. Trusts containing provisions that violate public policy are not charitable. 109 Once again, the state-action question would not affect the analysis. Instead, applying these traditional principles would lead to the conclusion that the racial restriction was invalid.

This conclusion would not completely resolve the controversy. Rejecting the whites-only provision on either statutory or common law grounds still would have required the court to decide whether to excise the restriction or declare that the entire conveyance had failed. The Foundation certainly would have argued for the former approach, and it could have invoked respectable supporting authority for eliminating the offending provision while leaving the underlying interest unfettered. 110 Preoccupation with constitu-
tional questions, in short, might have diverted attention from alternative, but less glamorous, arguments that could have led to a different result. As Part II demonstrates, however, the better rule is to make the decision on the basis of the grantor’s intent. Such an analysis would not have helped the Foundation. Inferences about intent do not depend upon the grounds for striking the racial restriction. The available evidence suggests that Jack Adams would have preferred that the Foundation’s interest fail completely and that the nursing home benefit from the trust income if the racial restriction were invalid for any reason. The approach advocated here, therefore, probably would have led to the same result that the Virginia Supreme Court reached.111

In a final effort to avoid this outcome, the Foundation might have claimed that the Academy’s unchallenged admission of several Chinese, Korean, and Vietnamese pupils some years earlier amounted to a waiver of the whites-only restriction. The presence of those pupils was widely known, having been mentioned in a national magazine article in 1979112 and in the Academy’s own newspaper in 1984.113 Moreover, the Foundation’s application for restoration of its federal tax exemption cited the admission of these nonwhite children as evidence of its nondiscriminatory policies.114 Thus, the absence of objection probably did not result from ignorance of the prior breach.115

111. See supra notes 45-51 and accompanying text.
115. Cf. Riverton Country Club v. Thomas, 58 A.2d 89, 96-97 (N.J. Ch.) (holding that a grantee may not defend its subsequent breach of a restriction by claiming that the grantor’s failure to object to a prior breach represented waiver when it was not clear that the grantor knew of the prior breach), aff’d per curiam, 64 A.2d 347 (N.J. 1948).
This defense would not have succeeded, however, on two grounds. First, an estate on limitation—a fee simple determinable or, as in *Hermitage Methodist Homes*, a fee simple subject to executory limitation—expires automatically upon breach of the restriction. Because the holder of the future interest need take no affirmative step to effect the forfeiture, the doctrine of waiver does not apply. 116 Second, even if the waiver doctrine did apply, many courts have held that failure to object to one breach does not preclude objection to a subsequent one.117 Under this reasoning, the earlier matriculation of the Asian pupils would not defeat a claim that the admission of blacks violated the terms of the Adams trust.

V. CONCLUDING THOUGHTS

*Hermitage Methodist Homes* illustrates the vices of the traditional approach to defeasible fees. Emphasizing form over substance, the decision turned upon the artificial distinction between limitations and conditions subsequent. The logic of that distinction effectively insulates some notably obnoxious racial restrictions from constitutional attack. This fact alone is not necessarily a dispositive argument for abandoning the distinction, because most

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It is also improbable that the Asian Americans were regarded as white. When the Adams trust was established, the relevant Virginia statute, which was frankly intended to preserve racial purity, classified Asians as nonwhite. Only those persons having "no trace whatever of any blood other than Caucasian" qualified as white. VA. CODE ANN. § 20-54 (Michie 1950) (repealed 1968). The leading case upholding that statute involved the marriage of a Chinese man and a white woman. Naim v. Naim, 87 S.E.2d 749, 750 (Va.), vacated, 350 U.S. 891 (1955), adhered to on remand, 90 S.E.2d 849 (Va.), appeal dismissed, 350 U.S. 985 (1956). The law was repealed after the Supreme Court declared it unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967). See *infra* note 124.

116. Colby v. Sun Oil Co., 288 S.W.2d 221, 223-24 (Tex. Civ. App. 1956); Milton I. Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 Harv. L. Rev. 248, 272 (1940); Howard R. Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 Tex. L. Rev. 158, 177 (1948). A possibility of reverter or an executory interest might be lost if the holder fails to act within the statute of limitations and the holder of the fee has satisfied the requirements of adverse possession. *Cunningham et al.*, *supra* note 69, § 2.7, at 53; Dunham, *supra* note 12, at 229; Goldstein, *supra*, at 272. There apparently was no basis for such a claim in *Hermitage Methodist Homes*.

117. 1 Simes & Smith, *supra* note 42, § 258, at 308 & n.98 (citing cases).
whites-only property restrictions are otherwise unlawful or unenforceable.118

Nevertheless, this episode vividly underscores the mischief that the limitation-condition distinction can cause. Lawyers and judges believe that the distinction matters, but they are too often confused by the arcana of essentially meaningless labels. Defeasible fees are misclassified with distressing frequency, thereby further blurring the distinction. In fact, parties to defeasible estates have every incentive to behave in the same fashion regardless of the labels attached to their interests. Whatever justification originally existed for the limitation-condition distinction therefore is no longer adequate.

The difficulty is not merely analytical confusion or wrong decisions, although those problems exist. The real issue is that the limitation-condition distinction allows courts to hide their reasoning behind a semantic cloud. Hermitage Methodist Homes graphically exemplifies this phenomenon. Although there were respectable arguments for a different outcome, the case came out correctly. In the process, however, the state supreme court squandered an opportunity to help Virginia come to terms with one of its most painful historical episodes.

This was, after all, a compelling case. Who could have anticipated that the Prince Edward School Foundation, which was es-


established by die-hard segregationists who fiercely challenged federal antidiscrimination efforts for almost thirty years, would ever seriously argue to the highest court in the birthplace of Massive Resistance that a whites-only educational trust is unconstitutional? This question raises others. Were the Foundation's arguments sincere, or did they simply represent a strategic rhetorical response to shrinking enrollments at the Academy? Even if those arguments were tactical, what significance should we attach to the Foundation's sacrifice of principle for principal? Should the court have effectively penalized a segregation academy for abandoning its racial exclusivity, whatever its reasons for doing so?

There are no obvious or easy answers to these questions. The Foundation has persistently denied that it harbors malice against blacks, although Academy officials avowed support of segregated schooling until shortly before the African-American pupils were admitted. Many local blacks, recalling the Foundation's origins, view it as a racist institution and doubt that it has really changed. Perhaps answering those questions was not absolutely necessary to decide the Hermitage Methodist Homes case. But confronting the past by focusing upon Jack Adams' intent might have led to explicit consideration of the meaning of Massive Resistance and its contemporary relevance. At some point, the Commonwealth of Virginia must come to terms with that period of its history, just as the federal government has acknowledged the wrongs it perpetrated against citizens of Japanese ancestry during World War II and emerging democratic polities in other nations.

119. The Academy's long-time headmaster was quoted in a 1984 book by a sympathetic author as saying that "[m]ost blacks simply do not have the ability to do quality school work." Wolters, supra note 27, at 98. That statement was consistent with his comment in a 1979 television interview that, because " 'each of the two races, being a little different culture and a little different background, . . . the best quality of education can be obtained if they are educated separately.' " 1985 Hearing, supra note 30, at 40 (statement of Carl T. Rowan, who conducted the taped interview in which the comment was made).

120. See 1986 Hearing, supra note 30, at 40-55 (statement and testimony of James E. Ghee); Evans, supra note 32.

have struggled to deal with violations of human rights committed by recently discredited dictators.\textsuperscript{122} To be sure, individual white Virginians have come to understand what was wrong with segregation, and an African American won the last gubernatorial election.\textsuperscript{123} In addition, the legislature repealed some old segregation statutes, but it did so only after the federal courts had found those measures unconstitutional.\textsuperscript{124} It is also true that a speech by Governor J. Lindsay Almond, Jr., in January 1959 marked the end of Massive Resistance at the state level, but that speech included the standard segregationist condemnation of integration and was delivered several months before Prince Edward County closed its schools.\textsuperscript{125}

The dispute over the Adams trust, in other words, could have been the occasion for an important state governmental institution


\textsuperscript{123} For example, on his retirement from the Supreme Court, Justice Powell, who before his appointment had been very active in the conservative Democratic organization that controlled Virginia politics for half a century, expressed amazement that he could have passively accepted the old racial order. ETHAN BRONNER, BATTLE FOR JUSTICE 24 (1989); JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 135-36 (1991).

Nevertheless, some who accepted the new developments did so with a certain ambivalence. One of Powell's former partners, who represented the Prince Edward County authorities until they closed the public schools in 1959, lamented that the attorneys who challenged segregation in \textit{Brown} had been afforded numerous professional opportunities that those who defended the practice had not. John W. Riely, Brown v. The Board: A Very Personal Retrospective Glance, VA. Law., Feb. 1989, at 17, 17 ("Many of the lawyers for the respondents are dead; many of the lawyers for the petitioners are federal judges."). I am grateful to David and Debra Palmer for calling this reference to my attention.

\textsuperscript{124} Although the state supreme court recognized that \textit{Brown} invalidated school-segregation requirements, Harrison v. Day, 106 S.E.2d 636, 644 (Va. 1959), those regulations remained on the books for years afterward. The state constitutional provision mandating segregated schools, VA. Const. of 1902, art. IX, § 140, survived intact until the adoption of a new constitution in 1971. The statute implementing this provision, VA. Code Ann. § 22-221 (Michie 1950), was repealed at about the same time. Act of Feb. 24, 1971, ch. 102, 1971 Va. Acts 128. Similarly, the segregation requirement for educational trusts was repealed in 1975, long after its invalidity had become clear. Act of Mar. 22, 1975, ch. 547, § 2, 1975 Va. Acts 1172, 1174.

It did not take as long for the legislature to repeal the state's miscegenation statute, but that also was done in response to a Supreme Court decision, Loving v. Virginia, 388 U.S. 1 (1967). Act of Apr. 2, 1968, ch. 318, § 2, 1968 Va. Acts 428, 430.

\textsuperscript{125} ELY, supra note 48, at 123-24; MUSE, supra note 25, at 131-34.
to reflect candidly, possibly for the first time, upon one of the defining moments in Virginia's history. That in turn might have stimulated broader public and political deliberation about this subject. Perhaps the state supreme court implicitly recognized the significance of the *Hermitage Methodist Homes* case by recalling retired Justice Albertis S. Harrison, Jr., to sit by designation when the appeal was considered.\(^{126}\) Justice Harrison served on the court for more than fourteen years after holding various elective offices for over three decades.\(^{127}\) Of special significance, he had, as attorney general, helped to precipitate the test case that invalidated one of the centerpieces of Massive Resistance and, as governor, cooperated with arrangements that provided formal training to Prince Edward's black children during the last year that the public schools were closed.\(^{128}\) The resulting opinion, unhappily, suggests that the underlying events are still too disquieting for forthright discussion.\(^{129}\)

Ultimately, then, *Hermitage Methodist Homes* exemplifies in the starkest terms what is really wrong with the limitation-condition distinction. Few cases raise such elemental questions as this one did. The availability of an already discredited doctrine to obscure those questions provides a powerful additional reason finally to abandon the limitation-distinction and unify the law of defeasible fees once and for all.

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126. There was a vacancy on the court when *Hermitage Methodist Homes* was heard. The recall of a retired justice to sit by designation in such circumstances was authorized by Va. Code Ann. §§ 17-7 to -7.01 (Michie 1988 & Supp. 1992).

127. For a panegyrical review of Harrison's career, see *Ceremony for the Presentation of the Portrait of The Honorable Albertis Sydney Harrison, Jr., Justice of the Supreme Court of Virginia*, 228 Va. xxxv (1984).


On the other hand, Harrison's selection as the designated justice in *Hermitage Methodist Homes* may have been entirely coincidental. He participated in approximately a dozen other cases at the same session and had been sitting by designation on a sporadic basis since his retirement eight years earlier.

129. Official silence may not be possible very-much longer. The Virginia Council for the Humanities and Public Policy recently made a grant to support production of a documentary film about the events in Prince Edward County.