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# Viability of Multi-Party Litigation as a Tool for Social Engineering Six Decades after the Restrictive Covenant Cases, The

Jose Felipe Anderson  
*University of Baltimore School of Law*

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# The Viability of Multi-Party Litigation as a Tool for Social Engineering Six Decades After the Restrictive Covenant Cases

José Felipé Anderson\*

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\* Professor of Law, University of Baltimore School of Law, Founding Director, Stephen L. Snyder Center for Litigation Skills, 2000–2008. Adjunct Professor, Department of Legal Studies and Business Ethics, University of Pennsylvania, the Wharton School. The author would like to thank the University of Baltimore Educational Foundation for the grant that supported this research.

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## I. INTRODUCTION

Using the courtroom as a tool for social reform is not a concept new to American jurisprudence. In the early days of colonist rebellion against the tyranny of King George III's taxation without representation, great lawyers used trials to highlight the need for a change in political conditions. The legal and political arguments of lawyers like James Otis supported the cries for independence from the British Empire and laid the foundation for legal rights, such as the Fourth Amendment's inclusion in the United States Constitution.<sup>1</sup>

Abolitionists used the circumstances of oppressive legislation, like the fugitive slave laws of the late 1700s and 1800s, to test the scope of the Missouri Compromise of 1820 affecting the ability of a slave to gain his rights in the case of *Dred Scott v. Sanford*.<sup>2</sup> Through this well-planned, multi-jurisdictional litigation, lawyers for Scott attempted to use the courts to seek recognition of an important human right: freedom from bondage.<sup>3</sup> Later that century, in the famous

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1. Recalling watching James Otis argue at a trial involving British abuses of search and seizure law in 1761, famed lawyer and former United States President John Adams reportedly stated: "American Independence was then and there born." DAVID MCCULLOUGH, JOHN ADAMS 62 (2001). The Fourth Amendment of the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. For an extensive historical examination of the Fourth Amendment see NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937) (discussing the adoption of the Fourth Amendment and its early constitutional jurisprudence). The Fourth Amendment embodies what has popularly become known as the "right to be let alone," particularly by government officials. That right has been described as supporting the most "personal possession of man, his dignity." MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE I (1962). The focus on such a sophisticated right is consistent with United States constitutional history at the time of the American Revolution, at least for those participants who were not operating under the limitations of racial oppression or slavery. *Id.* "Americans knew they were probably freer and less burdened with cumbersome feudal and hierarchical restraints than any part of mankind in the eighteenth century." GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 3 (1969).

2. 60 U.S. (19 How.) 393 (1857). One commentator has written of the *Scott* case:

[R]epudiating the power of Congress or non-slave states to interfere with the property status of blacks, helped propel the United States into the Civil War and, ultimately, to the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments (the "Civil War Amendments"). By means of the Civil War Amendments, white Americans extended to black Americans formal citizenship and civil rights, including the legal right of equality with respect to the terms on which states provided the right to vote. But they did not extend the opportunity for black people to enter into the constitutional compact, that is, to negotiate the terms under which blacks, too, would become members of the American nation.

To understand what the Civil War Amendments did not change, it is important to distinguish the different meanings of "citizens[hip]" used by the Court in *Dred Scott*.

James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 643-44 (1996).

3. See Blacksher, *supra* note 2, at 646.

The most infamous passage from Chief Justice Taney's opinion in *Dred Scott* declared that blacks "had for more than a century before been regarded as beings of an inferior order, and altogether unfit

case of *Plessy v. Ferguson*, activist lawyers from Louisiana filed a lawsuit challenging the state's choice to segregate persons by race in public accommodations.<sup>4</sup> This suit resulted in a judicial ruling that would take years to overturn.<sup>5</sup>

These cases are examples of how people have utilized judicial review to secure rights that may not have been available under a hostile legislative or executive branch of government.<sup>6</sup> It was not until the 1940s that lawyers emerged

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to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect . . . and that the negro might justly and lawfully be reduced to slavery for his benefit." The Civil War Amendments responded to Taney by expressly providing black Americans equal rights of citizenship and by outlawing slavery, but they did not even purport to remove slavery's badge of social inferiority and the corresponding refusal of white Americans to negotiate with blacks about their place in the nation. Chief Justice Taney may have been wrong about the Founding Fathers' intending to keep blacks in legal bondage forever or intending to exclude them from American citizenship forever. "But he was not wrong in his claim that the Founders excluded Negroes from that 'We the People' for whom and whose posterity the Constitution was made."

*Id.* One commentator has suggested that the motives of the lawyers in the *Dred Scott* litigation were possibly not in the best interest of the plaintiffs:

The Scotts themselves, it appears would have been far better served if the money and energy expended in further litigation would have been directed instead toward purchasing their freedom . . . . *Dred Scott v. Sanford* was either a genuine suit, or a counterfeit designed for abolitionist purposes, or part of a proslavery plot that succeeded. The task confronting the historian, then, is one of trying to determine the motives of the persons involved in the suit and the extent to which any cooperation between the opposing parties was collusive.

DON E. FEHRENBACHER, SLAVERY, LAW, AND POLITICS: THE DRED SCOTT CASE IN HISTORICAL PERSPECTIVE 271-72 (1981).

4. 163 U.S. 537 (1896). In *Plessy*, the Supreme Court considered an 1890 Louisiana law that required rail passengers of different races to ride in separate rail cars. Plessy sat in a rail car reserved for whites. He was asked to leave and was arrested after he refused to do so. *Id.* at 538. Plessy argued that he was "seven-eighths Caucasian and one-eighth African blood . . . and that he was entitled to every recognition, right, privilege and immunity" of the white race. *Id.* Under *Plessy*, "Congress and the states could not prohibit racial segregation, but the states could compel it." LEONARD W. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT 35 (1967). Thus, *Plessy* and the statutes and cases it spawned "most certainly dammed up and discouraged the democratic values of American life, stunted the political and moral capacity of people, and released and energized the most unworthy, even bigoted forces." *Id.*

5. Over five decades after the Supreme Court decided the *Plessy* case, it had influenced the laws in all public settings. The opinion "'ha[d] pursued the negro even into prisons, wash houses in coal mines, telephone booths and the armed forces. The separation extended as well to inanimate objects . . .'" CHARLES A. LOFGREN, THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION 202 (1988).

6. It should be remembered that access to political power for African Americans in this country is a relatively recent event, only bearing fruit in the last few decades. For example:

[I]n the Mississippi general elections of 1971, a record number of 309 black candidates sought public office at all levels . . . . [And] the victories of 72 black candidates at the city and county levels represented a net increase of 34 new black officials. Elected to public office in 1971 were 7 members of county boards of education, 16 members of election commissions, 1 state representative, 5 county-wide officials (including a tax assessor and a circuit clerk), and 46 county city-level offices.

John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 115 (1972). One provocative account of the criminal justice system in the early twentieth century involved the community of Phillips County, Arkansas, in the "Black Belt" of the South around 1919. Although more than seventy-five percent of the county's population was black and 18,000 of its residents

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who attempted to secure legal rights through litigation that involved an entire class of plaintiffs, perhaps from even more than one jurisdiction, attempting to secure an important legal remedy.<sup>7</sup> These cases involved complicated civil litigation that tested the boundaries of judicial review.<sup>8</sup> Often the rules for such cases were not yet clearly defined. These circumstances provided opportunities for outstanding lawyers to engage in some of the most innovative and creative advocacy ever attempted in our nation's courts.<sup>9</sup>

Six decades ago, a group of lawyers sought ways to overturn the racially restrictive covenants that were common across the United States.<sup>10</sup> These

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were of voting age, “[n]o Negro had served on either a grand jury or a trial jury in 30 years.”

LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 232 (1966).

7. This Article focuses primarily on group litigation for civil rights and evolving novel areas of tort law. It is in these categories that the courts are most troubled by the tension created by the other branches of government. There are those who believe that courts should not be places of political activism. *See, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946) (“It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.”); *accord* *Shaw v. Hunt*, 517 U.S. 899, 922 (1996) (Stevens, J., dissenting) (“When a federal court is called upon, as it is here, to parse among varying legislative choices about the political structure of a State, and when the litigant’s claim ultimately rests on ‘a difference of opinion as to the function of representative government’ rather than a claim of discriminatory exclusion, there is reason for pause.”) (quoting *Baker v. Carr*, 369 U.S. 186, 333 (1962) (Harlan, J., dissenting)).

8. Courts are not always anxious to deal with complicated multi-party civil litigation. One opinion explained that reluctance as follows:

Courts have usually avoided class actions in the mass accident or tort setting. Because of differences between individual plaintiffs on issues of liability and defenses of liability, as well as damages, it has been feared that separate trials would overshadow the common disposition for the class. The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters. If Congress leaves us to our own devices, we may be forced to abandon repetitive hearings and arguments for each claimant’s attorney to the extent enjoyed by the profession in the past.

*Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (internal citations omitted).

9. The restrictive covenant cases were among the first discrimination cases the NAACP challenged in its early years. Risa Lauren Goluboff, “*Let Economic Equality Take Care of Itself*”: *The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 *UCLA L. REV.* 1393, 1477 n.379 (2005) (noting that “NAACP’s lawyers had been committed to the elimination of racially restrictive covenants since the Margold Report” of the 1920s).

10. *See* *Hansberry v. Lee*, 311 U.S. 32 (1940). *Hansberry* was the first class action restrictive covenant case in the nation. The Supreme Court concluded in that case that “it is evident that those signers or their successors who are interested in challenging the validity of the agreement and resisting its performance are not of the same class in the sense that their interests are identical so that any group who had elected to enforce rights conferred by the agreement could be said to be acting in the interest of any others who were free to deny its obligation.” *Id.* at 44. Plaintiff Lorraine Hansberry went on to write the critically acclaimed Broadway play *A Raisin in the Sun*, drawing from the experience of the discrimination suit. One commentator noted that the “phenomenal success of *A Raisin in the Sun* has to be seen against the background of the temper of the racial situation in America and its cultural implications for American art forms.” HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* 277 (1967).

*Hansberry* was a collateral attack of sorts, in the sense that the procedural dispute in the case centered on the preclusive effect, if any, of an earlier judgment in an Illinois equitable forerunner of the modern class action. But *Hansberry* actually has little bearing on the contemporary debates over collateral challenges. To begin with, *Hansberry* was a locally confined dispute, such that the search

restrictions on integrated neighborhoods were the first legal battleground of the civil rights movement using the courts of civil justice to remove what many thought were immoral restrictions on the rights of free people. The most famous of those cases was *Shelley v. Kraemer*,<sup>11</sup> but the doctrine that emerged from that particular case was actually a series of separate, multi-party lawsuits in various locations, using teams of lawyers acting in concert with each other to achieve justice. It was at Howard University that its former Dean, Charles Hamilton Houston, perfected the academic laboratory for litigating multi-party civil rights, which both developed and trained civil rights lawyers.<sup>12</sup> Those lawyers also acted in concert with many civil rights organizations to eliminate racial segregation in the nation's neighborhoods.<sup>13</sup> The ultimate goal was to ensure that the only

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for a welcoming second court was not present. Second, *Hansberry* did not occasion judicial examination of the relationship between what we now know as direct and collateral review. At the time, Illinois practices in equity provided for judicial oversight as to the class treatment of the underlying claims only after the entry of a judgment in the aggregate, not before.

Samuel Issacharoff & Richard A. Nagreda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1705 (2008). "In something of a shock to the modern eye, Illinois procedure at the time 'required no further action beyond pleading a claim as a class action in order for the case to be treated as a class action.'" *Id.*

11. 334 U.S. 11 (1948) (voiding private agreements that prevented the sale of real property to Afro-Americans, explaining that the enforcement of such a racially restrictive covenant by state courts constitutes state action violating the Equal Protection Clause of the Fourteenth Amendment). Justices Stanley Forman Reed, Robert Jackson, and Wiley Rutledge took no part in *Shelley v. Kraemer*. They offered no reason, although some have assumed that it was because they owned property touched by racially restrictive covenants. Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 761 (1989).

12. Evelyn L. Wilson, *Louis Berry—A Man Among Men*, 20 S.U. L. REV. 149, 156–57 (1993).

The law professors at Howard training social engineers had created a laboratory for Civil Rights cases. James Nabrit, Jr. and Charlie Houston taught a Civil Rights course that was a favorite with the law students. They would address recent trends and cases, and would teach his students how to get into federal court, how to stay there, and how to win cases there. His techniques were developed in the early to mid-forties. The law school would provide a dry run for Supreme Court arguments, asking questions and challenging the arguments of the Civil Rights attorneys. The entire student body would then attend the Supreme Court arguments.

Berry remembers the dry run of *Shelley v. Kraemer*, restrictive covenants were private contracts between private individuals. Where was the Constitutional basis for the Supreme Court prohibiting them? During the rehearsal, Spottswood Robinson, who had thoroughly researched this issue, provided the constitutional argument. Although the covenants were private acts, they were enforced by state courts. A state's enforcement of discrimination based on race was contrary to the Fourteenth Amendment. The litigants were ready when Justice Frankfurter asked that very question.

*Id.*

13. One of the remarkable features of the *Shelley* litigation was the broad use and impact of the amicus briefs filed in the case. Some of them even argued the relevance of international human rights law to invalidate racially restrictive covenants. One particularly diligent scholar has chronicled the *Shelley* strategy:

Among the sixteen briefs debating the relevance of the U.N. Charter are the Brief of Amicus Curiae American Indian Citizens League of California at 6–7 (arguing that the Charter was binding); Brief of Amicus Curiae Civil Liberties Department of the Grand Lodge of Elks, I.B.P.O.E.W. at 7, (arguing that the Charter prohibited such discrimination on the basis of race); Brief of Amicus Curiae St. Louis Civil Liberties Committee at 1, 16 (relying on the Charter as evidence of United States' public policy); Brief of the American Civil Liberties Union at 27, reprinted in 46 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 393, 425

restriction on the ability of a person to live in a given neighborhood was his or her ability to afford a home there.<sup>14</sup>

The efforts of the legendary Charles Hamilton Houston,<sup>15</sup> who is best known as the architect of *Brown v. Board of Education*,<sup>16</sup> deserve a special note of

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(Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter *Landmark Briefs*] (relying on the Charter as a statement of the “overriding public policy” of the United States); Brief of the Congress of Industrial Organizations at 2, 4, reprinted in *Landmark Briefs*, supra, at 505, 508, 510 (invoking both the Charter and the need to fight fascism); and the Brief of the Non-Sectarian Anti-Nazi League to Champion Human Rights Inc. at 5 (arguing that covenants violate the treaty obligations of the Charter). Another amicus brief, filed by lawyers including Alger Hiss, Asher Bob Lans, Philip Jessup, Joseph Proskauer, Myres McDougal, and Victor Elting for the “American Association for the United Nations,” detailed the “obligations of the United States” under the U.N. Charter and argued that the “domestic jurisdiction” clause served to limit what the United Nations could do to enforce the provisions of the Charter but did not reduce the obligations of the member States under the Charter. See Brief for the American Ass’n for the United Nations as Amicus Curiae at 13–14, reprinted in *Landmark Briefs*, supra, at 357, 374–75. The American Veterans Committee, filing in support of the invalidation of the covenants, mentioned that its purpose included supporting the United Nations but did not argue about the Charter implications. See Brief of Amicus Curiae American Veterans Committee at 2 n.1.

A few amicus briefs supported invalidation of the racial covenants but did not rely on the Charter; included were the Brief of Amicus Curiae American Jewish Congress, and the Brief of California Amicus Curiae. An amicus supporting the constitutionality of the covenants—the Arlington Heights Property Owners Association—argued that the Charter either had no effect or, if it did, it violated states’ rights. Brief of Amicus Curiae Arlington Heights Property Owners Ass’n at 26–31.

Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *YALE L. J.* 1564, 1601–02 n.168 (2006).

14. See SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 3 (2004) (“Housing was the last plank in the civil rights revolution, and it is the realm in which we have experienced the fewest integration gains.”).

15. For the most comprehensive discussion of Charles Houston’s legal career to date, see generally GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983) (highlighting the efforts of Houston as a civil rights lawyer).

16. 347 U.S. 483 (1954). Houston also developed legal strategies that reformed important areas of the civil rights law.

There is little doubt that the most important civil rights lawyer during the first half of the twentieth century was Charles Hamilton Houston. His historical and professional accomplishments have long been recognized in academic circles. He is known as the person who developed the litigation strategy in *Brown v. Board of Education*. He also mentored Supreme Court Justice Thurgood Marshall and other lawyers who implemented Houston’s civil rights strategies. Houston achieved important legal victories in voting rights, jury selection, labor law, and criminal justice.

José Felipé Anderson, *Freedom of Association, the Communist Party, and the Hollywood Ten: The Forgotten First Amendment Legacy of Charles Hamilton Houston*, 40 *MCGEORGE L. REV.* 25, 25–26 (2009). Some scholars have placed him in the category of legal realist. One scholar explains that Houston:

[P]rovided a model for how to employ social science to effectuate change in laws bearing on racial equality. He also articulated a model for how to change racial policy and how both an academic and a practitioner could employ those means. As such, Houston embodied both Realist philosophy and practice.

While attending Harvard Law School, Houston was a student of Realists such as Roscoe Pound and Felix Frankfurter. In fact, Frankfurter was Houston’s J.S.D. advisor. Not surprisingly, Houston was well aware of Sociological Jurisprudence and Legal Realism. Houston’s jurisprudence made

attention. *Brown* is considered by many to be the most important case of the twentieth century.<sup>17</sup> *Brown* may well deserve that important recognition, but without the work of Charles Houston, as well as various civil justice organizations and the cadre of lawyers that worked on complex civil rights litigation involving housing discrimination, the *Brown* decision would not have been possible.<sup>18</sup>

This Article attempts to explain some of the housing discrimination litigation and place it in its proper historical context. It will discuss the important role of a few lesser-known cases leading up to the more famous Supreme Court litigation in *Shelley v. Kraemer*. Among the goals of this Article is to encourage the courts to become active participants in resolving major social issues that affect large groups of similarly situated litigants. This Article will offer perspective on how the lessons taught by those cases will serve us today, even as access to courts of civil justice has been under attack in the Legislature and by government executives who might like to limit access to the courts for groups seeking to collectively obtain relief through the use of a variety of lawsuits in the nation's courts.<sup>19</sup>

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Howard University, like Columbia and Yale, a center of Realist thought and action. Houston believed that a lawyer was "either a social engineer or . . . a parasite on society." He defined a social engineer as a "highly skilled, perceptive, sensitive lawyer" who understands the United States Constitution and knows how to employ it to solve local problems and to better underprivileged citizens' conditions."

Gregory Scott Parks, *Toward a Critical Race Realism*, 17 CORNELL J.L. & PUB. POL'Y 683, 694–95 (2008).

17. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). *But cf.* Roy L. Brooks, *Analyzing Black Self-Esteem in the Post-Brown Era*, 4 TEMP. POL. & CIV. RTS. L. REV. 215, 220 (1995) ("[T]he removal of racial segregation does little to improve an already healthy black self-esteem and, in fact, runs the risk of weakening systems within the black community—such as black schools—that have historically supported black self-esteem.").

18. It is clear that Charles Houston was the key driving force among the lawyers arguing the restrictive covenant cases. He organized meetings of a group of "Lawyers and Consultants on Methods of Attacking Restrictive Covenants." MCNEIL, *supra* note 15 at 178–79. Houston had expressed his view on the effect of racial covenants in an editorial during the 1940s, writing:

[T]he device of racial covenants not only constricts colored people within urban ghettos, but is used to segregate and exclude other elements from decent housing.

All minority groups such as Indians, Japanese-Americans, Orientals, Jews, Assyrians, etc., etc., are hit from time to time.

The traditional policy of America, as the melting pot of nations, has been replaced by a racially restrictive policy of segregation, restriction and ghettoization.

These covenants are not confined to city property. Practically every bit of desirable beach or vacation property is plastered with restrictive covenants against one group or another.

Charles H. Houston, Editorial, *The Highway*, BALTIMORE AFRO-AMERICAN, Oct. 11, 1947, at 4.

19. See Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1476 (2005) ("The admitted goal of congressional class action 'reform' is to save class actions by destroying them as viable state court proceedings and transferring them (at the whim of any single class member or defendant) to the federal system, where, the lobbyists in favor of 'reform,' at least, have promised the suits will languish and die.").

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Further, using perspectives from controversial obesity tort litigation in *Pelman v. McDonald's Corp.* and comparing the advantages gained from the racial covenant class action cases, this Article will identify sound policies for courts that usually avoid getting involved in some of these controversies.

Finally, this Article will introduce a concept known as "Activism Standing,"<sup>20</sup> which will encourage courts to resolve civil rights cases more quickly, so courts can more efficiently decide the issues presented.<sup>21</sup> Groups seeking rights in the courts may get unfavorable decisions, allowing losing parties to pursue their objective before another branch of government.<sup>22</sup> In a

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20. I have chosen a phrase which is unmistakably advocate-friendly. In doing so, I know I may well encounter the wrath of the litigation reform community. However, in this politically charged area, the season for standing on middle ground is over. In my view, courts have the responsibility to decide cases that are likely to recur more quickly than others. Multi-party cases certainly fall into this category. Civil rights cases involving multiple plaintiffs have been an example of the trend of increased class action activity for several decades. See Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 670-76 (1979) (noting the dramatic increase in class actions filed after 1966 and arguing that it was attributable to civil rights legislation and broad social trends).

21. The theory of "Activism Standing" may not be well received by the current Supreme Court. In recent years, the Court has appeared to be particularly willing to allow procedural rules to short-circuit review of important constitutional rights. See Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 525 (2004) ("[F]ederal courts, particularly the Supreme Court, have tended to be reluctant not just to accord broad structural remedies, but to accord any remedies at all in many instances, even when federal constitutional and statutory rights have been violated."). The Supreme Court recently addressed class action reform in *Wal-Mart v. Betty Dukes*, determining that a group of women could not sue as a class on certain gender discrimination claims. 564 U.S. \_\_\_, No. 10-277, (2011). One newspaper article made the following observation about the March 2011 oral argument in the case:

The justices strongly questioned whether more than a million female employees can join together against Wal-Mart . . . .

. . . .

. . . Another justice, Antonin Scalia, said he felt "whipsawed" by the plaintiffs' argument and said they had not made clear whether it was Wal-Mart's corporate culture or local store managers who were allegedly at fault. "Which is it?" he asked. Scalia questioned if it would be fair to the company, the world's biggest retailer, for the case to proceed. "Is this really due process?" he asked.

James Vicini, *Wal-Mart Gets Sympathetic US Court Bias Case Hearing*, REUTERS, Mar. 29, 2011, available at [www.reuters.com/article/2011/03/29/walmart-lawsuit-idUSN2927534120110329](http://www.reuters.com/article/2011/03/29/walmart-lawsuit-idUSN2927534120110329) (on file with the *McGeorge Law Review*).

22. The Supreme Court has most recently demonstrated its reluctance to expand the use of class action as a tool for seeking rights in *AT&T Mobility v. Concepcion*, where it held that the telecommunications giant could enforce provisions of its contract preventing individuals from pooling their claims into a class action lawsuit. 131 S.Ct. 1740 (2011). The class action plaintiffs alleged they had been improperly charged about 30 million dollars in sales tax on phones that were advertised as free. *Id.*

Deepak Gupta, an attorney at the consumer advocacy group Public Citizen who represented the couple, denounced the decision and said class actions had been an essential tool to achieve justice in U.S. society. 'The U.S. Supreme Court dealt a crushing blow to American consumers and employees, ruling that companies can ban class actions in the fine print of contracts,' he said.

James Vicini, *Supreme Court Rules for AT&T in Arbitration Case*, REUTERS, Apr. 27, 2011, available at [www.reuters.com/article/2011/04/27/us-att-arbitration-idUSTRE73Q4N520110427](http://www.reuters.com/article/2011/04/27/us-att-arbitration-idUSTRE73Q4N520110427) (on file with the *McGeorge Law Review*).

Ultimately, the Supreme Court would reject the plaintiff's discrimination claim in the Wal-Mart case. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. \_\_\_, No. 10-277, (2011). Referring to the 1.5 million women who

society that cherishes rights, it is important that claims for rights should be resolved quickly whenever possible.<sup>23</sup>

Multi-party litigation should still be an important tool for social reform to encourage, rather than discourage, rights litigation<sup>24</sup> and novel tort claims.<sup>25</sup>

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now work or previously worked in some 3400 stores, the Court stated that those women:

wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question 'why was I disfavored.'

No. 10-277, slip op. at 12. Justice Antonin Scalia went on to say in the 5 to 4 opinion that, "[b]ecause respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question" necessary for a class-action suit. *Id.* at 19. Justice Ruth Bader Ginsburg, writing for the dissent, including the Court's two other female justices, felt that the women should have been given the chance to prove their case, arguing that there was ample evidence of problems at Wal-Mart. *Wal-Mart*, No. 10-277, (Ginsburg, J., dissenting). According to her, "women fill 70 percent of the hourly jobs . . . but made up only 33 percent of management employees." *Id.* at 4. "The Court, however, disqualifies the class at the starting gate." *Id.* at 1.

Joseph Sellers, a disappointed lawyer for the women who sued the retailer, commented after the decision that "it is a big win for very large companies because I think part of the message from the majority's decision is . . . there are companies that are too big to be held accountable in a single forum for these kinds of practices," James Vicini, *Wal-Mart Wins in Sex-Bias Case at Top U.S. Court*, REUTERS (June 20, 2011), <http://www.reuters.com/article/2011/06/21/us-walmart-lawsuit-idUSTRE75J3P120110621> (on file with the *McGeorge Law Review*). Other scholars agree with the assessment that the Supreme Court has tilted toward protecting big business:

The effect of the Supreme Court's decision is to make it far less likely that corporations engaged in even massive fraud will be held accountable in situations where many people lose a little. The notion that an injured person has a right to his or her day in court is deeply ingrained in American culture. But in decisions like *Cullen v. Pinholster* and *AT&T Mobility LLC v. Concepcion*, the Court is slamming the courthouse doors closed. It is particularly troubling that the conservative majority is doing so by a strained and implausible reading of statutes to favor prosecutors over criminal defendants and businesses over consumers.

Erwin Chemerisky, *Closing the Courthouse Doors*, NAT'L L. J., (June 21, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202498020895> (on file with the *McGeorge Law Review*).

23. One commentator has insightfully noted that one of the great casualties for procedural default in rights litigation are cases involving prisoners who are, generally speaking, politically unpopular. *See, e.g.*, JOANNE MARINER, HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 352 n.9 (2001) ("[N]umerous prison suits are dismissed as frivolous because prisoners lack legal skill and, in some cases, because judges simply lack interest in their claims, not because prisoners' claims actually lack merit.").

24. The Supreme Court certainly has the power to recognize rights in the interest of justice if they choose. *See Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.").

25. Recent legislation has affected the use of the courts in resolving Multi-State and Multi-Party Cases Controversies. One commentator has summarized the Multi-party, Multi-forum Trial Jurisdiction Act of 2002 (28 USC § 1369) as follows:

This act further expands the jurisdiction of the federal courts through the use of statutorily authorized minimal diversity and has ramifications in areas ranging from removal to service of process. The act applies to accidents occurring after January 30, 2003 and authorizes original jurisdiction of "any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died at a discrete location." In addition, the suit must satisfy at least one of three other conditions: either (1) a defendant "resides" in a different state from the place where "a substantial part of the accident took place" (even if the defendant also

Allowing more class action claims to be resolved in courts can actually have a more dynamic effect on the legal system, making it more responsive to new claims. Such a process can also encourage the rapid movement of issues to the appropriate place in our government structure for decision.<sup>26</sup>

Restrictive covenant litigation, which led to overturning discrimination in purchasing homes, began with a set of lawsuits designed to test the constitutional principle of equal protection. The best way to understand the complex and intricate approach used to obtain victory in the Supreme Court requires a careful analysis of the actual briefs filed in the cases. These briefs reveal how the litigation was structured in the trial court to posit the greatest chance of success. By examining the arguments in detail, the advantage of allowing the courts to resolve issues quicker becomes apparent.

## II. THE *MCGHEE V. SIPES* BRIEF

The McGhees owned a plot of property at 4626 Seebaldt Avenue, located in Seebaldt's Subdivision, Detroit, which they occupied as their home.<sup>27</sup> The Sipes also owned property in the subdivision, as well as in an adjoining subdivision.<sup>28</sup> In 1934, the prior title holders agreed that the properties were only to be occupied by Caucasians.<sup>29</sup> The restriction was specifically stated to run with the land and to bind future grantees, but would not go into effect until at least eighty percent

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resides where the accident took place); (2) any two defendants reside in different states; or (3) substantial parts of the accident took place in different states. 1369(a)). Even if jurisdiction is proper, the federal court "shall abstain from hearing any civil action" in which "(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State." (1369(b)(1) and (b)(2)). The act defines "accident" as "a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons." If the act's jurisdictional requirements are satisfied anyone "with a claim arising from the accident . . . shall be permitted to intervene as a party plaintiff," even if she or he could not brought an action in the district court as an original matter. 1369(d). The act provides for nationwide service of process (1697) and, for good cause shown, permits the issuance of subpoenas nationwide (1785). It further amends the general venue statute to allow venue "in any district in which any defendant resides or in which a substantial part of the accident giving rise to the accident took place." 1391(g). The act also amends the removal statute to override both the in-state defendant limitation on removal in diversity in 1441(b) and the one year limitation on removal for diversity of citizenship cases for defendants who are added to a case in state court more than a year after it was commenced. 1441(e)(1)(A) and (B).

Marc Arkin, *Current Developments In Federal Civil Practice: 2004 Federal Jurisdiction and Pleading Requirements* 706 PLI/Lit 7 (2004).

26. This Article does not suggest that the court is the proper place for all disputes to be resolved. If a party should lose in court or have no proper basis to obtain judicial relief, he or she would always have an opportunity to pursue a legislative remedy for his or her issue. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 309 (1997) ("Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match . . .").

27. Brief for Petitioners at 2-3, *McGhee v. Sipes*, 334 U.S. 1 (1948) (No. 87).

28. *Id.* at 3.

29. *Id.*

of the property owners in the area were subject to the restriction.<sup>30</sup> The parties to the agreement intended to bind a total of fifty-three lots in the two subdivisions.<sup>31</sup> The prior owners who sold the McGhees their property did not sign the exclusion agreement.<sup>32</sup>

At the trial court, Sipes et al. (Sipes), Caucasians, were granted a decree requiring the McGhees, African Americans, to vacate the home they owned, but which was subject to a racially restrictive covenant that prohibited their use or occupancy of the property.<sup>33</sup> In response, the McGhees raised the defense that judicial enforcement of the covenant would violate the Fourteenth Amendment and that the restrictive covenant was void for public policy reasons.<sup>34</sup> When the court disagreed and ruled in favor of Sipes, the McGhees appealed to the Supreme Court of Michigan, assigning as error the lower court's holding that enforcement by the court did not violate the Fourteenth Amendment and that the covenant was not void for being against public policy.<sup>35</sup> Nevertheless, the Supreme Court of Michigan affirmed the decree.<sup>36</sup>

The question presented to the United States Supreme Court by the McGhees was whether judicial enforcement "of an agreement restricting the disposition of land by prohibiting its use and occupancy by members of unpopular minority groups, where neither the willing seller nor the willing purchaser was a party to the agreement imposing the restriction, violates the Fourteenth Amendment" and certain United Nations treaty obligations.<sup>37</sup> The McGhees pointed to three errors in the petition.<sup>38</sup> The first error was in the Supreme Court of Michigan's holding that the judicial enforcement of the racially restrictive covenant agreement did not violate the Fourteenth Amendment because the Due Process Clause guarantees only "notice, a day in court and reasonable opportunity to appear and defend."<sup>39</sup> The second error was in the court's holding that judicial enforcement of the racially restrictive agreement did not violate the Equal Protection Clause of the Fourteenth Amendment, because the agreement was a private action, and that refusal to enforce the agreement would actually deny the Sipes their right to equal protection.<sup>40</sup> The third and final error was in the court's holding that the "human rights provisions of the United Nations Charter are 'merely indicative of a desirable social trend and an objective devoutly to be desired by all well-

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 2.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 4.

38. *Id.*

39. *Id.*

40. *Id.*

thinking peoples[,] . . . [and not] ‘a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States . . . .’”<sup>41</sup>

A. *McGhee Argument Against Judicial Enforcement of Restrictive Covenants*

The McGhees began with a status check on restrictive covenants, specifically racially restrictive covenants, stating that such covenants “have developed through the uncritical distortion of doctrines concerning restrictions on the use of property.”<sup>42</sup> Originally, under English law, enforcement of restrictive covenants was generally intended to “accomplish socially desirable” ends by limiting the uses to which property in specific areas could be put.<sup>43</sup> All persons were equally subject to the restrictions. More recently, in the United States, restrictive covenants have been employed to prevent certain “unpopular minority groups” from owning or occupying certain properties.<sup>44</sup> The McGhees contended that the “discriminatory effect . . . and the absence of any resulting advantage to society” of the more recent, racially restrictive, covenants should defeat any analogy that would justify enforcement of the covenants.<sup>45</sup>

Citing the *Civil Rights Cases*<sup>46</sup> and *Buchanan v. Warley*,<sup>47</sup> The McGhees reminded the Court that the right to acquire, own, and freely use property “without state imposed impediment based upon race . . . [is] a fundamental civil right protected by the Fourteenth Amendment.”<sup>48</sup> That right was confirmed by the Constitution and laws of the United States, including the Civil Rights Act, which specifically protected the right to own and occupy property against race based restrictions.<sup>49</sup> *Buchanan* protected such rights against infringement by statute or by way of “private action.”<sup>50</sup> The McGhees contended that the reasoning in both of those cases left no doubt that a judicial action that infringes on the right to freely own and occupy property is no different than statutory action, and thus it cannot stand.<sup>51</sup> Moreover, the McGhees pointed out that the Supreme Court has, “[i]n a growing body of analogous situations . . . protected fundamental civil rights against judicial infringement.”<sup>52</sup>

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41. *Id.*

42. *Id.* at 7.

43. *Id.*

44. *Id.*

45. *Id.*

46. 109 U.S. 3 (1883).

47. 245 U.S. 60 (1917).

48. Brief for Petitioners, *supra* note 27, at 8.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

As the McGhees so masterfully pointed out, that “agreement is not self executing.”<sup>53</sup> The McGhees contended that state enforcement of the covenant required sacrificing a fundamental civil right in favor of the “public interest promoted by giving covenantors the benefit of their bargain.”<sup>54</sup> McGhee insisted—while noting the Court has consistently agreed in other cases involving fundamental civil rights—that “[t]he obligations of the Fourteenth Amendment may not thus be diminished or evaded.”<sup>55</sup> Moreover, since neither the McGhees nor their predecessors in title were signers to the agreement, “extraordinary” state action was actually *required* to affect the racial discrimination complained of herein.<sup>56</sup>

The McGhees also argued that the discrimination resulting from racial residential segregation, which diminished the property values and impaired the “health, morals, and safety” of both segregated communities and society as a whole, was “peculiarly repugnant,” because of its resultant “destruction of human and economic values.”<sup>57</sup>

### B. *History of Restrictive Covenants*

The McGhees then proceeded to expand the argument in more depth, beginning with a historical perspective.<sup>58</sup> They contended that “the zoning of human beings” has “disfigured” the country by “bring[ing] the ghetto to America,” and that the courts have enabled it.<sup>59</sup> Restrictive covenants have been used against a great diversity of peoples, including not only African Americans, but also “persons of Arabian, Armenian, Chinese, Ethiopian, Greek, Hindu, Korean, Persian, Spanish and Syrian ancestry as well as American Indians, Hawaiians, Jews, Latin Americans and Puerto Ricans, irrespective of citizenship.”<sup>60</sup> Restrictive covenants have been used to exclude people from “areas as large as one thousand lots and twenty-six city blocks.”<sup>61</sup> In one case, a clergyman was actually “excluded from occupancy of the parsonage of his church.”<sup>62</sup> Such consequences, contended McGhee, required that the restrictive

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53. *Id.*

54. *Id.*

55. *Id.* at 8–9.

56. *Id.* at 9.

57. *Id.* Next, McGhee argued that the restrictive agreement that the Sipes sought to enforce was proscribed by the human rights provisions of the UN Charter, which was controlling. *Id.* Making reference to the recently established United Nations Human Rights provisions was a novel approach to arguing a social issue. Though controversial, the argument was consistent with other broad themes articulated by the NAACP lawyers throughout the litigation.

58. *Id.* at 10.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

covenant, “a device of unreason and bigotry . . . [set] to destroy the essential character and oneness of America as a community,” must be recognized as a matter of [the] gravest national concern.”<sup>63</sup>

Restrictive covenants had evolved from restricting the uses of property to restricting what kind of people, according to race, could use property.<sup>64</sup> The basic policy considerations behind the law respecting restrictions on the use of property and the law respecting illegal restraints on alienation of property “are essentially the same.”<sup>65</sup> There is a strong preference for free alienability and unrestricted use of property in order to maximize the productive and beneficial use of the country’s land resources.<sup>66</sup> Accordingly, argued the McGhees, the law had gone no further to restrict free use and enjoyment than it had to restrict free alienation.<sup>67</sup> Nonetheless, enforcement of limited use restrictions tended to promote “healthier, safer and morally superior residential areas” without encroaching on “individual freedom of use and enjoyment of property.”<sup>68</sup>

The restrictive covenant enforceable in equity was employed solely to limit the uses of property.<sup>69</sup> “Neither the history of its development nor the economic or social justifications for its judicial enforcement disclose a basis for its employment as a racially discriminatory preventive of occupancy.”<sup>70</sup> The McGhees argued that such use developed from “historical accident,” and survived “only because of judicial indifference toward . . . fundamental concepts and principles . . . .”<sup>71</sup>

The Court engaged in a detailed analysis of the validity of the restrictions. First, the lower courts had ignored the fundamental “distinction between restrictions on use and [restrictions] on occupancy”—the difference between *what can be done* with the land and *who may do it*.<sup>72</sup> Second, nonracial covenants were equally applicable to all persons, regardless of race, restricting only what may be done with the land; whereas racially restrictive covenants “ignore[d] all reasonable considerations and ground[ed] their discriminations pointedly on race alone.”<sup>73</sup> Third, nonracial covenants involved restrictions that were in the public interest, usually proscribing “illegal, immoral, or unsafe” uses; whereas use and occupancy by an unpopular minority group did not fall into any of those

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63. *Id.*

64. *Id.* at 11.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 15.

69. *Id.*

70. *Id.*

71. *Id.* at 15–16.

72. *Id.* at 16.

73. *Id.* at 16–17.

categories, and thus, could not be statutorily prohibited.<sup>74</sup> Fourth, nonracial covenants did not destroy individual property rights, but merely curtailed freedom of use as a compromise between “conflicting freedoms of use possessed by others”; whereas racially restrictive covenants “represent[ed] obliteration, not a compromise.”<sup>75</sup> Fifth, nonracial covenants were designed as “engineers of superior residential areas . . . improving the health, morals, safety or general welfare” of residents; whereas racially restrictive covenants had the cumulative effect of actually impairing the “health, morals, safety and general welfare of all.”<sup>76</sup> The sorts of uses generally proscribed by nonracial covenants would most likely cause injury to a neighbor and be of concern to the state; whereas “the skin color, national origin or religion of the occupant of property” cannot cause legal injury to his neighbor and cannot be of concern to a democratic state.<sup>77</sup> Accordingly, the McGhees noted that since the Supreme Court’s decision in *Buchanan*, it has “uncompromisingly struck down every effort of the states to impose racial residential restrictions by legislation.”<sup>78</sup>

Next, the McGhees argued that the right to use and occupy property as a home is a civil right guaranteed protection by the Constitution and laws of the United States.<sup>79</sup> “Congress intended to protect the fundamental civil rights” of African Americans, including the right to own and occupy property, and expressly stated such in the reenacted Civil Rights Act, wherein Congress stated that all citizens “shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property.”<sup>80</sup> In the *Civil Rights Cases*, the Supreme Court clearly established that the Fourteenth Amendment applies to all state actions, including judicial action.<sup>81</sup> Thus, while the Fourteenth Amendment does not normally apply to private action, it does apply to private action when it is supported by judicial action and when it impairs a protected fundamental right, including the right to own and occupy property.<sup>82</sup> This was just such a case, and the denial of the McGhees’ right to occupy their property was a denial of their civil rights guaranteed by the Fourteenth Amendment.<sup>83</sup>

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74. *Id.* at 17.

75. *Id.* at 17–18.

76. *Id.* at 18.

77. *Id.*

78. *Id.*

79. *Id.* at 19 (noting that the right to freely use, enjoy, and dispose of property without “invasion by the states on racial grounds” is “expressly protected by the Fourteenth Amendment and the Civil Rights Acts”).

80. *Id.* at 19–20.

81. *Id.* at 20–21.

82. *Id.* at 21.

83. *Id.* at 21–22.

Moreover, the Supreme Court had thrice held that the states may not inhibit the purchase, occupancy, or sale of property based solely on race.<sup>84</sup> The McGhees noted that in *Buchanan*, the Court shot down a Louisville city ordinance prohibiting occupancy of properties by African Americans in neighborhoods mainly inhabited by Caucasians, and vice versa.<sup>85</sup> The Court observed that: (1) “Use and occupancy is an integral element of ownership of property”; (2) “Racial residential legislation [cannot] be justified as a proper exercise of police power”; and (3) “Race is not a measure of depreciation of property.”<sup>86</sup> Thus, “residential segregation on the basis of race” is in conflict with the Constitution, and is therefore invalid.<sup>87</sup>

The McGhees proceeded to argue that “[j]udicial enforcement of the racial restrictive covenant here involved is a denial by the State . . . of the Petitioners’ rights under the Fourteenth Amendment.”<sup>88</sup> By the terms of the covenant, the state court’s decision relied solely on the fact that the McGhees were not Caucasian, and could only be made after the court first made a determination about their race.<sup>89</sup> State action that discriminates on the basis of race clearly violates the Fourteenth Amendment.<sup>90</sup> The decision of the state court below had deprived the McGhees of their right to occupy their property, and, as such, that decision had to be tested against the requirements and limitations of the Fourteenth Amendment.<sup>91</sup>

Title to the property purchased by the McGhees, though intended to be covered by the racially restrictive covenant, was legally conveyed to them in fee.<sup>92</sup> Naturally, after purchase, the McGhees moved in.<sup>93</sup> Shortly thereafter, parties to the restrictive deed sought to evict the McGhees.<sup>94</sup> It was only through judicial enforcement of the otherwise impotent agreement that the McGhees were actually denied their right to occupancy.<sup>95</sup>

McGhee argued that there were four alternatives to the judicial system that the Sipes could have used to evict the McGhees.<sup>96</sup> First, the Sipes could have attempted to convince the McGhees to voluntarily move out on their own, which would have been a truly private interaction—and perfectly legal.<sup>97</sup> In fact, this

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84. *Id.* at 22.

85. *Id.* at 22–25.

86. *Id.* at 23–25.

87. *Id.* at 25.

88. *Id.* at 32.

89. *Id.* at 33.

90. *Id.*

91. *Id.* at 34.

92. *Id.*

93. *Id.*

94. *Id.* at 34–35.

95. *Id.* at 35.

96. *Id.* at 35–36.

97. *Id.* at 35.

was attempted, but the attempt failed.<sup>98</sup> Second, the Sipes could have tried to force or threaten the McGhees to leave, which would have been illegal and would have warranted police action to prevent injury or harm.<sup>99</sup> Third, the Sipes could have looked to Congress to enact statutes requiring that “all persons . . . respect ‘racial characteristics’ of established neighborhoods,” but the Supreme Court has long held that such statutes violate the Fourteenth Amendment.<sup>100</sup> Fourth, Sipes could have gone to the police to have them evict the McGhees, but the police, as the executive branch of the state, would still be required to “conform to the limitations of the Fourteenth Amendment.”<sup>101</sup> The Sipes were unable to enforce their private agreement by any of these other means, indicating that the agreement itself was powerless.<sup>102</sup> It was the judiciary that compelled the McGhees to vacate their home and forbade them from using or occupying it further, lest they be held in contempt.<sup>103</sup>

The Sipes’ contention that the judiciary was merely enforcing a private agreement, regardless of its content, did not mitigate or eliminate the state’s responsibility for denying the McGhees their civil rights.<sup>104</sup> Counsel had already established that the right to acquire, own, and occupy property is a civil right, “recognized by the Constitution and laws of the United States and the decisions of this Court,” and “protected by the Fourteenth Amendment against any racial impediment imposed by any form of state action.”<sup>105</sup>

A judicial decision to sanction any agreement necessarily “cannot be divorced from the subject matter of the agreement,” but rather “can only be the result of the judge’s conclusion that he is vindicating some interest . . . of public concern and worthy of the state’s protection.”<sup>106</sup> In *McGhee*, the court below must have concluded that ensuring the Sipes received “the benefit of their bargain” was “a matter of serious public concern,” warranting state action.<sup>107</sup> However, the court failed to balance that concern against the interests of parties opposing enforcement, and against its duty to protect the civil rights of the McGhees.<sup>108</sup> The McGhees vigorously argued that the lower court’s decision, protecting the Sipes’ right to the benefit of their bargain, could not be squared with the court’s

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 36.

102. *See id.*

103. *Id.*

104. *Id.*

105. *Id.* at 36–37.

106. *Id.* at 37.

107. *Id.*

108. *Id.*

obligation to protect the McGhees' constitutionally guaranteed fundamental right to own and occupy property "free from all impediment based on race."<sup>109</sup>

The fact that neither the McGhees nor their immediate predecessors in title were parties to the covenant further demonstrated the significance and indispensability of the state's role in effecting the denial of the McGhees' civil rights with respect to their property.<sup>110</sup> Covenants running with the land, i.e., those that purport to bind successors in interest who are not parties to the agreement, "are wholly the creature of equity" with respect to their force against persons not parties to the agreement.<sup>111</sup> Accordingly, when applying such agreements to third parties outside the agreement, the courts are limited in their discretion—such contracts that burden property are often strictly interpreted by the courts.<sup>112</sup> The right to enforce such contracts, which would normally be non-transferrable, has been made transferrable by the equity courts by their holding that the benefit of these contracts transfers with the land of the dominant tenement.<sup>113</sup> Whereas here, because the enforcement was sought against a third person not party to the agreement, it was even more imperative that the courts not violate their obligation to act within the confines of the Fourteenth Amendment, and not assist in denying the McGhees the power of acquisition.<sup>114</sup>

### C. *Policy Arguments*

The McGhees next addressed the issue of racially restrictive covenants from a societal-effects perspective, both locally and nationally, asserting that these effects make "[t]his form of discrimination peculiarly repugnant."<sup>115</sup> These covenants were primarily used to restrict the occupancy of African Americans and other minorities in residential areas, which consequently "limits the space and housing facilities in which these Americans may live."<sup>116</sup> This in turn led to a rapid migration of African Americans into urban areas, and as the populations in those areas grew, the housing supply shrank, and minorities began received a smaller proportion of the available housing units.<sup>117</sup>

Growth of the city's African American population created overcrowding in the ghettos, resulting in "an alarming decline in the living standards of a large segment of our population."<sup>118</sup> Overcrowding is generally measured by the

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109. *Id.* at 39.

110. *Id.* at 40.

111. *Id.*

112. *Id.* at 41.

113. *Id.*

114. *Id.* at 42.

115. *Id.* at 47; *see also id.* at 47–83.

116. *Id.* at 47.

117. *Id.* at 47–49.

118. *Id.* at 50.

relationship between number of persons and number of rooms.<sup>119</sup> This is the situation in most “Northern urban centers,” with overcrowding in African American housing units far exceeding overcrowding in Caucasian housing units, even on a percentage basis.<sup>120</sup> Along with overcrowding comes a marked decline in the health and safety conditions in which such overcrowded residents live.<sup>121</sup> At the same time, the restrictive covenants of the surrounding residential areas prevented the overcrowded residents from migrating to those residential areas in an effort to improve their living conditions, irrespective of their ability or desire to do so.<sup>122</sup>

The greater the overcrowding, the poorer the living conditions, and this was even more so for African Americans than for Caucasians.<sup>123</sup> For example, according to the Bureau of the Census in 1947, in Detroit, while non-whites occupied only eleven percent of total occupied housing, non-whites occupied thirty-three percent of the total substandard housing.<sup>124</sup> In Detroit’s slums, for example, at least ninety percent of the housing units were substandard.<sup>125</sup> Worse still is the fact that often the African American residents living in substandard housing were paying the same rental fees as their Caucasian counterparts were paying for suitable housing, thus further maximizing the gap between the status of the two groups, and further minimizing the African Americans’ chances of improving their situation.<sup>126</sup>

The increase in overcrowding and the resultant deterioration of living conditions due to the then-prevalent use and enforcement of racially restrictive covenants, led to increased “incidence of disease, crime, vice, and violence in unhealthy and deplorable living areas.”<sup>127</sup> These, the McGhees insisted, “are the products of enforced residential segregation.”<sup>128</sup> The blight that resulted from overcrowding and poor living conditions lead to increased transmission of communicable diseases and higher mortality rates.<sup>129</sup> It also resulted in the highest infant mortality rates for African American babies born in urban areas, and the lowest for Caucasian babies born in urban areas.<sup>130</sup> The McGhees argued

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119. *Id.* at 50–51.

120. *See id.* at 51–52 (graphing overcrowding among Caucasians and minorities).

121. *Id.* at 53.

122. *Id.*

123. *See id.* at 54 (graphing living conditions among Caucasians and minorities).

124. *Id.* at 55.

125. *Id.*

126. *See id.* at 56 (graphing sample blocks in Detroit).

127. *Id.* at 58.

128. *Id.*

129. *See id.* at 58–62 (examining the effects that residential segregation has on public health).

130. *Id.* at 60.

that the psychological impact of segregation was no less important than the physical health impacts, and no less severe.<sup>131</sup>

African Americans have suffered a disproportionately high incidence of certain mental illnesses, often thought to have been caused by “the intensity and severity of stress to which many [African Americans] are subjected.”<sup>132</sup> There is also a mental, emotional, and spiritual toll that living in substandard conditions takes on a person.<sup>133</sup> The Committee on the Hygiene of Housing was cited for pointing out “that more damage is done to the health of the children of the United States by a sense of chronic inferiority due to the consciousness of living in substandard dwellings than by all the defective plumbing which those dwellings may contain.”<sup>134</sup>

The effects of residential segregation were not only felt by African Americans and other minorities living in substandard conditions—they were also felt by society as a whole.<sup>135</sup> Municipal services are disproportionately consumed in high quantities by slum areas, while those areas contribute, by way of tax dollars, a disproportionately small measure of the means to pay for such service because those areas are so drastically overpopulated.<sup>136</sup> If African Americans were not restricted in their housing choices, they would undoubtedly have chosen property with greater value, which would generate greater tax revenues.<sup>137</sup> Preventing such freedom of choice only acted to “increase the tax burden of the rest of the community,” and resulted in a “loss in city revenue at the same time that the total population in the subsidized areas of the city is increased.”<sup>138</sup>

The inability of African Americans and other minorities to escape the overcrowded urban areas to which they had been relegated also prevented municipalities from improving the lands upon which those minorities lived—improvements that may have been desperately needed by the greater community, and, moreover, by the minorities themselves—such as building new hospitals or parks.<sup>139</sup> City planning and urban development were thus stifled by the segregation.<sup>140</sup>

Drastic increases in crime, racial tension, and mob violence were other substantial effects of racial segregation.<sup>141</sup> Slum areas experienced dramatically

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131. *Id.* at 61.

132. *Id.* at 61–62.

133. *Id.* at 62–63.

134. *Id.* at 63.

135. *See id.* at 63–71 (examining the costs of segregation to the community as a whole).

136. *Id.* at 63–64.

137. *Id.* at 64.

138. *Id.*

139. *Id.* at 65.

140. *Id.*

141. *See id.* at 66–71 (discussing those factors).

higher crime rates and housed comparably higher numbers of criminals.<sup>142</sup> Naturally, residents of the slums often wished to escape in order to improve their situation, but in trying, they were met by “organized and judicially sanctioned opposition,” in the form of restrictive covenants.<sup>143</sup> “Covenants are promoted by skillful propagandists of race hatred,” and their “consequences are the most lasting and harmful.”<sup>144</sup> This was particularly poignant because the courts enforced the covenants. Such enforcement legitimized the racism, opening the door to racism and segregation in other areas—for example, schools, health, and welfare services—and resulted in “definable” African American neighborhoods.<sup>145</sup> Similarly, these “definable” neighborhoods encouraged the formation of African American political districts, wherein “the political exploitation of racist issues comes easily” and “divisive racial ‘blocs’ were fostered.”<sup>146</sup> This in turn led to increased prejudice and “heightened group tension,” potentially increasing instances of violence.<sup>147</sup>

The McGhees next addressed the problem from an economic perspective, noting that there was no economic justification for enforcing racially restrictive covenants.<sup>148</sup> The contention that “the invasion of the [African American] destroys . . . property” values in a neighborhood was simply not supported by the “evidence compiled by housing and real estate experts.”<sup>149</sup> That evidence tended to support the conclusion that African Americans who were afforded “the opportunity to live in new and decent homes” tended to (1) “react[] better towards these new environments than any other groups of similar income,” and (2) “display[] desirable rent-paying habits when housed in structures designed to meet their rent-paying ability.”<sup>150</sup> Model communities could be found in Washington, D.C., New York, Philadelphia, and other cities, where African Americans moved into a community, resulting in increased property values, rather than decreased.<sup>151</sup> There is a mistaken belief that the introduction of African American residents in a neighborhood decreases property values. At the time African Americans spread into a community, that community is already old and in decay, having usually been deserted by its previous, Caucasian, residents.<sup>152</sup> “Available and valid data are cumulative confirmation of the proposition that when economic factors are kept constant, there are no noticeable

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142. *Id.* at 66.

143. *Id.* at 66–67.

144. *Id.* at 67.

145. *Id.* at 67–68.

146. *Id.* at 69.

147. *Id.* at 70–71.

148. *Id.* at 71–83 (detailing this argument in-depth).

149. *Id.* at 72.

150. *Id.*

151. *Id.* at 74–75.

152. *Id.* at 76.

differences in the quality of property maintenance, conditions of occupancy, and neighborhood standards on property values which can be directly traced to race.”<sup>153</sup>

Some proponents of residential segregation contended that the majority of African Americans were unable to afford decent housing, but this too was a mistaken belief.<sup>154</sup> “In the first place, it should be noted that [African Americans] pay much higher rentals for the quarters which they currently occupy than do white persons in comparable units.”<sup>155</sup> In addition, the post-World War II industrial surge resulted in a greater number of well-paying jobs—a greater number of white collar and professional jobs for African Americans—meaning a greater number of African Americans could have afforded (but were denied) decent housing.<sup>156</sup>

The housing market and the government failed to meet the housing needs of this new segment of the population, not because the segment had insufficient means, but rather because the government lacked building sites on which to build new housing, and the private sector lacked the incentive to build new housing for African Americans with greater means.<sup>157</sup> Statistics showed that a great number of African Americans could afford, and would have in fact paid more, if they were given access to better housing.<sup>158</sup> Thus, it was clear that the introduction of African American residents into a community did not destroy property values. African Americans were ready, willing, and able to purchase or rent better housing, were they not prevented from doing so by racial restrictions applicable to the communities surrounding “their areas of concentration.”<sup>159</sup>

#### *D. Deference to the UN Charter*

Finally, the McGhees made the argument that “[j]udicial enforcement of this restrictive covenant violates the treaty entered into between the United States and members of the United Nations under which the agreement here sought to be enforced is void.”<sup>160</sup> Articles 55 and 56 of the UN Charter require that member nations observe and promote “universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”<sup>161</sup>

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153. *Id.* at 77.

154. *Id.*

155. *Id.* at 78.

156. *Id.* at 79.

157. *Id.* at 79–80.

158. *Id.* at 80–81.

159. *Id.* at 83.

160. *Id.* at 84.

161. *Id.*

The American Law Institute has interpreted that provision “to include the right of every person to adequate housing.”<sup>162</sup> Furthermore, because the UN Charter is a treaty, it is the “supreme Law of the Land.”<sup>163</sup> “[T]he decisions of the Supreme Court left no doubt that a contract, by its own terms violative of the treaty obligations of the United States is void,” and could not be enforced by the state courts, because “the states have divested themselves of all authority in connection with international relations,” agreeing to leave that authority “vested solely in the federal government.”<sup>164</sup>

The attempt by the courts of the various states to aid private individuals in the prosecution of a course of action utterly destructive of the solemn treaty obligations of the United States must be struck down by this Court or America will stand before the world repudiating the human rights provisions of the United Nations Charter and saying of them that they are meaningless platitudes for which we reject responsibility.<sup>165</sup>

In conclusion, McGhee stated that the decision in this case “is not a matter of enforcing an isolated private agreement. It is a test as to whether we will have a united nation or a country divided into areas and ghettos solely on racial or religious lines.”<sup>166</sup> It was the question of whether we will protect the “basic human freedom” of each person to “be able to live, work and raise his family as a free American,” which “makes possible the functioning of a democratic economic and political system based on private property.”<sup>167</sup>

### III. THE *SHELLEY V. KRAEMER* DECISION

On February 16, 1911, thirty St. Louis property owners signed an agreement restricting their property to ownership and use by Caucasians for a period of fifty years. Part of the agreement stated that the property should exclude from occupancy “people of the Negro or Mongolian Race.”<sup>168</sup> At the time of the signing of the contract, the thirty signing owners held title to forty-seven of the fifty-seven parcels of land contemplated to be covered by the agreement.<sup>169</sup> The parcel at issue was one of those forty-seven.<sup>170</sup> Of the remaining ten parcels, five were, at the time of signing, owned and occupied by African Americans; one

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162. *Id.* at 85.

163. *Id.*

164. *Id.* at 89.

165. *Id.* at 90.

166. *Id.* at 91.

167. *Id.*

168. *Shelley v. Kraemer*, 334 U.S. 1, 4–5 (1947).

169. *Id.* at 5.

170. *Id.*

having been owned and occupied since 1882.<sup>171</sup> Seven of the nine owners on the south side of Labadie, near the subject property, did not sign the agreement.<sup>172</sup> In 1945, when this action was initially brought, four of those properties were occupied by African Americans, and had been occupied for twenty-three years or more.<sup>173</sup>

On August 11, 1945, the Shelleys purchased the subject property by warranty deed from Josephine Fitzgerald, who was unaware of the restrictive covenant applicable to the property.<sup>174</sup> The Shelleys were African Americans. On October 9, 1945, the Kraemers, who also owned property subject to the covenant, filed suit against the Shelleys, seeking to prevent them from taking possession of the property and to have the court divest them of ownership, revesting title in the original grantor or another party.<sup>175</sup> The trial court denied the claim because the parties to the agreement intended that it would not take effect unless all property owners within the district signed on.<sup>176</sup> That had not been accomplished.<sup>177</sup> The Kraemers appealed and the Shelleys moved in.<sup>178</sup>

The Supreme Court of Missouri reversed the trial court's decision and ordered the court to grant the Kraemers' requested relief, holding that the agreement was effective and that its enforcement violated no constitutionally guaranteed rights.<sup>179</sup> The court's ruling served not only to enforce the restriction with respect to use and occupancy of the properties covered by the covenants, but actually required divestment of the title of any property owner who violated the restriction.<sup>180</sup>

This is similar to the 1934 covenant in the *McGhee* case, restricting the use and occupancy of the subject property in Detroit, Michigan, to "those of the Caucasian race."<sup>181</sup> The agreement specifically stated "that [the restrictive covenant] shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."<sup>182</sup> Subsequently, the owners of eighty percent of the lots on the block executed similar agreements.<sup>183</sup>

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171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 6.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 10.

181. *Id.* at 6.

182. *Id.* at 7.

183. *Id.*

## IV. ANALYSIS

The cases collectively known as *Shelley v. Kraemer* represent a revolution in American jurisprudence.<sup>184</sup> Through the identification of proper plaintiffs or seeking jurisdictions with the most favorable courts or the most favorable law, advocates were able to present narrow, meritorious issues to courts that may not have been sympathetic to the aggressive litigation strategy of the activist lawyers who pursued them.<sup>185</sup> By using amicus briefs solicited from friendly organizations,<sup>186</sup> using the press<sup>187</sup> to draw attention to the cases, and seeking public support for the efforts to reform discrimination laws in the country,

184. One scholar has described the impact of *Shelley* in this way:

Although the Court in *Shelley* was confronted with an issue of property rights, the Court noted more generally that “[s]tate action . . . refers to exertions of state power in all forms.” The *Shelley* Court also noted that action of state courts in enforcing substantive laws formulated by those courts may constitute state action if it results in a denial of rights guaranteed by the Fourteenth Amendment. *Shelley* ultimately created the test for judicial state action when it asked whether, but for court enforcement, the deprivation of constitutional rights would not have occurred. The principles of such a test could analogously be applied in the context of paternity proceedings. If a right to decide not to be a legal father were recognized, it naturally follows that a declaration of paternity would constitute a judicial action that causes a constitutional deprivation to occur, assuming that such a determination comported with the constitutional boundaries of the right.

Christopher Bruno, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141, 163 (2008).

185. There are critics of the use of the courts to expand civil justice. See, e.g., Theodore B. Olson, *The Parasitic Destruction of America’s Civil Justice System*, 47 SMU L. REV. 359, 360–62 (1994) (discussing several multi-million dollar verdicts and expressing other concerns about how civil litigation effects the nation’s economy).

186. Greg Robinson & Toni Robinson, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on Their Sixtieth Anniversary*, 68 L. & CONTEMP. PROBS. 29, 43 (2005).

During Fall of 1947, twenty-eight organizations filed amicus briefs supporting the NAACP’s position in *Shelley v. Kraemer* and *Hurd v. Hodge*. Many of these, such as the ACLU and the American Jewish Congress, were groups that had filed amicus briefs in *Oyama*. One crucial supporter, the United States Justice Department, had not. In November 1947, U.S. Attorney General Tom Clark agreed to have the federal government file an amicus brief against the enforcement of restrictive covenants. Clark’s decision was heavily publicized, since it marked the first time the Justice Department had ever intervened as amicus curiae in a civil rights case. The decision to file a brief was the product of a complex set of factors, including political calculation regarding the upcoming presidential election, internal lobbying by officials in the Justice Department and the Indian Bureau (which opposed restrictive covenants against Native Americans), and the Report of the President’s Committee on Civil Rights, which called for the banning of restrictive covenants.

*Id.* at 43.

187. In his regular column in the *Baltimore Afro-American*, Houston wrote about the Housing Cases as they were being litigated. Interestingly, the power of the press was used after the Supreme Court had decided the racial covenant cases in an attempt to continue discrimination. One housing developer of Long Island, New York’s Levittown project, stood in open defiance of the Supreme Court’s ruling. The development prohibited African Americans since the first homes were opened in October 1947. The builder of the project, William Levitt, published a statement in the community newspaper in 1949 declaring that his admissions policy would remain unaltered despite the then-recent *Shelley* case. “Levittown has been and is now progressing as a private enterprise job, and it is entirely in the discretion and judgment of Levitt and Sons as to whom it will rent or sell.” Note, *Application of the Sherman Act to Housing Segregation*, 63 YALE L. J. 1124, 1134 n.83 (1954).

Charles Houston, the American Civil Liberties Union, and others, laid the foundation for the historic civil rights legal revolution that occurred during the Warren Court years in the 1950s and 1960s.<sup>188</sup>

The petitioners, both at the Supreme Court and at their respective state courts, primarily contended that “judicial enforcement of the restrictive agreements . . . [had] denied the[m] equal protection of the laws, deprived [them] of property without due process of law, and . . . denied [them] privileges and immunities of citizens of the United States,” in violation of their Fourteenth Amendment rights.<sup>189</sup>

The United States Supreme Court had previously only ruled on two cases involving enforcement of racially restrictive covenants, one of which was *Corrigan v. Buckley*.<sup>190</sup> That case, however, only presented the question of the validity of the restrictive covenants themselves, which were merely agreements between private parties, and presented no constitutional issue.<sup>191</sup> The second case was *Hansberry v. Lee*.<sup>192</sup> The decision in that case was driven by due process concerns with respect to a prior adjudication and did not involve the issues presented by *McGhee* and *Shelley*.<sup>193</sup> Therefore, *Shelley* was a question of first impression.

The framers of the Fourteenth Amendment regarded equality in property rights as “an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee.”<sup>194</sup> Accordingly, had a state government or agency imposed restrictions on occupancy, such as those involved in *Shelley* and *McGhee*, they could not have withstood attack under the Fourteenth Amendment.<sup>195</sup> In fact, the United States Supreme Court, in the case of *Buchanan*, unanimously ruled that a city ordinance, restricting occupation of properties to whichever race was most prevalent in the neighborhood, was an unconstitutional violation of the Fourteenth Amendment.<sup>196</sup>

Ten years later, in the case of *Harmon v. Tyler*,<sup>197</sup> the Court, again unanimously, declared unconstitutional an ordinance prohibiting persons of either race from “establish[ing] a home” in a neighborhood populated primarily by the other race without the written consent of the majority of the residents of

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188. See Darryl K. Brown, Symposium, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1422–23 (2002).

189. *Shelley v. Kraemer*, 334 U.S. 1, 7–8 (1947).

190. 271 U.S. 323 (1926); *Shelley*, 334 U.S. at 8.

191. *Shelley*, 334 U.S. at 8–9.

192. 311 U.S. 32 (1940); *Shelley*, 334 U.S. at 9.

193. *Shelley*, 334 U.S. at 9.

194. *Id.* at 10.

195. *Id.* at 11.

196. *Id.* at 11–12.

197. 273 U.S. 668 (1927).

such other race in that neighborhood.<sup>198</sup> Three years later, in the case of *City of Richmond v. Deans*,<sup>199</sup> the Court, following the precedents of *Buchanan* and *Harmon*, affirmed injunctive relief granted to an African American who was denied occupancy of a property based on a racially-restrictive local ordinance.<sup>200</sup>

In *Goetz v. Shelley* and *McGhee*, where the restrictive covenants were essentially agreements between private parties, the state action—as required for application of the Fourteenth Amendment—consisted of the judicial enforcement of those racially-restrictive private agreements.<sup>201</sup> The Kraemers and the respondents in *McGhee* argued that judicial enforcement is not state action. In the alternative, they argued that if judicial enforcement is state action, it is not sufficient state action for purposes of the Fourteenth Amendment.<sup>202</sup> Prior to *Shelley*, the Supreme Court, however, had consistently held that state judicial action, particularly of a state’s highest court, does constitute state action for purposes of the Fourteenth Amendment.<sup>203</sup>

The Court pointed to numerous decisions in the areas of jury selection, coerced confessions, prosecution based on perjured testimony, denial of effective assistance of counsel, and various other areas to highlight the denial of both procedural and substantive due process rights by statute or by common-law ruling.<sup>204</sup> In the subject cases, “[t]he difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to [the Shelleys and the McGhees] between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.”<sup>205</sup>

The Court, noting that the Fourteenth Amendment was primarily designed to ensure equal protection of the laws for African Americans, including as a key objective equality in property ownership rights, correctly ruled that the states’ judicial enforcement of the restrictive covenants violated the constitutional rights of the Shelleys and the petitioners in *McGhee*.<sup>206</sup>

Next, the Kraemers and the respondents in *McGhee* argued that judicial enforcement of these covenants did not deny equal protection of the laws because the courts would readily have enforced similar covenants restricting Caucasians from property ownership, had any such cases ever arisen.<sup>207</sup> The Court aptly responded that “[e]qual protection of the laws is not achieved through

198. *Id.* at 12.

199. 281 U.S. 704 (1930).

200. *Id.*

201. *Shelley v. Kraemer*, 334 U.S. 1, 13, 18 (1947).

202. *Id.* at 14.

203. *See id.* at 14–18 (examining Supreme Court jurisprudence on the issue).

204. *Id.*

205. *Id.* at 19.

206. *Id.* at 20–21, 23.

207. *Id.* at 21.

indiscriminate imposition of inequalities.”<sup>208</sup> The rights guaranteed by the Fourteenth Amendment are individual rights, the denial of which cannot possibly be remedied by similar denials to others.<sup>209</sup>

The final contention made by the Kraemers and the respondents in *McGhee*, and disposed of by the Court, was that to deny them their right to judicial enforcement of private agreements denied them equal protection of the laws.<sup>210</sup> The Court pointed out that the Constitution does not confer any right for an individual to demand state action that would deny another individual equal protection of the laws.<sup>211</sup>

Having addressed each of the arguments presented by the Kraemers and the respondents in *McGhee*, and having found none to withstand careful examination, the Court reversed the decisions in both cases, holding that judicial enforcement of the racially restrictive covenants denied the Shelleys and the petitioners in *McGhee* the “equal protection of the laws guaranteed [to them] by the Fourteenth Amendment.”<sup>212</sup>

#### V. CHARLES HOUSTON’S MARYLAND LABORATORY

As the Michigan and Missouri cases were winding their way through the courts, Charles Hamilton Houston was also testing his restrictive covenant theories in a set of Maryland cases as part of his national attack on restrictive covenants. Interestingly, as these cases progressed through the Maryland courts, the United States Supreme Court decided *Shelley* and its companion case *McGhee*.

##### A. Introducing *Goetz v. Smith* & Case No. 47

The *Goetz v. Smith* case involved the enforcement of racially restrictive covenants prohibiting the sale, lease, transfer, or occupation of certain properties by African American, Chinese, or Japanese peoples, or peoples of such descent.<sup>213</sup> The properties were parts of a tract called Beachwood Forest, platted and subdivided in 1922 by R.L. Jones, the owner at that time.<sup>214</sup> Jones began conveying lots in the subdivision by deeds containing the restrictive covenant along with a statement that the covenant should be incorporated in all other deeds for property in the plat.<sup>215</sup> However, early in that process, Mr. Jones conveyed

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208. *Id.* at 22.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 23.

213. *Goetz v. Smith*, 62 A.2d 602, 602 (Md. 1948).

214. *Id.*

215. *Id.*

64.8 acres of the initial one-hundred acre tract (approximately ninety-three of the 160 total lots) to one Mr. Booz without restriction, but with reference to the plat.<sup>216</sup> Thereafter, Jones conveyed all of the remaining lots in the subdivision, with restrictions in the deed of all but one, which was conveyed to one Mr. Seal without restriction, but which Mr. Seal later conveyed to another with the restriction.<sup>217</sup>

Wanda Goetz and Charles Bell (Goetz, et al.) sued Rev. Hiram E. and Lulu Smith, seeking an injunction to prevent the Smiths from occupying 64.8 acres of land that they purchased without restriction.<sup>218</sup> Despite this fact, Goetz contended that the property was subject to a racially restrictive covenant that applied to certain other properties, formerly joined with the Smiths' property.<sup>219</sup> The complaint was dismissed and Goetz appealed. Again, the original briefs in the case reveal the intricate legal strategy designed by Houston and his legal team in an effort to destroy racially restrictive covenants.<sup>220</sup>

Case No. 47 concerned lots in the portion of the plat that remained after the Booz conveyance. The Amers and the Phillips both purchased their lots in this portion with the restriction in their deeds.<sup>221</sup> However, only three of the four lots purchased by the Smiths in this portion had the restriction in the deed, and the remaining lot had none.<sup>222</sup> Case No. 46 concerned the 64.8 acres initially conveyed to Booz and subsequently conveyed to the Smiths without restriction.<sup>223</sup> After purchasing the property, the Smiths invested approximately \$70,000 into converting the property into a picnic ground and park for African Americans.<sup>224</sup>

In Case No. 47 and *Smith*, Caucasian property owners whose deeds contained the restriction sought to enforce the covenants against the use and occupancy by the Smiths and Saunders of the properties they each purchased.<sup>225</sup> In the courts below, the plaintiffs in No. 46 were unsuccessful but the plaintiffs in No. 47 were successful; the courts having held that the covenant did not apply to the 64.8 acre Booz parcel but did apply to the remaining lots.<sup>226</sup> Both losing parties appealed to the Court of Appeals of Maryland.<sup>227</sup>

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216. *Id.*

217. *Id.*

218. *Id.* The co-defendants in the suit to enforce the restrictive covenants also included Edward H. Phillips, Emma E. Phillips, Peter F. Amer, Mary Amer, Frank A. Saunders, and Edith M. Saunders. *Id.*

219. *Id.*

220. Brief for Appellees at 1, *Goetz v. Smith*, 62 A.2d 602 (Md. 1948) (No. 46).

221. 62 A.2d at 602.

222. *Id.*

223. *Id.* at 602-03.

224. *Id.* at 603.

225. *Id.*

226. *Id.*

227. *Id.*

B. *The Smith Brief*

Smith began his brief with probably the most basic and crucial fact of the case: the racially restrictive covenant in question was “not contained in the [Smiths’] deed nor in the deed of any of their predecessors in title.”<sup>228</sup> Smith proceeded to recite the facts (virtually identical to the recitation offered by Saunders), emphasizing the fact that the 64.8-acre parcel, the majority of the original one-hundred acres owned by Mr. Johnson, was transferred to Mr. Booz, who then sold to the Smiths, entirely free from restriction of any kind.<sup>229</sup> Smith also emphasized, as did Saunders, that the properties owned by the Smiths and other African Americans were “out of sight and out of hearing of” any properties owned by Caucasians, and they comprised a distinctly separate community.<sup>230</sup>

Smith argued that even if there had been a general scheme (despite inconsistencies in the restrictions) it was abandoned when the 64.8-acre parcel was conveyed to Booz without restriction. Thus, the racially restrictive covenant never applied to the 64.8-acre parcel.<sup>231</sup> Johnson, the original grantor, was the only party that could have objected to the restriction-free transfer to Booz, but he actually consented to it, thereby forfeiting any right to object.<sup>232</sup> This eliminated the possibility of any general plan or uniform scheme, particularly with respect to this 64.8-acre parcel.<sup>233</sup>

Smith also argued that Goetz was prevented from drawing “by inference racially restrictive covenants to bind this 64.8 acres in the face of the plain requirements of the Statute of Frauds,” which assumes that where a writing “is couched in such terms as import a complete legal obligation, . . . the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing.”<sup>234</sup> Accordingly, Smith contended that it “would be both onerous and unconscionable” to now enforce the covenant against him.<sup>235</sup>

Next, Smith turned to the question of whether Goetz was barred by the doctrine of laches from enforcing the covenant against the 64.8-acre parcel.<sup>236</sup> Goetz argued that she and others were unaware that the covenant was violated

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228. Brief for Appellees at 1, *Goetz v. Smith*, 62 A.2d 602 (Md. 1948) (No. 46).

229. *Id.* at 2–4.

230. *Id.* at 4.

231. *Id.* at 5.

232. Johnson was one of the original grantors who conveyed the whole one-hundred acres to Jones subject to a purchase money mortgage. *Id.* at 6. He had constructive knowledge of the unrestricted conveyance to Booz, whose deed was recorded several weeks prior to Johnson’s deed. *Id.* Furthermore, after the conveyance to Booz, Johnson released the portion of the mortgage applicable to the Booz parcel. *Id.* at 7. These facts, led to the lower court’s conclusion that Johnson knew of, and consented to, the unrestricted conveyance. *Id.*

233. *Id.* at 6–8.

234. *Id.* at 7–8.

235. *Id.* at 8.

236. *Id.* at 8–11.

until after the Smiths had already begun improving the property.<sup>237</sup> Smith, however, disputed this account of the facts.<sup>238</sup> Smith purchased the 64.8 acre parcel in August 1943.<sup>239</sup> Smith pointed out that, according to Phillips' uncontradicted testimony in Case No. 47, Phillips purchased his lot in September 1944, and several weeks later became aware of the violation of the covenant.<sup>240</sup>

Goetz acquired her parcel one year later, in September 1945, and Bell had owned his since July 1927.<sup>241</sup> The original complaint was filed in November 1946, more than three years after the Smiths purchased the 64.8 acres, and two years after the violation became evident.<sup>242</sup> Therefore, Goetz waited more than one year before bringing suit.<sup>243</sup> During the three years between the Smith's purchase and when the suit was brought, the Smiths invested between sixty and seventy thousand dollars into improving the land and building structures thereon.<sup>244</sup> For two of those three years, Goetz was aware of such expenditures and allowed them to continue.<sup>245</sup> Given the Smith's detriment and Goetz' delay in bringing suit, Smith argued that allowing Goetz to "contend that they . . . are not barred by laches would be to affront the conscience of this Court and the applicable principles pertinent to the doctrine of laches."<sup>246</sup>

In response to the Supreme Court's decision in *Shelley*, Smith finally raised the constitutional issue: specifically, whether judicial enforcement of the racial restrictive covenant violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>247</sup> Smith argued that Goetz' attempt to distinguish this case from *Shelley*, *McGhee*, and other precedential decisions was "specious and fallacious."<sup>248</sup>

Smith reminded the court that the Fourteenth Amendment should be liberally construed, and "was designed to assure to [African Americans] the enjoyment of all of the *civil rights* that under the law are enjoyed by white persons . . . whenever [they] should be denied by the States."<sup>249</sup> Smith contended that judicial enforcement of the racial restrictive covenant in this case violated the Equal Protection Clause of the Fourteenth Amendment.<sup>250</sup>

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237. Br. for Appellants at 9–10, *Goetz v. Smith*, 62 A.2d 602 (Md. 1948) (No. 46).

238. Br. for Appellees at 8–11, *Goetz v. Smith*, 62 A.2d 602 (Md. 1948) (No. 46).

239. *Id.* at 9.

240. *Id.* at 9–10.

241. *Id.* at 9.

242. *Id.*

243. *Id.*

244. *Id.* at 10.

245. *Id.*

246. *Id.*

247. *Id.* at 11–14.

248. *Id.*

249. *Id.* at 11–12 (citation omitted).

250. *Id.* at 12.

Quoting from the United States Supreme Court's opinion in *Shelley*, Smith pointed out that, "in granting judicial enforcement of the restrictive agreements[.]. . . the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."<sup>251</sup> *Shelley* went on to explain that "freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."<sup>252</sup> Smith then proceeded to refute the remaining constitutional arguments that Goetz raised.<sup>253</sup>

First, with respect to Goetz's argument that segregation of races is in accord with Maryland's public policy, Smith, citing *Shelley*, *Strauder v. West Virginia*,<sup>254</sup> *Ex Parte Virginia*,<sup>255</sup> and the *Civil Rights Cases*,<sup>256</sup> pointed out "that while the language of the Fourteenth Amendment may be prohibitory it also implies the existence of rights and immunities which neither state laws nor state police power, nor state policy may abridge."<sup>257</sup>

Finally, Smith refuted Goetz's contention that Smith had knowledge that their presence in the community would be regarded as a nuisance *per se* by their neighbors and that they should, therefore, be estopped from asserting that the Circuit Court had no right to enforce the covenant against him.<sup>258</sup> Smith, quoting from the lower court's transcript noted that Dr. Olive Wildon, who owned three of the lots closest to Smith's property, testified that she "see[s] no difference" between the races, and that she is "opposed to segregation of any kind," thus refuting Goetz's assertions that Smith's presence would be viewed as a nuisance, and that Smith knew as much.<sup>259</sup>

## VI. ANALYZING *SMITH*

The Smith and Saunders brief in the Maryland high court continued to focus the debate on the validity of the restrictive covenant decisions in the then-recently decided *Shelley* and *McGhee* cases.

In Case No. 47, in the court below, the Smiths and the Saunders argued that enforcement of the racial restriction was a violation of the Fourteenth Amendment.<sup>260</sup> The court disagreed, finding that the decisions of the Supreme Court and the Court of Appeals of Maryland held otherwise. In support, the court

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251. *Id.*

252. *Id.*

253. *Id.* at 13–14.

254. 100 U.S. 303 (1880).

255. 100 U.S. 339 (1879).

256. 109 U.S. 3 (1883).

257. Br. for Appellees at 13, *Goetz v. Smith*, 62 A.2d 602 (Md. 1948) (No. 46).

258. *Id.*

259. *Id.* at 14.

260. *Id.*

cited *Corrigan v. Buckley*,<sup>261</sup> *Meade v. Dennistone*,<sup>262</sup> and *Scholtes v. McColgan*.<sup>263</sup> The Maryland restrictive covenant cases were filed at the trial court in 1948, before the Supreme Court's decisions in *Shelley* and *McGhee*, which the Court of Appeals found to be controlling in these cases.<sup>264</sup>

The appellate attorneys opposed to extending the Supreme Court's decisions to the Maryland appellate court contended that *Shelley* and *McGhee* were not controlling and tried to distinguish them.<sup>265</sup> They stated that the trial court in *Shelley* found that the agreement failed because it had not been signed by all property owners, that the fifty year term of the agreement might be seen as unreasonable, that several of the properties had been occupied by African Americans for between twenty-three and sixty-three years, that as a result of that occupancy "there was no uniformity when the original agreement was signed," and that the African American purchasers had no knowledge of the restriction when they purchased.<sup>266</sup> They further stated that in *McGhee*, the agreement required eighty percent of property owners to agree to the restriction, leaving twenty percent of the properties unrestricted.<sup>267</sup>

Appellants also contended that the Smiths and the Saunders' case to defeat the restrictive covenants should fail because they knew of the restriction when they made their purchases and should be estopped from contesting it.<sup>268</sup> While the court agreed that these facts did distinguish the cases in some ways, they pointed out that the Supreme Court's decision in *Shelley* was not based on the specific facts of the cases, but rather on the judicial enforcement of the covenants.<sup>269</sup>

The Supreme Court held that judicial enforcement of the racially restrictive covenants constituted a state denial of the equal protection of the law, in violation of the Fourteenth Amendment, and as such, could not stand.<sup>270</sup> *Shelley* clearly established that "judicial enforcement by state courts of restrictive covenants based on race or color" is an unconstitutional violation of the Fourteenth Amendment's equal protection guarantees.<sup>271</sup> Accordingly, the court held that the Smiths and Saunders could not be estopped from asserting such defense, when the Supreme Court has said that they may.<sup>272</sup>

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261. 271 U.S. 323 (1926).

262. 196 A. 330 (Md. 1938).

263. 41 A.2d 479 (Md. 1945); *Goetz*, 62 A.2d at 603.

264. *Goetz*, 62 A.2d at 603.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

Finally, the court addressed the contention that since the Supreme Court said that the agreements themselves did not violate any rights guaranteed by the Fourteenth Amendment, the courts should enforce such agreements when they are breached.<sup>273</sup> The court pointed out that this argument is “precisely what the Supreme Court decided” in *Shelley* and *McGhee*, and because Supreme Court decisions “construing the United States Constitution and its Amendments are binding,” the Court here has no option but to follow them.<sup>274</sup>

The Court affirmed the decision in No. 46, in favor of the Smiths, and reversed the decision in No. 47 and dismissed that complaint.<sup>275</sup>

## VII. WHAT THE RESTRICTIVE COVENANT CASES AND THE *MCDONALD'S* CASE TEACH ABOUT THE ROLE OF COURTS

The legal strategies discussed in this Article have also provided intellectual support for state and federal legislative reforms in the civil rights area.<sup>276</sup> The cases surrounding *Shelley v. Kraemer* have set the tone for advocacy that went beyond the nation’s courtrooms, and into governor’s mansions and legislative houses. While the multi-party lawsuit served as a touchstone for the discussions of legal reform,<sup>277</sup> many of these efforts have come under attack in recent years by those who would limit the courts in entertaining such suits.<sup>278</sup>

There have also been efforts to discourage lawyers from assembling large class action or multi-state civil rights litigation. Some of those efforts have focused on denying the use of public funds to support the litigation<sup>279</sup> and alteration of the rules of professional responsibility.<sup>280</sup>

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273. *Id.*

274. *Id.*

275. *Id.* at 604.

276. See John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1107–08 (1998).

277. In 1981, the Supreme Court observed:

Class actions serve an important function in our system of civil justice. They present, however, opportunities for abuse as well as problems for courts and counsel in the management of cases. Because of the potential for abuse, a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties.

*Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–100 (1981) (footnotes omitted).

278. See, e.g., Cabraser, *supra* note 19, at 1476 (“The admitted goal of congressional class action ‘reform’ is to save class actions by destroying them as viable state court proceedings and transferring them (at the whim of any single class member or defendant) to the federal system, where, the lobbyists in favor of ‘reform,’ at least, have promised the suits will languish and die.”).

279. See, e.g., Erwin Chemerinsky, *Closing the Courthouse Doors to Civil Rights Litigants*, 5 U. PA. J. CONST. L. 537 (2003) (discussing Rehnquist Court’s hostility to civil rights class actions and funding of such litigation); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003) (discussing how the Supreme Court has undercut the use of lawsuits by private citizens to enforce federal civil rights statutes); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209 (2003) (exploring the limitations on access to the legal system including court imposed

In my view, it is far too late in the day to keep those who would use the court, where their voices otherwise are not heard, from filing creative multi-party litigation. In fact, to discourage such suits is not a wise use of our legal resources. The problem is that today's lawsuit may be tomorrow's arena for social reform. Such cases help focus controversial issues for the judiciary and allow matters to be decided by the courts or moved to the proper forum of government for decision. This is true even for litigation of doubtful value when it is first proposed in civil court.<sup>281</sup>

One of the key lessons to be learned from the restrictive covenant cases is that issues well presented and clarified in the courts can lead to agreement and consensus of most of the nation on public policy.<sup>282</sup> That is, allowing multi-party suits to move more easily and quickly through the courts may reveal that there is no real dispute about the existence of a legal right among the branches of government and the public. This certainly proved to be the case in the restrictive covenant cases.

Some critics would ask, why permit seemingly frivolous lawsuits to proceed in courts? To limit resolution of an important social issue to the whim of elected chief executives or members of the Legislature is dangerous for a society that relies so heavily on the rule of law.<sup>283</sup> Open access to the courts encourages the

restrictions on using certain funding to support progressive litigation and advocacy).

280. Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 115–28 (2002) (describing NAACP's early test case litigation strategies).

281. Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HASTINGS L.J. 849, 849 (2007) (providing a few convincing arguments that the law's provisions on litigation abuse are "the most significant provision[s] of the new law").

282. Interestingly, Attorney General Tom C. Clark and Solicitor General of the United States Philip B. Perlman submitted what has been described as a classic Brandeis brief as amicus curiae in support of the plaintiff's position in the restrictive covenant case, *Shelley v. Kraemer*. PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS 169–73 (1948); see also Garrett Power, *Meade v. Dennistone: The NAACP's Test Case To "... Sue Jim Crow Out of Maryland With The Fourteenth Amendments,*" 63 MD. L. REV. 773, 807 (2004).

Philip Perlman intervened in support of *Shelley*, arguing that private restrictions prohibiting the sale of houses to Negroes were not in the public interest. Philip Perlman had switched sides on the "race question." In 1925, as City Solicitor of Baltimore, he had led the Mayor's Committee on Segregation in its efforts to exclude blacks from white neighborhoods. In 1948, as Solicitor General of the United States, he argued to the Supreme Court that residential racial restrictions were unconstitutional. Perlman's conversion can be explained in terms of party politics. In 1925, virtually all of Baltimore's black voters were Republicans, and the Democratic Mayor Jackson had no sympathy for their dearth of houses. But Roosevelt's New Deal had brought blacks into the Democratic Party, and the Party's leadership now was intent upon satisfying some of their demands. Perlman's change of mind was symptomatic of a metamorphosis in the body politic—a movement away from discrimination and towards racial equality had begun.

*Id.* at 807 (demonstrating the effectiveness of bringing multiple cases sharing major policy issues before courts in order to reach consensus on those issues).

283. Commenting on lawyers seeking to use the "Rule of Law" in courts to obtain justice the legendary Nobel Peace Prize winner Martin Luther King Jr. wrote, "Observing and learning from these lawyers there is a strain that runs through all be Negro or White, conservative or radical, rich or poor, cynic or beguiled. It is an immutable commitment to that philosophy that with all of its uncertainty and weakness, the law is majestic and

settling of issues and the building of popular public consensus when some matters are little known or cannot achieve large public attention because of a lack of a groundswell of popular support.<sup>284</sup>

Consider the controversial lawsuit against McDonald's for serving food that allegedly caused the young plaintiffs to become obese.<sup>285</sup> This case serves as a good example of how encouraging court resolution of multi-party cases that are likely to recur would serve the ends of justice in the long run.

In *Pelman v. McDonald's Corp.*, several minor children filed suit alleging that the fast food chain was making and selling their product in a deceptive and negligent manner, causing injury to the health of children by making them obese.<sup>286</sup> Like other controversial tort claims, the federal trial court dismissed the complaint, but allowed the plaintiffs to file modified or amended claims within thirty days.<sup>287</sup> Somewhat unusual about the *McDonald's* case was that United States District Judge Robert W. Sweet provided a roadmap to aid the plaintiffs in filing, at least potentially, a more viable lawsuit.

Describing the case as "unique and challenging,"<sup>288</sup> the judge's opinion probed the legal and policy aspects of the dispute. Exploring the medical reality, corporate marketing, and the procedural implications of such lawsuits against multi-state fast food chains, the court cautiously began the difficult task of establishing guidance for what likely will be the next great wave of class action lawsuits involving products of common and voluntary use.<sup>289</sup>

The judge started his opinion with the unavoidable acknowledgment that the claim involved the intake of a legal product that poses known health risks. Like cigarettes and the smoking-related claims of prior years, the plaintiffs' choice to engage in the activity needed to be taken into account.<sup>290</sup> Indeed, the judge framed the controversy in this way: "[t]he issue of determining the breadth of personal

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the judicial process supreme." Martin Luther King, Jr., *The Law is Majestic*, N.Y. AMSTERDAM NEWS, July 31, 1965, at 16.

284. However, Dr. King also reminded us, "Justice at times proceeds with a halting gait. Historically the law has been slow to speak for the poor, the oppressed, the unpopular, the disfranchised." *Id.*

285. See *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y.2003).

286. *Id.* at 516.

287. *Id.* at 519.

288. *Id.* at 516.

289. John Banzhaf, a professor of public interest law at George Washington University in Washington, D.C. and a consultant in the original case against McDonald's, likened these obesity lawsuits to the fight against the tobacco industry: "I guarantee there will be more . . . Obesity is the new tobacco." Selicia Kennedy-Ross, *People v. Fast Food: Industry Getting Its Fill of Lawsuits From Customers*, SAN BERNARDINO COUNTY SUN, May 3, 2005.

290. It seems logical that some measure of personal choice enters into the act of eating fast food. Despite the personal choice defense offered by McDonald's and other vendors in the fast food industry, these lawsuits have been pressed in courts. One commentator has observed "[T]he ability of the plaintiffs' bar to threaten restaurateurs and junk-food sellers comes, not from the power of their theory of obesity liability, but from the too-real possibility of abuse of the conjunction of the consumer fraud laws and the class-action mechanism to blackmail a defendant into settling a case rather than risk the small chance of a bankrupting judgment." Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427, 440 (2006).

responsibility underlies much of the law: where should the line be drawn between an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her?"<sup>291</sup>

The judge explained that "[l]aws are created in those situations where . . . society needs to provide a buffer between the individual and some other entity—whether herself, another individual or a behemoth corporation that spans the globe."<sup>292</sup> When analyzing whether to hold McDonald's responsible in the litigation at all, the court said:

[G]uided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast food fare unless consumers are unaware of the dangers of eating such food . . . [t]hey cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of super sized McDonalds products.<sup>293</sup>

But the court cautioned, "[o]n the other hand, consumers cannot be expected to protect against a danger that was solely within McDonalds' knowledge." The court went on to explain, "McDonalds' products involve a danger that is not within the common knowledge of the consumers."<sup>294</sup> The judge noted that the plaintiffs made no such allegation in the case as it was presently filed.<sup>295</sup> That failure was among the primary reasons that the lawsuit was dismissed, but the judge continued to discuss the potential boundaries of the fast food lawsuit.

The court also addressed concerns about the possibility that the suit against McDonald's in this case could potentially lead them into a host of other lawsuits, and noted that Americans spend more than \$110 billion on fast food each year, and as much as thirty percent of the average household diet is composed of food prepared in fast food type operations.<sup>296</sup> In light of such a profound effect on daily commerce, the court said that it was "cognizant of its duty 'to limit the legal consequences of wrongs to a controllable degree and to protect [McDonalds] against crushing exposure to liability."<sup>297</sup>

Reviewing the allegations of the specific facts in the pleadings, the court identified the plaintiffs as infant consumers who purchased and consumed defendant's product and became overweight, "developed diabetes, coronary heart disease, high blood pressure, elevated cholesterol intake," and other adverse

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291. 237 F. Supp. at 516.

292. *Id.*

293. *Id.* at 517–18.

294. *Id.* at 518.

295. *Id.*

296. *Id.*

297. *Id.*

health effects.<sup>298</sup> The judge turned his attention to the national problem of increased childhood obesity over the years:

Today there are nearly twice as many overweight children and almost three times as many overweight adolescents as there were in 1980. In 1999, an estimated 61 percent of U.S. adults were overweight or obese and 13 percent of children aged 6 to 11 years and 14 percent of adolescents aged 12 to 19 were overweight. In 1980, those figures for children were 7 percent for children aged 6 to 11 years and 5 percent for adolescents aged 12 to 19 years.<sup>299</sup>

The judge then turned his attention to the societal cost of obesity:

Obese individuals have a 50 to 100 percent increased risk of premature death from all causes. Approximately 300,000 deaths a year in the United States are currently associated with overweight and obesity. As indicated in the U.S. Surgeon General's Report on Overweight and Obesity, "left unabated. . . [both] may soon cause as much preventable disease and death as cigarette smoking."<sup>300</sup>

Judge Sweet's opinion also cited the estimated financial costs of obesity. "In 1995, the total cost estimates attributable to obesity amounted to an estimated \$99 billion. In 2000, the cost of obesity was estimated to be \$117 billion."<sup>301</sup> The detailed focus on the health consequences of obesity in the opinion is a telling intervention into the public policy of health care. Once the judge included this discussion in his opinion, he had all but concluded that he believes the potential damages for harm is a real possibility in an appropriate case. He could have easily omitted this level of detail in his discussion, as it was irrelevant to the decision to dismiss the claims against McDonald's.

The court did, however, curiously note that McDonald's may be potentially open to liability on a "deceptive omission" claim if it failed to provide product information on the contents of the food. Although the court did not believe the plaintiffs' pleadings in this case alleged a "deceptive omission," it suggested that such a case could be made if the information regarding "the nutritional content of McDonald's product was solely within McDonalds' possession or that a consumer could not reasonably obtain such information."<sup>302</sup>

The claim with the most potential to destroy the fast food industry was the allegation that "McDonalds' products are inherently dangerous because of the

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298. *Id.* at 519.

299. *Id.* at 519–20.

300. *Id.*

301. *Id.*

302. *Id.* at 529.

inclusion of high levels of cholesterol, fat, salt and sugar.”<sup>303</sup> Although the trial court acknowledged that the plaintiffs had a high burden to establish this “inherently dangerous food” claim, the judge made several analogies to the tobacco litigation cases in his explanation. Ultimately, the judge rejected the comparison to the tobacco cases because the tobacco “companies had intentionally altered the nicotine levels of cigarettes to induce addiction.”<sup>304</sup> The judge also rejected comparisons to the asbestos class action litigation because the “dangers of asbestos did not become apparent until years after exposure. . . . Thus, any liability based on over consumption is doomed if the consequences of such over consumption are common knowledge.”<sup>305</sup>

Even more interestingly, the plaintiffs alleged that McDonald’s had created an entirely different, more dangerous food than one would expect from an ordinary hamburger or piece of chicken prepared at home. The plaintiffs argued that:

McDonalds’ products have been so altered that their unhealthy attributes are now outside the ken of the average reasonable consumer. . . . For instance, Chicken McNuggets, rather than merely chicken fried in a pan, are a McFrankenstein creation of various elements not utilized by the home cook . . . . Chicken McNuggets, while seemingly a healthier option than McDonalds hamburgers because they have “chicken” in their names, actually contain twice the fat per ounce as a hamburger.<sup>306</sup>

The court explained that the average consumer would need to go to the company website to have any idea of the degree to which the foods have been altered. The court reasoned that “[t]his argument comes closest to overcoming the hurdle presented to plaintiffs. If plaintiffs were able to flesh out this argument in an amended complaint, it may establish that the dangers of McDonalds’ products were not commonly well known and thus McDonald’s had a duty toward its customers.”<sup>307</sup> The opinion spent a good deal of time identifying some of the extensive ingredients and chemical processes used to produce the menu offerings at McDonald’s.

In what was clearly the judge’s most far-reaching policy statement, he rejected McDonalds’ claims that a successful suit against them on the contents of their processed food would lead to lawsuits against “pizza parlors, neighborhood diners, bakeries, grocery stores, and literally anyone else in the food business.”<sup>308</sup>

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303. *Id.* at 531.

304. *Id.* at 532.

305. *Id.*

306. *Id.* at 535.

307. *Id.* at 536.

308. *Id.*

The judge noted:

Most of the above entities do not serve food that is processed to the extent that McDonalds' products are processed, nor food that is uniform to the extent that McDonalds' products are throughout the world. Rather, they serve plain-jane hamburgers, fries and shakes—meals that are high in cholesterol, fat, salt and sugar, but about which there are no additional processes that could be alleged to make the product even more dangerous.<sup>309</sup>

After the discussion of product ingredients, another promising statement for the plaintiffs emerged in the lengthy opinion. The judge said:

It is premature to speculate as to whether this argument will be successful as a matter of law, if the plaintiffs amend their complaint to include these allegations, as neither argument has been more than cursorily presented to the Court and certainly is not before it. McDonalds' argument is insufficient, however, to convince this Court that the plaintiffs should not have the opportunity to amend their complaints to include these allegations.<sup>310</sup>

The judge noted the extent that McDonald's food has become a mainstay of the American diet. By information provided in the company's own legal papers, it reported that the corporation served over ninety-nine billion customers; about forty-six million each day at 13,000 outlets in the United States, and had a "43 percent share of the United States fast food market."<sup>311</sup> The court then suggested another possible legal theory for the plaintiffs:

A better argument based on over-consumption would involve a claim that McDonalds' products are unreasonably dangerous for their intended use. Their intended use of McDonalds' food is to be eaten, with some frequency, that circumstance presents a question of fact. If plaintiffs can allege that McDonalds products' intended use is to be eaten for every meal of every day, and that McDonalds is or should be aware that eating McDonalds' products for every meal of every day is unreasonably dangerous, they may be able to state a claim.<sup>312</sup>

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309. *Id.*

310. *Id.*

311. *Id.* at 536 n.26.

312. *Id.* at 537. In January 2005, the United States Court of Appeals for the 2nd Circuit overruled Judge Sweet's decision dismissing the law suit and reinstated the case so that it could proceed to the discovery phase. *Pelman v. McDonald's*, 396 F.3d 508 (2005). The court ruled that establishing the causal connection between McDonalds' advertising and the plaintiffs' obesity "is the sort of information that is appropriately the subject of

Several aspects of Judge Sweet's opinion are noteworthy. First, although McDonald's succeeded in having the judge rule that the entire lawsuit should be dismissed, the opinion followed the unusual approach of explaining how the plaintiffs' complaints could be more effectively crafted. Although judges often make occasional suggestions for the parties as they proceed in continuing litigation in written and oral opinions, the extent of Judge Sweet's suggestions to the plaintiffs, both in kind and quality, are unusually detailed. Some advocates of limiting the judicial role to concrete cases and controversies might be critical of his advisory role in this case.

Second, the judge clearly made a decision to thrust himself into this controversial policy debate. Perhaps Judge Sweet believed he was serving a function to advance this issue through the legal system more quickly, so that years of legal wrangling could be reduced. He may be justified in attempting to provide notice of the potential issues looming for both plaintiff's lawyers and the fast food industry.

The common law tradition of permitting reasonable expansion of the scope of tort liability provides ample support for Judge Sweet's attempt to anticipate issues of suits against the fast food industry. The history of other products liability and fair warning tort law suggests that eventually, many aspects of policy and damages compensation will wind through the courts until a body of case precedents eventually emerge to guide affected industries and consumers. Such evolution often takes decades.

Large industries can benefit from the certainty of multi-party lawsuits or recurring issues being decided sooner rather than later. In fact, the filing of the lawsuit and early rulings by one judge in one jurisdiction can result in industry changes to immediately minimize the risk of future expense to the business while waiting for the nation's courts to reach a consensus.

Judge Sweet likely understood that taking the claims against McDonald's lightly would simply extend the years-long journey that will ultimately lead to a settled balance between law and policy on claims against the fast food industry. Clearly, lawyers who are filing these suits, like their forerunners in the tobacco and asbestos litigation, intend to pursue their claims until they prevail, or until no court will entertain any of their legal theories. Accordingly, the judge's comprehensive treatment of these issues in the lawsuit was a sound use of judicial resources, since the claims against the fast food industry are unlikely to disappear overnight.

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discovery, rather than what is required to satisfy the limited pleading requirements of Rule 8(a), Fed.R.Civ.P." *Id.* at 512.

### VIII. WHY “ACTIVISM STANDING” MAKES SENSE

This Article introduces the concept of “Activism Standing,” which would apply more liberalized rules of access to courts for those seeking civil rights or attempting to establish new tort theories. Although everyone does not agree that parties should use courts to create new legal rights, it is clear that such an approach is now part of the fabric of our American legal system. Recognizing that reality, it makes far more sense to help courts resolve controversies regarding novel claims with as little delay as possible. Activism standing is a tool that will help to accomplish this goal. It would encourage the rapid resolution of substantive rights claims on the merits. These decisions would inform the public whether the courts will be able to resolve other similar claims. After a court has decided whether it is the proper forum for a claim, that court can fashion precedent as necessary. If such a court decides to reject those novel claims, it may allocate the claims to the appropriate alternate forum for resolution.

This proposal should not be understood as simply a wholesale system for court-created legal rights. In fact, the same legal principles that restrict judicial activism should be applied to whatever cases come before the courts. This should not be considered a liberal doctrine seeking the identification of expanded civil rights.

If applied in a noncontroversial manner, both liberal and conservative advocates would be able to seek more rapid resolution of rights in the courts. The tendency of most modern litigation reform has placed too many procedural hurdles in the way of resolving a question of the existence of a legal right. Removing procedural obstacles will better serve the public interest by getting the courts to either decide a matter or remove it from their docket to the place where it belongs.

The first step in this process would be to require trial courts to rule on questions of due process or the existence of a tort cause of action, even if the court believes that there are procedural flaws in the moving advocate’s claim.<sup>313</sup> This would give appellate courts the opportunity to rule on the matter one way or another in a reported opinion, if the matter was one likely to recur.

The second step in the proposal would be for certiorari courts to adopt a requirement that, in all cases involving multi-party litigation, the opponent seeking to contest the existence of a constitutional right or a claim for a relatively novel tort claim should be required to answer whether they believe there is substance to the right claimed, along with whatever procedural ground they argue

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313. Courts certainly are not unequipped to make preliminary determinations about the merits of a case. Indeed, they routinely make such determinations in cases where preliminary injunctions are being sought. *See, e.g., Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 810 F. Supp. 1072, 1075 (W.D. Mo. 1993) (denying a motion to stay injunction based on four-factor test assessing movant’s likelihood of success on appeal: whether movant will suffer irreparable harm absent the stay; whether the stay will substantially injure other parties; and where the public interest lies).

should prevent review.<sup>314</sup> If the issue is likely to recur, a statement of substantive position would serve the court in making its decision for review.<sup>315</sup>

The third step would be to encourage certiorari courts to publish more opinions in cases where petitions are denied, explaining why review was not granted.<sup>316</sup> This would encourage litigants to better fashion cases for the court's review with a new set of plaintiffs rather than guessing why the court did not think the case was ready to be heard.

## IX. CONCLUSION

There is no point avoiding review of important constitutional claims or controversial tort claims, especially if they are going to be resolved by the courts eventually. If they are unlikely to ever be decided by the courts, they should be quickly denied on the merits by the court of last resort so they may find their way to a proper place of resolution in the tapestry of our democracy.

The Supreme Court's recent reluctance to expand the role of class action in reform litigation as demonstrated in its opinion in *AT&T Mobility v. Concepcion*, suggests a disturbing trend to limit the power of the class action tool.<sup>317</sup> Such a short-sighted approach is likely to limit legitimate group claims that seek redress in the courts without the ability to consolidate their cases with other aggrieved parties. The restrictive covenant cases should have taught us that claims that are not popular, but may be meritorious often require group litigation to obtain justice.

Although it may appear that civil rights litigation and obesity litigation do not have much in common, I suggest that they share the same theme of getting important questions answered by the court that may affect large groups of affected people. Whether the group plaintiffs win or lose, clarifying rights and narrowing issues for legislative consideration as soon as possible is always a

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314. The traditional view of the role of courts with regard to constitutional decisions is certainly at odds with this Article's recommendations for reform. One commentator notes that "Federal Courts, including the Supreme Court, do not pass on constitutional questions because there is a special function vested in them to enforce the Constitution or police the other agencies of government. They do so rather for the reason that they must decide a litigated issue that is otherwise within their jurisdiction and in doing so must give effect to the supreme law of the land." Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1006 (1965).

315. Sometimes courts can identify the procedural shortcoming in a given case while alerting counsel below that the case may well contain a review-worthy substantive claim. This can be very useful for civil rights advocates hoping to get a suitable case reviewed in the appellate courts. See, e.g., *Riggs v. California*, 525 U.S. 1114 (1999) (recognizing the Eighth Amendment question but concluding the issue should first be addressed by a lower federal court or the California Supreme Court).

316. See Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541, 1548 (1986) (noting that under its rules for discretionary appellate review "rarely, if ever, will there be a published opinion denying review, even though many more motions for discretionary review are denied than are granted").

317. 131 S.Ct. 1740 (2011).

worthwhile goal. Activism standing would create a presumption that group claims should be resolved quickly by the courts so that society is not left wondering which rights and responsibilities the law intends to recognize.

Furthermore, without the class action tool it may be impossible for small but valid claims to be resolved in the courts because lawyers will not be available to pursue them without the ability to aggregate those cases. To reduce access to class action litigation because of the procedural challenges presented in defending them or hearing them will ultimately result in many civil rights violations and many commercial wrongs going unaddressed.