INVISIBLE WALLS: AN EXAMINATION OF THE LEGAL STRATEGY OF THE RESTRICTIVE COVENANT CASES*

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I. INTRODUCTION

On May 3, 1948, the Supreme Court issued two decisions in four cases that are now remembered as *Shelley v. Kraemer*.[1] In the *Shelley* cases, the Supreme Court held that judicial enforcement of racially restrictive covenants violated the equal protection clause of the fourteenth amendment. The Court's holding—that judicial enforcement of a private right constitutes state action for purposes of the fourteenth amendment—has generated enough criticism and commentary to fill a small library. There is, however, a significant aspect of the restrictive covenant litigation that has not received as much attention. The Supreme Court's decision in the restrictive covenant cases was the result of a highly organized effort involving more than thirty years of litigation and hundreds of cases. The conflict which caused the litigation arose from a dramatic population shift that occurred in the early decades of the twentieth century. The great migration of black families from rural areas to urban industrial centers prompted various efforts to establish and maintain racial segregation in housing. After legislated segregation failed, private covenants became the primary vehicle for maintaining segregated housing.[2]

The forces against restrictive covenants consisted of black families in search of adequate housing, the NAACP, and the lawyers who served on that organization's legal committee. From 1926 to 1947, the NAACP and the lawyers fighting against the covenants lost the vast majority of the hundreds of cases in which they challenged the covenants. By 1944, The American Law Institute's Restatement of Property, one of the most influential treatises in the field, endorsed racial covenants as a valid exception to the general rule against restraints on the alienation of property.[3]

In the face of a vast amount of adverse legal precedent, the NAACP lawyers seemed to know that they would ultimately prevail in the Supreme Court. Charles Hamilton Houston, who served at various times as counsel to the NAACP and was dean of Howard University Law

1. The Supreme Court's decision in Shelley v. Kraemer, 334 U.S. 1 (1948), was a consolidation of appeals from two state supreme court decisions: Kraemer v. Shelley, 198 S.W.2d 679 (Mo. 1946) (involving property located in St. Louis, Missouri) and McGhee v. Sipes, 25 N.W.2d 639 (Mich. 1947) (involving property located in Detroit, Michigan). The Supreme Court decision in Hurd v. Hodge, 334 U.S. 24 (1948), represented the consolidation of two cases concerning properties located in the District of Columbia: Hurd v. Hodge and Urciolo v. Hodge. All four cases are hereinafter referred to collectively as the restrictive covenant cases.

2. *See infra* notes 8-20 and accompanying text.

3. *See infra* note 13 and accompanying text.

School and the architect of the NAACP's school desegregation strategy, devised the restrictive covenant strategy. The covenant strategy involved an evidentiary demonstration of the relationship of crime and disease to overcrowded conditions in urban ghettoes, and the role of restrictive covenants in the perpetuation of those problems. This strategy, which made the victory in *Shelley* possible, also had a profound influence on the Supreme Court's attitude toward civil rights litigation. This Article will explore the origin and development of the covenants,[4] and examine urban housing conditions in the 1930s and 1940s.[5] It will review the NAACP's legal strategy and that organization's coordination of the covenant litigation,[6] and it will analyze each of the four cases that eventually reached the Supreme Court.[7]

II. THE ORIGIN AND DEVELOPMENT OF RACIAL COVENANTS

Racially restrictive covenants were prompted, in large measure, by the great migration of black families from rural areas to northern and midwestern industrial centers. The migration from field to factory began in the second decade of the twentieth century and reached its peak during the Second World War.[8] One response to the increased presence of black families in cities was the enactment of municipal ordinances which prohibited these families from owning, renting or otherwise occupying property except in specified areas of the cities. The ordinances were promptly challenged in courts and the Supreme Court ultimately held them unconstitutional in *Buchanan v. Warley*.[9] In *Buchanan*, the Supreme Court invalidated a Louisville, Kentucky ordinance. The Court concluded that racial minorities were protected by the equal protection clause of the fourteenth amendment from state or municipal legislation that limited their rights to acquire, use, or dispose of property solely because of race.[10]

After *Buchanan*, restrictive covenants quickly became the primary means by which neighborhoods maintained racially segregated housing patterns. The covenants were either inserted into deeds by real estate

4. *See infra* notes 8-20 and accompanying text.
5. *See infra* notes 21-23 and accompanying text.
6. *See infra* notes 24-53 and accompanying text.
7. *See infra* notes 54-85 and accompanying text.
8. *See* G. MYRDAL, AN AMERICAN DILEMMA (1944).
9. 245 U.S. 60 (1917).
10. *Id.*

developers at the time of construction or prepared by attorneys retained by neighborhood organizations, executed by individual homeowners, and recorded in the official real estate records of the city or county in question. The covenants typically restricted owners from the lease, sale or conveyance to, or ownership by, any member of the excluded groups, or use or occupancy by any member of those groups.[11] During the 1920s, racially restrictive covenants occurred extensively throughout the United States and courts routinely enforced them when civil actions were filed.[12] By 1944, the Restatement of Property recognized racially restrictive covenants as a valid exception to the general prohibition against restraints on the alienation of property on the ground that "social conditions render desirable the exclusion of the racial or social group in question."[13]

The Supreme Court considered the validity of the private covenants in a 1926 decision, *Corrigan v. Buckley*.[14] *Corrigan* was based on a covenant executed by a group of District of Columbia homeowners in 1921. The covenant prohibited the homeowners and their successors from selling their properties to racial minorities. One of the homeowners subsequently violated the agreement by selling his home to a black family. When a neighboring homeowner sued, the trial court granted an injunction voiding the sale. The Circuit Court of Appeals for the District of Columbia affirmed the injunction on appeal.[15] Relying on the Supreme Court's reasoning in the *Civil Rights Cases*,[16] the court of appeals concluded that the fourteenth amendment applied only to actions taken by states or governmental entities and did not apply "to actions by individuals in respect to their property."[17] The court also held that the covenants did not violate the Civil Rights Act of 1866 or the Civil Rights Enforcement Act of 1870 because those statutes could not create any greater protection than that accorded by the Constitution itself.[18]

Plaintiffs sought review of the court of appeals' decision in the Supreme Court. Although the Supreme Court declined review on jurisdictional grounds, it issued an opinion in which it agreed with the court

11. The excluded group always included blacks and frequently included Asians, native Americans and religious minorities.

12. C. VOSE, CAUCASIANS ONLY 55 (1959).

13. RESTATEMENT OF PROPERTY § 406 comment 1 (1944).

14. 271 U.S. 323 (1926).

15. 299 F. 899 (D.C. Cir. 1924).

16. 109 U.S. 3 (1883).

17. 299 F. at 901.

18. *Id.* at 902.

of appeals' determination that state action needed to invoke the protection of the Constitution was not present in *Corrigan*. The Supreme Court stated, *inter alia*, that the fifth amendment "is a limitation only on the powers of the general government and is not directed against the actions of individuals."[19] The Court also observed that the thirteenth amendment did not create any rights beyond a general prohibition against slavery, and that violations of the fourteenth amendment required some form of state action. Actions taken by individuals, it said, were beyond the reach of that amendment. With regard to restrictive covenants, the Court concluded that "[i]t is obvious that none of these [constitutional] Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property."[20] With the decision in *Corrigan*, the Supreme Court effectively endorsed the legality of restrictive covenants. During the following twenty-two year period, virtually every court that considered a challenge to restrictive covenants relied on the *Corrigan* dicta as governing legal authority. As a consequence, it appeared for several years that racially restrictive covenants would prevail as a mechanism for controlling housing patterns.

III. URBAN HOUSING CONDITIONS IN THE 1930S AND 40S

After *Corrigan*, the use of racial covenants flourished. In every city that had a black population of any significance, racial minorities were confined to specific geographic districts. Despite this disincentive, the migration of black families to urban centers continued unabated. As a consequence, the already overcrowded conditions of the urban ghettoes grew worse. In 1932, for example, the Report on Negro Housing of the President's Conference on Home Building and Home Ownership concluded that racial segregation "ha[d] kept the Negro-occupied sections of cities throughout the country fatally unwholesome places, a menace to the health, morals and general decency of cities and plague spots for race exploitation, friction and riots."[21]

One of the fundamental problems with the covenants was the severe space limitations which they created. The areas to which black families were confined were inadequate to support rapidly growing populations. Charles Hamilton Houston, one of the attorneys who led the fight against

19. *Corrigan*, 271 U.S. at 330.

20. *Id.*

21. PRESIDENT'S CONFERENCE ON HOME BUILDING AND HOME OWNERSHIP, REPORT ON NEGRO HOUSING 45-46 (1932).

restrictive covenants, complained bitterly that the covenants operated as an "invisible wall" which crowded black families into substandard housing.[22]

Despite the limitations imposed by the covenants, black home buyers invariably found ways to circumvent them. The most prevalent device was the use of a white "strawman" to purchase property. Under this system, a white buyer would purchase a home, then immediately resell the property to a black purchaser. The white homeowners in the affected area would then be required to bear the burden and expense of filing a civil action to seek enforcement of the covenant. White homeowners also circumvented the covenants by simply disregarding the covenants and selling directly to black purchasers. Because the demand for housing in black communities was far greater than the available supply, white homesellers frequently obtained substantially higher prices from black purchasers than they would have received from white buyers. As a result, despite the elaborate mechanisms that were created to perpetuate segregated communities, white homeowners and real estate agents had a significant economic incentive to sell properties to black purchasers. The influx of black families into urban centers continued throughout the 1920s and 1930s and, with the advent of the Second World War, the number of blacks migrating to urban centers increased dramatically. During the war, the defense industry created thousands of new jobs located in or near large cities.[23] As more minorities moved to the urban centers, the demand for housing increased, causing conditions in ghettoes to deteriorate rapidly. Because of the increased demand, homes subject to covenants were sold to black families. White homeowners responded with lawsuits and, by 1946, at least 100 civil actions were pending.

IV. THE NAACP'S ORCHESTRATION OF THE RESTRICTIVE COVENANT CASES

The NAACP had from its inception in 1909 sought to combat racial discrimination. Discrimination in housing was one of several areas on which the organization focused. In 1917, the organization successfully challenged municipal ordinances which sought to legislate segregated housing,[24] but suffered a major setback when the *Corrigan* court en-

22. G. MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

23. *See* G. MYRDAL, *supra* note 8.

24. Buchanan v. Warley, 245 U.S. 60 (1917).

dorsed the validity of private covenants in 1926.[25] Prominent white lawyers who were members of the NAACP board argued *Buchanan* and *Corrigan*, but the NAACP soon realized that utilizing white attorneys in such visible roles undermined the message the organization was attempting to convey. As a result, in the early 1930s, the organization began to actively recruit black lawyers to serve on its legal committee. In 1935, NAACP executive secretary Walter White recruited a black attorney, Charles Hamilton Houston, then dean of Howard University Law School, to serve full time as the organization's legal counsel.[26]

The NAACP's selection of Houston was an unusually wise choice for several reasons. He had impeccable educational credentials, having graduated from Amherst College with honors after being elected to Phi Beta Kappa. Houston served as an officer in World War I, and later enrolled in Harvard Law School, where he was the first black student elected to serve on the editorial board of the Harvard Law Review.[27] After graduation from Harvard, Houston studied law for a year in Spain, at the University of Madrid. He practiced for a brief period with his father in Washington, D.C., and was then appointed by Mordecai Johnson, president of Howard University, to serve as the vice-dean of Howard University Law School in 1929.[28]

During his tenure at Howard University, Houston transformed the law school from an unaccredited part time program to a fully accredited institution.[29] In addition to raising standards and improving the program of instruction, Houston served as the mentor for a generation of black lawyers. Houston was a visionary who believed that the law could be used as an effective weapon to fight racial discrimination. He also believed that lawyers should be "social engineers."[30]

During the reconstruction period which followed the Civil War, the constitutional guarantee of equal protection had been subverted to deny

25. Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

26. G. MCNEIL, *supra* note 22, at 86-105.

27. *See* law review editorial board at 35 HARV. L. REV. 950 (1922). These educational accomplishments would be impressive at any time but to be fully appreciated, Houston's achievements must be viewed in light of the enormous educational barriers that existed for black students in the second decade of the twentieth century.

28. The title is misleading because Houston actually functioned as the dean but refused the title as a symbolic protest to the low salaries paid to law professors. G. MCNEIL, *supra* note 22, at 46-56.

29. *See* R. LOGAN, HOW. UNIVERSITY: THE FIRST HUNDRED YEARS (1969).

30. G. MCNEIL, *supra* note 22, at 76. *See also* Read, *The Contribution of Charles Hamilton Houston to American Jurisprudence*, 30 HOWARD L.J. 803-08 (1988) (tracing Houston's legal philosophy to the sociological school of jurisprudence).

black Americans full citizenship rights. With the *Civil Rights Cases*[31] in 1883, and *Plessy v. Ferguson*[32] in 1896, the Supreme Court embraced the legal fiction of the separate but equal doctrine. Houston believed that the inequities sanctioned by those decisions could be successfully challenged through innovative litigation. When he was counsel to the NAACP in the late 1930s, Houston developed an "equalization" strategy under which a series of lawsuits were filed demanding that state and local governments provide educational facilities for black students equal to those provided to white students. Houston envisioned eventual school desegregation because he believed that states could not afford the financial burden of truly equal dual systems.[33] Houston's restrictive covenant litigation strategy involved the use of sociological and other scientific studies to demonstrate the relationship of overcrowded and substandard housing conditions—perpetuated by racial covenants—to poor health and crime.

When Houston accepted the position of special counsel to the NAACP, a formidable network had developed across the nation through three separate institutions: Howard University Law School, the NAACP's legal committee, and the National Bar Association.[34] During the 1930s and 1940s, Howard University was the only institution that was training a significant number of black lawyers.[35] Consequently, a substantial number of black attorneys during that period shared an old school tie grounded in Houston's philosophy. After they completed their studies and established themselves as practicing attorneys in communities across the country, Howard graduates joined or established black bar associations which served as affiliate chapters of the National Bar Association.

During the same period, the NAACP established local chapters in cities and towns throughout the nation. Because of the legal focus of the NAACP, black attorneys usually served in leadership roles, or were

31. 109 U.S. 3 (1883).

32. 163 U.S. 537 (1896).

33. R. KLUGER, SIMPLE JUSTICE (1975); M. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987).

34. The National Bar Association had been established in 1925 because the American Bar Association refused to admit black attorneys. Similarly, most of the local bar associations denied admission to black attorneys. Houston was a member of the National Bar Association and one of the founders of the Washington Bar Association, the District of Columbia's affiliate of the National Bar Association. *See* Smith, *The Black Bar Association and Civil Rights*, 15 CREIGHTON L. REV. 651 (1982).

35. Washington, *History and Role of Black Law Schools*, 18 HOW. L.J. 385 (1974).

otherwise closely associated with the local chapters. By the 1940s, the NAACP, the National Bar Association, and the local chapters of those organizations, together with Howard University Law School, had formed a vast network of interlocking civil rights organizations. This network had the pivotal role in the legal campaign against racially restrictive covenants.[36]

V. MIXED SIGNALS FROM THE SUPREME COURT

The first crack in the invisible walls occurred in 1940, when the Supreme Court decided *Hansberry v. Lee*.[37] *Hansberry* overruled an Illinois Supreme Court decision that had affirmed the validity of a restrictive covenant on Chicago property. The Court's decision did not reach the constitutional questions presented. Rather, the Court held, on procedural grounds, that the Hansberrys were not estopped from challenging a covenant that was the subject of an earlier lawsuit. Despite the Supreme Court's failure to address any constitutional issues, the attorneys involved in restrictive covenant litigation were encouraged by the favorable decision in *Hansberry*.[38]

There was another positive signal in the campaign against restrictive covenants when Charles Houston prevailed in the 1942 case of *Hundley v. Gorewitz*.[39] In *Hundley*, the Court of Appeals for the District of Columbia Circuit declined to enforce a restrictive covenant.[40] The decision was based on the "changed circumstances" principle, which authorized courts to deny injunctive relief when the character of the neighborhood had changed to such an extent that enforcement of the covenant would be futile.[41] Defendants were able to show that a substantial number of black families already resided in the area in question.

The campaign against restrictive covenants suffered a setback in 1945

36. Houston resigned from his NAACP position in 1938 and returned to private practice in Washington, D.C., but he continued to work closely with the NAACP until his death in 1950. He was succeeded by one of his former students whom he had recruited to work with him in the NAACP's legal department in New York. Accordingly, when he was just 30 years old, Thurgood Marshall became the head of the NAACP's legal department. G. MCNEIL, *supra* note 22, at 131-56.

37. 311 U.S. 32 (1940).

38. The Hansberrys were the parents of playwright Lorraine Hansberry whose play, *A Raisin In The Sun*, was inspired by the *Hansberry* litigation. L. HANSBERRY, TO BE YOUNG, GIFTED AND BLACK (1958).

39. 132 F.2d 23 (D.C. Cir. 1942).

40. *Id.* at 25.

41. *Id.* at 24.

when the Supreme Court denied a request for a writ of certiorari in *Mays v. Burgess*.[42] *Mays* involved a challenge to a restrictive covenant on property in the District of Columbia.[43] The court of appeals had affirmed the validity of the covenant, but one of the judges on the panel issued a forceful dissent. The dissenting opinion argued, *inter alia*, that the shortage of housing for black families in the District of Columbia was so severe that the restrictive covenants were contrary to public policy.[44] The dissent argued further that "our *Corrigan* decision was probably unsound when it was rendered," and that the court should not "enforce a privately adopted segregation plan which would be unconstitutional if it were adopted by a legislature."[45] A petition for a writ of certiorari was filed later in the Supreme Court. One of the attorneys involved, William Hastie, was confident that the Supreme Court would grant the petition based on the persuasive reasoning of the dissenting opinion.[46] Hastie's prediction proved unduly optimistic. The Supreme Court's order denying certiorari indicated that Hastie and his colleagues had secured only two of four votes needed—Justices Rutledge and Murphy. Although the Supreme Court's action was a disappointing defeat, many of the NAACP lawyers also interpreted it as a favorable indication that only two additional votes were needed to secure a review by the Supreme Court.

VI. THE NAACP'S CHICAGO CONFERENCE

Shortly after the certiorari petition was denied in *Mays*, the NAACP convened a series of conferences to discuss the pending covenant cases and to develop an overall strategy for securing a victory in the Supreme Court. It held the first meeting in Chicago in July, 1945.[47] William Hastie, who was by then governor of the U.S. Virgin Islands, presided at the meeting. Thurgood Marshall, the NAACP's special counsel, explained

42. 147 F.2d 869 (D.C. Cir.), *cert. denied*, 325 U.S. 868 (1945).

43. *Id.* at 869. George E.C. Hayes, Leon A. Ransom, and James A. Cobb, the attorneys who represented the black family during the *Mays* trial, had served as Howard Law faculty under Charles Houston. Thurgood Marshall, the NAACP's legal counsel, William H. Hastie, who was then dean of Howard's Law School (and was later appointed by President Truman to serve on the United States Court of Appeals for the Third Circuit) and Spottswood Robinson (another Howard Law School alumnus) became involved in *Mays* at the appellate level. G. WARE, WILLIAM HASTIE: GRACE UNDER PRESSURE (1984).

44. 147 F.2d at 876-77 (Edgerton, J., dissenting).

45. *Id.* at 875-76.

46. G. WARE, *supra* note 43.

47. Minutes of the NAACP Chicago Conference (July 9-10, 1945), Records of the NAACP, Group II Box 133 (Library of Congress) [hereinafter Minutes].

the purpose of the meeting. Thirty-five persons attended; most of these were attorneys involved in restrictive covenant litigation.

Charles Houston spoke of his experiences with restrictive covenant cases, and urged the attorneys present to adopt his strategy. He stressed that a defense which admitted that the purchasers were black and that the racial covenants existed made the tasks of the white homeowners' attorneys far too easy. Houston suggested instead that defense counsel deny that the purchasers were black. Houston explained that requiring plaintiffs' attorneys to prove the race of the defendants allowed the defense counsel to expose the irrational nature of the plaintiffs' assumptions about race during cross-examination. Houston also recommended the use of expert testimony by sociologists and economists who could testify about the effects of covenants on the overcrowded conditions of black communities and the relationship of overcrowding and substandard housing to infant mortality and crime.[48] These recommendations, which also involved challenging racial assumptions, introducing economic and sociological studies prepared by experts,[49] and the assertion of constitu-

48. *Id.*

49. Although the use of sociological data in civil rights cases has been criticized by several commentators, the relevant authorities indicate that evidence of this nature was considered as early as the nineteenth century in Plessy v. Ferguson, 163 U.S. 537 (1896). It was in Muller v. Oregon, 208 U.S. 412 (1907), however, that social science was explicitly relied upon, as expert testimony, in the determination of a legal issue. *See, e.g.*, Driessen, *The Wedding of Social Science and the Courts: Is the Marriage Working?*, 64 SOC. SCI. Q. 476 (1983). *Muller* was influenced to a great extent by the appellee's brief, prepared by Louis Brandeis, in which he introduced authoritative extralegal data in order to demonstrate "the *reasonableness* of the specific law at issue and the *relationship* of the regulation to the *needs* of society." Doro, *The Brandeis Brief*, 11 VAND. L. REV. 783, 789 (1958) (emphasis in original). In the *Muller* opinion, Justice Brewer quoted extensively from materials contained in the 104-page Brandeis brief which consisted of a two-page discussion of law and facts, while the remaining 102 pages outlined an argument supported by citations to various social science treatises. *Id.* at 792. Thus, process was determined, not just by consideration of abstract legal concepts, but also on the basis of the social and economic implications of the law at issue. *Id.* at 793. Such contextual considerations have remained a valid approach universally applicable in many different types of litigation on a variety of issues. *See, e.g.*, Colquitt, *Judicial Use of Social Science Evidence at Trial*, 30 ARIZ. L. REV. 51-84. Examples of judicial issues presented to the Supreme Court that were influenced by sociological evidence include: capital punishment, Gregg v. Georgia, 428 U.S. 153 (1976); employment discrimination, International Bd. of Teamsters v. United States, 431 U.S. 324 (1977); pornography, New York v. Ferber, 458 U.S. 747 (1982); venire size, Williams v. Florida, 339 U.S. 78 (1970); and venire selection, Witherspoon v. Illinois, 391 U.S. 510 (1968). In addition to expert testimony, authenticated scholarly writings can be introduced as evidence in nearly all jurisdictions, for use in the cross-examination of experts or as supportive materials for their expressed opinions. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 208 at 900 (1984). As early as 1857, the Alabama Supreme Court adopted the rule that written scientific works are admissible as substantive evidence, Stoudenmeier v. Williamson, 29 Ala. 558 (1857), and cited, as authority for this proposition, a Wisconsin ruling from eight years earlier, Luning v. State, 2 Pin. 284, 1

tional and common-law defenses, were the framework upon which the restrictive covenant cases were ultimately won in the Supreme Court.

At the time of the Chicago meeting, two of the four cases that the Supreme Court would ultimately hear were pending in lower courts. Furthermore, attorneys who handled the trials of all four cases attended the conference: William Graves and Francis Dent represented the defendants in the Detroit case;[50] George Vaughn represented the Shelley family in St. Louis;[51] and Charles Houston represented the defendants in the two District of Columbia cases.[52] At the conclusion of the conference, Thurgood Marshall closed with a promise that the NAACP would devote additional attention and resources to restrictive covenant litigation.[53]

VII. THE DISTRICT OF COLUMBIA CASES

The network of interests supporting restrictive covenants in Washington, D.C. was formidable. The Washington Real Estate Board had adopted a provision in its code of ethics which prevented its members from selling property located in a white area of the city to black families. Violators lost their membership in the board. Additionally, the *Washington Evening Star* maintained a policy of refusing to print advertisements offering restricted property for sale to black people. The paper enforced this policy through its cooperation with the Real Estate Board, whose public affairs committee determined whether an address was within a restricted area. This committee, in turn, consulted the citizens' association for the area in question.[54] As a result, the sixty-nine citizens' associations in Washington, D.C. exercised the final veto power over what housing could be advertised and sold to black purchasers.[55]

In 1944, James Hurd and his wife purchased a home at 116 Bryant St.

Chand. 178 (Wis. 1849). Rule 803 of the Federal Rules of Evidence also provides a method for the admission of scientific treatises as substantive evidence. FED. R. EVID. 803(18).

50. *See* discussion of Detroit case *infra* at notes 77-85 and accompanying text.

51. *See* discussion of St. Louis case *infra* at notes 71-76 and accompanying text.

52. *See* discussion of District of Columbia cases *infra* at notes 54-70 and accompanying text.

53. Minutes, *supra* note 47.

54. C. VOSE, *supra* note 12.

55. This aggregate of power, *i.e.*, the real estate board, the leading newspaper, and the citizens' associations, clearly establishes that the covenants were not private agreements between consenting parties. They were, in reality, the result of the activities of organized forces which would have been unconstitutional under *Buchanan*, 245 U.S. 60 (1917) if the municipal government had performed the same functions.

N.W., Washington, D.C. Although the surrounding area in northwest Washington had, by then, a substantial black population, the home purchased by the Hurds was subject to a covenant prohibiting the premises from being "rented, leased, transferred, or conveyed unto any Negro or colored person." In October of 1944, the white residents of the neighborhood filed a petition seeking to evict the Hurds from their home. During the pendency of the *Hurd* case, three more houses on Bryant Street were sold to black families. As a consequence, a second action was filed against the black purchasers of the Bryant properties and Raphael Urciolo, a lawyer and realtor who frequently sold homes located in white neighborhoods to black families.

Charles Hamilton Houston represented the defendants in both cases. During the trial, Houston employed the tactics he had described during the Chicago conference. Upon direct examination, Hodge, a white resident of the neighborhood, testified that blacks were undesirable neighbors and that she would prefer a white neighbor to a black neighbor under any circumstance. During cross-examination, Houston asked if the same would be true even if the black person carefully maintained his home and had no racially identifying features. Hodge responded that it would not matter. Houston then asked whether the same would be true if the hypothetical white homeowner allowed the property to deteriorate and had just been released from prison. The questions continued in this manner; by the time Houston completed his examination, Hodge was embarrassed and flustered because the questions and answers highlighted the absurdity of her prejudices.[56]

Another of Houston's tactics involved the use of expert testimony. This tactic, originally based on the changed circumstances principle, would ultimately prove to be the most significant influence in the restrictive covenant litigation.[57] To support the argument that the racial composition of the neighborhood had changed to such an extent that enforcement of the racial covenant would be futile, Houston offered the testimony of E. Franklin Frazier, a distinguished black sociologist.[58] Despite the repeated objections of plaintiffs' attorneys, Frazier was able to testify that the Bryant Street neighborhood had undergone changes in racial composition. Frazier also testified to the negative effects of over-

56. C. VOSE, *supra* note 12, at 75-100.

57. *See supra* note 39 and accompanying text. *See also* II AMERICAN LAW OF PROPERTY § 9.39 (1952).

58 Frazier was, at that time, chairman of Howard University's sociology department.

crowded housing conditions on the District of Columbia's black community and the covenants' role in the perpetuation of those conditions.[59]

When Houston concluded his defense, he had revealed the plaintiffs' irrational racial attitudes and had exposed the network of interests which cooperated to enforce segregated housing patterns in the District of Columbia. Houston also had established that the racial composition of the Bryant Street neighborhood had changed. He presented evidence demonstrating the severe problems caused by the overcrowded housing conditions in the black areas of Washington and the relationship of restrictive covenants to those conditions. The trial court was unpersuaded, however, and entered judgment for the plaintiffs, setting aside the sale to the black defendants.[60]

Houston appealed both cases to the Court of Appeals for the District of Columbia Circuit, where they were consolidated under the style *Hurd v. Hodge*.[61] With one judge dissenting, the court held that it was bound by twenty-five years of precedent in which racially restrictive covenants had been upheld in the District of Columbia. The changed conditions argument was rejected because "the infiltration of four colored families" was not sufficient to justify the imposition of the doctrine.[62] Relying on the Restatement of Property's endorsment of racially restrictive covenants,[63] the court of appeals also rejected Houston's argument that the covenants were an impermissible restraint on the alienation of property.

A dissent filed in *Hurd* echoed, in stronger language, the dissenting opinion filed by the same judge two years earlier in *Mays*.[64] The dissent argued that the covenants were inequitable and unreasonable restraints on the alienation of property, were contrary to public policy, and were prohibited by both the Civil Rights Act and the due process clause of the fifth amendment.[65] To support this conclusion, the dissent contended that black citizens "have a constitutional right to buy and use . . . whatever real property they can without direct government interference

59. C. VOSE, *supra* note 12, at 75-100.

60. *Id.* Houston had also requested that the trial judge recuse himself because he resided on property subject to a racial covenant. This request was denied but the parties involved assumed that this was the reason that three Justices recused themselves when the case reached the Supreme Court. G. MCNEIL, *supra* note 22, at 156.

61. 162 F.2d 233 (D.C. Cir. 1947).

62. *Id.* at 235.

63. *Id.*

64. 147 F.2d 869, 873 (D.C. Cir.), *cert. denied*, 325 U.S. 868 (1945).

65. 162 F.2d at 235 (Edgerton, J., dissenting).

based on race."[66] The judge also asserted that state action was involved because "[r]estrictive covenants are not self executing."[67] The powers of the state were invoked by virtue of the courts' enforcement of the covenants. In the dissent's view, the court's inquiry should have been "whether a court of the United States has the constitutional power to cancel deeds [solely] because the buyers are Negroes."[68] The dissent also claimed that the majority's ruling violated the fifth amendment and the Civil Rights Act since nothing was "alleged for or against appellants except their color."[69]

In *Hurd*, another covenant case had been lost at the appellate level but had generated a compelling dissent. A court of appeals judge had adopted virtually all of Houston's arguments and had relied heavily on sociological studies to support his views. The dissent evinced judicial sympathy to the arguments, even though the majority believed that it was bound by precedent affirming the validity of the covenants. From this decision and the St. Louis and Detroit cases,[70] one can see that once the courts began to acknowledge the impact of restrictive covenants on urban housing conditions, they were not far from recognizing that the covenants should no longer be enforced.

VIII. THE ST. LOUIS CASE

The Shelley family was part of the black migration which reached its zenith during the Second World War. The Shelleys moved to St. Louis from Mississippi in 1939. A modest man with a very limited education, J.D. Shelley was hard working and thrifty. By 1944, Shelley was employed at a government owned munitions factory and had saved enough money to make a down payment on a home. The housing conditions in St. Louis at that time were the same as those in every other urban industrial center. The black citizens of St. Louis were confined primarily to a very small district which was located in an area immediately west of the Mississippi river. Although the housing was substandard and the overcrowded conditions were a breeding ground for crime and poor health, rents were higher there than in comparable all-white areas.

The property the Shelleys purchased was located at 4600 Labadie Ave-

66. *Id.* at 238.
67. *Id.* at 239.
68. *Id.* at 238.
69. *Id.*
70. *See infra* notes 71-85 and accompanying text.

nue. Robert A. Bishop, the black minister of the Shelleys' church, drove the Shelleys by the property. After the Shelleys indicated an interest in purchasing the home, Bishop, who also dabbled in real estate, arranged a sale through a white intermediary realtor. Bishop's intermediary negotiated a sale to a straw purchaser who later transferred title to Bishop. Bishop purchased the property for $4,700 and immediately resold the property to the Shelleys for $5,700. A black realtor, James Bush, acted as the agent for the Shelleys. When the Shelleys took possession of the property on October 9, 1945, they were unaware of the existence of the restrictive covenant. Consequently, they were quite surprised when they were served with a lawsuit seeking their eviction on October 10th.

The opposing forces in the *Kraemer v. Shelley* litigation were the white homeowners belonging to the Marcus Avenue Improvement Association pitted against a group of black real estate brokers led by James Bush. The Kraemers were selected to serve as plaintiffs, but the case was financed by the Marcus Avenue homeowners' association. The black real estate brokers financed the Shelleys' defense, and they retained the services of a black St. Louis attorney, George Vaughn, to represent the Shelleys.

The covenant at issue in *Shelley* was executed in 1911. It provided that, for fifty years following the date of execution, the properties subject to the covenant could not be "occupied by any person not of the Caucasian race."[71] When *Kraemer v. Shelley* came to trial, Vaughn argued that the covenant was defective because it contained faulty property descriptions and had not been executed by all of the property owners. Vaughn also raised the changed conditions defense and called witnesses who testified that a number of black families already resided in the neighborhood. Vaughn further claimed that the covenant violated the Missouri Constitution, the United States Constitution and the 1866 Civil Rights Act. Vaughn's witnesses testified about overcrowded conditions within St. Louis' black district and the effects of overcrowding on health and crime. After two days of hearings, the trial court ruled that the covenant was defective because it had not been signed by all of the property owners to which it purported to apply.

On appeal, the Missouri Supreme Court, sitting en banc, reversed the trial court's decision.[72] The Missouri Supreme Court held that the signa-

71. Kraemer v. Shelley, 198 S.W.2d 679, 681 (Mo. 1946).

72. *Id.* at 683.

tures of all of the property owners were not required because the covenant was limited to the properties whose owners had actually executed the 1911 covenant. The court also held that the exclusion of certain parcels from the covenant's coverage did not affect the agreement's validity because there was never any intent to cover the excluded parcels.[73] The court stated that covenants did not violate public policy because "agreements restricting property from being transferred to or occupied by Negroes have been consistently upheld by the courts of this state."[74] Citing the *Mays* ruling, the court also held that "the restriction does not contravene the guarantees of civil rights of the Constitution of the United States."[75] Finally, with regard to the detrimental effects of overcrowded housing, the court observed that "such living conditions bring deep concern to everyone . . . but their correction is beyond the authority of the courts."[76]

In this decision, the Missouri Supreme Court acknowledged the deplorable conditions that existed in the St. Louis ghetto, but stated that courts did not have the authority to take remedial actions. The court's expression of "deep concern" illustrates that the courts were unable to ignore expert testimony showing a nexus between substandard housing conditions and poor health and crime. Once courts were persuaded that the connection existed, it became increasingly difficult for them to deny the critical role that restrictive covenants played in perpetuating the problem. Thus, although the forces against restrictive covenants continued to lose in the courts, their fight was gaining momentum.

IX. THE DETROIT LITIGATION

In 1935, the owners of properties located in a Detroit subdivision executed an agreement providing that properties located within the subdivision "shall not be used or occupied by any person or persons except those of the Caucasian race."[77] Ten years later, twenty-one property owners initiated a civil action, *Sipes v. McGhee*,[78] to evict the McGhees, a black family who had purchased a home in the subdivision.

The McGhees sought the assistance of the Detroit branch of the

73. *Id.* at 681-82.
74. *Id.* at 682.
75. *Id.*
76. *Id.* at 683.
77. Sipes v. McGhee, 25 N.W.2d 639, 640 (Mich. 1947).
78. *Id.*

NAACP. Two Detroit attorneys, Willis Graves and Francis Dent, undertook their representation.[79] During the trial, Graves and Dent developed what by then had become the standard NAACP defense. They claimed that the covenant violated public policy and that it was unconstitutional under the Michigan and United States Constitutions. They also raised a new defense: that the covenant was unenforceable because the definition of the class affected—non-Caucasians—was unduly vague.

The tactics used at the trial were similar to those employed by Houston during the District of Columbia litigation. The defense attorneys challenged the plaintiffs' assumptions about race. The technical requirements concerning execution and the recording of the covenants were also questioned,[80] and extensive sociological data was introduced which demonstrated the effects of overcrowded housing on Detroit's black community. At the conclusion of the trial, however, a judgment was entered for the plaintiffs.

The defendants appealed the trial court's decision. The NAACP's national office had become involved at the appellate level and, by the time the case reached the Michigan Supreme Court, support for the McGhees extended even further. Amicus briefs supporting the McGhees were filed by the Detroit section of the National Jewish Conference, the Detroit chapter of the American Lawyer's Guild, the United Automobile Workers, the National Bar Association and the National Bar Association's Detroit affiliate, the Wolverine Bar Association.

The court, sitting en banc, affirmed the validity of the covenants.[81] It dismissed almost summarily the technical challenge to the signatures. The court appeared to be concerned about the public policy argument. In an awkward attempt to reconcile conflicting principles, however, the court held that, although public policy of the state of Michigan did not favor racial discrimination, it permitted "restrictions on the use and occupancy of real property."[82] The McGhees had also argued that judicial enforcement of restrictive covenants constituted unlawful state action under the fourteenth amendment. The Michigan court responded that such an interpretation would deny the *plaintiffs* equal protection under

79. Willis Graves and Francis Dent served on the NAACP's national legal committee, and Dent had attended Amherst College with Charles Houston.

80. The McGhees claimed that 80% of the homeowners had not executed the covenant because the certificate of the official witness for one of the signers was defective. This defect, they argued, invalidated the property owner's signature. 25 N.W.2d at 641.

81. *Id.* at 638.

82. *Id.* at 643.

the law,[83] and would also prevent them from enforcing their private contracts. As for the sociological studies presented during the trial, the Michigan Supreme Court did find these "arguments based on the factual statements pertaining to questions of public health, safety, and delinquency strong and convincing."[84] Nevertheless, the court concluded that the controlling legal precedent compelled it to affirm the validity of the covenant.

The *McGhee* decision demonstrates the extent to which the momentum against the covenants had grown. The cause of the Missouri Supreme Court's "deep concern" in *Kraemer v. Shelley* had become "strong and convincing" in *McGhee*. Furthermore, by the time the case reached the Michigan Supreme Court, the black families were supported not only by the NAACP and black bar associations, but by Jewish organizations and organized labor. For perhaps the first time, active opposition to restrictive covenants extended beyond black organizations. Clearly, the court was troubled by the circumstances created by the covenants. The opinion contains a lengthy passage in which the court's obligations to equity and justice were weighed against the court's duty to follow established precedent.[85] Although precedent prevailed, the court's opinion shows that Houston's strategy, especially the sociological data, was having a measurable effect on the courts' deliberations in restrictive covenant cases.

X. THE ST. LOUIS FORCES LOSE PATIENCE

In January, 1947, the NAACP convened another meeting of black leaders, this time at Howard University. Several of the attorneys involved in restrictive covenant litigation attended.[86] During the meeting, the attorneys agreed that they should seek review by the Supreme Court, but based on the certiorari denial just two years earlier in *Mays*, they felt

83. The court did not explain how the white homeowners would have been denied equal protection of the law. This may have been a confusion of equal protection requirements with due process principles.

84. 25 N.W.2d at 644.

85. *Id.* at 645.

86. The conferees included Francis Dent and Willis Graves, the attorneys for the McGhees in the Detroit case, Spottswood Robinson, who had served as Houston's co-counsel in the appeal of the District of Columbia cases, George Hayes and Governor William Hastie, the defense attorneys in *Mays*, Thurgood Marshall, James Nabrit, Loring Moore (Moore had handled *Hansberry*), Arthur Shores, Vertner Tandy, Robert Carter, Mary Wynn Perry, Franklin Williams, C. Alphonso Jones, Edward Lovett, Mr. Hall and Andrew Weinberger. Minutes of the Conference on Restrictive Convenants, Howard University, Washington, D.C. (January 25, 1947).

that care should be taken to identify the appropriate case. The conferees agreed that the ideal record should include testimony of an economist concerning the effects of the covenants on housing availability, testimony by a sociologist showing the adverse effects of overcrowded housing conditions, maps showing the effects of restrictive covenants on housing patterns, and evidence concerning the extensive number of pending restrictive covenant cases.[87]

The attorneys also discussed the growing number of restrictive covenant cases, the increased opposition to the covenants, and the enhanced public awareness of the problem. Although nearly all of the cases had been lost, the conferees apparently sensed a changing climate and seemed confident that they would ultimately prevail in the Supreme Court. At the conclusion of the conference, the attorneys decided that they would allow additional cases to develop before filing a petition for certiorari in any of the pending cases. They agreed that prior to any actions before the Supreme Court, the group would "meet once more and discuss any other decisions which have come down in the meantime to determine what action we will take."[88]

George Vaughn did not attend the Howard University meeting but the members of the St. Louis Real Estate Brokers Association were determined to pursue the *Shelley* case. The St. Louis group became increasingly impatient with what it perceived to be uncertainties and delays. The Shelleys and their supporters had attempted to work in concert with the NAACP, yet, in their view, little progress had been made. George Vaughn had contacted Charles Houston shortly after the adverse decision issued by the Missouri Supreme Court, but Houston had declined Vaughn's request for assistance, based on the demands of a heavy workload. Frustrated by the delays, the Real Estate Brokers Association directed Vaughn to file a petition for a writ of certiorari with the Supreme Court. Vaughn filed a petition in April, 1947, without advising the NAACP. The request was granted in June.[89] After learning that certiorari had been granted in *Shelley v. Kraemer*, Thurgood Marshall hastily prepared a writ of certiorari for *McGhee*. Certiorari was eventually granted in that case as well as the District of Columbia cases.

In July, 1947, a letter was sent to the St. Louis Chapter of the NAACP by the Real Estate Brokers Association requesting financial assistance in

87. *Id.*
88. *Id.*
89. 331 U.S. 803 (1947).

carrying the *Shelley* case forward.[90] The local branch sent the letter to the national office in New York.[91] The next month, Thurgood Marshall responded, stating that the request should be taken up at the September meeting in New York. Marshall also noted that George Vaughn had not cooperated to his satisfaction.[92] David Grant, president of the St. Louis branch, was angered by the response from the NAACP's national office. Some of the tension probably resulted because a few of the attorneys involved in the restrictive covenant cases privately thought that Vaughn should not be allowed to argue *Shelley* in the Supreme Court. They were aware that Vaughn had handled restrictive covenant cases in St. Louis, but they considered his experience in appellate matters too limited for the Supreme Court. They also felt that he lacked the sophistication and skill necessary to master the complexities of restrictive covenant litigation and that he was not sufficiently versed in the sociological materials that they considered crucial to the litigation.

The St. Louis forces stood behind Vaughn. A series of curt letters were then exchanged between Thurgood Marshall, James Bush and David Grant. Marshall indicated that the $1,000 that had been offered to support the *Shelley* litigation was conditioned upon coordination of the Supreme Court briefs. James Bush believed that Marshall wanted Vaughn to step aside, but he admitted in a letter to Marshall that his sense of ethics would not permit him to require Vaughn to "step aside and let someone else run the show."[93] Bush made an unsuccessful trip to the NAACP's national office in an attempt to resolve his differences with Marshall, but tensions eventually eased and David Grant later received the national office's permission to initiate a local fundraising campaign.

XI. THE NEW YORK CITY CONFERENCE

In July, 1947, Thurgood Marshall called for a conference of the various individuals and groups involved in the campaign against restrictive covenants.[94] The conference was held in New York City in September.

90. Letter from Real Estate Brokers Association to St. Louis branch of the NAACP (July 11, 1947).

91. Letter from David Grant, president of the St. Louis NAACP, to Thurgood Marshall (July 30, 1947).

92. Letter from Thurgood Marshall to David Grant (Aug. 1, 1947).

93. Letter from James Bush to Thurgood Marshall (Sept. 19, 1947).

94. [W]e are calling a conference of lawyers who have worked on these cases with us and lawyers for various organizations interested in the problem .... We particularly urge that

Houston presided over the meeting,[95] announcing that certiorari had been granted in *Shelley* and *McGhee*.

The attorneys handling the cases summarized the facts of each case and the issues presented.[96] The conferees then turned to a discussion of the sociological data. They discussed a New York study of the effects of restrictive covenants in three New York City boroughs, and presented maps illustrating the operation of covenants. At the conclusion of this phase of the conference, a committee was appointed to coordinate the preparation of sociological studies. The conferees moved on to the question of amicus briefs, and, after identifying the interested organizations, a committee to coordinate the amicus briefs was formed.[97]

The conferees then debated the merits of various legal strategies and theories. George Vaughn began the discussion with his analysis of the state action question and his belief that the covenants violated the Civil Rights Act of 1866. Several of the conferees disagreed, citing the *Corrigan* decision.[98] This meeting was the final major conference prior to the arguments before the Supreme Court.[99]

XII. THE TRUMAN ADMINISTRATION'S ROLE IN THE RESTRICTIVE COVENANT CASES

In September, 1946, an ad hoc committee formed by the NAACP met with President Truman and requested that he take some action against the increasing episodes of violence against minority citizens. President Truman responded by issuing an executive order establishing the President's Committee on Civil Rights. The order authorized the Committee to determine what governmental actions could be taken to protect the civil rights of minority citizens and to prepare a written report of its

attorneys come to this meeting after having given considerable thought to the manner in which they believe that the issues should be presented to the Supreme Court.

Letter from Thurgood Marshall, NAACP Legal Defense and Educational Fund, New York to various individuals and groups (July 11, 1947).

95. Minutes of Meeting of NAACP Lawyers and Consultants on Matters, New York (Sept. 5, 1947).

96. Vaughn began with a brief description of the *Shelley* litigation. Graves followed with a summary of McGhee v. Sipes. After Graves concluded, Leon A. Ransom described an Ohio case, Trustees of Monroe Ave. Baptist Church v. Perkins. Phineas Indritz (who had assisted Houston in the appeals of the District of Columbia cases) concluded the case summaries with a brief description of Hurd v. Hodge and Urciolo v. Hodge. *Id.*

97. *Id.*

98. *See* discussion of *Corrigan supra* notes 14-20 and accompanying text.

99. Minutes, *supra* note 95.

findings.[100]

To accomplish its mandate, the committee hired a fourteen-member professional staff which reported to Professor Robert Carr, a recognized civil rights authority. Between January and September 1947, the committee held numerous public meetings where it received testimony from representatives of a broad range of interested groups. The committee issued a report, *To Secure These Rights*, in October, 1947.[101] Among the forty recommendations included in the report were three addressing problems related to restrictive covenants. One proposed the enactment of state laws outlawing racial covenants. Another suggested that Congress enact similar laws governing the District of Columbia. The third recommendation suggested the Justice Department's direct intervention in pending litigation.

After the Supreme Court granted certiorari in the restrictive covenant cases, President Truman, Attorney General Tom Clark, and Solicitor General Philip Perlman received numerous requests from individuals and organizations opposed to the covenants urging the Administration to submit an amicus brief. One day after the President's Commission on Civil Rights issued *To Secure These Rights*, the Truman administration decided to file an amicus brief challenging the validity of the covenants. This was the first time that the federal government submitted an amicus brief in a civil rights case.

XIII. FINAL PREPARATIONS FOR THE SUPREME COURT

In addition to securing support from the Truman administration, the restrictive covenant opponents had the support of several organizations that planned to file briefs in support of the NAACP. During the New York conference, Houston identified representatives of fourteen separate groups that attended the meetings and planned to file amicus briefs. These included: the National Bar Association, the American Jewish Congress, the Protestant Council of New York City, the Japanese American Citizens League, the Anti-Defamation League, the American Civil Liberties Committee, the Black Elks, the Congress of Industrial Organizations, the Anti-Nazi League, the National Lawyers Guild, the Board of Home Missions of the Congregational Church, the American Indian Association and the American Indian Council.

100. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).
101. *Id.*

The roster of organizations demonstrates that the groups opposing restrictive covenants had grown to include religious and racial minorities, who were themselves frequently the victims of restrictive covenants, organized labor, liberal public interest groups and the federal government. Some efforts were made to coordinate the briefs because of a concern that the court should not be flooded with too many briefs.[102] It appears, however, that eventually the attorneys handling the covenant cases consented to all requests to file amicus briefs.[103]

Another element of the final preparations involved practice sessions at Howard Law School. Since 1935, before each appearance in the Supreme Court, the NAACP's lawyers presented their arguments at Howard Law School in major practice sessions. These were arduous, all day rehearsals at the law school, in which the lawyers practiced their arguments before a simulated Supreme Court panel which consisted of Howard Law professors. Each professor adopted the persona of a specific Supreme Court Justice, raising questions that might be raised during the actual argument. Law students formed the audience and were encouraged to ask questions as well. Dean Johnson arranged a rehearsal for the *Shelley* argument. It is said that a second year student—to the groans of his peers—asked a long, rambling question but was vindicated when the same point was raised on oral argument, almost verbatim, by Justice Frankfurter.[104]

Another important aspect in the preparation of the restrictive covenant cases was the NAACP's coordination of the publication of additional legal commentary questioning the legality of restrictive covenants, as well as sociological studies demonstrating the negative effect of restrictive covenants. A number of books and articles appeared independently of the NAACP's efforts. Others, however, were the direct result of the

102. During the New York meeting, Governor Hastie warned that too many briefs of uneven quality might not be helpful and he recommended the formation of a committee to coordinate the amici. Minutes, *supra* note 95.

103. Amicus briefs supporting the petitioners were filed by the Civil Liberties Department; Grand Lodge of Elks; I.B.P.O.E.W.; the Protestant Council of New York City; American Federation of Labor; the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; the General Council of Congregational Christian Churches; the National Lawyers Guild; the Congress of Industrial Organizations; the American Veterans Committee; the American Jewish Congress; the American Jewish Committee; the American Indian Citizens League of California, Inc.; the American Civil Liberties Union; the National Bar Association; the American Association for the United Nations; and the American Unitarian Association.

104. G. MCNEILL, *supra* note 22, at 162; personal recollection of Professor Gerald Dunne of conversation with Herman Willer 1960, *see infra* note 147.

New York meeting.[105] Although none of these was cited in the Supreme Court opinion, they were appended as exhibits to briefs that were filed by the parties and the various amici. It is reasonable to conclude that these publications had a substantial influence on the Supreme Court's decision.

XIV. THE COMPOSITION OF THE SUPREME COURT IN 1948

Three of the nine Supreme Court Justices did not participate in the covenant cases decision. Justices Jackson, Reed and Rutledge recused themselves. No official reason was given but it was widely assumed that they lived in homes that were subject to restrictive covenants. To appreciate the Court's decision in the restrictive covenant cases, it may be useful to consider the backgrounds of the six justices who decided the cases.

The Chief Justice, Frederick Vinson, was born into a poor family in

105. H. LONG & C. JOHNSON, PEOPLE VS. PROPERTY, RACE RESTRICTIVE COVENANTS IN HOUSING (1947); Dean, *None Other Than Caucasian*, 86 ARCH. F. 16 (1947); Groner and Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948); Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); Jones, *Legality of Race Housing Restrictive Covenants*, 4 NAT'L. BAR. J. 14 (1946); Miller, *The Power of Restrictive Covenants Directed Against Purchase or Occupancy of Land by Negroes*, 62 AM. CITY 103 (1947); Miller, *Race Restrictions on Ownership or Occupancy of Land*, 7 LAW. GUILD REV. 99 (1947); Miller, *Covenants of Exclusion*, 36 SURV. GRAPHIC 541 (1947); Moore, *Anti-Negro Restrictive Covenants and Judicial Enforcement and Constitutional State Action under the Fourteenth Amendment*, 21 TEMP. L.Q. 139 (1947); Reilly, *Real Property*, 33 GEO. L.J. 356 (1945); Taylor, *The Racial Restrictive Covenants in the Light of the Equal Protection Clause*, 14 BROOKLYN L. REV. 80 (1947); Tefft, *Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants*, 4 NAT'L BAR J. 133 (1946); Vaughn, *Resisting the Enforcement by Courts of Restrictive Covenants Based on Race*, 5 NAT'L. BAR J. 381 (1947); Weaver, *Housing in a Democracy*, 244 ANNALS 95 (1946); Note, *Race Restrictive Covenants: Illegality of Judicial Enforcement*, 33 CORNELL L.Q. 293 (1947); Note, *Racial Restrictive Covenants*, 23 NOTRE DAME LAWYER 256 (1948); Comment, *State Court Enforcement of Restrictions Achieving Racial Segregation*, 9 OHIO ST. L.J. 325 (1948); Note, *Racial Discrimination Through Restrictive Covenants*, 18 ROCKY MTN. L. REV. 148 (1946); Note, *Current Legal Attacks on Racial Restrictive Covenants*, 15 U. CHI. L. REV. 193 (1947); Note, *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy Against Racial Restrictive Covenants*, 13 U. CHI. L. REV. 477 (1946); Note, *Current Legal Attacks on Racial Restrictive Covenants*, 15 U. CHI. L. REV. 193 (1947); Note, 9 U. DET. L. REV. 29 (1947); Note, *Judicial Enforcement of Racial Restrictive Covenants*, 42 U. ILL. L. REV. 812 (1948); Note, *Judicial Enforcement of Restrictive Covenants Against Negroes*, 40 U. ILL. L. REV. 432 (1946); *Recent Cases*, 59 HARV. L. REV. 293 (1945); *Recent Cases, Real Property—Deeds—Restrictive Covenants Against Occupancy by Non Caucasians—Action to Enforce*, 31 MINN. L. REV. 385 (1947); *Recent Cases, Real Property—Restraints on Alienation—Racial Restrictions*, 12 MO. L. REV. 221 (1947); *Recent Cases, Restrictive Covenants Prohibition of, Alienation to or Use and Occupancy by Non-Caucasians*, 17 U. CIN. L. REV. 77 (1948); *Recent Decisions, Real Property Restrictive Covenants—Prohibition Against Use or Occupation by Racial Groups*, 33 VA. L. REV. 658 (1947).

Kentucky in 1890, where his father worked as a county jailer.[106] After completing his legal education at Center College in 1911, he served as city attorney and later as commonwealth attorney.[107] In 1923, Vinson was elected to the U.S. House of Representatives as a Democrat and served until 1938.[108] During this period, he gained a reputation as a staunch supporter of New Deal policies and became good friends with then Senator Harry Truman.[109] As continuing rewards for Vinson's political support, Franklin D. Roosevelt appointed him to the Circuit Court of Appeals for the District of Columbia in 1938, to the Office of Economic Stabilization in 1943, and as Director of War Mobilization and Reconversion in 1945.[110] After acceding to the presidency in 1945, Truman appointed Vinson Secretary of the Treasury, and in 1946, he nominated him to the Supreme Court as its Chief Justice.[111] Vinson believed that the federal government needed broad powers to handle the problems of a complex society, and he was convinced that the Court's function was to protect constitutional principles while still respecting the judgment of citizens and their elected representatives.[112] Although Vinson moved cautiously in cases involving race discrimination, his concern for the equal treatment of all citizens[113] contributed to his participation in the unanimous decision of the Court in the restrictive covenant cases.

Harold Burton was born in 1888 to a religious Unitarian family that lived in a small town outside of Boston, Massachusetts.[114] Following his graduation from Harvard Law School in 1912, he practiced in Cleveland, Ohio, until he entered the Army five years later.[115] In 1929, he was elected to the Ohio House of Representatives, and became mayor of Cleveland in 1931. In 1940, he was elected to the U.S. Senate.[116] Burton developed a close friendship with President Truman during his tenure in

106. *See, e.g.*, 7 R. MAYER, THE SUPREME COURT IN AMERICAN LIFE: THE COURT AND THE AMERICAN CRISES, 1930-1952, at 259 (1987).

107. *Id.*

108. *Id.*

109. *Id.*

110. *See, e.g.*, 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2640 (L. Friedman & F. Israel ed. 1969) [hereinafter JUSTICES].

111. *See, e.g.*, A REFERENCE GUIDE TO THE UNITED STATES SUPREME COURT 345 (S. Elliott ed. 1986) [hereinafter REFERENCE GUIDE].

112. R. MAYER, *supra* note 106, at 260.

113. JUSTICES, *supra* note 110, at 2643.

114. R. MAYER, *supra* note 106, at 256.

115. *Id.* at 256-57.

116. JUSTICES, *supra* note 110, at 2617.

the Senate, resulting in his nomination to the Supreme Court in 1945.[117] Commentators believe that Justice Burton participated in the Court's cautious advance into race relations not out of personal philosophical convictions, but based on his belief in the free flow of commerce.[118] Given the economic, as well as the sociological, impact that racial restrictive covenants had on the housing market, it is not surprising that Burton supported the Court's bar on their enforcement.

Hugo Black, the eighth child of an Alabama farmer, was born in a log cabin in 1886.[119] At seventeen he entered medical school but left to attend law school at the University of Alabama, where he graduated with honors.[120] During his early years, Black's philosophy was shaped to a great extent by his family and rural environment. That his family had once been poor instilled him with a sympathy for the lower classes. In addition, Alabama was the center of the populist movement. Black worked for a while as typesetter for that organization's newsletter.[121] After law school, Black attempted to build his Birmingham law practice by joining such organizations as the Masons, the Knights of Pythias, the Oddfellows, the local baptist church, and, to his later embarrassment, the Ku Klux Klan.[122] He also took a part time job as a police court judge for the city of Birmingham where he gained a reputation for being fair and kind to the poor and black defendants who were brought before his court. In 1914, Black became a county prosecuting attorney and he served in that capacity until 1917, when he joined the Army.[123] Following the war he was elected to the Senate as the poor man's candidate. He served until 1937, when Franklin Roosevelt appointed him to the Supreme Court.[124] Black's opinions reflect a strong commitment to civil liberties, especially free speech and fair criminal procedures. His support for the rights of black Americans, as evidenced during his tenure as police court judge, significantly contributed to his conclusion that the case for equal access to housing was strong.[125]

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117. *Id.* at 2618.

118. R. MAYER, *supra* note 106, at 258.

119. *Id.* at 232.

120. *Id.* at 232-33.

121. JUSTICES, *supra* note 110, at 2323.

122. *See, e.g.*, JUSTICES, *supra* note 110, at 2324; *see also* G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 97-98 (1977) (discussing Black's actions on the police court).

123. REFERENCE GUIDE, *supra* note 111, at 256.

124. JUSTICES, *supra* note 110, at 2329; *see also* G. DUNNE, *supra* note 122, at 256-59 (discussing the conflict between Black and Frankfurter over due process).

125. R. MAYER, *supra* note 106, at 234.

Felix Frankfurter was born in Vienna in 1882 and emigrated to the United States with his parents when he was twelve years old.[126] His education began in Europe and culminated with a law degree from Harvard in 1906. He was appointed to serve as Assistant U.S. Attorney in the Southern District of New York.[127] In 1914, he became a member of the faculty at Harvard Law School.[128] In 1932, he refused an appointment to the Massachusetts Supreme Court, and a year later, he declined President Roosevelt's offer to appoint him Solicitor General. During the 1930s, Frankfurter established a strong friendship with President Roosevelt that eventually led to his 1939 appointment to the Supreme Court.[129] Although Frankfurter was criticized for his increasingly conservative decisions and his dedication to the philosophy of judicial restraint,[130] he joined the Court's stand against the enforcement of racially restrictive covenants.

William Douglas was born in 1898 in Minnesota. His father, a Presbyterian missionary, died when Douglas was six years old, leaving the family so poverty stricken that Douglas had to go to work to help the family survive.[131] After graduation from Whitman College in 1916, he served in the Army and worked as a high school teacher to earn tuition money for law school.[132] In 1922, Douglas hitchhiked across the country, staying in "hobo jungles" along the way, then entered Columbia Law School in the fall of that year.[133] Douglas graduated second in his class and secured a teaching position at Columbia in 1926. In 1929, he joined the faculty at Yale.[134] In 1934, he was appointed to the Securities and Exchange Commission where he became friends with President Roosevelt and established himself as a New Dealer.[135] This led to his nomination to the Supreme Court in 1939.[136] Douglas quickly gained a reputation as the Court's foremost liberal, and his concern for the underprivileged contributed to his support in the *Shelley* decision.

126. JUSTICES, *supra* note 110, at 2402.
127. *Id.*
128. R. MAYER, *supra* note 106, at 239.
129. JUSTICES, *supra* note 110, at 2404-06.
130. *Id.* at 2416-17; *see also* Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357-412 (1949).
131. JUSTICES, *supra* note 110, at 2448.
132. *Id.*
133. R. MAYER, *supra* note 106, at 242.
134. REFERENCE GUIDE, *supra* note 111, at 280.
135. *Id.*
136. *Id.* Douglas replaced Justice Louis Brandeis.

Frank Murphy was born in 1890, to an Irish Catholic family in a small town outside Detroit, Michigan.[137] His father was a lawyer and his family was relatively affluent. This economic security allowed him to study in Europe following his graduation from the University of Michigan Law School.[138] After he returned to America, he was appointed to serve as an Assistant U.S. Attorney in Detroit and was later nominated to the recorder's court.[139] During this period, Murphy developed a reputation for being a champion of the underprivileged.[140] In 1930, he was elected mayor of Detroit. He supported President Roosevelt's election and was rewarded with an appointment as governor general of the Philippines.[141] As governor general, Murphy was an extremely popular humanitarian. He helped the Philippines become the first Asian country to allow women the right to vote.[142] In 1936, he was elected governor of Michigan.[143] After an unsuccessful reelection bid, Murphy accepted an appointment as attorney general of the United States, and in 1940, President Roosevelt appointed him to the Supreme Court.[144] Murphy only reluctantly accepted, due to his desire to serve as Secretary of War.[145] Although he generally agreed with President Roosevelt's policies, Murphy demonstrated his independence when he opposed Roosevelt in the War Crimes Trial and in cases involving wartime control of Hawaii and Truman's handling of a coal strike.[146]

XV. ORAL ARGUMENT IN THE SUPREME COURT

The Supreme Court allotted seven hours for oral argument which took place on January 15 and 16, 1948. The Solicitor General received one hour and three hours were allotted to each side. For the petitioners, George Vaughn and Herman Willer argued the St. Louis case, Charles Houston and Phineas Indritz argued the District of Columbia cases, and Thurgood Marshall and Loren Miller argued the Detroit case. For the respondents, Gerald Seegers appeared in the St. Louis case, and Henry

137. *Id.* at 244.
138. *Id.* at 244-45.
139. JUSTICES, *supra* note 110, at 2496.
140. *Id.*
141. *Id.* at 2497.
142. *Id.*
143. REFERENCE GUIDE, *supra* note 111, at 320.
144. *Id.*
145. JUSTICES, *supra* note 110, at 2500.
146. R. MAYER, *supra* note 106, at 245-46.

Gilligan and James Crooks represented the white property owners from Detroit and Washington,[147] respectively.

The argument was opened by Solicitor General Philip Perlman. Perlman relied on the report of the President's Committee on Civil Rights in his attack against the evils of restrictive covenants. Their enforcement, he told the Court, hampered the federal government's ability to perform its obligations in the areas of public health, housing, home finance, and foreign affairs. Perlman urged the Justices to declare covenants contrary to public policy and unconstitutional. Perlman also claimed that enforcement of restrictive covenants constituted state action.[148]

Argument in the St. Louis case followed. George Vaughn presented the argument. He repeated the state action theory and stressed his claim that the judicial enforcement of the covenants violated the Civil Rights Act of 1866.[149] Vaughn characterized racially restrictive covenants as "the Achilles heel" of American democracy.[150] In what observers remember as the most dramatic point in the seven hours of argument, Vaughn, the son of a slave, stated, in a voice that reverberated through the corridors of the Court, that the "Negro knocks at America's door and cries, 'Let me come in and sit by the fire. I helped build the house.' "[151] Vaughn followed his words about "America's door" by rapping the counsel table. The sound of his knuckles striking wood resonated through the silent courtroom and supplied a climax to his argument that mere words never could.[152]

Gerald Seegers, the attorney for the white homeowners in St. Louis, contended that the Court should disregard the sociological and political claims of his opponents. He acknowledged that the question was important, and that the decision would affect the lives of millions of citizens. Seegers stressed, however, that "this is a lawsuit, this is a court of law

147. Herman Willer was a St. Louis attorney who had been recruited by Vaughn to assist with the Supreme Court case. Phineas Indritz was an assistant solicitor with the Department of Labor who assisted Houston with the District of Columbia cases. Loren Miller of Los Angeles, California, who had handled numerous restrictive covenant cases, including Hansberry v. Lee, was a black attorney and member of the NAACP's legal committee.

148. *Arguments Before the Court: Enforceability of Restrictive Covenants*, 16 U.S.L.W. 3219 (Jan. 20, 1948) [hereinafter *Arguments*].

149. *Id.* at 3219-20.

150. *Id.* at 3220.

151. *Id.*

152. Personal recollection of Professor Dunne of conversation with Herman Willer (1960). Herman Willer followed Vaughn with a summation of the primary legal arguments.

and the problems before the Court are legal ones."[153] He went on to argue that the problems of race discrimination "cannot be solved by judicial decrees and the current housing problem is no justification for a judicial amendment of the Constitution."[154]

The Michigan case was argued by Loren Miller and Thurgood Marshall. They argued that the State of Michigan denied the black petitioners their constitutional right to occupy residential property and that the court's order was state action contrary to the fourteenth amendment.[155] Thurgood Marshall referred to the sociological data contained in the briefs and urged the Court to weigh the effects of racial segregation on housing problems, crime, and disease. At that point, Justice Frankfurter asked: "What's the relevance of all this material? If you are right about the legal proposition, the sociological material merely shows how it works. If you're wrong, this material doesn't do you any good."[156] Marshall agreed that it was not necessary to rely upon it, but that it had legal significance and was essential in the District of Columbia cases where the state action theory was not applicable. There, he continued, the question of public policy was basic and the social and economic data should be an ingredient in any decision relating to the wisdom of enforcing restrictive covenants.[157] Justice Frankfurter agreed that the sociological material might be of some legal significance, especially in the the District of Columbia cases.[158]

Charles Houston followed with the District of Columbia cases. His argument focused on the record in those cases and pointed out that there had been no racial conflict in the neighborhoods involved. Houston also discussed the sociological material,[159] and he referred to Hodge's remark that she would rather live next door to a white criminal than a distinguished black person.[160]

Henry Gilligan and James Crooks, the attorneys for the white homeowners, responded. Gilligan stressed that the established policy of the courts of the District supported racially restrictive covenants. He reminded the Court that it had recently denied certiorari in similar restric-

153. *Arguments, supra* note 148 at 3220.
154. *Id.* at 3220-21.
155. *Id.* at 3221.
156. *Id.* at 3222.
157. *Id.*
158. *Id.*
159. *Id.* at 3223.
160. *Id.* Phineas Indritz also appeared for the District of Columbia petitioners.

tive covenant cases. This, he contended, had established "the right of citizens to live in homes in a neighborhood of their own selection unhampered by the dealings of greedy real estate speculators posing as friends of the Negroes."[161] After Crooks and Gilligan concluded, Charles Houston appeared briefly in rebuttal to emphasize that "racism in the United States must stop."[162] He discussed the housing problems of veterans and Japanese Americans to illustrate how the housing problem had become the focal point of a struggle between powerful economic groups and minorities. He asked the Supreme Court to rule that judicial enforcement of racially restrictive covenants was invalid and concluded with the argument that "the courts, by making racial unity impossible, are endangering national security."[163]

XVI. THE SUPREME COURT'S DECISION

A. The St. Louis and Detroit Cases

In May, 1948, the Supreme Court issued its decision in *Shelley* and *McGhee*.[164] Chief Justice Vinson delivered the Court's opinion. After a recitation of the underlying facts, the Court began its legal analysis with a statement that emphasized that it was considering, for the first time, the question of whether the fourteenth amendment prohibits judicial enforcement of restrictive covenants based on race or color.[165] The Court distinquished *Corrigan* on the grounds that it did not involve the fourteenth amendment and did not address the validity of judicial enforcement of covenants. According to the Court, the only constitutional issue addressed in *Corrigan* was the validity of covenant agreements as such.[166] The Court distinguished *Hansberry*, with an explanation that, in that case, the Court held only that petitioners had been denied due process when they were estopped from challenging the validity of a covenant agreement by a judgment entered in a prior suit to which petitioners had not been joined as parties.

After noting that, since the *Civil Rights Cases* of 1883,[167] the Court had consistently held that the fourteenth amendment "erects no shield

161. *Id.*
162. *Id.*
163. *Id.*
164. Shelley v. Kraemer, 334 U.S. 1 (1948).
165. *Id.* at 8.
166. *Id.* at 8-9.
167. 109 U.S. 3 (1883).

against private conduct however discriminatory or wrongful,"[168] the Court directed its discussion to a consideration of the types of state action involved in *Buchanan* and other decisions involving direct action by legislatures. In those cases, the Court said, state action was clearly involved because the challenged actions involved statutes or ordinances that were enacted by legislative bodies. *Shelley*, in contrast, involved "patterns of discrimination, and the areas in which the restrictions are to operate are determined . . . among private individuals."[169]

Because the state's involvement in this case was limited to the enforcement of private agreements, the critical question involved a determination of whether judicial enforcement of the restrictive covenants was "state action" for purposes of the fourteenth amendment. The Court answered that question in the affirmative: "That the action of state courts in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment is a proposition which has long been established by the decisions of this court."[170]

After citing a number of cases in which the actions of state courts were held unconstitutional under the fourteenth amendment, the Court reasoned that the fourteenth amendment was not restricted to situations in which the judicial proceedings were themselves found to be procedurally unfair. Relying on the holding in *American Federation of Labor v. Swing*,[171] the Court stated that judicial enforcement of a common-law right may violate the fourteenth amendment even where the judicial proceedings were themselves in complete accord with the most rigorous standards of procedural due process. As a result, the Court concluded that the "state action" contemplated by the fourteenth amendment "includes actions of state courts and state judicial officials."[172]

Proceeding from that conclusion, the Court reasoned further that there had "been state action in these cases in the full and complete sense of the phrase."[173] Supporting this determination, the Court observed that, without the intervention of the state courts, the black families involved in *Shelley* and *McGhee* would have been free to occupy the properties in question without interruption. The Court believed that it

168. 334 U.S. at 13.
169. *Id.*
170. *Id.*
171. 312 U.S. 321 (1941).
172. 334 U.S. at 18.
173. *Id.* at 19.

did not matter that the state's involvement arose from a private agreement because "the Fourteenth Amendment refers to exertions of state power in all forms."[174]

The Court then turned to the contentions of the respondents that there was no denial of equal protection because black families were free to execute covenants prohibiting the sales of properties to whites, and they were equally free to secure judicial enforcement of such covenants. The Court exposed the disingenuous nature of this argument by observing that there had never been a reported instance in which a black family had attempted to exclude a white family from a black neighborhood. On a more substantive note, the Court stated that, "[e]qual protection of the law is not achieved through indiscriminate imposition of inequalities."[175] For these reasons, the Court concluded that "in granting judicial enforcement of the restrictive agreements in these cases, the states have denied petitioners equal protection of the laws."[176]

B. The District of Columbia Cases

The decision in the consolidated companion cases to *Shelley* and *McGhee*, *Hurd v. Hodge* and *Urciolo v. Hodge*,[177] was also issued on May 3, 1948. Because the *Hodge* cases involved properties located in the District of Columbia, the arguments relied primarily on the fifth amendment, which applies to actions taken by the federal government, instead of the fourteenth amendment.

To everyone's surprise, the Court "found it unnecessary to resolve the constitutional issue which the petitioners advance; for we have found judicial enforcement of restrictive covenants by the courts of the District of Columbia improper for other reasons."[178] The other reason was a provision of a District of Columbia statute which was enacted at the same time and was virtually identical to the Civil Rights Act of 1866. The statute, Section 1978 of the Revised Statutes, required that "citizens of the United States shall have the same rights as enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real property."[179]

The Court determined in *Hodge* that the black purchasers, because of

174. *Id.* at 20.
175. *Id.* at 23.
176. *Id.*
177. 334 U.S. 24 (1948).
178. *Id.* at 30.
179. *Id.* at 30-31.

their race, had been subjected to court orders which divested them of their titles to the properties in question. As a result, the federal courts of the District of Columbia had denied the petitioners in the *Hodge* cases their statutory rights because they had not accorded them the same rights as white citizens to "purchase, hold and convey real property."[180] The Court also held that, even if there had been no statute, judicial enforcement of the restrictive covenants "is judicial action contrary to the public policy of United States." For these reasons, the Court held that racial covenants were not enforceable in the District of Columbia.[181]

XVII. CONCLUSION

The real issue in the *Shelley* cases was stated in the brief for the petitioners. They argued that the litigation was "not a matter of enforcing an isolated private agreement. It is a test as to whether we have a united nation or a country divided into areas and ghettoes solely along racial and religious lines."[182] To some degree, therefore, the Supreme Court's decision in the restrictive covenant cases was inevitable. The redistribution of the black population from rural to urban areas, and the availability of jobs in a growing industrial economy, assured that the rapid growth of black populations in cities could not be contained physically within the tiny districts to which they were confined by the covenants.

The economics of real estate transactions played a role as well. The law of supply and demand was in operation to the extent that white homeowners found, in many cases, that they could sell their homes to a black family for a higher price than they would have received if they sold to a white family. The real estate brokers earned their usual fees and commissions, and as witnessed in the St. Louis transaction, tremendous profits could be made through "straw" transactions.

The most significant influence may have been the change in the intellectual community's perceptions of black citizens. By the 1940s, studies had proven beyond doubt that the notion of inherent inferiority was scientifically baseless. Sociological studies demonstrated the same thesis but showed further the negative impact of segregation on black and white Americans. During the 1920s, when *Buchanan* was decided, this was not

180. *Id.* at 34.

181. In a one-page concurring opinion, Justice Frankfurter added that general equitable principles of good conscience provided "a sufficient and conclusive ground for reaching the Court's result." *Id.* at 36.

182. Brief for Petitioner McGhee at 90, Shelley v. Kraemer, 334 U.S. 1 (1948).

the case. Although there is no textual support for this conclusion in the Court's opinion, it seems likely that these external influences had a significant impact on the Supreme Court's decision. The trials of the four cases, the decisions issued by the appellate courts, and the evolution of the covenant cases as a whole suggest strongly that there was much more to *Shelley* than the Supreme Court's opinion indicates.

From a historical perspective, the restrictive covenant cases are significant because they set the stage for the Supreme Court's 1954 decision in *Brown v. Board of Education*.[183] The Court's opinion in the *Shelley* cases does not mention any of the extensive sociological and scientific studies that were appended to the briefs but the most compelling arguments were based on those materials. As the reviews of the school desegregation cases have shown, similar sociological and scientific data were the key ingredients in the Supreme Court's decision to reverse the *Plessey*[184] decision. Hence, the 1954 decision in *Brown* is in this regard directly attributable to the NAACP's success in the *Shelley* cases.

The restrictive covenant cases stand as a monument to the NAACP's organizational skills and the courage and persistence of that group's lawyers. Beginning with the successful challenge to legislated segregation in *Buchanan*, continuing through the 1926 loss to private discrimination in *Corrigan* and throughout the twenty-two years of litigation that followed, the NAACP's fight against discrimination in housing did not abate until it prevailed in the Supreme Court. It is said that the Harlem renaissance of the 1920s was the outstanding period for black writers and artists. There was undoubtedly a renaissance at Howard Law School for black lawyers in the 1940s.

183. Brown v. Board of Educ., 347 U.S. 483 (1954) (reversing the 'seperate but equal' doctrine of Plessey v. Ferguson, 163 U.S. 537 (1896)).

184. Plessey v. Ferguson, 163 U.S. 537 (1896) (establishing separate but equal doctrine).