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NAACP Strategy in the Covenant Cases

Clement E. Vose

ON MAY 3, 1948, the Supreme Court of the United States ruled that neither federal nor state courts may issue injunctions to enforce racial restrictive covenants.¹ This decision reversed thirty years of history during which privately-drawn housing restrictions against Negroes had been enforced by the courts of nineteen states and the District of Columbia. Because precedent and the *Restatement of Property*,² issued by the American Law Institute in 1944, favored judicial sanction of racial covenants, the Supreme Court's decision gave a surprising turn to legal development. On

the other hand, when the Negroes' political power and legal skill is taken into account their victory in the *Restrictive Covenant Cases of 1948* is less miraculous.

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It is hoped that an appraisal of the success of organized Negroes in these cases will point to the importance of group action in the judicial process and raise questions as to its effect in other areas of constitutional development.

Organization: The NAACP

Success in American politics has gone to the organized, whether businessmen, farmers, workers, or veterans. Since 1909, when the National Association for the Advancement of Colored People was formed, Negroes have followed the group-action formula and thereby made immense progress. Initiating the organization were white philanthropists like William English Walling, conservatives in the abolitionist tradition like Oswald Garrison Villard and Moorfield Storey, reformers like Jane Addams and Lincoln Steffens, and a Negro intellectual, W. E. B. DuBois. While the NAACP has come increasingly under the control of Negroes, the organization has continued to enjoy the financial and moral support of white persons.³

¹ *Shelley v. Kraemer*, *McGhee v. Sipes*, 334 U.S. 1 (1948); *Hurd v. Hodge*, *Urciolo v. Hodge*, 334 U.S. 24 (1948). This rule has since been applied to prevent enforcement by an action for damages. *Barrows v. Jackson*, 346 U.S. 249 (1953).

² RESTATEMENT, PROPERTY § 406 (1944).

³ The work of the NAACP is sketched in E. Franklin Frazier, *THE NEGRO IN THE*

The strong leadership of the Association at the national level was strengthened by its growth in membership throughout the country. Local chapters were established in all major cities and many smaller ones in the North and South. By the end of 1919, its tenth year, the NAACP boasted 310 branches with 91,203 members.⁴ Nearly half of this membership was in the South. When the second World War ended in 1945, the size of the Association had grown to 300,000 members and 1600 branches and youth councils.⁵

The NAACP has won more victories in the Supreme Court than any other single organization. From 1915 to January, 1948, when the *Restrictive Covenant Cases* were argued, 23 of 25 sponsored cases were won by the Association.⁶ In the face of failures to gain concessions from Congress, due in large part to the power wielded by the Southern delegation, particularly in the Senate, Negroes turned to the judiciary. Furthermore, many of the problems faced by Negroes were appropriate to settlement in the courts.

National Association for the Advancement of Colored People victories in the Supreme Court altered the doctrinal development of the Fourteenth and Fifteenth Amendments and improved the legal status of Negroes immeasurably. The right of Negroes to register and vote in the all-important Democratic primary election in the South was firmly established in cases⁷ won by NAACP efforts. The Supreme Court has been persuaded to uphold Negroes' rights to fair trial proceedings in criminal cases. Thus the Court overturned convictions obtained by forced confessions,⁸ systematic exclusion of Negroes from juries,⁹ and those which emanated from a court

UNITED STATES and in John Hope Franklin, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES.

⁴TENTH ANNUAL REPORT OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, 1919, p. 7. These reports, whose titles vary slightly year to year, are cited hereafter as NAACP ANNUAL REPORT.

⁵Note, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L. J. 574, 581 (1949).

⁶For a history of these cases see NAACP Legal Defense and Educational Fund, Inc., EQUAL JUSTICE UNDER LAW. The two lost cases were *Corrigan v. Buckley*, 271 U.S. 323 (1926), a racial restrictive covenant case, and *Lyons v. Oklahoma*, 322 U.S. 596 (1944), a confession by torture case.

⁷*Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1938); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allwright*, 321 U.S. 649 (1944).

⁸*Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Canty v. Alabama*, 309 U.S. 629 (1940); *Ward v. Texas*, 316 U.S. 547 (1942); *Lee v. Mississippi*, 332 U.S. 742 (1947). The issue in the latter case was self-incrimination.

⁹*Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Hill v. Texas*, 316 U.S. 400 (1942); *Patton v. Mississippi*, 332 U.S. 463 (1947).

room dominated by an atmosphere of white hostility.¹⁰ Segregation of passengers in interstate transportation has also come under successful attack.¹¹ More recently the attention of the Association has been directed toward equalizing educational opportunities for Negroes.¹² The *School Segregation Cases* of 1954¹³ climaxed its success; now the NAACP is working to end public school separation at every level in every southern state.

Leading white lawyers established the NAACP legal tradition but Negroes are continuing it. The Association's first president, Moorfield Storey, enjoyed a high standing as a constitutional lawyer before becoming associated with the fight for Negro rights. He was assisted in early cases by Arthur Spingarn and Louis Marshall. In 1936, Charles Houston, a Harvard Law School graduate and a Negro, became the first full-time lawyer serving as Special Counsel.¹⁴ Thurgood Marshall, a Negro who gained his legal education at Howard University, became Special Counsel in 1938. Throughout its history the NAACP has had a Legal Committee of eminent volunteers to serve in an advisory capacity. Clarence Darrow, Frank Murphy, Arthur Garfield Hays, Felix Frankfurter, Morris L. Ernst and Francis Biddle have served on this committee.¹⁵

Since 1939 the National Association for the Advancement of Colored People has, strictly speaking, devoted itself to legislative activities while a separate organization, the NAACP Legal Defense and Education Fund, Inc., has had the exclusive task of conducting legal action.¹⁶ Because "no

¹⁰ *Moore v. Dempsey*, 261 U.S. 86 (1923).

¹¹ *Morgan v. Virginia*, 328 U.S. 373 (1946). More recently the NAACP sponsored and won the case of *Henderson v. United States*, 339 U.S. 816 (1950).

¹² *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950).

¹³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁴ Mary White Ovington, *THE WALLS CAME TUMBLING DOWN* 266.

¹⁵ In 1947 the National Legal Committee of the NAACP was composed of these thirty-six lawyers: Atlanta, A. T. Walden; Birmingham, Arthur D. Shores; Charleston, W. Va., T. G. Nutter; Chattanooga, Maurice Weaver; Chicago, W. Robert Ming, Jr.; Cincinnati, Theodore M. Berry; Cleveland, William T. McKnight; Dallas, W. J. Durham; Erie, Pa., William F. Illig; Houston, Arthur Mandell, Thomas L. Griffith, Jr., Loren Miller; Louisville, Charles W. Anderson; Madison, Wis., Lloyd Garrison; Nashville, Z. Alexander Looby; New York, Donald Crichton, Morris Ernst, Osmond K. Fraenkel, Arthur Garfield Hays, Paul Kern, Karl N. Llewellyn, James Marshall, Shad Polier, Hope Stevens, Charles H. Studin, Andrew D. Weinberger; Pittsburgh, Homer S. Brown; Richmond, Va., Spottswood W. Robinson, III; San Francisco, Bartley C. Crum; Tulsa, Amos T. Hall; Washington, D. C., Charles H. Houston (chairman), William H. Hastie, Edward P. Lovett, Leon A. Ransom, Ruth Weyland; Wilmington, Louis L. Redding. NAACP, *ANNUAL REPORT*, 1947, p. 95.

¹⁶ Statement of Constance Motley, Assistant Special Counsel, personal interview, New York, January 22, 1952.

substantial part of the activities" of the Legal Defense and Educational Fund involve "carrying on propaganda, or otherwise attempting to influence legislation," contributions to it are tax exempt.¹⁷ However, the two organizations share the same office and for all practical purposes, save the one mentioned, are identical. A typical year, 1948, shows that the NAACP Legal Defense and Educational Fund supplied about 80% of the \$150,000 spent by the national office for legal activity.¹⁸ Lobbying expenditures as reported are difficult to analyze. The NAACP filed no return with Congress in 1948. But in 1950 it reported using \$184,794¹⁹ and in 1951 the Association became the fifth most lavish lobby in Washington by spending a total of \$335,591.²⁰

In spite of the plain fact of NAACP activity in litigation before the Supreme Court in terms of money spent, legal talent applied, and results gained, it has no credit lines in the official Court reports. Nor have legal historians or commentators given recognition to the role of the NAACP in forging recent constitutional development. An explanation of this neglect may be the presupposition of the American legal system that society is composed of free individuals and that cases reach the Supreme Court through individual actions alone. Court reports do not show the presence of groups even where an organization like the NAACP sponsors and manages the appeal and pays the expenses involved. The pressure of interest groups on the courts is thus ignored.

Postwar Housing

In 1945 Negroes' perennial shortage of good housing was worsened by the end-of-the-war scarcity. There had been a great influx of workers to the nation's industrial centers. Yet there had been little increase in building with Negroes rarely having priority on the most desirable dwellings. In this circumstance the enforcement of restrictive covenants, always irritating and clearly harmful to long-term hopes for improvement, frustrated immediate and pressing needs. Perhaps in the past restrictive covenants had been looked upon as merely one of the many limitations on Negro action, and could be endured with the rest. As the second World War was concluded, however, the enforcement of restrictions on an already circumscribed stock of residential housing provoked Negroes to fight back.

At the bottom of the postwar crusade against covenants were the bread-and-butter needs of Negroes. Throughout the nation, especially in the bigger Northern cities, large numbers were ready and willing, but unable,

¹⁷ INT. REV. CODE § 23 (O) (2).

¹⁸ 58 YALE L. J., 574, 582 (1944).

¹⁹ CONGRESSIONAL QUARTERLY ALMANAC, 1951, p. 719.

²⁰ CONGRESSIONAL QUARTERLY WEEKLY REPORT, May 23, 1952, pp. 487, 496.

to move to new homes. When the opportunity was presented, they purchased or rented property in restricted areas. Negro leaders encouraged this action. Some covenants remained idle, never enforced. In many instances, however, white property owners reached for their legal weapons. The Negro press urged its readers to stand firm. The National Association for the Advancement of Colored People gave assurances to individual Negroes that legal support would be provided.²¹

Soon at least a hundred injunctions to evict Negroes and dissolve their titles were brought by Caucasians. This estimate of the amount of litigation was made in 1946:

During the past four years more than twenty covenant suits, probably affecting a hundred Negro families, have been entered in Los Angeles alone. Chicago had about sixteen such suits pending at the end of 1945, which affected about fifty Negro families. A dozen or more have been instituted in Washington, D. C., several in St. Louis and Detroit, and others in scattered cities in the North.²²

Much publicity resulted as suits were brought in Los Angeles against the well-known Negro actresses, Hattie McDaniel and Ethel Waters.²³ In Washington, a government worker, Clara Mays, was adjudged in contempt of court for failing to move after losing a restrictive covenant case and barely missed being sent to jail.²⁴ The decision of the Circuit Court for the District of Columbia in the *Mays* case was widely commented upon in the law reviews.²⁵

The 1945 Chicago Conference

The crop of restrictive covenant cases sprouting over the country in 1944 and 1945 was tended by Negro lawyers in their own areas. But the situation was regarded as a national problem and the National Association for the Advancement of Colored People called a conference to consider the difficulties which might be solved by mutual legal work.²⁶ Thirty-three persons attended meetings in Chicago on July 9 and 10, 1945.²⁷ The

²¹ Loring B. Moore, CHICAGO DEFENDER, May 15, 1948.

²² Florence Murray, THE NEGRO HANDBOOK, 1946-1947, 33.

²³ *Id.* at 34.

²⁴ *Id.* at 35.

²⁵ *Mays v. Burgess*, 147 F.2d 869, 152 F.2d 123 (D. C. Cir. 1945), *cert. denied*, 395 U.S. 858, *rehearing denied*, 325 U.S. 896 (1945). See 33 GEORGETOWN L. J. 356 (1945); 59 HARV. L. R. 293 (1945); 40 ILL. L. REV. 432 (1946); 3 NAT. BAR J. 364 (1945).

²⁶ Minutes of Meeting, NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants, Chicago, Illinois, July 9-10, 1945. Mimeographed Minutes, 40 pages, in legal files of Willis Graves, Detroit, Michigan. Subsequent reference will be to *NAACP Chicago Conference*.

²⁷ *NAACP Chicago Conference*, p. 1. Those present were NAACP Lawyers: Hon. William H. Hastie, Washington, D. C.; Theodore Berry, Cincinnati; Oscar Brown,

major figures of the NAACP were on hand. Walter White, the national secretary, and Roy Wilkins, president, took part in the two-day conference. The presiding officer at the meetings was William H. Hastie. The Special Counsel of the Association, Thurgood Marshall, explained the purposes of the conference, with emphasis on the desirability of developing cases at the trial level carefully with a view toward an eventual Supreme Court test.

A number of lawyers attending the conference were actively engaged in restrictive covenant cases. Willis Graves and Francis Dent reported on a case then being decided by a Detroit judge. Charles Houston was working on two cases in Washington. Loren Miller in Los Angeles and George Vaughn in St. Louis were also trying to prevent the enforcement of covenants. With these and other lawyers were race relations experts eager to share experiences and plan for the future.

From long hours of discussion emerged a clear-cut blue-print for attacking racial restrictive covenants. Every conceivable opportunity of attack was suggested and the advantages of aggressiveness in and out of the courtroom were pointed out. There were comments on the trials, which cases to select for appeal, what issues to raise, how to win in the Supreme Court, and how to exploit public opinion to advantage. A résumé of the ideas presented at this "Meeting of N.A.A.C.P. Lawyers and Consultants on Methods of Attacking Restrictive Covenants" will show the individual lawyers' understanding of the problems faced. At the same time the development of legal and political strategy by an interest group is clearly delineated. It is for the reader to say whether Supreme Court cases are made or born.

What did the Negro leaders believe to be the origin and real nature of restrictive covenants? "They are property owners' associations," explained Spottswood W. Robinson, III; of Richmond, Virginia, "always composed partly of agitators, whose purpose and function is to stir the neighborhood into the execution of segregation agreements."²⁸ This fact

Chicago; Sidney Brown, Chicago; Francis Dent, Detroit; David Grant, St. Louis; Charles Houston, Washington, D. C.; Sidney Jones, Chicago; Maceo Littlejohn, St. Paul, Minn.; A. C. McNeal, Chicago; Jesse Mann, Chicago; Thurgood Marshall, New York; Loren Miller, Los Angeles; Irving Mollison, Chicago; Herman Moore, Chicago; Loring B. Moore, Chicago; Spottswood W. Robinson, Richmond, Va.; Eugene Shands, Chicago; Theodore Spaulding, Philadelphia; Hon. Charles E. Tovey, New York; George Vaughn, St. Louis; A. T. Walden, Atlanta; Andrew Weinberger, New York; Walter White, New York; Roy Wilkins, New York. Consultants in attendance were: Elmer Goertz, Chicago Council Against Racial and Religious Discrimination; William E. Hill, American Council on Race Relations; Homer Jack, Chicago Council Against Racial and Religious Discrimination and the American Civil Liberties Union; George B. Nesbitt, Racial Relations Advisor, Region III, F. P. H. A.; Harry Walker, Mayor's Committee on Race Relations, Chicago; Dr. Robert C. Weaver, American Council on Race Relations.

²⁸ *NAACP Chicago Conference*, p. 9.

creates in them an inherent weakness. "The agreements, in form a representation of the desire of all signers, is always the product of a few, which stands because of the aggressiveness of the few."²⁹ Robinson expressed the belief that such agreements lacked stability and with persistence by Negroes, could be broken. At another point in the discussion, Loren Miller, speaking of his experience in Los Angeles, said it was a good thing that a new suit was brought every time a Negro moved in. "The expenses of constant litigation are militating against those who desire to enforce the agreement."³⁰ Miller believed there were more cases in Los Angeles than in any other city, with twenty different suits in progress.

But if the enforcement of restrictions reduced the Caucasian³¹ bank roll, it was no less expensive for Negroes. A St. Louis lawyer, David Grant, described the process of opening a covenanted area to Negroes as slow and costly.³² First, he explained, "some intrepid, energetic real estate operator" will purchase three or four houses in a white neighborhood. His sole motive is to make money. Having used straw parties in buying the property, he will then get "a Negro buyer and move him in there and sit back and wait and see what happens." If there is no objection he buys up more property because he knows it can be sold to Negroes at a profit. Sometimes the covenants are enforced; sometimes the brokers get into trouble with the Real Estate Commission and lose their licenses. "To what extent," asked Grant, "should Negroes go to the aid of these real estate brokers?"

"You should go completely to their aid," urged Charles Houston; "The pattern is the same in Washington."³³

Grant questioned this with a view to public opinion. "There is a lot of community disapproval on profiteering."

"I don't see how we can expect to break the agreements," said Loring Moore, an experienced attorney from Chicago, "if we don't have these law breakers."³⁴

This view and that of Houston's were supported by Thurgood Marshall. "This is not an ordinary service," the practical minded Special

²⁹ *Ibid.*

³⁰ *Id.* at 3.

³¹ As used in this article, the term "Caucasian" refers to those white persons who, preferring to live apart from Negroes, have established and sought legal enforcement of racial restrictive covenants. No anthropological definition of race is intended, but rather a social or functional one employed in numerous deed restrictions to differentiate the major races.

³² *NAACP Chicago Conference*, p. 19.

³³ *Ibid.*

³⁴ *Ibid.*

Counsel advised. "You can't expect to break into a neighborhood at the regular rates."³⁵

An associated problem, the possibility that individual Negroes might become pawns in the larger struggle to end covenants, was talked over frankly. For one thing, in the movement into a traditionally white area, Charles Houston warned that leaders in all cities "must not let one Negro be stuck out there all alone. Negroes do not break covenants. They are broken by whites selling to Negroes when the property becomes less desirable for white occupancy."³⁶ Once a covenant is enforced against a Negro, a lawyer is faced with alternatives of trying to win the case on any ground as swiftly as possible, or managing the defense with an eye toward testing a broader point in an appellate court. If the latter approach were to be pursued, it would be appropriate for the Association to safeguard the individual by purchasing the property. Irving Mollison of Chicago said, "otherwise a lawyer might not be justified in giving up for a client other definitions which would win the case in order to test the point."³⁷

Perhaps a fair measure of success of any conference is whether it produces more questions than it answers. But there were answers too. Strong statements were made about techniques of attacking racial restrictive covenants. Undoubtedly the most respected lawyer present was Charles Houston, who expounded at length on his philosophy of questioning the assumptions of the Caucasians as a method of education. In the District of Columbia, Houston explained, "we use the Court as a forum for the purpose of educating the public on the question of restrictive covenants because, after all, the covenants reflect a community pattern."³⁸ The philosophy of segregation should be questioned as frequently as possible.

The legalistic methods of the Caucasians must be understood, continued Houston. He generalized that, "in the enforcement, the technique of those upholding covenants is to narrow the issues as much as possible."³⁹ Lawyers for the white property owners have clear sailing if they merely prove that the restriction exists, is properly recorded and has been violated by a Negro. The plaintiffs make a *prima facie* case by setting up the legal instrument and showing its violation. Against this, Houston had some advice for the defense lawyers.

The person fighting it should broaden the issues just as much as possible on every single base, taking nothing for granted. We must make it just as difficult as possible for the plaintiffs. One technique is to start out

³⁵ *Id.* at 20.

³⁶ *Id.* at 19.

³⁷ *Id.* at 38.

³⁸ *Id.* at 16.

³⁹ *Ibid.*

denying that the plaintiffs are white. There has been a past tendency to draw clear cut lines by admitting that the plaintiffs are white and the defendants are Negroes. The first thing I recommend is to deny that the plaintiffs are white and the defendants are Negroes. . . .

Then Houston evaluated this approach as an educational method.

Every time you draw these plaintiffs in and deny that they are white, you begin to make them think about it. That is the beginning of education on the subject. In denying that your defendants are Negroes, you go to the question of the standards of race. There are many people who cannot give any reason why they are white. They don't have any standard about Negroes either.

Reminiscing, Houston told how successful this approach could be.

I just tried a case involving about 20 whites. All were in court. After the first day I had them up a tree. The next day one woman said, "We were discussing that last night." The more you shake them, the better off you are. If they make a definition (of race) — you can't do it on color or hair — make them admit it will not hold.⁴⁰

The logic of racial definitions should then be applied to exploit the change of neighborhood doctrine, continued Houston. This claim had won cases in Washington when all others had failed. It may be noted that under this rule a court will not order enforcement if the property has already been surrounded by Negroes sufficiently to make meaningless the covenant's purpose, to maintain the status quo of a white neighborhood. When this point is in issue some percentage of Negroes in the white area must be accepted as the point where the section is no longer called "white." In reaching this point Houston would have the defense turn the whites' own definition of race to logical scrutiny.

Establish the degree of penetration which makes the objects of the covenant unattainable. Play whites on their own prejudices — what degree of penetration changes a neighborhood from white to colored? One drop makes you colored, but one family in a block doesn't make the block colored.⁴¹

Comments on local court politics were added to these strategic suggestions. A prominent Missouri Democrat, George Vaughn, said that in St. Louis many of the decisions had "a political angle."⁴² For many years this had been an advantage to him in attacking restrictive covenants. "Because the Negro vote played such an important part in the election of judges, they were unwilling to offend it unnecessarily."⁴³ But, Vaughn lamented, "the method of selecting judges now has been changed." A consultant to the conference, Dr. Robert C. Weaver of the American Council

⁴⁰ *Ibid.*

⁴¹ *Id.* at 18.

⁴² *Id.* at 6.

⁴³ *Ibid.*

on Race Relations, speaking with Chicago in mind, claimed that "often political candidates can be defeated on the basis of their signature of racial covenants."⁴⁴ The consensus was that local circumstances in all cities made the task of winning cases in trial courts next to impossible. Loren Miller, deeply involved in twenty Los Angeles restrictive covenant cases, told the conferees that the appellate courts in California were little better than the city superior courts. "Our District Court of Appeals decisions are increasingly reactionary, and I believe hopeless."⁴⁵ Complications make it worse, Miller declared when "the State Supreme Court evades the issue by sending all cases on appeal to the District Court of Appeals." This intermediate court had recently added insult to injury by refusing to permit the NAACP to file a brief *amicus curiae*.

A successful test in the Supreme Court of the United States was what everyone was hoping for. Working for this involved a number of considerations. There are many unforeseeable factors in the passage of a case through the judicial process to the Supreme Court, but one—the decision on what case to carry up—was in the hands of these lawyers. However, there was disagreement among them. Loring Moore believed that the test case should come from a big city in the north like Los Angeles, Detroit or his own Chicago. The public policy of northern states was officially against segregation, while that of the South supported segregation. Believing that "the Supreme Court decision may turn on whether it will sustain a state policy,"⁴⁶ Moore reasoned that they should "get a case where public policy is favorable." It should come from a section where there has been "some tradition of freedom." He had worked to break a restrictive covenant in Kentucky, but declared: "I would not think of that case being appealed to the U.S. Supreme Court."

Echoing this argument, Irving Mollison raised special objections to appealing cases from Washington, D. C. He recalled that in the recently decided *Mays* case the Circuit Court there had "referred to the rules of law upholding restrictive covenants in the District as almost rules of real property law."⁴⁷ The Court did not wish to unsettle affairs in the Capital where large amounts of real estate had been acquired in faith and reliance on the old rule. This led Mollison to the conviction that cases for an ultimate test should be selected from outside the District of Columbia. Here he added a seldom revealed thought on the full nature of the problem.

. . . As a practical matter, considering some of the things about judges, is it desirable that we have applications for certiorari so immediately close

⁴⁴ *Id.* at 23.

⁴⁵ *Id.* at 3.

⁴⁶ *Id.* at 37.

⁴⁷ *Id.* at 37.

to the home and the real estate investments of the judges of the Supreme Court? I don't believe they can properly separate themselves from their expensive homes and the terrain. We should select cases with greater care and take only a very excellent case up. But future applications should come from a state which on the face of it, by its law and constitution, has at least some outward expression against racial discrimination.⁴⁸

Leaders of the NAACP like William Hastie and Thurgood Marshall disagreed with this viewpoint. Hastie emphasized that restrictive covenants must be broken everywhere in the nation. But he said, "The Supreme Court will not forget that a decision from Illinois will affect Georgia and Mississippi."⁴⁹ Thurgood Marshall also cautioned against "putting too much stress on the public policy angle alone." Eighty percent of the Negro people live in states where public policy is against them respecting segregation. The loss of a case on this basis in a northern state like Illinois "immediately becomes a precedent for enforcement in every other state."⁵⁰

Non-lawyers present were greatly interested in applying Houston's idea of using the courts as educational forums for moulding national opinion. Homer Jack, a Unitarian minister from Evanston, Illinois, representing two organizations, the Chicago Council Against Discrimination and the American Civil Liberties Union, argued for a publicity campaign.

... in the line of public relations it would be awfully important to bal-lyhoo a case similar to the Scottsboro Case and get the rank and file of NAACP and other organizations to highlight and understand the process of carrying it out and even though it is lost and there is a terrible let down, it would be terrifically educational and you should get public opinion on it. Even if it is an artificial case, it would be important to spend a good deal of money to build a case and try to decide it on constitutional issues. . . .⁵¹

At the conclusion of this two day conference in 1945 Thurgood Marshall announced that the national office of the NAACP would devote special attention to the problem of restrictive covenants. He promised a campaign of publicity against "the evils of segregation and racial restrictive covenants."⁵² Marshall would recommend that the Association maintain a full-time staff member on housing. Most important of all, he said, would be keeping in touch. Frequent conferences like the present one were important, he declared, and more were promised.

Some of the minutiae of this conference, involving conflicting and repetitious comments on technicalities, must go unrecorded. There is, of course, no record of the informal discussion outside the meeting room. The very fact that this conference was held underscored its value. Here

⁴⁸ *Id.* at 37-8.

⁴⁹ *Id.* at 37.

⁵⁰ *Id.* at 38.

⁵¹ *Ibid.*

⁵² *Ibid.*

was an opportunity for lawyers facing practically identical problems to exchange views. As we shall see, Graves and Dent in Detroit, Vaughn in St. Louis and Houston in Washington, were already conducting defenses in cases destined to be carried to the United States Supreme Court. And the other leaders, drawn together by a common purpose, would return home with a fuller comprehension of the complicated problem with which they were dealing.

The Sociology of Law

Before Negroes could effectively register their claims against the validity of racial restrictive covenants they had to await the development of favorable social and economic theories. They could know, however, that once new data was available and widely known it could serve as a persuasive factor in reshaping the judicial mind. The growing political power of Negroes and their increasing effectiveness in pressure politics had to be supported by facts and theories. The interpretation of the Negroes' position in American society by sociologists after 1920 placed the race problem in an environmental setting and proved to be potent assistance in the struggle toward a higher status for colored people.

It was in 1908 that the sociological brief, created by Louis Brandeis and Felix Frankfurter, had its first test. Under its influence the Supreme Court sustained the Oregon ten-hour law for women.⁵³ Statistics on the relationship of long hours of work to the health of women had convinced the Court of the reasonableness of the legislation.⁵⁴ This was a departure from traditional legal method. The significance of this sociological brief lies in the fact that it "did not rely exclusively or even largely on legal reasoning and precedent, nor on such sketchy extra-legal materials as the court, on its own initiative, might have cared to take judicial notice of; but brought to the support of their arguments convincing arrays of historic, sociologic, economic, statistical and other similar data."⁵⁵ The approach to law taken by sociological jurisprudence was not immediately accepted on a wide scale. In fact the position of Brandeis himself as a dissenter on the Supreme Court after 1915 indicates the slow progress made by the new approach. But rapid gains were made after 1937 until, finally, the socio-

⁵³ *Mueller v. Oregon*, 208 U.S. 412 (1908).

⁵⁴ For a discussion of the application of sociological jurisprudence to this field of labor, see Felix Frankfurter, *The Hours of Labor and Legal Realism*, 29 HARV. L. REV. 353 (1916).

⁵⁵ Glueck, *The Social Sciences and Scientific Method in the Administration of Justice*, 167 ANNALS 106 (1933), reprinted in Simpson and Stone, 2 LAW AND SOCIETY 1406 (1949). For discussion of an even newer approach, see Tracy S. Kendler, *Contributions of the Psychologist to Constitutional Law*, 5 AMER. PSYCHOLOGIST 505 (1950).

logical method became "all but the official doctrine of the Court."⁵⁶ In recent years the Supreme Court has avoided the mechanical application of legal formulae where possible and has based its decisions on such facts of life as "the economics of the wheat industry."⁵⁷ If judges were to be guided in this way⁵⁸ they could be expected to take into consideration the sociology of the race problem in deciding cases involving Negroes.

At the time restrictive covenants were first applied in the United States, dominant social theory favored the segregation of the races.⁵⁹ It was commonly thought that the white race, whether termed "Nordic," "Caucasian," "Teutonic," or "Aryan," was superior and that it should protect itself from the corrupting influence of darker people. Social Darwinism, the interpretation of society in terms of the survival of the fittest, was in vogue.⁶⁰ The notion that Caucasians were in a position of power because of biological superiority was held not only by Southern intellectuals like Charles Wallace Collins,⁶¹ but was widely believed in the North, as well. The literature of sociology was dominated by the view that Negroes were inferior to the white race in every way.⁶² This position of scholars both reflected and reinforced popular beliefs.⁶³ Thus a study of public attitudes toward Negroes in 1923 showed that the mental capacity of Negroes was ranked far below that of whites.⁶⁴ This was related to the notion that Negroes were predisposed to a life of crime, immorality, and emotional instability.⁶⁵ The existence of this image in the popular mind was closely associated with

⁵⁶ Henry Steel Commager, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S* 381 (1950).

⁵⁷ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁵⁸ For a discussion of recent trends regarding judicial realism, see Alexander H. Peckis, *LAW AND SOCIAL ACTION IN SELECTED ESSAYS* 1 (Konvitz ed. 1950).

⁵⁹ For an extended analysis of the political theory of race supremacy in the United States, see David Spitz, *PATTERNS OF ANTI-DEMOCRATIC THOUGHT* 137 (1949).

⁶⁰ An historical treatment of Darwinian influence on theories of racial superiority in the United States, particularly in reference to justifications of imperialism, may be found in Richard Hofstadter, *SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915* (1945) pp. 146-73.

⁶¹ Collins, *WHITHER SOLID SOUTH?* (1947). In this book, Collins set down the political theory of the modern Dixiecrat movement. For an appraisal which stresses the importance of Collins, see Hofstadter, *From Calhoun to the Dixiecrats*, 16 *SOCIAL RESEARCH* 135, 143-149 (1949). His reputation as a constitutional lawyer was established long ago. See Collins, *THE FOURTEENTH AMENDMENT AND THE STATES* (1912).

⁶² E. B. Reuter, *Racial Theory*, 50 *AM. J. OF SOC.* 452 (1945).

⁶³ The Chicago Commission on Race Relations, *THE NEGRO IN CHICAGO; A STUDY OF RACE RELATIONS AND A RACE RIOT* 445 (1922). The background of prevailing popular beliefs concerning Negroes is presented.

⁶⁴ *Id.* at 437.

⁶⁵ *Id.* at 439.

justifications of segregation. 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 a social theory.

Explanation of Negro behavior and living habits in terms opposed to these racial theories developed slowly and spread gradually. The emphasis on biological inferiority was questioned by scholars long before it actually lost its grip on the popular imagination. In the field of Negro housing a beginning was made in 1912 with the *American Journal of Sociology* publishing a monograph on conditions in Chicago.⁶⁶ The article showed statistically that the Negro lived in dilapidated buildings, suffered from over-crowding, lack of ventilation and toilet facilities. As a result the occupants were in ill health. For all this the Negroes paid disproportionately high rentals compared to the housing white people could command. No broad social conclusions were drawn from this study. Its importance lies in the fact that it laid the groundwork for new ideas based upon its objective presentation of economic and sociological data.

In 1922 came the report of the Chicago Commission on Race Relations. The Commission had been established by Governor Frank O. Lowden following the riots of 1919 to study the broad question of the relations between the two races in Illinois and particularly in the metropolitan area of Chicago.⁶⁷ The thirteen members of the Commission were prominent representatives of the white and Negro community. Its staff was likewise of mixed complexion. The associate executive secretary, Charles S. Johnson, provides an example of the talent enlisted. A Negro just then establishing himself as a leading sociologist, he is today President of Fisk University.

The published findings of the Commission, *The Negro in Chicago*, covers the whole gamut of racial problems in a large city and devotes considerable attention to housing.⁶⁸ Along with general information on the intricate evils of low-grade housing for Negroes, and histories of individual family difficulties, is the assertion that these conditions resulted from segregation enforced by organized prejudice.⁶⁹ Real estate dealers and property owners formed protective associations which pledged to do everything possible to prevent the renting and selling of homes to Negroes in white areas. "In carrying out their program, they resorted to vilification,

⁶⁶ Alzada P. Comstock, *Chicago Housing Conditions, VI: The Problem of the Negro*, 18 AM. J. OF SOC. 241 (1912).

⁶⁷ The Chicago Commission on Race Relations, *THE NEGRO IN CHICAGO; A STUDY OF RACE RELATIONS AND A RACE RIOT* (1922).

⁶⁸ *Id.* at 108-139, 152-230.

⁶⁹ *Id.* at 115.

ridicule, and disparagement of Negroes, accusing them of destroying property values and robbing white people of their homes."⁷⁰ Along these same lines it was found that where Negro occupancy depreciated residential property values in Chicago it was due to "the social prejudice of white people against Negroes."⁷¹ To white members of the public the Commission addressed the recommendation that better Negro housing without segregation be developed.

Our inquiry has shown that insufficiency in amount and quality of housing is an all-important factor in Chicago's race problem; there must be more and better housing to accommodate the great increase in Negro population which was at the rate of 148 per cent from 1910 to 1920. This situation will be made worse by methods tending toward forcible segregation or exclusion of Negroes, such as the circulation of threatening statements and propaganda by organizations or persons to prevent Negroes from living in certain areas, and the lawless and perilous bombing of houses occupied by Negroes or by whites suspected of encouraging Negro residence in the district.

We therefore recommend that all white citizens energetically discourage these futile, pernicious, and lawless practices, and either cooperate in or start movements to solve the housing problem by constructive and not destructive methods.⁷²

In the time since the report of the Chicago Commission on Race Relations the Negro has been viewed less as a Negro and more as an individual caught in a web of environmental misfortunes. In academic jargon, "the trend has been away from physical concepts and biological processes, through cultural analysis, and into a sociological and social-psychological study of social interrelations."⁷³ The twenties were the greatest years of urban sociological study and Robert E. Park at the University of Chicago was the man responsible for most of the leading contributions.⁷⁴ Park had been an associate of Booker T. Washington and was particularly interested in the problem of the Negro. Among his students were E. Franklin Frazier, Charles S. Johnson, themselves Negroes, and Louis Wirth. The work of these and other scholars confirmed the findings of the Chicago Commission on Race Relations and placed the main weight of the sociology profession on the side of a sympathetic environmental explanation of the urban Negro's position.

There were two main themes in the shift toward scientific methodology in writing on the sociology of Negro housing.⁷⁵ One was the conclusion

⁷⁰ *Id.* at 608.

⁷¹ *Id.* at 610.

⁷² *Id.* at 645.

⁷³ E. B. Reuter, *Racial Theory*, 50 AM. J. OF SOC. 456 (1945).

⁷⁴ See E. A. Shils, *The Present Situation in American Sociology*, 2 PILOT PAPERS: SOCIAL ESSAYS AND DOCUMENTS 10 (1947).

⁷⁵ Among the writings characteristic of the newer, sociological approach to Negroes

drawn from evidence that low standards in space, sanitation, and comfort cause unfortunate results: it was found that crime, juvenile delinquency and disease stem from these conditions. The second theme was that segregation was directly responsible for the poor housing. Too many people were forced to live in a space built to accommodate smaller numbers. Colored people had to pay higher rents than white people paid for comparable quarters. And since the segregated areas were overcrowded with inferior dwellings, there was no opportunity for those Negroes who had money to rent, buy, or build superior housing to live at a standard equal to their income. All of this was related to restrictive covenants and other methods of enforcing segregation. These studies helped the Negro cause, for although the popular feelings of prejudice were not eliminated by their publication it remained true that scholarly opinion was at last opposed to the racial restrictive covenant. These materials were not overlooked when the preparations for testing the enforceability of covenants in the courts were being made.

New Legal Theory

In March, 1945 the *California Law Review* featured an article with the assertive title, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional."⁷⁶ This conclusion was reached by the author, Professor D. O. McGovney of the California Law School, through two steps in reasoning. First, he argued that state enforcement of restrictive covenants is state action under the Fourteenth Amendment and, second, that this is forbidden because it denies Negroes the equal protection of the laws.

McGovney's approach gave the Negroes a new theory with which to blast the constitutional logjam built up behind the Supreme Court's decision in *Corrigan v. Buckley*.⁷⁷ There a racial restrictive agreement was found to be perfectly proper because the Constitution did not prohibit "private individuals from entering into contracts respecting the control and disposition of their own property."⁷⁸ Now, taking a new sight on the

relative to the housing problem are Louis Wirth, "Segregation," 7 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 643 (1937); Thomas J. Woofter, THE NEGRO PROBLEM IN CITIES (1928); St. Clair Drake and Horace R. Cayton, BLACK METROPOLIS; A STUDY OF NEGRO LIFE IN A NORTHERN CITY (1945); Charles S. Johnson, PATTERNS OF NEGRO SEGREGATION (1943); Gunnar Myrdal, AN AMERICAN DILEMMA; THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944); Richard Sterner, THE NEGRO'S SHARE (1943).

⁷⁶ D. O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5 (1945).

⁷⁷ 271 U.S. 323 (1926).

⁷⁸ *Id.* at 330.

problem, McGovney agreed that individuals can make such a contract but stressed that the enforcement of a restriction brought the state into the picture. This amounted to state action. The situation did not parallel the problem of the *Civil Rights Cases*⁷⁹ which held that private action unaided and unsupported by the state government could not be limited by federal statutes enacted under the authority of the Fourteenth Amendment.

Professor McGovney carefully distinguished between the private action of making a restrictive covenant and the state action of enforcing one.

The discriminatory agreements, conditions or covenants in deeds that exclude Negroes or other racial minorities from buying or occupying residential property so long as they remain purely private agreements are not unconstitutional. So long as they are voluntarily observed by the covenantees or the restricted grantees no action forbidden by the Constitution has occurred. But when the aid of the state is invoked to compel observance and the state acts to enforce observance, the state takes forbidden action. The deed to the colored buyer cannot be cancelled by purely private action. The Negro cannot be ousted from occupancy by purely private action. When a state court cancels the deed or ousts the occupant, the state through one of its organs is aiding, abetting, enforcing the discrimination.⁸⁰

The claim that the enforcement of restrictive covenants was a violation of the Equal Protection Clause was based on a broad view of the line of cases beginning with *Buchanan v. Warley*,⁸¹ which had disapproved of the enforcement of racial segregation by city ordinance or state legislation. The result in segregation was reached through either method, the legislative or the judicial. If a statute or ordinance enforcing segregation was unconstitutional, enforcement by a court was also.

A number of law review articles at this time and later criticized the enforcement of restrictive covenants, but none performed a comparable feat to McGovney's, which gave to the Negro cause a solid constitutional theory with which to attack the older notions of the law. Negro lawyers were active in attacking restrictive covenants, particularly through the organ of their own legal body, the National Bar Association.⁸² Earlier articles had been dispassionate in their discussion of restrictive covenant cases,⁸³ but by 1945 there was open and sharp criticism of them. The underlying assumption seemed to be that "the litigation of constitutional issues and issues of

⁷⁹ 109 U.S. 3 (1883).

⁸⁰ McGovney, *supra* note 76, at 21.

⁸¹ 245 U.S. 60 (1917).

⁸² Loren Miller, *Race Restrictions on the Use or Sale of Real Property*, 2 NAT. BAR J. 24 (1944).

⁸³ Harold M. Bowman, *The Constitution and Common Law Restraints on Alienation*, 8 B.U.L. REV. 1 (1928); A. A. Bruce, *Racial Zoning by Private Contract*, 13 VA. L. REG. U.S. 526 (1928); Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule against Restraints on Alienation*, 21 ILL. L. REV. 704 (1927); Arthur T. Martin, *Segregating Residences of Negroes*, 32 MICH. L. REV.

land policy in a sociological vacuum has resulted in socially undesirable doctrines."⁸⁴

Reconsideration of the problem of restrictive covenants indicated that the new environmental theories of the sociologists had made a dent in the law schools. It was suggested that those who might defend Negroes in future litigation should include "relevant sociological data in the record and briefs."

No court should be called upon to determine the validity of an anti-Negro restrictive covenant on the tacit assumption that only the parties litigant and the parcel of land as to which they assert rights will be affected by the decision. Instead, the relationship of the particular restriction to the entire community should clearly appear.⁸⁵

Unless the courts reversed themselves terrible conditions would continue.

Judicial failure to abandon a rule so costly in its social consequences to the community at large will ultimately require legislative correction, unless abominable housing conditions for Negroes, and the pernicious effects of such conditions on the general community, are to be accepted as a permanent condition of American life.⁸⁶

As Charles Evans Hughes once said, "in confronting any serious problems, a wide-awake and careful judge will at once look to see if the subject has been discussed, or the authorities collated and analyzed, in a good law periodical."⁸⁷ The Supreme Court of the United States has often followed the law reviews. In 1943, the Court reversed its 1940 position on the Jehovah's Witness flag salute problem.⁸⁸ The first decision was the subject of sharp legal criticism which was marshalled by Professor Zechariah Chafee, Jr. of the Harvard Law School and brought to the Supreme Court's attention through an *amicus curiae* brief filed for the Committee on the Bill of Rights of the American Bar Association in the second case. Justice Jackson referred to these law review articles in his opinion.⁸⁹ Earlier, in 1938, when the Supreme Court changed its position on the question of taxing the income of a federal judge, Justice Frankfurter took into account the

721 (1934); M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L. J. 413 (1928).

⁸⁴ Harold I. Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 U. OF CHI L. REV. 198, 207 (1945).

⁸⁵ *Ibid.*

⁸⁶ *Id.* at 213.

⁸⁷ The quotation is from the Foreword to 50 YALE L. J. 737 (1941), found in Bernard L. Shientag, *The Stream of Progress in the Law*, 21 FORDHAM L. REV. 39 (1952).

⁸⁸ The first case was *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). It was overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

⁸⁹ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 634, 635 (1943).

fact that the first decision "met wide and steadily growing disfavor from legal scholarship and professional opinion."⁹⁰

Viewed against these results the legal criticisms after 1945 of the judicial enforcement of racial restrictive covenants had an importance beyond the edification of the bar. Favoring the Negro position as they did, these law review articles could be expected to carry some weight with judges, when brought to their attention.

The Publicity Drive

Indicative of the growing importance of restrictive covenants and the gathering storm against them toward the end of the second World War is a flyer printed in the spring of 1945 by the Chicago Branch of the NAACP Legal Defense and Educational Fund.⁹¹ The flyer urged Negroes to contribute \$50,000 to a campaign to "buy freedom from slums." It suggested they hold livingroom meetings, secure help from churches, and circulate petitions in order to stimulate interest in the campaign. This material was arranged around an editorial from *The Chicago Sun* titled "The Fight Against Covenants." It informs us that in Springfield at the state legislature a bill to invalidate racial restrictive covenants had been proposed and was to be the subject of a forthcoming hearing.

The legislation ought to pass. Restrictive covenants based on racial discrimination are "unethical, undemocratic and uneconomic," as the Chicago Council Against Racial and Religious Discrimination has said. They are, in the words of the City Club, immoral and productive of racial tensions. The Metropolitan Housing Council, the Y.M.C.A. and many other organizations have called for their abolition.

In the present low state of the legislature, prospects for the legislation are not bright. The General Assembly finds it much easier to serve the lobbies of special interests than the general welfare. But whatever the outcome, the fight will not have been in vain. Someday restrictive covenants are going to be knocked out of American law and custom, because they are repugnant to American ideals.

And on the NAACP broadside the concluding paragraph of the editorial from the *Sun* was underlined:

If the legislative fight is lost, the campaign of the National Association for the Advancement of Colored People to obtain a definitive test of the covenants in the U. S. Supreme Court must be pressed with all possible vigor.

A Conference for the Elimination of Restrictive Covenants was held in Chicago on May 10th and 11th, 1946. It was called by the NAACP and the Chicago Council Against Racial and Religious Discrimination and

⁹⁰ *O'Malley v. Woodrough*, 307 U.S. 277, 281 (1938). This case overruled *Evans v. Gore*, 253 U.S. 245 (1920).

⁹¹ A copy of this flyer is in the legal files of Willis Graves, Detroit, Michigan. The Editorial appeared in *The Chicago Sun* on June 6, 1945.

sponsored by more than forty labor, civic, religious, housing and veterans groups in Chicago.⁹² Plans for legal procedures and briefs in restrictive covenant cases were formulated there by lawyers who were working on these cases in all parts of the country.⁹³ Loren Miller, Los Angeles attorney and member of the NAACP National Legal Committee, and the Most Rev. Bernard Sheil, founder of numerous Catholic Welfare organizations in Chicago, gave the major addresses at the Conference.⁹⁴ The former speaker outlined the new legal arguments against the enforcement of restrictive covenants, while the latter condemned them as being immoral and anti-Christian. This meeting brought together the leading opponents of restrictive covenants and signified the new post-war interest in ending their effectiveness.

The value of this meeting or of loud efforts to drum up enthusiasm and support for the attack on restrictive covenants was debatable. It could have played a vital role in raising money. It could have stimulated interest in the broader problem of Negroes in American society. But whatever the positive usefulness of the publicity campaign it surely reflected the approach of Negroes to the task of bringing about more favorable rules of law. It may be difficult to verify its influence on courts but there can be no doubt that the sponsors of this publicity believed it would have some effectiveness.

Potential Test Cases

During 1945 and 1946 numerous restrictive covenant cases were developing throughout the country. Negroes lost them all and yet thereby came closer to an ultimate test of the constitutionality of judicial enforcement in the United States Supreme Court. On January 26, 1947, Negro leaders met for the third time, now at Howard University in Washington,⁹⁵ to evaluate their progress in ending the power of racial restrictions in housing. Because the Supreme Court had refused certiorari in *Mays v. Burgess*⁹⁶ only two years before, William Hastie agreed with Thurgood Marshall that if another failure was to be avoided, "the next record on which we apply for certiorari would have to contain something substantially stronger."⁹⁷

⁹² Details of these meetings have not been located. However, a pamphlet resulted from the Conference. Preston Bradley, *RACIAL RESTRICTIVE COVENANTS* (1946).

⁹³ NAACP ANNUAL REPORT, 1948, p. 27.

⁹⁴ In Preston Bradley, *Racial Restrictive Covenants* (1946): Loren Miller, *Restrictive Covenants vs. Democracy*, pp. 5-23; Bernard J. Sheil, *Restrictive Covenants vs. Brotherhood*, pp. 25-31.

⁹⁵ Conference on Racial Restrictive Covenants, Howard University, Washington, D. C., January 26, 1947. Mimeographed minutes, NAACP files, New York City.

⁹⁶ 147 F.2d 869 (1945), *cert. denied*, 325 U.S. 868 (1945).

⁹⁷ NAACP Howard University Conference, p. 1.

All eighteen persons present subscribed to the sensible plan of seeking the best possible case in which to apply for a writ of certiorari.⁹⁸

Loring Moore, active as a leader of the National Bar Association, an organization of Negro lawyers, told the conference of the basic components of a case he was working on in Chicago.⁹⁹ From this he presented an analysis of the ideal record to build for presentation to the United States Supreme Court.¹⁰⁰

- (1) Testimony of an economist on the effects of covenants upon availability of housing;
- (2) Testimony of a sociologist as to the effect of overcrowded slum conditions and black ghettos upon both the victim of discrimination and their fellow citizens;
- (3) Introduction of a map of racial occupancy in the community;
- (4) Superimposed upon (the map) . . . a map of the restrictive covenants indicating the extensiveness of the restrictions;
- (5) Thereafter, further testimony by a sociologist as to the effect of the type of restriction proved by the two maps upon housing conditions;
- (6) Evidence as to the effect that thirty or more other restrictive covenant cases are pending in the community to show that the effect of enforcement would be extensive private zoning in the areas.

Actually, Moore's ideal was a mustering of the standard approaches used by Negro lawyers in a number of contemporary cases. The trial record was important, and appeals to higher state courts or intermediate federal courts were planned with care. Nevertheless, failures in these tribunals did not necessarily prejudice Negro chances in the United States Supreme Court. Consequently, NAACP leaders bore in mind the ultimate goal of obtaining a decision on the broad constitutional question from the Supreme Court. When the Howard University conference was held in January, 1947, in addition to the Chicago litigation, cases in six cities showed promise of serving as constitutional tests.

In Washington, D. C., an Executive Committee of Owners in the North Capitol area acted to have the District Court for the District of Columbia enforce against James Hurd, a Negro, a deed covenant recorded by Mid-

⁹⁸ *Ibid.* Those present were: Francis Dent, Willis M. Graves, George E. C. Hayes, Attorney Hall, Governor William H. Hastie, C. Alphonse Jones, Edward P. Lovett, Thurgood Marshall, Loring Moore, James Nabrit, Frank Reeves, Spottswood W. Robinson, III, Arthur D. Shores, Vertner Tandy, Andrew Weinberger, Robert L. Carter, Marian Wynn Perry, Franklin H. Williams.

⁹⁹ The case was *Tovey v. Levy*, No. 45-S-947, Superior Court of Cook County, Illinois. The decree enforcing the covenant was entered on Nov. 28, 1947. This decree was later reversed, on the authority of the *Restrictive Covenant Cases of 1948*, 401 Ill. 393, 82 N.E.2d 441 (1948).

¹⁰⁰ NAACP Howard University Conference, p. 2.

daugh & Shannon, Inc., prominent Washington real estate developers between 1905 and 1910.¹⁰¹ This covenant provided that the lots covered "shall never be rented, leased, or sold, transferred or conveyed unto any Negro or colored person, . . ." Defending James Hurd who wanted to stay in his newly purchased home on Bryant Street, Charles Houston dramatically applied his philosophy of defense, explained in conferences,¹⁰² to the courtroom of the District Court. Houston said that Hurd was an Indian, not a Negro, taunted the plaintiffs to characterize racial qualities and presented as witnesses a bacteriologist from the George Washington Medical School and an anthropologist from Catholic University to show personal distinctions cannot be corroborated by science. In spite of Houston's educational efforts, the District Court ordered enforcement of the restriction. Carrying this decision to the Court of Appeals for the District, Houston again lost but by a vote of two to one with Judge Henry Edgerton writing a powerful dissent.¹⁰³

In St. Louis, the Marcus Avenue Improvement Association, organized to protect a large area of that city against Negro inroads,¹⁰⁴ obtained an injunction in 1945 to enforce a racial covenant adopted in 1908. This case, *Shelley v. Kraemer*, was lost by the Negroes on appeal to the Missouri Supreme Court in December, 1946.¹⁰⁵ George Vaughn, the colored attorney, was prepared to carry this case to the Supreme Court in order to gain a victory.

In Detroit, Negroes were fighting a losing battle in the case of *McGhee v. Sipes*.¹⁰⁶ The Detroit attorneys, Willis Graves and Francis Dent, received considerable aid from the national leadership of the NAACP in New York.¹⁰⁷ After enforcement was ordered by the trial court of Wayne County a strong effort was made to obtain a reversal by the Michigan Supreme Court. Several labor and liberal organizations filed briefs as friends of the court along with the NAACP while numerous property

¹⁰¹ Information on the property owners organizations obtained from their attorney, James Crooks, Washington, D. C., March, 1952.

¹⁰² Trial records of Supreme Court cases are now available on microfilm or microcard at various law libraries about the country. See *United States Supreme Court Records and Briefs; a Union List, with a Note on Their Distribution and Microfilming*, 40 LAW LIBRARIAN'S J. 82 (1947).

¹⁰³ *Hurd v. Hodge, Urciolo v. Hodge*, 162 F.2d 233 (D.C. Cir. 1947).

¹⁰⁴ The information that the Marcus Avenue Improvement Association sponsored the case for Mrs. Kraemer was obtained from the organization's former president, Emil Koob, and its counsel, Gerald Seegars, in St. Louis, December, 1951.

¹⁰⁵ *Shelley v. Kraemer*, 355 Mo. 814, 198 S.W.2d 679 (1947).

¹⁰⁶ *McGhee v. Sipes*, 316 Mich. 614, 25 N.W.2d 638 (1947).

¹⁰⁷ The role of the NAACP was revealed by a study of the state supreme court briefs obtained from the Michigan State Library, Lansing, Michigan. The author also profited from an interview with Willis Graves, Detroit, Michigan, Dec. 29, 1952.

owners associations entered a joint brief *amicus curiae* in opposition. Enforcement of the covenant was upheld by the state supreme court on January 7, 1947.

A case in the Court of Appeals for Franklin County, Ohio, raised the novel question of whether a church corporation in Columbus, whose congregation was largely composed of Negroes, could be enjoined from allowing its Negro pastor to live in a house on the restricted property which it owned. The deed covenant provided that the property not be sold to or used by non-Caucasians. Ownership of the property by the church was allowed on the theory that as a corporation it was separate and distinct from its shareholders and therefore was without racial identity. At the same time, the court granted an injunction to prevent the colored minister or any other Negro from occupying the premises. The case, decided October 30, 1946, stimulated a great deal of interest. The Eastwood Civic Association of Columbus, "and others," filed an *amicus curiae* brief urging enforcement of the restriction. Briefs supporting the Negro position were entered by the American Civil Liberties Union, with Arthur Garfield Hays and Osmond K. Fraenkel among the attorneys, an individual, Edward B. Paxton, and the Columbus Council for Democracy. That the Franklin County Court of Appeals felt and resented the pressure represented by the briefs filed on behalf of the Church and its Negro clergyman cannot be doubted from this passage in its opinion.

We well recognize that vociferous minorities of our citizens, instigated by politicians not statesmen, clamor for judicial denial of public rights under the guise of public welfare which is to say public policy. However, the courts ought to be and are ever mindful of that basic thought which underlies representative democracy: "Give all power to the many and they will oppress the few, give all power to the few and they will oppress the many, so that each should retain within themselves the power for their own self-preservation." That reservoir of protection is to be found in our guaranty of constitutional rights, for example, the right to private contract, and in the hesitancy of the courts to be swayed by that which is seemingly popular for a moment but which finds little or no sound reason or precedent, either in law or equity.¹⁰⁸

The appeal to the Supreme Court of Ohio was dismissed on March 5, 1947,¹⁰⁹ but preparations were made to carry the case to the United States Supreme Court.

Rapid population growth in Los Angeles caused Caucasians to enforce racial segregation by restrictive covenants as they were commonly doing elsewhere. A first-rate Negro attorney and NAACP leader, Loren Miller,

¹⁰⁸ *Id.* at pp. 466-7.

¹⁰⁹ *Trustees of the Monroe Avenue Church of Christ v. Perkins*, 147 Ohio St. 537, 72 N.E.2d 97 (1947).

conducted the legal defense in numerous cases.¹¹⁰ Although not blessed with success, the tendencies as far as the Negroes were concerned pointed in the right direction. In the last restrictive covenant decision of the California Supreme Court, *Fairchild v. Raines*¹¹¹ decided in 1944, the Negroes had found one voice of sympathy in Justice Roger Traynor, who wrote a sharp dissenting opinion.¹¹² Another heartening development for Negroes came in September, 1946 when the Attorney General of California filed a brief as *amicus curiae* in eight companion cases then pending before the state supreme court.¹¹³ Robert W. Kenny, sometime president of the National Lawyers Guild, was the state's attorney general at this time. His "special advisor" on this brief was the professor, D. O. McGovney, whose partisan law review article of the previous year had given impetus to the movement to end court enforcement of racial covenants. In a foreword to the brief, the Attorney General made a sharpened rationale of the position he was taking for the state.

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 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 that other race.

But this is not all. Some of the parties to the agreement, either because of avarice or change of heart, have failed and refused to live up to their agreement. The other parties to the agreement now call into play all of the machinery of the State for the purpose of giving effect to this agreement.

The State as a whole is interested in this matter. The aid of the Courts, nisi prius and appellate, has been sought; its clerks, sheriffs and constables have been called to issue and serve writs which issue in the name of the People of the State of California; ultimately (if the hopes of plaintiffs and appellants are realized) even the jails of the State may be called upon to play a part in these actions.

Under such circumstances we do not feel that the legal arm of the State should remain inactive.

When the State is called upon to take State action in its own name

¹¹⁰ These cases eventually reached the state Supreme Court: *Fairchild v. Raines*, 24 Cal. 2d 818, 151 P.2d 260 (1944); *Cummings v. Hokr*, 31 Cal. 2d 844, 193 P.2d 742 (1948). Eight other cases were consolidated with this last.

¹¹¹ 24 Cal. 2d 818, 151 P.2d 260 (1944).

¹¹² *Id.* at 831.

¹¹³ *Anderson v. Auset*, L.A. No. 19, 759. The disposition of these cases by the California Supreme Court was never reported. The brief of the Attorney General of California, as *amicus curiae*, was obtained by the author from Herman Willer of St. Louis, Missouri. It is relevant that Attorney General Kenny and Professor McGovney cooperated in filing *amicus curiae* briefs in subsequent California cases. See *Cummings v. Hokr*, 31 Cal.2d 844, 193 P.2d 742 (1948); *Cassell v. Hickerson*, *Fairchild v. Raines*, 31 Cal.2d 869, 193 P.2d 743 (1948); *Davis v. Carter*, 31 Cal.2d 870, 193 P.2d 744 (1948).

against a large segment of its law-abiding citizens the law officers of the State should be heard.¹¹⁴

Further evidence of the nation-wide agitation against legal enforcement of restrictive covenants came in New York in the case of *Kemp v. Rubin*,¹¹⁵ decided on February 11, 1947 by the Supreme Court of Queens County. The participation of interest groups in the litigation was greeted enthusiastically by Judge Livingston who prefaced consideration of the issues in his opinion with this generous remark:

. . . the court wishes to express its deep gratitude to counsel for plaintiffs, defendants, and the various organizations which have intervened in this action as *amicus curiae*, for their able and enlightening arguments and for their scholarly briefs.¹¹⁶

The record in *Kemp v. Rubin* identified the real plaintiffs as the Addisleigh Park Improvement Association,¹¹⁷ but it may be presumed that Judge Livingston meant to commend the briefs *amicus curiae* of various liberal groups. Lawyers for one of the defendants, a Negro against whom the plaintiffs sought to enforce a covenant, were Andrew D. Weinberger, NAACP attorney who was present at the Howard University Conference to end restrictive covenants, and Vertner W. Tandy, Jr. Will Maslow filed an *amicus curiae* brief for the American Jewish Congress and the American Civil Liberties Union, and Marian Wynn Perry, a paid employee of the NAACP at that time, filed one for the City Wide Citizens Committee on Harlem. *Amici curiae* briefs were also submitted for the New York State and Greater New York Industrial Union Council, C.I.O., the Social Action Committee of New York City Congregational Church Association, and the Methodist Federation for Social Service. In spite of Judge Livingston's regard for these organizations as true friends of the court, he did not decide the case in compliance to their views. Nor did he follow his own sanguine feelings, which he asserted were those of Justice Murphy that "distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals."¹¹⁸ Against his sympathies, so unlike those of the judge in the Columbus, Ohio case, Judge Livingston, using the institutional third person, declared that "regardless of what its sentiments may be, this court is con-

¹¹⁴ Brief for Attorney General of California as *amicus curiae*, p. iv, *Anderson v. Ausetz*, L.A. No. 19, 759, appeal to California Supreme Court, Sept. 4, 1946.

¹¹⁵ 69 N.Y.S.2d 680 (1947).

¹¹⁶ *Id.* at 682, 683.

¹¹⁷ The record and briefs were studied by the author at NAACP headquarters, New York, N. Y., Jan. 23, 1952.

¹¹⁸ *Hirabayashi v. United States*, 320 U.S. 81 (1943) quoted in *Kemp v. Rubin*, 69 N.Y.S.2d 680, 683 (1947).

strained to follow precedent and govern itself in accordance with what it considers to be the prevailing law."¹¹⁹ The covenant was enforced.

To the Negro leadership the accumulating defeats from Washington, St. Louis, Detroit, Columbus, Los Angeles, New York, and other cities¹²⁰ might well have made their cause seem hopeless. The Caucasian fortifications were greatly strengthened by the addition of these fresh precedents from the postwar years. On the other hand, hindsight shows that nothing new had been added to the law that was already favorable to the Caucasians while the increased litigation created greater opportunity for the Negroes to press the Supreme Court of the United States into reviewing the problem.

Certiorari: The Crucial Writ

A Negro attorney, Loren Miller of Los Angeles, who has argued a number of cases before the Supreme Court, has said recently that these cases "are contests between opposing forces rather than law suits between individuals. They are cast as individual pieces of litigation because the Constitution guarantees the rights of individuals rather than those of groups."¹²¹ If the Supreme Court were to consider the problem of racial restrictive covenants it would do so by agreeing to hear particular cases. This would be signified by an order of the Court granting a writ of certiorari. Since Congress enacted the Judiciary Act of 1925 the Court has very largely been able to choose for hearing the cases it believed it ought to hear. It has said, in Rule 38, that "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."¹²²

Negroes had repeatedly asked the Supreme Court to reconsider the position it had taken in 1926 on the side of the validity of racial covenants and

¹¹⁹ 69 N.Y.S.2d 680, 683 (1947).

¹²⁰ Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780 (1946); Vernon v. R. J. Reynolds Realty Co., 226 N.C. 58, 36 S.E.2d 710 (1946); Northwest Civic Association v. Sheldon, 317 Mich. 192, 27 N.W.2d 36 (1947); Mrs. v. Reynolds, 217 Mich. 200, 27 N.W.2d 40 (1947); Schwartz v. Hubbard, 198 Okla. 194, 177 P.2d 617 (1947); Hawkins v. Wayne, 198 Okla. 400, 178 P.2d 138 (1948).

¹²¹ Loren Miller to author, Nov. 25, 1953.

¹²² The Court's exercise of its discretionary powers has been closely analysed and attacked. See Fowler V. Harper and Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. OF PENN. L. REV. 293 (1951). This criticism has been answered by Louis L. Jaffe: "It should be remembered that in almost every case in which certiorari has not been granted there has already been the considered judgment of two or three courts and that, if the problem is exigent and persistent, it will ultimately reach the Supreme Court; the delay may perhaps produce conditions conducive to a more mature disposition." Jaffe, Foreword to "*The Supreme Court, 1950 Term*," 65 HARV. L. REV. 107, 110 (1951).

their judicial enforcement in *Corrigan v. Buckley*.¹²³ The Court had first refused certiorari in 1929 in two cases in the District of Columbia.¹²⁴ In 1937 it was again asked to grant a writ in a District case and refused it.¹²⁵ From the states, the only case the Court was petitioned to hear was *Hansberry v. Lee*,¹²⁶ which the NAACP brought up from Illinois in 1941. Although certiorari was granted in that case the Supreme Court declined to rule on the constitutional and public policy issues and restricted itself to the question of fraud in the acknowledgments to the covenant. In 1945 the Court refused to grant the writ in *Mays v. Burgess*¹²⁷ but to this order was appended the comment "Mr. Justice Murphy and Mr. Justice Rutledge are of the opinion that certiorari should be granted."

The process by which the Supreme Court determines the cases it shall consider through the manipulation of the writ of certiorari has only been slightly understood by lawyers and the public but it is clear that the writ will be granted when four of the nine justices believe it should be. When Justices Murphy and Rutledge dissented from a denial, therefore, they signified to the Negro attorneys that only two more votes would be needed in any subsequent application for the writ.¹²⁸ That the NAACP leaders knew this and more is revealed by the remarks made in February, 1947 at their conference at Howard University:

It was pointed out that only Justices Murphy and Rutledge seemed to be anxious to have the Court pass unequivocally upon restrictive covenants, and that the balance of the Court does not want to touch restrictive covenant cases at this time. Justice Burton is definitely opposed to our position and Justice Jackson is as yet uncommitted. Therefore, it is necessary that we provide J. J. Murphy and Rutledge with leverage with which to bring two more Justices to their side in order to grant us certiorari. Mr. (Thurgood) Marshall felt that it was important that we not build up a record of many applications for certiorari denied.¹²⁹

The Detroit attorneys, Willis Graves and Francis Dent, urged that the case

¹²³ 299 Fed. 899 (D. C. Cir. 1924), *appeal dismissed*, 271 U.S. 323 (1926).

¹²⁴ *Cornish v. O'Donoghue*, 30 F.2d 98 (D. C. Cir. 1929), *cert. denied*, 279 U.S. 871 (1929); *Russell v. Wallace*, 30 F.2d 781 (D. C. Cir. 1929); *cert. denied*, 279 U.S. 871 (1929).

¹²⁵ *Grady v. Garland*, 89 F.2d 817 (D. C. Cir. 1937), *cert. denied*, 302 U.S. 694 (1937).

¹²⁶ 372 Ill. 369, 24 N.E.2d 37 (1940), *rev'd on other grounds*, 311 U.S. 32 (1940).

¹²⁷ 147 F.2d 869 (D. C. Cir. 1945), *cert. denied*, 325 U.S. 868 (1945), *rehearing denied*, 325 U.S. 896 (1945).

¹²⁸ The rumpus over certiorari provoked Justice Frankfurter to explain to the bar that a denial "simply means that as a matter of 'sound judicial discretion' fewer than four members of the Court deemed it desirable to review a decision of a lower court." *Agoston v. Pennsylvania*, 364 Pa. 464, 72 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

¹²⁹ NAACP Howard University Conference, p. 2.

of *Sipes v. McGhee*¹³⁰ would be a suitable test and others agreed that it might turn the trick. But it was decided that additional cases should be allowed to develop before applying for certiorari in any single one. However all agreed that once other cases in Michigan and elsewhere were decided 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."¹³¹

Before another meeting of NAACP lawyers was held the St. Louis attorney, George Vaughn, took unilateral action by filing a petition for certiorari with the Supreme Court of the United States in *Shelley v. Kraemer*, on April 21, 1947. This provoked NAACP leaders in New York into taking hasty action and so on May 10 a petition was also filed for the *McGhee* case. On the last Monday of the term, the Supreme Court agreed to consider these two cases by granting writs of certiorari to the supreme courts of Missouri¹³² and Michigan.¹³³ Charles Houston's Washington cases were not decided by the Circuit Court until May 26 and he did not file petitions for certiorari with the Supreme Court until August. On October 20th, early in the new term, certiorari was granted in the cases of *Hurd v. Hodge* and *Urciolo v. Hodge*.¹³⁴ Following common practice the Court ordered that these federal cases be consolidated with the two state cases for its consideration. Briefs were to be filed before December 1 and oral arguments in the four cases were set for January 16 and 17, 1948. With a decision by the Court in the spring of 1948 the history of these restrictive covenant cases would be concluded after four years in the courts.

With this important round won, Charles Houston, Thurgood Marshall, Loren Miller and other NAACP attorneys could know that the justices of the Supreme Court would comprehend the broad interests of the Negro they were defending. The remarks of Chief Justice Vinson before the American Bar Association could well have been addressed to these lawyers:

Those of you whose petitions for certiorari are granted by the Supreme Court will know . . . that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients but tremendously important principles upon which are based the plans, hopes, and aspirations of a great many people throughout the country.¹³⁵

¹³⁰ 316 Mich. 614, 25 N.W.2d 638 (1947).

¹³¹ NAACP Howard University Conference, p. 3.

¹³² *Shelley v. Kraemer*, 355 Mo. 814, 198 S.W.2d 679 (1947), cert. granted, 331 U.S. 803 (1947).

¹³³ *McGhee v. Sipes*, 316 Mich. 614, 25 N.W.2d 638 (1947), cert. granted, 331 U.S. 804 (1947).

¹³⁴ *Hurd v. Hodge*, *Urciolo v. Hodge*, 162 F.2d 233 (D. C. Cir. 1947) cert. granted, 332 U.S. 789 (1947).

¹³⁵ Chief Justice Vinson, Address to the American Bar Association, 18 U.S.L. WEEK 2117, Sept. 13, 1949.

NAACP and the Trial Lawyers

Consolidation of the four restrictive covenant cases by the Supreme Court meant that there would have to be some coordination in brief writing and oral argument by the Negro attorneys in the different cases if final success was to be gained. In fact a cooperative spirit was established and maintained even though the NAACP had somewhat different relations with the lawyers in charge of the four cases. The national office entered the Michigan case as *amicus curiae* at the state supreme court level. The two Detroit lawyers, Graves and Dent, were willing to allow the national office of the NAACP to prepare the brief in the United States Supreme Court. Their names appeared on the briefs but Thurgood Marshall and his associates in New York prepared the case.¹³⁶

Shelley v. Kraemer was not an NAACP case in the strict sense and rapport between the national office and the trial lawyer, George Vaughn, was never good. Diplomatic relations were carried on but cordiality was lacking. In New York, Vaughn was regarded as lacking proper sophistication and skill successfully to handle the intricate legal complexities of the problem. In St. Louis, Vaughn's feelings have been described by a lawyer who was closely associated with him in this case:

. . . All contacts with the NAACP, if any, were handled by him. Mr. Vaughn died some time ago, but I remember him mentioning to me that he received very little or no encouragement. I believe that organization thought, either it was not the proper time, or that a different case should be presented at some other time. I also received the impression from Mr. Vaughn that he received very little, if any, financial help from them; . . . Mr. Vaughn and I, however, prepared the briefs and argued before the Supreme Court in our case.¹³⁷

In the Washington cases there was instinctive cooperation between Charles Houston and his local helpers and the national office of the NAACP. Houston was a close friend of Thurgood Marshall and they moved in the same direction at about the same pace without antagonism. In Washington, furthermore, there was a group of interested people who cooperated closely with Houston in getting the Hodge case to the Supreme Court. One was Phineas Indritz, an attorney who worked in the Office of the Solicitor of the Department of the Interior. He sought the help of Charles Abrams of New York, recognized expert in the field of housing and a leader in the attack on segregated housing in the New York area. Inviting Abrams to a meeting in Washington, Indritz wrote, on July 23, that a group of District of Columbia lawyers, economists, sociologists and race relations experts, cooperating with Charles Houston "think it would be most helpful to the Supreme Court if a comprehensive study of the

¹³⁶ NAACP ANNUAL REPORT, 1948, p. 27.

¹³⁷ Herman Willer to author, July 18, 1952.

prevalence and effect of private zoning through operation of the restrictive covenants . . . could be presented to the Supreme Court at the time of the argument."¹³⁸ If this could be completed, perhaps the study could be published by the Russell Sage Foundation.

Indritz reported progress when he wrote again on August 14:

During the past two days, working past midnight, Houston, (Spottswood) Robinson and I have whipped into shape and sent to the printer petitions for writs of certiorari and brief for submission to the Supreme Court of the United States in the cases of *Hurd* and *Urciolo v. Hodge*. We expect to file them next week. . . . We shall begin preparing the briefs on the merits, on the assumption that the writs of certiorari will be granted.¹³⁹

Indritz stressed the need to support the attack in the Supreme Court with a "full sociological presentation." And he hoped that Robert Weaver, who had already published studies on the effects of racial restrictive covenants, and others who were expert in the field would help.

. . . Houston and I feel that the brief should be accompanied by a separate appendix reprinting all the major articles, or excerpts, dealing with the effects of these covenants. Although the Justices might have the library send to them the articles and books to which we make reference, there would be greater likelihood of their reading the references if we place such a compilation before them.

Flooding the Law Reviews

If the Negroes were to win the restrictive covenant cases they had carried to the Supreme Court in the 1947 Term they would have to rely heavily on non-judicial material. The precedents favored the Caucasians overwhelmingly. To offset this advantage the Negroes would try to persuade the Court that judicial enforcement of covenants was state action which violated the Fourteenth Amendment, as Professor McGovney had suggested.¹⁴⁰ They would also point to the social results of the practice of enforcement. But reasoning by itself is not enough, nor are raw statistics considered to be sufficient for presentation in legal briefs. Citations of articles and books where the facts and ideas had been published would surely make a better appeal to the learned justices. At least this was the theory of the lawyers involved in these cases. In order to meet this and other problems, Thurgood Marshall sent out a call for another NAACP conference for the fall of 1947:

¹³⁸ Indritz to Abrams July 23, 1947. Charles Abrams, public housing authority, lawyer and author, made his personal files available to the author, New York City, March 13-17, 1952. Cited hereafter as Abrams files.

¹³⁹ Indritz to Abrams August 14, 1947. Abrams files.

¹⁴⁰ D. O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5 (1945).

In order that we may present every issue as clearly as possible, and cover all conceivable arguments which might be presented to the court, we 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 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. Prior to the date of the meeting, we will also send to you an outline of the material in the record in the two cases and any other written material which we have which will be helpful in preparing for discussion on these cases.¹⁴¹

Forty-four persons attended the all-day conference in New York on September 6.¹⁴²

The first round of discussion at the conference centered upon the twin problem of preparing sociological material and getting it published so that it could be used in briefs to be presented to the Supreme Court. Phineas Indritz suggested that the maps he had might be copyrighted, although he felt it "would be much better if they were published by a reputable magazine."¹⁴³ Charles Houston urged that "evidence and data which is not already in the record should be published and put in some acceptable form."¹⁴⁴ Marian Wynn Perry of the New York office of the NAACP commented: "Among the organizations here represented there must be a great many publicaions. We should get our joint public relations committees together and tell them that we want it published in the best kind of

¹⁴¹ Form letter from Thurgood Marshall for the NAACP Legal Defense and Education Fund, Inc., New York, July 11, 1947. Abrams files.

¹⁴² Those present were: Charles H. Houston, Washington, D. C., Chairman; James T. Bush, St. Louis; Sidney P. Brown, Chicago; Irving Brand, Anti-Nazi League, New York; Robert L. Carter, New York; Francis M. Dent, Detroit; Frank Danner, CIO, Washington, D. C.; Phineas Indritz, Dept. of Interior, Washington, D. C.; Harold Kahen, American Jewish Congress, New York; Edward Lovett, Washington, D. C.; Newman Levy, American Jewish Committee, New York; Loren Miller, Los Angeles; Loring B. Moore, Chicago; Robert Ming, Chicago; Constance B. Motley, New York; William K. Newman, Congregational Board, Home Missions, New York; James Nabritt, Washington, D. C.; Shad Polier, New York; Marion W. Perry, New York; Sol Roblin, Anti-Defamation League; S. Rosenwein, Lawyers Guild, New York; Spottswood W. Robinson, Richmond, Virginia; Stanley M. Riesner, American Jewish Congress, New York; Louis L. Redding, New York; S. Rosenzweig, Lawyers Guild, New York; Leon A. Ransom, Washington, D. C.; Jacob Schaman, American Jewish Committee, New York; Ina Sugihara, Protestant Council of Churches, New York; Lucia Thomas, National Bar Association; Raphael G. Urciolo, Washington, D. C.; George Vaughn, St. Louis; Franklin H. Williams, New York; Ruth Weyand, Washington, D. C.; Allen Wirin, Los Angeles; Walter White, New York; Richard Westbrook, Chicago; Andrew Weinberger, New York; Willis M. Graves, Detroit; Prof. R. L. Hale, Columbia University, New York; Dr. Frank Horne, Washington, D.C.; Will Maslow, American Jewish Congress; Byron Miller, Chicago; Annette Peyser, New York.

¹⁴³ Meeting of NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants, Sept. 6, 1947, mimeographed minutes, NAACP files, p. 2.

¹⁴⁴ *Id.* at 3.

space available in the October issues."¹⁴⁵ This was agreed to by Harold Kahen of Chicago, who had published an article against the validity of the judicial enforcement of covenants in 1945.¹⁴⁶ He believed that "the sociologists should gather the material and get it published in some journals and then supply it to a group of lawyers."¹⁴⁷

The NAACP had already published some material. It had sponsored a pamphlet, *Race Bias in Housing* by Charles Abrams, together with the American Council on Race Relations and the American Civil Liberties Union.¹⁴⁸ Abrams had also attacked covenants in the monthly magazine, *Commentary*,¹⁴⁹ published by the American Jewish Committee. These blasts served the purpose of bringing the evils of racial restrictive covenants to the attention of the public. However, the object of future publication would be to gain new sources which might be cited in the briefs to be filed with the Supreme Court.

So much independent work had been done in assembling sociological material that the leaders of the movement to end restrictive covenants hoped to coordinate work by appointing a committee to handle the problem. Dr. Louis Wirth of the University of Chicago, who was not present at the meeting, was made chairman. Others agreeing to serve on the committee were Loring Moore, Robert Ming, Harold Kahen, Bryon Miller and Dr. Robert Weaver, all of Chicago, Ruth Weyand of Washington, James T. Bush of St. Louis, and Annette Peyser of New York.¹⁵⁰

Soon a great flood of writing condemning the existence and application of racial restrictions in housing flowed from the presses of the nation. Numerous case notes and comments appeared.¹⁵¹ Full-length articles turned up in *The Annals*, *Yale Law Journal*, *University of Chicago Law*

¹⁴⁵ *Ibid.*

¹⁴⁶ Harold I. Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 U. OF CHI. L. R. 198 (1945).

¹⁴⁷ Meeting of NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants, Sept. 6, 1947, p. 4.

¹⁴⁸ Charles Abrams, *RACE BIAS IN HOUSING* (1947).

¹⁴⁹ Charles Abrams, *Homes for Aryans Only; The Restrictive Covenant Spreads Legal Racism in America*, COMMENTARY (May, 1947), p. 421.

¹⁵⁰ Meeting of NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants, Sept. 6, 1947, p. 4.

¹⁵¹ The comments, many of them questioning the correctness of court enforcement of racial restrictive covenants, were as follows: *Mays v. Burgess*, 147 F.2d 869 (D. C. Cir. 1945), cert. denied, 325 U.S. 868 (1945); 33 GEO. L. J. 356 (1945); 59 HARV. L. REV. 293 (1945); 40 ILL. L. REV. 432 (1946); 3 NAT. BAR J. 364 (1945); 18 Rocky Mt. L. Rev. 148 (1946). *Northwest Civic Association v. Sheldon*, 317 Mich. 416, 27 N.W.2d 36 (1947); 33 VA. L. REV. 658 (1947). *Kemp v. Rubin*, 69 N.Y.S.2d 680 (1947); 22 N.Y.U. L.Q. 301 (1947). *Perkins v. Trustees of the Monroe Avenue Church of Christ*, 79 Ohio App. 457, 70 N.E.2d 487 (1946), appeal dismissed, 147 Ohio St. 537, 72 N.E.2d 97 (1947); 17 U. OF

*Review, National Bar Journal, Architectural Forum, National Lawyers Guild Review, Journal of Land and Public Utility Economics, and Survey Graphic.*¹⁵² Two books on the subject were also published: *The Negro Ghetto* by Dr. Robert Weaver and *People vs. Property: Race Restrictive Covenants in Housing* by Herman H. Long and Charles S. Johnson of Fisk University.¹⁵³ Quite clearly the writing public was aroused; the NAACP could tell the Supreme Court.

NAACP's "Friends of the Court"

With plans made to prepare sociological data for use in the briefs, the NAACP conference of September 6, 1947, turned to the question of *amici curiae* briefs.¹⁵⁴ Charles Houston took a poll of the organizational representatives in attendance and found that fourteen planned to file briefs as friends of the court. These were: the American Jewish Congress, American

CIN. L. REV. 77 (1948). *Kraemer v. Shelley*, 355 Mo. 814, 198 S.W.2d 679 (1946); 12 MO. L. REV. 221 (1947). *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947); 31 MINN. L. REV. 385 (1947); 9 DETROIT L. REV. 29 (1947); 9 OHIO ST. L. J. 325 (1948). *Hurd v. Hodge, Urciolo v. Hodge*, 162 F.2d 233 (D. C. Cir., 1947); 33 CORNELL L.Q. 293 (1947); 10 GA. BAR J. 237 (1947); 15 U. OF CHI. L. REV. 193 (1947); 42 ILL. L. REV. 812 (1948); 23 NOTRE DAME LAW 256 (1948).

¹⁵² Following is a list of articles which express opposition to court enforcement of racial restrictive covenants in the order of their appearance prior to the United States Supreme Court's opinion in the principal cases: Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendment Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627 (1946); S. A. Jones, Jr., *Legality of Race Restrictive Covenants*, 4 NAT. BAR J. 14 (1946); Charles Tefft, *Marsh v. Alabama—A Suggestion Concerning Racial Restrictive Covenants*, 2 NAT. BAR J. 133 (1946); Robert C. Weaver, *Housing in a Democracy*, 244 ANNALS 95 (1946); Note, *Anti-Discrimination Legislation and International Declarations as Evidence of Public Policy Against Racial Restrictive Covenants*, 13 U. OF CHI. L. REV. 477 (1946); Loren Miller, *The Power of Restrictive Covenants*, 36 SURVEY GRAPHIC 46 (1947); Note, *Restrictive Covenants Directed Against Purchase or Occupancy of Land by Negroes. THE AMERICAN CITY (MAY, 1947)*; Loren Miller, *Race Restrictions on Ownership or Occupancy of Land*, 7 LAW. GUILD REV. 99 (1947); Clifford R. Moore, *Anti-Negro Restrictive Covenants and Judicial Enforcement Constituting State Action under the Fourteenth Amendment*, 21 TEMPLE L. Q. 139 (1947); John P. Dean, *None Other Than Caucasian*, ARCHITECTURAL FORUM (October, 1947) p. 16; Loren Miller, *Covenants for Exclusion*, 36 SURVEY GRAPHIC 541 (1947); George Vaughn, *Resisting the Enforcement by Courts of Restrictive Covenants Based on Race*, 5 NAT. BAR J. 381 (1947); Note, *Current Legal Attacks on Racial Restrictive Covenants*, 15 U. OF CHI. L. REV. 193 (1947); Irwin M. Taylor, *The Racial Restrictive Covenants in the Light of the Equal Protection Clause*, 14 BROOKLYN L. REV. 80 (1947); I. N. Groner and D. M. Helfeld, *Race Discrimination in Housing*, 57 YALE L. J. 426 (1948).

¹⁵³ Herman H. Long and Charles S. Johnson, *PEOPLE VS. PROPERTY, RACE RESTRICTIVE COVENANTS IN HOUSING* (1947); Robert C. Weaver, *THE NEGRO GHETTO* (1948); Kenesaw M. Landis, *SEGREGATION IN WASHINGTON* (1948).

¹⁵⁴ Meeting of NAACP Lawyers and Consultants on Methods of Attacking Restrictive Covenants, Sept. 6, 1947, p. 4.

Jewish Committee, Protestant Council of New York City, Japanese American Citizens' League, National Bar Association, Anti-Defamation League, American Civil Liberties Union, Negro Elks, Congress of Industrial Organizations (CIO), Anti-Nazi League, Board of Home Missions of the Congregational Church, National Lawyers Guild, American Indian Association and the American Indian Council.

Leaders of the NAACP were no doubt gratified to have so much support offered in carrying the fight to the Supreme Court but they had the practical problem of winning the cases and feared that a show of force without careful planning might be disastrous. Governor Hastie made this warning:

The question of who shall file *amici* briefs needs some coordination. We will get a large group of *amici* briefs saying the same thing and some of them will be good and others will be poor which will not do very much for the cases. Suggests there should be an *amici* brief committee.¹⁵⁵

Phineas Indritz was quick to agree.

We should strive not to flood the court with too many briefs. Suggested that a limited number be filed and that other interested organizations should merely indicate that they concur in everything that has been said by the organizations filing these briefs. Should ask the five lawyers, Graves and Dent, Vaughn, Ransom and Houston to decide how we are going to present these *amicus* briefs.¹⁵⁶

A representative of the Non-Sectarian Anti-Nazi League to Champion Human Rights, Irving Brand, put the dilemma in a nutshell when he remarked that "too many friends are sometimes just as bad as too many enemies."¹⁵⁷ The motion was seconded by Harold Kahen who urged that a committee be established to take up "the task of convincing some of the organizations that what they have already been said and that they should merely sign the brief as concurring."¹⁵⁸ He also suggested that the organizations that did file briefs should outline the theme they were going to follow.

Although the minutes of the New York meeting show that consensus was reached on limiting the number of briefs and coordinating their content, little was done afterwards to insure this. As counsel for the parties, the NAACP lawyers had to give consent for the filing of each *amicus curiae* brief¹⁵⁹ but no thought was given to formally restricting mis-

¹⁵⁵ *Id.* at 5.

¹⁵⁶ *Id.* at 4.

¹⁵⁷ *Id.* at 5.

¹⁵⁸ *Ibid.*

¹⁵⁹ The general rule is that "a brief of an *amicus curiae* may be filed only upon written consent of all parties, or upon the granting by the Court of a motion for leave to file." STERN & GRESSMAN, SUPREME COURT PRACTICE 295 (1950).

guided friends who wanted to help. The lawyers for the white property owners likewise had to give permission to all friends of the court; they did so willingly.¹⁶⁰

The NAACP did not wish to alienate any of the groups so eager to provide assistance but some gentle hints were made to gain limited coordination. Thus when Thurgood Marshall granted consent to file a brief *amicus curiae* to William Strong of the American Indian Citizens League of California he included these suggestions:

. . . I believe that it would be very helpful if you would check with Mr. Loren Miller, of your city, (Los Angeles) who will join in arguing this case before the Supreme Court, so that you will be familiar with the points raised and the general discussion which has occurred among the attorneys for various organizations interested in filing briefs *amicus*. We are particularly anxious, in securing the cooperation of attorneys for organizations who are interested in filing briefs *amicus*, to eliminate as much as possible the repetition of arguments which are fully presented in other briefs. This does not mean, of course, that we do not want briefs filed but rather that we are hoping that each brief can present a new angle of the case.¹⁶¹

So far as is known the NAACP took no other measures to see that the *amici curiae* briefs favoring them were worked up together. Thurgood Marshall and his staff were fully occupied with the preparation of the main brief in the *McGhee* case. Eventually a total of nineteen briefs were filed by friends of the court which argued for the Negro position but except for the fact that those interested could draw from the same published sources and could correspond among themselves for information and ideas these briefs were not coordinated.

As an isolated example of the manner in which one *amicus curiae* brief developed, the experience of the Independent, Benevolent, Protective Order of Elks of the World is instructive. This large Negro fraternal organization's full-time counsel, Perry Howard, a Republican National Committeeman from Mississippi, has explained how this came about.¹⁶² George Vaughn came to him and suggested that the Elks file a brief *amicus curiae*. Howard then discussed the matter with the executive board of the Elks and gained consent to file a brief, following which Vaughn was retained to write the brief for the organization. Subsequently, George Vaughn wrote a nineteen page brief for which, according to Howard, he received \$1,000.

¹⁶⁰ Both Gerald Seegers in St. Louis, and James Crooks have stated that they believed that all persons interested in the outcome of the cases were entitled to file briefs. This is not to say that they were not disquieted by the great number of *amicus curiae* briefs on the opposition side presented to the Court.

¹⁶¹ Marshall to Strong, Sept. 23, 1947. Abrams files.

¹⁶² Statement of Perry Howard, Washington, D. C., on December 21, 1951, personal interview.

Some broad problems of what should be said in a brief and who should say it are illuminated by the experiences of the New York housing consultant, Charles Abrams, in connection with the *amicus curiae* briefs filed in the covenant cases by two organizations. The American Civil Liberties Union had entered numerous Supreme Court cases and therefore had the experience and know-how to write its own brief, but sought Abrams' advice and asked him to sign it.¹⁶³ In the meantime, Newman Levy of the American Jewish Committee sought Abrams' comments on the brief Levy was writing for that organization. In November, 1947, Abrams responded with a letter setting forth his ideas on the proper function of the *amicus curiae* brief.¹⁶⁴

I have just completed reading your brief. I just couldn't reach it earlier, and hope it isn't too late for suggestions.

It is an excellent "main brief" written with your fine straight style. But I question the adequacy of its emphasis as a brief *amici*.

I have always viewed the function of the *amici* to take up and emphasize those points which are novel or which, if stressed in the main brief, might dilute or weaken the main forceful arguments.

I never thought there was much cumulative force in the repetition of logic by eighteen briefs. Unlike good poetry, repeated it has a tendency to bore. But a weak legal argument, with a moral quality, forcefully presented by an "outsider" will not detract from the force of the main argument. If it creates a healthy doubt or insinuates even a slight justification for itself on moral grounds, it may bend the judge toward adopting the law advocated in the main brief.

Novel arguments in a brief *amici* may serve another purpose. Sometimes the court is ready to adopt the arguments of the main brief. In our case for example it may entail upsetting *Corrigan v. Buckley*. Or it might be loath to annul a contract between private parties or impinge upon the states' rights doctrine.

The *amici* should be providing the arguments that will salvage the judges' consciences or square with their prepossessions should they lean toward holding for us.

The TVA decision (*Ashwander v. Tennessee Valley Authority*¹⁶⁵) is a case in point. Upholding TVA as an exercise of the War Power is about as reasonable an analogy as the Laws of Mohammed are to our law of Domestic Relations. But the Court did not then wish to expand the welfare power so drew upon the war power, which surprised everybody.

In conclusion, Abrams suggested that sociological arguments were useful for furnishing the moral background for a judicial holding.

. . . play up what entailment of all land would mean socially. Use the relevant references by Gunnar Myrdal; give the British background for exclusion of non-conformists and their migration to America where the freehold and the fee simple became one of our earliest and greatest tradi-

¹⁶³ Frederick B. Sussman to Abrams, Nov. 7, 1947; Clifford Forster to Abrams, Dec. 2, 1947; Forster to Abrams, Dec. 9, 1947. Abrams files.

¹⁶⁴ Abrams to Levy, Nov. 13, 1947. Abrams files.

¹⁶⁵ 297 U.S. 288 (1936).

tions. Show how Jefferson and the States immediately after Independence adopted laws excluding primogeniture and entail. Quote from these constitutions and the debates that prompted their enactment. What if covenants in Washington, D. C., become as common as in Chicago and Los Angeles? Will that not bar Negroes, Jews or other Americans from holding office? May people band together to bar a race from food and clothing? These are a few of the important irrelevancies that occur to me.

Why desert all these rich and adventurous passages to jam the safe waters that should be reserved for the main advocates?

There can be little quarrel with these sentiments as an expression of the ideal *amicus curiae* brief, but the various organizations had their own interests at heart, and these did not necessarily coincide with Abrams' ideal. Newman Levy explained this problem in an answer to Abrams.

I enjoyed your letter and I wish that time permitted me to adopt your suggestions. As you know the briefs have to be filed before Dec. 1 so I have to send mine to the printer next week.

I thoroughly agree with everything that you say about the function of an *amicus* brief. So far as the court is concerned I am inclined to think that it is pretty much like an endorsement on a note. Its purpose is to tell the court that we agree with the appellant and we hope that it will decide in his favor. I got a note from Proskauer (Joseph Proskauer of the American Jewish Committee) last summer when I first started the brief, in which he said that *amicus* briefs aren't worth a damn because courts don't read them anyway.

There is another function in the present case which perhaps I shouldn't discuss, and which, in fact, I hope you won't repeat. I mean that horrible thing called "public relations." Many of these briefs, I regret to say, are being filed as a sort of organizational propaganda. Although I worked hard on mine it is quite possible that the decision would be the same even if I didn't file it. In the Vashti McCollum case involving released time in the schools, we recently submitted a combined brief, and the American Jewish Congress has ordered 1500 copies to distribute to its admirers around the country. . . .

When this brief was first contemplated I discussed it with my legal committee, and they agreed that I should confine myself exclusively to the constitutional question. That was why I omitted the sociological stuff, the United Nations Charter and the rest of it. You see, if the Supreme Court should happen to mention in its decision that restrictive covenants are illegal upon the authority of *Buchanan v. Warley*, we all will be able to say to our members, "Isn't that exactly what we told the Court?"¹⁰⁰

¹⁰⁰ Levy to Abrams, Nov. 14, 1947. Abrams files. The publicity motivation in the use of *amicus curiae* briefs largely accounts for recent restrictions on the device by the Supreme Court. For a discussion of the excesses of organized groups, see Harper and Etherington, *Lobbyists Before the Court*, 101 U. OF PENN. L. REV. 1172 (1952). The *Revised Rules of the Supreme Court*, Rule 42.1, effective July 1, 1954, provide that an *amicus curiae* brief may be filed "only after order from the Court or when accompanied by written consent of all parties to the case." Justice Tom Clark, in conversation with the author, Cleveland, Ohio, Oct. 27, 1954, stated that he believed the *amicus* brief was too often used as a propaganda device. For further information on reasons for the limitation, see Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, at 80-81 (1954). On adoption of the revised rules, Justice Black made this objection: ". . . I have never favored the almost insuperable obstacle our rules put in the way of briefs sought to be filed by persons

Even though the brief was not changed, Abrams consented to having his name appear on the brief.

Later, Marian Wynn Perry, Assistant Special Counsel of the NAACP Legal Defense and Education Fund, who was put in charge of coordinating the various briefs, wrote to Abrams to thank him for a copy of the letter he had written to Levy. "I wish I'd had the courage to write that kind of letter to all the *amici*," she said.¹⁶⁷

The Department of Justice as Amicus Curiae

The winter of 1947-1948 appeared to be a propitious one in official Washington for Negroes hoping to see the enforcement of restrictive covenants ended. The Report of President Truman's Committee on Civil Rights appeared in October and the President's sweeping, and controversial civil rights program, so favorable to Negroes, was sent to Congress in February.¹⁶⁸ The Committee had been created at the suggestion of Walter White, Secretary of the NAACP, and others who called on President Truman at the White House in the fall of 1946.¹⁶⁹ Composed of fifteen civic, business, educational and religious leaders, the Committee's chairman was Charles E. Wilson of General Electric and its executive secretary was Professor Robert K. Carr of Dartmouth College.¹⁷⁰ At its meetings during 1947, the Committee heard some forty witnesses and also had correspondence with "nearly 250 private organizations and individuals."¹⁷¹ The findings and recommendations were highly pleasing to the NAACP.

The Report of the President's Committee on Civil Rights, entitled *To Secure These Rights*, condemned the use of racial restrictive covenants in no uncertain terms¹⁷² and recommended the following action in order to strengthen the right to equality of opportunity:

The enactment by the states of laws outlawing restrictive covenants;
Renewed court attack, with intervention by the Department of Justice,
upon restrictive covenants.

other than the actual litigants. Most of the cases before this Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* beliefs." SUPREME COURT JOURNAL, Oct. Term, 1953, 194.

¹⁶⁷ Marian Wynn Perry to Abrams, Nov. 21, 1947. Abrams files.

¹⁶⁸ President's Committee on Civil Rights, *TO SECURE THESE RIGHTS* (1947); New York Times, October 30, 1947, p. 1.

¹⁶⁹ Walter White, *A MAN CALLED WHITE*, 203.

¹⁷⁰ Among many attacks on the Committee was one by the columnist Westbrook Pegler which described its personnel as subversive. The numerous factual errors in Pegler's articles have been corrected in a Jesuit publication. See Edward Marciniak, "Pegler: A Case Study," 2 *SOCIAL ORDER* (1952) pp. 3-10.

¹⁷¹ *TO SECURE THESE RIGHTS*, p. 178.

¹⁷² *Id.* at pp. 68-70.

The effectiveness of restrictive covenants depends in the last analysis on court orders enforcing the private agreement. The power of the state is thus utilized to bolster discriminatory practices. The Committee believes that every effort must be made to prevent this abuse. We would hold this belief under any circumstances; under present conditions, when severe housing shortages are already causing hardship for many people of the country, we are especially emphatic in recommending measures to alleviate the situation.¹⁷³

This was a small part of the complete report, but the prestige of the Committee which made the recommendation was great, and anything it said was important.

The position of the President's Committee in opposing the enforcement of racial restrictive covenants was anticipated at the September, 1947, meeting of NAACP lawyers and consultants in New York and thought was given to exploiting this fact. Phineas Indritz, the Interior Department lawyer, suggested that if the Judiciary Branch of the Government was to be persuaded to end the effectiveness of covenants an effort should be made to win the support of the Executive Branch. The minutes of the meeting provide a summary of the remarks made by Indritz:

Stated that it is important to get government in on it. Government has decided not to file briefs in the Japanese cases.¹⁷⁴ The Bureau of Indian Affairs, Dept. of Interior will file a memorandum on the Indian aspects of restrictive covenants. Permission will also have to be cleared through the Dept. of Justice. Also understands that the President's Committee is going to make some recommendations. Stated that it would be a good idea for the directors of the various organizations represented to visit the heads of the various departments. There should be a well-coordinated group action to get behind these agencies.¹⁷⁵

The Department of Justice functions as the law office of the United State Government and consequently is charged with enforcing the laws of the United States. Within the Department the Solicitor General's office conducts Government litigation in the Supreme Court. Ordinarily this involves legislation enacted by Congress and administrative action by a Government agency. The Solicitor General during most of President Truman's administration, Philip Perlman, has described the extent of activity of his office. "During the 1947 term the Government was involved in 57 percent of the cases argued orally before the Court on the merits, and in 41 percent of all appellate cases before the Supreme Court."¹⁷⁶ The fact that

¹⁷³ *Id.* at p. 169.

¹⁷⁴ *Oyama v. California*, 332 U.S. 336 (1948); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

¹⁷⁵ Meeting of NAACP Lawyers and Consultants, Sept. 6, 1947, p. 4.

¹⁷⁶ Philip B. Perlman, *The Work of the Office of the Solicitor General of the United States*, an address before the Maryland State Bar Association, Atlantic City, July 2, 1949, p. 4.

the record of the Solicitor General's office in winning the cases in which it participates is about 75 percent would naturally make it a powerful ally in any Supreme Court case. Philip Perlman has recently recalled how the decision of the Department of Justice to file a brief *amicus curiae*, on the side of the Negroes, was reached:

The decision was reached during informal conferences which I had with Attorney General Tom C. Clark at the time and was announced by him during the course of a press conference. There were a number of letters filed with the Attorney General and also with me by different religious, racial, welfare and civil rights organizations, urging the Government to enter the litigation. I believe it was the first time that the Department of Justice had filed a brief in litigation of this character to which it was not a party. It was also decided, in addition to the filing of a brief, that I should ask the Court for leave to present an oral argument, so that in that case the Government filed a brief and argued the merits.¹⁷⁷

The friend of the court brief filed by the Department of Justice was a response not only to Negro pressures, the President's Committee on Civil Rights and the President himself but to the wishes of official groups within the Executive Branch. A section of the brief is devoted to repeating specially prepared statements on the conflict between the existence of racial covenants and the ideal of a public policy established on the basis of equality of opportunity. Letters were included from Raymond M. Foley, Administrator, Housing and Home Finance Agency; Surgeon General Thomas Parra; Oscar L. Chapman, Under Secretary of the Interior; and Ernest A. Gross, Legal Advisor to the Secretary of State. The Justice Department brief was published as a book by the Public Affairs Press in the spring of 1948, before the Supreme Court had come to its decision in the covenant cases.¹⁷⁸

By the end of 1947 the Negroes interested in having the court enforcement of racial restrictive covenants ended had come a great way from the previous year when repeated defeats in state and lower federal courts were being sustained. The Supreme Court had agreed to hear four test cases. The able attorneys of the NAACP were preparing careful briefs in these cases while nineteen other organizations would file briefs *amici curiae* with the Court. Articles and books were appearing regularly to support the Negro position with facts, figures and theories from legal lore and sociology. Finally, a Committee on Civil Rights established and supported by the President of the United States and his Department of Justice had taken strong stands in favor of the Negro claims. It is clear that the Negroes had prepared well for their day in the Supreme Court of the United States.

¹⁷⁷ Philip Perlman to author, Feb. 6, 1953.

¹⁷⁸ Clark and Perlman, PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS with an Introduction by Wesley McCune (1948).

Amici Curiae Briefs for the Negroes

The nineteen briefs *amici curiae* for the Negro side fall into four fairly well-defined categories of interest in these cases. These were led by the racial, ethnic or religious minorities which suffer directly when prejudice is translated into acts of discrimination. Thus a Negro fraternity, the Independent, Benevolent, Protective Order of Elks of the World pointed out, "some of the conditions from which its members and others of the millions who belong to the colored race are suffering."¹⁷⁹ The National Bar Association, composed mainly of Negroes, did the same. The brief *amicus curiae* of the American Indian Citizens League of California reminded the Supreme Court that

The American Indians and their descendants, have not only suffered various indignities for years, but are now being denied, in many parts of the United States, as non-caucasians, a place to live upon the continent which was once entirely theirs, all as the result of land restrictions prohibiting occupancy of premises by Indians and their descendants.

The Japanese American Citizens League expressed the theory that "discrimination or unfair treatment against any minority rebounds to the detriment of all minorities. . . ." Its brief also told of the difficulties of its own members in finding housing. Referring to the forced evacuation by the army in World War II, the brief made its own explanation of the root of the trouble:

Were the Japanese not forced, by reason of race restrictive covenants, to live in definite areas, they would presumably have lived normal lives throughout the area and consequently the "clanishness" which General DeWitt found so inimical to national safety would not have existed.

The interests of the Jews in these cases was much the same as those of the Indians and Japanese Americans. The Court was told that Jewish interests are threatened whenever any group of human beings is humiliated because of race, religion or national origin. One brief was filed by the American Jewish Congress. Another was a consolidated brief *amici curiae* in behalf of four organizations, the American Jewish Committee, B'nai B'rith (Anti-Defamation League), Jewish War Veterans of the United States of America and the Jewish Labor Committee. Also in the category of minorities was the only brief filed for an individual under the misleading title, "California Amici Curiae." Sponsored by a Negro defendant in a Los Angeles covenant case then before the appellate courts there, this brief documented the widespread use and effectiveness of property restrictions on the West Coast.

The briefs of the two large national labor organizations stressed their direct interest in the outcome of these cases in a manner very similar to that

¹⁷⁹ All quotations were taken from the microfilm copy of the briefs. See note 102, *supra*.

of the minority groups. The American Federation of Labor told the Supreme Court that 750,000 of its members were Negroes and said that it desired "to help in every possible way to secure for its members—and for all Americans—the opportunity to live in decent homes. . . ." It asserted that restrictive covenants had been responsible for the scarcity of housing for Negroes and the resulting high prices.

All that the A. F. of L. has accomplished in raising the income of Negro workers in the past—all that may be done in the future—is rendered virtually worthless when members cannot use their increased means to leave the ghettos and move to more congenial surroundings.

The same was true for the members of Congress of Industrial Organizations, whose brief was signed not only by its General Counsel, Lee Pressman, but also by twenty-six attorneys representing member international unions. "The effect of these covenants on our own members has not been confined to depriving them of adequate shelter at reasonable prices and endangering their livelihood," the CIO brief said. "These covenants have forced our members into slum areas which breed vice, disease and delinquency."

A third batch of briefs came from religious organizations. In one of the few briefs ever filed with the Supreme Court without a legal citation, counsel of the Congregational Church sought to persuade the justices to abstain from evil by preaching them a sermon.

We repent of the sin of racial segregation as practiced both within and outside our churches, and respond to the mandate of the Christian Gospel to promote with uncompromising word and purpose, the integration in our Christian churches and our democratic society of all persons of whatever race, color, or ancestry on the basis of equality and mutual respect in an inclusive fellowship.

* * * * *

Segregation is a sinful denial of fellowship between men and women who are equally chosen of God whatever their color or national ancestry may be. Because of the evil consequences of segregation—psychological, economic, sociological—this commonly practiced form of discrimination on the basis of race and creed denies the very basis of our democratic creed and undermines our moral influence in international affairs. We believe that race restrictive covenants are unconstitutional, immoral, and against the public interest and welfare. They increase and perpetuate hostility between groups and are a persistent threat to peace and progress in our society. It is our conviction that a great moral victory would be achieved by this Nation if the constitutional and democratic principles of America were to be upheld by a decision of the Supreme Court of the United States invalidating these unjust and discriminatory agreements so far as they are now enforceable by court action.

The brief of the Human Relations Commission of the Protestant Council of New York City was confined to routine legal arguments, but the third religious *amicus curiae*, the American Unitarian Association, emphasized the incompatibility of racial restrictive covenants with the concept of the brotherhood of man.

Other support for Negroes was furnished by a half dozen organizations primarily devoted to various liberal political ends. Part of the constant log-rolling in inter-group politics these organizations hoped to help the Negro so that the NAACP would lend its weight to their special causes. However, in their *amici curiae* briefs in the covenant cases the American Civil Liberties Union and the unaffiliated St. Louis Civil Liberties Committee reiterated the theme of the main briefs. Their concern over the defense of the Bill of Rights was an important overtone in their exposition. Another group, the American Association for the United Nations, noted the impact of racial inequality in the United States on foreign affairs. The Supreme Court was told that legal enforcement of restrictive covenants prevented the country from living up to United Nations ideals. An *amicus* brief from the American Veterans Committee pointed out that many Negroes were former soldiers and that these veterans were prevented by covenants from living in decent homes. Two other organizations, the Non-Sectarian Anti-Nazi League to Champion Human Rights and the National Lawyers Guild, argued in separate briefs as friends of the court that such racial practices as these were contrary to the American democratic creed.

Main Briefs

There was little originality in the briefs for the parties filed with the Supreme Court in the four covenant cases taken under consideration in the autumn of 1947.

The Negro briefs made the familiar constitutional and public policy claims. Two basic arguments were made to the Court. The first was that racial restrictive covenants produce undesirable social results and unfairly limit Negroes' access to decent housing. This assertion was supported by a tremendous amount of sociological data with references to the books and articles published on the subject during the previous few years. The segregated slums which resulted, it was claimed, make enforcement of covenants contrary to sound public policy. Secondly, it was argued that when a court acts to enforce a racial restrictive covenant, it is acting for the state in violation of the limitation of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This, too, was bolstered by reference to the recent articles in the law reviews on the subject as well as the decisions of the Supreme Court which had expanded the concept of state action.

The briefs entered by the white property owners¹⁸⁰ bristled with the precedents of state courts which had enforced restrictive covenants over the years. It was natural to rely on precedent for only one law review article had

¹⁸⁰ John A. Huston, *Constitutional Law — State Court Enforcement of Race Restrictive Covenants as State Action Within Scope of Fourteenth Amendment*, 45 MICH. L. REV. 733 (1947).

supported the Caucasian position.¹⁸⁰ The federal cases from the District of Columbia were stressed in briefs in the *Hodge* cases and the early Supreme Court decision of *Corrigan v. Buckley*¹⁸¹ was repeatedly endorsed. The law of the land on this question was firmly established and should not be tampered with. These briefs were devoted also to answering the Negroes' contentions. It was said that racial restrictions were private agreements; consequently enforcement of them by courts did not deny Negroes any constitutionally-protected right. In fact the action of the courts in these instances supported the contract rights of individual white property owners. The public policy issue again saw the white attorneys relying on precedents. It was added that the position of Congress was a more authoritative expression of public policy than the political speeches of President Truman and the declarations of other executive officials. Congress had refrained from enacting any legislation questioning the wisdom of segregation; rather, it had long supported racial separation in the District of Columbia. From all of this it was urged that the enforcement of racial covenants was in tune with public policy.

On each side the briefs carried no mention of the organizations responsible for them. The National Association for the Advancement of Colored People was not mentioned in any way although the organization lawyers were named on the briefs. The attorneys in *Shelley v. Kraemer* were George Vaughn and Herman Willer; in *McGhee v. Sipes* they were Thurgood Marshall, Loren Miller, Willis Graves and Francis Dent; and in the *Hodge* cases Charles Houston, Phineas Indritz and Spottswood Robinson, III. In this respect the opposing briefs were identical as there was no indication that the actions were sponsored by protective associations in St. Louis, Detroit and Washington. However, the attorneys for these groups signed the briefs: Gerald L. Seegers in *Shelley v. Kraemer*, and Gilligan and Crooks in the other cases.

Decision by the Supreme Court

A unanimous six-man Court ruled in favor of the Negroes in the *Restrictive Covenant Cases* on May 3, 1948. Justices Reed, Jackson and Rutledge had not participated in the oral argument in January and did not take part in the decision. The best surmise for their absence is that each owned or occupied restricted property and did not feel qualified to sit on these cases. In his opinion for the Court, therefore, Chief Justice Vinson spoke for his brothers Black, Frankfurter, Douglas, Murphy and Burton. It was agreed, in *Shelley v. Kraemer* and *McGhee v. Sipes*,¹⁸² that when a state court enjoins Negroes from taking restricted property it is state action in violation of the equal protection guarantee of the Fourteenth Amendment.

¹⁸⁰ 299 Fed. 899 (D.C. Cir. 1924), *appeal dismissed*, 271 U.S. 323 (1926).

¹⁸² 334 U.S. 1 (1948).

The opinion did not mention a single sociological or legal article. No hint of the labors of the NAACP that had gone before is provided. Chief Justice Vinson's opinion was a long one but it dealt primarily with the constitutional problem. In this sense the opinion paralleled McGovney's reasoning for the Supreme Court was now adopting an extension of the state action theory.

A separate opinion by Chief Justice Vinson was given for the District of Columbia cases. Since the Fourteenth Amendment was inapplicable in *Hurd v. Hodge* and *Urciolo v. Hodge*,¹⁸³ the Court held that it was contrary to the Civil Rights Act of 1866 and the nation's public policy for federal courts to use their equity powers to enforce racial restrictive covenants.

Conclusion

Scrutiny of the NAACP's part in the successful litigation which ended the court enforcement of racial restrictive covenants indicates techniques used by a pressure group dealing mainly with the judiciary. The NAACP carefully planned its test cases and encouraged publication of articles for use in its legal briefs. The Association showed adeptness in bringing the Court's attention to its political strength in the Executive Branch and in the nation at large by winning the support of the Justice Department and the organizations which filed *amici curiae* briefs.

Other interest groups in controversies before state and federal courts need to be studied. In numerous instances today organized pressure groups are seeking favorable decisions from the United States Supreme Court. The power and techniques of these groups need to be understood if the movement of constitutional interpretation is to be comprehended. It is hoped that analysis of the role of organizations and their attorneys in Supreme Court cases will become as common as interest in judicial biography. Doctrinal evolution does not take place in a vacuum.

¹⁸³ 334 U.S. 24 (1948).