

REMEMBERING *SHELLEY v. KRAEMER*: OF PUBLIC AND PRIVATE WORLDS*

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As far as I know, no one has made a serious effort to measure the influence exerted by “great cases” on the way lawyers and judges perceive the law and the society of which it is part. Certainly, great cases constitute prominent features in the intellectual landscapes of most legally trained persons. Such cases supply symbols and guideposts, and may sometimes act as limitations on thought. Their influence is not purely intellectual, however; they provide drama and emotional coloration as well.

Any effort to define the impact of great cases on thought and feeling is complicated by the fact that cases earn the appellation “great” for many and varied reasons.¹ A case may be great because it announces legal propositions containing the seeds of growth, holdings that are the genesis of important developments in private or public law. In this connection one may think of *Powell v. Alabama*.² Decided in 1932, *Powell* justly may be seen as the source of an important body of new legal doctrine—the constitutional law of criminal procedure as practiced by state systems of justice.³ Yet a case may be great, not because it provides the basis for significant doctrinal developments, but rather, as in *Dred Scott*,⁴ because it displays the existence of irrepressible conflicts of moral principle and

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1. These matters were briefly adverted to many years ago in Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191 (1958).

2. 287 U.S. 45 (1932) (failure to appoint counsel to defendant accused of felony is a denial of due process).

3. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 522-42; Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 217-19 (1959).

4. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856). Whether the abortion case, *Roe v. Wade*, 410 U.S. 113 (1973), will be so remembered remains to be seen.

social interest, differences incapable of being repaired or resolved by litigation.

Some cases are great because of the sheer drama involved in witnessing the state's effort to pull a prominent public figure from his pedestal and subject him to the rigors of penal sanctions. One thinks of the prosecution of Oscar Wilde in England⁵ and perhaps that of Aaron Burr in this country.⁶ More perversely, we may include within our classification cases that rivet attention simply because of the heinous nature of the acts with which defendants are charged—prosecutions like those of Lizzie Borden in Massachusetts⁷ or Henri Landru in France.⁸

Great constitutional cases have their own special attributes. Typically, they touch upon a broad range of interests and issues. The interests often take on a different significance with the passage of time, and therefore the "meaning" of great cases cannot be defined once and for all. In this respect, the search for meaning in great constitutional cases resembles the similar search in great works of art. Perceptions and understandings change over time, and the significance of *Shelley v. Kraemer* today may not be what it was for the participants in the litigation forty years ago.

In my judgment, *Shelley v. Kraemer*⁹ and its companion cases¹⁰ are entitled to be included in the category of great cases. The calling of this conference forty years after the 1948 decisions provides substantial corroboration for this conclusion. Yet the judgment is subject to qualifications, and some persons may reject it outright.

Perhaps the most persuasive claim for the designation rests with the immediate social impact of the decision. The holding effectively eliminated enforcement of racially restrictive covenants from the arsenal of devices employed by those committed to the achievement of racial segregation in urban residential housing. The cancerous growth of the covenant system had advanced far by 1948. Even more significant is that, but for *Shelley v. Kraemer*, the ghettoizing of American cities would soon have gone much further, and the racial covenant system would have become a leading feature, not only of northern cities, but of the burgeoning

5. R. ELLMAN, *OSCAR WILDE* (1988).

6. *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

7. F. SPIERING, *LIZZIE* (1984).

8. Allen, *Henri Landru*, 13 *ENCY. BRIT.* 661 (1971).

9. 334 U.S. 1 (1948).

10. *McGhee v. Sipes*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948).

urban areas of the South as well.¹¹

But *Shelley* may be remembered for other reasons. One of the most useful published studies of the case to date focuses, not on the social impact of its holding, but rather on the influence of private groups associated with the litigation in achieving significant constitutional change.¹² The important role of such groups as the NAACP in collecting social data, initiating litigation, and piloting the cases through the obstacles surrounding Supreme Court review may have special significance for us today as we observe the phenomena of group activity in an election year.

Yet for all the interest in and significance of the *Shelley* litigation, it is only realistic to say that a cloud of skepticism, and even of hostility, hangs over Chief Justice Vinson's 1948 opinion. The skepticism reflects no sympathy for the racial covenant system, but rather is directed to the viability of the opinion as a constitutional precedent. An interesting change has occurred in the attitude in law review literature toward the constitutional theory employed by the Chief Justice in the *Shelley* case. The theory that equitable enforcement of private restrictive agreements violates fourteenth amendment rights of the excluded persons was not an innovation of the Court. It had been widely expounded in the law reviews—most notably in the well known article of Professor D.O. McGovney¹³—in legal briefs,¹⁴ and in dissenting opinions in lower courts.¹⁵ With a single exception, the law review exegesis favored the

11. "If this trend continues unchecked, almost all new residential sections of our cities will be barred, within ten or twenty years, and to an increasing degree by other groups." Brief for the United States as Amicus Curiae at 38-39, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (No. 72) [hereinafter Brief for the United States].

12. C. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE N.A.A.C.P., AND THE RESTRICTIVE COVENANT CASES (1973). See also Vose, *N.A.A.C.P. Strategy in the Covenant Cases*, 6 W. RES. L. REV. 101 (1955). Modern research is adding further insights into the role of the NAACP in the covenant cases. See Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U.L.Q. 737 (1989).

13. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Covenants or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5 (1945). See also, e.g., Groner and Helfeld, *Race Discrimination in Housing*, 57 YALE L.J. 426 (1948); Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 U. CHI. L. REV. 198 (1945).

14. See, e.g., Brief for the United States, *supra*, note 11, at 48; Consolidated Brief for the Petitioners at 10, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290 and 291) [hereinafter Petitioners' Consolidated Brief].

15. *Hurd v. Hodge*, 162 F. 2d 233, 237-40 (D.C. Cir. 1947) (Edgerton, J., dissenting). Cf. *Corrigan v. Buckley*, 271 U.S. 323 (1926), which raised the question of judicial enforcement as a violation of constitutional right. The Supreme Court concluded that the issue was not properly before it, but also indicated doubt about the validity of the argument.

theory and urged its acceptance by the courts.¹⁶

Soon after the Supreme Court's opinion, however, legal scholars began to express doubts.¹⁷ The literature raised questions as to whether the *Shelley* opinion stated an intelligible principle useful for future constitutional development. Certainly the courts have been wary of the *Shelley* precedent; the case has overtly influenced subsequent constitutional adjudication much less strongly than was widely anticipated at the time of its decision.¹⁸ A distinguished teacher of constitutional law recently told me that he no longer assigns *Shelley* for classroom discussion. Apparently, for many competent observers, *Shelley v. Kraemer* is a classic instance of great cases making bad law.

In the remarks that follow, I shall try to accomplish two tasks. First, to the extent possible, I should like to place *Shelley* in its historical context and, in some measure, present the case as it was seen by those who witnessed or participated in the decision. Second, I shall attempt to throw some light on why the theoretical issues called forth by these cases are difficult. In short, my purposes consist of providing a prologue for the conference; and I, like you, look forward to the more meticulous discussions to follow.

II.

The passage of forty years in a dynamic society leaves few institutions and attitudes untouched. But the years 1948 to 1988 are particularly momentous, for they constitute a watershed in the law of race relations in the United States. *Shelley v. Kraemer* and its companion cases were litigated in the years immediately following the Second World War, a war

16. The exception is a thoughtful student piece. See Note, *State Court Enforcement of Race Restrictive Covenants as State Action within Scope of Fourteenth Amendment*, 45 MICH. L. REV. 733 (1947).

17. See, e.g., Haber, *Notes on the Limits of Shelley v. Kraemer*, 18 RUTGERS L. REV. 811 (1964); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 474 (1962); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Cf. Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949); Scanlon, *Racial Restrictions in Real Estate—Property Values Versus Human Values*, 24 NOTRE DAME LAW. 157 (1949).

18. Selected U.S. Supreme Court cases influenced by the *Shelley* holding are: *Moose Lodge v. Iris*, 407 U.S. 163 (1972); *Evans v. Abney*, 396 U.S. 435 (1970); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Bell v. Maryland*, 378 U.S. 226 (1964); *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Black v. Cutter Laboratories*, 351 U.S. 292 (1956); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Barrows v. Jackson*, 346 U.S. 249 (1953).

fought by the United States with military forces largely segregated on racial grounds.¹⁹ The public policy of many American states was frankly segregationist, and in many northern states, where racial equality was ostensibly recognized by law, civil rights legislation enacted in the years following the Civil War was largely ignored and unenforced. The Illinois legislature defeated a proposal to invalidate racially restrictive covenants only a few months before the Supreme Court spoke the *Shelley* case.²⁰

Prior to *Shelley*, the structure of racial discrimination by law at state and local levels received little interference from the Supreme Court of the United States. The fourteenth amendment, adopted in 1868, and intended by its framers as a bastion for the protection of minority rights, failed largely of its purpose well into the twentieth century. To be sure, the Court in 1917 outlawed racial zoning by state law.²¹ It also struck down the purposeful exclusion of black persons from state jury service. However, the unrealistic evidentiary standards subsequently imposed by the Court on those attempting to prove purposeful exclusion by state authority largely negated this result.²² A study published in 1912 announced the failure of the fourteenth amendment as a protector of civil rights and characterized it instead as a source of privilege for private economic interests and corporate enterprise.²³

Although it is familiar history, one may still feel shock when faced with the formidable tolerance displayed by the Supreme Court toward state legislative efforts to construct systems of racial segregation in the years following ratification of the fourteenth amendment. Statutes barring interracial marriage abounded in the South, and were not invalidated until nearly twenty years after the *Shelley* decision.²⁴ Racial

19. By World War II the military had developed a racial stereotype of the Negro soldier—a military version of white supremacy—that exerted a strong influence on the use of black manpower. Military planners constantly stated that their racial policies were based upon the requirements of efficiency and that they were not concerned with social problems or social theories. The opposite was in fact the truth. Negro soldiers were restricted to certain kinds of military duty because of a widespread belief in their inherent racial inferiority.

R. DALFUME, *DESEGREGATION OF THE U.S. ARMED FORCES* 3 (1969).

20. Kahen, *supra* note 13, at 210, n.50.

21. *Buchanan v. Warley*, 245 U.S. 60 (1917) (city ordinance forbidding blacks from living on predominantly white blocks unconstitutional). *See also* *City of Richmond v. Deans*, 281 U.S. 704 (1930); *Harmon v. Tyler*, 273 U.S. 668 (1927).

22. *See* *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879). *But see* *Norris v. Alabama*, 294 U.S. 587 (1935); *Thomas v. Texas*, 212 U.S. 278 (1909).

23. C. COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* (1912).

24. *See* *Pace v. Alabama*, 106 U.S. 583 (1883). The antimiscegenation laws were finally invali-

separation in public transportation and, some thought, public education,²⁵ was sanctioned by *Plessy v. Ferguson*'s doctrine of "separate but equal."²⁶ Although Jim Crow was under attack in 1948, it was alive and apparently well in large areas of the United States. It is said that Thurgood Marshall, while special counsel for the NAACP, urged his colleagues not to place great reliance on appeals to public policy when attacking racially restrictive covenants in court. The reason was simple and persuasive: eighty percent of the black population of the country then lived in jurisdictions in which state public policy expressly embraced the goal of racial segregation.²⁷ *Shelley* was litigated before the civil rights movement entered the phase of public protest. The road that was to lead to *Brown v. Board of Education*²⁸ seemed rocky and uncertain and the civil rights legislation of the 1960s was more than a decade away.

It helps to note these realities when considering the *Shelley v. Kraemer* decision. One is tempted, in looking back over the last forty years, to believe that the destruction of legal supports sustaining racial segregation in the United States was inevitable and foreordained. Not only does this easy assumption distort the atmosphere experienced by those participating in the cases, but it also overlooks the crucial importance of *Shelley* in bolstering morale and providing impetus for the civil rights struggles in the following decades.

Despite sobering social and legal realities, however, 1948 was a time of hope and optimism. For many persons, American involvement in World War II constituted a crusade to defend the human rights placed in jeopardy by the Nazi regime. For many who had undergone the wartime experience, a commitment to advance human rights abroad implied a similar purpose at home. The disposition of the new Court that had emerged since 1937, while not fully tested on racial issues, appeared sympathetic to that objective. Already, the succession of cases that was ultimately to lead to *Brown v. Board of Education* was passing through the

dated in *Loving v. Virginia*, 388 U.S. 1 (1967). The Court had failed earlier to take similar action in the much criticized case of *Naim v. Naim*, 350 U.S. 985 (1956).

25. But note the statement in the Brief for the United States, *supra* note 11, at 59 n.31: "It may be observed, however, that this Court has never had the occasion to rule directly on the question whether compulsory segregation in education, even where substantially equal facilities are afforded, is a denial of rights under the Fourteenth Amendment."

26. 163 U.S. 537 (1896).

27. *Vose*, *supra* note 12, at 111.

28. 347 U.S. 483 (1954).

Court.²⁹ For some, the Court's new willingness to test the fairness and decency of state criminal procedures against the mandates of the fourteenth amendment was a favorable augury. The rationale of those holdings rarely referred overtly to racial discrimination, but the Court's awareness of racial abuse could be detected just below the surface of the decisions. The smoldering language of Chief Justice Hughes, speaking for the Court in *Brown v. Mississippi*, forcefully demonstrates this perception.³⁰

There were other grounds for optimism. One was the emergence of private groups, especially the NAACP, which after often disheartening experiences, had acquired impressive skills in conducting civil rights litigation. The experience, intelligence and persistence of the NAACP contributed impressively to the morale of those attacking the covenant system and to the ultimate outcomes of the cases.³¹

Finally, the position of the federal government toward the covenant litigation deserves attention. President Harry Truman played a critical role in the history of the American civil rights movement, a fact that may have perhaps faded from many memories. It was the Truman administration that made important moves to desegregate the military forces.³² The President himself called for new and affirmative attitudes toward problems of racial discrimination—attitudes that bore fruit in later civil rights legislation.³³ In December, 1946, he appointed the President's Committee on Civil Rights, which produced the widely read pamphlet entitled *To Secure These Rights*, a document of continuing contemporary significance.³⁴ The Truman Justice Department filed an impressive ami-

29. Thus, just a week before the argument in the restrictive covenant cases, the Court heard argument in *Sipuel v. Regents of the University of Oklahoma*, 332 U.S. 631 (1948), a case involving the right of a black applicant to be admitted to a state law school. *See also* *Fisher v. Hurst*, 333 U.S. 147 (1948).

30. 297 U.S. 278 (1936).

31. *See supra* note 12.

32. Exec. Order No. 9981, 3 C.F.R. 722 (1943-1948) (President Harry S. Truman, July 26, 1948) (establishing the President's Committee on Equal Treatment and Opportunity in the Armed Services). *See also* R. DALFUME, *supra* note 19, at 4: "[I]t was one of the first federal actions against segregation, coming six years before the 1954 school desegregation decision. The example of accomplishing integration by executive authority also provided a precedent for the Eisenhower, Kennedy, and Johnson administrations."

33. President Truman, speaking at the 38th Annual Conference of the NAACP on June 29, 1947, said: "The extension of civil rights today means not protection of the people *against* the Government, but protection of the people *by* the Government." Vose, *supra* note 12, at 171. *See also* J. DANIELS, *THE MAN OF INDEPENDENCE* 336-46 (1950).

34. The President's Committee was established by presidential executive order on December 5,

cus brief in *Shelley*, and the Solicitor General appeared in the oral argument of the cases in support of petitioners' position. It is pleasant to recall that there once were Justice Departments of this sort.

As in most great contests of principle, those attacking the racial covenant system in the 1940s acted in an atmosphere comprised of doubts and hopes. The legal and social obstacles to success appeared formidable, but deeply held convictions sustained courage and motivated effort.

III.

Restrictive covenants are created by agreements among owners of real estate to limit the uses made of the designated properties.³⁵ For the agreements to be effective over the long term, successors in title to the properties, like the original signatories, must be bound by the terms of the covenant. Such equitable restrictions are familiar tools for real estate development in this country, and may affect, for example, the kinds of structures or the sizes of the lots permitted in the restricted area. Use of the equitable restriction as a device to control the racial or religious attributes of those who own or occupy real estate dates back to the last century.³⁶ The racial covenant, however, became widespread only after the Supreme Court of the United States, in *Buchanan v. Warley*,³⁷ outlawed racial zoning by municipal ordinance. In every realistic sense, the racial covenants represented conscious efforts to achieve the objectives of racial or religious zoning in urban housing while, at the same time, evading the literal limits of *Buchanan*.

From the vantage point of the 1980s, the success of the racial covenant system in state and lower federal courts is nothing short of astonishing. As the opinion of Chief Justice Vinson for the Court in *Shelley* rightly stated, the racial covenant did not restrict the *use* to which the affected property was to be put—that use, after all, was residential occupancy. What was restricted were the classes of people permitted to use the property.³⁸ In other words, use was not restricted, but rather *who* was to use.

1945. Exec. Order No. 9808, 3 C.F.R. 590 (1943-1948). The pamphlet was widely cited at the time and frequent references to it are made in petitioners' briefs in the restrictive covenant cases.

35. A brief summary of the principal elements of equitable-servitude doctrine may be found in French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1276, 1281 (1982).

36. See, e.g., *Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D. Cal. 1892).

37. 245 U.S. 60 (1917). See *supra* note 21.

38. [T]hese covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions

But with disheartening unanimity, the courts enforced and maintained the covenant system.

The personal and social consequences of the racial covenant system and its potential for greatly enlarged future harm were well understood in 1948. Even before 1930, groups like the NAACP had identified the racial covenant as a significant peril.³⁹ Perhaps more surprising, a commission appointed by President Herbert Hoover warned in 1932 of the social pathologies created by racial discrimination in residential housing.⁴⁰ It was not, and never has been, the position of foes of the covenant system that the restrictive agreements were the sole cause either of the urban ghetto or of the human and social costs resulting from the conditions of life prevailing there.⁴¹ Nor, I believe, would those who combated the covenant system in 1948 have been particularly surprised to learn that forty years later newspaper headlines would still be announcing abrasive controversies involving race and housing. The opponents of racial covenants, however, recognized restrictive agreements not only as instruments of egregious discrimination, but also as potent devices for enforcement and enlargement of racial segregation in the United States. A statement published in 1947 that racially restrictive covenants were "the principal instrument of residential segregation in the North"⁴² seems hardly overdrawn.

World War II elevated the problem of low cost housing to one of national concern, and focused attention on the distortion of the real estate market caused by the covenant system. The migration of thousands of black workers, attracted to northern cities by war industries, enlarged initial deficits of low priced dwellings in those cities into critical shortages that persisted in the years following the war. Black migrants were confined to the restricted black areas in their search for housing. Those financially able to purchase decent accommodations in other parts of the city were nevertheless required to remain in the ghetto and com-

of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes.

Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

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

40. Brief for the United States, *supra* note 11, at 29.

41. "The unfortunate truth is that Negro ghettos will not disappear overnight if judicial enforcement of restrictive covenants is denied." Petitioners' Consolidated Brief, *supra* note 14, at 97-98.

42. Weaver, *Community Action Against Segregation*, 13 SOC. ACTION 18 (Jan. 15, 1947), *quoted in* Petitioners' Consolidated Brief, *supra* note 14, at 49.

pete with the less affluent for available dwellings. This produced, among other problems, overcrowding and soaring rentals. In Baltimore, twenty percent of the city's population was herded into two percent of the homes.⁴³ 90,000 persons per square mile were living in Chicago's black belt as compared to 20,000 in the adjacent white apartment areas.⁴⁴ In New York's notorious "lung block," population density was of a rate sufficient to accommodate the existing population of the United States on one-half of New York City's land area.⁴⁵ Overcrowding brought with it the accompanying pathologies of disease, mental illness, crime, inadequate city services, frustration and despair. The iron law of supply and demand operated to inflate the costs of ghetto accommodations. One contemporary study asserted: "Negro residents of the Chicago 'Black Belt' pay as much per cubic foot per room as that paid by wealthy residents for equivalent space on the Lakeside Drive."⁴⁶ The vices of the covenant system, however, were as much moral as social and economic. Discrimination created and perpetuated by racially restrictive covenants is peculiarly irresponsible. However persuasive the critique of the "separate but equal" doctrine, however clear that separate is rarely equal, the doctrine at least recognizes, in the public sphere, a constitutional governmental obligation to serve the needs of the minority groups. In contrast, American courts, treating the covenant system as wholly private in its origins and operation, freed all groups, public and private, that nurtured the system, from any responsibility for the harm done to the excluded classes and to broader social interests.⁴⁷ Indeed, it must be assumed that many persons in the groups promoting the covenant system were the most adamantly opposed to governmental programs, like public housing, designed to alleviate the havoc created by the restrictive agreements.⁴⁸

Whether, therefore, the racial covenant system under attack in the

43. Groner and Helfeld, *supra* note 13, at 428.

44. 1 S. DRAKE & H. CAYTON, *BLACK METROPOLIS* 204 (1962).

45. Brief for the United States, *supra* note 11, at 13.

46. Cayton, *Negro Housing in Action*, SOC. ACTION 18 (Apr. 5, 1940), *quoted in* Groner and Helfeld, *supra* note 13, at 432 n.27.

47. It must be stressed that if white people insist on segregation—and if society is assumed not to tolerate costly sub-standard housing for Negroes—the logical conclusion is that, in a planned and orderly way, either areas of old housing now inhabited by whites or vacant land must be made available for Negroes.

G. MYRDAL, *AN AMERICAN DILEMMA* 627 (1962) (emphasis in original).

48. A recital of the difficulties created by the racial covenants in the administration of the federal public housing programs is included in Brief for the United States, *supra* note 11, at 5-10. See also Groner and Helfeld, *supra* note 13, at 436.

Shelley litigation is viewed from the social, economic, or moral perspective, great issues were raised and great interests were at stake. How the Supreme Court would resolve the issues was properly seen as of high national importance.

IV.

In the following remarks, I shall present some personal recollections of the covenant cases in the Supreme Court of the United States. My vantage point was that of a law clerk for Chief Justice Vinson, who wrote the Court's opinions in *Shelley v. Kraemer* and *Hurd v. Hodge*. I would be wrong to dignify what follows with the label "history." The remarks are chiefly the product of memory, and may well contain distortions characteristic of such accounts. My only warranty is that what I shall say represents my best recollection.

Chief Justice Vinson voted to grant certiorari in all the covenant cases, believing that the results below should probably be reversed. Despite the action, I was concerned about the strength of his resolve. Law clerks, of course, often are convinced that their wisdom is superior to that of the judges who employ them; most, including me, did not scruple about making his views known to the judge while a case was under consideration. Some observers of the Court have viewed the law clerk's role with alarm. My observation is that a judge has little difficulty in resisting the urgings of her clerks when it suits her purposes to do so. Certainly, this was true of Chief Justice Vinson.

The character and attributes of the Chief Justice form an important part of the *Shelley* story.⁴⁹ He was a man of high native intelligence. He had been in public life nearly all of his mature years, a career that included truly distinguished service as a Congressman, a period as a wartime administrator in the executive branch, membership in the Truman cabinet, and a five-year term as member of the District of Columbia Court of Appeals. His thought processes relied less on reading and private meditation than on oral exchange. He possessed a remarkable talent for absorbing complex ideas by ear, an attribute no doubt sharpened by his years in Congress. My unease about the solidity of the Vinson vote was based on the realization that he had not yet gone through his characteristic process of spoken exchange, so important to his decisionmaking.

49. Allen, *Chief Justice Vinson and the Theory of Constitutional Government: A Tentative Appraisal*, 49 Nw. U. L. REV. 3 (1954).

The Chief's tentative position appeared to rest mainly on his scanning of the impressive dissenting opinion in *Hurd v. Hodge* written by Judge Henry W. Edgerton,⁵⁰ a man whom Vinson had known as a colleague on the court of appeals and greatly admired.

Feeling uneasy about the Chief's commitment to reverse the lower court judgments in the covenant cases, I, in my youthful arrogance, felt called upon to do what I could to "nail down" the Vinson vote for reversal. Accordingly, during the hot summer of 1947, and to the considerable neglect of my newly acquired bride, I devoted long hours to the preparation of a memorandum addressed to the Chief Justice in which I attempted to canvass the principal issues posed by the cases and to articulate persuasively the arguments favoring the constitutional invalidity of the covenant system. By summer's end the memo had grown impressively in size, along with my pride of authorship. My vanity set the stage for one of the most deflating experiences of my professional life. When the Chief returned to Washington in September, I delivered the memo to him with considerable aplomb. A day or two later I was summoned to his chambers. As soon as I entered the room, I detected signs of disturbance on the Chief's expressive face. "You know," he said, "when I left here in June I thought I was going to vote to reverse in the covenant cases. After reading your memo, I'm not so sure."

The oral arguments in the cases held on January 15 and 16, 1948, may have strengthened the Chief's resolve to reverse the lower court decisions. Viewed simply as a forensic performance, the advantage was all on the petitioners' side. The lawyers defending enforcement of the covenants were, in many instances, engaged in real estate practice in the cities from which the cases arose, practices that likely included few appearances in appellate forums. Petitioners, on the other hand, were represented by some of the country's most distinguished and tested veterans of civil rights litigation. Thurgood Marshall, a familiar figure at the Court's lectern, delivered a typically elegant and articulate argument. Marshall's co-counsel, Loren Miller, employed a style that verged on the pedagogic, but which was nevertheless lucid and persuasive. The presentation that I remember most vividly, however, was that of Charles H. Houston. Mr. Houston was nearing the end of a distinguished career that included service as full-time counsel for the NAACP and dean of the Howard Uni-

50. 162 F.2d 233, 235-46 (D.C. Cir. 1947).

versity Law School.⁵¹ In his argument he succeeded impressively in combining intellectual strength with moral force, and in communicating a sense of personal integrity.

Some four months after the arguments, opinions in the restrictive covenant cases were handed down. I believe that certain of Chief Justice Vinson's convictions and attributes strongly influenced the form and content of the opinions. Mr. Vinson was a man of strong institutional loyalties. He believed that divisions on the Court had endangered its authority and prestige in the recent past. He was apprehensive about the consequences, both to the Court and the country, of a decision invalidating enforcement of racial covenants announced by a tribunal fragmented as to result or constitutional theory. It is my impression that one of the Chief's central objectives, therefore, was that the decision be as nearly as possible unanimous, and that the Court speak with one voice. A circumstance favorable to that objective was the decisions of Justices Reed, Jackson, and Rutledge to remove themselves from participation in the cases. None stated publicly his reasons for the withdrawal, but it was generally assumed that each of the three Justices owned property burdened by a racial covenant.⁵² The Chief's objective of consensus was largely achieved. In the state cases, no concurring or dissenting opinions were written. In the District of Columbia cases, the line was breached only by a brief concurrence by Justice Frankfurter.⁵³

The Chief's assumptions, I believe, also contributed to the *Shelley* opinion's minimalist posture. A persistent criticism of the opinion has been that it gives inadequate guidance for the application of the *Shelley* precedent in later cases. Perhaps one may find in the opinion an effort to limit what was said to the prevailing consensus on the Court, to accomplish the reversal of the judgments in the instant cases, leaving for another day, when division and controversy might be less damaging, the difficult problems of application to different facts. Again, the quest for consensus may have influenced the Court in choosing the equal protection clause as the constitutional ground for the decision. The selection

51. A sketch of Mr. Houston's career is to be found in C. VOSE, *supra* note 12, at 43-44.

52. The action of Justice Rutledge, in particular, appeared puzzling. As a member of the District of Columbia Court of Appeals, he sat in a case involving a racial restriction, and filed a brief concurring opinion. *Hundley v. Gorewitz*, 132 F.2d 23 (D.C. Cir. 1942). Later, as a member of the U.S. Supreme Court, he participated in the Court's action that resulted in denial of certiorari in *Mays v. Burgess*, 147 F.2d 869 (D.C. Cir. 1945). In that action, he joined Justice Murphy's opinion that certiorari should have been granted. *Mays v. Burgess*, 325 U.S. 868 (1945).

53. *Hurd v. Hodge*, 334 U.S. 24, 36 (1948).

may have been surprising in view of earlier decisions of the Court invalidating racial zoning squarely on due process grounds. Recall, however, that the struggle on the Court to free state regulatory powers from the toils of substantive due process doctrine was very recent history in 1948.⁵⁴ Reliance on that doctrine, even in the wholly different context of *Shelley*, might well have sparked resistance from some of the Chief's colleagues.

It was important to the Chief Justice that the opinion not "reach" for its result, that the argument of the Court, insofar as possible, rely on familiar and established assumptions of constitutional law. The Court's opinion virtually ignored social data, assiduously collected in the briefs, concerning the impact of the covenant system on the human lives.⁵⁵ The Court also ignored contentions that enforcement of the covenants was contrary to the Charter of the United Nations, to which the United States had only recently subscribed.⁵⁶ Instead, the opinion focused on the traditional concepts of "state action" in fourteenth amendment law. The covenants themselves, said the Court, were the product of private activity and, as such, fell outside the scope of the constitutional mandates. The fourteenth amendment was violated, if at all, by the action of the states in enforcing the covenants. One consequence of the sharp dichotomy between public and private was to absolve the states of all responsibility for the *creation* of the covenant system. It is possible, too, that the dichotomy as stated failed to give due weight to then recent developments in the constitutional definitions of state action.⁵⁷

However this may be, the opinion found the requisite state action in the enforcement of the covenants by state courts of equity. Among the factors apparently important to the conclusion were that the state courts were proceeding pursuant to state common law rules, that equitable powers were being employed directly against the parties subject to discrimi-

54. Thus, it was just over a decade earlier that the Court, by a 5-4 vote, sustained the validity of a state regulation of women's wages. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

55. See Petitioners' Consolidated Brief, *supra* note 14 and Brief for the United States, *supra* note 11.

56. Shortly before the *Shelley* decision, the Ontario High Court had invalidated a restrictive covenant directed to "Jews, or to persons of objectionable nationality" through reliance, in part, on the U.N. Charter, which requires its signatories to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Re Drummond Wren* 4 D.L.R. 674 (1957). *But cf.* *Re Noble and Wolf* 4 D.L.R. 123 (1948).

57. Frank, *The United States Supreme Court: 1947-48*, 16 U. CHI. L. REV. 1 (1948).

nation on grounds of race,⁵⁸ and that the transactions being invalidated by the state courts were those between "a willing seller and a willing buyer," thus frustrating the effort of the seller to ignore racial criteria in the sale of his land.⁵⁹ Clearly, too, the fact that minority groups might hypothetically enter into restrictive agreements barring Caucasians from residential occupancy was to be accorded no significance in defining the protection of equal protection.⁶⁰

V.

It is perhaps ironic that the *Shelley* opinion, which sought so conscientiously to rely on traditional rules of public law, has been the target of critics who find the opinion lacking in the essential attributes of the rule of law. Space does not permit a scrupulous review of the critical literature that has emerged since the decision of *Shelley* forty years ago.⁶¹ Instead, I shall sketch an approach to the *Shelley* opinion, in the hope that the comments will assist in identifying some serious issues to which the case has given rise.

Some who have pondered the *Shelley* case have characterized it as involving a conflict between liberty and equality. I prefer to state the matter somewhat differently. For me, the underlying problems in *Shelley* are those of defining the boundaries separating the private from the public worlds.⁶² Any society basing its polity on the value of the human indi-

58. The point, as it bears on standing to assert the rights of the person excluded from ownership and occupancy of real property, proved to be of crucial importance to Chief Justice Vinson. See his dissenting opinion in *Barrows v. Jackson*, 346 U.S. 249, 260-69 (1953). Interestingly, the distinction drawn by the Chief Justice between equitable enforcement against the minority member and an action for damages against one who had signed the restrictive agreement was suggested in the dissenting opinion of Judge Edgerton in *Hurd v. Hodge*, 162 F.2d 233 (D.C. Cir. 1947). Judge Edgerton stated: "To say that the Constitution forbids direct and actual *enforcement* of a racial covenant by injunction . . . is not to say that it forbids awarding to a neighboring property owner such damages, if any, as an executed sale to a Negro may be shown to have caused." *Id.* at 240 n. 22 (Edgerton, J., dissenting).

59. This point has been emphasized in one interesting rationale of the *Shelley* decision. See Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

60. In the course of making the point, the Court in *Shelley* states: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." 334 U.S. at 22. In years gone by when I was teaching the course in constitutional law, I discovered that a remarkable diversity of answers was forthcoming when the class was asked to interpret the sentence. I should not like to spoil the game, in the event it is still being played, by commenting further on it.

61. A portion of the literature is cited *supra* at note 17.

62. The comments that immediately follow have been substantially influenced by the essay of Professor Louis Henkin, published over a quarter century ago. Henkin, *Shelley v. Kraemer: Notes*

vidual must recognize an area of action, solitude, meditation, and intimate relationships that is immune from the intervention of state power—an area, in the language of the famous Wolfenden Report, that “is, in brief and crude terms, not the law’s business.”⁶³ It betrays no secret to say that the borders of the private world are under great pressure in modern American society.⁶⁴ One cause of this is the extreme and increasing disparity of power between government and corporate wealth, on the one hand, and private individuals, on the other. For example, the command of electronic and computer technology in the public sector constitutes an unremitting peril to the integrity of the private world, even when the purposes of those controlling the technology are benign. Unfortunately, recent history makes clear that the purposes are often not benign.⁶⁵

Of equal importance in explaining the modern assault on the private world is that the interests and values assigned to that world are contingent, not absolute, in nature. Although preservation of the immunity of the home from state invasion is important, we are not likely to concede that a homemaker is privileged to maintain her property in such an unsanitary condition as to threaten the health of the community. The difficulty resides in the fact that acts committed in private often produce serious public ills. Nor is there an adequate calculus to determine when and to what extent state power may properly invade the boundaries of the private world in the interest of public concerns. Thus, rightly or wrongly, we have criminalized the sale and consumption of narcotic drugs in defense of perceived public interests. The costs of this policy include the regular penetration of official force into areas of private concern in ways undreamed of by our forebears. In the United States, assaults on the citadel are conducted for the most part by persons who concede the importance of the private world, but who in the particular instance contend that the value of public intervention exceeds its costs. Increasingly, in recent years, the values sought to be achieved by public intervention have seemed more tangible and urgent than the rather

for a Revised Opinion, 110 U. PA. L. REV. 473 (1962). I have not attempted to acknowledge my indebtedness to him at each step of my argument. It may be assumed, however, that the obligation is considerable.

63. ALLEN, *Nineteen Eighty-Four and the Eclipse of Private Worlds*, in *THE FUTURE OF NINETEEN EIGHTY-FOUR* 151-75 (1984).

64. *Report of the Committee on Homosexual Offenses and Prostitution* 79-80 (Home Office, Scottish Home Department) (1957).

65. J. BAMFORD, *THE PUZZLE PALACE: A REPORT OF AMERICA'S MOST SECRET AGENCY*, *passim* (1982).

amorphous claims made in behalf of the private world.⁶⁶

As critical as is the tendency in modern America for governmental and societal power to constrict the borders of the private world, there are contrasting problems. For just as the private can be misconceived as the public, so may the public be disguised as the private. Indeed, one of the persistent tendencies of our history is the effort of powerful groups whose activities are of prime public concern to escape public scrutiny and containment by claiming the immunities of the private world. The principal analytic weakness of the *Shelley* opinion may be its insistence on the strict dichotomy between the *making* of restrictive agreements, which is seen as wholly private, and the judicial *enforcement* of the covenants, which is seen as public action. The inadequacy of the classification becomes apparent when one sees that the agreements involved in the litigation, which involved only a limited number of residences,⁶⁷ were nevertheless part of broad and comprehensive systems of segregation. Moreover, the systems of segregation could not have functioned without active governmental participation at all levels, from creation of the restrictions to their enforcement.

One cannot determine precisely how widespread the use of racial covenants in the northern cities had become when *Shelley* was decided. The absence of adequate statistical knowledge constitutes a curious gap in the social research of the time. In Chicago, for example, it was stated that eighty percent of the properties in the city had been made subject to the covenants.⁶⁸ Scholars have doubted this figure,⁶⁹ but it is clear that coverage of properties on the periphery of the black belt was very nearly complete.⁷⁰ Nor can one doubt that the use of the covenants was expanding significantly, both in Chicago and in many other American cities.⁷¹

More important than coverage statistics, however, is the degree to

66. See P. FREUND, ON UNDERSTANDING THE SUPREME COURT 22 (1949): "On the whole the active proselyting interests have been given greater sanctuary [in our law] than the quiet virtues or the right of privacy."

67. Thus, in the District of Columbia cases the agreement encompassed twenty lots. Eleven lots in the same block were not included. *Hurd v. Hodge*, 334 U.S. 24, 26-27 (1948).

68. *Iron Ring in Housing*, 27 THE CRISIS 205 (1940), quoted in Note, *supra* note 16, at 736 n.6. See also S. DRAKE & H. CAYTON, *supra* note 44, at 187; Groner and Helfeld, *supra* note 13, at 430 n.21.

69. Kahen, *supra* note 13, at 204 n.27.

70. "[By 1937] over 95 per cent of the frontage [adjacent to middle class neighborhoods] was reported covered by restrictive covenants." S. DRAKE & H. CAYTON, *supra* note 44, at 187.

71. See *supra* note 44.

which the covenant system penetrated the very fibers of social life in the cities where it prevailed. Something of the impact of the system on the living conditions of the black and white populations of Chicago can be gleaned by revisiting such works as the classic study of Drake and Cayton, *Black Metropolis*.⁷² Our knowledge of the dynamics of social life and political processes counsels that no such system can emerge, flourish, and expand without the active support of local governments. The evidence suggests that, in the language of the criminal law, the governments aided and abetted the creation and operation of the covenant system. As aiders and abettors, they may be viewed as legally and constitutionally accountable for the systems that resulted. The case for accessorial responsibility is perhaps stronger here than in the criminal law, for, in criminal cases, accountability does not depend on a showing that but for the accessory's behavior the forbidden result would not have occurred.⁷³ In the covenant cases, however, it seems relatively clear that without the element of governmental participation, the system could hardly have emerged or flourished.

This is not to say that simply because of state enforcement of the covenants, other property owners were encouraged to enter into restrictive agreements. Such encouragement is a possible consequence any time a contract is enforced. Rather, the aiding and abetting referred to are the myriad acts—some overt, some *sub rosa*—performed by persons wielding public power which were intended or had the effect of expanding the covenant system. The role of the Federal Housing Authority (FHA) in creating and perpetuating the system is suggestive, even though it reflects national rather than local governmental power. The FHA, which engaged in insuring the holders of mortgage loans against loss, was a powerful factor in local real estate markets in the post-war world. By insisting on the presence of racial covenants in the transactions it approved, the agency became a formidable engine for creating and perpetuating the covenant system.⁷⁴ Evidence of similar activity by local officials

72. See *supra* note 44.

73. See, e.g., *State ex rel. Attorney General v. Tally*, 102 Ala. 25, 69, 15 So. 722, 732 (1894).

74. The role of the FHA was widely recognized at the time. Thus, G. MYRDAL, *supra* note 17, at 625-26, states:

The Federal Housing Administration, in effect, extends credit to Negroes only if they build or buy in Negro neighborhoods and to whites only if they build in white areas which are under covenant not to rent or sell to Negroes. This policy of the F.H.A. is the more important since it has been an ambition and accomplishment of this agency to make housing credit available to low income groups. The effect has probably been to bring about an

is harder to find. Stories were current in my younger years in Chicago of City Hall bringing pressure to bear against banks to withhold mortgage funds on properties lacking racial covenants. It must be said in all conscience, however, that local financial institutions ordinarily seemed to require little prodding.

Basic to understanding the role of governmental action in maintaining the covenant system is the perception that the patterns of residential segregation, created and perpetuated in substantial part by the restrictive agreements, constituted the status quo upon which local political power rested. In large American cities, the distribution of political power is typically determined by considerations of ethnicity and geography. In Chicago, for example, white politicians perceived the migration of substantial numbers of black persons from the ghetto to other parts of the city—which did occur to some degree after the *Shelley* decision—as acute threats to their power bases. For similar reasons, some black politicians were less than pleased by the prospect of their constituents fleeing across the ghetto's boundaries.⁷⁵ Thus, local office holders possessed powerful motives to support and strengthen the covenant system. To doubt that, inevitably, these motives determined governmental action requires disregard of hard-earned knowledge of our social and political environment.

If this view of the genesis and evolution of the covenant system is accepted, then state action was involved in the creation of the restrictive agreements. It would seem to follow that, just as the legislatively created racial ordinances were invalidated in *Buchanan v. Warley*, the restrictive agreements in *Shelley* must also fall under the fourteenth amendment's ban. No such comprehensive approach was presented to the Court in 1948, although some of the advocacy of the time may have reflected simi-

extension of such 'protection' to areas and groups of white people as were earlier without it.

See also Groner and Helfeld, *supra* note 13, at 436-37; Vose, *supra* note 12, at 191. In 1949, it was charged that "discrimination is indulged in today as freely as ever on F.H.A.-insured loans." *Id.* at 225.

75. A contemporary report on the political dynamics described above may be found in S. DRAKE & H. CAYTON, *supra* note 44, at 201:

During the campaign against restrictive covenants, one prominent Negro leader confirmed to an interviewer: 'Sure, I'm against covenants. They are criminal. But I don't want Negroes moving about all over town. I just want to add little pieces to the Black Belt. I'd never get re-elected if Negroes were all scattered about. The white people wouldn't vote for me.'

lar perceptions.⁷⁶ There is no reason to believe that the Court would have based its own decision on the argument, had it been fully presented. There are, of course, formidable problems of proof; what we know with substantial certainty as practical sociologists and political scientists often resists translation into juridical facts. For my own part, I believe the conclusion that there was state participation in the creation of the covenant system should be entitled to presumptive support.

The *Shelley* opinion did not take as broad a view of governmental action as that just advanced. Instead, state participation was seen only in the judicial enforcement of the restrictive agreements. It is at this point that substantial unease about the opinion has arisen. Does *Shelley* mean that the freedom of action accorded private contractors is limited in all respects by the same constitutional restraints imposed on the action of public bodies? If it does not and cannot mean that, then what are the circumstances that transform the attempted judicial enforcement of private rights into state action violative of the fourteenth amendment?

The questions posed are of fundamental importance to all concerned with maintaining the boundaries of the private world against the modern assaults upon it. One substantial mechanism of the private world is the system of private contract. A wide ranging freedom of contract is essential to the exertion of private volition in broad areas of social life, and to the creation of what may be called private lawmaking. Paradoxically, maintenance of a system of private contract is dependent on the availability of public powers of enforcement. The very concept of a right of privacy presupposes access to public power to buttress the private world, for "rights" are the product of governmental power. In most situations, it is reasonable and necessary to assume that in enforcing private rights the state is not adopting as its own the purposes and methods of the private parties. We do not assume that the state approves the purposes of the neo-Nazi when it safeguards his freedom to speak. So also in the contract area, the state, in enforcing an agreement, does not ordinarily adopt or place its imprimatur on the purposes of the parties. Rather, the state action in these cases is independent of the calculations of private parties, and consists of the neutral implementation of a system of contract within

76. When a widely diffused public interest has become enmeshed in a network of multitudinous arrangements and governmental machinery has been invoked for the effectuation of such arrangements, that public interest cannot be submerged by abstracting one such arrangement from its context and treating it as though it were an isolated private covenant immune from the prohibitions of the Fourteenth and Fifth Amendments.

Brief for the United States, *supra* note 11, at 80. *Cf.* Note, *supra* note 16, at 747.

which private individuals may pursue their multiple and sometimes conflicting ends.

The question, then, is did the enforcement of the racial covenants prior to *Shelley* by state and lower federal courts amount simply to the neutral enforcement of equitable restrictions on land? The conclusion which I reached forty years ago, and which has been reinforced by my recent revisitation of the cases, is that something considerably more occurred. There is substantial evidence, I believe, that the states placed enforcement of racial restrictions in a favored category, and that by word and act introduced into the public policies of the states the purposes of those who drafted and signed the racial covenants.

Defending judicial enforcement of restrictive agreements as simply manifestations of private contractual freedom neglects the unique aspects of the racial covenant system. Comparison with ordinary contracts of employment may prove useful. Employment contracts, of course, constrict the power of third parties to engage those already bound by contracts of hire. But restrictive covenants constrict the contractual power of tens of thousands of fellow citizens, and judicial enforcement of the covenants was tantamount to reconstructing the urban social structure to the acute disadvantage of those of lesser economic and political power.⁷⁷ That these policy issues, crying for consideration, were largely ignored or summarily dismissed by state and lower federal courts constitutes no bright page of American legal history.⁷⁸ Surprisingly, judges, confronted by requests for extraordinary equitable remedies to enforce racially re-

77. Thus, California Attorney General Robert W. Kenney stated in his amicus brief at iv in *Anderson v. Auseth*, L.A. No. 19,759, on appeal to the California Supreme Court, Sept. 4, 1946:

Although these actions are entitled as though they were between private litigants this is not really the fact. Whole sections of the population are to be affected by the final outcome of this litigation. Some persons of one race seek to fence in all persons of another race and by agreement among themselves have attempted to fix the bounds of the habitations of another race.

Quoted in *Vose*, *supra* note 12, at 124-25.

78. In response to the argument that enforcing restrictive covenants would work hardship on some 50,000 black persons in Kansas City because of a shortage of housing, a Missouri court responded that it could not agree "that the property of any person may be confiscated for private purposes simply because some one, regardless of race and color, fancies a particular house and covets it and no other." *Porter v. Johnson*, 232 Mo. App. 1150, 1152, 115 S.W. 2d 529, 533 (Kan. City Ct. App. 1938). A few American judges responded affirmatively to the public policy argument. Thus, the late Justice Roger Traynor asserted in a concurring opinion that enforcement of the covenants "must yield to the public interest in the sound development of the whole community." *Fairchild v. Raines*, 24 Cal. 2d 818, 831-35, 151 P. 2d 260, 267-69 (1944). In his influential dissenting opinion in *Hurd v. Hodge*, Judge Edgerton pitched a substantial portion of his argument on public policy grounds. 162 F. 2d at 237.

restrictive covenants, rarely appeared to assign weight to, or even to perceive as relevant, the Supreme Court's finding that municipal ordinances designed to segregate residential housing were lacking in substantial relationship to public health, safety, morals or general welfare.⁷⁹

One of the most striking features of pre-1948 state racial covenant law was the persistent reluctance of the courts to apply doctrines limiting the enforcement of restrictive agreements, doctrines that had first emerged in cases involving other kinds of equitable restrictions.⁸⁰ For instance, with respect to other restrictions, the "changed circumstances" doctrine had been given wide currency: if conditions involving the restricted property have so altered that it is no longer possible to achieve the purposes of those who created the restriction, then equity will not enforce the restriction.⁸¹ Many litigants attacking racial covenants sought to rely on the doctrine, usually to no avail.⁸² One court held, for example, that even if a small racially restricted tract became completely surrounded by properties occupied by black persons, the restriction would continue as long as no black occupants had penetrated the restricted area.⁸³ One Missouri case stated that even if changed circumstances made the land more valuable if freed from the restriction, the covenant would be enforced because "[t]here are some rights more valuable than money."⁸⁴

Even more arresting was the position of state courts with respect to the basic doctrine of property law forbidding or limiting restraints on alienation. According to the *Restatement of Property* as it appeared at the time:

The underlying principle which operates throughout the field of property

79. *Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917).

80. If the courts which enforce such covenants were merely applying a general rule that all restraints on alienation are enforceable, that might be one thing. It is quite another when the courts do not enforce all restraints on alienation, but do approve those which are based on race and color.

Brief for the United States, *supra* note 11, at 77.

81. *RESTATEMENT OF PROPERTY* § 564 (1944); 2 *AMERICAN LAW OF PROPERTY* § 9.39. "Application of the rule strikes a balance between the pressure for redevelopment and the desire for stability." French, *supra* note 35, at 1300.

82. "Change of circumstances is the usual ground for non-enforcement, but the change must be 'radical', and some courts insist that the change be in property covered by the covenants rather than the surrounding property, a requirement that seems almost impossible to fulfill." Groner and Helfeld, *supra* note 13, at 445. Cases in which the defense of changed conditions proved successful include *Fairchild v. Raines*, 24 Cal. 2d 818, 151 P. 2d 260 (1948); *Pickel v. McCawley*, 329 Mo. 166, 44 S.W. 2d 857 (1931).

83. See, e.g., *Pierce v. St. Louis Union Trust Co.*, 311 Mo. 262, 295, 278 S.W. 398, 408 (1925).

84. *Porter v. Johnson*, 232 Mo. App. 1150, 1152, 115 S.W. 529, 534 (Kan. City Ct. App. 1938).

law is that freedom to alienate property interests one may own is essential to the welfare of society. . . . Thus to uphold. . . [such restraints], justification must be found in the objective that is thereby sought to be accomplished or on the ground that the interference with alienation in the particular case is so negligible that the major policies are not materially hampered.⁸⁵

Of the five factors listed that would weigh against upholding the restraint, the fourth was that "the restraint [was] unlimited in duration," and the fifth that "the number of persons to whom alienation [was] prohibited [was] large."⁸⁶ In fact, many racial covenants restricted the rights of non Caucasians in perpetuity or for long terms of years;⁸⁷ and in many cities the covenants barred tens or even hundreds of thousands of persons from ownership of the restricted lands.⁸⁸ As the Government observed in its amicus brief:

It is doubly significant that the only cases in the United States upholding the exclusion of a social group of considerable size are the racial covenant cases, and, that, except for a single case from a non-common law jurisdiction . . . all these cases were decided after . . . [the Supreme Court] had struck down legislative housing segregation in *Buchanan v. Warley*⁸⁹

The courts offered varied justifications as they ordered enforcement of racial covenants. In one of the first state appellate cases, a Louisiana court said:

[I]t would be unfortunate if our system of land tenure were so hidebound, or if the public policy of the general government or of the state were so narrow, as to render impracticable a scheme such as the one in question in this case, whereby an owner has sought to dispose of his property advanta-

85. RESTATEMENT OF PROPERTY 2379-80 (1944).

86. *Id.* at 2407.

87. Thus in the two state cases before the Court in *Shelley*, one involved an agreement with no time limitation and the other was agreed to be effective for fifty years. 334 U.S. at 4, 6.

88. The racial factor apart, it would seem clear that a restraint which perpetually excluded at least a quarter of the population of the District of Columbia, and some 20,000,000 American citizens, should not be upheld. The owner's freedom to convey would plainly be substantially impaired, and no adequate counterbalancing considerations could exist.

Brief for the United States, *supra* note 11, at 115. Despite the stated criteria, the Institute approved a provision upholding racial restraints "in states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question." RESTATEMENT OF THE LAW OF PROPERTY § 406 comment I (1944).

89. *See* Brief for the United States, *supra* note 11, at 107-08. A few American courts invalidated racial restrictions as unlawful restraints on alienation. *See, e.g.*, Title Guarantee and Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470 (1919). A West Virginia court invalidated a covenant restricting sales of property to black persons, but upheld the restraint on occupancy. *White v. White*, 108 W. Va. 128, 150 S.E. 531 (1929).

geously to himself and beneficially to the city wherein it lies.⁹⁰

A Michigan court appeared to rest its holding, in part, on the validity of racial segregation as a state policy, citing *Plessy v. Ferguson*⁹¹:

The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in private dealings between individuals would only serve to accentuate the difficulties which the situation presents.⁹²

The Missouri court quoted earlier⁹³ spoke of the proper willingness of the courts to protect the covenantor's investment in "happiness and security."⁹⁴

These cases suggest that the state common-law rules which *Shelley* condemned as unconstitutional were not simply reflective of a neutral policy of contractual freedom.⁹⁵ In addition, the courts were embracing the covenants' objective of residential racial segregation as consistent with a variety of state ends, including maintenance of public order, protection and enhancement of property values, and, in some instances, racial purity.⁹⁶

The foregoing is perhaps sufficient to express my conclusion that the

90. *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 727, 67 So. 641, 642 (1915).

91. *Parmalee v. Morris*, 218 Mich. 625, 627, 188 N.W. 330 (1922) (citing *Plessy*, 163 U.S. 537 (1896)).

92. *Parmalee*, 218 Mich. at 628, 188 N.W. at 331.

93. See *supra* note 84 and accompanying text.

94. *Porter v. Johnson*, 232 Mo. App. 1150, 1160, 115 S.W. 2d 529, 535 (Kan. City Ct. App. 1938). Frequently, restrictive agreements were upheld on the argument of "reasonableness." Thus in *Chandler v. Ziegler*, 88 Colo. 1, 5, 291 P. 822, 823 (1930), the court said:

A person who owns a tract and divides it . . . for the purpose of selling one [tract] or more may prefer to have as neighbors persons of the white race and may believe that prospective purchasers . . . would entertain a similar preference, and would pay a higher price if the ownership were [so] restricted . . . Surely, it is not unreasonable to permit such a person to insert in his deeds a provision restricting, not only the occupancy, but also the ownership of tracts conveyed by him.

95. In short, the carving out of racial real estate limitations from the application of the common-law rule against restraints on alienation has largely resulted from . . . sympathy with, or affirmative acceptance of, the social interest in racial residential segregation, rather than from a development of the original policy premises of the common-law doctrines of free alienability.

Brief for the United States, *supra* note 11, at 114. See also *Wyatt v. Adair*, 215 Ala. 363, 110 So. 801 (1926), where the court interpreted a lease lacking a written restriction as containing an implied covenant against leasing to black persons because the building provided only a common toilet to be used by white tenants occupying the adjacent apartment. Cf. *Shulte v. Starks*, 238 Mich. 102, 213 N.W. 102 (1927).

96. "No excuse for other forms of social segregation and discrimination is so potent as that one that sociable relations on an equal basis between members of the two races *may possibly* lead to

result reached in *Shelley v. Kraemer* was correct. This is true whether one takes note of the contributions of state governmental power to the creation of the covenant system, or whether consideration is confined to judicial enforcement of the restrictive agreements. But asserting the constitutional correctness of the result reached on the facts of *Shelley* does not resolve the question of how the precedent should be applied to other facts. And doubts about the future applicability of *Shelley* pervade the scholarly literature. I must at this point resort to conclusory statements. Since we are not prepared to sacrifice substantially the values either of the public or the private worlds, the courts must perform a balancing of those values either explicitly or covertly, in future applications of *Shelley*. The courts must strike a balance after consideration of such factors as the magnitude of the harms complained of by the moving party, the degree of participation of official power in producing the harms, and the extent to which rectification of the harm through constitutional remedies trespasses on the precincts of the private world.⁹⁷

This is by no means an entirely happy assertion. Attempts to balance these imponderable considerations have not provided the Supreme Court of the United States with its finest hours.⁹⁸ It is a process that often exalts the personal element in judicial decisionmaking. Nor have the results always been acceptable. For example, the present Court has moved a fair distance toward balancing the fourth amendment out of its crucial role in monitoring and containing official powers in American law enforcement. It has done this not only by dismantling the exclusionary rule, but also by significantly constricting the substantive scope of the amendment.⁹⁹

Yet there is little reason to despair about the place of *Shelley v. Kraemer* in our constitutional jurisprudence. *Shelley* represents the heavy ar-

intermarriage." G. MYRDAL, *supra* note 47, at 606 (emphasis in original). See also C. VOSE, *supra* note 12, at 66:

The most important defense of the white race was established through state miscegenation laws which made it a crime for white and colored persons to marry. Residential segregation was the next most important means of maintaining racial purity. Thus the restrictive covenant can be viewed as a method of enforcing social theory.

Racial purity was one of the express purposes of those defending racial ordinances in the Supreme Court. See *Buchanan v. Warley*, 245 U.S. 60, 81 (1917).

97. See Henkin, *supra* note 62, at 491-96.

98. Professor David Haber has ably delineated some of the difficulties accompanying the balancing approach in the context of the *Shelley* case. See Haber, *supra*, note 17.

99. Junker, *The Structure of the Fourth Amendment: The Scope of the Protection*, 79 J. CRIM. L. & CRIMINOLOGY 1105 (1989).

tillery of civil rights law. It has been and should be used sparingly. One of the reasons for its apparent neglect is the proliferation of civil rights legislation at both state and federal levels since the case was decided. Many of the modern issues are resolvable within the more restricted parameters of statutory law. When resort to legislation is available, a kind of Ockham's Razor directs us to take that course, and to avoid the massive confrontations of values likely to be engendered by invoking the *Shelley* precedent. Still, however infrequently the precedent is summoned, I am among those persons happy to have *Shelley v. Kraemer* in our constitutional armory.

* * * * *

It has been more than forty years since on a May morning in 1948 Chief Justice Vinson peered across the courtroom and began a deliberate verbatim reading of the Court's opinion in *Shelley v. Kraemer*. Ordinarily, the Justices give only truncated oral versions of the opinions they have written, sometimes doing little more than announcing outcomes. The Chief Justice, however, believed that the full rendition of the opinion from the bench was justified, given the portentous nature of the decision. Was he correct in assigning such importance to the *Shelley* case?

Certainly, *Shelley v. Kraemer* has not brought an end to racial discrimination in the sale and lease of residential property. The problems have proved especially obdurate. After *Shelley*, twenty years elapsed before the passage of the housing provisions in the federal civil rights legislation of 1968.¹⁰⁰ Another twenty years were required before new legislation could be enacted to strengthen the protections of the old.¹⁰¹ Fear, greed, ignorance, and poverty are with us still, and we continue to feel the social dissonance they engender with particular force in the housing area. The word "Yonkers" is sufficient to make the point.¹⁰²

Yet the record of *Shelley* has not been one of futility. The holding did, after all, eliminate judicial enforcement of racial covenants, one of the most devastating instrumentalities of racial segregation yet to emerge. Perhaps of greater importance, *Shelley* lifted the issues of residential segregation to a new and higher level of moral discourse; and this effect

100. The Fair Housing Act, Title VIII of Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1982).

101. Act of Sept. 13, 1988, Pub. L. No. 100-430, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 1619.

102. Feron, *How Yonkers Came to a Sad Impasse*, N.Y. Times, Aug. 7, 1988, at E5.

continues to be felt. Whatever the intricacies of "state action" in federal constitutional law, millions of Americans detected the unmistakable stamp of governmental connivance in newspaper pictures showing the sheriff forcibly conducting members of a dazed black family from their home to stand by a few personal possessions piled on the sidewalk. Further scenes of this nature would have done no service to the conduct of American foreign policy, as the nation in 1948 undertook the obligations of leader of the western world.¹⁰³

It is important, also, to see *Shelley* as a vital part of a legal current moving to the statutory and constitutional protection of minority rights. The decision supplied a powerful source of morale and confidence for subsequent civil rights struggles. Indeed, perhaps the best way to sense the continuing significance of *Shelley v. Kraemer* is to ask: What would the history of human rights in the United States have been had the Court announced in 1948 that the great moral imperatives of the fourteenth amendment were irrelevant to the system of racial discrimination created and sustained by the restrictive agreements? In short, what if *Shelley* had been decided the other way?

103. "The broad implications of restrictive covenants are entirely inconsistent with the future national and international welfare of the United States in its relations with the non-white peoples. This Department firmly believes that the cancer of restrictive covenants should be excised from this nation." Letter of Under Secretary of the Interior, Oscar L. Chapman, Nov. 10, 1947, *quoted in* Brief for the United States, *supra* note 11, at 19.

