THE NEGRO AND THE OWNERSHIP OF PROPERTY: AN EXAMINATION OF NAACP STRATEGY IN THE RESTRICTIVE COVENANT CASES

THESIS

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Michael Robert Heintze, B.A.
(Austin, Texas)

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This work is dedicated to my parents,

Albert and Bernice Heintze.

Their countless sacrifices helped make

this study a reality.

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CHAPTER I

RESTRICTIONS UPON THE OWNERSHIP OF PROPERTY: THE PROMISE OF RECONSTRUCTION AND THE FORMATION OF THE NAACP

The decade following the Civil War, commonly known as Reconstruction, was one of the most significant reform eras in American history. With the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, over four million Negro slaves living in Southern states were theoretically granted civil freedom and political equality.[1] For the purpose of orientation, it will be helpful to briefly review the content of these three amendments. The Thirteenth Amendment is the briefest, the most direct, and, in the long run, the least significant of the three. Section one destroyed the institution of slavery, but it did not define the status of the black man.[2] In section two, Congress was given the power to enforce the amendment by "appropriate legislation," but without a definition of status, it was not at all clear what kinds

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[1]Everette Swinney, "Supressing the Ku Klux Klan: The Enforcement of the Reconstruction Amendments, 1870-1874" (unpublished Ph.D. dissertation, University of Texas, 1966), p. 1.

[2]Ibid., p. 2.

of legislation would be "appropriate."[3] In sum, while the Thirteenth Amendment was a seminal reform achievement, by failing to define the exact social and political status of the Negro and the extent of federal power to define and protect that status, the amendment created about as many problems as it solved.[4]

Understandably, conservative Southerners were determined to perpetuate as much of the old slave order as possible. Thus, in response to the Thirteenth Amendment, Southern states enacted the "Black Codes." These laws, like the slave codes they replaced, were designed to "stigmatize, retard, and segregate" Negroes.[5] In other words, they defined the Negroes' new status as being as close to slavery as possible, making a mockery of the Northern idea of freedom.

To meet this racist challenge, Congress passed the Civil Rights Act of 1866, providing an alternative definition of status under the Thirteenth Amendment. This law declared that all persons born in the United States were citizens and enumerated several rights of

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[3] Ibid.

[4] Ibid.; Milton R. Konvitz, A Century of Civil Rights (New York: Columbia University Press, 1961), p. 48.

[5] Swinney, "Supressing the Ku Klux Klan" (dissertation), p. 3.

citizenship.[6] Briefly, it guaranteed citizens the right: (1) "to make and enforce contracts"; (2) "to sue, be parties, and give evidence"; (3) "to inherit, purchase, lease, sell, hold, and convey real property and personal property"; (4) to enjoy "full and equal benefit of all laws and proceedings for the security of person and property"; and (5) to be "subject to like punishment, pains, and penalties."[7]

Due to widespread uncertainty concerning the constitutionality of the law, enforcement of the Civil Rights Act of 1866 was spotty and piecemeal. Ultimately, Congress incorporated the major guarantees of the Civil Rights Act into another constitutional amendment.[8] The resulting Fourteenth Amendment was the most far-reaching as well as the most controversial part of the Reconstruction reforms. Sections one and five construct an expansive, but somewhat vague, barrier against discrimination --"one, a shield to guard the citizens from infringement of his rights by the states; five, a sword (albeit an

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[6]J. G. Randall and David Donald, The Civil War and Reconstruction (Lexington, Massachusetts: D. C. Heath and Company, 1969), pp. 574-80.

[7]Swinney, "Supressing the Ku Klux Klan" (dissertation), p. 3.

[8]Robert W. Johannsen, Reconstruction: 1865-1877 (New York: The Free Press, 1970), p. 4; Randall and Donald, Civil War and Reconstruction, pp. 580-81; Joseph B. James, The Framing of the Fourteenth Amendment (Urbana: University of Illinois Press, 1956), p. 182.

ex calibur [sic] which has never been completely removed from the rock of traditional constitutionalism) authorizing Congressional legislation to positively enforce basic liberties":[9]

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . . .
>
> Section 5
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The terminology of section one is rather vague, but it appears that the men who framed the amendment expected it to include equality for the Negro in adjudication, commerce, property, and transportation. On the other hand, they did not expect section one to bestow upon the Negro the right to vote, the right to intermarry with the white race, or the privilege to attend integrated schools.[10]

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[9]The shield-sword analogy is taken from Robert Carr, Federal Protection of Civil Rights: Quest for a Sword (Ithaca: Cornell University Press, 1947); cited by Swinney, "Supressing the Ku Klux Klan" (dissertation), p. 5.

[10]Swinney, "Supressing the Ku Klux Klan" (dissertation), pp. 6-7.

At any rate, the passage of the Fourteenth Amendment marked a permanent departure in national policy concerning the Negro and a reaffirmation of the ideal that all men are created equal.[11]

The final item of the trilogy, the Fifteenth Amendment, made illegal the use of race as a qualification for voting in federal elections (not state elections). Unfortunately, the amendment left the states free to strangle suffrage through other means such as property qualifications, literacy tests, and poll taxes.[12] Overall, the adoption of the Reconstruction Amendments promised the Negro civil and political equality. Regrettably, political sentiments, especially in the South, created an atmosphere which prevented the transformation of theoretical equality into actual equality.[13]

Southern whites had accepted the Thirteenth Amendment which abolished slavery, with a minimum of objection, but they expected no further federal interference. For this reason, it will be necessary to trace briefly the white reaction to Reconstruction, noting the effect this reaction had upon the Negro. To begin with, Southern

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[11]Jacobus tenBroek, The Antislavery Origins of the Fourteenth Amendment (Berkeley: University of California Press, 1951), p. 217.

[12]Swinney, "Supressing the Ku Klux Klan" (dissertation), p. 7.

[13]Ibid., p. 8.

states made no serious attempt to remodel the Southern economy or society to benefit the Negro.[14] Moreover, when the Republican Congress used federal power to interfere in Southern affairs, via the Civil Rights Act of 1866, most Southern whites vigorously resisted.[15] This resistance resulted in the eventual passage of the Fourteenth and Fifteenth Amendments.

With slavery abolished, Southern planters searched for other methods to keep the Negro subservient and available as a cheap labor source. While Reconstruction made an attempt to free the Negro politically, it did virtually nothing to assure his freedom in the economic sense. Although the Thirteenth Amendment abolished slavery, Negroes faced the hard reality that they owned no land, mules, cotton gins or presses. In addition, they possessed no possible means of acquiring the adequate funds to purchase these necessities.[16] As a result, many Negroes often found themselves in worse economic condition after the Civil War than before it--they were still agricultural laborers, but they no longer enjoyed the "social

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[14]Rembert W. Patrick, The Reconstruction of the Nation (New York: Oxford University Press, 1967), p. 140.

[15]Kenneth M. Stampp, The Era of Reconstruction: 1865-1877 (New York: Vintage Books, 1967), p. 14.

[16]Carter G. Woodson, A Century of Negro Migration (Washington, D.C.: The Association for the Study of Negro Life and History, 1918), p. 128.

security" which was a part of slavery. Eventually, a new economic institution, sharecropping, filled the void created by the demise of slavery. As "croppers," Southern Negroes were "made victims of fraud" as they signed contracts which they could not understand for the purchase of land, goods, or jobs.[17] Vagrancy laws were enacted to harass and imprison unemployed Negroes. Finally, vigilante groups such as the Ku Klux Klan, the Sons of Midnight, the Order of the White Rose, and the Knights of the White Camellia robbed, beat, and murdered Negroes throughout the South in an attempt to discourage their participation in the political process.[18] For the year 1875, General Philip Sheridan reported that in the state of Louisiana alone, as many as 3,500 Negroes had been killed or wounded by such organizations.[19]

There were also discussions in the South and the North suggesting the possible deportation of Negroes from the United States. For example, President Lincoln allegedly supported the "chimerical scheme of ante-bellum idealists" to settle Negroes in Africa, Mexico, Central America, or the Caribbean islands.[20] In addition,

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[17] Ibid.

[18] Patrick, Reconstruction, pp. 151-52.

[19] Woodson, Negro Migration, p. 128.

[20] Patrick, Reconstruction, p. 245.

President Ulysses S. Grant stated in his memoirs that one of the reasons for the attempted annexation of Santo Domingo in 1870 was to secure land for Negroes.[21] Freedmen, however, rejected this idea and sought to keep their American citizenship.[22] Another plan designed to deal with the purported Negro problem called for the relocation of blacks somewhere within the United States. The idea of transforming several Southern states into "Negro commonwealths" was quite appealing to most Northerners, although completely unacceptable to Southern whites as well as Negroes.[23]

Given their preference, most Negroes merely wanted to integrate into the American society and live in peace. Many did desire to move North; but without the necessary finances, they were shackled to their Southern homes and relegated to the life of a sharecropper, domestic servant, or unskilled laborer.[24] For the most part, their only hope rested with the reform-minded Reconstruction Congress. In March, 1865, the

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[21]Ibid.; Thomas A. Bailey, A Diplomatic History of the American People (New York: Appleton-Century-Crofts, 1964), pp. 382-83.

[22]Patrick, Reconstruction, p. 245; Arnold Rose, The Negro in America (Boston: The Beacon Press, 1944), p. 63.

[23]Patrick, Reconstruction, p. 245.

[24]Ibid., pp. 245-46; Rose, Negro in America, pp. 61-62.

Freedmen's Bureau bill was enacted by Congress. In its original form, this proposal suggested, among other things, that all abandoned lands in the South be opened to Negro settlement.[25] However, Congress vacillated on this particular issue and for various reasons emasculated this portion of the bill and dashed the Negro's hopes for land ownership.[26]

Regrettably, the social and economic position of the Negro grew steadily worse as Reconstruction drew to a close. By the election of 1876, Republican politicians were turning away from the philosophy of abolitionism and losing interest in programs aimed at uplifting the Negro. The party of Lincoln was no longer dedicated to "human egalitarianism, but to laissez-faire economics and the growth of industrial empires" which dominated the latter part of the nineteenth century.[27] Anthony Lewis aptly notes in his work, Portrait of a Decade: The Second American Revolution, that the disputed Hayes-Tilden presidential election of 1876 marked a political

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[25]LaWanda Cox, "The Promise of Land for the Freedman," Mississippi Valley Historical Review, XLV (December, 1958), 414; Paul W. Gates, "Federal Land Policy in the South: 1866-1888," Journal of Southern History, VI (August, 1940), 303-6.

[26]Cox, "The Promise of Land," pp. 418-19.

[27]Anthony Lewis and The New York Times, Portrait of a Decade: The Second American Revolution (New York: Random House, 1953), p. 18.

watershed. The awarding of the Presidency to Hayes in 1877 was interpreted in several ways. To Republicans, the Compromise of 1877 seemed to represent a "statesmanlike act, engendering happy adjustment and good will" between the sections of a reunited nation.[28] Southern Democrats saw the Compromise as a means to secure economic progress for the industrially-backward South. Other Southerners feared the Compromise would mean Northern exploitation and economic dependence. Finally, Northern Democrats looked upon the agreement as a disastrous blow to the Democratic party just as it was about to regain control of the White House.[29]

Above all, handing over the Presidency to Hayes was a bargain that historians have described as giving the Republicans control of the federal government and economy in return for home-rule for Southern whites. This, of course, meant giving the South free reign to do as it pleased with the Negro.[30] The South began taking advantage of this situation in the 1880's. It became evident that the Negro would be effectively "disfranchised" throughout the South, that he would be firmly

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[28]David Lindsey, Americans in Conflict: The Civil War and Reconstruction (Boston: Houghton Mifflin Company, 1974), p. 241.

[29]Ibid.

[30]Ibid., pp. 241-42; Lewis, Portrait of a Decade, p. 18.

relegated to the lower rungs of the economic ladder, and that "neither equality nor aspirations for equality in any department of life were for him."[31] As C. Vann Woodward notes in The Strange Career of Jim Crow, the "public symbols and constant reminders of his inferior position were the segregation statutes, or 'Jim Crow' laws."[32] This code of segregation lent the sanction of the law to a racial ostracism that touched churches, schools, voting, housing, jobs, eating, and drinking.[33] It extended to virtually all forms of "public transportation, to sports and recreation, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries."[34]

As the political situation changed, so did the Supreme Court's interpretation of the Reconstruction Amendments. The Court's justices, like the nation's business and political leaders, became more interested in economics than in race discrimination.[35] In the Slaughterhouse Cases (1873), the Supreme Court defined

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[31]C. Vann Woodward, The Strange Career of Jim Crow (New York: Oxford University Press, 1966), pp. 6-7.

[32]Ibid., p. 7.

[33]Ibid.

[34]Ibid.

[35]Lewis, Portrait of a Decade, p. 18.

the "privileges and immunities clause" of the Fourteenth Amendment so narrowly as to render it impotent.[36] Later, in the Civil Rights Cases (1883), the Court invalidated several sections of the Civil Rights Act of 1875 which forbade racial segregation in transportation, inns, and theaters and required racial equality in selecting juries.[37] The Court ruled that race discrimination by private citizens could not be punished by Congress--because while the Fourteenth Amendment prohibits state enforced discrimination (civil or political), it does not forbid discrimination by private individuals (social) who are unsupported by state authority.[38] Finally in 1896, the Court, by establishing the "separate but equal" doctrine in Plessey v. Ferguson, dealt a severe blow to the "equal protection clause" of the Fourteenth Amendment by legalizing segregated public transportation.[39] In sum, during

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[36]16 Wall. 36; 21 L.Ed. 394 (1873); Paul C. Bartholomew, Ruling American Constitutional Law, Vol. II: Limitations on Government (Totowa, New Jersey: Littlefield, Adams, and Company, 1970), pp. 169-70.

[37]109 U.S. 3 (1883); Stanley Kutler, The Supreme Court and the Constitution: Readings in American Constitutional History (Boston: Houghton Mifflin Company, 1969), p. 200.

[38]109 U.S. 3; Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases (Los Angeles: University of California Press, 1959), p. 15.

[39]163 U.S. 537 (1896); Vose, Caucasians Only, p. 15.

the years that followed the end of Reconstruction and the Compromise of 1877, the rights of Black Americans guaranteed by the Thirteenth, Fourteenth, and Fifteenth Amendments, the Civil Rights Acts of 1866 and 1875, and the Enforcement Acts of 1870-2, eroded away as the former slaves were abandoned by the Congress, the President, and the United States Courts. As a result, by the turn of the century, Southern Negroes were exiled to a kind of no-man's-land, halfway between slavery and freedom.

As we have seen, the areas in which Negroes encountered racial discrimination were quite diverse. By 1900, the cancerous growth of discrimination included restrictions on the right to vote, public transportation, military service, public education, and the ownership of property. It is not surprising that Negroes, unable to exercise their civil rights, began "collectively" voicing their dismay.[40] Without a doubt, the most influential organization or pressure group to materialize in the twentieth century as the result of discrimination was the National Association for the Advancement of Colored People (NAACP). It must be noted, however, that the NAACP was not the first collective effort on the part of

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[40]Charles Flint Kellogg, NAACP: A History of the National Association for the Advancement of Colored People, Vol. I: 1909-1920 (Baltimore: Johns Hopkins Press, 1967), p. 14.

Negroes to battle racism. In fact, the formation of the NAACP was merely another link in a long chain of Negro organizations which stretched back to the early 1800's.

Historically, the earliest black groups to stand together openly on behalf of Negro rights appeared, by necessity, in the North.[41] The first so-called National Negro Convention was held in Philadelphia in 1830.[42] Here Negroes gathered to discuss what they summarized as "the oppression of our brethren in a country whose republican constitution declares 'that all men are born free and equal.'"[43] In 1849, an organization known as the State Convention of Colored Citizens of Ohio gained recognition by giving assistance to escaped slaves.[44] During and after Reconstruction, groups such as the First California Negro Convention (1855), the Convention of Colored Men of Texas (1883), the Young Men's Progressive Association of New Orleans (1878), and the Macon, Georgia Consultation Convention (1888) met to discuss ways to combat a growing tide of racism which threatened to drag the Negro down to

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[41] Langston Hughes, Fight for Freedom: The Story of the NAACP (New York: W. W. Norton & Co., Inc., 1962), p. 16.

[42] Ibid.

[43] Ibid.

[44] Ibid.

a level of near-bondage or peonage.[45]

In 1897, the scholarly American Negro Academy turned its attention away from the "promotion of literature, science, and art" to include in its objectives "the defense of the Negro against vicious assault."[46] Among the initial members of the American Negro Academy was William Edward Burghardt DuBois. Later, in 1905, DuBois played an instrumental role in assembling the all-black Niagara Movement, which advocated a program of racial equality at a time in history when blacks were systematically excluded from social and political life.[47] Advocating the use of protest, the Niagara Movement "bravely attempted to counteract Booker T. Washington's philosophy of appeasement" with white men.[48] Although the Niagara Movement faded before its fifth anniversary, it was not a complete failure. The Niagara Movement resurrected in Black America the age old "spirit of protest and battle--the spirit of slave uprisings and revolts."[49]

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[45]Randall W. Bland, "The Collective Struggle for Negro Rights: 1915-1940," North Carolina Central Law Journal, X (Spring, 1970), 82.

[46]Hughes, Fight for Freedom, p. 17.

[47]Virginia Hamilton, W. E. B. DuBois: A Biography (New York: Thomas Y. Crowell Company, 1972), p. 94.

[48]Ibid.

[49]Ibid.

In 1907, the third and final gathering of the Niagara Movement took place in Faneuil Hall in Boston.[50] It was motioned that a new organization be formed, designed to combine the Niagara Movement with similar-minded white movements dedicated to racial equality.[51] Randall Bland, in "The Collective Struggle for Negro Rights: 1915-1940," notes that the reason for the sudden outpouring of white sympathy for the Negro appears to have been motivated by the horrifying increase of mob violence and the lynching of Negroes.[52] During the "Gay Nineties," Negroes were being lynched on the average of one every other day and by 1959, a total of 4,733 cases had been reported.[53] The immediate occasion, however, for calling a national convention composed of "similarly minded" whites and Negroes was not a lynching, but rather a race riot.[54]

In 1908, vicious race riots erupted in Springfield, Illinois.[55] Enraged white mobs swept through Negro districts in Lincoln's hometown, burning, looting, and

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[50]Bland, "The Collective Struggle," p. 83.

[51]Hughes, Fight for Freedom, p. 18.

[52]Bland, "The Collective Struggle," p. 83.

[53]Ibid.

[54]Ibid., p. 84.

[55]Ibid.

interfering with the work of firemen.[56] Two Negroes were lynched, six were killed, and more than fifty were wounded.[57] This death and destruction overwhelmed Oswald Garrison Villard.[58] In a stinging article carried by the New York Evening Post, Villard, the grandson of the famous abolitionist William Lloyd Garrison, condemned the violence in Springfield as "the climax of a wave of crime and lawlessness that was flooding the country."[59] In another article appearing in the liberal periodical The Independent, Southern journalist William English Walling declared that "the spirit of the abolitionists, of Lincoln and Lovejoy, must be revived and we must come to treat the Negro on a plane of absolute political and social equality."[60]

Walling's article caused a sensation throughout the "liberal white community" and especially impressed

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[56]Mary White Ovington, The Walls Came Tumbling Down (New York: Schocken Books, 1970), p. 102; Rose, Negro in America, p. 263.

[57]Kellogg, NAACP, p. 9; Hamilton, DuBois: A Biography, p. 95; Rose, Negro in America, p. 263; William English Walling, "The Founding of the N.A.A.C.P.," The Crisis, XXXVI (July, 1929), 226.

[58]Kellogg, NAACP, p. 9.

[59]Ibid.

[60]Rayford W. Logan, ed., What the Negro Wants (New York: Van Rees Press, 1944), p. 117.

New York social worker, Mary White Ovington.[61] Ovington, a founder of the Greenpoint Settlement in Brooklyn[62] and a descendant of an abolitionist, heartily agreed with Walling's plea for the revival of the abolitionist spirit.[63] She wrote to Walling and eventually held several discussions with him, and together, they conceived the idea of a new civil rights group.[64] The organizational meeting, held in January of 1909, was attended by Walling; Ovington; Dr. Henry Moskowetz, a New York social worker; Charles Edward Russell, a socialist, writer, and close friend of Walling; and Oswald Garrison Villard.[65] These five activists formulated the long-range purpose of the proposed interracial organization: "that it should be aggressive, a watchdog of Negro liberties, and should allow no wrong to take place without a protest and a bringing to bear of all the pressure that it could muster."[66]

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[61]Mary White Ovington, "The National Association for the Advancement of Colored People," The Journal of Negro History, IX (April, 1924), 109.

[62]Mary White Ovington, "Beginnings of the N.A.A.C.P.," The Crisis, XXXII (June, 1926), 76.

[63]Ovington, "The National Association," p. 109.

[64]Walling, "Founding the NAACP," p. 226; Ovington, "Beginnings of the NAACP," p. 77.

[65]Kellogg, NAACP, pp. 10-14.

[66]Ibid., p. 14

A "CALL," drawn up by Villard, was released on February 12, 1909, the hundredth anniversary of Lincoln's birth.[67] The appeal, co-signed by sixty well-known whites and Negroes including W. E. B. DuBois, Rabbi Stephen S. Wise, J. G. Phelps Stokes, Ida B. Wells Barnett, and Jane Addams, called for a national conference to meet in May, 1909, to discuss race relations.[68] Villard's invitation, printed in the New York Evening Post, said in part:

> In many states to-day Lincoln would find justice enforced, if at all, by judges elected by one element in a community to pass upon the liberties and lives of another. He would see the black men and women, for whose freedom a hundred thousand of soldiers gave their lives, set apart in trains, in which they pay first-class fares for third-class service, and segregated in railway stations and in places of entertainment; he would observe that State after State declines to do its elementary duty in preparing the Negro through education for the best exercise of citizenship.
>
> Added to this, the spread of lawless attacks upon the Negro, North, South, and West--even in the Springfield made famous by Lincoln--often accompanied by revolting brutalities, sparing neither sex nor youth, could but shock the author of the sentiment that 'government of the people, by the people, for the people, shall not perish from the earth.'
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> Silence under these conditions means tacit approval. The indifference of the North is already responsible for more than one assault upon democracy, and every such attack reacts as unfavorably upon whites as upon blacks. Discrimination once permitted cannot be bridled; recent history in the South shows

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[67]Ovington, "The National Association," p. 109; Kellogg, NAACP, p. 14; Bland, "The Collective Struggle," p. 85.

[68]Bland, "The Collective Struggle," p. 85; Ovington, "The National Association," p. 110.

> that in forging chains for the Negroes the white voters are forging chains for themselves. 'A house divided against itself cannot stand'; this government cannot exist half-slave and half-free any better to-day than it could in 1861.
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> Hence we call upon all the believers in democracy to join in a national conference for the discussion of present evils, the voicing of protests, and the renewal of the struggle for civil and political liberty.[69]

The conference began on May 30, 1909, with an inter-racial gathering at the Henry Street Settlement in New York and concluded with a mass demonstration at Cooper Union.[70] The conference resulted in the formation of the National Negro Committee, or Committee of Forty.[71] This Committee held several meetings during the following year and launched a membership drive.[72] At the second annual meeting, in May, 1910, the Committee changed the name of the organization to the National Association for the Advancement of Colored People.[73] In addition, the Committee announced the purposes of the organization:

> To promote equality of rights and eradicate caste or race prejudice among the citizens of the United

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[69]Ovington, "The National Association," pp. 109-10.

[70]Hughes, Fight for Freedom, pp. 22-23; Bland, "The Collective Struggle," p. 86.

[71]Elliot M. Rudwick, W. E. B. DuBois: A Study in Minority Group Leadership (Pennsylvania: University of Pennsylvania Press, 1960), p. 120; Kellogg, NAACP, p. 34; Hamilton, DuBois: A Biography, p. 45.

[72]Bland, "The Collective Struggle," p. 86.

[73]Ibid.; Hamilton, DuBois: A Biography, p. 95.

> States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.[74]

In order for this dream to materialize, effective administrative machinery was required. In the next months, as membership and interest climbed, the administrative framework consisting of five branches was established. First, a publicity bureau, aided by a press section, was to investigate racial injustices and to make its findings public. Second, a legal bureau was established to prosecute lynchers. Third, a political and civil rights bureau was set up to work for the enforcement of the Fourteenth and Fifteenth Amendments. Fourth, an educational department was formed to aid Negro colleges and universities by raising funds, making administrative improvements, and offering general advisory services. Finally, an industrial bureau was conceived in an effort to assist Negroes in combatting labor discrimination.[75]

After the initial framework was erected, officers and staff members were elected and appointed to direct these agencies. The first president of the NAACP was the distinguished Boston lawyer, Moorfield Storey.[76] Other

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[74]Hughes, Fight for Freedom, p. 23.

[75]Kellogg, NAACP, pp. 20-21.

[76]Hughes, Fight for Freedom, p. 23.

initial officers included John E. Milholland and Bishop Alexander Walters, vice-presidents; Oswald Garrison Villard, chairman of the board; Mary White Ovington, secretary; and Walter Sachs, treasurer.[77] Interestingly, all of these high-level officers were white.[78] In an effort to incorporate a Negro into the leadership, W. E. B. DuBois was named Director of Publicity and Research.[79] In the fall of 1910, DuBois created the NAACP's official periodical, The Crisis: A Record of Darker Races.[80] Its purpose was to publicize to the world the "hindrances, aspirations and contributions of 'darker races'" with clarity, frankness, and vehemence.[81] The magazine was an immediate success, reaching a circulation of over 12,000 copies by the close of 1910.[82]

The Association's early years were marked by a

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[77]Charles Flint Kellogg, "The NAACP and The Crisis," in W. E. B. DuBois: A Profile, ed. by Rayford W. Logan (New York: Hill and Wang, 1971), p. 123.

[78]Rose, Negro in America, p. 263.

[79]W. E. B. DuBois, The Autobiography of W. E. B. DuBois (U.S.A.: International Publishers Co., Inc., 1968), p. 254; Ovington, "The National Association," p. 112.

[80]Saunders Redding, The Negro (Washington, D.C.: Potomac Books, Inc., 1967), p. 39.

[81]Shirley Graham DuBois, His Day Is Marching On: A Memoir of W. E. B. DuBois (Philadelphia: J. B. Lippincott Company, 1971), p. 27.

[82]Ovington, The Walls Came Tumbling Down, p. 107.

rapid growth in membership throughout the country. By the end of 1919, its tenth year, the NAACP had grown to 310 branches with 91,203 members.[83] By the end of World War II, the Association had mushroomed to over 1600 branches and 300,000 members.[84] Following its official guidelines, the NAACP employed the use of litigation and public education as the core of its protest movement.[85] Operating from the "assumption that an informed public and the traditional channels of judicial appeal are all that are necessary to bring about social change," the Association attacked the problems of discrimination.[86]

The NAACP would ultimately win more victories in the Supreme Court than any other group involved in race relations. Between 1915 and 1948, the Association won twenty-three of the twenty-five cases it sponsored.[87] Several prominent white lawyers must be credited with establishing the NAACP's impressive legal tradition, but they were soon joined by several distinguished Negro lawyers as well. The Association's first president,

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[83]Clement E. Vose, "NAACP Strategy in the Covenant Cases," Western Reserve Law Review, VI (Spring, 1955), 102.

[84]Ibid.

[85]Bland, "The Collective Struggle," p. 87.

[86]Ibid.

[87]Vose, "Strategy in the Covenant Cases," p. 102.

Moorfield Storey, was a respected constitutional lawyer and one of the NAACP's first legal representatives.[88] During the first year, Storey, Arthur Spingarn, and Louis Marshall comprised the entire NAACP legal team.[89] In 1936, Charles Houston, a Harvard Law School graduate and a Negro, became the first full time lawyer serving the Association.[90] In 1938, Thurgood Marshall, a Negro graduate of Howard University, joined the NAACP as Special Counsel.[91] Furthermore, the Association maintained a Legal Committee, composed of eminent volunteers, which served as a legal advisory body. Such well-known legal practitioners as Clarence Darrow, Frank Murphy, Arthur Garfield Hays, Felix Frankfurter, Morris L. Ernst, and Francis Biddle have served on this committee.[92] After 1939, due to a mountainous volume of legal work, a new branch was created within the NAACP. Known as the NAACP Legal Defense and Education Fund, Inc., this agency was given the responsibility of conducting the Association's

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[88] Ibid., p. 103.

[89] Ibid.; Ovington, The Walls Came Tumbling Down, p. 109.

[90] Vose, "Strategy in the Covenant Cases," p. 103.

[91] Ibid.

[92] Ibid.; Redding, The Negro, p. 39.

legal affairs.[93]

Through its efforts in the area of litigation, the NAACP has vastly improved the legal status of Negroes. For example, the right of Negroes to register and vote in primary elections was essentially the result of NAACP efforts.[94] In addition, the Supreme Court was persuaded to outlaw forced confessions and all-white juries.[95] The Association's lawyers were also successful in striking down segregated interstate transportation. In the School Segregation Cases of 1954, the NAACP's legal team helped dismantle the "Plessy doctrine" in segregated public education.[96]

Another problem which arose during and after the Reconstruction era concerned restrictions upon the ownership of property, via racial zoning laws and restrictive covenants. Responding to this discrimination, the NAACP became involved in various litigations which spanned more than half the twentieth century. The organization's

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[93]Clement E. Vose, "Litigation as a Form of Pressure Group Activity," Annals of the American Academy of Political and Social Science, CCCXIX (September, 1958), 22-23.

[94]Vose, "Strategy in the Covenant Cases," P. 102.

[95]Rose, Negro in America, p. 226.

[96]Vose, "Strategy in the Covenant Cases," p. 103.

impact upon the courts, their decisions, and public opinion in this area has been quite remarkable. Generally speaking, this thesis will trace the role of the NAACP in the litigation process with respect to property discrimination. Primary emphasis, however, will be given to an examination of the NAACP's legal contribution in the controversial Restrictive Covenant Cases of 1948.

CHAPTER II

THE RISE OF RACIAL ZONING LAWS AND RESTRICTIVE COVENANTS: NAACP LITIGATION PRIOR TO THE RESTRICTIVE COVENANT CASES

Chronologically speaking, the actual problem of restrictions upon the ownership of property and the discriminations involved is a relatively recent one. The issue came to national attention around 1910, as large numbers of Negroes began migrating into Northern industrial cities in search of jobs, freedom, and a future.[1] The total percentage of the national population to become urbanized in the United States rose from 45.8 per cent in 1910 to 56.5 per cent in 1940, a 10.7 per cent increase.[2] On the other hand, the total percentage of the Negro population to become urbanized climbed at a much higher rate--from 27.3 per cent in 1910 to 48.6 per cent by 1940--a 21.3 per cent gain.[3] This increase can be translated into a net migration

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[1]Kenneth B. Clark, Dark Ghetto (New York: Harper and Row, Publishers, 1965), p. 22.

[2]Tom C. Clark and Philip B. Perlman, Prejudice and Property (Washington, D.C.: Public Affairs Press, 1948) p. 13.

[3]Ibid.

of about 1,750,000 Negroes from South to North between 1910 and 1940.[4] This massive influx of Negro immigration dramatically changed the racial composition of many Northern cities, as the following chart illustrates.

Increase in Negro Population in Ten Leading Industrial Cities:

City	1910		1940	
	Number of Negroes	% of tot. pop.	Number of Negroes	% of tot. pop.
New York.....	91,709	1.9	458,444	6.1
Chicago.....	44,103	2.0	277,731	8.2
Philadelphia.....	84,459	5.5	250,880	13.0
Detroit.....	5,741	1.2	149,119	9.2
Cleveland.....	8,448	1.5	84,504	9.6
St. Louis.....	43,960	6.4	108,765	13.3
Pittsburgh.....	25,623	4.7	62,216	9.3
Cincinnati.....	19,639	5.1	55,593	12.2
Indianapolis.....	21,816	9.3	51,142	13.2
Kansas City, Mo....	23,556	9.5	41,574	10.4[5]

This "Great Migration" altered the distribution of Negroes throughout the United States, changing the race problem from a sectional to a national one.[6]

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[4]Rose, Negro in America, p. 63.

[5]Clark and Perlman, Prejudice and Property, p. 13.

[6]Rose, Negro in America, p. 63.

Clement E. Vose states in Caucasians Only that although there were no "established customs or mores restricting race relations . . . Southern attitudes toward the Negro were easily adopted in the North."[7] Overnight, Northern cities began utilizing the Southern practice of enacting racial zoning laws which separated the races in urban areas.[8]

Harrell Rodgers and Charles Bullock note in Law and Social Change: Civil Rights Laws and Their Consequences that as the nation's black population was lured from the rural "black belt" of the South to the Northern cities in search of work, the newly arrived immigrants received something less than the key to the city.[9] Most black migrants began urban life in much the same fashion as other ethnic groups which preceded them.[10] Lacking the talents required by an urban society, Negroes entered the economic system at the "lowest-skill and lowest-pay levels."[11] Consequently, they settled in slum districts

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[7]Vose, Caucasians Only, p. 9.

[8]Clark and Perlman, Prejudice and Property, p. 11.

[9]Harrell R. Rodgers, Jr. and Charles S. Bullock, Law and Social Change: Civil Rights Laws and Their Consequences (New York: McGraw-Hill Book Company, 1972), p. 139.

[10]Redding, The Negro, p. 41.

[11]Rodgers and Bullock, Law and Social Change, p. 139.

where crime, disease, and overcrowding were worst.[12] Overall, residential segregation was determined by a combination of three factors: (1) severe poverty which prevented individuals from paying for anything more than the cheapest housing; (2) a desire to live in an area inhabited by others of the same race; and (3) segregation enforced by whites.[13] While other ethnic groups were able to secure jobs and eventually move out of the slums in a generation or two, Negroes were not so fortunate.[14] Even when blacks secured decent jobs and could afford to move out of the "ghettos," racial discrimination usually blocked their escape.[15] As Rodgers and Bullock note, the European immigrant could "lose his accent or change his name and be accepted in non-ethnic neighborhoods if he so desired"; but the Negro, "indelibly marked by color," was unable to break the

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[12] Ibid.

[13] Rose, Negro in America, p. 210.

[14] Rodgers and Bullock, Law and Social Change, p. 139.

[15] Kenneth Clark points out that the term "ghetto" was the name given to the Jewish quarter in sixteenth-century Venice, and later it came to mean any section of a city to which Jews were confined. Clark states that America has contributed to the concept of the ghetto "the restriction of persons to a special area and limiting of their freedom of choice on the basis of skin color" Dark Ghetto, p. 11.

ghetto-cycle.[16]

One method employed to keep Negroes isolated in ghetto areas was the enactment of racial zoning laws, the history of which goes back to an 1879 ordinance passed in California authorizing cities to exclude or segregate Chinese immigrants. In 1890, however, a federal court invalidated the California law as a violation of the "equal protection clause" of the Fourteenth Amendment.[17] Undeterred, segregationists enacted similar municipal ordinances in the South around 1910.[18] One such ordinance enacted in Louisville was "artfully drawn in an attempt to square it with constitutional requirements."[19] It was entitled an "ordinance to prevent conflict and ill-feeling between the white and colored races [and] . . . to preserve the public peace and promote the general welfare by making reasonable provisions requiring . . . the use of separate blocks for residence, places of abode and places of assembly by white and colored people

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[16]Rodgers and Bullock, Law and Social Change, pp. 139-40.

[17]Loren Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (New York: Pantheon Books, 1966), p. 246; Robert C. Weaver, The Negro Ghetto (New York: Russell and Russell, 1948), p. 22.

[18]Thurgood Marshall, "Equal Justice Under Law," The Crisis, XLVI (July, 1939), 200.

[19]Miller, The Petitioners, p. 246.

respectively."[20] The ordinance was composed of two parts: first, it prohibited Negroes from buying or occupying property in an area where the majority of the residents were white; second, it forbade whites from buying or occupying property in an area where the majority of the residents were Negro.[21] The Louisville city-fathers hoped that the ordinance, by equally discriminating against both whites and blacks, would not violate the Fourteenth Amendment and would be sustained by the courts.

The Louisville ordinance was challenged in the state courts in 1916.[22] Robert Buchanan, a white man, owned a lot within a block where eight residents were white and two were Negro. Buchanan sold his lot to William Warley, a Negro. Warley, aware of the zoning law, wisely hired legal assistance to secure the addition of the following clause in the purchase agreement:

> It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence.[23]

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[20] Ibid.

[21] Buchanan v. Warley, 245 U.S. 60 (1917), pp. 70-71.

[22] Ibid., p. 60.

[23] Ibid.

Both Buchanan and Warley knew that a Negro could not build a home on the property and occupy it if the city zoning law was valid.[24] As expected, when Buchanan offered to deed the property to Warley, he was refused by city officials. Warley, referring to the clause in the agreement, stated he would not pay or accept a deed unless he had the right to build and occupy a residence there.[25] Buchanan then began court action to make Warley pay. Thus, a weird situation developed: Buchanan, a white man, was contending in court that the zoning law was unconstitutional; while Warley, a Negro, seemed to be upholding the racial ordinance. Ultimately, the judge threw the case out, saying that the ordinance was constitutional and that Warley did not have to pay. Buchanan appealed to the Kentucky Court of Appeals, which sustained the lower court ruling.[26]

Buchanan continued his appeal and the case reached the Supreme Court as Buchanan v. Warley in April of 1916. Representing Buchanan were three NAACP lawyers: Clayton B. Blakey, Moorfield Storey, and Harold S. David.[27] Stuart Chevalier and Pendleton

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[24]Miller, The Petitioners, p. 248.

[25]Ibid.; Clark and Perlman, Prejudice and Property, p. 47.

[26]Miller, The Petitioners, p. 248.

[27]245 U.S. 60, p. 61.

Beckley spoke for Warley.[28] There were numerous amici curiae briefs filed for both sides. Among those filing briefs for Buchanan were the NAACP and the United Welfare Association of St. Louis.[29] In support of Warley, briefs were entered by the City of Baltimore, the City of Richmond, and the eight white residents living on the block in question.[30]

Buchanan's lawyers offered a formidable argument. They asserted that the Louisville ordinance did not prevent conflict and ill-feeling between the races as had been supposed, rather it placed the Negro in an inferior position and violated "the spirit of the Fourteenth Amendment without transgressing the letter."[31] The Fourteenth Amendment guarantee of "equal protection of the laws," without regard to race, religion, or color, includes the basic right to acquire and possess property of

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[28] Ibid., p. 64.

[29] Ibid., p. 69.

[30] Those filing amici curiae briefs in the case supporting Warley were: Mr. S. S. Field for the Mayor and City of Baltimore; Mr. W. Ashbie Hawkins for the NAACP, Baltimore Branch; Mr. Frederick W. Lehmann and Mr. Wells H. Blodgett; Mr. Alfred E. Cohen; Mr. Chilton Atkinson for the United Welfare Association of St. Louis; Mr. H. R. Pollard for the City of Richmond; Mr. Wells H. Blodgett, Mr. Charles Nagel, Mr. James A. Seddon, Mr. Seldon P. Spencer, Mr. Sidney F. Andrews, Mr. W. L. Sturdevant, Mr. Percy Werner, Mr. Everett W. Pattison, and Mr. Joseph Wheless; Ibid., p. 69.

[31] Ibid., p. 62.

any type.[32] Further, the ordinance violated the "privileges and immunities clause" because it forbade, under threat of penalty, a landowner in certain parts of the city to live there if he was a Negro, but held no such restriction if he was white. Clearly, the NAACP lawyers pointed out, "a plainer case of racial discrimination cannot well be imagined."[33]

The Association's lawyers pointed out, in conclusion, that the ordinance could not be justified as an exercise of police power because state police powers must give way to federal law, i.e., the Fourteenth Amendment. The law could not be justified as a measure to protect property rights, because it protected only the rights of Caucasians. The NAACP lawyers predicted that if this law were upheld, race discrimination would know no limits and might affect other isolated minority groups such as Jews, Mexicans, or Japanese who were located in numerous communities throughout the country.[34]

On the other hand, Warley's attorneys suggested that the ordinance showed no discrimination against either race. They contended that the statute was a fair and valid police regulation which "does not interfere with the

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[32] Ibid.

[33] Ibid., p. 63.

[34] Ibid., p. 64.

ownership of property, but merely regulated the occupancy of property."[35] Finally, citing the use of segregated railroad cars, public schools, and laws against miscegenation, Chevalier and Beckley maintained that segregation of the races was a long established and legally accepted fact.[36]

The decision was handed down on November 5, 1917, by Justice Day. Speaking for an unanimous Court, Day declared the Louisville ordinance unconstitutional, stating that

> The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than a mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it.[37]

Summing up, Justice Day decreed:

> The effect of the ordinance under consideration was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character it was void as being opposed to the due-process clause of the Constitution.[38]

The Buchanan decision was a great victory for the Association, since it virtually destroyed state supported racial zoning laws. However, the victory was of limited

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[35] Ibid., p. 65.

[36] Ibid., pp. 64-65.

[37] Ibid., p. 74.

[38] Ibid., p. 80.

importance because private means of discimination--the restrictive covenant--soon replaced state segregation. Essentially, a restrictive covenant involved a neighborhood agreement written into a deed.[39] It generally stated that the signer or signers would not commute their property, in any manner, to "any person other than of the Caucasian race."[40] If a Negro bought property affected by such an agreement, he could be sued by his white neighbor, given an injunction by a state or federal court voiding the sale, and ultimately forced off the property.[41] This form of residential segregation was quickly established in many Northern cities. The following advertisements are typical of those used to gain support for restrictive covenants in the Washington, D.C. area:

> IMPORTANT STATEMENT TO OWNERS
> NOW IS THE TIME TO COMPLETE THE RE-EXECUTION AND RECORDING OF ALL RESTRICTIVE AGREEMENTS, AND YOU ARE URGED TO DO THIS IMMEDIATELY IN ORDER THAT THE WHOLE COMMUNITY OF A THOUSAND HOMES, SIX CHURCHES, HIGH SCHOOLS AND ELEMENTARY SCHOOLS MAY CONTINUE TO BE THE

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[39]Barton J. Bernstein and Allen J. Matusow, ed., The Truman Administration: A Documentary History (New York: Harper and Row, Publishers, 1966), p. 99.

[40]Robert C. Weaver, "Race Restrictive Housing Covenants," The Journal of Land and Public Utility Economics, XX (August, 1944), 184; Vose, Caucasians Only, p. 6.

[41]Clark and Perlman, Prejudice and Property, p. 11; Miller, The Petitioners, p. 251; Vose, Caucasians Only, pp. 7-8.

> STRONGEST PROTECTED WHITE SECTION IN THE DISTRICT OF COLUMBIA. NO section of Washington is as safe from invasion as is your section; LET'S KEEP IT SAFE! Make sure the Restrictive Agreement in your block is being completed NOW. DO IT AT ONCE.
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> . . . . . .
>
> TO PROPERTY HOLDERS IN THE 2100 BLOCK OF FIRST STREET, N.W.
>
> If you own your home, HOLD ON TO IT: remember that the cost of a house elsewhere in the District is far above the normal values, and NO COMMUNITY IN WASHINGTON IS SAFE FROM NEGRO OWNERSHIP AS IS OURS OF A THOUSAND HOMES, SIX CHURCHES, AND FIVE SCHOOLS. If you own as an investor, you have a FINE INVESTMENT: DON'T BE STAMPEDED INTO LOSING THAT GOOD INVESTMENT.[42]

Supporters of restrictive covenants insisted that their agreements were legally enforceable. They felt that covenants were compatible with the "equal protection clause" of the Fourteenth Amendment since Negroes were free to draw up racial covenants of their own. Thus, the basic difference between zoning laws and private covenants emerges. Now private citizens, instead of state or municipal governments, would be executing the discriminatory acts. The importance of this lies in the fact that the Fourteenth Amendment forbids states from discriminating against Negroes (civil discrimination), but makes no mention of limitations upon private individuals (social discrimination).[43] Therefore, in the coming years, the

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[42]Vose, Caucasians Only, pp. 75-76.

[43]Alfred L. Scanlan, "Racial Restrictions in Real Estate-Property Values Versus Human Values," Notre Dame Lawyer, XXIV (Winter, 1949), 165; Miller, The Petitioners, p. 251.

primary constitutional questions before the courts would be: (1) are restrictive covenants valid, and (2) may they be enforced by state and federal courts?

Answers to these questions began to unfold in December, 1919, with a ruling by the California Supreme Court in Los Angeles Investment Co. v. Gary. The investment company had developed a 167 lot area in a Los Angeles suburb, inserting a restrictive covenant clause in all the deeds which stated in part:

> It is hereby covenanted and agreed by and between the parties hereto and it is a part of the consideration of this indenture, that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of the Caucasian race be permitted to occupy said lot or lots; provided further, that a breach of any of the foregoing conditions shall cause said premises to revert to the said grantors. . . .[44]

One of these lots was purchased by a white man, who later sold it to Alfred Gary, a Negro. Thereafter, the Los Angeles Investment Company sued Gary in an attempt to regain title to the lot according to the provisions of the restrictive covenant. In his defense, Gary argued that the covenant was in violation of the Fourteenth Amendment; thus, he should be allowed to retain his property.[45]

Speaking for the California Supreme Court, Judge J. Olney stated that two questions were raised; one, was

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[44]186 P. 596 (1918), p. 597.

[45]Ibid.

the racial covenant valid; and two, were Gary's rights, guaranteed in the Fourteenth Amendment, violated? First, Olney concluded that the covenant was a valid agreement. Second, he found that Gary's rights were not violated: "Construing this amendment, the Supreme Court of the United States has held in a number of instances that the inhibition applies exclusively to action by the state, and has no reference to action by individuals. . . ."[46] As a result, the sweet victory of the Buchanan decision quickly turned sour, as residential segregation, via restrictive covenants, seemed to be on the rise.

The first racial covenant case to reach the United States Supreme Court was Corrigan v. Buckley in 1926.[47] This case arose in the District of Columbia where both the plaintiff, John J. Buckley, and the defendants, Mrs. Irene Corrigan and Mrs. Helen Curtis, were residents. In 1921, thirty white residents, including Corrigan and Buckley, entered into a neighborhood agreement that stated in part:

> . . . for their mutual benefit and the best interests of the neighborhood . . . they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run . . . for twenty-one years

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[46] Ibid., p. 598.

[47] 271 U.S. 323 (1926).

from and after its date.[48]

In 1922, Mrs. Irene Corrigan sold her lot to Mrs. Helen Curtis, a Negro. This led, in turn, to a suit filed by one of the co-covenanters seeking to secure an injunction preventing the sale until and after the twenty-one year period set out in the restrictive agreement.[49]

The Supreme Court heard the case on January 8, 1926. Once again NAACP lawyers were on hand, as Louis Marshall and Moorfield Storey headed up the legal team defending Corrigan and Curtis.[50] Marshall and Storey argued that previous court decisions upholding restrictive covenants were a breach of the Fifth and Fourteenth Amendments, because they deprived appellants of their liberty and property without due process of law.[51] As a result, the decisions of the court were accomplishing what the legislative and executive branches of government were forbidden to do by Buchanan v. Warley. The NAACP lawyers asserted: "These decisions have all the force of a statute. They have behind them the sovereign power. In rendering these decrees, the courts which have pronounced

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[48]Ibid., p. 324; Clark and Perlman, Prejudice and Property, p. 63.

[49]Clark and Perlman, Prejudice and Property, p. 63.

[50]271 U.S. 323, p. 324.

[51]Ibid.

them have functioned as the law making power."[52]

The purpose of the NAACP argument was apparent: the Court had ruled in Buchanan that residential segregation could not be imposed by law. If the NAACP lawyers could convince the Court that a "decree ordering enforcement of a segregation agreement had all the force of a statute passed by either the legislative or executive branches of government," then the Supreme Court would have to hold that a court could not enforce racial covenants.[53]

Regrettably, in the lower courts, before the NAACP lawyers were involved, Corrigan's main defense had centered around another argument, i.e., that covenants were unconstitutional and the case should be dismissed. In delivering an unanimous decision for the Supreme Court, Justice Sanford focused on this point: "The only constitutional question involved was that arising on the motion to dismiss on the grounds that the covenant itself was void."[54] He pointed out that it had been Corrigan's contention that racial covenants were unconstitutional with respect to the Fifth, Thirteenth, and Fourteenth Amendments. In response, Sanford declared: "It is

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[52]Ibid., p. 325.

[53]Miller, The Petitioners, p. 253.

[54]271 U.S. 323, pp. 328-30.

obvious that none of these Amendments prohibited individuals from entering into contracts respecting the control and disposition of their own property."[55] With respect to the argument offered by the NAACP legal team, he asserted that this plea came too late to be effective and could not serve as the basis for an appeal, because it had not been raised in the original proceedings.[56]

Truly, the Corrigan decision was a crushing defeat for Negro rights and the NAACP. The decision opened the way for similar covenants to spring up all over the country. In the following months, state courts in nineteen states and the District of Columbia followed the doctrine of judical enforcement of restrictive covenants.[57] Although the outlook was grim, the NAACP continued its struggle and in some instances were successful in knocking down racial covenants and zoning laws.

The most notable success by the NAACP in the 1930's came in City of Richmond v. Deans.[58] J. B. Deans brought suit against the City of Richmond concerning a restrictive ordinance which stated:

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[55] Ibid.

[56] Miller, The Petitioners, p. 254; Clark and Perlman, Prejudice and Property, pp. 64-65.

[57] Miller, The Petitioners, p. 255.

[58] 281 U.S. 704 (1930); 37 F. (2d) 712.

> To prohibit any person from using as a residence any building on any street between intersecting streets where the majority of residences on such street are occupied by those with whom said person is forbidden to intermarry by section 5 of an act of the General Assembly of Virginia entitled 'An act to preserve racial integrity.'[59]

The Federal District Court struck down the ordinance as a violation of the "due process clause" of the Fourteenth Amendment. Thereupon, the City of Richmond appealed to the Fourth Circuit Court of Appeals. Lucius F. Gary represented the City, while NAACP lawyers, Alfred E. Cohen and Joseph R. Pollard spoke for Deans.[60] In a per curiam decision,[61] Judges Parker, Northcott, and McDowell upheld the lower court ruling on the grounds that since the ordinance prohibits intermarriage of the races, it violates the "due process" guarantee of the Fourteenth Amendment.[62]

Although the NAACP was successful in the City of Richmond case, courts throughout the United States continued to follow the doctrines established by Corrigan.

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[59] Ibid., p. 713.

[60] 37 F. (2d) 712, p. 713.

[61] Per curiam is a phrase used to describe an opinion presented by the whole court rather than by any one judge. It is generally confined to a very brief and summary disposition of the case at hand. See Alfred H. Kelly and Winfred A. Harbison, The American Constitution: Its Origins and Development (New York: W.W. Norton & Company, Inc., 1970), p. 1100.

[62] 37 F. (2d.) 712, p. 713.

Following World War II, American cities experienced a renewed wave of Negro migration to urban areas.[63] Consequently, when the NAACP called its national conference in July of 1945, the intensifying problem of restrictions upon the ownership of property was given top priority.[64]

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[63]Miller, The Petitioners, pp. 321-22.

[64]Randall W. Bland, Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall (Port Washington, New York: Kennikat Press, 1973), p. 49.

CHAPTER III

THE ANATOMY OF LITIGATION: THE RESTRICTIVE COVENANT CASES

In 1945, the shortage of suitable Negro housing was intensified by the "end-of-the-war scarcity."[1] While the prosperity of full employment which accompanied World War II promulgated a renewed Negro migration to northern industrial cities, there was virtually no increase in housing construction.[2] In this atmosphere, the enforcement of restrictive covenants, always irritating and harmful to long-term hopes of improvement, frustrated the housing needs of Negroes, provoking them to fight back.[3] Whenever the opportunity arose, large numbers of Negroes purchased or attempted to purchase property in restricted areas. As a result, white property owners "reached for their legal weapons" in an attempt to stem the Negro invasion.[4] While the Negro press urged blacks to resist,

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[1]Vose, "Strategy in the Covenant Cases," p. 104.

[2]Rose, Negro in America, p. 66.

[3]Vose, "Strategy in the Covenant Cases," p. 104.

[4]Ibid., p. 105.

the National Association for the Advancement of Colored People gave assurances that legal support would be available.[5] In 1945 and 1946 the number of covenant cases to come before the courts steadily grew. National publicity was attracted when suits were brought in Los Angeles against well-known Negro actresses, Hattie McDaniel and Ethel Waters.[6]

Early in 1945, the use of restrictive covenants received another boost in a case decided in Washington, D.C. The case involved the enforcement of a covenant against a federal employee, Miss Clara I. Mays. Defending Miss Mays were several lawyers associated with the NAACP in Washington, D.C., including William Hastie, George E. C. Hayes, and Leon Ransom. A federal district court ruling evicted Miss Mays from occupancy and was upheld by the Court of Appeals for the District of Columbia.[7] As Randall W. Bland notes, in Private Pressure In Public Law: The Legal Career of Justice Thurgood Marshall, Judge Henry Edgerton, wrote a stinging dissent which heartened the Negro lawyers. Resting his argument on economic and social data, Edgerton declared that the

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[5] Ibid.

[6] Ibid.

[7] Mays v. Burgess 147 F. 2d. 869; 152 F 2d. 123 (1945).

shortage of Negro housing was so severe that enforcement of restrictive covenants was in opposition to the public interest. Although the lawyers for Miss Mays attempted to have the case reviewed by the Supreme Court, their petition for a writ of certiorari[8] was refused.[9]

Under a cloud of apprehension and uncertainty, the NAACP called a conference to discuss these difficulties. Thirty-three delegates attended the meeting in Chicago on July 9 and 10, 1945.[10] NAACP leaders on hand were: Roy Wilkens, the Association's president; Walter White, the national secretary; William Hastie, then governor of the Virgin Islands; and Thurgood Marshall, the Director-Counsel for the Association.[11] During the conference, many proposals and suggestions were aired. In a noteworthy address, lawyer Charles Houston "expounded at length on his philosophy of questioning the assumptions

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[8]A writ of certiorari is an appeal by those who have been adversely affected by the decision of a lower court. Granted by the Supreme Court of the United States, the writ orders the entire record of the case be sent to the Court for further review. See Rosco J. Tresolini and Martin Shapiro, American Constitutional Law (New York: The Macmillan Company, 1970), p. 34.

[9]Bland, Private Pressure, p. 50.

[10]Vose, Strategy in the Covenant Cases," p. 105.

[11]Ibid., p. 106; Bland, Private Pressure, pp. 49-50.

of the Caucasians as a method of education."[12] In the District of Columbia, Houston explained, the courts were used as a forum for the purpose of educating the public on the question of racial covenants.[13] Houston warned that Negroes must understand and outmaneuver the legalistic methods of Caucasians, because "in the enforcement, the technique of those upholding covenants is to narrow the issue as much as possible."[14] Houston observed that white legal strategy usually concentrated upon showing that a covenant existed, that it was a legal contract, and that it had been breached by a Negro.[15] To offset this strategy, Houston suggested:

> The person fighting it should broaden the issues just as much as possible on every single base, taking nothing for granted. . . . One technique is to start out 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.[16]

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[12]Vose, "Strategy in the Covenant Cases," p. 108.

[13]Ibid.

[14]Ibid.

[15]Ibid.

[16]Quoted in Ibid., p. 9.

Evaluating this approach, he advised:

> Everytime 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.[17]

This approach, Houston intimated, could be utilized in attacking residential segregation, since courts were reluctant to enforce covenants 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."[18] In other words, at what point do neighborhoods cease to be white and become colored?[19] Houston answered his own question:

> 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.[20]

Other views were added by George Vaughn, who reminded the conference that in the past the Negro vote deterred covenant enforcement since it played an important role in the election of judges. Dr. Robert C. Weaver of

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[17]Quoted in Ibid.

[18]Ibid.

[19]Ibid.

[20]Quoted in Ibid.

the American Council on Race Relations suggested that the Negro vote should be used against all political candidates who openly supported racial covenants.[21] Homer Jack, a Unitarian minister from Evanston, Illinois, representing the Chicago Council Against Discrimination and the American Civil Liberties Union, suggested a publicity campaign, advising:

> . . . in the line of public relations it would be awfully important to ballyhoo a case similar to the Scottsboro Case and get the rank and file of the 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.[22]

On the final day of the conference, Thurgood Marshall mapped out future NAACP strategy along three lines. First, the Association would continue to pursue cases in the courts in an effort to dismantle the Corrigan doctrine; second, it would conduct a national public relations campaign aimed at educating Americans on the question of restrictive covenants; and third, it would coordinate with leaders of other groups to plan future Negro strategy.[23] Subsequently, eighteen Negro leaders held a second conference at Howard University on

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[21]Vose, "Strategy in the Covenant Cases," pp. 109-10.

[22]Quoted in Ibid., p. 111.

[23]Vose, Caucasians Only, p. 64; Bland, Private Pressure, pp. 49-50.

January 26, 1947.[24] Among those attending were William Hastie, George Vaughn, Loren Miller, and "Mr. Civil Rights," Thurgood Marshall.[25] The group decided that sociological and economic data would be utilized in upcoming cases.[26] They came to realize, as Clement Vose points out in Caucasians Only, that "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," and "the growing political power of Negroes and their increased effectiveness in pressure politics had to be supported by facts and theories."[27] Since 1908, when Louis Brandeis presented a brief before the Supreme Court of the United States that was based primarily on sociological, economic, and statistical data and won approval of Oregon's ten-hour work law for women in Muller v. Oregon, 208 U.S. 412,[28] "an increasing number of American scholars and jurists began to accept sociological jurisprudence as a

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[24]Vose, Caucasians Only, p. 151.

[25]Ibid., pp. 151-52; Anna Bontemps, 100 Years of Negro Freedom (New York: Dodd, Mead, and Company, 1961), p. 249.

[26]Bland, Private Pressure, p. 50.

[27]Vose, Caucasians Only, p. 64.

[28]Bland, Private Pressure, p. 51

part of constitutional law."[29] In 1921, Roscoe Pound, a leading advocate of the use of sociological data, wrote:

> The jurists of today seek to enable and to compel law-making and also the interpretation and application of legal rules, to take more account and more intelligent account, of the social facts upon which law must proceed and to which it is to be applied. . . they strive to make effort more effective in achieving the purposes of law. Such is the spirit of twentieth-century jurisprudence. Such is the spirit in which legal reason is to be employed upon our received jural materials in order to make of them instruments for realizing justice in the world of today.[30]

As a result, sociological jurisprudence became an integral part of the official doctrine of the Supreme Court of the United States after 1937. Since Thurgood Marshall was already using social tactics in two higher education cases, Sipuel v. University of Oklahoma, 332 U.S. 631, and Fisher v. Hurst, 333 U.S. 147, he was familiar with the doctrine.[31] Consequently, the decision reached at the Howard Conference to employ sociological and economic arguments was not an altogether original one. Loring Moore of the National Bar Association drew up a list of proposed stratagems:

> (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

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[29] Ibid.

[30] Quoted in Ibid.

[31] Ibid.

ghettos upon 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.[32]

The success of this policy decision would depend on the outcome of the next restrictive covenant case(s) brought before the Court.[33]

At roughly the same time Negro leaders were conferring at Howard University, two covenant cases were being tried in the lower state courts of Missouri and Michigan: Shelley v. Kraemer and McGhee v. Sipes.[34] The Shelley case grew out of an agreement that had been signed by thirty residents of a St. Louis suburb in 1911. The covenant, signed by a majority of the residents stated:

> . . . no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property

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[32] Vose, "Strategy in the Covenant Cases, " p. 121.

[33] Bland, Private Pressure, pp. 51-52.

[34] 334 U.S. 1 (1948).

> for resident or other purpose by people of the Negro or Mongolian Race.[35]

In August, 1945, a white resident of this suburb sold his lot to Mr. and Mrs. J. D. Shelley, Negroes who had no prior knowledge of the restrictive agreement at the time of the purchase.[36] In October, 1945, Louis Kraemer, a white resident and co-covenanter, brought suit against Shelley attempting to stop the Negroes from taking possession of the property and calling for an injunction resending the title to its original owner.[37] The state court denied the request by Kraemer on the grounds that the covenant could not be effective unless it had been signed by all the residents, which was not the case. On appeal, the Supreme Court of Missouri reversed the lower court ruling, concluding that judicial enforcement of restrictive covenants was not in violation of the Fourteenth Amendment.[38] On April 21, 1947, Shelley filed a petition for a writ of certiorari with the Supreme Court of the United States.[39]

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[35] Ibid., pp. 4-5.

[36] Ibid., p. 5.

[37] Vern Countryman, ed., Discrimination and the Law (Chicago: University of Chicago Press, 1965), p. 86.

[38] Scanlan, "Restrictions in Real Estate," p. 167.

[39] Bland, Private Pressure, p. 52.

In the Michigan case, Mr. and Mrs. Orsel McGhee, also Negroes, bought some property from a white resident in Detroit in November of 1944. The people who sold them the property made no conditions upon the sale and were not co-signers of the restrictive covenant drawn up in that area which stated:

> This property shall not be used or occupied by any person or persons except those of the Caucasian race.
>
> It is further agreed that this restriction shall not be effective unless at least eighty per cent of the property fronting both sides of the street in the block where our land is located is subjected to this or a similar restriction.[40]

White residents of the area, led by Mr. and Mrs. Benjamin Sipes and Mrs. James A. Coon, secured an injunction from the State Circuit Court requiring the McGhees to leave their property. The Supreme Court of Michigan upheld the decision.[41] On May 10, 1947, Thurgood Marshall and his NAACP staff, on behalf of the McGhees, filed a petition for certiorari with the Supreme Court of the United States.[42] The next month, the Supreme Court granted the petitions for writs of certiorari in both cases, stating that the two would be handled together. In October,

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[40] McGhee v. Sipes 331 U.S. 804 (1947); 25 N.W. 2d. 638, p. 714.

[41] Ibid., p. 719.

[42] Miller, The Petitioners, p. 323.

the Court granted certiorari for two similar cases in Washington, D.C.: Hurd v. Hodge and Urciola v. Hodge.[43]

In Hurd, twenty of thirty-one lots on a block in Washington, D.C. were sold under the following restrictive agreement:

> . . . that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of two thousand dollars ($2,000), which shall be a lien against property.[44]

Difficulty arose when James M. Hurd, a Negro, purchased one of these lots. Shortly afterward, several white residents on the block sued Hurd in District Court to have the restrictive covenant enforced.[45] In Urciola, a white real estate dealer sold three restricted lots to Negroes. Thereafter, several co-covenanters brought suit against Raphael G. Urciola.[46] The two cases were consolidated for trial and the District Court upheld the covenant: (1) declaring void the deeds of the Negro petitioners; (2) enjoining Urciola from leasing or selling property to Negroes; and (3) ordering the Negro petitioners to remove themselves and all of their personal belongings from the

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[43] 334 U.S. 24 (1948).

[44] Ibid., p. 26.

[45] Scanlan, "Restrictions in Real Estate," p. 167.

[46] 334 U.S. 24, p. 27.

properties within sixty days.[47] The case was appealed to the United States Court of Appeals for the District of Columbia. The Court of Appeals upheld the District Court's verdict which prompted Hurd and Urciola to apply for a writ of certiorari to the Supreme Court of the United States.[48] These combined cases--Shelley, McGhee, and Hurd--became commonly known as the Restrictive Covenant Cases.

In addition to its legal strategies, the NAACP intensified its propaganda or educational campaign against covenants. Group pressure was brought to bear upon the administration, particularly on President Truman and the Department of Justice, to encourage the United States to enter an amicus curiae[49] brief on behalf of the Negroes.[50] During his first year in office, Truman was constantly bombarded with petitions from various civil rights groups. Chief among these was the NAACP which helped organize the National Emergency Committee Against Mob Violence in September of 1946.[51] The National Emergency Committee was composed

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[47] Ibid.

[48] Ibid.

[49] An amicus curiae brief may be filed by a person or a group who is not a party in the case, in an effort to influence the decision of the court. See Tresolini and Shapiro, Constitutional Law, p. 53.

[50] Bland, Private Pressure, p. 52.

[51] Vose, Caucasians Only, p. 168.

of forty-seven national organizations which included the NAACP, the American Federation of Labor, the Congress of Industrial Organization, and the National Council of Churches.[52] In response to a number of racial incidents, representatives of the National Emergency Committee, headed by NAACP leader Walter White, suggested that the President create a commission to investigate the status of race relations in America.[53] On December 5, 1946, Truman established the President's Committee on Civil Rights.[54] This fifteen member panel was empowered to make recommendations to the President on how government action might protect the civil rights of minorities. Truman noted in his Memoirs that

> I took this action because of the repeated anti-minority incidents immediately after the war in which homes were invaded, property was destroyed, and a number of innocent lives were taken. I wanted to get the facts behind these incidents of disregard for individual and group rights which were reported in the news with alarming regularity, and to see that the law was strengthened, if necessary, so as to offer adequate protection and fair treatment to all of our citizens.[55]

Six months later, on June 29, 1947, speaking to the annual

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[52] Ibid.

[53] Bland, Private Pressure, p. 53.

[54] Harry S. Truman, Memoirs by Harry S. Truman, Vol. II: Years of Trial and Hope (New York: Doubleday and Company, Inc., 1956), p. 180.

[55] Ibid.

convention of the National Association for the Advancement of Colored People, Truman reaffirmed his commitment to civil rights, saying: "As Americans, we believe that every man should be free to live his life as he wishes . . . . Each man must be guaranteed equality of opportunity."[56]

Within the administration, the President's Committee was nicknamed "Noah's Ark" because it included two Negroes, two women, two Catholics, two Jews, two businessmen, two Southerners, two labor leaders, and two college presidents.[57] On October 29, 1947, the Committee

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[56] Ibid., p. 181.

[57] Members of the Committee included: Charles E. Wilson, president of General Electric; Sadie T. Alexander, Philadelphia city solicitor and a Negro; James B. Carey, secretary-treasurer of the CIO and a member of the National Emergency Committee Against Mob Violence; John S. Dickey, president of Dartmouth College; Charles Luckman, president of Lever Brothers; Morris Ernst, prominent New York attorney and active member of the ACLU; Rabbi Roland B. Gillelsohn of Rockville Center, New York; Frank Graham, liberal president of the University of North Carolina; Henry Knox Sherrill, Presiding Bishop of the Episcopal Church; Boris Shiskin, AEL economist and member of the National Emergency Committee Against Mob Violence; Mrs. M. E. Tilly, a prominent Methodist and Southern friend of the Negro; and Channing Tobais, Negro executive of the Phelps-Stokes Fund and a member of the National Emergency Committee Against Mob Violence. Robert K. Carr, a political scientist at Dartmouth and a liberal student of civil rights, became the executive secretary and guiding spirit of the Committee. See Barton J. Bernstein, Politics and Policies of the Truman Administration (Chicago: Quadrangle Books, 1970), p. 278.

delivered its famous report, To Secure These Rights, to President Truman listing numerous recommendations which fell into ten broad categories: (1) establish a permanent Commission on Civil Rights, a joint Congressional Committee on Civil Rights, and a Civil Rights Division in the Department of Justice; (2) strengthen existing Civil Rights statutes; (3) provide federal protection against lynching; (4) protect more adequately the right to vote; (5) establish the Fair Employment Practices Commission; (6) modify federal naturalization laws to permit the granting of citizenship without regard to race, color, or national origin; (7) provide home rule and suffrage in presidential elections for the residents of the District of Columbia; (8) provide statehood for Hawaii and Alaska; (9) equalize the opportunities for residents of the United States to become naturalized citizens; and (10) settle the evacuation claims of Japanese Americans.[58]

While the Committee's report covered a broad spectrum of problems, its primary concern was racial discrimination. With respect to restrictive covenants, the Committee commented:

> Equality of opportunity to rent or buy a home should exist for every American. Today, many of our citizens face a double barrier when they try to satisfy their housing needs. They first encounter a general housing shortage which makes it difficult

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[58]Truman, Memoirs, II, 181.

> for any family without a home to find one. They then encounter prejudice and discrimination based upon race, color, religion or national origin, which places them at a disadvantage in competing for the limited housing that is available.[59]

More importantly, the Committee on Civil Rights called for the Department of Justice to intervene in future litigation aimed at the downfall of state enforced racial agreements. The attitude of the Truman administration became apparent the following day (October 30, 1947) when Attorney General Tom C. Clark announced that the Solicitor General, Phillip B. Perlman, would submit an amicus curiae brief in what was now known as the Restrictive Covenant Cases.[60] NAACP leader Thurgood Marshall commented that this was "the first amicus curiae brief ever filed, by the United States, in private civil rights litigation."[61] Undoubtedly, it influenced the Supreme Court's decision.[62]

Although the three cases were to be ruled upon together, the lawyers in each were allowed to work out their own arguments. The NAACP's Legal Defense and Educational Fund planned the briefs for the McGhee v.

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[59]Quoted in Barton J. Bernstein and Allen J. Matusow, ed., The Truman Administration: A Documentary History (New York: Harper and Row, Publishers, 1966), p. 98.

[60]Vose, Caucasians Only, p. 168.

[61]Quoted in Bland, Private Pressure, p. 53.

[62]Ibid.

Sipes case and assisted in the others.[63] Thurgood Marshall and Loren Miller argued the McGhee case before the Court, while George L. Vaughn and Herman Willer argued the Shelley case.[64] Charles H. Houston and Phineas Indritz prepared the briefs in Hurd.[65] As promised, Solicitor General Phillip Perlman and Attorney General Tom Clark filed a brief on behalf of the United States supporting McGhee, Shelley, and Hurd. This, however, was only one of twenty amici curiae briefs filed in support of the petitioners. Others included: the Order of Elks, the Protestant Council of New York, the American Federation of Labor, the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc., the General Council of Congregational Christian Churches, the National Lawyers Guild, the Japanese American Citizens League, the Congress of Industrial Organizations, the American Veterans Committee, the American Jewish Congress, the American Jewish Committee,

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[63] Ibid., p. 52.

[64] Assisting Marshall and Miller in McGhee were Willis M. Graves, Francis Dent, William H. Hastie, Charles H. Houston, George M. Johnson, William R. Ming, Jr., James Nabrit, Jr., Marian Wynn Perry, Spottswood W. Robinson, III, Andrew Weinberger, and Ruth Weyand. See Briefs for Petitioners, 334 U.S. 1, No. 87, Department of Photographic Reproduction, The University of Chicago Library, Chicago, Illinois (1947).

[65] 334 U.S. 24, p. 25.

the American Indian Citizens League of California, B'nai B'rith, the Jewish War Veterans, the American Civil Liberties Union, the National Bar Association, the American Association for the United Nations, and the American Unitarian Association.[66]

The thrust of Marshall's and Miller's argument rested upon five points. First, they maintained that racially restrictive covenants had developed through a distortion of commonly accepted doctrines of restrictions on the use of property. In the past, covenants were employed by real estate owners and builders for the purpose of keeping their "real estate limited solely to development for residential purposes."[67] Marshall and Miller pointed out that this practice was twisted in the twentieth century by an historical accident--the decision in Los Angeles Investment Co. v. Gary which laid the legal foundation supporting racial covenants culminating in the Corrigan decision.[68] Second, Marshall and Miller used the Fourteenth Amendment and the Civil Rights Act of 1866 to argue that the right to own and use property was a basic right guaranteed by the Constitution.[69] In

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[66]334 U.S. 1, pp. 3-4; Vose, "Strategy in the Covenant Cases," pp. 141-43.

[67]Bland, Private Pressure, p. 54.

[68]Ibid., pp. 54-55.

[69]Ibid.

the third point, the NAACP lawyers declared that according to the Fourteenth Amendment no state can restrict a person from owning and using property. From this, they deduced that the right is protected from invasion by any agency of the state including the judiciary:

> It is plain that the acts of state courts are those of the state itself within the meaning of the limitations of the Fourteenth Amendment. Any other conclusion in a common law system would be untenable. For, to the extent that decisions of courts serve as authoritative precepts regulatory of conduct beyond the case in litigation, no logical distinction can be drawn between the acts of the legislature and the decisions of the court.[70]

In addition, they argued that the enforcement of restrictive covenants was detrimental to both races, because it only intensified the struggle for better housing.[71]

Fourthly, Marshall and Miller offered a thirty-eight page sociological and economic dossier showing how judicial enforcement of covenants was harmful to the status of minorities. Using census data, they exposed the overcrowded and unsanitary conditions of ghetto neighborhoods.[72] To further support their claims, Marshall and Miller cited various professional works such as, Britton, "New Light on the Relations of Housing to Health," in the American Journal of Public Health

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[70] Brief for Petitioners, No. 87, pp. 31-32.

[71] Bland, Private Pressure, p. 55

[72] Ibid., p. 56.

(1942); Hyde and Chisholm, "Relations of Mental Disorders to Race and Nationality," in the New England Journal of Medicine (1944); and Cooper, "The Frustration of Being a Member of a Minority Group," in Mental Hygiene (1945).[73] Using an article by Robert Weaver, the Association's lawyers also discussed the ability of Negroes to purchase and maintain better housing:

> Already there is a body of evidence which indicates that Negroes with steady incomes who are given the opportunity to live in new and decent homes . . . instead of displaying any "natural" characteristics to destroy better property have, if anything, reacted better towards these new environments than any other groups of a similar income.[74]

In the final point, Marshall and Miller suggested that state enforcement of restrictive covenants violated the Charter of the United Nations, of which the United States was a member.[75] Charter Articles 2, 55, and 56 pledge member nations to the eradication of racism.[76] In their summary statement, the NAACP advocates declared that this case did not involve the enforcement of an isolated racial covenant, rather it was a test "as to whether we will have a united nation or a country divided into areas

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[73]Cited in Ibid.

[74]Weaver, "Race Restrictive Covenants," p. 189; Quoted in Bland, Private Pressure, p. 56.

[75]Brief for Petitioners, No. 87, pp. 84-85.

[76]Ibid.

and ghettos solely on racial or religious lines."[77] They concluded by saying the downfall of state supported covenants would allow a "flexible way of life to develop in which each individual will be able to live, work and raise his family as a free American."[78]

In Hurd, Charles H. Houston and Phineas Indritz used much of the same legal narrative that was conveyed by Marshall and Miller, with one exception. Hurd's lawyers indicated that "governmental action on the part of the courts of the District of Columbia is forbidden by the due process clause of the Fifth Amendment of the Federal Constitution."[79]

The Restrictive Covenant Cases were argued on January 15-16, 1948; however, the Court's decision was not handed down until May.[80] Mr. Chief Justice Vinson delivered separate opinions for the State cases, Shelley and McGhee, and the District of Columbia case, Hurd v. Hodge. In a unanimous decision, Vinson held that "restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by

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[77] Ibid., p. 91

[78] Ibid.

[79] 334 U.S. 24, p. 28.

[80] 334 U.S. 1.

the Fourteenth Amendment."[81] However, he intimated that enforcement of such covenants by the state courts was a violation of the "equal protection clause" of the Fourteenth Amendment:

> We have no doubt that there has been state action in the cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.[82]

In summary, Vinson decreed:

> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.[83]

Consequently, the restrictive covenants were nullified and the decisions of the Supreme Courts of Michigan and Missouri were reversed. For the Hurd case, Chief Justice Vinson again delivered the unanimous decision of the Court. Avoiding any discussion concerning the applicability of the Fifth Amendment, Vinson invalidated the covenant stating that federal enforcement violated the Civil Rights Act of 1866, which guarantees to all citizens

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[81] Ibid., p. 13.

[82] Ibid., p. 19.

[83] Ibid., p. 20.

of the United States the right to own and maintain property.[84]

Response to the decisions was immediate. Thurgood Marshall commented:

> This ruling gives thousands of prospective home buyers throughout the United States new courage and hope in the American form of government. . . . It is obvious that no greater blow to date has been made against the pattern of segregation existing within the United States.[85]

Lester B. Granger, Executive Secretary of the National Urban League, "praised the court ruling as meriting the commendation and respect of 'every thoughtful American'."[86] Dr. Stephen S. Wise, President of the American Jewish Congress, noted that the decision "knocks out the most important prop of the ghetto system . . . which un-American forces in our midst are seeking to maintain."[87] The Negro periodical, The Crisis, proclaimed:

> One more telling blow has been struck at segregation. . . . The opinion is not merely a victory for Negroes, but a significant re-affirmation of basic American democracy delivered at a time when such a restatement of faith and practice was sorely needed.[88]

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[84] 334 U.S. 24, pp. 33-34.

[85] Editorial, The Christian Science Monitor, May 5, 1948, p. 6.

[86] Ibid.

[87] Ibid.

[88] "No Support for Covenants," The Crisis. LV (June, 1948), 169.

The Catholic periodical, Commonweal, also praised the Court's decision and added that although the decision did not permanently settle the development of neighborhood communities, it should "stimulate us to look further and with greater eagerness to a better ideal of a rich and comprehensive society of neighbors-in-fact."[89] In a milder tone, the New York Times praised Chief Justice Vinson for his clear insight and remarkable judgement in the cases.[90]

Several public opinion polls, however, revealed a great deal of dissatisfaction with the decisions, and Truman's active role in civil rights. A Gallup Poll, released on April 5, 1948, asked the following two-part question: "How do you feel about Truman's civil rights program? Do you think Congress should or should not pass the program as a whole?"[91] Those polled answered:

Should	6%
Should not	56%
No opinion	6%
	68%
Had not heard of the program	32%[92]

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[89]Editorial, The Commonweal, May 14, 1948, p. 94.

[90]Editorial, The New York Times, May 4, 1948, p. 24.

[91]Dr. George H. Gallup, The Gallup Poll: Public Opinion 1935-1971, Vol. I: 1935-1948 (New York: Random House, 1972), p. 722.

[92]Ibid.

In a special survey also released on April 5, white Southerners were asked: "Do you think the present administration in Washington has dealt fairly, in general, with the South?"[93] In response, 34 per cent answered yes, 51 per cent said no, and 15 per cent had no opinion.[94] On April 10, 1948, another poll was taken in the South which asked: "Do you approve or disapprove of the way Harry Truman is handling his job as President?"[95] The poll revealed that 35 per cent approved, 57 per cent disapproved, and 8 per cent had no opinion.[96] These statistics seem to indicate a rather strong opposition to Truman's civil rights program, which included, of course, involvement of the Justice Department in the Restrictive Covenant Cases. No poll, though, is available for public opinion on the Covenant Cases per se.

Undoubtedly, the covenant decisions of 1948 were a welcomed victory for the NAACP. Amidst the jubilation, however, Loren Miller offered a warning:

> The Supreme Court decision is only a tool for an attack on that evil. The manner in which the tool is used depends on those in whose hands it has been thrust. That tool will not avail us much

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[93] Ibid., p. 723.

[94] Ibid.

[95] Ibid., p. 724.

[96] Ibid.

> if we retire it to the trophy room of legal victories. It can be a potent weapon in our long quest for first class citizenship only if we use it skillfully and with determination.[97]

Subsequently, the Association would continue their efforts against covenants and other forms of property discrimination with the judicial doctrines secured in the Restrictive Covenant Cases of 1948.

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[97]Loren Miller, "Supreme Court Covenant Decision--An Analysis," The Crisis, LV (September, 1948), 285.

CHAPTER IV

VICTORY DEFINED: THE EVOLUTION OF PROPERTY LITIGATION SINCE 1948

In July, 1949, Thurgood Marshall was again engaged in a case involving property restrictions entitled Dorsey v. Stuyvesant Town Corporation.[1] Here, a state law assisted a private corporation, Stuyvesant, in constructing a housing project by granting certain tax exemptions.[2] After the apartment complex was opened, several Negroes were refused admission merely because they were Negroes. Joseph Dorsey and other Negroes brought suit in the New York State Supreme Court.[3] Dorsey's counsel, which included Marshall, contended that the corporation must be held to the restrictions outlined by the "equal protection clause" of the State and Federal Constitutions, since it had been state assistance which helped make the apartments possible.[4] Much to Marshall's disappointment,

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[1] 339 U.S. 981 (1950); 87 N.E. 541.

[2] Ibid., p. 542.

[3] Ibid.

[4] Ibid.

the New York Court ruled that although the state law had in fact aided the corporation, the discrimination in the selection of tenants on the part of the private corporation did not equal state action and, thus, did not violate the Fourteenth Amendment.[5]

Over a year later, in December, 1950, the NAACP participated in a case dealing with city zoning laws. City of Birmingham v. Monk grew out of a disputed zoning law enacted by Birmingham that made it illegal for Negroes to reside in areas zoned "white-residential" and for whites to reside in areas zoned "Negro-residential."[6] Moreover, the law made it a misdemeanor for Negroes to live in a white area. Mary M. Monk and others brought suit against the city claiming the law was unconstitutional.[7] Thurgood Marshall was among those representing Miss Monk before the United States District Court in Alabama. Marshall charged that Miss Monk had been deprived of property without due process of law and demanded that the law be struck down as an invalid exercise of state police power and a violation of the Fourteenth Amendment.[8] The District Court held in favor of Monk and

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[5] Ibid., p. 551

[6] 341 U.S. 940 (1951); 185 F. 859, pp. 859-60.

[7] Ibid.

[8] Ibid.

declared the city ordinance void. The City of Birmingham appealed, but the Court of Appeals upheld the lower court's ruling. Finally, the City of Birmingham applied for a writ of certiorari to bring the case before the Supreme Court of the United States, but the Supreme Court denied the plea.[9]

For all practical purposes, it seemed that restrictive covenants had been successfully destroyed by 1950. NAACP leaders had good reason to rejoice--their victories in the Restrictive Covenant Cases appeared complete. However, proponents of racial segregation refused to concede defeat and continued to search for new and more effective ways to stop the Negro invasion of their neighborhoods. The possibility of collecting damages from white property owners who violated covenants was widely discussed after the decisions rendered in the Restrictive Covenant Cases. Foregoing suits to acquire injunctions against Negroes, whites by-passed this whole issue with its Fourteenth Amendment complications and began suing the white sellers for breach of contract. Between 1949 and 1952 whites collected damages from other whites who sold their property to Negroes in Missouri, Oklahoma, Maryland, Michigan, California, and the District of Columbia.[10] Criticism of these decisions

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[9] Ibid., p. 859.

[10] Vose, Caucasians Only, p. 230.

was widespread; and courts in different sections of the country refused to follow the new practice. In California the state courts openly refused to enforce restrictive agreements by not sustaining damage claims.[11] Supreme Court guidance was clearly needed on this issue, and the opportunity arose in 1953 when certiorari was granted in a California case, Barrows v. Jackson.[12]

The litigation arose in a Los Angeles neighborhood where white residents had signed an agreement which stated, in part, that no parcel of property "should ever at any time be used or occupied by any person or persons not wholly of the white or Caucasian race."[13] In September of 1950, Mrs. Leola Jackson broke the agreement by selling her property to Mrs. Olive Barrows, a Negro.[14] Three area residents then sued Mrs. Jackson for $11,600 in damages; however, no legal action was taken against Mrs. Barrows.[15] The Los Angeles Superior Court dismissed the suit for damages, as did the District Court of Appeal for the State of California. When the Supreme Court of California

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[11] Ibid., p. 231.

[12] 346 U.S. 249 (1953).

[13] Ibid., p. 251.

[14] Miller, The Petitioners, p. 326.

[15] 346 U.S. 249, p. 256.

refused to hear the case, Barrows petitioned the Supreme Court of the United States, which granted certiorari on March 9, 1953.[16]

Loren Miller, Thurgood Marshall, and Franklin H. Williams defended Mrs. Jackson. On the case for Mrs. Barrows were J. Wallace Knight, John Miles, and Charles Bagley.[17] Amici curiae briefs supporting Mrs. Jackson totaled six: the American Civil Liberties Union, the Japanese American Citizens League, the Los Angeles Urban League, the American Veterans Committee, the American Jewish Committee, and the National Community Relations Advisory Council.[18]

In their brief, the NAACP lawyers recognized that in most instances, the Court usually denied standing to persons not sustaining direct injury to his rights. They emphasized that much more was at stake than a mere suit for breach of contract. If Mrs. Barrows won her case, whites would again have an almost foolproof method of enforcing residential segregation. Marshall and his colleagues concluded that if the Court reversed the State Court ruling, minorities would indirectly lose rights

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[16] Ibid., p. 250.

[17] Ibid.

[18] Ibid., pp. 250-51.

guaranteed by the "equal protection clause" of the Fourteenth Amendment.[19] On June 15, 1953, Associate Justice Minton delivered the majority decision upholding the rulings of the California courts:

> To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants.[20]

It is important to note that Chief Justice Vinson, who earlier spoke for the Court in destroying the covenants in the famous Restrictive Covenant Cases, now issued a stinging dissent. Vinson pointed out that the Court had ignored the direct question which involved a suit for breach of contract. Instead, he declared, the Court concerned itself with the possible indirect results of a ruling in the case. In other words, the heart of Vinson's dissent rested on the judicial tradition that the "Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue."[21]

> Accordingly, respondent must show, at the outset that she, herself, and not some unnamed person in an amorphous class, is the victim of the constitutional discrimination of which she complains. Respondent makes no such showing. She does

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[19] Ibid., p. 259.

[20] Ibid., p. 254.

[21] Ibid., p. 246.

> not ask the Court to protect her own constitutional rights, nor even the rights of the persons who now occupy her property. Instead, she asks the Court to protect the rights of those non-Caucasians--whoever they may be--who might, at some point, be prospective vendees of some other property encumbered by some other similar covenant.[22]

In conclusion, Vinson stated that since he could not see how Mrs. Jackson could "avail herself of the Fourteenth Amendment rights of total strangers," he could not join the majority.[23] Marshall realized that in the future the Chief Justice would be reluctant to apply the "restraints of the Fourteenth Amendment to any conduct, 'however discriminatory or wrongful,' that did not directly result from the commands of the state."[24]

Barrows marked a climax in the NAACP's campaign against restrictions upon the ownership of property. On the surface, the decision appeared to leave white segregationists virtually powerless to enforce restrictive agreements. However, in the coming years, groups like the NAACP would be called on to help strike down similar covenants. In the future, the job would be easier because of the legal foundations already established. Take, for example, Reitman v. Mulkey.[25] The question in

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[22] 346 U.S. 249, pp. 264-65.

[23] Ibid., p. 268.

[24] Bland, Private Pressure, p. 59.

[25] 387 U.S. 369 (1967).

this case, involved Article 1, Section 26, of the California State Constitution, which said in part:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.[26]

The Mulkeys brought suit against Reitman when he refused to rent an apartment to them because the Mulkeys were Negroes. Reitman pleaded that according to the previously mentioned statute, he had not acted unlawfully. The California Supreme Court, however, ruled that this law unconstitutionally involves the state in racial discrimination and was void.[27]

The Supreme Court of the United States granted certiorari and heard the case argued on March 20-21, 1967. Representing the Mulkeys were Herman F. Selvin and A. L. Wirin.[28] Once again a flood of friends-of-the-court briefs were filed on behalf of the defendants: Solicitor General Thurgood Marshall, Attorney General Thomas Lynch, the California Democratic State Central Committee, the American Civil Liberties Union, the National Committee

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[26] Ibid., p. 371.

[27] Ibid., pp. 371-72.

[28] Ibid., p. 369.

Against Discrimination in Housing, and the United Automobile, Aerospace and Agricultural Implement Workers of America.[29] On May 29, 1967, Justice White handed down the Court's decision which upheld the ruling of the Supreme Court of California:

> Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the state. The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgements should be overturned.[30]

On April 1-2, 1968, the Supreme Court heard another case involving property discrimination entitled, Jones v. Alfred H. Mayer Co.[31] Mr. and Mrs. Joseph Lee Jones, Negroes, filed a complaint against the Alfred Mayer Company, which refused to sell them a house because they were black.[32] The District Court and the Court of Appeals upheld the respondents' motion to dismiss the complaint, concluding that section 1982 of the United States Code does not apply to private action. It states:

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[29] Ibid., p. 370.

[30] Ibid., pp. 380-81.

[31] 392 U.S. 409 (1968).

[32] Ibid., p. 412.

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.[33]

The Supreme Court of the United States then granted certiorari and handed down its ruling in June, 1968. Justice Stewart delivered the opinion, overturning the lower courts' rulings, saying that section 1982 "bars all racial discrimination, private as well as public."[34]

Hunter v. Erickson[35] developed when the Akron, Ohio City Council inserted an amendment into the city charter requiring that any legislation passed by the council regulating property on the basis of race must be approved by a majority of the voters.[36] This prevented the council from implementing any ordinance dealing with discrimination in housing without the approval of the majority of the voters of Akron.[37] In 1964, the Akron council passed a fair housing act to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry

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[33] Ibid.

[34] Ibid., p. 413.

[35] 393 U.S. 385 (1969).

[36] Ibid.

[37] Ibid., p. 386.

or nation origin."[38] Nellie Hunter, a Negro, attempted to purchase a home in Akron, but was refused because of her race. Miss Hunter addressed a complaint to the City Council stating that her rights, as prescribed by the Akron fair housing act, were violated. The City Council notified Miss Hunter that the fair housing ordinance was unavailable to her because the city charter had been amended to provide that:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the election as provided herein.[39]

When the Supreme Court of Ohio upheld the city charter, Miss Hunter appealed to the Supreme Court of the United States. On January 20, 1969, Justice White declared the Akron charter amendment unconstitutional.[40] Referring to the "equal protection clause" of the Fourteenth Amendment White held:

Even though Akron might have proceeded by majority

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[38] Ibid.

[39] Ibid., p. 387.

[40] Ibid., p. 393.

> vote at town meeting(s) on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.[41]

Reviewing the last three cases--Reitman v. Mulkey, Jones v. Alfred H. Mayer Co., and Hunter v. Erickson--it is easy to see that, even though the NAACP was not directly involved, the existing legal doctrines which the Association helped create made these decisions possible. In conclusion, the NAACP's role in the Covenant Cases illustrates the techniques used by a pressure group in civil rights litigation. It is apparent that the NAACP carefully planned its test cases and encouraged publication of articles for use in its legal agruments.[42] In addition, the NAACP's efforts outside the courtroom, especially their efforts to win the support of President Truman and the Justice Department at the moment the Restrictive Covenant Cases were moving toward the Supreme Court, must be recognized as tremendously important. Analyzing the NAACP's efforts, Clement E. Vose relates:

> . . . the Negro victory in the Restrictive Covenant Cases forces the conclusion that this result

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[41] Ibid., pp. 392-93.

[42] Vose, "Strategy in the Covenant Cases," p. 145.

> was an outgrowth of the complex group activity which preceded it. Groups with antagonistic interests appeared before the Supreme Court, just as they do in Congress and other institutions that mold public policy. Because of organization the lawyers for the Negroes were better prepared to do battle through the courts. Without this continuity, money, and talent they would not have freed themselves from the limiting effects of racial residential covenants, notwithstanding the presence of favorable social theories, political circumstances, and the Supreme Court justices.[43]

The coordination and planning of their forces engaged in litigation and public pressure at this time were critically important in the outcome of Shelley, McGhee, Hurd, and later Barrows. In the legal sense, the Association must be credited with the downfall of racial covenants. Unfortunately, this does not mean that total equality was reached in housing. The decisions in the Restrictive Covenant Cases removed the legal barriers to Negro acquisition of property and housing, but the cases did not eradicate the practice of banks and other lending institutions refusing loans on property not occupied by whites. Nor did they stop the discriminatory practices of real estate boards and operators refusing to show Negroes property located in white neighborhoods.[44] Although the decisions in the Covenant Cases were not a judicial solution for all the problems of residential

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[43]Vose, Caucasians Only, p. 252.

[44]William R. Ming, "Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases," University of Chicago Law Review, XVI (Winter, 1949), 228.

segregation, they did "eliminate the use of the power of the state to maintain ghettos."[45] The NAACP's victory in the Restrictive Covenant Cases was not the final chapter in the struggle against residential segregation; rather, it was a hopeful beginning.

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[45] Ibid., p. 229.

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