discussion of the contemporary international scene tend to skimp both history and analysis, and are more successful as reminder than as narrative.

These objections, and others that might be noted, are perhaps only some of the troubles that beset the pioneer. The book on the whole is a bold, careful, and successful effort to examine the interwoven legal problems of international law, constitutional law, and federal jurisdiction, raised by a particular complicated and important contemporary issue. The author takes us outside the machinery of United States governmental power and lets us look at a cut-away model, as if he were leading a sophisticated civics class of Martian candidates for an American J.S.D. To his task he has admirably fitted a clear and unobtrusive style, which is related to typical law-review style as the whole-tone scale is to atonality.

If anything like the provisions for arms control being postulated in this book or being discussed currently should be enacted, someone in the United States will have to deal with problems of compliance, enforcement, and administration. Someone will have to turn to the drafting of statutes, regulations, ordinances, and, possibly, even constitutional amendments. Whoever is charged with these tasks, even if it be Professor Henkin, will find this book an indispensable desk-book for the first twelve months of his tenure. The rest of us also must remain in Professor Henkin's debt.

LEON LIPSON†

CAUCASIANS ONLY. By Clement E. Vose. Berkeley and Los Angeles: University of California Press, 1959. Pp. xi, 296. $6.00.

THE *Restrictive Covenant Cases* of 1948—*Shelley v. Kraemer*[1] and *Hurd v. Hodge*[2]—were possibly the most noteworthy civil rights cases of their decade. By denying on equal-protection and due-process grounds the power of state and federal courts to give specific enforcement to covenants aimed at the exclusion of Negroes, the Supreme Court greatly enlarged the choice of housing available to Negroes and other minority groups. In addition, looking beyond the direct impact of the decisions themselves, they facilitated the final invalidation of state-supported segregation;[3] and the rationale of the *Restrictive Covenant Cases* provided an important new dimension to the concept of state action.

In *Caucasians Only* Professor Clement E. Vose of the Government Department of Wesleyan University provides a fascinating "inside" view of the activities of the various special interest groups which participated in the *Restrictive*

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

2. 334 U.S. 24 (1948).

3. See Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954). See also Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

Covenant Cases. Although it is, of course, the importance of the decisions themselves that prompted Professor Vose's inquiry, his study is not principally of the change they effected in the law, or even of the future implications of that change. Thus, Professor Vose gives only brief attention to the next important decision, *Barrows v. Jackson*,[4] a 1953 case in which the Court held that a state court could not enforce a restrictive covenant in an action for damages between co-covenators. That case was significant not only as a further extension of the state-action concept, but also for its impact on the doctrine of standing to sue; the Court allowed an argument of racial discrimination in a law suit involving only white persons. And Professor Vose does not mention at all more recent cases in which the Court has indicated that there are limits beyond which the state-action concept cannot, at least for now, be pressed.[5] But these omissions are certainly understandable in view of the fact that the author's "chief aim was to learn something of the role of interest groups in the judicial process, and perusal of the United States Reports showed that a record number of separate *amici curiae* briefs by organizations had been filed in [the *Restrictive Covenant*] cases."[6]

This is an interesting undertaking in which Professor Vose has performed a useful service with commendable skill. Other studies have been made of the various forces that enter into a decision of major constitutional importance [7] and of the functioning of special interest groups.[8] But nowhere else is the emphasis placed squarely upon the role played by special interest groups in co-operating successfully to influence the outcome of a single major constitutional case.

The *Restrictive Covenant Cases* presented difficult questions of law and strategy for those who challenged the enforceability of the covenants. The apparently well-established precedents all favored the validity of restrictive covenants; and the nearly universal rulings had been that the same legal or equitable remedies for breach were available here as for other breaches of contract.[9] At least since 1915 the NAACP had sought unsuccessfully to

4. 346 U.S. 249 (1953).

5. *E.g.*, Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880 (1954), *judgment vacated and cert. dismissed as improvidently granted*, 349 U.S. 70 (1955); Pennsylvania v. Board of Directors of City Trusts of Philadelphia, 353 U.S. 230 (1957), *on remand*, 391 Pa. 434, 138 A.2d 844, *appeal dismissed*, 357 U.S. 570 (1958). See also Charlotte Park & Recreation Comm. v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956). For a good discussion of the state-action problem, see Clark, *Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

6. P. ix.

7. *E.g.*, WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE (1958); see Vose, Book Review, 69 YALE L.J. 716 (1960).

8. *E.g.*, KEY, POLITICS, PARTIES, AND PRESSURE GROUPS (2d ed. 1948); Note, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574 (1949).

9. See Corrigan v. Buckley, 271 U.S. 323 (1926). Section 406, RESTATEMENT, PROPERTY (1944), specifically approved the validity and enforceability of restrictive covenants, despite the restriction on alienation normally disfavored in the law.

upset this solid array of authority; but its efforts before 1948 had produced at most a further entrenchment of the established doctrine.[10] Accordingly, it was recognized within the NAACP and elsewhere that if change was to be effected new theories and different approaches would be necessary.[11] Over a period of time agreement was reached that the best chance of success lay in simultaneous effort along two lines: (1) It was decided to develop the then-novel legal theory that judicial enforcement of racially discriminatory restrictive covenants was a form of state action forbidden by the concept of equal protection. There was some precedent for this approach in cases which forbade judicial participation in jury selection which excluded otherwise qualified Negroes because of race.[12] But this principle had never been extended to judicial enforcement of restrictive covenants; indeed, it had been implicitly rejected.[13] (2) It was also decided that the NAACP and other interested organizations should develop statistical, economic, and sociological data (a) to demonstrate the injury to Negroes and other minority groups resulting from exclusion from desirable housing; (b) to show the harm to the community as a whole, including members of majority groups; and (c) to document the injury to American prestige abroad.

Principally as a result of these efforts, eighteen briefs amici were filed in the *Restrictive Covenant Cases* by a wide variety of special interest groups. There were, of course, a number of racial groups, including a Negro fraternal organization and citizens' leagues for American Indians and Japanese Americans. Other participants included religious organizations, unions, civil liberties bodies, the American Association for the United Nations, and the United States Government.[14] Professor Vose's discussion of the masterminding of the strategy which led to the more or less harmonious cooperation among these diverse groups makes fascinating reading; particulary illuminating is the discovery that in a campaign of this kind too many friends can prove almost as embarrassing as too few.

The book is factually instructive on an important and previously little-understood aspect of the judicial process, the role of amici curiae in cases before the Supreme Court, especially the great public law cases. There remain, however, other questions not specifically resolved in the volume—indeed they may be insoluble. But such questions must be faced by all courts when they deal with constitutional issues, as well as by those individuals and groups that seek to influence the development of constitutional law.

10. Pp. 50-57.
11. Pp. 57-73.
12. *E.g.*, *Ex parte* Virginia, 100 U.S. 339 (1879).
13. See note 9 *supra* and accompanying text.
14. The participation by the United States, by both brief and oral argument, was especially significant. The decision of the Department of Justice to file a brief was announced following the publication of a recommendation to that effect by President Truman's Committee on Civil Rights. To SECURE THESE RIGHTS 169 (1947). The Government's brief, later published under the title PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS (1948), was one of the best submitted to the Court.

The problems of decision involved in the *Restrictive Covenant Cases* raise in microcosm the much-debated issue as to whether the Court should be "activist" in matters of constitutional law or whether it should play a merely passive role. Activism is for many a term of opprobrium when applied to the judicial process, while others may view it as the high obligation of the judiciary, at least when interpreting the Constitution. In terms of "activism" versus "restraint," however, the debate may lack focus, for it is clear that in this sense the United States Supreme Court has been "activist" from the time that John Marshall cautioned that "we must never forget that it is *a constitution* we are expounding."[15] Perhaps, then, many of the demands for judicial self-restraint have represented less an opposition to activism than a displeasure over particular decisions.

The *Restrictive Covenant Cases* raise, and Professor Vose discusses, a second interesting and troublesome question. Was the Court moved to its in-effect reversal of earlier case law by the newly developed legal theory offered by the Negro litigants and their allies, or was the state-action concept merely a convenient handle for acknowledging new and powerful sociological, economic, and even political forces? No one can know the answer for sure. The Court's opinion plays it straight, as if nothing but a previously unresolved legal question were involved; and the Court makes no reference at all to the factors which moved the parties amici to participation. But Professor Vose is not deterred by this silence. He seems to have found in the Court's solemn pronouncement on discriminatory state action an implicit recognition of factors extraneous to law qua law. He finds in the background of the six participating Justices evidence of extra-judicial predisposition to decide these cases against enforcement of the covenants;[16] and he assumes that the Court was much impressed by the weight of the sociological evidence assembled to demonstrate the evils of continued enforcement.[17] This assumption was later used as the principal basis for attack on the *School Segregation Cases*—that those decisions were based on sociology and not on the constitutional text. But I cannot help doubting the soundness of the assumption in both cases. Perhaps the legal argument employed by the Supreme Court is too simple for the legal sophisticate. In a way the result seems so obvious that we are hesitant to believe that it could have been so long overlooked if it were in fact sound. Yet this is exactly what I believe to be the true explanation of the decision: Governmental participation in action whose effect is to discriminate on grounds of race is per se a denial of the equal-protection and due-process guarantees of the fourteenth and fifth amendments respectively. Period. Why the law was so long otherwise I do not pretend to understand. As to how important the sociological data was we can only speculate; and I for one doubt that it played an important part in the decision.[18]

15. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).
16. Pp. 177-83.
17. Pp. 184-210.
18. See Cahn, *"Jurisprudence"* in 1954 ANN. SURVEY OF AM. L. 809 (1955).

In deference to the judicial process should we not simply accept at face value the straightforward legal reasoning which the Court unanimously approved in both the *Restrictive Covenant* and *School Segregation Cases*? Particularly there appears to be no sufficient reason to look behind the language for hidden meanings when the constitutional text not only supports but almost compels the result achieved in those cases. I cannot prove Professor Vose in error on this point (nor in this most conjectural inquiry can he prove me wrong); but I am at least more comfortable in the belief that these Supreme Court opinions can and should be read to mean what they plainly say.

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