TWO

Courtrooms

Local Lawyers and Legal Activism

It must have been an odd sight for passersby—the judge marching down the block while the dueling attorneys trailed close behind, interjecting their thoughts as they saw fit. Judge Thurmond Clarke, the son of a prominent local attorney, strode with the power that had shattered the state's sprinting records as a youth, pausing only to inspect the condition of the houses along Oxford Avenue and Harvard Boulevard. A political conservative, he bore the confidence of wealth and of a man who had held his post on the Los Angeles Superior Court since his appointment a decade earlier at the age of thirty-two.[1]

One of the attorneys matching his pace on that December morning in 1945 had grown up under quite different circumstances. Born in the hamlet of Pender, Nebraska, in 1904, Loren Miller had been raised on the Kansas plains—trapping ground squirrels and indulging his passion for books in the town where his grandparents had fled after their emancipation. As a boy, Miller had wanted to become president of the United States, exhibiting the ambition and precocity that fueled his later career as an activist, attorney, and entrepreneur in California's City of Angels. His parents and siblings had joined together to put him through the University of Kansas. It was there that he first confronted the daily indignities of segregation. In those years, Miller later recounted, "I dug into my text books and written large between the lines was the lesson that the Negro had a place, a subordinate place, in America. I was, in turn, hurt, then stunned, then angry, then driven to sullen acceptance. I went to college an American. I emerged a Negro." His collegiate experience burned into his mind the desire for change. In the ensuing decades, Miller would hungrily pursue the prospect of racial reform, exploring a variety of political commitments and undergoing a dramatic professional evolution. By the mid-1940s, his legal work had made him into California's premiere civil rights advocate.[2]

It was, in the end, Miller's advocacy that brought these two men together that day. Judge Clarke had agreed to inspect the integrated neighborhood

that black Angelenos called "Sugar Hill" in order to assess the claims of Miller's courtroom opponent that African American homeowners devalued and ruined healthy properties. At Miller's urging, Clarke walked the streets of the West Adams Heights district to see for himself the products of racial housing integration. The case at hand, involving some fifty black property owners in the area, drew nationwide attention due to the high profile of Miller's clients. The individuals who faced eviction from the old colonial mansions that lined the streets included Academy Award–winning actress Hattie McDaniel, renowned blues singer Ethel Waters, and an assortment of other prominent African American entertainers. They had chosen Miller to represent them because by that time he was one of the nation's most experienced and successful anticovenant litigators. Their decision paid quick dividends as Miller became one of the handful of local attorneys to score an unlikely victory against racial restrictions.[3]

Within eighteen months Miller would go from representing movie stars and other members of Los Angeles' black elite to fighting in the U.S. Supreme Court on behalf of Orsel McGhee, an otherwise anonymous custodian half a nation away in a city Miller hardly knew. Indeed, for the McGhees in Detroit and the families in St. Louis and Washington, D.C., those Sugar Hill mansions and the celebrities that owned them seemed worlds away from the modest homes and stretched budgets that would send them to their own court battles. Yet the fighting connected them. Regardless of their status, black covenant-breakers took to local courtrooms to assert their rights as citizens and homeowners. In doing so, they entrusted their fates to attorneys like Loren Miller, Charles Hamilton Houston in Washington, or a host of lesser-known lawyers in cities around the country who could navigate the arduous process of civil rights litigation.

AS LEGAL BATTLES over covenants took shape in the 1940s, they provided an important perspective on the contours of litigating racial justice at the grassroots. At the heart of these efforts was a dynamic brand of "collaborative legal activism" that helped to guide and sustain attorneys in cities across the country. The work of anticovenant lawyers and the progression of the *Shelley v. Kraemer* (1948) cases through the courts in Missouri, Michigan, and the District of Columbia revealed that although local courtrooms played a critical role in shaping the development of civil rights campaigns, legal activism rarely stopped at the courthouse door. Five central themes characterized the structure of this style of litigation. Taken together these themes offer insight into the strategies that drove the legal battle for civil rights for-

ward and speak to the relationship between legal advocacy and the broader cause of black freedom at midcentury.[4]

First—and most obviously—collaborative legal activism relied on the law to defend the rights of African Americans and to effect change in local and national patterns of racial discrimination. Legal activists believed in the importance of the judicial system as a forum to articulate black Americans' demands for the full privileges of citizenship and to guard against infringements of existing rights. They sustained this belief in spite of the fact that in the past the law had often facilitated the subjugation of African Americans. Legal activists looked beyond this discouraging history and evinced an underlying faith that the law was a necessary and at times uniquely powerful tool to fulfill the promises of equal treatment and the protection of life and liberty. Wielded skillfully, the law could be an engine of remarkable change.[5]

Second, this brand of activism challenged the law's institutional fixity. Black advocates well understood the legal system's imbrication with the popular customs of segregation and white supremacy and the deference to precedent that bolstered the nation's racial status quo. In order to challenge the courts' relative stasis, legal activists advanced new theories about jurists' duties in adjudicating cases. Attorneys in anticovenant litigation integrated statistics, social scientific observations, and moral appeals into their cases and asked judges to consider the full consequences of their decisions and to acknowledge the affirmative roles that they played in sustaining patterns of inequality. These advocates challenged the courts to look beyond the settled principles of law in order to achieve justice and they framed their arguments in ways that could encourage and allow for a departure from the judicial orthodoxies of decades past.[6]

Collaborative legal activism also relied upon intellectual creativity and courtroom experimentation. This third characteristic grew unavoidably from the difficulties of fighting against the solid bulwark of Jim Crow's legal legitimacy. Veteran attorneys like Houston and Miller constantly probed the defenses of American segregation with new strategies and claims as they searched for breaking points. Local courts simultaneously became battlegrounds and proving grounds—theaters and laboratories—where legal activists sought out the right combination of evidence and argument to achieve a victory.

This innovation and dynamism sprang in no small part from collaborative legal activism's fourth feature: national networks of communication between civil rights litigators. A vigorous exchange of ideas between attorneys

from across the country brought local struggles into dialogue through a nationwide community of legal activists. Through correspondence and professional societies, lawyers traded tactics and shared their experiences as they refined various methods of attack in their respective cities. Local attorneys still exercised a considerable amount of independence in their decisions, but most engaged frequently with their peers as they pursued their cases. This collaborative approach promoted experimentation, provided intellectual and professional support, and helped disseminate successful strategies. While local particularities always profoundly shaped individual cases, in many respects civil rights lawyering was never strictly a local process.

The final characteristic of this activism was that it closely linked the efforts of attorneys with the energies of the communities in which they worked. These individuals, often themselves local leaders, tapped into the resources and support of black professional, social, and religious networks in their cities as they pursued litigation at the grassroots. Some of those same interests exerted their own influence on the litigation process, as did St. Louis's black realtors when they helped to bankroll and guide the *Shelley* case. Though the process was not always pleasant, the interaction of legal activists and the communities they served was both a formative and essential part of the campaign against segregation in the courts.

As the *Shelley* cases moved from the neighborhood streets in Washington, Detroit, and St. Louis into courtrooms, they revealed the complexity and importance of local legal activism. The work of attorneys like Miller, Houston, and the other men who fought against covenants in the 1940s exemplified the local contests that ultimately formed the foundation of broader national campaigns that would receive far greater public attention and recognition. Fighting within and against a legal system that offered little promise of change, these attorneys pitched battles that held in the balance not only the fate of the litigants, but their own ambitions, the desires of businessmen, and the concerns of entire communities.[7]

Profits: Black Realtors and Neighborhood Integration in St. Louis

When J. D. and Ethel Shelley discovered that they might lose their new home on St. Louis's Labadie Avenue in October of 1945, they had turned to Robert Bishop, the man doubling as their pastor and realtor, for guidance. Bishop immediately took the matter up with his employer, E. M. Bowers, and the two men joined with James T. Bush, another prominent black realtor, to se-

cure legal representation for the family and began to fund the Shelleys' defense.[8] Bishop and Bowers were part of an informal coalition of black real estate men in the Gateway City who were spearheading the local fight against restrictive covenants.

Across the country, in crowded postwar conditions, realtors who catered to an African American clientele recognized that supporting the legal challenge against residential restrictions could pay significant dividends. Breaking open a new housing market for black homeseekers meant the prospect of major financial windfalls. After all, Bishop had resold the Labadie residence to the Shelleys for a one-day profit of more than $1,100 and he later suggested that he could have charged up to $750 more given the state of the city's housing conditions. Progress stood to be lucrative.[9]

Undoubtedly genuine political concern played a role as well in the decision of black St. Louis realtors to underwrite the Shelleys' defense, but the potential for profits was always part of the equation. For these men, the litigation in *Shelley* was as much about commercial opportunity—their right to sell homes where they pleased—as it was about the Shelleys' right to purchase property wherever their means allowed. The situation in St. Louis reflected the impact that black professionals who were not lawyers could have in grassroots legal activism. While the conflation of black business interests with the pursuit of civil rights litigation was nothing new, this case offered a stark reminder that among the forces that drove the legal fight for racial justice, altruism and moral righteousness occasionally had less noble companions.[10]

Regardless of their motivations, the sincere desire of Bishop, Bowers, and Bush to defeat restrictive covenants dictated their choice of counsel for the Shelleys. Attorney George L. Vaughn had earned a reputation as one of the city's most ardent civil rights advocates in his forty-year career as a lawyer and politician in St. Louis. The grandson of Louisiana slaves, Vaughn was born in Kentucky in 1880 and worked his way through college and law school in Kentucky and Tennessee before heading west to Missouri. In 1905, Vaughn passed the Missouri bar "at the head of a class of which he was the only colored member," and began serving the black community in the Gateway City. He was an avid student of history, a skilled writer and orator, an ambitious leader, and always maintained a certain flair for the dramatic. An acquaintance once remarked that "he could thrill an audience at any time with his eloquence . . . he was the only local Negro who could fill the gymnasium of the Pine Street Y.M.C.A with people to hear him, as they would hear W.E.B. DuBoix, [*sic*] Carter G. Woodson, or Mordecai Johnson, distinguished national leaders." His friends also knew him as a man who cared far more for

serving his fellow black citizens than for the monetary rewards that could accrue from his legal and political offices.[11]

For four decades, Vaughn carved out a place at the heart of St. Louis's black community. He cofounded the *St. Louis Argus*—the lifeblood of the city's black press—and the Mound City Bar Association where he led the fight to include black St. Louisans as jurors in the state's local and federal courts. He held leadership roles in numerous black fraternal organizations including the Masons, Elks, and the Omega Psi Phi Fraternity, Inc. He served as lead counsel for the city's NAACP chapter in its early years and helped spearhead the branch's efforts to defeat a 1916 ballot initiative that imposed racial zoning restrictions in the city's neighborhoods.[12]

As World War I approached, the thirty-seven year-old Vaughn enlisted in the U.S. Army and ultimately became a first lieutenant. His experiences with discrimination at southern training bases and in America's Jim Crow military during his two years of service further solidified his commitment to civil rights advocacy. He referred to these encounters as "a blessing in disguise," a crushing reminder of the depth of the nation's prejudices and the inequities of the color line that gave him—and tens of thousands of other "New Negroes"—a renewed sense of purpose and urgency.[13]

Following the war, Vaughn expanded his legal endeavors and political aspirations. He became a prominent Democratic Party official in the 1930s and 1940s, standing at the vanguard of the party's effort to rehabilitate its image among African Americans. After an unsuccessful run for Congress, Vaughn served briefly as a justice of the peace in the city's Fourth District and as an assistant attorney general for the state throughout the 1940s. Vaughn also took a turn as the chairman of the St. Louis NAACP's Executive Committee and played a part in founding the local chapter of the March on Washington Movement.[14]

Vaughn's litigation efforts during this time focused on conditions in and around the main black residential district known as "the Ville." He led a series of legal protests to secure better school facilities and educational access for the area's children, sued Washington University to end its policies of exclusion, and increasingly began to work in the arena of covenant litigation. In the mid-1940s, Vaughn may not have been the city's most accomplished civil rights attorney, but it was not for lack of effort.[15]

When Robert Bishop and James T. Bush approached Vaughn with the Shelleys' case late in 1945, the veteran lawyer had been steadily building a record of fighting restrictive agreements. Vaughn's advocacy on housing matters had begun when he helped lead the local charge against legislative resi-

dential segregation in 1916, but by the 1930s he had started attacking covenants in earnest. Vaughn had at least six different covenant cases under his purview in the months after World War II's end and had won at least one other suit in previous years. Though it was unclear how many of these cases he took at the behest of the city's black realtors, he and Bush had likely crossed paths in Vaughn's earliest anticovenant work. The attorney had earned his stripes in the battle against racial restrictions by successfully defeating a covenant on Page Avenue. Bush himself moved there following Vaughn's victory and he had been one of the most active brokers on the street. Regardless of the nature of their prior relationship, the two men became fast friends. Bush's daughter described them as "soul brothers" after they joined forces behind the Shelleys' case.[16]

Though Bishop and Bowers were the agents most directly involved with the disputed property, it was Bush who became Vaughn's primary benefactor in the ensuing legal fight. Only a generation removed from Texas cotton plantations, Bush had come to the Gateway City working in the railway mail service before taking an interest in real estate. His ambition and business acumen sparked a rapid ascent in the 1920s. The onset of the Great Depression, however, wiped out his financial holdings and forced him to abandon his company and take work as a foreman in the city's garbage collection division. By 1935, however, Bush had reopened his doors and developed a penchant for covenant-breaking as a means of generating business. To succeed in this endeavor, Bush cultivated a cadre of straw-party purchasers made up of fair-skinned black St. Louisans who could pass for white during the initial transactions. Before long, Bush rebuilt his wealth and developed a particular interest in seeing restrictive covenants laid to waste in America's courtrooms.[17]

WHEN GEORGE VAUGHN ENTERED the St. Louis City Circuit Court in October of 1945, then, he served at the behest of two clients. While J. D. and Ethel Shelley's interests were the focus of his efforts, Vaughn also understood that the realtors paying for his services had certain expectations of their own. Ultimately both clients sought the same practical results—namely that the Shelleys be allowed to keep their new home. The realtors funding the case, however, had the additional demand that Vaughn defend their business practices should the need arise.[18]

The hearings began on October 18 in the courtroom of Judge William Kinney Koerner. Vaughn offered a barrage of written and oral arguments against the covenant in question and the use of racial restrictions as a whole.

At the center of his claims were four main points. First, Vaughn argued that the agreement covering the property at 4600 Labadie was invalid due to defects in the instrument itself. Here, he adopted the wisdom of a young anti-covenant lawyer from Virginia named Spottswood Robinson who had pointed out a legal conference a few months earlier that "more attention could be paid to the matter of execution of restrictive agreements. In probably 10 or 15 percent of the cases, you are apt to find that the restriction is not valid to start with."[19] The most obvious problem for the white homeowners in the current case was the fact that the Shelleys' home was in a neighborhood that had been integrated for several decades. Vaughn insisted that the neighborhood's long-standing acceptance of other black property owners—including those in the home next door to the Shelleys—rendered the intentions of the agreement void. A restriction whose sole purpose was the exclusion of African Americans from the area only served an unfairly punitive function if enforced against individuals after the region was already integrated.[20]

Vaughn's second chain of arguments dealt with constitutional and statutory violations. Covenants, Vaughn reasoned, abridged black homeowners' rights by preventing African American purchasers from making contracts with willing sellers and by denying them access to the use of properties because of their race. Such efforts clearly infringed upon the protections guaranteed by the Fourteenth Amendment and the Civil Rights Act of 1866 that provided all citizens "of every race and color" with the right "to make and enforce contracts . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." This set of arguments, however, left Judge Koerner unconvinced because the courts presumed that these protections only addressed discrimination by agents of the state and not the actions of individuals.[21]

Koerner similarly rejected Vaughn's third argument that emerged in his cross-examination of the Shelleys' white neighbors. Through his questioning Vaughn attempted to strip those defending the Labadie covenant of the facade that their only concern was for their property rights. Vaughn believed that if he could expose the prejudices at the root of this effort to evict his clients the court might be more inclined to see the case as a flagrant denial of the Shelleys' rights because of their race than as a simple contractual dispute between homeowners. To that end, he probed various witnesses' participation in prior local segregation efforts outside of the housing arena. He questioned several Labadie residents about their roles in the protests against opening a local school to black enrollment. He interrogated a white business

proprietor about whether he accepted black customers at his establishments. He pounced when an elderly witness stated that he joined the covenant enforcement effort "simply to keep up the standards of the neighborhood" and to "keep away slaughter houses, junk shops, anything that was objectionable." When Vaughn seized upon this last statement and tried to coax the witness into an outright admission that he saw African American homeowners to be as offensive to his sensibilities as the stench of a killing floor, Judge Koerner intervened. "We don't want to get in such discussions as that, comparing colored people to slaughterhouses," the judge insisted. "We want to keep all such things as that out of the case. I am sure he has no such idea in his mind." Vaughn was considerably less certain that this was true, but before he could press any further Koerner made his stance clear. He stated flatly from the bench that the "only question in the case" that he was willing to consider was "whether or not they [the Shelleys] violated the contract . . . and of course your constitutional questions." Vaughn moved on.[22]

The fourth series of claims that the attorney offered seemed to strike Judge Koerner more. Vaughn's witnesses, including James T. Bush, offered compelling evidence of the overcrowding and resulting struggles of St. Louis's black communities. Vaughn highlighted the rapid growth of the Gateway City's black population from approximately 40,000 residents in 1910 to nearly triple that number by the end of World War II. At the same time, he insisted, "the portions of this City . . . occupied by Negroes have been narrowed, surrounded and circumscribed almost completely" by the growth of covenants and "by increasing business areas and the condemnation of lands . . . for the purposes of widening streets and beautifying the city and building public institutions." Vaughn pointed to the social consequences of these trends as evidence of restrictive covenants' inhumanity and injustice. The veteran attorney made his case to the court and hoped that moral as well as legal arguments would sway the judge.[23]

For an important portion of the trial, however, Judge Koerner seemed far more interested in an injustice of another sort. During the testimony of the Shelleys' realtor Robert Bishop, Koerner took a particular interest in the practices of the city's black real estate agents and offered at times a cross-examination more strident than that of Vaughn's opposing counsel. Koerner seemed genuinely appalled by Bishop's overzealous profit taking. "Don't you know," he demanded of the realtor, "that an agent owes loyalty to his clients and is not supposed to buy property in his own name and then turn it over to his clients at a profit?" Bishop's rather weak defense of his actions amounted to his insistence that "that's some of the practice of the . . . real estate

business; your Honor, I didn't make much, not considerable, but that's what I did." As Koerner and the opposing counsel, Gerald Seegers, both hammered away at the unapologetic businessman, Vaughn scrambled to protect his benefactors, doing his best to shut down the line of questioning with objections. If the Shelleys' attorney felt any compunction about vigorously maintaining Bishop's blamelessness for having exploited his clients, he never showed it either inside or outside of the courtroom. Vaughn doggedly worked to counter Koerner's distaste for Bishop's actions, insisting that the realtor's profit was not nearly as much as it seemed and that Bishop had simply followed the practices of other members of his profession—both black and white. "They do it all over town, your Honor," Vaughn pleaded. If anything this only frustrated the judge more.[24]

Ethel Shelley, who was likely better acquainted with the predatory realities of the real estate industry for African Americans, took the courtroom revelation of Bishop's profit taking in stride. While she admitted that she had not known that her pastor and realtor had drastically marked-up the price of her home, she made no comment regarding her feelings about this discovery and exhibited considerably less resentment than Judge Koerner. Still, it must have been difficult for her to watch her own attorney defend the man who had abused her family's trust and vulnerability. It must have been even harder to know that her only chance of keeping the home depended on this man's willingness to continue financing her case. She was no doubt keenly aware at that moment of her relative powerlessness in the face of hostile neighbors who wished to force her out of her home, a court that held the authority to do so, and financiers whose interests—while temporarily aligned with hers—were not focused on the welfare of her family. Yet it was her resolve in the witness chair that began slowly to win over the judge.[25]

Coming on the heels of Bishop's testimony, Judge Koerner appeared roundly unmoved by the Shelleys' case before Ethel Shelley took the stand. Gradually over the course of her testimony, however, Koerner seemed to express measures of admiration and sympathy for this strong and beleaguered woman. As Mrs. Shelley explained her family's circumstances, their struggles with finding a home, and her interactions with her realtor, Koerner found himself vocalizing his empathy for her plight. When she expressed her bewilderment at the fact that she could be evicted from her home despite the fact that she lived on a block with several other black families, Koerner assured her, "You have the sympathy of the Court; I will tell you that." Koerner's interactions with Mrs. Shelley later earned a rebuke from the opposing

counsel, who insisted that, "the Court . . . was overly kindly, courteous and condescending" to her and other witnesses during the trial.[26]

Judge Koerner ultimately ruled in favor of Vaughn and the Shelleys in mid-November of 1945. In his decision, the judge relied on his belief that the restriction covering 4600 Labadie was invalid because the original signers had never fulfilled the intent of the agreement. By leaving almost 20 percent of the properties unrestricted, and several of those in the hands of African American homeowners, Koerner argued "the agreement [was] not signed by a sufficient number of landowners to accomplish its purpose." Koerner—moved by the testimony he had heard—also took judicial notice of Vaughn's moral and demographic claims regarding the state of overcrowding in St. Louis's black neighborhoods. The judge dealt Vaughn's constitutional and statutory arguments a blow when he curtly dismissed them all, but the balance of his findings supported the Shelleys. The family would keep their home. Moreover, Koerner also ordered the plaintiffs Fern and Louis Kraemer to pay more than $700 in court costs to Vaughn and the city. Though the looming appeals would threaten this hard-won victory, the Shelleys could breathe a little easier for the time being.[27]

WHILE MOST of the real estate men backing the Shelleys' case were thrilled by this outcome, Robert Bishop likely had some misgivings. Despite Vaughn's efforts to soften the judge's distaste for the man, Bishop ultimately found himself facing an official complaint that Judge Koerner personally filed with the Missouri Real Estate Commission. The judge's opinion also singled out what he saw as Bishop's abuse of Vaughn's clients, describing the realtor's "antagonistic" interests and leaving no doubt about who he believed to be at fault for the entire situation. The Kraemers might have been on the wrong side of the law in this case, but in the court's eyes it was the realtor who had crossed the line both ethically and morally.[28]

Koerner was certainly not the only one to have qualms about the role of black realtors in the business of covenant-breaking. For anticovenant advocates, black realtors were complicated partners in the effort to secure better housing access for African Americans' urban communities. Litigators and activists across the country faced the question of whether or not to embrace and defend the potentially unseemly practices of covenant-breaking realtors. This somewhat reluctant partnership extended beyond instances like that of the Shelleys, where real estate men directly funded the defenses of particular clients. In the summer of 1945, just months before J. D. and Ethel

Shelley purchased the house on Labadie Avenue, the legal leadership of the NAACP addressed this issue at a conference of lawyers engaged in covenant cases. During the gathering, the St. Louis NAACP's director David Grant had asked the conferees what to do about "some intrepid, energetic real estate operator who to make money will go out . . . and buy up in the names of straw parties 3 or 4 houses. Then he will get a Negro buyer and move him in there and sit back and wait to see what happens. . . . To what extent should we go to the aid of these real estate brokers?" Charles Hamilton Houston, the man leading the campaign against residential restrictions in Washington, D.C., immediately exclaimed, "You should go completely to their aid." The prospect made Grant somewhat uneasy.[29]

As the lawyers discussed the appropriate course of action in such a case, they largely dismissed popular concerns about realtors' professional practices. Though Grant insisted that there was "a lot of community disapproval on profiteering," and suggested that an ardent defense of black real estate men might harm the popular appeal or fund-raising ability of local litigation campaigns, the other attorneys quickly dispensed with the issue. One participant stated flatly, "I don't see how we can expect to break the agreements if we don't have these law breakers." NAACP special counsel Thurgood Marshall even justified the excessive profit taking that occurred by maintaining that "this is not an ordinary service. You can't expect to break into a neighborhood at the regular rates." The lawyers, however, were not oblivious to the importance of perception in both the arena of public opinion and in the courtrooms themselves. As such, Houston advocated that the speculating realtor "should also try to cover his hand and divorce himself from the matter so that it will look like a natural development of sales." The methods were dubious enough that this partnership was better if kept out of the public eye. With only minor hesitations the NAACP and legal activists across the country welcomed the mingling of financial and political interests in postwar covenant cases.[30]

Still, the whole practice often reeked of exploitation. These members of the city's black professional elite—part of the upper crust of their community's income earners—had built their business in part on the desperation of their peers and of blue-collar families like the Shelleys. The realtors did not create the distressed conditions of these populations or the problems that black homeseekers faced; those were the fault of the housing shortage and discriminatory practices by white homeowners and real estate men. Still, individuals like Robert Bishop, E. M. Bowers, and James T. Bush made the decision to profit off of these circumstances. Though these men risked their ca-

reers to provide much-needed housing to members of their communities, the rewards they reaped came primarily at the expense of their African American clientele. Indeed, Bishop stood to lose his license as much for his profiteering in the Shelleys' case as for his willful disregard of a discriminatory instrument. The service these men provided was a necessary one. The way in which they provided it, however, left a bitter taste in the mouths of many observers.

What made the *Shelley* case and St. Louis unique was how prominently the professional community of African American realtors figured in the drive to move the cases forward. While black real estate men in cities across the country stood to benefit from—and therefore lent their support to—covenant-breaking litigation, Bush, Bishop, and other realtors in the Gateway City took this participation to new heights. As *Shelley* moved through the appeals process, Bush and Bishop began formalizing the unofficial network of businessmen that had coalesced around the case. In December of 1946, a little more than a year after the suit first entered Missouri's courtrooms, Bush created the Real Estate Brokers Association (REBA) of St. Louis. Comprised of most of the city's black realtors and several salesmen, these men rejected Houston's admonition from the previous year and chose not to play silent partners to the civil rights lawyers in the city.[31]

The group quickly announced its formation on the front page of the *St. Louis Argus* and began publicly issuing appeals for donations. Though their first order of business was to generate financial support for the *Shelley* litigation, they articulated a broader social and political purpose. They hoped to lead the way "in the protection of homes and investments in real estate" for the Gateway City's black community by lobbying for reforms in property assessments and taxation, ensuring appropriate municipal services and facilities for African American districts, and pursuing neighborhood beautification campaigns. One goal had particular resonance for the realtors as the men sought to "improve and expand certain neighborhoods."[32]

The REBA's formation and day-to-day operation was truly Bush's brainchild. Though Bishop would take a prominent role in the organization, serving as its second-in-command and using his office on Finney Avenue as the association's headquarters, Bush was its undisputed leader. Bush acted as the group's president and he stocked the other key leadership positions with his close allies. He chose as treasurer Dr. Charles T. Herriot—a prominent physician and landlord who had long served as one of Bush's straw-party buyers. As his public relations officer, he selected his protégé, a realtor named P. T. Robinson. Together Bush and his colleagues constructed a very public

and prominent role for the city's black real estate men in the fight for improved housing conditions. Their support would prove tremendously effective, especially in their first major campaign to bolster the *Shelley* litigation.[33]

In the fight to sustain this case on appeal, however, Bush also recognized the limitations that an advocacy group based solely upon realtors would face. Given the level of popular mistrust or distaste for some of their professional practices, soliciting contributions to meet their $5,000 fund-raising goal could prove difficult. To combat this issue and to defray successfully the financial burdens and organizational responsibilities of the campaign, Bush created an offshoot outfit in early 1947 that incorporated a range of community leaders and activists. Called the "Citizens Committee," the group remained closely tied to the REBA. They shared the same headquarters, Bishop and Robinson served as officers in both organizations, and other key REBA members like Bush, Herriot, and Bishop's employer E. M. Bowers were significant forces on the committee.[34]

While the real estate men retained enough of a presence to steer the new group, they populated the committee's large advisory board with an array of black middle-class St. Louisans. Apart from the realtors the sixty-six board members included a dozen reverends, eight attorneys, seven doctors, a handful of newspapermen, and a healthy collection of business owners. The group also featured ten prominent women including the president of the St. Louis County Teachers Association and members of the executive boards of the local NAACP and the Association of Colored Women's Clubs. The committee's acting chairman was Herman Dreer, a well-respected author and faculty member at Sumner High School.[35]

Despite the legion of legal and political activists who lent their names to the Citizens Committee, the group functioned almost exclusively as the fund-raising arm of the REBA. The organization successfully tapped into the broader African American business community of St. Louis and many of the city's key religious, social, and political institutions to amass donations totaling more than $4,000 during a period of economic retrenchment for many black St. Louisans. Members of the REBA would add close to $3,000 more of their own contributions to the case by the end of 1947. The Gateway City's black realtors had stirred a community desperate for change and yearning for progress in an uncertain postwar climate.[36]

Shelley highlights some of the ways that class dynamics and tensions within local black communities affected the trajectory of legal activism. The collision of professional, political, and class interests that restrictive cove-

nants generated was in some respects uniquely situated in the continuum of civil rights causes. Litigators had worked shoulder-to-shoulder with black middle-class and professional groups like teachers and railway workers on other issues, but rarely had the triangular relationships between clients, attorneys, and "constituents"—those benefactors to whom the attorneys owed some part of their allegiance—been so complex.[37]

In *Shelley*, black realtors were able to use covenant litigation to refocus popular distaste for their practices on an external target while simultaneously strengthening their businesses. These cases and the actions that precipitated them therefore represented a form of investment in the growth and success of local real estate companies, one where an assortment of other middle- and working-class black Americans—including a blue-collar migrant family on the tenuous dividing line of class status—bore the risks and costs of litigation most substantially. The realtors who promoted *Shelley* and other covenant cases around the country had much more to gain and less to lose than individuals like the Shelleys who they sometimes callously shoved onto the frontlines of urban America's battle over residential segregation.

At the same time, these realtors were also the men who enabled and sustained a campaign against restrictive covenants at times and in places when local political advocacy groups could not. In St. Louis they helped to generate the kind of capital and popular support that fueled the costly process of litigation. The larger fight against covenants and individual cases like *Shelley* could not have endured without this. Legal and political activists in the immediate postwar years were spoiling for a renewed attack on residential restrictions and the participation of realtors in a campaign that intended to move forward with or without them helped to defray the financial and organizational burdens of the movement. *Shelley* galvanized broad swaths of the city's black population and served as a reminder that litigation was rarely the province of only one group or individual. Instead, legal activism on behalf of civil rights often became the product of various forms of broad-based community participation, with all of the benefits, pitfalls, tensions, and partnerships that entailed.

Local Lawyers? Professional Networks and Covenant Litigation

Covenant-breaking homebuyers could not always count on the support of their realtors when the time came to go to court. Many families thus found

themselves at the mercy of local civil rights organizations or, if they could afford it, hired an attorney on their own. James and Mary Hurd in Washington, D.C., and Mac and Minnie McGhee in Detroit—already straining to meet the burdens of their mortgage payments—sought the assistance of their local NAACP branches. They were not alone. Branch offices became clearinghouses for the onslaught of covenant litigation that arose in the 1940s. To handle the volume of casework, branches tapped the reserves of local legal talent, often finding men willing to volunteer their time and services at little to no cost. Attorneys like Charles Hamilton Houston in Washington, Willis Graves and Francis Dent in Detroit, and Loren Miller in Los Angeles opened their offices to families like the McGhees and Hurds and took up their struggles.[38]

These legal activists fueled local campaigns against restrictive covenants. City courtrooms served as sites of protest and innovation where civil rights lawyers could use their professional expertise to erode the legitimacy of racial restrictions. Attorneys experimented with tactics and legal arguments as they sought to generate enough traction to win cases at the local level and build broader national momentum that might force the U.S. Supreme Court to revisit the issue of covenants' constitutionality. In the twenty years since *Corrigan v. Buckley* (1926), when the Supreme Court had ruled that neither the Fifth, Thirteenth, nor Fourteenth Amendments "prohibited private individuals from entering into contracts respecting the control and disposition of their own property," the Court had allowed only one covenant case appeal to reach its chamber. Anticovenant lawyers had therefore recognized that they advocated within and spoke to a legal system that took many of its cues from the national level. Because the vast majority of covenant cases would never pass beyond local and state courts for adjudication, civil rights advocates increasingly understood that a string of individual efforts would ultimately prove far less successful than a collaborative approach that allowed their courtroom experiments to work in concert.[39]

By sharing their experiences and ideas through national communication networks legal activists built local campaigns rooted in the particular struggles of their communities while sharing the wisdom earned by a battery of their colleagues locked in similar struggles around the country. Anticovenant attorneys from coast to coast explored and exchanged strategies designed to achieve success in their cases locally while eyeing the larger goal of forcing a reconsideration by the U.S. Supreme Court. Covenant lawyering relied upon individual ingenuity and resolve to fight unfavorable precedents

through city and state courtrooms, but the task was rarely ever a truly local or solitary endeavor.

WHEN THE MCGHEES TURNED to the Detroit branch of the NAACP for legal assistance early in 1945, they found a pair of experienced, capable, and creative advocates in Willis Graves and Francis Dent. Graves and Dent had each migrated to the Motor City in 1919 to pursue careers in law and though they maintained separate practices after an initial partnership in the 1920s, by the end of World War II their commitment to the local NAACP's Legal Redress Committee had again turned them into a formidable team. By the time they took the McGhees' case they had become Detroit's point men in the fight against restrictive covenants.

Willis Graves had begun his life in Raleigh, North Carolina, remaining in the city from his birth in 1890 until he completed college at Shaw University. Not long after graduation, Graves found his way to Howard University School of Law in Washington, D.C., where he received his degree in 1919. Enticed by the opportunities of a growing black community in Detroit, Graves left for Michigan and quickly discovered the direness of the Motor City's housing problems. A close friend of Ossian Sweet, a Detroit physician and fellow Howard graduate, Graves watched the 1925 prosecution of the Sweet family for the murder of a member of a violent mob that had attempted to drive the Sweets out of their new home in a white neighborhood. The events surrounding the case instilled a sense of outrage and resolve in the young attorney and he vowed to help break the barriers of residential segregation in the city.[40]

Graves developed into a significant community leader in the interwar period, becoming active in the business and political life of Detroit. A lifelong Republican, the stoic and "refined" attorney never held office himself, but instead organized and campaigned on behalf of others. By the 1940s, Graves had also received his license as a real estate broker and assumed the office of chairman of the board of directors at the Morison Investment and Realty Company—the state's self-proclaimed "fastest growing realty corporation." It was unclear whether the Morison Company participated in covenant-breaking and Graves's anticovenant crusade certainly never enjoyed the same financial backing from the real estate community that his counterpart George Vaughn had received in St. Louis. Yet there was undoubtedly some link between Graves's entrepreneurial and legal activities. His financial stake in opening the housing market may well have played some role in his enthusiasm for fighting covenants.[41]

It was in Detroit's courtrooms, however, that Graves made his most enduring impressions. In addition to his law practice, Graves became the official counsel for the local NAACP and served on the Association's National Legal Committee. As the leader of the Detroit branch's legal activism from 1939 to 1949, the respected attorney "handled, without remuneration, the greatest number of legal cases initiated by [the] branch for a period of ten years." Graves understood the law as a potent instrument of change in a community that so desperately needed it. He worked himself to the point of exhaustion on various occasions, paid out of his own pocket to keep underfunded cases alive, and fought the daily cruelties of prejudice and segregation with an elegant tenacity.[42]

Housing access became the central cause of Graves's legal career in the 1940s. Driven by the sheer necessity attendant with the issue in Detroit and his own determination, Graves fought case after case in the hope of prying loose the grip of residential segregation. He worked alongside Thurgood Marshall in a 1944 suit protesting the NHA's exclusion of African Americans from public residential projects for war workers in nearby Willow Run. He also handled—often with his colleague Francis Dent—as many as ten covenant cases at a time in the months following the war. In the process he became something of an evangelist for the anticovenant cause. At one point, when community spirit behind the litigation appeared to be flagging, Graves addressed a gathering at a local church to reenergize the campaign. "It was a passive audience," observed one of the attendees, "until Willis M. Graves recalled the German invasion of Czechoslovakia." Invoking the specter of Nazism, Graves maintained that only when "the world came out of its state of apathy and decided to match steel with steel," did the threat give way. "This we must do in the covenant fight," he continued. "Plan to lose on all levels until we reach the Supreme Court—there with our legal forays . . . expect to win. You have then matched steel with steel!" His impassioned speech apparently convinced his audience, who gave him a standing ovation and "a substantial amount of money" to support the ongoing cases. Graves remained utterly convinced that the right combination of arguments could bring down residential color lines. He was certain that he could change the prevailing winds of the nation's legal attitudes.[43]

Graves's partner in the McGhees' case had followed a somewhat similar path to that defense table in 1945. Francis Dent, known as "Freckles" or "Freck" to his friends in the legal community, was another southern transplant to the Midwest. Born in Rome, Georgia, in 1894, his parents were college-educated members of the state's black elite. Like Graves, he spent sev-

eral years in Washington upon leaving the South when his father, an attorney and later a government clerk, moved the family shortly after the turn of the century. Dent graduated from the prestigious M Street High School in the same class as fellow civil rights litigators Charles Hamilton Houston and George E. C. Hayes and went on to attend Amherst College where he graduated in 1916. Shortly thereafter, he enlisted in the U.S. Army along with his brother. He went on to attain the rank of first lieutenant and was subsequently wounded in military action in the Argonne Forest in 1918. That same fighting spirit would serve him well after the war.[44]

Following the completion of his service, Dent decided to pursue a new profession in a new city. He entered Detroit College of Law at the same time that Graves began his preparation for the Michigan bar and soon embarked on a long and successful legal career. He also flirted with politics in a failed campaign for the Michigan State Senate in 1930 and remained politically active afterward. He lobbied against the creation of segregated dormitories for women at the University of Michigan and fought to stop the screening of D. W. Griffith's paean to white supremacy, *Birth of a Nation*, when theaters sought to bring a revival of the film to Detroit in 1931. As early as 1929, Dent identified restrictive covenants as "the most dangerous blow toward the colored race since the acts of disfranchisement in the South," and he subsequently dedicated his energies to the campaigns of local and national advocacy groups like the NAACP, National Lawyers Guild (NLG), National Bar Association (NBA), and the Wolverine Bar Association, which he and Graves helped to found. At one point during the height of his anticovenant battles in the 1940s, Dent was serving on the legal committees of eight separate organizations and used his position in each of them to push resources toward the fight for housing access.[45]

When Graves and Dent brought the *McGhee* case before Judge Guy A. Miller in the Wayne County Circuit Court, they arrived eager to experiment with whatever tactics might work. At trial they emphasized four points. First was the claim that Seebaldt Street's white residents had improperly executed the covenant. The attorneys challenged the validity of a number of individual signatures and argued that the notaries for the original agreement had failed to provide enough detail in their certification of the contract. The court largely ignored these technical claims as insufficient to render the covenant void.[46]

Their second contention alleged that the covenant violated the "public policy" of the state of Michigan and the United States. The public policy argument gave attorneys some added maneuverability in their courtroom claims by focusing on specific issues of law in a broader legal and political

context. By insisting that residential restrictions violated the rather broad concept of "public policy," Graves and Dent suggested to the court that even if covenants did not breach the exact letter of the law they certainly violated the spirit of it. Because states like Michigan had prohibited racial discrimination in other arenas and the federal government had embraced more racially egalitarian policies and rhetoric during wartime, the attorneys argued that continued housing discrimination would undermine the thrust and intent of these efforts. The larger aim of the state and nation, the public policy argument contended, was to limit the extent of racial exclusion. Therefore even if the ongoing support of restrictive covenants in the courts was in keeping with judicial precedent, it would subvert the interests of local and national government and should be discontinued.[47]

Their third claim maintained that both the racial restriction and the court's enforcement of the contract would violate the Fourteenth Amendment. The argument that covenants themselves were unconstitutional was nothing new, but their second contention—that judicial enforcement would contravene the strictures of the amendment—stood at the cutting-edge of anticovenant litigation tactics. The idea that attorneys could challenge the constitutional right of a court to implement the terms of a restrictive agreement had only started to gain traction in the months before the *McGhee* case went to trial. Two lawyers in Chicago and California had taken a simultaneous interest in the issues surrounding the explosion of covenant cases during World War II. Harold Kahen and University of California law professor D. O. McGovney published law review articles in February and March of 1945, respectively, touting the argument that courts should consider the judicial enforcement of restrictive covenants as discriminatory state action and therefore an act proscribed by the Fourteenth Amendment.[48]

McGovney's lengthier and more technically specific article laid out a strategy to circumvent the roadblock that the U.S. Supreme Court had established with its 1926 decision in *Corrigan v. Buckley*. The Court overreached in that case, he argued, by discussing the applicability of the Fourteenth Amendment to covenants in a suit from the District of Columbia, which was under federal and not state authority. Lower courts and anticovenant advocates, therefore, could not simply accept the Supreme Court's pronouncements on that particular issue. The Fourteenth Amendment still provided ample ground from which to stage an attack on racial restrictions. The key to making covenants appear to be a matter of state concern rather than simply a private arrangement between individuals, however, was to ask courts to consider their own role in the process of enforcement. By choosing to im-

plement the terms of these contracts, McGovney insisted, "the state through one of its organs is aiding, abetting, enforcing the discrimination." Calling attention to the way that judicial rulings effected racial exclusion and lent the authority of the state to those acts might force courts to reevaluate constitutional leeway that they had thus far accorded to covenants. Graves and Dent hoped that process might start in the Wayne County Circuit Court.[49]

For their final argument at trial, Graves and Dent moved even farther out onto the frontier of innovative tactics. Because Mr. McGhee had been fair-skinned enough to pass as white for more than a decade and his wife also had a light complexion, Graves and Dent decided that they would try to force the plaintiffs and their attorney to prove that the McGhees were in fact African Americans. This was a tactic they had employed at least once before in another restrictive covenant case just months earlier. The only two witnesses they offered at trial were not their clients, but instead two social scientists from nearby Wayne University.[50]

During the testimony of Dr. Norman Humphrey, a professor of sociology and anthropology, Graves and Dent asked what it would take to determine an individual's racial identity with accuracy. "In order to approach knowing what racial derivative a person possesses," Humphrey began to expound, "one would proceed to measure a number of known points by means of calibers and develop their relation . . . to certain averages which have been worked out." When Judge Miller asked for clarification, the professor elaborated that the measurements would include "structural features such as the eyefold, degree of freeness in the upper lid . . . the shape of the nose and that sort of thing." Here, the attorneys flirted dangerously with endorsing a style of physical classification that had eerie similarities to those employed by white supremacist sociopolitical orders in Nazi Germany, South Africa, and Australia that gave the patina of scientific legitimacy to the identification and isolation of racial "others." Their purpose here, however, was to harness that scientific authority for a different end.[51]

Graves and Dent quickly turned the focus onto the issue of who was qualified to determine an individual's race. The men sought to challenge plaintiff Benjamin Sipes's authority to label the McGhees as African Americans in the courtroom. Graves and Dent struck at the idea that Sipes's only basis for his conclusions was the observation that "I have seen Mr. McGhee and he appears to have colored features. They are more darker than mine." The reality that the court would accept this simple and superficial evaluation as legal fact disturbed the two men. They used Dr. Humphrey's testimony to address this point in particular by asking whether or not "the average layman

could look at a person and tell what . . . racial classification they should be put under?" Humphrey answered no and again insisted that only "scientific determination" could establish the "racial stock" to which someone belonged. This legal strategy pushed back against decades of judicial deference to the popular wisdom of the white "common man" concerning who did and did not qualify as white under the law. One's right to keep their home, Graves and Dent implied, ought to hinge on something more substantial than the opinion that his or her features were "more darker" than his neighbors.[52]

When the attorneys finished their arguments, Judge Miller deliberated for almost three months before rendering his decision in August of 1945. Despite the lengthy wait, however, the judge's decree rejected all of Graves and Dent's claims. Miller dispensed with the technical and constitutional questions hurriedly, declaring that the homeowners had properly executed the covenant and that state and federal precedents had thoroughly established the legitimacy of private residential restrictions. He ignored the public policy arguments in their entirety and was only slightly less dismissive of the attorneys' claims respecting the racial identity of their clients. His opinion simply stated without explanation that the McGhees were "not of the Caucasian race but . . . of the colored or Negro race." He gave the family ninety days to vacate the premises.[53]

Judge Miller's rejection of Graves and Dent's challenge to the system and authority of racial classification in America, however, came too late to discourage the dissemination of the tactic to other anticovenant advocates. Within weeks of Graves and Dent's initial experiment, the national community of anticovenant lawyers was abuzz about the potential benefits of disputing racial categories in their cases. When the NAACP's National Legal Committee sponsored a meeting in July of 1945 to discuss the future of covenant litigation, it was Dent's associate from high school and college, Charles Hamilton Houston, who extolled the virtues of this strategy. "We must," he exhorted his colleagues, "make it just as difficult as possible for the plaintiffs. . . . The first thing I recommend is to deny that the plaintiffs are white and the defendants are Negroes." He had refined the original argument somewhat, turning away from supporting rigid scientific determinations of racial categories and instead encouraging lawyers to focus on the murkiness of popular definitions of race and the haziness of biological boundary lines.[54] He described the purpose of the tactic by pointing out that "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 standards about Negroes either. The more you shake them, the better off you are. If they make a definition—you can't do it on color or hair, make them admit it will not hold."[55]

The rapid diffusion and adaptation of this tactic to different local courtrooms and covenant fights bespoke the importance of this network as a tool of legal activism. Communication and connections between civil rights attorneys were largely the products of social acquaintance—as in the case of Dent and Houston—as well as the marginalization of African American attorneys within a predominantly white legal system and the exhausting demands of legal and political activism. National organizations involved in legal advocacy like the NAACP and the National Bar Association also provided forums and formalized spaces for interaction and exchange like the July anticovenant conference. The networks these advocates established became a market for the best strategies to uproot the pillars of de jure segregation and innovation was the currency that fueled it. Graves and Dent's experiment quickly took hold in the professional network of anticovenant attorneys and by the end of the year a handful of cases across the country had field-tested their own versions of the argument. Among the attorneys who put this tactic into practice was Dent's friend in Washington, Charles Hamilton Houston.[56]

IT WAS IN HOUSTON'S very capable hands that James and Mary Hurd placed their trust in the summer of 1944 when they reached out to Washington's local NAACP branch. The man who would serve as their counsel stood as perhaps the most renowned civil rights attorney in the nation and was an avid opponent of restrictive covenants. By the 1940s, Houston had played an especially influential role in the process of refining anticovenant litigation tactics. In taking the Hurds' case, Houston brought a national profile to the local stage of Washington's district court, where he returned after leading the NAACP's national legal office from 1935–39.

Born in Washington in 1895 to a prominent local attorney, Houston's intellect and precocity took him to Amherst College where he was Phi Beta Kappa and graduated magna cum laude before the age of twenty. Houston, like his elder St. Louis counterpart George Vaughn and his friend Francis Dent, enlisted in the U.S. Army during World War I and served as a second lieutenant for a field artillery unit. Houston's experiences with racial hostility and discrimination in the war shook him from the relative shelter and privilege he had thus far enjoyed in life and helped spur his ambitions for reform. After completing his service to his country he enrolled at Harvard

Law School in 1919 and quickly became the first African American elected to the editorial board of the prestigious *Harvard Law Review*. Houston later won a fellowship to continue his legal studies in Spain and traveled the European continent before returning to Washington to join his father's practice.[57]

The late 1920s witnessed Houston's emergence at the forefront of African American legal work. He assumed a leadership role at Howard University School of Law and spearheaded its rapid transformation into the nation's principal training ground for black attorneys. In 1935 he took over the office of special counsel for the NAACP's national office and crafted the Association's civil rights litigation agenda for the next five years before relinquishing the position to his protégé, Thurgood Marshall, and resuming a less taxing role on the organization's National Legal Committee. On his return to Washington, Houston took over teaching Howard's newly established course in civil rights law, served on President Franklin D. Roosevelt's Fair Employment Practices Committee investigating instances of labor discrimination, and expanded his local legal pursuits—taking on a variety of cases in his private practice and on behalf of the local NAACP.[58]

As the wartime housing shortage forced the issue of restrictive covenants toward center stage in civil rights litigation during the 1940s, Houston's anticovenant efforts quickly blossomed. His caseload grew to the point that he engaged the services of attorney Spottswood Robinson, who had taken a particular interest in the covenant issue. The two men spent long hours hunched over their desks going line by line through briefs and appeals that they hoped would break open the barriers to better housing for their fellow black Washingtonians.[59]

Houston's efforts gave him considerable familiarity with the Bryant Street neighborhood that James and Mary Hurd attempted to enter in 1944. Before the Hurds' case arrived at his desk, Houston had navigated a series of courtroom confrontations in 1941 and 1942 against restrictions including some on Adams Street in Northwest—the block directly behind the Hurds' home on Bryant. Though his arguments in these earlier cases had lost at trial, his persistence and tactics of delay allowed the Adams Street residences to remain in the hands of black purchasers long enough that the white plaintiffs abandoned their enforcement efforts and ultimately the neighborhood.[60]

Houston's work in the Adams Street cases illuminated his commitment to the issue of housing discrimination. He clearly felt a deep sense of personal resolve in his crusade against restrictive agreements and this determination fueled his cases. When he met a setback in the first of the Adams Street suits,

he wrote a letter to every other African American living on the block promising them that "the fight goes on and that we intend to appeal . . . and to make Mr. Bishopp and Miss Musson [the white plaintiffs] fight every inch of the way for every single house in the block." That defeat sparked Houston's moral outrage and piqued his well-known appetite for victory. Those who sought to keep Washington's restrictive covenants in place, he warned, were on the wrong side of morality and liberty. "This fighting," he wrote, was for nothing less than to "establish some democracy here at home."[61]

By the time Houston took the Hurds' case to trial in October of 1945, just nine days before the Shelleys' entered their courtroom in St. Louis, he had cultivated a reputation as a resilient and ardent anticovenant activist. Through a combination of delaying tactics and slow movement by the district court in Washington, Houston's suit had taken more than a year to go to trial. When it did, the court joined his case with those of Raphael Urciolo—the white realtor who had recently sold three other homes to black purchasers on the Bryant Street block.[62]

As Houston formulated his strategy in the *Hurd* case, he experimented with a number of arguments. Finding the key to a successful courtroom challenge, he believed, would involve putting forward an array of claims in the hopes that one—or the sum total of all of them—might convince the court to rule in his favor. Houston had extolled the virtues of this strategy at the gathering of anticovenant attorneys in Chicago during July of 1945. Those who defended covenants at trial, he pointed out, always sought "to narrow the issues as much as possible" by arguing that the case revolved around nothing more than the rights of individuals to make private contracts as they wished. Anticovenant advocates, therefore, "should broaden the issues just as much as possible on every single base, taking nothing for granted." Three months later, when *Hurd* went to the courtroom of Judge F. Dickinson Letts, Houston sought to do just that.[63]

He began by challenging even the most basic of assumptions underlying the case. Houston put into practice a modified version of the tactic that his colleagues Graves and Dent had pioneered in Detroit. He insisted throughout the trial that his clients were not African American and that the covenant prohibiting use or occupancy by "any Negro or colored person" did not apply to the Hurds. In the *McGhee* case, Graves and Dent had kept their clients off the stand and had only disputed the right of a layman to determine the McGhees' race rather than explicitly claiming that they were not African Americans. Houston's clients, on the other hand, were more specific in their denials. James Hurd maintained that he was in fact Native American

and Mary Hurd, an orphan who had lived among white people for much of her life, claimed not to know the racial identity of her parents. Houston demanded that the plaintiffs in the case prove that his clients were in fact black, an exercise he knew would expose the illogic and inconsistencies of the popular wisdom about what made "race."[64]

Because the Hurds' physical appearances—like the McGhees—put them in the poorly defined margins of standard racial categories, Houston tried to use the ambiguities of racial identity to his advantage. When questioning Frederic Hodge, the husband of the primary plaintiff, Houston went so far as to call James Hurd up from the gallery and have him sit in the jury box as the witness made a frank appraisal of the physical markers of his race. "What," Houston asked, "is a negro [*sic*] about Mr. Hurd's features?" Hodge strained forward slightly to inspect his neighbor, taking in the detail of his face and weighing his reply. "I would say the nose for one thing . . . the nostrils, the lower part of the nose." In the end, Hodge concluded that it was only his neighbor's "nose and his skin" that marked him as African American.[65]

Houston, however, went beyond contesting the racial identity of only his clients. Throughout the trial, he also attempted to force the plaintiffs to prove their whiteness for the court. His purpose in doing so, he had once explained, was that "every time you drag 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. . . . There are many people who cannot give any reason why they are white." The privilege of calling oneself white in the United States at that time came with a certitude that often seemed unshakeable—and indeed likely had to remain so for the system of classification to work. Houston took that self-certainty to task. In a particularly tense exchange with the primary plaintiff Lena Hodge, Houston asked how the witness knew that she was white and continued to press her on the subject until Hodge finally snapped, "How do you know you are a Negro?" Houston quickly shot back, "I know that, because you all say I am." Eager to get the final word on the subject, Hodge could only muster, "I know that you are and I know that I am white." The frustration and assuredness that Lena Hodge and her husband showed in their exchanges on this subject laid bare the kinds of assertions that passed for legal fact on the issue of race. The Hodges' whiteness gave them the prerogative to police the boundaries of racial categories and to claim the right to determine exclusion and belonging in the "common wisdom" of American racial identity.[66]

Houston and his cocounsel pushed this line of argument even further by calling in a pair of expert witnesses from local universities to testify about

the ambiguities of racial categories. Monsignor John M. Cooper, head of the Department of Anthropology at Catholic University and editor of the *Review on Anthropology*, confirmed under questioning that visible physical traits were often unreliable indicators of a person's race and that his field was undecided as to whether a "pure white race" actually existed. He agreed that social concepts "enter very largely into the problem" of what was meant by the term "white," but he stopped well short of completely rejecting a physical basis for categorization or endorsing a purely social understanding of race.[67]

Houston's experimentation with this strategy in *Hurd* also bespoke a larger purpose than simply winning the case at hand. Previous chroniclers of the restrictive covenant cases have either ignored or dismissed these claims regarding race as little more than a desperate tactic designed to prolong litigation or manufacture technical grounds for a dismissal of the case. Houston undoubtedly proposed the idea in part as a strategy to frustrate his opponents—to "have them up a tree," as he put it—and to multiply the arguments available to potentially sympathetic judges. Yet, he always maintained that the act of questioning what made someone white was "the beginning of education on the subject." Houston hoped to use the district court trial as a forum to expose and interrogate the flimsiness of racial categories. Because one's access to full citizenship rights depended upon these perceived physical differences, Houston struck at the issues of how individuals made these distinctions and who had the authority to do so. It seemed indefensible that the right to live in a given home could hinge on a man's testimony about the shape of his neighbor's nostrils and the uncertain hue of his skin. In the immediate wake of World War II, when many Americans became more attuned to the dire potential consequences of a social and political order premised on a discourse of racial difference and superiority, Houston seemed to sense a moment of particular vulnerability for popular wisdom about race.[68]

The rest of Houston's tactics in the *Hurd* case were more straightforward. Beyond his assertions regarding the ambiguities of racial identity, Houston relied primarily upon an argument regarding the changing demographics of the neighborhoods surrounding the Bryant Street address. "The 100 block of Bryant Street, Northwest," Houston charged, "was not . . . a so called 'white' neighborhood . . . and could not be made such by any action of this Court." He elaborated that since the establishment of the covenant in 1906, the "neighborhood, square and surrounding area have completely changed in character . . . and that the purposes which called forth said covenants, if

any, cannot now be accomplished." Pointing to the close proximity of black families on Adams Street immediately behind the Bryant properties and further down the same block of Bryant, Houston asserted that continued enforcement of the covenant could not possibly achieve the results its creators had intended.[69]

His criticism of the restriction's futility continued during the testimony of Howard University sociologist E. Franklin Frazier. Calling Frazier as an expert on urban demography and the process of racial succession, Houston laid out the facts for the court bluntly. "Would you consider the neighborhood in the 100 block of Bryant Street," he began, "where out of 31 houses, 11 houses were occupied by negroes, and . . . five or more houses were occupied by Italians and Assyrians, would you consider that a white neighborhood?" Frazier replied that he would not. Houston hoped the court would see those facts the same way.[70]

At the district court stage of the *Hurd* case, Houston declined to offer any constitutional or statutory points in favor of his clients' right to keep the home, arguing instead about the weaknesses of the particular covenant at issue. Houston relentlessly attacked the logic underlying the agreement—namely that African Americans' presence in the area would devalue the homes and upset the neighborhood's social dynamics—to show that enforcement was unnecessary. Houston extracted concessions from the neighborhood's white residents that the black families on the block had maintained their properties well and in several cases had improved them. Testimony from local realtors and a member of the city's Rent Control Board documented the fact that property values actually increased substantially when African American homebuyers entered new neighborhoods. Because black homeseekers would pay a premium to obtain decent residences, the covenants themselves hindered the appreciation of value by turning restricted homes into what one witness called "white elephants." "The whites don't want them," he explained, "the negroes can't have them."[71]

Houston, however, cautiously pushed back against the implication that white residents' only option was to sell to African American purchasers and leave the area. He attempted to show that integration had not adversely affected the social character of the neighborhood or provided white property owners with any legitimate reason to abandon the Bryant Street block. Houston challenged the insistence of the lead plaintiffs that black residents' presence had diminished the "sociability of the neighborhood." These same witnesses admitted under questioning that they had never had any problems or been disturbed by African American homeowners in and around the area,

but that they simply "want[ed] to live with people [our] own color." When Houston pressed for specific answers or examples regarding how the block's "sociability" had changed since the Hurds' purchase, the witnesses offered vague assertions that failed to amount to anything more than a gut feeling. Houston had made his point. If black homeownership along Bryant Street had increased property values, improved the physical appearance of the neighborhood, and created only an ambiguous sense of social discomfort, his reasoning suggested, the covenant's only real function was to indulge the whims of a few prejudiced residents and unjustly punish desperate and responsible black homebuyers. The judge, however, proved unsympathetic to this logic.[72]

Houston gambled on one other maneuver midway through the proceedings. Frustrated by Judge Letts's lack of receptiveness to his defense, Houston sought for grounds to cast doubt upon his impartiality and perhaps have him removed from the case. Four days into the trial, Houston discovered that Letts was living in a rented property covered by a restrictive agreement and filed a motion alleging a personal bias against the interests of the Hurds and requesting Letts's recusal from the case. Houston politely—but firmly—insisted that when his clients had finished testifying the previous day, "they felt your Honor had his mind made up against them." Letts quickly overruled the motion while stating for the record that he did not own the property and was unaware of any covenants affecting its use. Houston could hardly have expected Letts to consider his allegation seriously, but the decision to press forward anyway testified to both his thoroughness and his commitment to a strategy of forcing the court to address as many issues as possible. The veteran attorney would try whatever he could to find a way to delay or defeat the enforcement of the Bryant Street covenant.[73]

Despite these efforts, Judge Letts eventually ruled in December of 1945 against the Hurds. He dispensed with each of Houston's arguments curtly. On the issue of racial identity, he found no cause to doubt the whiteness of the plaintiffs or the blackness of the defendants and dismissed James Hurd's testimony about his ancestry without comment. Houston's contention that the racial composition of the area surrounding the neighborhood had changed to such a degree that the covenant could no longer serve its stated purpose met a similarly blunt end. Letts construed the boundaries of the Bryant Street neighborhood narrowly, limiting it to the twenty houses that had remained under covenant and white ownership until the Hurds' purchase. "There has been no constant or substantial penetration of negroes into the area," the judge insisted, "sufficient to show that the purpose of the

covenant . . . has been frustrated or that the result of enforcing it would depreciate rather than enhance the value of the property involved." With that, Letts voided the purchases of the Hurds, Rowes, Stewarts, and Savages and ordered the families "to remove themselves and all of their personal belongings from the land and premises now occupied by them within 60 days." They had always known their evictions were possible, perhaps even likely. Now, however, they suddenly faced the harsh reality that they would soon be at the mercy of either the appellate court or Washington's streets.[74]

ON THE WEST COAST, but in the center of a national network of anticovenant advocates, stood Houston, Graves, and Dent's future colleague in the *McGhee* case, Loren Miller. In the covenant litigation hotbed of Los Angeles, Miller had quickly built a reputation as one of the most experienced, innovative, and accomplished advocates for greater housing access. His work on the Sugar Hill cases in December of 1945 won him national recognition for his legal exploits.

Before taking up the fight against restrictive covenants in Southern California, Miller had been part of a cohort of young, radical activists that sharply criticized the NAACP and its reliance on litigation as a means of reform. Through most of the 1930s, Miller was an especially outspoken detractor of the Association's legal campaigns and of Houston's leadership as Special Counsel. Not long after he began his anticovenant practice in 1939, however, Miller found himself as a central figure in the professional networks whose efforts he had often disparaged. By 1944, he served as the chairman of the Los Angeles NAACP's Legal Committee and as his covenant work blossomed, so did his connections to the national office of the NAACP.[75]

In his first eight years of fighting covenants, Miller took up more than 100 local cases. None, however, won him more public recognition and acclaim than the Sugar Hill suits in 1945. In the months leading up to the Sugar Hill trial that December, Miller had grown particularly enamored with the "state action" theory that Harold Kahen and Professor D. O. McGovney had detailed earlier in the year and that Graves and Dent had wielded unsuccessfully in the *McGhee* case. The idea of challenging courts' enforcement of covenants rather than the constitutionality of the specific instruments, however, struck Miller as the key to unlocking the U.S. Supreme Court's closed book on the issue. He spent the rest of the year waiting for the perfect opportunity to build a case around the argument.[76]

Miller searched for a way to make state action claims the central issue in the cases. Earlier efforts by Graves, Dent, and George Vaughn had all in-

cluded the enforcement argument in their respective cases and had been either ignored or dismissed without any substantive comment. The challenge Miller faced was how to get a court to rule specifically on the issue. His ability to do so depended upon finding a judge willing to take the claim seriously and some ingenuity in presenting his case. As the Sugar Hill suits readied for court, Miller streamlined his argument and made the decision to focus on only one issue at trial. "We did not file any briefs in the case," he later wrote, "and our authority as furnished to the court was contained in [Kahen and McGovney's] Chicago and California Law Review Articles." Miller then made a "motion to deny the introduction of evidence" and objected "to the introduction of testimony" by the plaintiffs in the case, asking Judge Thurmond Clarke to decide strictly on the state action argument that Miller put forth. At a time when the prevailing wisdom of anticovenant litigation called for attorneys to lob at local courts just as many arguments and pieces of evidence as they could, Miller's strategy was certainly unusual. He also had little reason to expect Judge Clarke to comply with his motions. Clarke would only have to overrule Miller's objection to force the attorney to pursue a more conventional line of argument. Miller offered no real indication of why he chose to pursue such an approach in this instance when success seemed so unlikely. Yet, Clarke—in a move that stunned nearly every participant and observer—granted Miller's motion and quickly ruled in favor of his clients.[77]

Clarke's motivations for this ruling remain unclear. Perhaps the celebrity of Miller's clients and the public scrutiny that would invariably ensue encouraged him. Perhaps it was what he had seen with his own eyes in the West Adams Heights district where they lived. The day before his ruling, he had chosen to walk with the attorneys through the streets of the neighborhood in question and inspect firsthand the conditions of black-owned homes and an integrated block. For nearly a decade, black and white residents had lived alongside each other on these avenues and the neighborhood hardly seemed on the brink of the destruction that was supposed to ensue. Or perhaps Clarke's decision in the case sprang from nobler principles. The text of his ruling suggested a personal conviction that the continued enforcement of restrictive covenants violated the essence of freedom promised by the Constitution and defended at tremendous cost in the recent war. He declared, "This court is of the opinion that it is time that members of the Negro race are accorded, without reservations and evasions, the full rights guaranteed them under the 14th Amendment. . . . Certainly there was no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the war just ended."[78]

Judge Clarke was not alone among his colleagues in finding fault with restrictive agreements, yet he was unique in his decision to rest his decision solely upon the state action argument. His intention in doing so was to provoke the U.S. Supreme Court into granting a new hearing on the issue of covenants. "Judges," he wrote, "have been avoiding the real issue for too long." Clarke's stunning and lonely act of judicial audacity evidenced the fact that local civil rights litigation could often hinge on an individual judge's principle, politics, or personality.[79]

In fact, a handful of jurists across the country had begun to take aim at the legitimacy of restrictive covenants. Most of the judges who took the strongest stands appeared to act out of genuine concern over the conditions for black urban communities in the postwar moment. Moral indignation at the injustice of America's racial ghettos fed anxieties about the public policy implications of deteriorating and overcrowded slums. Local judges like Clarke and William Kinney Koerner in St. Louis each noted the problems caused by racial housing restrictions in their decisions against covenants. Clarke in particular had bucked his fairly conservative judicial leanings to embrace Miller's state action claims, a fact that seemed attributable primarily to the urgency of the moral questions at stake in the issue. Other more progressive jurists like Justice Roger Traynor of the California Supreme Court or Judge Henry Edgerton of the Federal Circuit Court of Appeals in Washington, D.C., had also focused intently on the consequences of overcrowding as an exigent public policy concern in their opinions against restrictive agreements. Even those jurists who felt constrained by precedent to uphold covenants sometimes pointed to the evils that they helped create. Chief Justice Robert E. Crowe of the Cook County Superior Court in Illinois, for example, enforced a Chicago covenant even as he decried "those in our midst who would sabotage unity and break down our spiritual defenses by denying to certain minorities the rights which our Constitution guarantees to all citizens. Those who would continue old restrictive covenants and attempt to establish new ones are in this un-American group. They would do violence to American laws and traditions." Others were less strident in their reflections on the growth of housing segregation, but nonetheless urged legislatures to address the issue since they considered their hands tied by precedent. Miller's strategy in the Sugar Hill cases had tapped into this deep uneasiness within the nation's judiciary and, with a bit of luck, had succeeded in shaking something loose.[80]

News of Miller's victory elicited a mixture of shock and excitement among civil rights attorneys' national networks. Within days, praise poured in for

Miller's tactical maneuvers. "The newspaper quote suggests that the judge placed the decision squarely on the 14th Amendment," exclaimed attorney Pauli Murray—who had personally endured the process of covenant enforcement the previous year. "Is that true?" she asked. "If so, congratulations twice." Another colleague of Miller's wrote, "I needn't tell you how surprised I was to learn that . . . Clarke of all judges did what the liberal judges of Los Angeles haven't had the courage to do. . . . If there is to be an appeal, please let me help on it." Even Miller himself privately professed some surprise at the outcome when he claimed to a friend that he had "succeeded in pulling a rabbit out of the hat" in the case. With a hint of pride—and an appreciation of the good fortune involved—in his triumph, Miller confided that "this was a rather neat trick in view of the numerous holdings to the contrary by both state and federal courts." Miller had found the right jurist and the right strategy to stoke the zeal of anticovenant lawyers around the country. As NAACP special counsel Thurgood Marshall put it in a congratulatory letter to Miller the week of the ruling, attorneys everywhere began to feel that "maybe this is it."[81]

The California Supreme Court would ultimately derail the Sugar Hill cases' opportunity to reach the nation's highest court by refusing to issue a decision on the appeal for almost two years, but the state court could not obstruct the energy and ideas that Miller infused into local struggles in other cities. The conversations that Sugar Hill generated among anticovenant attorneys revealed the extent and power of the professional networks that would help to carry other cases forward. Letters flooded into Miller's office in Los Angeles for months from New York, Washington, D. C., Chicago, Detroit, and nearly every other covenant litigation hotbed. Lawyers fighting restrictions in each of these cities solicited advice, offered assistance, asked for copies of the case record and the state action law review articles, and briefly shared stories of their individual struggles against the prevailing tide of judicial support for enforcement.[82]

Miller wrote back, sharing whatever counsel and encouragement he could. A Chicago attorney seeking guidance on the latest arguments available in the covenant fight received a response that "urgently recommended" he read McGovney's article. "I would be glad to send you a copy," Miller offered, "but I have just sent my last one to Willis Graves in Michigan." As part of his correspondence on a single, particularly busy day, Miller commiserated with a Washington anticovenant attorney who lamented the volume of cases his office was forced to handle, shared details of his strategy with housing expert Robert Weaver at the American Council on Race Relations,

discussed the tactics for an appeal with Howard Law School dean William Hastie, and advised a colleague in New York to try and generate "much more public discussion" regarding covenants to lay the groundwork for review by the U.S. Supreme Court. Miller also eventually corresponded extensively with each of the attorneys whose cases would reach the high court in 1948. He exchanged case records and regularly conferred with Charles Hamilton Houston and Willis Graves in the wake of the *Hurd* and *McGhee* rulings and received a $100 fee from George Vaughn for consulting on *Shelley* as it readied for appeal.[83]

Sugar Hill moved Miller to the intellectual center of the anticovenant legal crusade. The extensive professional network that Miller's activities revealed, however, indicated that successful civil rights litigation in a legal system generally hostile to change relied upon collaboration and the sharing of resources and ideas on a national level as much as it depended upon the tactical ingenuity and intellectual creativity of individual attorneys. As lawyers like Houston, Miller, Graves, Dent, and Vaughn battled the varied forms of racial segregation and discrimination in local communities across the country, they could feel the strength of a nationwide coalition of their colleagues at their backs. It was a strength they would need as they faced a dogged opposition in court.

Resistance: The Legal Defense of Restrictive Covenants

Across the aisle from the nation's anticovenant attorneys stood other local advocates fiercely committed to defending residential restrictions and white homeowners' claims. The opposing lawyers in the *Shelley* cases and the legal defense they mustered gave voice to white communities that had increasingly come to see their desire for racial exclusion as a matter of principle and property rights rather than prejudice. These attorneys—like the neighborhood associations and homeowners they represented—were deeply rooted in both discriminatory custom and segregated communities and felt a personal investment in the continuity of both. They were active local leaders and competent, if unremarkable, lawyers who adhered to a sort of legal orthodoxy that was fast dissolving around them. They fought adamantly to withstand the evolving challenges of civil rights advocates and sustain the legal legitimacy of their desire to exclude African Americans from white neighborhoods. Ultimately, the efforts and motives of restrictive covenants' courtroom defenders offered insight into the challenges that civil rights liti-

gators faced and the reasons for the creativity that characterized the fight against segregation's various forms.[84]

In St. Louis, white residents of the Labadie Avenue area and members of the MAIA turned to a young, newly minted attorney to pursue the case against the Shelleys. Thirty-six-year-old Gateway City native Gerald Seegers had grown up in a blue-collar Catholic family and initially trained for priesthood at a local seminary before moving on to a legal education at both St. Louis University and Washington University. Graduating in 1943, one of his first clients was the MAIA, whose veteran covenant defender D. Calhoun Jones he replaced. Seegers came to the organization through his uncle, Martin Seegers—a founding member of the MAIA and its first president—and quickly became thoroughly involved in its operations. Though he still took nominal fees for his legal services, he extended his participation beyond the sphere of litigation, regularly attending meetings and taking on some leadership responsibilities. The young attorney, whether through his family ties to the area and the MAIA or through a personal conviction about the issues of residential segregation and property rights, soon found himself deeply invested in protecting racial restrictions. Lawyers like Seegers came to see the neighborhoods they fought on behalf of not as clients but as causes and their legal expertise and community leadership were a crucial part of the successful functioning of homeowners groups like the MAIA. Civil rights litigators often found themselves up against opponents as ardently committed and willing to work with minimal compensation as themselves.[85]

The man who battled Willis Graves and Francis Dent in Detroit, Lloyd Chockley, left a clearer sense of his personal beliefs on the issue of residential integration than his St. Louis counterpart. Born in 1889, Chockley grew up on a Colorado farm before abandoning the agrarian life and migrating to Detroit with his younger brother just before the First World War. Their first residence in the Motor City was on Seebaldt Street, the same street that Chockley would fight to keep restricted almost thirty years later. By the 1940s, he had moved just five blocks away and remained deeply tied to the white neighborhood north of Tireman Avenue. When the Northwest Civic Association retained Chockley's services on behalf of Benjamin Sipes in 1945 and began the process of evicting the McGhee family, they placed their interests in the hands of a man with no particular reputation, but with a fierce devotion to housing segregation and an acerbic temperament. Both of these qualities were on display in his briefs to the Michigan Supreme Court late in 1946.[86]

More than many of his peers, Chockley gave insight into his personal attitudes and motivations in his legal writings. He evinced a disdain for those "protagonists of the intermixture of the races" who wished to violate covenants and repeated the loaded term "intermixture" when characterizing the objectives of his opponents—echoing the implicitly sexualized threat of racial proximity that earlier protests against housing integration in the city had used. Chockley saw himself as a defender of the "right" of white Detroiters "to live and rear their families in white neighborhoods" and it was this steadfast determination that drove his advocacy for the exclusion of black homebuyers like the McGhees. Though Chockley would die suddenly in 1947 before the final appeals in the case, his work in Detroit, like that of Seegers in St. Louis, again spoke to procovenant attorneys' personal commitment to enforcing the racial boundaries of the nation's cities. Legal activists like Graves and Dent rarely faced off against men who were simply hired guns. Seegers, Chockley, and residential segregation's other courtroom defenders played the part of crusaders rather than mercenaries in that their efforts grew from an allegiance to some combination of custom and prejudice over an interest in financial gain.[87]

Like Chockley, Washington attorney Henry Gilligan—Houston's opponent in the *Hurd* case—felt an added personal incentive and urgency in his cause. Gilligan lived at 2304 First Street, Northwest, just around the corner from the homes along Bryant that he was fighting to keep out of the hands of African Americans. The sixty-two-year-old attorney had grown up in Baltimore before moving to his First Street residence around the time of World War I. Unlike his counterparts in St. Louis and Detroit, Gilligan brought an immediate profile to the cases and a reputation he had cultivated through nearly two decades of community leadership in the District of Columbia. He had held a seat for eleven years on Washington's Board of Education, was elected as a director of the District Building and Loan Association in the 1930s, served as master of his Masonic lodge, and as choir director, organist, lay leader, and chairman of the board at his Methodist church. Gilligan's neighbors also elected him president of the North Capitol Citizens Association (NCCA), a local homeowners' group where he provided both legal and organizational leadership.[88]

Gilligan's attitudes on racial and residential integration betrayed a man deeply unsettled by the prospect and pace of change in the bustling metropolis where he lived. In his occasional letters to the editor at the *Washington Post* and in some private correspondence, Gilligan pronounced himself a fair-minded friend of the District's black population. "The many movements

now under way to encourage economic opportunities and independence for our Negro citizens," he once wrote, "are most commendable and right-minded citizens of all colors must approve." Yet through decades of political and legal activities, Gilligan consistently showed a reluctance to accept any form of integration as a feasible means of black advancement. In the early 1930s, he provided a vocal dissenting opinion on the Board of Education when faced with opening a new facility for African American pupils that he believed was "forcing on a white community a colored school."[89]

Two years after he left the board, he publicly objected to Howard University's efforts to hold a concert by Marian Anderson at a local white high school. Claiming to speak on behalf of the overwhelming majority of Washington's citizens—both black and white—Gilligan voiced his belief that such a gross violation of the city's Jim Crow ethics would only lead to "unrest and acrimonious discussion." "I have no racial prejudice whatever," he maintained perhaps a bit too vigorously. "The question with me is one of law, rules, and the best interests of our colored and white people." Gilligan captured with these words a pervasive sentiment that racial progress, if it came, should never take place at the expense of upsetting the lopsided comfort and civility of the status quo. For him, as for so many others of the era, the preservation of custom mattered far more than any agenda or immediate demands of those who sought greater rights for African Americans.[90]

Gilligan was especially adamant on the issue of segregated neighborhoods. Like Lloyd Chockley in Detroit, he articulated a belief in the right of "fine white people in our community to live their lives among people of the white race—in their homes, their schools and their churches," and some years later insisted that "there is no way that I know of to do this except through covenants." Ignoring the conditions that forced black homeseekers to obtain covenanted homes, Gilligan laid the blame for the increased agitation over racial restrictions at the feet of unscrupulous realtors and political antagonists who had "no compunctions of any kind" and were bent on the "destruction of white communities." He portrayed himself as a defender of a social and moral order that had its roots deep in the traditions of Jim Crow segregation. Restrictive covenants, he seemed to suggest, were one of the key pieces holding it all together.[91]

Gilligan's partner in the fight to preserve residential restrictions, James A. Crooks, seemed destined to follow in his mentor's footsteps as a community leader and proponent of racial exclusion. The attorneys lived next door to each other and as colleagues fought to enforce covenants for more than a decade. Crooks was nearly thirty years younger than his associate, but the

two men recognized something familiar in each other—an ambition for leadership and a commitment to the mores of a segregated society. Though a native New Yorker, Crooks had grown up in the District, graduated from George Washington University, and attended law school at National University. He devoted his time to a series of organizations including the Americanization School Association and the NCCA, where he was secretary-treasurer and served alongside Gilligan. At the age of thirty, he became the NCCA's delegate to the Federation of Citizens Associations, an umbrella organization for the sixty-five homeowners' groups in the city, and helped lead the Law and Legislation Committee for a number of years. Late in 1942, Crooks accepted a position at the District Rent Control Office and quickly worked his way up to the job of chief counsel. Because of these additional responsibilities, Crooks did not participate in Gilligan's *Hurd* case until later in the appellate process, but he undoubtedly played a role and provided support to his colleague in these early stages through the NCCA.[92]

The experiences and attitudes of the four attorneys who fought to enforce covenants in the *Shelley* cases revealed the nature of the legal resistance that civil rights litigators faced. The lives of Seegers, Chockley, Gilligan, and Crooks exposed how community ties, local leaders, and the law interacted to create a formidable opposition to change. Men like Gilligan and Crooks floated between roles in the courts, neighborhood associations, and city governance—blending the boundaries of legal, political, and community opposition. Covenant cases were never just abstract principles being debated and decided by outsiders; rather they required the mobilization of entire communities to defend the customs and perceived rights that had kept their neighborhoods white. Procovenant attorneys, by virtue of their skill set and their commitment to the cause of exclusion, became influential in shaping the architecture of white resistance to residential integration.

IN THE COURTROOMS THEMSELVES, however, the legal defense of restrictive agreements looked positively mundane compared to the dynamism and intellectual ingenuity of anticovenant litigators. All of the procovenant attorneys in the *Shelley* cases followed a simple pattern during the first phase of the trials. Their only goals were to establish for the courts that a valid restrictive covenant existed for the property in question, that the restriction served an important purpose, and that the defendants had violated the terms of the covenant. The lawyers kept the matter as direct as possible, using strikingly similar formulations in each of their respective cases. The similarities extended to the specific language of what was at stake for their clients. When

discussing the consequences of violating the neighborhood's racial proscriptions, for example, St. Louis attorney Gerald Seegers insisted that his clients would "suffer irreparable injury and irremediable damages to their property." Lloyd Chockley of Detroit had argued at two separate points that "continued violation of said restriction will cause irreparable injury to these plaintiffs and all other owners in the vicinity." Likewise, in Washington, Henry Gilligan maintained that "the continued occupancy and/or ownership by the defendants . . . will constitute a continuing wrong and injury that is irreparable, and is incapable of ascertainment and compensation in damages." The nearly identical patterns of argument and the close resemblance of the language in each case exemplified how customary courts' enforcement of racial covenants had become. All of these individuals—despite the fact that they had no contact with one another—effectively worked off of the same script that had emerged from decades of successful pleadings around the country.[93]

Attorneys in the *Shelley* cases shared this method for good reason. The U.S. Supreme Court decision in *Corrigan v. Buckley* (1926) and the local precedents that echoed that finding provided procovenant attorneys with a straightforward and available source for a winning strategy that needed little, if any, adaptation. As a result, these lawyers could ignore constitutional and statutory arguments entirely in this initial stage of the case. The only challenge they faced at trial was to try and limit the impact of any new arguments from anticovenant attorneys. By offering extensive objections to the introduction of testimony respecting the growth and poor housing conditions of African American communities or by simply ignoring their opponents' constitutional claims altogether, procovenant lawyers tried to keep the courts' focus on the narrow issue of whether black homebuyers had violated properly executed private contracts. For the most part, judges obliged by only addressing and upholding the validity of individual agreements.[94]

Even on appeal to the Michigan and Missouri Supreme Courts or the Federal Circuit Court of Appeals in Washington, D.C., the attorneys defending covenants found their work comparatively easy to that of their colleagues across the aisle. The short briefs to these courts were pointed restatements of the U.S. Supreme Court's findings in *Corrigan* and the argument that the Fourteenth Amendment was never intended to apply to the private actions of individuals. In Washington, Henry Gilligan answered Charles Hamilton Houston's nearly 100-page brief to the court of appeals with just ten pages. Citing existing precedents, he stood firm on the presumption that the changing conditions of black urban life and the intellectual acrobatics of his

opponent would fail to shake the jurists out of their established custom of enforcement.

Lloyd Chockley followed the same playbook in the Michigan Supreme Court against Willis Graves and Francis Dent. The court, Chockley insisted, only needed to read the decision in *Corrigan* and not the "reams of arguments" that Graves and Dent had put forth in order to settle the matter. Chockley even took a swipe at one of the key architects of the new "state action" theory, offering the sneering suggestion that Professor D. O. McGovney's arguments were so wildly out of step with the existing legal orthodoxy that he could "hardly be trusted either as to his judgment or his intellectual integrity." Despite the occasional editorialized remarks, none of the procovenant attorneys in the *Shelley* cases felt it necessary to offer extensive rebuttals to their opponents. They never strayed far from the central strategy that had served the interests of clients like theirs so effectively.[95]

This strategy and its simplicity, its uniformity, and its presumption of success served as a reminder of the enormous challenge that anticovenant litigators like Vaughn, Houston, Graves, and Dent faced. In the courts, the status quo generally prevailed and white attorneys simply had to fend off the salvos of those who sought to change it. The creativity and collaboration—both local and national—that characterized anticovenant litigation in the 1940s thus sprang largely out of necessity. Facing formidable challenges, legal activists operated within an institution built upon the rule of precedent and an orthodoxy that had long favored the white majority's desires over black Americans' claims.

Though these legal conventions had weakened somewhat in the preceding decade, civil rights litigators increasingly recognized that they had to challenge fundamental jurisprudential traditions in order to attack segregation. Procovenant attorneys could turn back African Americans' attempts to secure decent housing with relative ease not necessarily because they were right about constitutional principles, but because precedent mandated a victory in all but the most narrow of circumstances. Black litigators recognized the need for a strategy that would put proponents of Jim Crow on the defensive by forcing them to justify a system of discrimination that wrought deep suffering in black communities. Precedent would always have a place, but it could not supplant justice. The dynamism and ingenuity of midcentury legal activism sprang in part from this dual effort to undermine not only specific methods of exclusion, but also the overarching philosophies that gave the defenders of white supremacy the benefit of the doubt.

The cracks of light that opened when procovenant attorneys met defeat showed the way forward. Yet even after victories like those of George Vaughn and Loren Miller, the appellate process quickly reminded civil rights litigators in the *Shelley* cases of the great hurdle they faced. One by one their cases foundered against discrimination's sturdy legal bulwark.

Appeals: The Cases and the Appellate Courts

In Detroit, Washington, and St. Louis, the losing attorneys all filed appeals in their respective suits. For the anticovenant advocates, it was a chance to hone their arguments and elaborate on the need for change as they prepared what might be possible auditions for the U.S. Supreme Court. They knew that the stakes rose on appeal and every loss made future litigation more difficult. Despite their efforts, however, the Missouri and Michigan Supreme Courts and the Federal Circuit Court of Appeals in Washington, D.C., all upheld the validity and legitimacy of residential restrictions and scorned the experimental arguments. As defeat after defeat rolled in, anticovenant litigators' frustration mounted. Yet the courts' decisions also further galvanized legal activists and the local communities that supported them.[96]

As Vaughn, Houston, Graves, and Dent readied their cases for these appeals, they could not help but feel a tinge of optimism. Armed with bold new arguments—and in Vaughn's case, a victory already in hand—they began to rally additional community support and to expand upon their claims regarding covenants' social and moral costs. The impact of the recent war featured prominently in several of the new briefs. Houston's simmering indignation seeped through: "No wonder the morale of most Negro troops in the war was low: when they realize that alien enemies, prisoners of war . . . and even unnaturalized foreigners all had superior rights, privileges and acceptance in this country over them, regardless what sacrifices they might be called upon to make." Himself a veteran of a different war, Houston called the mobilization of white communities to impose residential restrictions against black GIs and other African Americans "divisive maneuvering at its lowest and worst." Surely the service to their nation of so many would not be rewarded with their exclusion from decent homes.[97]

In Michigan, Graves and Dent argued that the war itself gave the court reason to repudiate covenants. They focused on the egalitarian rhetoric of freedom and democracy that American leaders had espoused to argue that the war heralded a new direction in public policy that deemed racial

discrimination unfitting for the world's self-proclaimed beacon of liberty. Moreover, the United States had signed the 1945 United Nations Charter, a treaty that committed its signatories to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race." They insisted that it would be unconscionable for America's courts to continue to sanction the existence of minority ghettos and the tools that helped make and sustain them. Here, Graves and Dent innovated again as they reframed their public policy argument to include the pressures of international law and the nation's growing role as a global arbiter of justice.[98]

Not content simply to bolster their arguments for this new venue, Graves and Dent also enlisted the aid of Detroit's broader political community as they prepared the appeal. Signaling a growing popular support for black housing rights, the two attorneys found a series of organizations willing to lend their names and complementary briefs to the cause. Six groups ultimately filed arguments on behalf of the McGhees. Among them were the NAACP—where the national office had increasingly begun to lend legal support to local covenant fights—the American Jewish Congress, and a handful of legal advocacy groups including the National Lawyers Guild, the National Bar Association, and the Wolverine Bar Association. Graves and Dent also won the support of the United Automobile Workers union, which lent its voice to the plight of black homeseekers in the interests of promoting cohesion and fairness for its racially diverse membership. Several of the briefs stressed the injustice of restrictive covenants by drawing on recent surveys of black urban conditions and social-scientific scholarship to highlight the social consequences that emanated from residential discrimination. Following Vaughn in the St. Louis Circuit Court, Graves and Dent's coalition put forth a set of claims that used African Americans' dire housing situation to arouse the court's sense of justice.[99]

Each of the appellate courts answered with little sympathy for anticovenant advocates' arguments. In Missouri, the first of the three appeals to return a decision, early December of 1946 brought word that the state supreme court had overturned Vaughn's triumph. A unanimous decision found fault with Judge Koerner's reasoning that black residents' long-standing presence in the Labadie neighborhood meant that preventing further integration amounted to a futile and punitive effort that the court could not enforce in good conscience. The Missouri Supreme Court instead inferred that the homeowners must have known what they were doing when they created such an odd arrangement. "Obviously," the decision declared, "it could not

have been the intention of the parties to prevent any negro occupancy at all because that already existed. It must have been their intention to prevent greatly increased occupancy by negroes. And their plan has succeeded." Regardless of how erratically the homeowners had thrown up the boundaries of this covenant, the court seemed to say, the desire of those individuals to prevent further integration was enough to justify this unusual solution. The court then added a hasty rejection of Vaughn's constitutional claims, pointing to the suffocating words of *Corrigan v. Buckley* to snuff out each of his arguments.[100]

The Missouri court did, however, take the opportunity to editorialize on the need for some remedy to the distressing urban conditions that African Americans increasingly faced. Citing the rapid growth of St. Louis's black population and the overcrowding shown in the case record, the court remarked that "such living conditions bring deep concern to everyone and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership." Adding that it was "tragic that such conditions seem to have worsened," the court then explained that solutions stood beyond its purview as it forced yet another African American family out of their new home and back into those same circumstances it had just decried.[101]

Initially the news of the decision disheartened some of *Shelley*'s key backers. James T. Bush's daughter described his reaction as "probably the only time I saw him look discouraged." At the urging of his wife, he quickly rallied. That night he vowed to found the St. Louis REBA in order to orchestrate an appeal to the U.S. Supreme Court. The ruling equally inflamed George Vaughn who declared in a series of editorials for the *St. Louis Argus* that he intended to make the court's mistake "an epoch-making event in the history of the Negro's struggle for the attainment of full citizenship rights." His office was flooded with "letters of inquiry from places as far away as New York and Los Angeles," convincing Vaughn now more than ever that "there is no backing down. This thing must be settled once and for all." The fight would go on, he insisted. Vaughn then took advantage of his reputation as one of the Gateway City's most influential black leaders and wrote that "naturally, I expect to receive the backing of the Negro people and their friends in this fight. It should rally them as nothing has done in many years."[102]

More bad news followed in January of 1947 when the Michigan Supreme Court upheld the covenant in *McGhee*. Like its counterpart in Missouri, the court quickly dispensed with Graves and Dent's constitutional arguments as thoroughly settled by precedent. Then the decision made short work of the

two attorneys' claims regarding the McGhees' racial identity. After laying out the testimony regarding Benjamin Sipes's observation that Mr. McGhee "appears to have colored features. They are more darker than mine," the court declared that Sipes had provided information "sufficient to sustain this [lower court's] finding." The court justified this move with a reference to *People v. Dean*, an 1866 Michigan voting rights case that had maintained, "there is not a court in the United States which holds that a 'colored person,' in the popular acceptation . . . can be called white, without doing violence to language." Under this logic, denying a white individual's ability to make a commonsense observation of who was and was not white risked upsetting the entire language and popular conception of whiteness, rendering race less effective as a legal category of division. Because of the enduring relevance of race in the state and national legal systems, the Michigan court found this alternative unpalatable.[103]

The court elaborated most thoroughly on Graves and Dent's public policy argument. The concept of public policy, the ruling argued, was difficult to define and often carried multiple meanings. "In substance, it may be said to be the community common sense and common conscience," the court wrote. "Sometimes such public policy is declared by Constitution, sometimes by statute. . . . More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just." Once again deferring to the traditions of the majority, the court effectively held that public policy was whatever the white mainstream desired. Despite some well-established areas where Michigan law prohibited racial discrimination, residential restrictions were not yet on the wrong side of public opinion. "These rules of property," the court concluded, "should not be brushed aside in the absence of strong and cogent reasons."[104]

For those anticovenant advocates who cited the suffering of black communities and the interests of social justice as compelling enough, the court had a ready answer. In the contest between arguments "predicated upon a plea for justice" and those that sought "the application of the settled principles of established law," a court's responsibility was to precedent and not to notions of justice. To emphasize this point, the opinion cited at length from an 1861 Texas Supreme Court case that amounted to an extended meditation on the respective merits of justice and the law in the American legal system. Though the Michigan court likely hoped to lessen the controversy of the ruling with this inclusion, the fact that the court took its lessons on justice from a pre–Civil War case in a slaveholding state infuriated black activists.[105]

Indignation at the court's decision swept Detroit's black communities. The local NAACP branch sponsored a rapid succession of public meetings to shore up popular support for the cause, particularly since the *McGhee* case was only the first of nine covenant cases the Legal Redress Committee had before the Michigan Supreme Court. One outraged editorial noted that the decision's parsing of justice from the law effectively vindicated the McGhees' cause even as the court ordered their eviction. The justices, the author opined, "make this decision with their tongues in their cheeks. . . . [They] abandoned right, and sought the greasy teat of spurious legalism." He continued, "Certainly no self-respecting Negro citizen of this state can allow this decision by our State Supreme Court to go unchallenged." As the public furor mounted over the ruling and weekly fund-raising meetings began to gather a war chest for another appeal, one speaker bellowed a clarion call: "We are starting an avalanche that will not stop until we are at the doors of the United States Supreme Court." The Michigan court had provoked a massive infusion of popular energy into the anticovenant fight.[106]

A little over four months later, the last of the three appellate courts reached its decision in Washington. Though Houston's efforts in *Hurd* still failed in the Federal Circuit Court of Appeals in May of 1947, a powerful dissent from one of the three judges on the panel gave anticovenant advocates across the country reason to hope. The majority's opinion had rested squarely on the numerous precedents upholding the applicability of covenants in the District and varied little from recent rulings on the subject. After their brief affirmation of the covenant's validity, however, Judge Henry Edgerton wrote a scathing repudiation of his colleagues' reasoning. Building upon a pair of earlier dissents he authored when the court of appeals had heard—and then reheard—the case of *Mays v. Burgess* (1945), Edgerton offered a lucid and impassioned analysis of the faults in the continued juridical support of covenant enforcement.[107]

Edgerton began by attacking the prevailing interpretation of *Corrigan v. Buckley*, the keystone of judicial resistance to anticovenant efforts. The U.S. Supreme Court, he insisted, had neither declared racial restrictions valid nor had they ruled on courts' authority to enforce these agreements. While *Corrigan* had established that the Constitution did not explicitly prohibit private racial covenants, the Court had left open the questions of their legitimacy with respect to public policy and the propriety of their enforcement by lower courts. Instead of engaging these issues on their respective merits, the federal circuit court had simply assumed the Supreme Court had answered them and had skipped over a substantive debate of the legal arguments. Rather

than relying on the law, Edgerton argued, "this court's present decision . . . rests only on our own past decisions to like effect." The solid pillar of precedent that had held covenants up as nearly sacrosanct was in fact hollow.[108]

The judge then took on the two central issues. He first dealt with the subject of enforcement. "Restrictive covenants," he reminded his colleagues, "are not self-executing." Enforcement of the agreements with injunctions demanded the participation and intervention of the state. Because "arbitrary and unreasonable" restrictions imposed by state actors on citizens infringed upon individuals' ability to enjoy the full spectrum of rights accorded to them by the Constitution, Edgerton argued that the judicial defense of harmful contracts that were based on little more than blind prejudice had no justification under the law. "The right to buy and use anything that whites may buy and use is conferred upon Negroes implicitly by the due process clauses of the Fifth and Fourteenth Amendments and explicitly by the Civil Rights Act [of 1866]," Edgerton maintained. "Of the civil rights so conferred, none is clearer and few are more vital than the right to buy a home and live in it." Despite *Corrigan*, he concluded, the courts were under no obligation to abet or abide the "denial and destruction of the right of Negroes to acquire property."[109]

Edgerton then moved to the subject of restrictive covenants' relationship to public policy. Unlike the Michigan court in *McGhee*, Edgerton delved into the substance of white homeowners' justifications for residential exclusion. Simply accepting the wishes and property rights claims of white homeowners as the clearest expression of public policy, as the Michigan court had done, seemed unjust to the judge. "If the satisfaction which many . . . whites . . . derive from excluding Negroes is to be given weight," he wrote, "it must be weighed against the dissatisfaction which Negroes may feel at being excluded." Citing extensively from Swedish social scientist Gunnar Myrdal's *American Dilemma*—a detailed examination of American race relations and the state of black communities published in 1944—the judge contended that restrictive covenants failed to provide any financial benefits to white homeowners and actually increased the likelihood of racial conflict in the nation's cities. Edgerton insisted that courts must take into account these observations and the added knowledge of the crippling housing shortage and the costs of overcrowding in black neighborhoods. Indeed, much of Edgerton's passion in his arguments against covenants seemed to stem from these social consequences. At various instances in both *Hurd* and the earlier *Mays* case, Edgerton appeared viscerally aghast at the state of housing for

African Americans in the capital and it fed a moral outrage that fueled his dissents.[110]

Perhaps more than any of his colleagues on the bench, Edgerton also took seriously America's recent treaties and the words of its leaders as evidence of an evolving public policy in the wake of World War II. In contrast to a Michigan court that found the egalitarianism of these pronouncements quaint and "merely indicative of a desirable social trend," Edgerton argued that the United Nations Charter "and our American desire for international good will and cooperation cannot be neglected" when evaluating the obligations of the courts on racial issues. Quoting from the charter, General Dwight Eisenhower, and President Harry Truman on the importance of domestic justice and peace for the future of democracy in the world, Edgerton solemnly proclaimed that "suits like these, and the ghetto system they enforce, are among our conspicuous failures to live together in peace." Both the soundness of moral and legal judgment as well as the political objectives of the postwar nation demanded an end to the enforcement of racial restrictions.[111]

Legal activists hailed Edgerton's dissent as the clearest and most forceful argument in favor of the rights of black homeowners to date. One Chicago litigator acclaimed it as the new "model for the presentation of [a] direct attack" on residential restrictions and Loren Miller gleefully wrote to Charles Hamilton Houston that "Edgerton's dissent is one of the best things that has been done in this field." Phineas Indritz, a young white attorney in President Truman's Department of the Interior was so moved by the force of Edgerton's argument that he immediately called Houston to offer his assistance on any further appeal of the case. Perhaps this was the moment they had been waiting for.[112]

Looking Ahead: Test Cases and a U.S. Supreme Court Appeal

Legal activists felt glimmers of optimism, but if history served as precedent the appellate courts' evictions of the black litigants should have brought the cases to an end. Only two covenant suits in more than twenty years had gone beyond the state supreme courts or federal circuit court of appeals. Despite the bold proclamations of many of the *Shelley* cases' supporters, the decision on whether or not the U.S. Supreme Court would intervene did not rest with them.

Yet now more than ever, black communities and litigators in St. Louis, Detroit, and Washington saw the moment as their best chance and determined

to fight as far as they could. The networks of legal activists and the creativity of local advocates had yielded some intriguing new arguments about the role of courts as agents of the state, the legal definitions of race, and the place of covenants in postwar public policy. Some of these new claims might well convince the Supreme Court to take another look at the covenant issue. It was at this moment—in the limbo between the story of a local failure and the seeds of a national campaign—that the eyes of many black homeowners and attorneys turned to the national office of the NAACP. The organization had been present throughout each of these cases to varying degrees, having only minimal connections to the *Shelley* suit and a more substantial role in *McGhee* and *Hurd*. Indeed, the NAACP's legal offices had sought to energize and facilitate a widespread campaign against covenants since the summer of 1945. As the public calls now rose for the Association to make a test case out of one or more of these suits, the NAACP's attorneys faced a crucial decision. The consequences of choosing the wrong case with which to appeal could set their cause back another two decades, but the fight against covenants could not remain locally oriented much longer. The time for a truly national campaign had come.

THREE

The NAACP

National Leadership and Housing Desegregation

With bated breath, the NAACP legal team looked to the U.S. Supreme Court in June of 1945. As the days rolled on, they waited eagerly for a decision on the fate of *Mays v. Burgess*. The office was abuzz with the prospect that the Supreme Court might grant a hearing in the case and anticovenant lawyers across the country understood exactly what hung in the balance. Since *Corrigan v. Buckley* (1926), the Court had refused to address directly the question of covenants' validity under the Constitution. That earlier decision had sparked an explosion of new restrictions and had ensured the sanctity of court-enforced housing discrimination for two decades. But *Mays* now held out the tantalizing possibility of a shift in that stance. Howard University Law School dean and longtime NAACP official William H. Hastie considered *Mays* "the best restrictive covenant case we have ever had in the District of Columbia." If any suit might force the justices to take a fresh look at covenants and perhaps weaken the scourge of urban segregation, this looked to be the one.[1]

Regardless of the Court's decision with respect to hearing the case, however, the NAACP legal team believed that now was the time to bring national leadership to the struggle against racial restrictions. In the second week of June, Thurgood Marshall called upon the nation's foremost civil rights attorneys, inviting them to gather in Chicago in order to determine how they might surmount "the foremost problem confronting Negroes today." The NAACP's National Legal Committee was a veritable powerhouse of jurisprudential intellect and Marshall sought to muster as much of that as he could. The coming fight would be difficult, he warned, and only the "pooling of our legal resources" would be able to assure the "best possible chance of success." One month later, the committee would convene in the Windy City to consolidate and coordinate the efforts of local anticovenant fighters and legal experts from around the country. For two days in July some of the best minds in the NAACP's legal arsenal would hammer out a strategy designed to overcome decades of entrenched support for covenants.[2]

Marshall's invitations had only just arrived when the Court knocked the wind out of the surging voice of those demanding change. On June 18, the justices denied a hearing to the *Mays* case and cast new doubt on whether or not the NAACP would ever be able to shake the Court's indifference toward restrictive agreements. Unwilling to let this latest setback stand, however, Marshall pushed ahead with his plans for the conference in the hopes that he could prevent the anticovenant campaign's momentum from stalling. His persistence paid off. The meeting in Chicago that summer became arguably one of the most significant gatherings of civil rights legal talent to that point in the Association's history. What transpired on those two sweltering days would define the NAACP's early postwar urban agenda and reignite the drive for a national reckoning on the issue of covenants.

The Chicago conference in 1945 launched the NAACP headlong into a renewed battle against housing discrimination, one that summoned the full measure of the Association's energy and resources. The attorneys now faced the daunting task of forcing the Supreme Court, in short order, to reverse its stance on twenty years worth of covenant enforcement—a stance the justices had reaffirmed just weeks earlier. To do this, the Association's legal staff hoped to establish the national office as a clearinghouse for the best arguments, most innovative tactics, and strongest test cases that emerged from local activists' struggles against individual restrictions. With *Mays* further weighing down the scales against them, they knew that there was virtually no room for error at the national level. They could not afford another rejection or another defeat in the Supreme Court.[3]

Something remarkable began to take shape at that conference, the seeds of a strategy that would grow and strengthen in the coming years. The Association remained hopeful about the prospects of their anticovenant fight in the wake of the Chicago gathering and strove to cultivate the best possible suits it could anywhere in the country. Yet it was not one of their carefully planned test cases that jolted the campaign forward, but instead the renegade actions of George Vaughn and his St. Louis real estate industry backers that flung the Association—much to their displeasure—back toward the Supreme Court years before the legal team felt they would be ready. The ensuing chaos born of Vaughn's uncontrollable zeal and the Association's frantic responses produced an unexpectedly sudden yield. In the summer of 1947, just two years after the failure in *Mays*, the Court granted a hearing to the *Shelley* and *McGhee* cases.

In parallel with this rather awkward leap forward, the NAACP found itself evolving dramatically in the immediate postwar period. By 1947, the As-

sociation was awash with record levels of popular support. The organization's size and political influence grew rapidly after the war, buoyed by the renewed urgency of black protest and an expansion of African Americans' voting power in the 1940s. At the same time, public opinion had grown increasingly receptive to arguments against racial discrimination. The anticovenant campaign took shape in a nation saturated by the language of freedom and democracy and newly responsive to the dangerous extremes of racial and ethnic discrimination. Because the issue of adequate housing deeply affected Americans of all races, covenant litigation fostered a tremendously broad coalition of activists, attorneys, scholars, and organizations as the cases moved through the courts.[4]

During this moment of unique opportunity, the NAACP brilliantly and effectively tapped into not only the popular backlash against America's traditions of racial inequality, but also into an evolving intellectual discourse about the social consequences of racial prejudice. Building on the influential work of antiracist social scientists who fought to reshape the contours of scholarly and popular thinking about race, the Association's lawyers fashioned a legal strategy in the covenant cases that relied upon a new body of socioeconomic research into the costs of segregation. Once the Supreme Court agreed to hear the cases, the attorneys used this emerging scholarship in an attempt both to sway the justices and to educate the broader public about the needs and nature of African American homeowners as the ghetto sought to tighten its grip on urban black communities.

How the NAACP crafted its postwar covenant campaign and how its lawyers prepared for the Supreme Court revealed a great deal about the organization's institutional priorities in the mid-1940s and the ways that World War II shaped civil rights protest in the aftermath of the conflict. Despite their initial caution, as *Shelley* and *McGhee* headed to the court the national legal staff enthusiastically embraced innovative tactics and brought together an unprecedented combination of allies as they readied for a court battle that very few of them were confident they would win.

A Cautious Campaign: The Chicago Conference and the Seeds of Strategy

If the NAACP's Chicago meeting had marked a moment of unparalleled collaboration in the struggle against covenants, the gathering itself was largely the product of one man's efforts. Thurgood Marshall, the Association's special counsel, spearheaded the drive for a national conference and an

organized campaign against restrictive agreements that put the NAACP legal staff squarely in the center of the fight. For at least a year prior to the July meeting, Marshall had publicly maintained his desire to have the Association "establish procedure which will lead to an all-out legal attack on restrictive covenants." "Residential segregation," he wrote elsewhere, "should be attacked at the earliest possible moment." While he and the legal staff of the NAACP had pursued this goal in house, Marshall refrained from consulting broadly with other attorneys or taking any real control over the course of pending litigation. Still, his insistence that a full-scale assault on housing segregation could only take shape "after careful planning" led him to seek greater influence over the myriad efforts stretched across the country. Marshall used both the promise and the disappointment of the *Mays* case to bring local covenant lawyers, housing experts, the National Legal Committee, and his own staff together in the hopes of developing a national strategy.[5]

Though Marshall would elect not to chair the conference and was not an especially vocal participant, the whole affair showcased his strengths as an organizer. As one of his biographers would later describe it, "This was Marshall in full flower, for the first time acknowledged by senior black leaders as one of their own." Marshall had by this time already made a name for himself in black legal and political circles as a prominent civil rights advocate; just the previous year he had argued successfully before the Supreme Court for the elimination of the white primary in *Smith v. Allwright*. The Chicago conference, however, signaled Marshall's emergence as a national leader and agenda setter in new ways. Here he grabbed the reins of complex and wide-ranging local efforts in an attempt to create and impose some overarching structure. Another biographer explains that this moment represented Marshall's "first major attempt to organize the nation's civil rights attorneys to play from the same sheet of music." Marshall designed the daily agendas, handpicked the leaders of each session, and even arranged for the Monday night dinner where the attendees and prominent Association officials met with the press.[6]

Apart from establishing the Association's lead role in the anticovenant campaign, the conference also tried to determine the best path for a new Supreme Court test case. The gathering had to focus on how and when to make another attempt at getting before the highest court. As Marshall sketched out the daily schedules, he ensured that each of the conference's four sessions pushed forward in this regard. Two meetings on Monday examined the present state of covenant litigation and some of the best tactics in use locally. The following day centered on how best to promote public

awareness on the issue and how to select appropriate cases for appeal to the Supreme Court. The conferees would have a plan of action by the time they adjourned on Tuesday evening.

First, William H. Hastie presided over an initial postmortem of the *Mays* case. He insisted that *Mays* held out some hope. The attorneys in the case had fought the restriction thoroughly, "raising every possible ground" in an attempt to convince the Supreme Court to grant a hearing on the issue. The problem, he seemed to suggest, was not the strength or weakness of the case itself, but that the Court was reticent to entertain any serious challenge to the validity of these contracts. Hastie and his colleagues, however, believed that the justices were slowly warming to the prospect of reexamining covenants' place in American jurisprudence. Indeed, *Mays* had fallen just two votes shy of receiving a hearing before the Court.[7]

With his optimism for future test cases thus established, Hastie yielded the floor to a series of local covenant attorneys from around the country. Loren Miller of Los Angeles, Willis Graves of Detroit, George Vaughn of St. Louis, and Theodore Spaulding of Philadelphia all described the state of pending cases in their respective cities. Their opinions about the future chances of covenant litigation in local courts ranged from stark pessimism to guarded confidence. Miller, whose victory in the Sugar Hill cases was still six months away, addressed the nearly twenty suits presently in Los Angeles courts. While he noted that the "expenses of constant litigation [were] militating against" the enforcement of restrictions, he firmly believed that the "District Court of Appeals' decisions [were] increasingly reactionary, and I believe hopeless." On the prospects of five pending cases from Michigan, Graves reserved his judgment in anticipation of the Wayne County Circuit Court judge's forthcoming ruling in *McGhee*—which he and Francis Dent would lose some weeks later. Vaughn, on the other hand, evinced more hope than his colleagues. Speaking just weeks before the Shelleys would purchase their home on Labadie Avenue and become his clients, the St. Louis attorney highlighted a handful of recent victories in the Gateway City's courts. He attributed this latest, albeit small, rash of success to the political pressure on judges who faced elections and were thus increasingly conscious of alienating the city's growing black electorate. Covenants, it seemed, might have a political solution if not a legal one.[8]

After bringing the assembled attorneys up to speed on where the anticovenant campaign stood, the discussion turned to the issue of potential tactics. Charles Hamilton Houston, ever the eager strategist, steered the conferees toward a set of arguments called the "change of neighborhood

doctrine." This tactic focused on the proximity of existing black-owned homes to restricted white neighborhoods and mirrored many of the claims he would use in the *Hurd* case. The basic premise of the argument held that when white and black homeowners already occupied areas that bordered one another, the purpose of the covenant—namely to prevent property owners of different races from being in the same neighborhood—had already failed. Any further enforcement of the agreement's terms, therefore, would be both fruitless and unnecessarily punitive. Houston had already been successful at least once before in pursuing this line of reasoning, winning a 1942 case before the Federal Circuit Court of Appeals in Washington, D.C., on the strength of this argument.[9]

The "change of neighborhood" claims relied in part upon social scientific assessments of cities' shifting racial compositions and on sociological arguments about the effects of integration in cycles of neighborhood development. Houston contended that evidence in Washington and other cities had shown that as older white neighborhoods deteriorated physically and became dependent upon renters rather than owners, African Americans' entrance into these areas actually rejuvenated the physical and social character of the region by promoting homeownership and better maintenance standards. By characterizing the entry of black homeowners into an area as "the orderly trend of development in a city," Houston confronted white residents and the courts with the idea that restrictive agreements impeded—rather than protected—the peaceful improvement of urban areas. Houston, however, recognized that the change of neighborhood doctrine could only apply to specific areas of cities where substantial numbers of black and white homeowners already lived in close proximity. Thus, the tactic had the potential to invalidate only individual covenants in cases that met these preconditions and could not provide courts with the grounds to reject all residential restrictions. Anticovenant experts understood this as primarily a "haphazard remedy." Still, Houston embraced this idiosyncratic approach to covenant-fighting, though he also believed in the merits of pursuing constitutional and statutory claims that would challenge these agreements collectively.[10]

The two most recent national test cases indicated that idiosyncratic arguments about the validity of specific covenants had a greater immediate chance of success than an approach on constitutional grounds. While the 1945 *Mays* case failed to win a Supreme Court hearing despite the attorneys' varied constitutional and statutory claims, the 1940 Chicago case *Hansberry v. Lee* had enjoyed a different reception. The Court had not only agreed to accept *Hansberry* for review, the justices also overturned the restrictive

covenant at the center of the suit. The attorneys in *Hansberry* had originally relied upon the argument that the white homeowners had improperly executed the paperwork establishing the property restriction and that the courts could not consider this agreement valid due to these technical defects. The covenant's language had stipulated that the terms would become binding only after 95 percent of property owners in the area signed the restriction. Only slightly more than half of the residents had joined the agreement, however. The Supreme Court ultimately sided with the black homeowners in the case, but had only agreed to review the case because of questions surrounding class action litigation procedures. The decision relied on these narrow procedural grounds that had virtually nothing to do with the larger question of covenants' validity. Still, the justices reversed the state court's enforcement order and the white homeowners abandoned their efforts to relitigate the case, recognizing that they could not overcome the covenant's technical deficiencies.[11]

The *Hansberry* victory, limited as it was, marked the most significant national progress in almost two decades of covenant litigation. The case's success alongside the disappointment of *Mays* indicated that idiosyncratic claims might serve more appropriately the interests of local lawyers concerned with the immediate fate of their individual clients. In the larger picture, however, the precedent set in *Hansberry* proved extremely narrow and relatively easy for white homeowners to circumvent. Indeed, the case sparked a flurry of efforts to strengthen and solidify the technical elements of individual covenants.[12]

In spite of the limitations inherent in any idiosyncratic approach, the change of neighborhood doctrine seemed particularly promising in the postwar moment for Houston and his colleagues. The argument rested on facts that white property owners could not evade by refashioning their restrictions. One could not simply tighten legal language or gather new signatures to negate the reality that some white communities already existed in close proximity—often just one street away—from black neighborhoods. While Houston believed that constitutional claims would ultimately have the greatest effect on the broader pattern of residential restrictions, he did not feel that the pursuit of a total victory should come at the expense of immediate gains. As his peers clamored for national test cases on constitutional grounds, Houston reminded the conferees, "I don't think that in the interim . . . we should neglect making any progress we can." His insistence on the "potentialities" of the doctrine found a healthy reception. Indeed, William H. Hastie's only criticism of the *Mays* case record was that it had not relied

more heavily on "change of neighborhood" claims. Houston's determination to refine and combine the idiosyncratic and constitutional approaches to covenant litigation gave the assembled attorneys a look at the cutting edge of available tactics.[13]

The strategy, however, had its critics. As the lawyers yielded the floor to some of the consultants that had chosen to attend, housing expert Robert Weaver spearheaded the early conversation. Weaver, a Harvard-trained economist, had played a prominent role on President Franklin D. Roosevelt's "Black Cabinet" in the 1930s and was presently serving on the Chicago-based American Council on Race Relations (ACRR). Weaver immediately challenged the suitability of Houston's change of neighborhood doctrine for the root problems that black homeseekers faced. Houston had argued that "we all oppose the question of ghettos. One of the ways of knocking them down is to broaden them." Weaver strongly disagreed. He cautioned against settling—even in the short term—for only the growth of present slums. "Expanding existing Negro areas," he insisted, "simply creates new islands and ghettos. The bands around these do not give way quickly enough to relieve congestion." Because the change of neighborhood doctrine required a lengthy challenge to each individual covenant and could only apply in the areas immediately adjacent to established concentrations of black homeowners, even this "broadening" of the ghetto that Houston advocated would proceed too slowly and too narrowly to provide any real relief. Attorneys could not resign themselves to arguing for "bigger and better ghettos," Weaver warned. Only a concerted and coordinated campaign for the outright dissolution of all racial covenants' strength could put black urban communities on the path toward progress and equality.[14]

Weaver and Houston agreed wholeheartedly, however, on the need for a program of public education about the consequences of covenants. Weaver recommended attacking residential restrictions in a campaign that combined litigation, legislation, public information, political pressure, and "economic action." While the courts would be an important theater of battle, he saw opportunities for state legislatures to enact anticovenant laws and for experts like himself to familiarize the public with the fallacies that justified covenants' use and the problems that these agreements engendered. Through widespread use of media, Weaver wanted to "present the economic and social problems incident to race restrictive covenants" and use this knowledge to undermine their popular support. Houston saw a similar need for public awareness and encouraged the conferees to "use the Court as a forum for the purpose of educating the public." Others at the confer-

ence felt that the NAACP was in the best position to disseminate information and at least one participant vigorously urged the Association to offset the propaganda that demonized black homeseekers, arguing that they should "go everywhere and educate people." Those supporting the campaign against covenants would have to fight intensely on many fronts. The courts alone would not offer the solution.[15]

As the conference drew to a close, the attendees sensed real progress. In their final meeting, the attorneys and consultants hammered out a plan to assemble the best test case moving forward. They focused most intently on constitutional and statutory tactics, looking for the arguments that would win over the Supreme Court when the time came. The attorneys paid particular attention to the recently developed theory that they could mount a constitutional challenge to courts' enforcement of restrictions in addition to contesting the validity of covenants themselves. Building upon the law review articles published earlier in 1945 by attorney Harold Kahen and University of California law professor D. O. McGovney, the conferees decided to argue that judicial enforcement of covenants constituted discriminatory state action as prohibited by the Fourteenth Amendment. Because the Supreme Court had begun to appear more disposed "to recognize as state action activities formerly deemed to be only of private concern" in other questions of law, the attorneys believed this line of attack would be essential to any future test cases.[16]

The second key to the constitutional approach, as Hastie saw it, was to "show that the courts, to the extent that they uphold the covenants, are acting contrary to the highest manifestation of public policy." He advocated that any test case "bring in just as many statutory and constitutional provisions as possible" to demonstrate the ways in which state court enforcement of residential restrictions directly contravened the intentions of the Constitution and the U.S. Code. Again, the focus rested on juridical support for covenants and an approach that would undermine the effects of all discriminatory homeowners agreements at once. The conferees wanted a coup de grâce.[17]

To that end, Hastie pressed his colleagues to specify what the ideal test case should look like. "What do we want," Hastie asked, "that we haven't had in previous cases?" The group decided on at least three key features. First, they wanted a case from an area with extensive covenant coverage throughout the city. They also insisted that the case come from a metropolitan area in the North or West. Finally, they agreed that testimony and social scientific data on "overcrowding, high rent costs, [and] social things" needed to be part of the case record. Coming from a major urban hub outside the South,

the NAACP's ideal test case would revolve primarily around claims that judicial enforcement of covenants constituted discriminatory action by the state that denied African Americans equal protection under the law and greatly harmed their quality of life. The NAACP looked to take this fight to a national stage and its objectives were bold. Not only would the attorneys argue for a radical expansion of the Fourteenth Amendment's reach, they would also transform the way that they justified these claims—relying on social scientific data in their courtroom arguments more than ever before.[18]

With the plan in place, Thurgood Marshall sprang into action. He began to design a "campaign of publicity . . . against the evils of segregation and racial restrictive covenants for circulation throughout the country." For this, Marshall and the Association turned to Robert Weaver. Weaver's efforts resulted in the publication of an educational pamphlet on covenants later that year in which he consolidated the litany of social and economic arguments against covenants for public consumption. Marshall also wanted to shore up the strength of his legal team and add "a full time staff member to do nothing but work on housing" as a sign of the NAACP's commitment to the covenant fight. In December of 1945, he hired thirty-year-old Marian Wynn Perry of the NLG to handle the national office's housing cases.[19]

Marshall and Perry had met while lobbying on behalf of their respective organizations for state fair employment legislation in New York. Perry was a lifelong New Yorker and the daughter of Canadian immigrants who had grown up in a white-collar neighborhood in Queens. She graduated from Brooklyn Law School in 1943 and earned a master's degree in public administration from New York University (NYU). During the war, Perry took a job with the U.S. Department of Labor and began serving as the secretary of the New York NLG's Constitutional Liberties Committee. Perry's experience with lobbying and litigation and her connections to other local advocacy groups made her an appealing ally as the NAACP sought to expand its courtroom efforts and its cooperation with like-minded organizations. Over the next eighteen months, Marshall and Perry kept a watchful eye on the progress of dozens of local covenant suits, waiting patiently for the one that would make the perfect appeal.[20]

Marshall had wanted the NAACP at the forefront of the covenant campaign in part to ensure that his legal team would have control when that appeal came. After the 1945 conference, the Association's legal team left much of the work of developing cases in the hands of local legal activists who experimented with the best methods to undermine racial restrictions while adhering to the broad strokes of the strategy laid out in Chicago. At the na-

tional level, however, the Association exercised an abundance of caution in their preparations and wanted a methodical and deliberate approach to the Supreme Court, even at the risk of protracting the fight. Franklin Williams, one of the attorneys working with Marshall at the NAACP during this time—who later became particularly critical of his former boss—suggested that the legal team's leader was "very reluctant . . . to push the restrictive covenant cases." This wariness, Williams suggested, was not unique to the housing issue. Marshall supposedly "had to be convinced beyond a reasonable doubt of victory" in order to throw the full weight of the office into petitioning for a Supreme Court review. Perry later commented that "it was a deliberate strategy not to take chances" with litigation. "We expected to win," she said, "because our cases had to be so compelling to be brought in the first place." The Association was undoubtedly committed to moving forward on the matter of covenants, but the attorneys believed that careful and unhurried preparation was the only prudent course of action.[21]

The consequences of this more methodical approach were not insignificant. Waiting for the ideal case meant abandoning families like the Shelleys, McGhees, and others who hoped for another day in court. It also meant leaving adrift the campaigns that local communities had formed around these petitioners. Local branches and supporters invested considerable energy in individual suits from their respective cities. They raised money, sponsored public protest meetings, and galvanized popular outrage at the state of urban housing conditions. Turning away these cases as inadequate threatened to weaken morale and deflate communities' organizing efforts, making subsequent campaigns potentially more difficult.

Still, a losing test case might do even greater damage to the fight against racial restrictions. If the Supreme Court built up a lengthier precedent of denying hearings for covenant cases, the NAACP might never even get the issue before the Court. Moreover, a loss in the Supreme Court—one that upheld the rights of white homeowners over those of black homeseekers—might take decades of new litigation to unravel. Rushing ahead with a case that the lawyers had doubts about seemed not only unwise, but also dangerous. Additionally, the legal staff harbored concerns about their own reputation and resources. Perry explained that her colleagues "had to be cautious to build momentum and [a] sense of victory. . . . A loss could have been politically blown out of all proportion." Wins and losses mattered both practically and symbolically and by the end of World War II the Association knew that it needed victories to propel the civil rights struggle forward. Supreme Court decisions that rejected African Americans' claims to equality in the

postwar moment might well become a new "separate but equal" doctrine, giving renewed courage and added strength to segregated institutions and the forces of racial discrimination. At the same time, Supreme Court losses would overtax the financial resources of the NAACP—which were considerable, but still limited. Marshall and the others recognized that only noteworthy victories could sustain the energy and fiscal viability of the Association's entire civil rights litigation agenda. The attorneys knew what was at stake for countless African American families desperate for decent homes. They also knew that a failure might cause much greater harm than a delay. Both the families and the organization stood to suffer severely if the campaign flopped and so the attorneys proceeded with caution to protect both their chances of success and the Association's future strength. Indeed, by 1946, the NAACP had more than ever to lose in this fight.[22]

Gathering Strength: The Postwar NAACP

The NAACP's carefully orchestrated postwar covenant campaign came in the midst of an incredible period of growth and activity for the Association. World War II had helped to spawn a wave of black political activism that energized and emboldened the organization and the postwar years yielded new levels of strength. The 1940s marked a transformative phase of the struggle for civil rights and the Association rode at the forefront. Infused with urgency and resources, the NAACP expanded its agenda and generated a degree of political access and influence that it had never before experienced. This vibrant moment of protest showed the NAACP at its most dynamic and most powerful.[23]

The Association's growth was nothing short of explosive. Membership skyrocketed from just over 50,000 in 1940 to nearly 450,000 just six years later. Wartime prosperity and dedicated organizing took the NAACP from some 350 branch offices at the start of the decade to more than 1,000 in the aftermath of the war. The years 1946 and 1947 marked a peak in the Association's strength and influence within African American communities, with the latter yielding "the greatest year of growth in the number of branches, youth councils and college chapters of the Association's existence. A total of 234 new units were organized." A greater emphasis on local leadership training accompanied the proliferation of branches and the expansion of the membership. By the end of the year, NAACP executive secretary Walter White would boast to the Association's board members that "we have built the greatest civil rights organization which has ever been created." Fueled

by the rising tide of black activism and the ever-increasing demands for change, the Association mobilized and rode a tidal wave of support into the immediate postwar period.[24]

Income from membership fees mushroomed and the NAACP's operating budget grew and became markedly less dependent upon philanthropic contributions. In the 1930s, the budget had hovered near $55,000 with less than $10,000 of that for the legal department. As late as 1941, the lawyers at the national office ran their litigation campaigns with just a $14,000 allotment. By 1947, however, the Association was spending nearly $320,000 annually and the legal team had budgeted more than $20,000 for covenant litigation alone. The NAACP put its financial windfall to work.[25]

Flush with resources and followers as never before, the Association accelerated and emboldened its efforts in both litigation and political mobilization. In the legal arena, the influx of African Americans into wartime industry sparked a wave of labor cases under the NAACP's guidance. These determined efforts to protect workers' rights built upon—and helped to further—the growth of the Association's working-class membership that had reached unprecedented levels by the mid-1940s. The attention paid to workplace issues also laid the groundwork for an improving relationship with labor unions and helped bolster the Association's political clout and connections.[26]

NAACP attorneys found equally fertile fields for litigation in a range of other areas. Rampant discrimination and prejudice in the armed services prompted the hiring of a new attorney to help handle the legal team's expanded workload on this issue and in 1946 Thurgood Marshall helped bring *Morgan v. Virginia* to the Supreme Court, where he scored another important victory that struck down segregation in interstate transportation. NAACP lawyers also quickly reentered the fight against educational discrimination, taking up several cases in the postwar years.[27]

These litigation efforts also stretched into the critical arena of voting rights. In the 1940s, the NAACP's leaders, lawyers, and activists rallied around the cause of political mobilization and empowerment with newfound vigor. *Smith v. Allwright* (1944), the case that disallowed the exclusion of black voters from primary elections, had weakened one of the South's key instruments of disfranchisement and helped launch a large-scale voter registration movement. The decision had reinvigorated the efforts of organizers and made African American communities more cognizant of their rights and the potential power of their ballots. As a result, registrations rose dramatically across the Deep South, a place where the NAACP had historically

tread with relative caution. Though the Association's estimates were somewhat unreliable and registration numbers alone overstated African Americans' actual impact at the polls due to the varied methods of intimidation and exclusion on election day, the NAACP's mobilization of black voters proved promising. Even in light of the physical and economic repercussions doled out by white supremacists for the most basic of political activities, the NAACP claimed to have helped register nearly 700,000 new African American voters in the Deep South by 1948. Coupled with an additional 700,000 black Americans who had left the South and its voting restrictions during wartime and the hundreds of thousands that would follow over the remainder of the decade, the black electorate looked to exercise more influence than ever in the late 1940s. As the largest and most powerful African American interest group in the country, the NAACP suddenly found itself with a new level of access and influence in national politics.[28]

BY THE END of 1946, the Association had amassed an impressive record. A string of significant Supreme Court victories, the voter registration campaigns underway—even in the South—increased media attention and popular support, and staggering organizational growth all helped build the NAACP's momentum. The momentum promised to continue. Association officials and outside observers speculated that the group's size would surpass 500,000 or even 600,000 members. The scope of the organization's activities mattered just as much as its size. Indeed, the Association derived part of its strength and reputation in these years from the fact that it could balance—and often succeed in—so many simultaneous endeavors. Few savvy politicians doubted the influence that the NAACP might wield among an increasingly relevant black electorate. The growing size and strength of an African American voting bloc in the North and West promised that black ballots could matter more than ever before in postwar elections.[29]

The Association used its organizing triumphs in the years following World War II to reach political decision makers. Insistent lobbying and repeated reminders about the significant role that African Americans' votes would have in upcoming elections became staple tactics for the NAACP. In the eighteen months leading up to the 1948 election, Association officials made no secret of their intention to influence black voters. Walter White relished the opportunity to deploy constant references to the Association's numerical and mobilizing strength when he addressed political leaders. It was clear that the NAACP leadership wanted to sit atop the rising tide of black elec-

toral power and use the increasing import of African American votes to advance a strong civil rights agenda.[30]

The NAACP's momentum soon generated a degree of political access that only further served to enhance the Association's strength. As President Harry S. Truman looked toward the electoral landscape in 1948, it seemed apparent that the NAACP could very well play a deciding part in the outcome. Within a month of assuming office following the death of Franklin D. Roosevelt in 1945, Truman arranged a private meeting with White where they discussed the problems of colonialism and international human rights. Two weeks later, White and Truman exchanged letters regarding discrimination in federal housing insurance and the need for better protections against racial prejudice in hiring practices. This correspondence proved encouraging for the Association's leadership. Over the next three years their lobbying efforts and attempts to build a closer relationship with the administration intensified.[31]

In September of 1946, White led a delegation of six men into a meeting with the president to discuss some of the lynchings and actions of "hate organizations" that had occurred in previous months. Of the half-dozen delegates that sat in the Oval Office that afternoon, three—including White—were NAACP officers, testifying to the prominent role the Association would play in civil rights lobbying efforts. Though White apparently entered the meeting with doubts that any real changes would result, a sustained discussion with the president buoyed his spirits. By the end of the day, Truman had agreed to establish a committee "to investigate the entire subject of violation of civil liberties and to recommend a program of corrective action." Most importantly, the president decided to circumvent any congressional filibusters or impediments by using an executive order to create the commission. He requested the advice of White's delegation regarding the committee's composition and White essentially handpicked the chairman and at least one other member of the fourteen-person body. Ten weeks later, the president made the committee a reality.[32]

On December 5, Truman's Executive Order 9808 created the President's Committee on Civil Rights (PCCR). A little less than a year later, in October of 1947, the PCCR's members announced their findings to the president and subsequently the nation. Named *To Secure These Rights*, the committee's final report offered what Walter White proclaimed was "without doubt the most courageous and specific" assessment of the nation's racial problems and potential remedies ever created. Reproduced in mass quantities by the

Government Printing Office—and later a trade press—Truman implored the American public to read what he deemed "an American charter of human freedom." In their proposed remedies, the PCCR articulated forty recommendations that would provide greater protections for civil rights, individual safety, the privileges of citizenship, the right to "freedom of conscience and expression," and equal opportunity. *To Secure These Rights* advocated—among many things—the creation of a civil rights section in the Federal Bureau of Investigation, national statutes directed against lynching and police brutality, the abolition of the poll tax, an extended program of civil rights education, and steps to eliminate residential segregation by weakening governmental support for restrictive covenants. The sweeping recommendations of the report seemed nothing short of revolutionary in a nation that still offered safe haven to Jim Crow and the "separate but equal" doctrine of the late nineteenth century.[33]

Even before the release of the PCCR's report, however, the Truman administration had made two significant demonstrations of its support for the NAACP and the Association's agenda. In the spring of 1947, administration officials dusted off a three-year-old plea from the NAACP leadership regarding discriminatory practices in FHA underwriting policies. The Association had strongly protested the FHA's endorsement and encouragement of racial restrictive covenants, especially in the manual for underwriters. After repeated complaints, the agency finally made some concessions to the NAACP by adjusting references to the desirability of residential segregation in the 1947 edition of the manual. Though the FHA continued to insure mortgages on covenanted property and declined to condemn racial restrictions in spite of the NAACP's objections on both of these matters, the changes to the *Underwriting Manual* signaled that the Association's lobbying was having a positive impact on the Truman administration's racial policies.[34]

In the wake of the manual's publication in May of 1947, housing officials in the administration circulated copies of the FHA's changes to prominent anticovenant attorneys. "It should be noted," one of the accompanying letters maintained, "that positive steps taken since Raymond Foley became commissioner of [the] FHA . . . together with the revisions in the *Underwriting Manual*, fulfill almost completely the four recommendations contained in the NAACP Memorandum of October 1944." The letter emphasized the agency's attentiveness to the NAACP's specific concerns and the willingness of Truman appointees like Foley to act on some of the Association's demands. While NAACP officials would continue to protest FHA activities that

condoned discrimination, the agency's recognition of their appeal for change was certainly promising.[35]

Within weeks of the FHA's actions, President Truman himself made a bold and public demonstration of his support for the NAACP and the Association's agenda. Late in April of 1947, at the urging of Walter White, the president had promised to address the NAACP's annual convention in Washington, D.C., during that summer. Thus, Truman became the first president to address the NAACP in the Association's nearly forty-year existence. Standing on the steps of the Lincoln Memorial—where Martin Luther King Jr. would share his dream for America sixteen years later—Truman announced a vision of his own. Ignoring the counsel of one of his closest advisers to limit his discussion of civil rights to a minute-long paragraph, the president spoke at some length on the issue, adding an explicit message to the implicit symbolism of his appearance.[36]

The scope, urgency, and unbridled egalitarianism of the address proved remarkable. Truman's message reached not only the 10,000 convention delegates the NAACP had assembled, but also a national and international radio audience. The president's address promised a greater role for the federal government in the provision and protection of African Americans' rights. "The extension of civil rights today," Truman announced, "means not protection of the people against the government, but protection of the people by the government." The nation could not afford to wait for equality to take root and segregation to wither. Powerful, immediate, and decisive federal action had to lead the way. "We cannot wait another decade or another generation" to bring about the end of Jim Crow and its attendant evils, he argued. America urgently needed an end to racial injustice. As Truman concluded the address he took his seat next to White, leaned over, and affirmed to the secretary, "I said what I did because I mean every word of it—and I am going to prove that I do mean it."[37]

Skepticism lingered, however. White, recalling the event in his autobiography a year later, remarked that "the applause when he [Truman] finished was hearty but not overwhelming." Promises were just that until African Americans' social, political, and material conditions actually changed. Still, the speech confirmed to the NAACP's national leadership that they had Truman's ear. For the first time, an American president had publicly championed the Association's needs, its hopes, and its demands. Truman's address symbolized how far the organization had come and how much it might yet accomplish.[38]

The year 1947 marked the pinnacle of the NAACP's influence and strength during the first half of the twentieth century. Thurgood Marshall would call it "the busiest legal year in the history of the NAACP." The Association had amassed for itself an enormous following, a broad agenda, and unprecedented political influence that translated into a wave of institutional momentum. Through dedicated organizing, persistent lobbying, and carefully crafted campaigns like the attack on restrictive covenants, the NAACP looked as though it might achieve any and all of its goals. Still, the Association's officials knew that their string of successes and the rising tide of their power might falter at any moment. An attitude of caution and measured steps forward thus prevailed. The fight against residential restrictions—which constituted the centerpiece of the Association's agenda for that year—offered a perfect example of this approach. Time and again, the pervasive sense of urgency and opportunity in the postwar moment clashed with the NAACP's calculated line of attack. As the Association worked to transform their covenant campaign into another major victory, the attorneys suddenly found themselves at odds with advocates who had quickly grown tired of the caution and deliberation. Just as the NAACP embarked on what would soon become its most triumphant year to date, a key part of the careful planning that had brought the organization to that point looked ready to crumble at the hands of those frustrated by the pace of change. For some, any further delay on the issue of covenants proved unbearable.[39]

Caps over the Wall: Preparations for the Supreme Court

George Vaughn of St. Louis numbered among those restless souls determined not to wait a moment longer. Perhaps the urgency of the cause drove him. Perhaps it was a sense that this case might be the capstone to his career of advocacy for black St. Louisans. Perhaps the real estate brokers underwriting his efforts exerted some pressure. Or perhaps he simply felt compelled by his clients' struggles. Whatever the reasons, Vaughn entered the early months of 1947 in dogged pursuit of a hearing before the Supreme Court. Despite the NAACP legal staff's urgings for him to slow down or stop the Shelleys' case and coordinate his efforts with theirs, Vaughn drove relentlessly forward. He forced the Association's hand by applying for certiorari in April. That move dashed the NAACP's hopes for a carefully planned approach to the Supreme Court that would revolve around a perfectly crafted test case.

By petitioning the Court, Vaughn compelled the Association to decide whether to risk another denial of certiorari while waiting for one of their pre-

ferred cases to plod through the appellate courts, or to throw their energy into making the best possible case out of the less desirable suits their branch offices had available. The haphazardness of these events and the NAACP's efforts to respond to them reveal the practical complexities of civil rights litigation and highlight the Association's ability to mobilize its legal resources to react to changing circumstances. Order and chaos could simultaneously shape the course of civil rights cases.[40]

The St. Louis case would remain a thorn in the NAACP's side for the entirety of the litigation process. The organization's attorneys clashed with Vaughn and his real estate industry backers throughout the year—both publicly and privately. Decades after the conclusion of the cases, Thurgood Marshall still shuddered at the memories of Vaughn's involvement, insisting to his biographer that the St. Louis attorney was a "blunderbuss" and disparaging his colleague's performance before the Supreme Court by unjustly portraying him as a doddering and borderline incompetent showboater.[41]

The tensions first flared in late December of 1946, shortly after the Shelleys' loss in the Missouri Supreme Court. Loren Miller, who kept a watchful eye on developments in restrictive covenant litigation across the country, fired off an anxious letter to the national office about a troubling newspaper story out of St. Louis regarding Vaughn—whom he had met at the Chicago conference in 1945. "I notice that he [Vaughn] is saying that he will seek Supreme Court review," Miller wrote. "I think you will agree with me," he continued, "that any attempt to get Supreme Court review should be thoroughly discussed by those who are interested . . . my information is that the record in his case is not altogether satisfactory." Miller pointed out for the attorneys, who likely needed no reminder, that "our failure to get review from [the] Supreme Court at this time will probably result in another long delay." Miller urged them to restrain Vaughn because the consequences of presenting a weak case to the nation's highest court might short-circuit the potential impact of a handful of promising test cases working their way through the appeals process. These suits included Miller's Sugar Hill case that was presently stalled in the California Supreme Court, but had become a particular darling of the NAACP's legal staff.[42]

Thurgood Marshall immediately cautioned Vaughn against moving forward by himself. "You will recall that at our meeting in Chicago year before last," he prodded, "we all agreed that the best way to break restrictive covenants was by a full exchange of information and by acting only after consultation among all the different attorneys working on restrictive covenants all over the country." He reminded Vaughn that the Association was not

simply sitting on its hands. Branch attorneys around the country were awaiting decisions on cases that could be coordinated for a petition to the Supreme Court.[43]

Vaughn was unbowed and unapologetic. He promptly notified Marshall that in spite of the Association's plea for patience, he intended to appeal the Shelleys' case. The veteran attorney seemed both resolute and positively giddy at times about seizing the chance to argue his case to the Court. He charged ahead with little regard for the Association's legal advice or for its preferred strategy. Vaughn's determination confronted the NAACP with the dilemma of how best to proceed in light of this upcoming effort.[44]

The Association's first step was to take stock of the cases their affiliated attorneys currently had in process. Unfortunately, the immediate options were severely limited. In fact, the *McGhee* case in Detroit looked like the only suit far enough along in the appellate process to go before the Supreme Court in time. In January of 1947, Marshall and the NAACP legal staff began writing to a select group of covenant experts from around the country, asking them to read the *McGhee* case record and to render their opinions on whether the suit represented an acceptable test case.

As the responses trickled in over the following weeks, it became clear that the Association's consultants were deeply divided over *McGhee's* fitness for appeal. Half of the respondents felt strongly that the case was simply not up to the task of winning either a hearing from the Supreme Court or a victory. Those who did think the case merited an appeal typically had reservations. New York anticovenant attorney Andrew Weinberger, for example, felt the NAACP should push forward on appeal primarily because he saw "great harm permitting to rest unchallenged an adverse holding by a state court of last resort." He had no particular faith in the chances of the case, but felt it would set a dangerous precedent not to pursue these suits to the fullest extent possible. Chicagoan William R. Ming also felt that the case itself was not very strong, but that the Michigan court's decision might be outrageous enough to warrant a committed challenge.[45]

Sensing only lukewarm support, Marshall decided to convene an urgent meeting of the national anticovenant leaders and hold an extended conversation. On Sunday January 26, the attorneys gathered on the campus of Howard University to discuss the case more fully and further assess the prospects for appeal to the U.S. Supreme Court. While most of the major figures in the fight against restrictive agreements were in attendance, George Vaughn was noticeably absent. There would be no opportunity to convince him that the time was not right for a coordinated push forward.

The Association's legal staff had to make the best of the difficult situation Vaughn had put them in. The two lead attorneys in the Michigan case, Willis Graves and Francis Dent, expressed a good deal of optimism about the issues raised by the state supreme court's decision in *McGhee*. The fact that they had secured a direct ruling on the matter of whether court enforcement of covenants constituted state action under the Fourteenth Amendment made the case particularly promising. The Michigan court's explicit rejection of the state action argument seemed ripe for adjudication by the Supreme Court. Dent also emphasized his belief that "in the present state of international relations, the Supreme Court of the United States would be most loath to uphold and enforce restrictive covenants since it would be embarrassing to the American position in foreign policy in which we purport to be the leader of the democratic forces." The time was right and the issues were compelling, he insisted. His arguments won several of the attendees over to his view.[46]

Indeed, the *McGhee* case met several of the criteria the attorneys had established at the Chicago conference. The suit came from a northern city, from an area with particularly extensive residential restrictions, and raised Fourteenth Amendment grounds in a clear and direct manner. Yet the case had powerful detractors in the room. Thurgood Marshall and William H. Hastie both expressed doubts about the strength of the suit and covenant expert Spottswood Robinson felt that because the case record had no sociological testimony or data the NAACP might not be able to introduce that material on appeal. The dearth of socioeconomic evidence and relatively thin case record proved especially disconcerting to the national office's legal team and several of the consultants. Still, given that Vaughn's petition looked as though it would move ahead regardless of their reservations, the assembled lawyers wanted to give the *McGhee* case a fair hearing among themselves and take a hard look at its chances of winning certiorari.[47]

As the conferees laid out the bare logistics of an appeal, they speculated that Justices Frank Murphy and Wiley B. Rutledge might vote to grant certiorari—as they had in *Mays*—and that Justice Harold Burton certainly would not. If the pattern from *Mays* held true to form, they could also expect Justices Robert Jackson and Stanley Reed to abstain from voting, meaning they needed only two additional votes for a majority. However, the remainder of the Court seemingly "did not want to touch restrictive covenant cases at this time." Just as with Hastie's assessment of *Mays* eighteen months earlier, however, this opposition appeared to the attorneys as reluctance rather than hostility. What the campaign needed, the lawyers argued, was

a case that was strong enough to "provide Justices Murphy and Rutledge with leverage with which to bring two more Justices to their side in order to grant us certiorari." In that light, *McGhee* seemed inadequate for the task. The meeting therefore adjourned with the understanding that "there may be Michigan cases coming up before the court better than the Sipes [v. McGhee] case on which to appeal, and that therefore we would not file a petition for certiorari until the very last moment." The short-term prospects for the NAACP's restriction cases looked uncertain at best.[48]

The Association's legal staff held out hope for more time to develop a handful of promising cases that conformed better to the standards that the attorneys had laid out in 1945. The national office had kept its eye on two cases in particular, one of Loren Miller's in Los Angeles and one of Loring Moore's in Chicago. Miller had emerged from the 1945 conference committed to the NAACP's plan for developing ideal test cases and with a full caseload of restriction suits. His Los Angeles Superior Court victory in Sugar Hill had won a great deal of acclaim nationally and seemed perfectly poised for adjudication by the U.S. Supreme Court. Here, the NAACP seemed willing to overlook the lack of socioeconomic evidence in the case record in part because of its high-profile petitioners and partly because of Miller's eagerness to work with the national legal team. Miller was so hopeful about these suits that while he waited for the opposing counsel to petition the California Supreme Court for a rehearing, he confided to Hastie that "it would be downright dirty if the plaintiffs refused to appeal." The plaintiffs did eventually challenge the superior court's ruling and Miller's hearing before California's high court came in the summer of 1946. All that was then left to do was wait for a decision and prepare another appeal. The California Supreme Court, however, was in no hurry to dispense with the issue and Miller waited with dwindling patience as month after month passed without word on his case. In the summer of 1947, Miller privately seethed to Charles Hamilton Houston about the delay, fuming that despite the yearlong interval, "no decision is in sight yet." As Miller's test case languished in limbo, the NAACP's legal staff remained hopeful, knowing that a decision would inevitably come at some point. Still, they increasingly kept an eye out for other promising litigation.[49]

By the end of 1946, a new favorite case was emerging in Chicago under the direction of veteran anticovenant attorney Loring Moore. Moore unabashedly touted his *Tovey v. Levy* case as the best existing hope for the fight against racial restrictions and key NAACP legal staffers and other interested observers concurred. In mid-December, Marian Wynn Perry wrote a detailed memorandum on the *Levy* case for Thurgood Marshall, explain-

ing Moore's strategy. Moore's approach to covenant litigation involved creating a comprehensive case record—a process that pursued the twin goals of thoroughness and delay, stretching the will and resources of covenant defenders as far as possible while developing every conceivable legal ground for appeal. The Chicago attorney began his case by filing "lengthy motions to dismiss . . . in which every possible objection was raised from . . . technicalities . . . to such substantial defenses as the constitutional and public policy ones." When this failed, Moore responded with lengthy answers on each point. Perry noted that these motions pushed the timing of a potential review by the Illinois Supreme Court into the spring of 1948, some fifteen or sixteen months in the future.[50]

What made the *Levy* case seem particularly worth the wait was in part the emphasis Moore had placed on social scientific evidence in his arguments. Moore made the most out of the plethora of Chicago scholars studying race relations and urban conditions for African Americans, calling upon the talents of renowned urban scholars Robert Weaver, Horace Cayton, and St. Clair Drake for both testimony and help in the preparation of written briefs. Their efforts made up an important part of the "more than fifteen hundred pages of testimony and more than one hundred exhibits in the record" that Moore's thoroughness had yielded by January of 1947. In working closely with some of the best-known experts on black urban life and the issue of race in housing, Moore generated the kind of case record steeped in social scientific testimony that the NAACP had sought since the Chicago conference. Weaver's involvement with the case was particularly heartening for the Association's attorneys as he had been the leading voice in the sociological attack against covenants and had been supportive of the NAACP's campaign from its inception.[51]

The national office, however, continued to feel the mounting pressure from Vaughn's unwillingness to cooperate and from the increasingly plaintive cries of the Detroit branch office—the Association's largest local chapter—that urged the legal staff to move forward with *McGhee*. After corresponding regularly with the national office for several weeks, Edward Swan and Robert Bradby of the Detroit branch finally received the NAACP's determination about *McGhee*'s immediate future. "Our legal staff will bear in mind the time limit for further action," the national office promised, "but will assist in no action until the very last moment in the hope that a better case will appear than the Sipes [v. McGhee] case."[52]

As the ninety-day window for an appeal steadily elapsed, the Association held out hope that it could wrest control of the covenant campaign away from

Vaughn. The NAACP's legal team had a great deal more faith in Miller's and Moore's legal skills, intentions, and ability to work as a part of a team. They lacked any real confidence in Vaughn and the *Shelley* case, not to mention their own existing options for appeal. *McGhee*, the Association's best available test case, had the National Legal Committee deeply divided over its adequacy and chances for success. Many of the top anticovenant attorneys in the country and most of the NAACP leadership hoped to wait for one of the more carefully crafted test cases in the litigation pipeline to make its way through the appeals process before they agreed to pursue a Supreme Court review. Their hopes, however, mattered little if they could not persuade Vaughn to stop the Shelleys' case.

The Association's legal staff began applying what pressure it could to dissuade Vaughn and disrupt his momentum. In early February of 1947, Marshall again wrote to Vaughn and pleaded for what he deemed a more careful approach. "We hope that you will cooperate with us in withholding any future action on your case," he urged, "until we can all get together on it because we are more than anxious to work together." Marshall hoped to arrange another meeting of the nation's anticovenant attorneys to stall Vaughn's action and put him under the direct pressure and scrutiny of his peers. Vaughn, however, filed for a stay of the Missouri court's ruling just days after Marshall's letter—the first step in his preparations to seek certiorari.[53]

When these gentler attempts failed, the NAACP's attorneys quietly began working behind the scenes to disrupt Vaughn's case before he could file his final petition. Vaughn chose to wait another two months before officially submitting his case to the Supreme Court in order to line up supporters for the litigation. The NAACP's lawyers sensed an opportunity. While the Association had little influence over Vaughn directly, the attorneys maintained strong ties with some of the organizations that Vaughn reached out to for help. Perhaps by isolating the St. Louis lawyer from additional assistance, the Association might induce Vaughn to back down and thus regain control over the fate and direction of the covenant campaign.[54]

NAACP lawyers convinced at least one potential ally to reject Vaughn's request for aid. When Clifford Forster, the acting director of the American Civil Liberties Union (ACLU), contacted the national legal office for guidance on how to approach Vaughn's plea for support, Marian Wynn Perry warned Forster off in no uncertain terms. Perry informed him that in the Association's opinion *Shelley* was a "weak case" and that it would be "unwise to apply for certiorari at this time." Forster soon replied, "I have written to our St. Louis committee outlining to them exactly what you discussed with me. I told them

that . . . it would be futile and perhaps dangerous to take the case to the Supreme Court." In a follow-up letter to the ACLU's St. Louis director, Forster echoed the NAACP's tone regarding Vaughn's fitness to lead the charge against covenants. "The issues raised should," he insisted, "be handled by experts in the field. The cases must be meticulously prepared and require a wealth of knowledge and expert handling. . . . Rather than build a record of rejected cases . . . we believe that we should wait until an opportune time presents itself." Perry's actions in this instance evidenced the limitations of the NAACP's willingness to support the efforts of local civil rights attorneys. A lawyer who threatened the Association's planning and control—who disrupted the order of that careful campaign—might well find himself on the wrong side of the NAACP's growing influence.[55]

Vaughn again remained undeterred. Though the Association's pressure slowed his march to the Supreme Court, in April of 1947 he finally submitted his petition for certiorari. The NAACP's cautious planning descended into temporary chaos. The only options at hand were to proceed with the *McGhee* case or to let Vaughn go it alone. If the Association failed to match or even to support Vaughn's effort, then the national office risked losing its leadership on the issue entirely or could face a now-strengthened precedent of the Supreme Court's refusal to review covenant suits. Yet *McGhee*'s complete lack of socioeconomic data and thin case record appeared nearly as daunting an obstacle for the campaign's future. The prospect of having to wait another two years or more developing a new set of test cases, or of losing control over the covenant issue entirely proved even less palatable to the national legal staff than proceeding with a case that provoked more anxiety than approbation. The Association finally bowed to pressure from the Detroit branch and directed Graves and Dent to file for certiorari in the *McGhee* case in mid-April, hitching the immediate fate of their cautious campaign to Vaughn's insurgent crusade.

IN LATE JUNE of 1947, Willis Graves and George Vaughn received a succinct message from Supreme Court clerk Charles Elmore Cropley. The U.S. Supreme Court, Cropley informed the attorneys, had agreed to hear the two cases in the fall term. Vaughn's gamble had unexpectedly paid off. NAACP legal staffer Constance Baker Motley later revealed that there had been "little hope [among Association officials] that the petition would be granted." When it was, she reflected, "we realized that the Supreme Court had offered us the opportunity to draw up our battle line for a last ditch fight against this form of residential segregation." Vaughn's seemingly reckless shove into the

spotlight had suddenly given the anticovenant cause its opportunity for a command performance. The fight was on.[56]

By granting a review of *Shelley* and *McGhee*, the Court raised the stakes immeasurably for the campaign. A loss before the Court would do a great deal more damage to the cause than a denial of certiorari might have. The Court's decision escalated the consequences of what transpired within the NAACP's offices and between Association attorneys and George Vaughn over the remaining summer months. Despite the successful petition for certiorari, the NAACP still looked upon Vaughn as a dangerous wildcard. Their fears had at least some merit. Vaughn's go-it-alone approach and lack of experience with the exigencies of Supreme Court litigation posed some substantial risks right when the costs of any mistakes were higher than ever. Though he had exposed the Association's plan as an overly cautious one, Vaughn's independence now proved a legitimate liability. Indeed, it soon became clear that he was less prepared than his colleagues at the NAACP for the intense scrutiny that awaited. The future of black Americans' access to decent homes hinged on how quickly the lawyers could restore cooperation and organization amidst the chaos that had ensued earlier that year. With thirty years of fighting residential discrimination behind them, the NAACP now had less than six months to perfect what might be their last real chance to stave off the permanent entrenchment of segregation in America's neighborhoods.

Immediately, the Association set about making the *McGhee* suit appear as similar as possible to one of the test cases they had wanted to pursue in its place. The first step was to put lawyers more closely affiliated with the national office in charge of the appeal. Within days of the Court's decision to hear *Shelley* and *McGhee*, Thurgood Marshall asked Willis Graves and Francis Dent in Detroit to step down as lead counsel. Marshall wrote that "we should make every effort to have the arguments made by Charlie Houston and Loren Miller," two of the men most closely tied to the NAACP's national anticovenant campaign and exceptional fighters against restrictions. Houston was eager to participate because his cases in Washington did not appear as though they would pass through the appellate process quickly enough to join the Michigan and Missouri suits. Marshall's request of Graves and Dent was truly that; he had no authority to remove them or force them to relinquish their role. "I am making this merely as a suggestion," he wrote, "in the interest of getting complete harmony in the matter and would appreciate your reaction." In subsequent conversations, however, Marshall apparently gave the attorneys the impression that Miller was a veteran practitio-

ner before the U.S. Supreme Court and thus better suited for the task, despite the reality that Miller had no prior experience at the Supreme Court bar. The two Detroit attorneys quickly agreed to the substitution—in part because Graves had been in poor health—and handed over their place in history for what they saw as the good of the case and their race. Even when this bit of misdirection about Miller's experience soon came to light, the two men apparently harbored no bitterness over Marshall's desire to push them aside. "I was not interested in personal credit," Dent later reflected, "so much as having the principle established. I think we adopted the right course."[57]

With the NAACP's handpicked duo now at the helm, the Association set about the work of clarifying and orchestrating their strategy for the rest of the summer. The legal team's next order of business was to schedule another strategy conference with every available expert and lawyer who had collectively helped shape the covenant campaign up to that point. Two weeks after the Supreme Court's notification, Marian Wynn Perry fired off a letter notifying interested parties that "in order that we may present every issue as clearly as possible, and cover all conceivable arguments which might be presented to the court, we are calling a conference of lawyers who have worked on these cases with us." The legal staff set the meeting date for September 6—roughly halfway through the time allotted for preparing the cases. Unlike the two previous convocations at neutral sites in Chicago and Washington, the NAACP scheduled this meeting at the Association's headquarters in New York, leaving no doubt about who was in charge.[58]

Despite the NAACP's strong push forward, doubts lingered about the strength of the *McGhee* and *Shelley* cases. To bolster the Association's chances, Charles Hamilton Houston filed a new petition seeking certiorari for the Washington cases. The Federal Circuit Court of Appeals in Washington, D. C., had denied Houston and Raphael Urciolo's motion for rehearing on the same day in June that the U.S. Supreme Court had agreed to review *McGhee* and *Shelley*. Houston believed his cases were so strong that for the first time in his long career "I actually hoped [the court of appeals] would decide against me and was afraid I might win." He had pursued a rehearing, he admitted, only out of concern for the immediate best interests of his clients and had secretly hoped to fail "lest it might be granted and spoil my chances of applying to the U.S. Supreme Court." Because the court of appeals declined to reopen his cases, Houston was now free to file for certiorari in time to join the *Shelley* and *McGhee* suits. "This time," he sighed, "thank Heaven—the court would not see it my way." The attorneys now raced to bring the cases of the Hurds, Rowes, Stewarts, and Savages into the fold.[59]

Houston and a small cadre of lawyers including civil rights advocates Spottswood Robinson and Phineas Indritz now worked frenetically to refine a petition for certiorari in the Washington suits. They filed in mid-August and for two months, amid the NAACP's intensive preparation of the *McGhee* suit, Houston and his colleagues anxiously awaited word. Houston approached George Vaughn with the idea of asking the Court for a postponement of *Shelley* until after a decision on certiorari in the *Hurd* case. Vaughn apparently gave some consideration to the idea, but wavered in offering a definitive answer because of his desire to avoid any further delays in his appeal. In late October the Court agreed to hear Houston's collection of cases immediately following the presentation for *McGhee*. The Washington attorneys would have only a few weeks to prepare their arguments.[60]

While Houston, Urciolo, and their clients had waited for the Court's decision about their companion suits, the national legal staff had continued to ready the *McGhee* case. The NAACP's New York covenant strategy conference in September 1947 provided the Association with a chance to reassert control and establish an overarching structure for the potentially complex litigation ahead. The gathering served two important functions for the NAACP lawyers. First, it offered a chance to wrestle Vaughn into line with the Association's approach to arguing the cases before the Court. Second, it presented the assembled attorneys and experts with a valuable forum to debate ideas and air concerns about specific legal arguments while obtaining immediate feedback from a wide array of their colleagues. By challenging one another and laying out all the tactics and options available, they might just map out a feasible path to victory.

Even if the Association's legal team had forgiven Vaughn for ignoring their pleas for caution and patience when applying for certiorari—and it was by no means clear that they had—serious doubts lingered about the specific statutory and constitutional grounds that Vaughn had decided to argue before the U.S. Supreme Court. While the NAACP's arguments in *McGhee* revolved primarily around the central claim that judicial enforcement of covenants constituted discriminatory state action under the Fourteenth Amendment, Vaughn elected to ground his arguments primarily in the Thirteenth Amendment—which prohibited slavery and involuntary servitude—and the Civil Rights Act of 1866. The main concern of many of the strategists in September was to corral what they saw as an overly ambitious, idealistic, or simply foolhardy set of contentions from their Gateway City colleague. Vaughn, who was now set to argue first before the Court, threatened to undercut the legitimacy of the NAACP's entire set of arguments by framing the

issue on Thirteenth Amendment grounds that the justices would view very unfavorably. His colleagues at the Association were not shy about telling him so.[61]

The NAACP's pressure on Vaughn to drop these claims and join the Association's line of argument came in two waves. First, the NAACP used its financial resources to coerce Vaughn into cooperating. The monetary burdens of litigating the *Shelley* case accumulated quickly for the REBA in the Gateway City. In the summer of 1947, as they prepared to fund Vaughn's U.S. Supreme Court challenge, the brokers initiated a local fund-raising campaign that reached out to the St. Louis branch of the NAACP. When branch president David Grant wrote to Thurgood Marshall soliciting support from the national office for a potential donation, Marshall responded that while the Association had been happy to support local anticovenant efforts that collaborated with the NAACP's campaign, "we have not had that type of cooperation concerning the case of Shelley vs. Kraemer." Rather than flatly denying the appeal for assistance and perhaps to ensure that Vaughn and his backers actually attended the September meeting, Marshall raised the possibility of revisiting the issue at the conference.[62]

When September came, NAACP attorneys used the proceedings to expose publicly the weaknesses in Vaughn's arguments and challenged him to defend his claims on each possible point. Vaughn found himself on the defensive throughout the conference, facing extensive and occasionally harsh questioning and criticism from a significant portion of the assembled experts. Much of the worry focused on Vaughn's decision to argue from the Thirteenth Amendment. Legal expert Robert Lee Hale had some particularly choice words regarding Vaughn's approach. If Vaughn proceeded with his current argument, Hale insisted, "the Court would not listen. . . . Prohibition to buy property shown as slavery would not be a good point. The Court would think you had a weak case if you relied on the Thirteenth Amendment." A handful of other participants repeatedly tried to convince the St. Louis attorney that Fourteenth Amendment grounds would better suit his arguments. At one point, Vaughn's exasperation led him to exclaim that it was "not necessary to discuss this point at the present time," though the conference's stenographer noted that "there were many who wished to continue the discussion."[63]

Even after Vaughn pushed through the strongest of the challenges to his claims, he found himself on the defensive yet again. At times, the questioning resembled a mock trial—something that would have seemed less confrontational at a legal conference had Vaughn not been the only one subjected

to the high level of scrutiny. The assembled attorneys probed Vaughn's arguments for weaknesses, lobbing two or three questions and citations at a time toward the beleaguered lawyer. They pressed Vaughn on how he might defend the state action concept of the Fourteenth Amendment. When his frustrated answer proved unsatisfactory for his colleagues, Charles Hamilton Houston chastised him and warned that "you will be questioned further than that [by the Court]." At the end of the day, the group had turned so far against him that the NAACP record keepers purged from the official transcript the only positive words that Vaughn had received from his peers. Though Houston had expressed his belief that Vaughn should "be congratulated on being the first to go for certiorari in a case of this type," someone quickly struck through even this begrudging praise with an unforgiving line of ink.[64]

Marshall also resumed his financial maneuvers at the New York summit. When Vaughn arrived at the gathering with his friend and principal supporter, James T. Bush, Marshall negotiated with Bush in the hopes of using financial pressure to coerce Vaughn into a closer partnership with the Association's attorneys. Some days later, Marshall wrote to David Grant disclosing the agreement's details. "The Executive Committee of our Board of Directors has agreed to contribute a total of $1,000 . . . toward the expenses of the restrictive covenant case," Marshall wrote. He then revealed that the funds were "conditioned upon an agreement with Mr. Vaughn to work in close cooperation with the National Legal Committee and the staff of the NAACP under the direction of Charles H. Houston." Furthermore, he continued, "it is also conditioned upon the agreement that Mr. Vaughn will . . . work with the other lawyers who are handling similar restrictive covenant cases." The NAACP was understandably wary about funding Vaughn's rogue endeavor without any preconditions so they decided to withhold any disbursal of funds until after they appeared before the Supreme Court. Still the legal staff hoped that the shrewd proffering of the Association's resources might finally restrain their colleague in St. Louis. Their offer of $1,000 represented a substantial investment—though they had already provided a much larger sum for Loring Moore's *Levy* case in Chicago—especially as the national office assumed complete financial responsibility for the *McGhee* case.[65]

For the remainder of the month of September, however, Marshall and Bush exchanged a volley of confrontational letters disputing what the Association should expect from Vaughn in exchange for the promise of assistance. Two weeks after the conference Bush apparently came to believe that

the Association wanted Vaughn removed from the case completely, something that he adamantly refused to consider. In his reply, Marshall seemed both baffled and indignant at Bush's tone. "I told you personally, and the record will show," Marshall insisted, "that this Association has never forced a lawyer to step aside in his own case." Marshall reminded Bush that the issue "is bigger than Vaughn, you, me or anyone else. . . . There is no question of glory involved in these cases. It is a question of getting a job done and the only way to really get a job done is for everyone to roll up his sleeves and work with everyone else in a spirit of cooperation." Marshall would later confide privately to David Grant that most observers generally agreed that the St. Louis case was in serious disarray and that the REBA was simply looking to lay the blame for this on the national office. "For the life of me," an increasingly bewildered Marshall wrote, "I cannot understand what is behind these moves of Mr. Bush, and I can only hope that we will some time down the line be able to work with them." The relationship between the REBA and the national office would only continue to deteriorate as the court date grew closer.[66]

Though the disputes lingered well into the middle of 1948, the final straw came for Marshall when a related group of St. Louis anticovenant advocates wrote to him late in 1947. In a letter on behalf of the REBA's Citizens Committee, chairman Herman Dreer berated the NAACP's legal staff. Concerned St. Louisans, Dreer wrote, "do not at all like the manner in which you have responded to our appeals for assistance from the national organization . . . your attitude is one of indifference or neglect . . . to our regret you have failed us." Marshall took exception to the entire tone and content of the letter and attempted to set the record straight with a stern rebuttal. Reminding Dreer of the NAACP's belief in the importance of all the cases at hand, Marshall detailed the utter lack of consultation that Vaughn had sought in the preceding months. Marshall's statements made clear that the NAACP would never be content to reduce its role to that of simply a philanthropic or lending institution for civil rights litigants, distributing money without any other involvement in what transpired. The whole premise and success of the Association's legal advocacy depended upon collaboration, exchange, and support between local activists and the national office.[67]

Through its nationwide networks of communication and organization, the NAACP saw itself as bringing the benefits of structure as well as financial assistance to the individual struggles of civil rights advocates. The two assets came hand in hand. Lawyers who sought the Association's backing to take their local issues to the national level could not expect to receive funds

while refusing to coordinate their efforts with the NAACP's veteran cadre of legal experts.

THE NEW YORK CONFERENCE, of course, did not revolve completely around George Vaughn. The Association made its preparations for the *McGhee* case as well. Two significant conversations focused on how best to argue the scope of judicial state action and whether to frame the impact of restrictive covenants in terms of the collective effects of widespread agreements or the detrimental results of individual restrictions. The concern over the state action argument revolved around how the attorneys could advance the idea that judicial decisions constituted an exercise of state authority. William H. Hastie first raised the point out of pragmatic concerns. "I believe," he warned his colleagues, "that the Supreme Court is afraid of opening up a broad field of new situations in which it will be in the position of reviewing action of state courts." If every state court decision amounted to an exercise of state power rather than a presumably impartial adjudication of disputes, then the U.S. Supreme Court would radically extend the parameters of its jurisdiction. The Supreme Court, Hastie and others in attendance felt, would reject any universal attempt to cast lower courts as state agents rather than arbiters of state law. The NAACP risked having a Supreme Court that was "emotionally set against" them or "frightening" the Court into a negative ruling unless they narrowly defined the type of state action they sought to classify as discriminatory. In asking the Supreme Court to break new ground, the Association did not want to present the justices with too big a legal weapon for fear that they would hesitate to use it.[68]

Thus the attorneys tried to define what constituted impermissible state action by local courts in these cases. Hastie proposed an argument that would ask the Court "to go no further than to say that the [lower] Court shall not do under the Fourteenth Amendment anything the legislature cannot do under the [same]." Others present held fast to their belief that "every action by a state court is state action," but maintained that the discrimination at issue in these cases was unique in its legal form. Ultimately the lawyers and consultants came to a general agreement that Hastie's definition would best serve their interests in this case. Because the Supreme Court had found legislative racial zoning to be unconstitutional in *Buchanan v. Warley* (1917), the argument held, local courts should not be permitted to enforce contracts that accomplished the same results. "Private" zoning, enforced by the courts, should receive the same constitutional scrutiny as city-mandated residential segregation. This line of reasoning borrowed from the language and con-

cerns of housing experts like Charles Abrams who had warned that "it is now possible that the use of restrictive covenants could blanket a whole community and a whole town if enforced by the court."[69]

Still, even this consensus fomented some additional legal debate. Loren Miller, for one, was concerned about arguing solely against the aggregate effects of restrictions in urban areas. He did not want the assembled lawyers—or more importantly the Supreme Court—to lose sight of the fact that even "if there were only one [covenant], you are dealing with a question of high public importance." As a result, he cautioned his colleagues not to rely completely on the concept of private zoning, but to emphasize additionally the harm, injustice, and significance of every single restrictive agreement in place in America's cities. While a handful of the conferees urged Miller not to try and "win too much at one time," his point resonated with the many in the group. This argument evinced a boldness and determination that wanted to settle for nothing less than a full acknowledgment by the Supreme Court that these contracts in and of themselves were unjust and immoral instruments of fear, hatred, and inequity.[70]

At the New York conference's conclusion, the advocates emerged with a reinvigorated sense of resolve. Only ten weeks remained before the attorneys in these cases would submit their briefs to the Court. The meeting had successfully imposed some structure and direction as preparations moved ahead. Out of the confusion and worry that George Vaughn created in the spring with his unwelcome, but successful, shove forward, the NAACP had marshaled its resources and restored as much of its original plan as it could under the circumstances. As the Association remade *McGhee* into the best possible test case, however, one crucial step remained.

Social Science and Segregation: The NAACP's "Brandeis Brief"

Throughout all of their jousting with Vaughn and the frantic preparations that ensued, the NAACP legal staff never lost sight of the nagging fact that the *McGhee* case record failed to include any social scientific arguments about the consequences of discrimination. This presented a significant problem for the team taking charge of the case. A centerpiece of the Association's postwar campaign against covenants had been the desire to integrate a burgeoning body of scholarship about housing segregation into its attorneys' legal arguments. For at least a decade the NAACP's lawyers had experimented with social scientific material as a part of their briefs, but in the aftermath of World War II they became markedly more determined

in their desire to bring sociology, psychology, and economics into the courtroom. Their efforts in the covenant cases would serve as a turning point in their use of the social sciences as tactical instruments within litigation campaigns.

Though the explicit use of socioeconomic data in its legal work was a process that took until the 1930s to develop in earnest, the Association had deep ties with social scientists that dated back to the organization's founding. Indeed, the NAACP's multifaceted activism—in which litigation, lobbying efforts, and public relations campaigns frequently overlapped in complementary ways—had ensured that the Association's attorneys long understood the potential value of arguments rooted in social facts as a strategy for shaping the outcome of cases. Their litigation had always developed alongside broader institutional commitments that emphasized the need to study racial prejudice's impact on society and extolled the importance of disseminating that information widely. There was, in other words, never a stark dividing line between the NAACP's legal work and its efforts to educate Americans about race and racial inequality. What would change over the first half of the twentieth century was the form that relationship took.[71]

Just as important as the Association's long-standing ties to social scientists were the legal department's significant imbrications with the early twentieth-century evolution of sociolegal thought. Attorneys affiliated with the NAACP, including Charles Hamilton Houston, Albert Pillsbury, Karl Llewellyn, and Robert Lee Hale had all been eager practitioners—and in some instances, leaders—of emerging jurisprudential trends that saw great value in the use of data and nonlegal scholarship. Each of these individuals brought these progressive sensibilities to bear on their work with the Association and in turn helped to shape the organization's litigation strategies. As the legal battle against Jim Crow took shape, the attorneys embraced a gradual transition toward increasingly substantial uses of social scientific material in the courtroom.[72]

Despite these extensive connections, the Association's lawyers had generally refrained from deploying socioeconomic data in their legal briefs for the first two decades of their legal work. The NAACP's two early housing cases, *Buchanan v. Warley* (1917) and *Corrigan v. Buckley* (1926), offered an example of this reticence. As badly as they may have wished for the Court to understand the practical consequences of housing discrimination, not a single nonlegal citation informed their arguments. Instead, it was the Association's opponents in *Corrigan* who deployed the prevailing public scholarship of the day. Attorneys for the white homeowners in the case linked the pro-

priety of residential segregation to prohibitions against racial intermarriage by citing a handful of popular tracts decrying the "amalgamation . . . of the races" as the "most dangerous" threat to the continued vitality of American civilization. The prevalence of such beliefs within social scientific scholarship at the time had contributed significantly to the NAACP's reluctance to offer sociological arguments in their written pleas. It would be another decade before the Association's attorneys began to dabble with social scientific data and statistics as a part of their briefs.[73]

By the late 1930s, as the NAACP's legal team trained their focus on the disparities in segregated education, the shift began to take shape. In the landmark *Gaines v. Canada* (1938) case contesting Missouri's discriminatory practices in postgraduate education, the Association's brief included a two-page statistical appendix highlighting school enrollments, literacy rates, and the distribution of higher education funding along racial lines. The attorneys used this data to demonstrate the inequalities of Jim Crow schooling in the state, but this proved a rather tepid experiment that would not become a regular practice in the ensuing years. While Charles Hamilton Houston, in his capacity as an NAACP attorney, would urge other lawyers to pursue sociologically oriented legal arguments during the late 1930s, the litigators at the NAACP's national office would only use nonlegal citations in amicus curiae briefs in educational and labor cases where they were not directly involved in the litigation at hand. They still hesitated to build their own cases on a record steeped in social scientific material.[74]

In the briefs for *McGhee* and *Hurd*, however, the NAACP would employ socioeconomic data as it never had before. By introducing legal arguments imbued with social scientific scholarship—a practice known in legal circles as a "Brandeis brief"—the NAACP now wholeheartedly embraced a tactic that had first appeared four decades earlier. In 1908, a young Jewish labor reformer and activist named Josephine Goldmark along with her brother-in-law, future Supreme Court justice Louis Brandeis, had pioneered the use of nonlegal information in this fashion. The NAACP would steadily turn toward this strategy in the interwar period and reach a decisive turning point in the covenant cases. Though the Association's attorneys would still rely primarily on constitutional claims, their choice to emphasize the social consequences of segregation more than ever before reveals a great deal about the opportunities that civil rights advocates felt they could seize in the wake of World War II. It seemed possible in the postwar moment to challenge fundamentally the rationalizations and supposed propriety of racial discrimination as a social norm or a social good.[75]

As the NAACP legal team worked feverishly throughout the summer and fall of 1947 to inject socioeconomic material into their briefs for the Supreme Court, their efforts highlighted both the importance the Association assigned to these arguments and the growing impact of the social sciences on the process of civil rights litigation. In *McGhee* and *Hurd*, the Association's attorneys would ask the Court more directly than ever whether American society could truly afford to accept racial intolerance in one of its most costly forms. The struggle was how best to pose the question.[76]

GRAPPLING WITH WHAT SOON became their accidental test case in *McGhee*, the Association's attorneys and consultants had devoted considerable discussion to the absence of any detailed sociological claims. As Willis Graves would later reflect, he and Francis Dent had never intended to "attempt any sociological defense" in the case. This had proven to be perhaps the greatest sticking point for the national legal team throughout the first half of 1947. Indeed, immediately after Loren Miller took the reins of *McGhee*'s litigation in July, he set about preparing social scientific material for his arguments to remedy this omission.[77]

Since 1946, Miller had tied the future success of the anticovenant fight to the use of "the sociological data at our command." Now with his own Supreme Court test case in which to experiment, Miller quickly wrote to Thurgood Marshall to express his conviction that "extensive 'sociological briefs' should be filed." Simultaneously in Washington, Charles Hamilton Houston insisted on consulting "a panel of anthropologists, economists and sociologists" as the Hurds' case moved forward. Houston's verve for sociological arguments on appeal was unsurprising given his long-standing interest in the practice and his enthusiastic use of Howard University's social science faculty—including E. Franklin Frazier—in his local cases like *Hurd*. Both Miller and Houston were determined to make social scientific material a central point of contention in their pleas.[78]

Houston's own commitment to using socioeconomic scholarship found an equally adamant partner in Phineas Indritz, his new colleague on the *Hurd* appeal. Several times over the summer, Indritz wrote to prominent social scientists and housing experts soliciting their opinions and scholarly contributions for the Washington cases. In each request he plainly stated his belief that "the attack in the Supreme Court . . . must be supported by a full sociological presentation. Legal arguments, standing alone, may find a less fertile field for acceptance in this controversy which has so frequently been dominated by unspoken emotional preconceptions and misconceptions."

Again and again the attorneys in the covenant cases showed a remarkable insistence and urgency as they prepared their social scientific arguments.[79]

One of the NAACP's clearest indications of support for combining socioeconomic and legal claims came in the form of financial allocations. When the legal staff drew up a proposed budget for the cases as they approached the Supreme Court, they set aside more than 40 percent of the funds for the research and preparation of socioeconomic data. Coupled with the national office's projected investment of anywhere from $8,500 to $12,000 in Loring Moore's *Tovey v. Levy* test case in Chicago—which won the NAACP's backing primarily due to the strength of its social scientific presentations—this meant that the Association was ready to commit an astonishingly large amount of its litigation money to chasing the strongest possible Brandeis brief.[80]

What made the legal team's dedication to this tactic all the more startling was that nearly all of their previous experiments with socioeconomic arguments in the courtroom had been fairly restrained. In an organization known for its general attitude of caution in civil rights litigation, the NAACP's lawyers now enthusiastically launched themselves headlong into waters in which they had only gently waded prior to that point. The relative ease and certainty with which the Association proceeded on this track testified to the urgency and innovation that postwar attacks on segregation increasingly cultivated. The moment and the issue demanded a new boldness—even if couched in the NAACP's highly organized and initially slow-developing campaign. Throughout the pursuit and preparation of their covenant test case, then, the organization seemed to harbor no doubts about the necessity and utility of a substantial Brandeis brief.

This unflinching confidence stemmed from a transformative movement within the social science disciplines and in American intellectual culture called scientific antiracism. Taking hold in the interwar period and flourishing in the postwar years, scientific antiracism strove to uproot the beliefs and practices of previous generations and had a profound influence on the NAACP's leadership. The Association relied heavily upon this emerging body of scholarship as it forged a growing alliance between activists and academics that quickly solidified the shift in its litigation tactics during the postwar era. Because the NAACP's legal team generally lacked the resources and personnel to generate original research on its own, the success of the Brandeis brief in the covenant cases would hinge upon the legal team's ability to mobilize a group of scholars who had begun to challenge the conventional academic wisdom about race in America.

In the first decades of the twentieth century, most of the available social scientific work about race had supported popular stereotypes asserting the innate inferiority of African Americans and the appropriateness of segregation as a natural order for society. Early scholarship in the social sciences typically defended the concept of an inherently superior white race and presented racial discrimination and the subordination of black Americans as the only reasonable solution in a racially diverse nation. For these intellectuals, the condition of African Americans and their place as second-class citizens was the inevitable result of natural deficiencies in their character. While this canon of "scientific racism" had helped provide an academic rationale for segregation, an antiracist intellectual counteroffensive took shape in the interwar period and slowly began to win out.[81]

Scientific antiracism, especially in the fields of anthropology, sociology, and psychology, gradually promoted an evolution in scholarly thinking. The interwar decades witnessed a shift away from Social Darwinist and sociobiological conflations of race, character, and caste. Over time, conventional thought in these disciplines gave way to a new stance that interpreted the conditions for African Americans in the United States as the product of white racial prejudice rather than biology. This understanding cast Jim Crow segregation as a problem and an impediment to progress rather than a sensible approach to social organization. In place of the intellectual authority that had strengthened racial prejudice for the first quarter of the century, a growing number of scholars began to portray this intolerance as irrational, harmful, and without a basis in scientific reality. As social scientists rejected theories of black biological inferiority, racial inequality came to represent a potentially solvable problem rather than an acceptable feature of American life.[82]

When the nation plunged once again into international warfare in the 1940s, scientific antiracism and the authority of antiracist scholars as social analysts gained increasing credibility. This new wave of social scientific thought had struggled to gain a large following during the 1930s, but the events of World War II focused national scrutiny on the problems that segregation caused while simultaneously building public confidence in social scientists as interpreters of societal conditions. The war solidified and expanded the popular legitimacy that these disciplines had steadily achieved in the quarter century prior to Pearl Harbor. America's wartime government invested unprecedented levels of trust and resources in social scientists' research, turning to these scholars—and especially social psychologists—for a variety of tasks including the assessment of national morale, the analysis and development of propaganda, and the evaluation of racial tensions on the

home front. These opportunities provided scholars with extraordinary access and governmental support and helped reify the national public's faith in these disciplines as accurate and useful methods of social analysis.[83]

More importantly, the specter of Nazi Germany's racial ideologies forced many Americans to take a long, hard look at race relations in the United States. Within the social sciences, American scholars witnessed the potential consequences of theories that zealously exalted the biological superiority of one race over another as the physical and intellectual atrocities of their enemy unfolded. This sobering recognition of the extremes that scientific racism could promote and defend gave renewed purpose to the activism of antiracist scholars in the 1940s. Increasingly, the NAACP found at its disposal a multiracial network of social scientists who energetically championed civil rights causes and eagerly lent their expertise to the Association's courtroom efforts.[84]

At the same time, the war also influenced public perceptions of scientific antiracism—expanding both the public receptiveness and the size of the audience that these scholars enjoyed. As World War II came to represent a struggle between democratic freedom and Nazi totalitarianism, the gap between America's egalitarian promises and the stark realities of racial injustice garnered increasing national and international scrutiny. The vitality of Jim Crow and race prejudice forced many Americans to realize that the difference between their country's racial ideologies and those of their Nazi adversaries were at times paper-thin. This unsettling awareness led a growing number of Americans to embrace the sort of racially egalitarian ideas that the nation's social scientists had begun promoting in even greater earnest. Though scientific racism's legacy and proponents would linger long after the war's conclusion, by the late 1940s social science disciplines had largely overcome many of their early opinions about racial difference and discrimination.[85]

A high point of this rapidly culminating shift came with the publication of Swedish social scientist Gunnar Myrdal's *An American Dilemma: The Negro Problem and Modern Democracy* in 1944. When it appeared in the midst of World War II, Myrdal's work captured and epitomized the spirit of scientific antiracism and the changing intellectual consensus about racial subjugation in America. Myrdal and the legion of scholars who prepared the massive study offered a comprehensive interdisciplinary look at the problems confronting African Americans and the prejudices that undergirded inequality. The tome helped to consolidate an extensive body of interwar social scientific work on race and distill the message of racial egalitarianism

for broad popular consumption. *American Dilemma* received overwhelmingly positive scholarly acclaim and remarkable public recognition. The NAACP's attorneys took notice and soon began preparations for their most expansive Brandeis brief yet.[86]

THE CAMPAIGN AGAINST housing discrimination offered an ideal issue around which to build a set of socioeconomic arguments. Few developments sparked more intensive social scientific scrutiny in the 1940s than the growth of America's racial ghettos. Antiracist scholars trained their considerable expertise on the nation's cities and produced an array of studies that would become pillars of the NAACP's arguments in the covenant cases. By 1946, this scholarship and the burgeoning intellectual networks between academics and activists had convinced the Association's legal team that a robust sociological presentation could and would aid the organization's campaign against residential segregation. Exactly what would constitute success, however, remained somewhat unclear.[87]

For all of its potential, the Brandeis brief represented a tool of litigation whose effects were largely hypothetical. In theory the social scientific material would show that racial discrimination caused the severe hardships that African American communities endured and this would somehow influence the Court's decision making. Loren Miller was particularly adamant that sociological data would help strengthen the argument that covenants worked contrary to public policy. Yet all of the NAACP's lawyers understood that direct causation was something extraordinarily difficult to prove through scattered psychological, public health, economic, and sociological studies. Furthermore, the Court could easily choose to ignore the data entirely as irrelevant to the constitutional issues at stake. As a result, one of the key challenges for the NAACP in crafting their Brandeis brief was how to make the theoretical potential of this strategy speak to the practical needs and difficulties both of black urban communities and the Association's agenda.[88]

This tension led the NAACP to establish a dual purpose for their foray into social scientific arguments in the covenant cases. The primary objective remained an attempt to convince the Supreme Court of the severity of the burdens and the extent of the consequences that flowed from housing discrimination. The brief's secondary function, however, was as a tool for educating the public regarding the costs of residential segregation. Indeed, the Association's legal staff ultimately wanted their Brandeis brief for the covenant cases to provide a nearly comprehensive survey "of all of the sociological studies that have been made on the question of restrictive covenants and

housing." Though the NAACP's penchant for wide-ranging surveys was nothing new, the use of a legal brief to present and disseminate such extensive findings was. Whether or not the arguments prevailed before the Court, the NAACP planned in advance "to reprint this material for general distribution to all colleges and organizations in order to build wholesome support for the fight against restrictive covenants." The potential to use the brief as both a legal and an educational instrument ensured that even if the NAACP had misjudged the Court's willingness to entertain social scientific data, the attorneys' efforts would still serve to advance the anticovenant cause. If, on the other hand, the Court did acknowledge and accept the sociological arguments, then the Association would have a ready-made study to help counter public resistance and ease the decision's implementation.[89]

With this agenda in mind, the NAACP's legal team still confronted the basic difficulty of determining how to assemble the massive volume of data they would need in order to write the brief. Part of what made the covenant cases a turning point in the Association's experimentation with this tactic was the legal department's appointment of their first-ever "socioeconomic analyst" just as the litigation accelerated toward the Supreme Court. In 1947, Thurgood Marshall hired a recent graduate from NYU's Sociology Department—a young Jewish woman by the name of Annette Peyser. Over the coming year, Peyser served as a crucial liaison between the NAACP's national office and the cadre of social scientists working feverishly to compile the Brandeis brief. Her hiring marked an important shift in how the Association's litigators would approach the use of social scientific arguments.[90]

Annette Peyser had grown up in a white-collar immigrant neighborhood near Fordham University in the Bronx, the daughter of a successful accountant. She followed her father's footsteps to NYU, where she studied sociology and worked closely with renowned political scientist Harold Lasswell. It was Lasswell's influence and his strong letter of recommendation that ultimately secured Peyser a temporary job with the NAACP as a "press content analyst" in autumn of 1946. Her academic training, idealism, and work ethic earned her a quick series of promotions within the organization. After a few months, her work had come to the attention of the legal team.[91]

Peyser's talents caught Marshall's eye after she compiled a study on the "inequities in educational opportunity between negroes and whites in the South" at the request of the legal department. Her report came on the heels of the NAACP's most recent experiment with a Brandeis brief late in 1946. The Association had filed an amicus brief in support of *Mendez v. Westminster*, an educational discrimination case regarding the segregation of Mexican

and Mexican American students in Southern California schools. Because the suit was not affiliated with any NAACP branches and the Association's only involvement with the case came late in the appellate process—just as it reached the Ninth Circuit Court of Appeals—it offered an ideal opportunity for the legal staff to continue their dabbling with the kind of social scientific arguments they soon hoped to use in one of their own cases. Amicus filings allowed the NAACP to conduct dry runs with the tactic without any real risks or costs in the event that a case lost. The resulting brief, authored primarily by attorney Robert Carter, had drawn from a handful of the leading sociological texts of the day including Myrdal's *American Dilemma*. Carter dedicated a substantial portion of the brief to an argument rooted in both statistical data and a larger claim about the social costs of racial discrimination. *Westminster* proved to be an important experiment, but was still tremendously restrained in scope and scale compared to what the NAACP's lawyers would undertake with Peyser's help less than a year later in *McGhee*.[92]

When Peyser joined the legal staff full time in early 1947, her primary responsibility was to prepare for the Association's next attempt at a Brandeis brief when an opportunity arose. Over the following months, she often labored alongside attorney Marian Wynn Perry and served as an important conduit between the national office and the network of scholars eager to aid in the NAACP's litigation efforts. She would work almost exclusively on the restrictive covenant cases once the Supreme Court granted certiorari that summer. Marshall described Peyser's duties as the legal team's first and only socioeconomic analyst, explaining that she provided "research in all extra-legal fields connected with our work," "preparation of memoranda and sections of briefs on such extra-legal matters," and the "answering of correspondence and requests for information on such . . . matters." The attorneys increasingly relied upon Peyser to survey and distill the findings of any relevant scholarship regarding the consequences of racial discrimination across an array of academic disciplines. And they needed it done quickly.[93]

Peyser, thankfully, received a good deal of help in the buildup to the covenant cases. Knowing that a task of this size and importance would be too much for any one person to handle, especially considering the fact that Peyser was neither a lawyer nor a formally trained academic, the attorneys left the initial work of compiling the relevant data to a committee of consultants. At the September covenant conference in New York, the assembled delegates selected a team of ten individuals including urban scholars Robert Weaver and Louis Wirth along with attorneys Loring Moore, William R. Ming, Byron Miller, and Ruth Weyand to spearhead the preparations. Peyser's inclusion

on the committee only further evidenced her significance in the national office's objectives.[94]

It was scholar/activist Louis Wirth, however, who had laid much of the groundwork for the new committee's hurried efforts. Since May of 1947—months before the Supreme Court had agreed to hear the covenant cases—Wirth had used his position as president of the ACRR to direct resources toward "the development of a model brief in which the scientific evidence, where now available and obtainable, can be brought to bear upon judicial decisions" in restrictive covenant litigation. The ACRR's board unanimously viewed their support of the NAACP's research as being of "singular importance" and allocated thousands of dollars toward the project. As a result Wirth could step readily into his role as chairman of the Brandeis brief committee and put the full resources of the ACRR at its disposal.[95]

Under the direction of Wirth, Weaver, and Miller, the group swiftly amassed a comprehensive sixteen-chapter study, which they released to the conferees three weeks later. The speed with which the team assembled the data resulted in part from the early legwork that both Peyser and the ACRR had done, from Weaver's efforts following the 1945 Chicago conference, and from the pragmatic decision to gather existing research rather than attempt to conduct any original work in the limited time available. The final document examined a wide range of issues from the current state of housing conditions for urban black residents to the effects of discrimination and isolation on black communities. Chapters covered the connections between segregation and health, "Crime, Delinquency, Vice and Family Disorganization," "the Quality of Public Services," "Access to Economic Opportunities," and "Public Peace and Order." Another chapter promised to illuminate the "Psychological Effects of Segregation and Its Relationship to a Democratic Order." The committee made sure to bring the full weight and breadth of scientific antiracist scholarship to bear in pronouncing the evils of covenants.[96]

The task then became one of translating this specially commissioned study into an effective legal brief. Accordingly, Peyser took on added responsibilities as the preparations proceeded. Throughout the month of October, Peyser and Perry sorted through the data and pored over the arguments and citations in Wirth and Weaver's report. As they traveled back and forth between New York and Washington, coordinating with both teams of attorneys arguing the *McGhee* and *Hurd* cases, they carried well-worn copies of some of the key texts on race and housing. In the end, their efforts yielded an astonishingly thorough presentation of social scientific claims in the

briefs. Their reliance on this nonlegal data far surpassed anything the Association had done before.[97]

Indeed, each of the NAACP's previous attempts at a Brandeis brief had proven fairly limited in their scope. Even in the amicus filings from recent years, where the Association's lawyers had explored the use of social scientific data more freely, the legal team had never cited more than eighteen nonlegal sources in a single case. They matched that number in one of their own suits for the first time in an Oklahoma law school desegregation case, *Sipuel v. Board of Regents*, which arrived at the Supreme Court within a week of *McGhee* and *Hurd*. The NAACP's sociological arguments in *Sipuel*, submitted within a few days of the covenant case briefs, spanned fifteen pages of the document and doubled the number of extralegal citations from *Westminster* the previous year. This was a substantial escalation that demonstrated the NAACP's growing use of the Brandeis brief tactic. But even *Sipuel*'s social scientific elements would pale in comparison to those in the covenant cases.[98]

For *McGhee* and *Hurd*, the legal team pulled out all the stops. In the Detroit case, they cited eighty-three different social science texts, government agency publications, journal and magazine articles, and NAACP pamphlets. Socioeconomic research filled more than forty pages of the document. The scale of the effort was staggering. Not to be outdone, Charles Hamilton Houston's arguments in *Hurd* relied upon 140 different nonlegal citations and occupied over sixty pages of text. With an additional fourteen pages of maps and tables in an appendix, social scientific material comprised just under half of the entire Washington case brief. Marian Wynn Perry later reflected that it was at this moment when "sociology was used for the first time in a major way" by the legal team. These filings in the covenant cases marked an unprecedented shift in the NAACP's reliance upon social scientific data in the courtroom. Now there could be no mistaking the legal team's commitment to the tactic or their sincere belief in its potential power.[99]

ALL OF THIS DATA in the covenant cases focused around two key objectives. First, the Brandeis briefs imparted the extent and the consequences of the hardships that black communities faced due to residential segregation. Second, the briefs attempted to show that racial restrictions had no rational basis in economic or social facts. By highlighting the negative impact of covenants while undermining white homeowners' standard rationalizations for their use, the attorneys sought to expose these agreements as nothing

more than punitive instruments of bigotry grounded in a baseless fear of African Americans and other minority groups.

Both the *McGhee* and *Hurd* briefs dramatized the plight that housing discrimination forced upon black urban populations. The "nation-wide destruction of human and economic values which results" from housing segregation, the Detroit brief argued, "makes this form of discrimination peculiarly repugnant." An "unprecedented overcrowding and congestion" in black districts and the subsequent deterioration of existing homes was nothing short of devastating. The attorneys insisted that covenants were the "direct and major cause" of these overburdened conditions. Deprivation prevailed in many forms, they argued, throughout the nation's distended racial ghettos. It came with a tremendous cost.[100]

The social ills flowing from the constriction that covenants caused became a significant point of emphasis. Both briefs underscored the "increase in disease, death, crime, immorality, juvenile delinquency, racial tensions, and economic exploitation" along with vice and mob violence that accompanied the disadvantages forced upon black citizens. These costs, in turn, not only affected the communities in which they occurred, they also proved injurious to the successful functioning of America's cities and society as a whole. This was a strategy of argumentation that had its own risks, a line of reasoning that might evoke condemnation of "damaged" black urban populations rather than moral outrage. Here, however, the negative depictions of urban life for African Americans were not some misguided attempt to identify black residents as irrevocably broken by the strain of segregation—nor was this a plea simply on behalf of those with the means to escape the shadow of a distressed underclass. Instead, the NAACP's attorneys highlighted the disruptive aspects of life in the ghetto as much for legal reasons as for moral ones.[101]

The damage caused by racial restrictions formed a critical portion of the Association's public policy claims before the Court. If the proven consequences of residential discrimination through covenants were these degrees of misery and unrest, the attorneys argued, then the exercise of state power to promote these conditions could only be seen as unseemly, unconscionable, and unacceptable. Courts could not legitimately permit the state to exercise its power in furtherance of an end that was so clearly harmful to the continued health and function of the state itself. The attorneys painted black urban communities not as being so damaged that they needed the Supreme Court's special protection, but instead as populations suffering

under a debilitating, but temporary, state of hardship with an acute, readily identified, and remediable cause.

With the costs of enforcing covenants thus displayed, the Brandeis briefs then attacked the irrationality of restrictive agreements from another angle. The NAACP's legal team believed it was critically important—whether for the benefit of the Court or a popular audience—to contest some of the key justifications that undergirded the use and maintenance of covenants. The Brandeis brief became a forum to rehabilitate the image of African Americans as good homeowners and to debunk claims that residential integration caused permanent damage to property values and the social harmony of white neighborhoods. In this line of argument, the attorneys took on two of the most insidious claims that covenants' advocates had employed to spread the use of racial restrictions over the previous decades.

The financial rationale for exclusion became the first target. There were, the brief stated plainly, absolutely "no economic justifications for restrictive covenants against Negroes." Black occupancy did not inevitably lead to the depreciation of values across a given neighborhood. Quoting at length from a study by Robert Weaver, the attorneys claimed that African American homeowners, "instead of displaying any 'natural' characteristics to destroy better property," showed a greater tendency to maintain and improve their residences than "any other groups of similar income." In fact, the argument held that numerous instances in cities like Washington, D.C., and New York had demonstrated an upward trend in home prices after black homebuyers entered a neighborhood. Concerns about plummeting values in the wake of integration and the instances when this did occur resulted only from the spread of unfounded fears and rumors that became self-actualizing during panic selling.[102]

The attorneys took on a second popular justification for covenants when they challenged the idea that "forced" integration of neighborhoods would lead to social unrest and violent conflict between the races. In a darkly comic moment, Charles Hamilton Houston insisted that "this Court's decision declaring racial restrictive covenants unenforceable will not cause revolutionary disturbances." Such fears amounted to nothing more than ignorance and a willful disregard for recent history—including the record in the case at hand. "The people who see the end of the white race in America if restrictive covenants are outlawed," Houston remarked, "have their minds already made up and closed." These individuals who predicted bloodshed and the destruction of American society were nothing more than fearmongers and their victims. They were the same people, the brief claimed, who

"predicted that political revolution and election by bullet instead of by ballot would result" after the white primary case in 1944. They foretold "wholesale riots" after the Court invalidated a segregation law for interstate bus passengers. Dismissing the most dire warnings of procovenant forces as hysterical bombast, Houston and his team argued that there was "no cause for alarm here. . . . All that elimination of restrictive covenants will do is to remove an intolerable, artificial restrictive barrier and permit the functioning of the economic and social forces which affect and control city growth." Armageddon was not waiting in the wings.[103]

Though these arguments had more of a popular focus than a legal one, the briefs used these claims to insist that a decision against covenants would do no harm to white property owners. The attorneys posited that the only true motive behind restrictive agreements was a capricious and malicious racial hatred. Lest the Supreme Court find any ambiguity in their overarching message, the attorneys explained that "the sole reason for the enforcement of covenants are racial prejudice and the desire . . . to exploit financially the artificial barriers created by covenants." In the end, the Brandeis briefs attempted to show that for all of the harm these restrictions caused, the only tangible benefits fell to unscrupulous profiteers.[104]

IN PAGE AFTER PAGE, the NAACP's attorneys used extralegal arguments to hammer away at the injustice and irrationality of covenants. They did so with the force and authority that came from months of preparation and decades of antiracist scholarship. Through the work of Annette Peyser, Marian Wynn Perry, Charles Hamilton Houston, Louis Wirth, Robert Weaver, and a dedicated team of other social scientists committed to the NAACP's civil rights agenda, the legal team crafted its most expansive Brandeis brief ever. The social scientific data and extralegal claims in the Detroit and Washington suits gave voice to the networks of advocates and intellectuals who shared the strength of a desire for reform. In compelling fashion, the briefs had harnessed the power of a generation of scholarly efforts to undo the legacy of scientific racism.

With their forcefulness and urgency, the arguments in *McGhee* and *Hurd* displayed the NAACP's resolve in the fight to seize a fleeting moment of promise. The legal staff tapped the resources of a wide array of scholars, embraced a new boldness, and built a new strategic approach to their litigation. The Brandeis briefs in the covenant cases marked a crucial turning point in the NAACP's relationship with antiracist social science and the coalition of intellectuals who imagined a future without racial inequality. Now, the

Association would reach out to another group of allies and urge them to file briefs of their own.

Friends of the Court: A Coalition against Covenants

The NAACP found itself flush with offers of support and assistance as the date for arguing the cases in the Supreme Court approached. A wide range of organizations ultimately filed amicus briefs with the Court. What made the covenant cases unique was the number of groups that claimed a vested interest in the outcome. Driven by the impulse for reform in the wake of World War II and by the NAACP's deep connections to other advocacy groups, the *Shelley* cases yielded the largest collection of amicus briefs that had ever reached the Court. The development of this coalition offers insight into the interconnectedness of civil rights organizations and agendas in the 1940s as the events of the war buoyed the levels of activism on behalf of minority groups.[105]

In the end, nineteen of the twenty-three different amicus briefs supported the side of the black homeowners. The NAACP's combination of allies represented a broad spectrum of constituencies that spanned religious denominations, racial and ethnic groups, labor unions, legal advocacy organizations, and an assortment of other interests. They included long-standing stalwarts of political reform like the ACLU, the American Federation of Labor (AFL), the Congress of Industrial Organizations (CIO), and the Anti-Defamation League (ADL) alongside an amalgam of relatively recent causes including the American Association for the United Nations (AAUN), the American Veterans Committee (AVC), and the NLG. This coalition of supporters provided varied claims and arguments that revealed how deeply the issue of housing segregation cut in postwar America.[106]

Concern over the extent of housing discrimination alone, however, did not account for all of the motivations that brought this alliance together. The strong ties that existed between various civil rights organizations facilitated the NAACP's efforts to rally a broad backing for the test cases. Institutional interconnections permeated the still burgeoning field of minority advocacy where a host of organizations shared—to some degree—ideas, resources, and personnel in pursuit of postwar equality. Nearly half of the Association's amicus coalition evidenced these intertwined interests. The NBA, a professional society for African American lawyers, joined the case in part because *McGhee* attorney Loren Miller also served as the NBA's vice president. Miller's personal connections also undoubtedly influenced the filings of at least

two other amici: a group of California anticovenant attorneys and the Japanese American Citizens League (JACL)—though the JACL had its members' own hardships with racial restrictions in mind as well. The NAACP's deep ties to the ACLU through its longtime counsel Arthur Garfield Hays and through active engagement with local branches helped bring about their participation. Indeed, Francis Dent, one of the Detroit attorneys who originally argued the *McGhee* case, served as a coauthor of the ACLU's brief and another of the authors had been active on the NAACP committee that prepared the sociological arguments for the Court. Among the other groups, Houston's cocounsel in the *Hurd* case, Phineas Indritz, also served as counsel for the AVC and prepared portions of their amicus brief. Marian Wynn Perry also had strong ties to the NLG, where she had worked before joining the legal team in the covenant cases. The connections ran long and deep.[107]

The amici filings also showed the strong ties between the NAACP and leading Jewish advocacy organizations. Thurgood Marshall and Charles Hamilton Houston both served on the board of the American Jewish Congress's Commission on Law and Social Action (CLSA) and helped spur the CLSA's filing in the covenant cases. Newman Levy, an attorney for the ADL and the American Jewish Committee (AJC), had been a stalwart supporter of the litigation and had worked closely with the NAACP attorneys throughout the summer of 1947. Finally, the relationship between NAACP executive secretary Walter White and the AJC's president Joseph Proskauer proved close enough that White actually lobbied the Association's legal team to allow Proskauer to deliver one of the oral arguments before the Supreme Court. The AJC also supplied the legal team with a $2,000 donation to help defray the litigation costs and give further evidence of their support and concern. The NAACP and Jewish activists' coalition proved especially productive on this issue.[108]

The Association's political ties in the 1940s further bolstered their combination of amici. Indeed, the decision of the nation's two major labor groups to file on behalf of the NAACP's cases stemmed in some measure from organized labor's growing receptiveness to the Association's workplace rights agenda. As the NAACP gained traction on workers' rights issues and continued to attempt building a healthy political alliance with labor groups, the Association found the AFL and CIO reciprocating that support in some valuable ways.[109]

Despite the personal and organizational ties that strengthened the amicus coalition, a genuine concern over the issue of restrictive covenants undoubtedly also brought these groups together. While the links between the

NAACP and many of these amici were far from trivial, each of these organizations might well have tried to join the fight regardless of their connections to the Association. As the legal team prepared their arguments in autumn, offers of assistance flooded in from a wide range of groups across the country. This support often came from organizations without the same close connections that helped rally other collaborators. At times, the NAACP actually felt compelled to turn potential allies away for fear of duplicating arguments or overwhelming the Supreme Court with supplementary materials. In the end, the Association only had to solicit the support of three out of the nineteen amici.[110]

Many of the amicus briefs that reached the Court represented a true partnership between the Association's attorneys and the filing groups. In several instances, NAACP lawyers and consultants commented on drafts of the briefs—exchanging thoughts on the details of the arguments and how they would fit into the overall presentation of the cases. One of the Association's key advisers on the covenant issue, housing expert Charles Abrams, also corresponded with some of the amici and offered some perspective on how they could best increase the NAACP's chances of victory. Rather than repeating the central legal logic in each brief, Abrams saw more value in emphasizing the nonlegal aspects of the cases' impact. He advised one interested group not to worry as much about the strength of their arguments on the law, because "if it creates a healthy doubt or insinuates even a slight justification for itself on moral grounds, it may bend the judge toward adopting the law advocated in the main brief." The role of these supporting briefs, he argued, "should be providing the arguments that will salvage the judges' consciences or square with their prepossessions should they lean toward holding for us." With such powerful moral arguments to be made about the evils of covenants in American society, it seemed foolish to "desert all these rich and adventurous passages to jam the safe waters that should be reserved for the main advocates." The deepening of residential segregation in the postwar period had touched a nerve rubbed raw by the events of World War II and the anxieties over worsening conditions in America's cities. For NAACP consultants like Abrams and for the lawyers in the covenant cases, the amici needed to tap into these reserves of moral outrage and show the Supreme Court how profoundly the issue affected many corners of American society.[111]

The legacy of the Second World War weighed particularly heavily on the minds of the amici. In the consolidated brief of the AJC, ADL, Jewish War Veterans, and Jewish Labor Committee, the authors claimed a particular awareness of the "dangers to democracy arising from racial or religious res-

idential segregation." The experiences of Jews, they reminded the Court, "gave rise to the word 'ghetto,'" and it was the "threat of revival of that institution—implicit in the mushroom growth in almost every major American city of racial restrictive covenants" that sparked Jewish concern in the matter and demanded these groups' intervention in the cases at hand. Similar concerns drove the arguments of the Anti-Nazi League. For the AVC, their participation in the cases represented a continuation of the "basic aims for which they had fought" and an attempt to protect black veterans who suffered from housing discrimination. In another brief, the AAUN emphasized the relevance of the newly written United Nations Charter in the issue before the Court. The authors claimed that the covenant cases directly spoke to "the good faith of this country in observing the intent of the Charter" and the spirit of cooperation and tolerance that the United Nations hoped to foster in the postwar world. For each of these organizations, the outcome of these cases would have a lasting impact on the real meaning of the victory in war that the nation had sacrificed so much to secure.[112]

Other members of the amicus coalition interceded largely out of a concern for the impact of restrictive agreements on the quality of life in American cities. The three Christian groups that filed briefs in the cases grounded their claims in the moral costs of housing discrimination—both from the conditions it produced and the inherent "sin of racial segregation" embodied in the agreements themselves. From another angle, the AFL and CIO intervened on behalf of their growing black constituencies and made particularly detailed presentations on the disparities in both the quality and quantity of African Americans' housing supply. The physical, social, and economic tolls exacted upon black communities, their briefs argued, made the injustice of covenants indisputably clear and rendered them untenable.

The legal advocacy groups—the ACLU, NBA, and NLG—all attempted to bolster the NAACP's arguments about state action, international treaties, and property rights under the Fifth and Fourteenth Amendments. In addition, the black fraternal order called the Grand Lodge of Elks filed at the behest of longtime member George Vaughn and reiterated some of Vaughn's arguments about the Civil Rights Act of 1866. The attorneys clearly felt that some added support for the purely statutory and constitutional claims would benefit their case.

Regardless of their motivations in filing or the types of arguments they made, the amici organizations played an important role in highlighting the broad impact of the covenant issue across American society. The unprecedented cavalcade of interest groups that rallied behind the NAACP's cause

made it clear to the Supreme Court that the cases at hand spoke to one of the central postwar concerns for advocates of many races, religions, and backgrounds. The Association had mobilized a remarkably diverse coalition of activists in support of their calls for equality in housing access and had fashioned a powerful consensus among some of the leading liberal groups of the day. That so many organizations united behind the cause revealed the strength of the desire for reform in postwar America and the lasting influence that the events of World War II had in 1940s civil rights struggles.

Legacies of War: Remaking the Fight against Discrimination

As the oral arguments steadily approached, the Association's legal team crafted two powerful Brandeis briefs and assembled an impressive array of supporters. In the final days of October 1947, however, the NAACP and its coalition of allies anxiously awaited word from one last potential amicus curiae—the U.S. Department of Justice. For two months, the Association and all of its collaborators had engaged in a full-scale struggle to persuade the attorney general to support their case. The federal government had proved extraordinarily reluctant to intercede in a civil rights case between two private parties, so the effort seemed from its inception to be something of a long shot. Still, the NAACP brought the full extent of its institutional influence and momentum to bear on Attorney General Tom C. Clark. Through sustained lobbying, the Association hoped to convince the most reluctant and most powerful potential ally in the nation to take a dramatic step in a case that kept defying precedents.

The fate of the NAACP's campaign to entice the Justice Department into the covenant cases rested in large part upon the enduring impact of World War II on the nation's collective conscience regarding racial matters. The country had only recently emerged from a violent and costly battle in defense of the ideal of freedom and was now poised to plunge into another and much longer conflict with the Soviet Union. As the Truman administration attempted to marshal international support for American democratic principles in yet another global contest, the contradictory legacies of the United States as both the greatest enemy of totalitarianism and one of the most ardent oppressors of racial minorities seized the nation's attention in new ways. The federal government would increasingly face the need to reconcile the promises of American ideals with the practices of a nation built upon segregated institutions.

For black activists and organizations like the NAACP, the attorney general's decision would signal a great deal about the prospects for reform in the postwar period. An intercession on behalf of the Association's case could indicate meaningful new possibilities through the addition of tremendous power and resources to the struggle for civil rights. Silence would likely mean that progress would have to come in spite of government action. Surely the Truman administration, with all of its recent calls for egalitarianism and its budding relationship with the NAACP, could not continue to ignore the desperate plight of urban black homeseekers. Surely the sacrifices and lessons of the war would yield something more than a future of crowded slums and dismal homes. The Justice Department's response would be a telling one. The attorneys and their allies looked toward Washington once again with growing anticipation.

FIVE

Failures and Foundations

The Covenant Cases and Postwar Black Freedom Struggles

In October of 1949, just under eighteen months after the victory in *Shelley*, the eminent sociologist, activist, and anticovenant crusader Louis Wirth began drafting a painful note from his office at the University of Chicago. Wirth wrote to his colleagues at the ACRR and reflected on the results of the countless hours and considerable resources they had invested in restrictive covenant litigation over the previous years. Fund-raising had now slowed to dangerously low levels. "Indifference and apathy" appeared to displace the kind of public-spiritedness that had fueled a broader civil rights consciousness in the immediate wake of World War II. Perhaps most disconcerting of all, he lamented, "little remains of the initial wholesome impact of the President's Committee on Civil Rights or of the Supreme Court decision on restrictive covenants." So soon after the triumphal fanfare of victory, one of the important architects of the anticovenant campaign prepared to label the cases a failure.[1]

Public responses to the covenant cases that had unfolded over the previous year even led Wirth to question the soundness of litigation as a tactic to resolve the nation's racial inequities. "The fact that so many of the problems of racial and cultural relations have become defined in terms of . . . litigation," he wrote with disappointment, "has alienated a wide segment of public interest." Legal resolutions to community-level problems, he seemed to say, only served to exacerbate tensions over minority groups' civil rights claims. Among the disaffected were white Americans that previously "could be relied upon to support movements for improvement as long as they required only personal good will and called only for unofficial citizen organization and action." Progress and interracial harmony, Wirth implied, might only be possible if the solutions to racial injustice were voluntary and deferred to the comfort of white citizens. The tenacity of residential segregation that stood just outside his window in Chicago's neighborhoods provided

all the evidence he needed to consign the legacy of the covenant cases to the margins of history.[2]

Indeed, the resistance that *Shelley* encountered when it returned from the Supreme Court to America's cities in the summer of 1948 became the central factor shaping the historical memory of the anticovenant campaign. Even the most optimistic of the covenant cases' supporters had acknowledged that housing discrimination would not suddenly disappear as a result of the decision. Decades of protest had imparted the lesson that wholesale change would rarely—if ever—come swiftly or easily. Yet the ferocity and effectiveness of white Americans' efforts to keep neighborhood segregation in place proved staggering. Residential color lines became perhaps the most indelible of those that white citizens drew and defended in the twentieth century. In the process, the reaction to *Shelley* helped seal the fate of the racial ghetto as one of the most intractable institutions in modern American life.

The enduring specter of America's segregated ghettos has subsequently cast a long shadow over the anticovenant campaign's victorious climax. Wirth's abandonment of *Shelley* presaged a sense of futility that many commentators would ascribe to the cases in the decades to come. Against the backdrop of unabated residential discrimination, the covenant cases have often served as a quintessential example of a "hollow hope" where litigation seems impossibly and tragically outmatched against the popular will of those who disagree with a court's ruling.[3]

From the 1950s onward, legal scholars would cast U.S. Supreme Court chief justice Frederick Moore Vinson's expansion of the state action doctrine as so untenably broad in its potential applications that it appeared to "leave little room for any private legal rights at all," and thus could never truly serve as a lasting influence in the realm of civil rights law. Conversely, historians of the civil rights movement and of urban segregation have pointed to the cases as largely obsolete from their inception and too narrowly targeted to assail the imposing boundaries of the ghetto. These historians have lent an air of inevitability to the covenant cases' shortcomings, depicting them as little more than a Pyrrhic victory over an outdated tool of exclusion. In many respects, *Shelley* has yet to escape the shadow of present conditions that obscure a different—and truer—narrative.[4]

The anticovenant campaign's consequences in the years following the Court's decision ultimately reveal the more complex, substantial, and enduring legacy that the cases rightfully deserve. As much as the fight against racial restrictions may have faltered in its highest objectives of providing

black Americans with genuinely open access to housing, *Shelley* was able to accomplish a more limited set of aims in neighborhoods across the country that provided some immediate material benefits to black communities. Additionally and perhaps even more importantly, the successes of the campaign itself equipped legal activists with new experiences, tactics, and alliances to make even more substantive gains in other areas of advocacy. The covenant cases would soon play a critical role in fomenting civil rights litigators' intensive and far-reaching attacks on the legal foundations of Jim Crow. Assessing the consequences of both vehement white resistance to *Shelley* and black communities' efforts to seize whatever opportunities they could from the victory offers a compelling look at the role of law in social justice movements and the transformative influence of the anticovenant campaign on postwar American society.

"I Think We Can Keep It White": Defiance, Evasion, and the Ghetto's Stubborn Roots

Chief Justice Vinson's solemn and sonorous delivery of the Court's opinions in *Shelley* and *Hurd* had barely finished echoing before the cry of resistance arose in countless white communities. Residential segregation had sunk its roots deep into the soil of America's cities and clung tenaciously as the anticovenant campaign sought to tear loose its grip in the years following the decision. *Shelley* placed new pressures on the architects of housing's color lines and spurred a wave of defiance that simultaneously reified existing networks and strategies of resistance while stimulating creative energies that offered novel avenues of exclusion for white homeowners. Segregation's proponents not only voiced their displeasure at the decision, they quickly employed any means they could to prevent the fulfillment of its potential effects. From the moment that civil rights activists scored their victory, the movement for greater housing access confronted an invigorated backlash that helped ensure the persistence of the nation's ghettos.

Opposition to the Court's decision overflowed in neighborhoods and courtrooms across the country and resounded from the floor of Congress, exposing the fervor of many white Americans' commitment to the prerogative of residential exclusion. Though the responses of the mainstream press were generally favorable to the decision or at least tempered in their attitude, private letters and press reports of public meetings gave voice to a swelling outrage. The justices' offices fielded an assortment of vitriolic dispatches from America's anxious homeowners. One woman excoriated Vinson for his

perceived "betrayal of the 'White Race' in this country," and lamented the idea that the Court had unfairly chosen to favor the rights of minorities over those of the white majority. An angry Los Angeles resident confronted with the prospect of impending residential integration venomously offered, "I'm sorry your office isn't elective—how quickly the people would put you all back on your front porch. . . . I am heart-broken and will sell my beautiful home."[5]

Chicago-based poet Oliver Allstorm flayed the justices in verses specially composed for the occasion, bringing the themes of his earlier antimiscegenation screeds to the topic of housing:

> You say that White men in our State
> Must never try to segregate;
> That Negroes have the social right
> To "*force*" themselves upon the White
> And that henceforth each race reside
> Close to each other, side by side;
> And that the Blacks may dance and dine
> Within the White man's Color-line.

Allstorm promised that he and likeminded citizens, would resist the Court's efforts at every turn. A more ominous commentator insisted that "American homeowners never will even recognize any such ruling, and if such races persisted in trying to move in next door, we—the people—would have to make our own laws." Violence, the author implicitly reminded the justices, had always been a ready tool to achieve exclusion and the Court's weakening of more respectable means simply invited a greater reliance on force.[6]

While this sort of individual resistance arose from the same long-standing fears regarding property values and prejudicial assumptions about the character of African American homeowners, the correspondence and public statements surrounding the covenant cases offered insight into some more complicated notions of race and home at stake in the housing battle. White property owners expressed their dismay at the prospect of integration in part because many of them understood their property claims as reaching well past their picket fences or the legal boundaries of their lots. "I believe a man's home," wrote one California woman, "extends beyond his own property line and includes the surrounding neighborhood." Another man offered similar thoughts, invoking the "right" of white neighbors to "collectively develop and enjoy the benefits and privacy of a combined home, whether it be a single building or group of buildings." These attitudes cast neighborhoods as more

than a collection of properties linked by market value and instead reflected a more deep-seated vision of community and identity. Many individuals understood their home as a place of interaction and intimacy that encompassed both the physical space of their block and the relationships with their neighbors. Certainly not all homeowners felt such strong connections or shared equally broad definitions of home, but this sentiment helped fuel the bitterness and discomfort evident in the deluge of resistance.[7]

If a person's home included the neighborhood and one's neighbors, the logic seemed to hold, residential integration posed a fundamental challenge to the racial identity of homeowners. Perhaps the clearest evidence of this notion came from the Bryant Street block in Northwest Washington, D.C., where the Hurds, Stewarts, Savages, and Rowes had just won the right to keep their homes. The Purdue family at 146 Bryant, originally from Georgia, told reporters that the black families in the area were "fine neighbors . . . better than some white ones we had," but that their house would be on sale the next day. When the reporter asked Mrs. Purdue why she would abandon her home in spite of the congenial relationship she enjoyed with local black residents, the Georgia-born woman offered a curt, two-word response: "I'm white." Her choice was simple and deliberate. When popular conceptions of the home included one's neighbors, living with African Americans nearby could call into question her whiteness. Segregation and racial identities were defined and maintained by daily practices. Regardless of her experiences with these families, then, moving away and pursuing life in a segregated enclave elsewhere became the best way to preserve her claim to racial superiority.[8]

Elsewhere in Washington, local homeowners groups offered a communal space to air their members' grievances with the Court. The president of one association promised to organize his neighbors to combat the decision. "This area is strictly white," he told the gathered crowd, "and I think we can keep it white." For the leader of another association at the same meeting, even this declaration proved too "conciliatory." Calling white Americans the "victim[s] of partisan politics," he promised to take the issue back into the courts and left no doubt about his ultimate aims in the nation's capital. "There will once again be white supremacy," he thundered. Similar thoughts echoed from frantically assembled meetings in white neighborhoods around the nation.[9]

Rebukes of the Court came from more powerfully positioned Americans as well. Mississippi's congressional delegation was apoplectic after the decision's announcement. "There must have been a celebration in Moscow last night," bellowed Senator John Rankin, "for the Communists won their great-

est victory in the Supreme Court . . . when that once august body proceeded to destroy the value of property owned by tens of thousands of loyal Americans in every State in the Union." He castigated the justices for attempting "to reverse the laws of nature by their own edict" and concluded by intimating that Vinson's Court had revived and revised the infamous Dred Scott decision. "White Christian Americans," Rankin seethed without any apparent hint of irony, "seem to have no rights left which the present Supreme Court feels bound to respect." His colleague, Representative John Bell Williams, suggested that *Shelley* would do more to reinvigorate the Ku Klux Klan than any event of the previous four decades. An Arkansas congressman took to the floor arguing that the cases were "forcing by law fundamental principles on the American people" and proposed a constitutional amendment to protect the sanctity of race restrictions.[10]

Resistance came from the ranks of the nation's judiciary as well. A federal district court judge from Kansas City denounced *Shelley* at the city's annual Bar Association meeting, telling the audience that "the time should never come when private citizens should not enjoy the right reasonably to say who their neighbors shall be." He urged a similar understanding on his colleagues. Perhaps the most telling moment came five months after the decision in the same Detroit courtroom that the McGhee family had been forced to visit in early 1945. Judge Guy Miller rendered a decision in a local case, *Bishop v. Kanfer*, that sought to enforce a covenant restricting whether property owners could take on boarders. Miller, the original jurist for the *McGhee* litigation, dispensed with the issues of the case quickly and instead devoted most of his ruling to the Supreme Court's reasoning in the recent covenant cases. Miller could hardly veil his contempt for the Court. "I disagree wholly with the conclusion," he fumed. "It is, of course, binding upon this Court as to matters contained within the four corners of that opinion; but it is of such a nature that it ought not to be extended one-thirty-second of an inch beyond that." Miller's opinion articulated the frustrations that many in the legal profession felt regarding the *Shelley* decision and represented the uncertainty and resistance that defined much of the white response to the Supreme Court's action. His determination to ensure that the covenant cases had the narrowest possible impact reflected a growing sense among white litigators and jurists that Vinson's Court had grossly overstepped its authority.[11]

Shelley marked an especially inflammatory example of the changing currents at work in the highest echelons of the American judiciary. The Supreme Court had overturned more than thirty precedents in the past decade

and now offered a ruling that seemed to fly in the face of long-established contractual and property rights. Of equal concern was the sense that the Court had dramatically expanded the definition of state action and thereby poised itself to intervene in a wide assortment of other ostensibly private activities. Given the justices' correspondence with each other surrounding Vinson's opinion, the Court itself certainly believed for a time that it had broken new ground and sown the seeds of a judicial revolution. Vinson had, however, left considerable ambiguity as to how far-reaching this new understanding of state action would prove to be. Critics wondered aloud whether any private contracts or agreements could escape the Supreme Court's scrutiny under the principles that *Shelley* established. For Guy Miller, the *Bishop* case was a perfect example of the excesses the Court had invited. The Kanfer family used the *McGhee* case to argue that the restriction on their ability to rent rooms in their home violated the equal protection clause of the Fourteenth Amendment just as a restriction against race would. Miller found the idea patently ridiculous, but saw it as an inevitable product of the Supreme Court's misguided efforts in the covenant cases. Even for those individuals who were not primarily driven by the desire to ensure segregation's continued existence, the uncertainty surrounding the decision fostered an anxious defiance.[12]

Indeed, defiance remained the watchword for many white homeowners and real estate brokers as well. Though the inability to enforce covenants presented new difficulties, white neighborhoods continued to defend residential segregation vigorously and began closing off this avenue of progress as soon as it emerged. In response to the setback that *Shelley* created, real estate boards around the country dissuaded enterprising brokers from seizing the opportunity to ignore covenants. Within days of the Court's ruling, the Detroit Real Estate Board had gathered with local procovenant attorneys to discuss new strategies for "minimizing violations." From St. Louis, Gerald Seegers, the attorney for the Kraemer family and the MAIA, noted that within weeks the city's Real Estate Exchange had coordinated with white neighborhood associations to fix boundaries for racial "zones" in the city and threatened to revoke the membership of anyone who sold across the lines. While the threat of expulsion was nothing new for the exchange, *Shelley* spurred a feverish wave of organization and intimidation within the group's ranks. Other realty boards across the country followed suit.[13]

Homeowners and homebuilders also continued to establish covenants on new properties after 1948. The ACRR had noted that many white homeowners embarked on a concerted campaign to spread covenants in their commu-

nities after the cases had reached the Supreme Court. That momentum in cities like Detroit, Chicago, and Washington continued in spite of the Court's decision. A study of the Kansas City metropolitan area revealed that developers and property owners recorded hundreds of new restrictions in the years following *Shelley*. Between 1949 and 1951, an observer in the nation's capital noted that 10–15 percent of deeds in a random sample of new subdivisions contained covenants. Though this marked a substantial decrease in the rate of restrictions prior to 1948, white neighborhoods took advantage of the fact that covenants themselves were still legal and exerted considerable pressure to keep them intact.[14]

That coercion took a variety of forms, some new to the post-*Shelley* moment and some that were long-standing tools of intimidation and exclusion. When a Wayne County Court bailiff in Detroit sold his covenanted home to black purchasers late in 1948, his neighbors—now unable to sue for the enforcement of the covenant—turned to public protest tactics, establishing picket lines in front of the seller's new home and his workplace at the courthouse and "denouncing him for selling 'white' property to Negroes." The protests were disruptive and embarrassing enough for the bailiff to seek and successfully obtain an injunction against his former neighbors, who retreated when confronted with the court order. Extralegal pressures like these, however, witnessed a resurgence after *Shelley* and proved frighteningly effective in many cases.[15]

White homeowners in the weeks following the Court's decision also frantically devised new legal strategies to circumvent the loss of covenants' enforceability. Reports quickly percolated back to NAACP attorneys of various proposals formulating in communities across the country. Realtors in Los Angeles, confided a sympathetic financier, were creating "new neighborhood contracts wherein the parties agree not to sell to non-Caucasians on penalty of a large forfeiture." This tactic required homeowners to furnish a deposit that they would lose if they violated the covenant. Financial penalties, reasoned various subdividers and neighborhood associations, might keep existing restrictions from faltering. Some neighborhoods dabbled with the idea of insisting that all purchasers be members of a designated private social club since these groups were less readily subject to judicial scrutiny. Others arranged for each property sale to be subject to a vote of local residents or the developer's board of directors. New restrictions that avoided racialized language offered yet another potential option for those eager to hold the line. Though most of these methods proved too costly or unwieldy to take hold broadly, attorneys urged covenanted neighborhoods to keep testing tactics

until they found one that could pass muster in the courts. Innovation suddenly abounded in America's segregated neighborhoods.[16]

The most promising of white homeowners' new lines of defense quickly became suits for financial damages. Neighbors targeted those who sold covenanted properties to minority purchasers, suing them for compensation as a result of the alleged destruction of property values that integration would cause. By the end of 1948, anticovenant attorneys in nearly every major city had begun fending off suits that sought penalties from willing white sellers. The litigation proved so extensive that Charles Hamilton Houston wrote urgently to the NAACP national office that "the second stage of the restrictive covenant fight . . . is here." Seeking thousands of dollars on behalf of each household covered by a restriction, white homeowners left the issue of enforcement aside and instead sought to make the process impossibly expensive for potential white covenant-breakers. By directing the litigation at white targets and playing on the Vinson Court's affirmation that covenants themselves constituted valid contracts, damage suits offered a potentially dangerous and seemingly race-neutral way around *Shelley*.[17]

Within five years, the Supreme Court felt compelled to address the matter head on. In *Barrows v. Jackson* (1953), a test case from Los Angeles under the direction of Loren Miller, the Vinson Court weighed the validity of compensatory claims. More than sixty neighborhood associations stretching from San Francisco to the nation's capital joined and filed amicus briefs with the Court defending this practice. Their efforts demonstrated some of the urgency and breadth of support that covenants enjoyed, a sign of the faith that homeowners continued to place in racial restrictions. Ultimately, though, the endeavor proved futile. The justices struck down the possibility of obtaining damages and blocked this avenue of evasion.[18]

Notably, however, the Court's lone dissenting voice came from the architect of the *Shelley* ruling, Chief Justice Vinson himself. Vinson offered a bitter response to his colleagues, who he felt had now stretched his logic from the covenant cases past its limits. Claims for damages involved no direct harm or discrimination against a nonwhite party, he insisted. The courts that awarded the penalties thus could not be engaged in a discriminatory act. Vinson's willingness to break with his colleagues and to endorse such a deliberate circumvention of his efforts in *Shelley* revealed both the limits of his constitutional vision on the question of racial egalitarianism and, perhaps, some of the anxieties he felt over popular reactions to the covenant cases. According to one of his earliest biographers, Vinson was notably attuned to the public's reception of the Court's decisions and the political climate in

which he made his judicial interpretations. Part of his reluctance to bolster *Shelley* in *Barrows* may have stemmed from this sensitivity to popular opinion. Regardless of Vinson's motivations, the rest of the Court closed the damages loophole and further weakened the legal props supporting residential exclusion.[19]

Still, the desperate search for legal methods to prevent integration exposed the extent to which white homeowners viewed the law as a critical tool for the maintenance of housing discrimination. Exclusion could often be accomplished in fairly thoroughgoing fashion through less formal extralegal means. The return to legal devices again and again in the years after *Shelley* bespoke the significance and value that white communities had attached to covenants and to what they represented: a legal sanction to indulge their fears, prejudices, and desires. The comfort of legal approval, its attendant implication of moral rightness, and, just as importantly in many respects, the signal that racial restrictions conveyed about the collective commitment of white residents to the principles of exclusivity, were powerful enough that many neighborhoods sought to reinvent and re-create them as quickly as possible.[20]

Throughout the years following the decision in the covenant cases, white realtors and attorneys were abuzz with these efforts to engineer new loopholes. Maintaining racially homogenous neighborhoods had always required effort on the part of white communities, but had only rarely demanded much in the way of innovation in order to succeed. Now, however, creativity seemed the order of the day. Gerald Seegers and other procovenant lawyers began sharing suggestions and ideas across the country, establishing the kinds of networks that had proven so effective for civil rights litigators. Seegers promised one correspondent that "if anyone hits on a practicable plan I will hear of it. If and when I do I will disseminate it far and wide." Experimentation and cooperation of this sort stood as evidence of how jealously many white Americans guarded the prerogative of residential discrimination. The loss in *Shelley* had spurred local proponents of exclusion to link together what had typically been only loosely coordinated efforts up to that time.[21]

White homeowners unmistakably felt the anticovenant campaign's challenge to the sanctity of segregated communities. All those who denounced the Court's decision and all who drafted and deployed new tactics in its wake helped ensure the persistence of America's ghettos. They fed and nurtured the stubborn roots of residential segregation that held fast in the soil of urban neighborhoods from coast to coast. They did so with astounding effectiveness and disturbing consequence.

In subsequent decades, violence, intimidation, and institutional discrimination along with the flight of industry, white residents, and their capital to outlying areas would render integration exceedingly difficult. These processes simultaneously worsened the physical and economic conditions for many black communities. Housing segregation thus continued largely unabated after *Shelley* and even deepened in some respects. While the covenant cases were only a part of these larger transformations in America's cityscapes, they helped fuel white intransigence in the immediate postwar period. The enduring prominence of the nation's ghettos has made *Shelley* into the "noble failure" that many historians see it as today. Yet the obstinacy of segregationists' reactions cannot be the sum total of the covenant cases' legacy. Rendering the cases in this fashion denies the significance of the hopes and energies that civil rights advocates drew from the campaign. In the face of victory and a dramatic backlash, black communities understood that in more ways than one this was only the start of a much larger and longer fight toward justice.[22]

Making Movements: The Meanings of Victory

The fact of the matter was that most activists remained profoundly hopeful in the wake of *Shelley*. Indeed, black communities used the anticovenant campaign to seize new opportunities to expand their access to housing and to foment a broader and more successful assault on Jim Crow in the postwar era. The covenant cases opened a horizon of possibilities in the legal battle against segregation's legal foundations, convincing activists that if they could find the right combination of pressure and persuasion, the whole edifice of racialized inequality might come tumbling down. Even in the face of such intense white resistance, the real lesson that civil rights advocates took from *Shelley* was that resolve, cooperation, and creativity could break down even the most steadfast barriers to black progress. "The music is in the air," wrote the *Afro-American* in the weeks after the decision. "All that we need is a set to tune in the program."[23]

Reevaluating the covenant cases from the standpoint of what they made possible affords a unique perspective on the development of civil rights litigation in the years leading up to *Brown v. Board of Education* (1954). Black activists and communities found something more than symbolism or hollow triumph as they brought *Shelley* back from the Supreme Court to their neighborhoods and into their legal offices. While the extent of white opposition assured that the anticovenant campaign could never be an unqualified suc-

cess, black Americans crafted their own meanings and improvements out of the covenant cases, forming a narrative of empowerment and uplift that has remained largely hidden.[24]

One of the most immediate consequences of *Shelley* was a tangible measure of relief that some black homeseekers found in the aftermath of the cases. African Americans enjoyed significantly increased access to properties that had previously been restricted. Though in many instances whites withdrew from transitioning neighborhoods, sowing the seeds of the suburban exodus that would span the next half century and thus keeping the levels of segregation high, black homeseekers nonetheless obtained the right to use a larger share of their cities' housing supply. Just days after the Court's ruling in 1948, black residents in St. Louis reported that "formerly restricted property is now being advertised in the daily papers as available to Negroes." Later in the summer, ACRR officials noted the "freer movement and fairer distribution of available housing" that black homeowners enjoyed. Other observers pointed to the potential financial benefits that could accrue from alleviating the artificial shortages that covenants had helped to maintain. Realtors estimated that black communities would save millions as a result of improved access and decreased litigation. Commentators, however, acknowledged that these gains could not fully solve the crippling shortage still confronting black communities, that most progress was limited to older housing stock instead of new subdivisions, and that financial exploitation of black purchasers seemed unlikely to abate significantly. These were, in the end, simply the "bigger and better ghettos" that Robert Weaver had warned of at the 1945 Chicago conference. Yet to many of the homeowners who now found some relief in this fashion it was cause for celebration.[25]

Less than three years after *Shelley*, the number of families who gained access to once-prohibited areas reached into the tens of thousands. By 1952, Chicago alone had witnessed some 21,000 relocations into covenanted areas according to local estimates. Phineas Indritz explained from Washington that "significant shifts in racial residential patterns are beginning to develop," while housing official Frank Horne described "maps of planning commissions in cities across the nation reveal[ing] an increasingly freer mobility of nonwhite families through the housing supply." Loren Miller, even as he lamented the lack of progress in residential integration, declared in 1955 that *Shelley* had afforded Los Angeles' minority populations the ability "to secure much better housing than was open to them before." Many families thus found new access to homes and obtained properties that were of a better quality. For these individuals, the anticovenant campaign had offered a

chance for substantial improvements in their daily lives and they seized the opportunities whenever possible. Housing access gains proved so substantial that in a 1952 speech President Truman insisted that as a result of the covenant cases, "more Negroes are homeowners today than ever before in American history."[26]

Not all segments of America's black urban communities, however, enjoyed the advantages of this expansion. Middle-class African Americans benefited most directly from the changes underway while poorer black individuals remained largely trapped in identical—or worsening—circumstances. For the NAACP this was both an expected and acceptable outcome, at least for the short term. The attorneys had long understood that private housing, especially at shortage-induced prices, could only address part of the desperate need for adequate shelter in black neighborhoods. Because homeownership was intimately bound up with economic mobility and purchasing power, a significant portion of these communities would be consigned to stay in the slums. NAACP advocates hoped that the attack on covenants would have the ancillary benefits of opening previously restricted lands for public housing developments and that the potential outmigration of middle-class black Americans would alleviate overcrowding and price gouging, but few believed that the poorer segments of black society would derive the same advantages. This was in keeping with the overarching orientation of NAACP objectives that often privileged class-based advancement, viewing middle-class individuals as better ambassadors of respectability in the process of integration. While the immediate impact of *Shelley* would be fairly significant, then, the benefits of progress fell unequally along the lines of class and may well have exacerbated the concentration of poverty and flight of capital that deepened the disadvantages of those left behind. The vision of the anticovenant campaign was not without its costly limitations.

Still, the measures of improvement made as a result of *Shelley* went beyond the expansion of private housing opportunities. There was an incalculable benefit to the protection that nonwhite homeseekers now received from at least some of the vulnerabilities and harassments that covenants had made commonplace. As just one example, anticovenant activists celebrated a 1948 Texas court decision overturning a racial restriction that targeted people of Mexican descent. An unscrupulous individual had apparently sought to exploit a covenant provision that caused ownership of the home to revert to the original seller in the event of a violation. His scheme was to pocket the down payment of a Mexican American purchaser, reclaim title to the property, and then sell it again to a white buyer. Prior to *Shelley*, the local court would have

been obligated to enforce the covenant's terms and implicitly support the practice. With the decision in hand, however, the Latino purchaser was rightfully able to win his ownership claim. The loss of down payments as a result of covenant litigation had been just one of the many financial and emotional hardships minority purchasers endured prior to 1948. Though exploitative practices and schemes would never disappear from America's urban housing markets, *Shelley* now provided more tangible protections from some of the humiliations and mistreatments that covenants had permitted.[27]

The limitations that remained were considerable, yet there was a distinct period of progress in the immediate aftermath of the decision. The gains were substantial enough that five years later at least a handful of observers believed that the trend was unmistakably "toward a gradual breakdown of enforced racial segregation in housing." Loren Miller and Frank Horne each saw the development of state "fair housing" laws as a result of the anticovenant campaign's lingering significance. For most anticovenant activists, then, the period after *Shelley* was a moment rich with possibility and some measure of success.[28]

Indeed it was telling that various individuals and organizations argued that the victory may well have slowed the worsening of conditions for black urban populations and prevented potentially more dire outcomes. Shortly before the Court rendered its decision, the National Association of Intergroup Relations Officials analyzed the various paths the justices could take in *Shelley* and tackled what failure to win would mean for black homeseekers. "Approval of racial covenants," they warned, "will serve to strengthen the efficacy and toleration of other devices over the long-run by reinforcing their moral and pseudo-legal sanction." An adverse decision would probably "accelerate [covenants'] use at a rapid rate" and "give the appearance of legality and respectability to any and all actions taken by residents in the areas entered by Negroes to drive them out." Given the rapid growth of covenanting in the postwar years leading up to *Shelley*, the disastrous predictions seemed entirely plausible and offer some insight into what might have transpired without the benefit of the Court's decision. Black homeseekers would have almost certainly suffered even greater hardships had restrictive covenants retained their full legal authority into the 1950s. Circumscribed as the effect of *Shelley* was, the alternative result could have been more destructive.[29]

THE COVENANT CASES' impact ultimately extended well beyond the neighborhoods of America's cities, stretching back into the offices of top civil rights litigators and the courtrooms where a resurgent battle against Jim Crow

steadily blossomed. There, *Shelley*'s success helped to shift the tenor and tactics of black legal protest in substantial ways that soon brought the NAACP to the brink of an assault on the "separate but equal" doctrine. As black activists absorbed and applied the lessons of the anticovenant campaign, their efforts revealed how that litigation encouraged a broader and more successful assault on segregation's legal legitimacy.

Three critical outgrowths of the victory helped yield an invigorated and newly equipped team of legal activists prepared to take on the greater challenges ahead. First, the resounding and unexpected triumph served as a call to action, mobilizing and emboldening civil rights litigators. The Court's embrace of innovative arguments and the unanimity of its opinion imparted a degree of hope and urgency that propelled the next wave of challenges forward. Second, *Shelley* yielded a newly strengthened and increasingly fruitful partnership between civil rights activists and the Department of Justice. By enlisting the Truman administration's support, the NAACP obtained the mantle of federal approval and additional resources from their most powerful ally yet. Finally, the experiences of the covenant campaign encouraged the Association and its collaborators to adapt the tactics they had tested in *Shelley* and deploy them in the mounting fight over segregated education. In the end, the covenant cases played a key role in putting the NAACP on an inevitable collision course with the lingering shadow of *Plessy v. Ferguson*. African Americans' redoubled battle for justice in the nation's courtrooms would be forever changed as a result.

Victory had quickly energized legal activists across the country. *Shelley* signaled to many that the Supreme Court was willing to give new force and meaning to the antidiscrimination provisions of the Fourteenth Amendment and that unfavorable precedents might not pose the same difficulties they had in the past. Hope and determination pervaded attorneys' reactions in the wake of the decision. From Chicago, anticovenant campaign leader Loring Moore rattled off a congratulatory note to Loren Miller insisting that now "we can move on to other battle fields." Miller whole-heartedly agreed. In his typically eloquent fashion, the ardent activist vowed that the recent triumph would serve as an instrument with which to press ahead in other areas of advocacy. Cautioning against "retir[ing] it to the trophy room of legal victories," he counseled that attorneys should instead immediately put the lessons of the case to use as a "potent weapon in our long quest for first class citizenship." Miller reasoned that "these are times when we should press every advantage we have and confront the Supreme Court as often as

possible." The Court suddenly seemed a much more compelling ally in the march toward greater legal freedom.[30]

Anticovenant advocates also used the success of the covenant campaign to argue for more explicit connections between legal and social protest. Even as the NAACP used *Shelley* to justify consolidating power within the organization, individuals like Miller stressed the importance of mass activism and widespread education as critical partners in the courtroom fight against Jim Crow. Miller offered a blunt assessment of the role of litigation for black activists: "laws and court decisions do not solve social problems; they merely set limits within which those problems may be tackled and ultimately solved. It is up to us to give effect to the decision. . . . That job wouldn't be an easy one even if all Americans were inclined to accept the spirit of the Supreme Court's ruling. . . . The Supreme Court decision won't have the desired effect on residential segregation without sustained and vigorous effort." Here, Miller cut to the heart of a contentious debate over what purpose the law could serve in effecting social change. Legal activists faced a vocal contingent of their peers who maintained that looking for redress from an overwhelmingly white judiciary and a legal system steeped in white supremacy constrained the possibilities of protest and reform. Miller and many of his colleagues realized the strands of truth in these charges. He understood that court decisions could not singlehandedly undo long-standing traditions of racial subordination and urban discrimination, so he articulated a vision of how law and "social action" could intersect and how each expanded the capacities of the other. Litigation, he contended, represented a necessary tactic that could lay the groundwork for social change but required the use of extralegal activism to ensure the achievement of its objectives. Without protest, court decisions might amount to little more than symbolic "trophies." Yet the law provided a powerful tool for "organization and direction of the sentiment favoring change" when incorporated with other forms of pressure. Miller and like-minded anticovenant activists used the success of *Shelley* to call for more broad-based and far-reaching reform efforts.[31]

The hope and urgency that the covenant cases imparted to litigators manifested itself outside of the legal profession as well. Editorials in the black press exhorted readers to use the covenant cases to "inspire a greater fight against all forms of racial discrimination." "This is no time to rest upon our oars," insisted the *Afro-American*. "We must continue to press forward" on issues such as employment discrimination and Jim Crow in the military. NAACP executive secretary Walter White seemed particularly stirred by the

moment. Addressing an enthusiastic crowd in Detroit, White vowed that "gradualism is a thing of the past" and that those engaged in the struggle for black progress had to "redouble our efforts to wipe out discrimination wherever it appears." Though White's uncompromising tone stood in contradiction to the Association's continued reliance on cautious planning and negotiation in its campaigns, his remarks exemplified a broader theme among the NAACP's leaders. The organization had begun its turn toward a full-blown assault on "separate but equal."[32]

ONE OF THE CRITICAL factors behind this shift in tone was the success of the lobbying campaign for the Justice Department's intervention. Tom C. Clark and Philip Perlman's roles in the cases offered new hope in the larger fight against Jim Crow and served as an especially exciting development for black activists. "It was said," wrote one columnist, "that there was no way for us legally to destroy residential segregation . . . but President Truman, Attorney General Tom Clark, and Solicitor General Philip Perlman, working with the best legal minds that we have, produced a way to do it." The executive branch's willingness to use its influence in unprecedented ways against racial injustice had helped secure a victory that had seemed improbable only two years earlier. With the Supreme Court and the Truman administration each showing signs of a more receptive attitude toward civil rights advocates' claims, for the first time in a long time the battle for racial equality looked like it might become a fair fight.[33]

That hope proved to be well founded. Perlman apparently relished the attention and acclaim that he won as a result of his oral argument and felt genuinely moved by the experience of fighting on behalf of the black homeowners in *Shelley*. Philip Elman, who had worked closely with the solicitor general throughout the process, mused that the moment "changed Perlman entirely" and transformed his attitudes toward civil rights litigation. "From then on," Elman reflected, "there was no holding him back, and he put us into everything we could possibly go into." Perlman "couldn't wait to go back to the Supreme Court again and again, arguing for equality, for liberty, for decency. He loved it." The restrictive covenant cases had fomented an enduring and powerful partnership between the DOJ and civil rights legal activists.[34]

The solicitor general himself acknowledged the transformation. He declared that *Shelley* "set a precedent" for his office and marked a "rejection of the notion that government should pursue a laissez-faire policy in the field of civil rights." Describing his efforts in a 1949 interview, he impressed upon

the nation his sincerity. "We are waging no sham battle," Perlman insisted. "We are going to hit inequality wherever we can, at every opportunity." His success before the Court had also won the Justice Department a blanket approval from President Truman to intervene in any future civil rights cases they saw fit.[35]

The department's assistance came immediately and in various forms. Perlman's participation in civil rights litigation before the Supreme Court now became almost standard practice after *Shelley*. This marked a significant change from previous policies. Indeed, the DOJ had declined to join any of the Association's cases in the preceding decade—even when they directly involved discrimination by state actors. Now, however, the solicitor general brought his influence to bear through amicus filings in a number of subsequent suits. By 1950, he had joined the NAACP's attacks on segregation in professional education as part of *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents*. In these cases, Perlman began urging the Court to overrule *Plessy* and expunge "separate but equal" from the nation's legal lexicon as "an unwarranted deviation from the principle of equality under law."[36]

Perlman lent his energies and the voice of his office to legal activists outside of the NAACP as well. The experiences of *Shelley* spurred him into action on cases regarding segregation in railroad dining cars, the exclusion of African Americans from railroad firemen's unions, and the early stages of a suit dealing with public accommodations in the District of Columbia. He reveled in his newfound role as a champion of racial freedom and provided important symbolic and material assistance in an array of attacks on Jim Crow until he left the office in 1952.[37]

Perlman's precedent ultimately laid the groundwork for the DOJ's important contributions in the NAACP's *Brown* litigation. Though Perlman himself actually proved reluctant to attack segregation in primary school education and spent the early months of 1952 stymieing efforts to bring the department into *Brown*, the momentum established by his previous efforts helped to carry his successor inexorably into the landmark case. Even when Perlman had reached the limits of his commitment to racial equality, the partnership that black activists had forged with the Justice Department in *Shelley* continued to yield dividends.[38]

Nor did this relationship between activists and the Truman administration stop at the courtroom door. At the NAACP's urging, Perlman, Clark, and Truman adviser Philleo Nash inserted themselves into the process of once again amending the FHA's underwriting manual to prohibit it from insuring new residential developments that established restrictive covenants.

Throughout 1949, they worked closely on the issue with Raymond Foley, administrator of the HHFA, which oversaw the regulation and implementation of federal housing policy. Foley had remained unsure about how to incorporate the Supreme Court's ruling in *Shelley* into the HHFA's long-standing practices promoting and demanding covenants' usage. A week after the decision, Foley wrote privately that because it was still legal to establish restrictive agreements and "human reactions to mixed occupancy" were unlikely to change immediately, the FHA's responsibility was to continue using covenants as a key factor in their appraisal process.[39]

Over the course of the following year, however, Foley embraced a new policy that Perlman and Nash had constructed in direct consultation with Thurgood Marshall and Loren Miller. By December of 1949, Foley convinced the FHA and Veterans Affairs to amend their guidelines "so as to refuse to aid the financing of properties . . . restricted on the basis of race or creed or color." These changes, approved by the NAACP, brought federal home financing activities "into line with the policy underlying the recent decisions of the Supreme Court" and helped to further a somewhat more racially egalitarian tilt in the FHA's procedures. Though the implementation of federal housing policy would remain deeply discriminatory in the ensuing decades, anticovenant activists had at least secured the possibility of more equitable access to housing. These private negotiations, along with the public stances that the DOJ took in its amicus efforts, convinced civil rights advocates—and especially those in the NAACP—that *Shelley* had fostered a lasting and transformative change in federal attitudes toward racial discrimination.[40]

BUOYED WITH A MOUNTING enthusiasm and a blossoming partnership with the Justice Department, the NAACP's leading legal minds soon fixed their sights on a more thoroughgoing challenge to segregated education and Jim Crow's legal foundations. In his weekly column following the victory, Charles Hamilton Houston wrote matter-of-factly that "the next point of attack after restrictive covenants is the segregated school. In many ways the two discriminations are inseparably tied together." With African Americans gaining greater access to housing, neighborhood schools seemed more likely than ever to face pressure for desegregation and were thus ripe for new legal tests. Echoing these sentiments, Thurgood Marshall declared "this blow to racial segregation in the field of housing . . . opens up the pending fight against segregation in education which . . . must be carried on with renewed vigor." Jim Crow's schoolhouses stood as the Association's next targets. In-

deed, the intensified struggle over education seemed to flow inevitably from the success of the covenant campaign.[41]

Even more than its mobilizing effects, though, *Shelley* equipped the NAACP's attorneys with new tactics for this next round of litigation. Among the tools now at the Association's disposal was a robust interracial coalition of organizations willing to lend their support as amici. Though the DOJ was by far the most influential of these new allies, the Association could soon count on regular assistance from a variety of other groups. Prior to the covenant cases, only the NLG and the ACLU had filed briefs in the NAACP's major education suits and no recent case had more than two amici. *Shelley* established alliances and networks that in turn provided a veritable cornucopia of collaborators for future campaigns. Though none of the subsequent cases approached nearly the same volume of supporting briefs, the Association now enjoyed reliable backing from the CIO, AVC, and Jewish advocacy groups like the CLSA and ADL in *Sweatt*, *McLaurin*, and *Brown*. Regardless of what the Court made of these filings in its deliberations, these coalitions facilitated the sharing of intellectual and financial resources that helped ease the burdens of litigation. They became a valuable source of support for the NAACP.[42]

Shelley also furnished the Association's legal staff with a more powerful language to articulate the ongoing social consequences of segregation. While NAACP attorneys like Robert Carter had urged the more extensive use of Brandeis briefs in school desegregation cases since 1946, a transformation took hold after *Shelley*. Voices within the legal division urged the attorneys to adapt the scientific antiracist claims they had employed in the covenant cases as their educational litigation moved forward. The Association's briefs in the covenant cases had marked a dramatic increase in the use of nonlegal citations and this practice carried into subsequent efforts. Apart from the *McGhee* and *Hurd* cases, the 1948 *Sipuel v. Board of Regents* case—conducted almost simultaneously with the covenant suits—had been the Association's most substantial use of social scientific data yet with just under twenty different source materials. *McGhee* alone had used more than four times as many citations in its main brief while *Hurd* had marked a sevenfold increase in that number. When the next round of educational desegregation suits reached the Supreme Court in 1950, however, the shift became evident. In *McLaurin* and *Sweatt*, the legal team used fifty-two and sixty nonlegal citations respectively, three times the number they had deployed just two years earlier arguing relatively similar issues in *Sipuel*. As Marian Wynn Perry later put it, after the Brandeis briefs in *McGhee* and *Hurd*, "Thurgood Marshall saw

its worth at once [and] liked it a lot." Though constitutional claims would always remain the central feature of their litigation, the legal team's experiment in the covenant cases had quickly changed the way the attorneys argued against segregation.[43]

The covenant cases would also help shape how the NAACP used the social scientific data it now enthusiastically included in its briefs. Annette Peyser, the socioeconomic analyst the NAACP had hired to help prepare for the covenant cases, became an outspoken advocate for the further use of extralegal data in subsequent campaigns. In particular, she expressed her conviction that psychology held the key to building a successful case against Jim Crow. Peyser first articulated her thoughts about the potential importance of social psychology at a legal conference in 1948 following the victory in *Shelley*. Delivering a speech entitled "The Use of Sociological Data to Indicate the Unconstitutionality of Racial Segregation," the young activist urged the development of a "better and more productive relationship between the legal expert and the social scientist." She remarked on the NAACP's recent experience with the Brandeis brief as a valuable instrument of attack against discrimination before suggesting possible areas of improvement. Foremost among her recommendations was a call for "scientific research on the subject of the psychological effects of segregation." As the NAACP made sociological arguments a regular component of its presentations to the Supreme Court in the ensuing years, Peyser continued to press the issue of how best to mobilize these arguments.[44]

In the summer of 1950, just weeks after the NAACP had won the *McLaurin* and *Sweatt* cases in part on the strength of robust extralegal claims regarding the inherent inequalities that segregation imposed, Peyser returned to the lessons of *Shelley* in a memorandum that called for her colleagues to embrace an even more expansive attack. She argued that the groundwork laid in 1948 and extended in the most recent education cases offered an ideal foundation to tackle directly the legitimacy of "separate but equal" jurisprudence. The anticovenant campaign, Peyser noted, had gone to great lengths to highlight not only the physical inequalities that emerged as a result of discrimination, but also the fact that the disparities in physical conditions created profound psychological consequences. "There is no *real* distinction," she insisted, "between the 'inequality' of physical facilities, and the . . . psychologically harmful effects of being separated from the majority group." The power of these arguments, tested even more explicitly in *McLaurin* and *Sweatt* with continued success, afforded the Association a chance to build upon these recent triumphs. "We must for the first time hit

segregation . . . head on," Peyser urged. She believed whole-heartedly that the combination of legal and social scientific arguments against Jim Crow that the NAACP had mobilized in *Shelley* could now deliver a deathblow to persistent racial inequality. Peyser was certainly not alone in advocating this strategy, but her early and explicit formulation offers insight into this evolving approach.[45]

Though these arguments regarding the psychological consequences of segregation were not unproblematic, they did prove to be increasingly effective before the Supreme Court. The framework for the NAACP's sociological claims against the legal propriety of discrimination had grown dramatically in *Shelley*, continued in the graduate education cases, and ultimately formed a critical part of the pleadings in *Brown* with the inclusion of—among other sources—Kenneth Clark's now famous doll studies. The Brandeis brief tactic thus helped the NAACP to reach further in its attacks on Jim Crow, providing a valuable tool in the burgeoning assault on racial inequality.[46]

Beyond offering a set of tactics and alliances that became hallmarks of the Association's litigation, though, *Shelley* also presented some important encouragements to legal activists from the standpoint of its judicial reasoning. For William Coleman Jr., who in 1949 became the Supreme Court's first African American clerk, the covenant cases clearly portended the end of *Plessy*. In a memorandum for Justice Felix Frankfurter about the pending *McLaurin* and *Sweatt* litigation, Coleman addressed the significance of *Shelley* directly. Arguing that "faced with the question of whether segregation is constitutional, this Court will have to overrule *Plessy v. Ferguson*," Coleman reasoned that the covenant cases had laid the groundwork for this eventual conclusion. *Shelley*, he wrote, had offered the first instance in which the Court explicitly stated that "classifications based upon race are illegal when they result in equal facilities." The Court's opinion in the covenant cases, Coleman seemed to suggest, never argued that restrictive agreements prevented black homeseekers from obtaining property in a general sense or from obtaining property of an equal quality to that covered by a given restriction. The quality of African Americans' alternative options was in fact a moot point to the Court because it was the denial of access itself that was an affront to the principle of equal protection. Even if black purchasers could have easily found better homes than those denied to them by a covenant, the Court's logic would have been the same. The relative equality of available facilities did not matter because the act of exclusion—at least when given the sanction of state power—was inherently unconstitutional. To Coleman's mind, the Court had already declared that separate was fundamentally unequal.[47]

While it would take the Court another five years to make that pronouncement explicit, Coleman brought this sense of possibility to his later work with the NAACP. Shortly after he left his clerkship, he became one of Thurgood Marshall's closest advisers as Marshall steered the Association's preparations for *Brown*. Coleman's insights proved instrumental throughout that campaign. Though he advocated caution and restraint in the buildup to *Brown*, the Court had convinced him in *Shelley* that the justices would ultimately strip Jim Crow of its most valuable legal armor. Coleman played a critical role in bringing that process to fruition.[48]

WHATEVER THE POSTWAR anticovenant campaign failed to do with respect to its highest ideals and objectives, it seems apparent from closer examination that in fact it succeeded in accomplishing quite a bit. Confronted with largely intransigent and staggeringly effective white resistance to residential integration, black activists and the communities they represented made the most they could out of the victory in *Shelley*. The substance of what they made in the ensuing years transformed not only the lives of thousands of black families who obtained easier access to at least somewhat better housing, but also forever altered the trajectory of black Americans' fight for racial justice under the law.

Victorious in their campaign, legal activists moved on from the covenant cases invigorated and hopeful that their continued advocacy could further revitalize the Fourteenth Amendment's protections in other areas of their lives. An adviser to the NAACP's legal team and one of the architects of Chicago's anticovenant efforts remarked that "perhaps the whole range of issues arising in connection with racial segregation may be encompassed by logical application of the constitutional theory adopted" in *Shelley*. The cases, it appeared, could "open to federal judicial scrutiny much, if not all, of the area of racial discrimination" and offer new avenues of relief for black populations wrestling against the various constraints of Jim Crow. Although *Shelley*'s constitutional theory never quite gained the traction that activists hoped it would, the case nonetheless left its mark on black Americans' resurgent movement for civil rights.[49]

Taken together, the experiences of *Shelley* not only set legal activists on an inevitable collision course with "separate but equal" jurisprudence, but also equipped them with essential alliances and tactics to succeed in that fight. Attorneys across the country took the victory in the covenant cases as a signal to press on faster and further than they ever had before in their pursuit of equality. The cases also bolstered these activists' faith in tactical in-

novation as a solution to the problem of entrenched juridical support for segregation. Just two years after the Supreme Court had denied certiorari in *Mays v. Burgess*, legal activists had developed a strategy for their campaign that persuaded the Court to abandon more than two decades of almost unbroken indifference toward restrictive agreements. *Shelley* also spurred forward a strain of social science-based legal advocacy that helped to galvanize some quarters of popular opinion and that quickly became a valuable mainstay of NAACP desegregation suits. Litigators now fought for racial justice differently than they had before. Finally, the covenant campaign fomented unprecedented partnerships and coalitions in the struggle for legal freedoms, establishing a new era of federal receptiveness to African Americans' civil rights claims. Each of these developments simultaneously pointed black legal activists toward a confrontation with the long shadow of *Plessy* that had constrained the possibilities of progress for black Americans over more than half a century.

In many respects, the covenant cases were uniquely situated to bring about these transformations. Urban conditions and the contours of the ghetto were one of the central preoccupations of social scientific scholarship in the immediate postwar era, making the issue of housing access ideal for the NAACP's growing reliance upon Brandeis briefs. The covenant issue also proved an exemplary cause for the development of multiracial alliances and the enlistment of federal support on the side of civil rights litigators. Residential restrictions targeted a broader array of Americans than any other practice of discrimination in use at the time while the growth of the urban ghetto raised the specter of American race relations' parallels with Nazism in singularly disturbing ways. The fight for access to a decent home also presented an issue fundamental to the enjoyment of American citizenship, the priorities of New Deal liberalism, and emerging global conceptions of human rights. No other matter could have evoked quite the same constellation of pressures that inspired the DOJ's initial intervention.

Black activists took conscious advantage of each of these peculiarities throughout the campaign. The unique dimensions of the covenant cases were thus not simply the products of coincidental timing or luck, but instead the result of intentional and significant effort, careful planning, rigorous innovation, and a deep determination on the part of activists. These were men and women who rightfully saw that without an appreciable change in housing conditions, black communities were destined to suffer disproportionate hardships and to see the fruits of other costly battles for racial freedom wither away beyond the reach of those locked into segregated slums. In this, the first

national postwar battle over the future of the American ghetto, black activists understood the stakes to be impossibly high.

It was in part this realization that led civil rights litigators to seize whatever gains they could from the victory, to suck the marrow of the Court's decision and the energies of the campaign that had made it a reality. As their efforts foundered in the face of white Americans' intractable devotion to residential segregation, they channeled the lessons of *Shelley* into other arenas in search of new cracks in Jim Crow's bedrock. In the process, they remade the trajectory of the legal fight for civil rights and left a lasting legacy that has yet to receive the recognition it deserves. The story of the covenant cases in both their triumphs and their failures is in many ways a largely untold narrative about the making of a new civil rights movement in postwar America.