

PANEL DISCUSSION

*A question and answer period followed Professor Ware's speech. Jules Gerard¹ inquired whether Professor Allen had anticipated Chief Justice Vinson's dissent in *Barrows v. Jackson*.²*

I would like to be able to say that, of course, I had perfect foresight and knew this was going to happen. Actually, I'm not sure whether or how much I thought about the question. I wasn't too surprised when Vinson took his position. The question in *Barrows v. Jackson* is one of standing, and not itself a constitutional issue. I think, myself, that if the court was going to do what it did in *Shelley v. Kraemer*, then it is rather odd to draw the line where Vinson placed it. On the other hand, on the basis of existing law, Vinson's position was not frivolous. As a matter of fact, people as wise as a distinguished constitutional law professor at Harvard thought that Vinson was quite right in the conclusion he reached. I have often wondered whether, had I been with Vinson at the time, I might have written one of those magic memos, and maybe he would have come out the other way.

*Professor Ware, when asked about the earliest example of long term litigation strategy, stated that twenty or thirty-year campaigns originated with the NAACP efforts. Professor Rotunda then asked both panelists why several Justices recused themselves from *Shelley v. Kraemer*. Professor Allen stated:*

It was widely assumed both in the Court and the country . . . that each of these three Justices had properties in the District of Columbia burdened by a restrictive covenant; and this would certainly not be surprising at that time. There is some mystery about the case of Justice Rutledge, because Rutledge had participated in a covenant case in the Court of Appeals before he became a member of the Supreme Court; and apparently at the earlier time did not think that the matter justified his disqualifying himself He concurred in that [earlier] case on a procedural ground, but indicated that he was taking no position on the constitutional validity of the covenant's enforcement.

Professor Ware added:

[T]hat was part of the strategy in the District of Columbia cases. Houston moved to have the trial judge recused to show how pervasive the covenants were and I guess, to some degree, to embarrass the trial court judge. It was

1. Professor, Washington University School of Law.

2. 346 U.S. 249 (1953) (Vinson, C.J., dissenting from decision barring recovery of damages from co-covenantor for breach of race restrictive covenant).

assumed therefore, that the Supreme Court Justices recused themselves because they lived in homes that were covered by racial covenants.

Judge Higgenbothom next asked how great a factor the sociological data had been in persuading the Court to decide Shelley as it did. Professor Allen responded first:

I can't give a confident answer to that There is a transcript of the argument of the *Shelley* case in which the sociological data were being argued by one of the counsel for the petitioners and there is a dialogue (I think between Frankfurter and petitioners' counsel, perhaps Thurgood Marshall) in which, Frankfurter in effect says, "Well, that's very interesting but it really isn't relevant, is it Mr. Marshall?" My hunch is that the inclusion of the sociological data in the brief, particularly the NAACP briefs in the Michigan case and the amicus brief of the government, was not a waste of time; but if you ask me to quantify the impact or the influence, I cannot give a very satisfactory response.

Judge Frankel compared the results of a similar strategy for sociological influence in Brown v. Board of Education³:

In school segregation, in the matter of *Brown v. Board of Education*, there is a famous footnote in which sociology is made an explicit consideration.⁴ I've always thought it was a misfortune and that the decision would have been a lot better off without it. The point was illustrated by District Judge Scarlett of South Carolina, who took evidence on school segregation from a number of people who were running a sort of traveling circus to give such evidence. From that evidence, the judge figured out as a matter of *fact* that segregation was good for black people and therefore, he said, "since I sit as a fact-finding court and the Supreme Court is not a fact-finding tribunal, I don't have to follow their facts and I hold that school segregation *is* constitutional." He was reversed the next day, as he deserved to be, and yet on that factual ground, in his preverse way, I always thought he had a point and that the Supreme Court made a mistake. The constitutional principle of equal protection for blacks is one to which sociology has no relevance one way or another. It didn't matter what surveys showed—and I think eventually in the long history of this thing that's probably what the case stands for.

Margaret Bush Wilson then related her personal experience with the Shelley family and their litigation:

I was present in a session where George Vaughn and my father sat around our dining room table and talked about what to do about *Shelley*. George

3. *Brown v. Board of Education*, 347 U.S. 483 (1954).

4. *Brown*, 347 U.S. at n. 11.

Vaughn was my father's lawyer on other matters and the *Shelley* case now had reached a point where the Missouri Supreme Court had ruled that the lower court, where the Shelleys won, was now reversed. So the strategy was simply one of "what can we do to stop this, where do we go from here." And it was clear from the conversation that both George Vaughn and my father knew they were going to take the case as far as it could go, and they were going to use all the resources they could find to get it done.

I give a great salute to the NAACP for its long term strategy and the development of the whole approach to challenging racial restrictive covenants. But there is some basis for saying that the NAACP planners had been so discouraged by the decisions that were made during that twenty-year period, 1925-1945, that they were very reluctant to take a particular case until all the ducks were in a row. And I have a sense that they were not sure the *Shelley* case was the case they wanted to take to the U.S. Supreme Court. So they took their time, and that led my father and the other brokers and black families of St. Louis to say, we can't wait. They formed their own organization, raised money and did not care to have the NAACP involved until after the grand finale.

The people who were really the ones who were desperate in all this were people like the Shelleys. I don't know whether people in this room know that at that time in St. Louis, families with four and five children were living in two rooms. There was a limited geographic area where black people could live and the population had grown substantially. So there simply wasn't adequate housing for these people and it was a desperate situation.

The session concluded with a question regarding whether blacks alone were subject to restrictive covenants. Professor Ware responded that, depending on where one looked in the country, covenants might have excluded Asians, native Americans, and even religious minorities such as Jews.

