# The More Things Change: *Hundley v. Gorewitz* and "Change of Neighborhood" in the NAACP's Restrictive Covenant Cases

*Alisha Jarwala**

*Racially restrictive covenants flourished throughout the United States in the early twentieth century. These private agreements prohibited the sale or rental of specific parcels of land to non-white individuals, with the goal of maintaining residential segregation. Today, the primary case associated with restrictive covenants is* Shelley v. Kraemer*, in which the Supreme Court used the state action doctrine to strike down restrictive covenants in 1948.*

*However, there was a road not taken. The NAACP challenged hundreds of restrictive covenants and lost the majority of these cases, with a notable exception in 1941:* Hundley v. Gorewitz*. In* Hundley*, a federal court struck down a racially restrictive covenant in Washington, D.C., under a different theory: the "change of neighborhood" doctrine. This doctrine allows a court in equity to declare a restrictive covenant unenforceable if there has been such a radical change in the neighborhood that the covenant's original purpose has been defeated. NAACP lawyer Charles Hamilton Houston was able to persuade the D.C. Circuit that a racially restrictive covenant was unenforceable if a neighborhood was already becoming predominantly Black, and the Hundleys kept their home.*

*This Note seeks to provide a legal historical account of* Hundley v. Gorewitz *and the change of neighborhood doctrine in the fight against restrictive covenants. A close examination of this case and doctrine provides insights into the NAACP's civil rights litigation strategy. First,* Hundley *demonstrates the NAACP's desire to use litigation as a tool to educate the courts and the public about the social and economic impacts of restrictive covenants. In addition, the use of this doctrine highlights Houston's legal pragmatism: Ideologically, the change of neighborhood doctrine was a compromise because it accepted the premise of segregated neighborhoods. In making this argument, Houston utilized the converging interests of white homeowners, who wanted to be able to sell their properties to Black buyers. Ultimately,* Hundley *and the change of neighborhood doctrine showcase Houston's ingenuity, pragmatism, and forward thinking at a time when the NAACP faced long odds in the fight against housing segregation.*

## Table of Contents



* J.D., Harvard Law School, 2020; B.A., Yale University, 2015. I would like to thank Dean Tomiko Brown-Nagin and Professor Laura Weinrib for their thoughtful feedback, insights, and encouragement. I am also grateful to the librarians at Harvard Law School, the librarians at the Schlesinger Library at Radcliffe, and the editors of the *Harvard Civil Rights-Civil Liberties Law Review* for their assistance.

"Change of neighborhood is a question of judicial technique. We all oppose the creation of ghettos. One of the ways of knocking them down is to broaden them."

—Charles Hamilton Houston[1]

## I. Introduction

On January 17, 1941, Mary Gibson Hundley and her husband Frederick moved into a house on Thirteenth Street in Washington, D.C.[2] By any account, they were desirable, accomplished neighbors—the Hundleys were friendly and quiet high school teachers, involved with local charities and civic associations.[3] Mary was a graduate of Radcliffe College and the Sorbonne.[4] However, the Hundleys were Black, and the property was subject to a racially restrictive covenant: The deed contained a clause mandating that the property "shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person."[5] Some weeks after the Hundleys moved in, their white neighbors, the Gorewitzes, sued to enjoin them from occupying the home.[6] "They had watched us coming and going, they had seen us improving the property, they had even grown fond of our dog," Mary said in a radio interview, "but they did not like us."[7] In need of an attorney, the

[1] Charles Hamilton Houston, NAACP Special Counsel, Potentialities of Change of Neighborhood Doctrine, Remarks at NAACP Conference on Restrictive Covenants 1 (July 9, 1945), *in* NAACP Papers, Folder 001521-020-0495, ProQuest History Vault.

[2] *Interview with Mary Gibson Hundley*, Americans All: A Radio Program (Sept. 28, 1947), https://sds.lib.harvard.edu/sds/audio/450745415, at 2:12, *archived at* https://perma.cc/5C2N-4NGZ.

[3] *See* Jane Knowles, *Hundley, Mary Gibson Brewer (1897-1986)*, American National Biography (2000), https://doi.org/10.1093/anb/9780198606697.article.1501019, *archived at* https://perma.cc/TTA3-PQ8Y.

[4] *Id.*

[5] Hundley v. Gorewitz, 132 F.2d 23, 23 (D.C. Cir. 1942).

[6] *See Interview with Mary Gibson Hundley, supra* note 2, at 2:27.

[7] *Id.* at 2:38.

Hundleys turned to Mary's high school classmate Charles Hamilton Houston, a prominent civil rights lawyer who was special counsel for the National Association for the Advancement of Colored People (NAACP).[8] Houston was well versed in the injustice of racially restrictive covenants, which were common in cities with a significant Black population, like Washington, D.C., in the 1940s.[9]

The case that ensued, *Hundley v. Gorewitz*,[10] is rarely mentioned as more than a footnote in the literature on challenges to restrictive covenants. However, the case merits close study. First, *Hundley* is remarkable because it is one of the NAACP's few success stories of challenging a racially restrictive covenant: After over a year of litigation, the Hundleys prevailed and were able to move back into their home.[11] The NAACP challenged hundreds of restrictive covenants around the country between 1926 and 1947.[12] They lost the vast majority of these cases until the Supreme Court's 1948 decision in *Shelley v. Kraemer*,[13] which held enforcement of restrictive covenants unconstitutional under the Fourteenth Amendment.[14]

The *Hundley* case is also important to the study of restrictive covenant cases because it illustrates Houston's successful use of the "change of neighborhood" doctrine. This doctrine, also called the doctrine of changed conditions, allows a court to declare a restrictive covenant unenforceable if there has been a radical change in the neighborhood, such that the covenant's original purpose has been defeated and enforcement would be to the disadvantage of the property owner. Employing the change of neighborhood doctrine, Houston was able to persuade courts in the District of Columbia that a racially restrictive covenant was unenforceable if the surrounding neighborhood was becoming Black. In addition, *Hundley* showcases the NAACP's desire to use litigation as a tool to educate the courts and the public about the social and economic implications of restrictive covenants. The use of this doctrine highlights Houston's pragmatism—ideologically, utilizing the change of neighborhood doctrine meant temporarily accepting housing segregation. Houston's argument was bolstered by the fact that white homeowners had interests that suddenly converged with those of potential Black buyers: White individuals also wanted to be free from restrictive covenants in order to sell their property in diversifying neighborhoods. Through the *Hundley* case and others like it, Houston's pragmatic arguments laid the groundwork for ending formalized residential segregation.

---

[8] *See Hundley*, 132 F.2d at 23; Knowles, *supra* note 3.

[9] *See* Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L. Q. 737, 738–39 (1989).

[10] 132 F.2d 23 (D.C. Cir. 1942).

[11] *Interview with Mary Gibson Hundley*, *supra* note 2, at 5:26.

[12] *See* Ware, *supra* note 9, at 738.

[13] 334 U.S. 1 (1948).

[14] *Id.* at 23; Ware, *supra* note 9, at 741–42.

## II. The Housing Crisis in Washington, D.C.

*Hundley v. Gorewitz* was set against the backdrop of a housing shortage of unprecedented proportions in Washington, D.C. During the 1930s, the city's Black population nearly doubled as families left the rural south, pushed out by racial violence and agricultural problems and drawn to northern cities by the promise of economic opportunity.[15] Washington's Black newcomers were part of what would be the largest internal migration in American history.[16] The city had been home to just over 100,000 Black residents in 1920.[17] By 1940, the census reported that over 187,000 Black residents were living in Washington, D.C.[18]

The magnitude of the housing problem and its causes were apparent to scholars at the time. In a 1929 study on housing commissioned by Howard University, sociologist William Henry Jones wrote that "[t]he allocation and distribution of the Negro population in Washington has been conditioned by the processes of economic competition and racial antagonism."[19] Jones's two concerns, economics and racism, were apt. The capital was not equipped to provide housing for an influx of this size, and construction of new housing failed to keep pace with population growth.[20] Beyond lack of construction, residential segregation subjected Black would-be purchasers at all income levels to artificial scarcity.[21] Racial restrictions on housing had been a fact of life in Washington, D.C., since the 1800s, when the city's first suburb, Uniontown, was developed for exclusively white residents, and developers continued to divide the city along racial lines.[22] By 1928, half of white-owned homes and nearly all new housing developments were subject to racial restrictions.[23] These building patterns continued in the decades that

---

[15] Chris Myers Asch & George Derek Musgrove, Chocolate City: A History of Race and Democracy in the Nation's Capital 251, 273 (2017); *see also* Oliver McKee, Jr., *Washington as a Boom Town*, 239 N. Am. Rev. 177, 183 (1935).

[16] Asch & Musgrove, *supra* note 15, at 273.

[17] Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States*, U.S. Census Bureau, tbl. 23 (Sept. 2002), https://www.census.gov/content/dam/Census/library/working-papers/2002/demo/POP-twps0056.pdf, *archived at* https://perma.cc/97Y7-5NS7.

[18] *Id.*

[19] William Henry Jones, The Housing of Negroes in Washington, D.C.; A Study in Human Ecology 57 (1929), http://hdl.handle.net/2027/uc1.$b538873, *archived at* https://perma.cc/J9XB-J8HE.

[20] Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 W. Res. L. Rev. 101, 104 (1955).

[21] William R. Ming Jr., *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. Chi. L. Rev. 203, 209 (1949).

[22] Asch & Musgrove, *supra* note 15, at 244; *see also* Sarah Jane Shoenfeld & Mara Cherkasky, *"A Strictly White Residential Section": The Rise and Demise of Racially Restrictive Covenants in Bloomingdale*, 29 Wash. Hist. 24, 28 (2017).

[23] Shoenfeld & Cherkasky, *supra* note 22, at 29. The problem was not unique to the nation's capital. Scholars have noted that "[t]he public policy of many American states was frankly segregationist," and that these policies were propped up by the federal government.

followed, leading to a severe housing crisis that would persist in the city through World War II.[24]

The scarcity of housing open to Black residents in Washington, D.C., forced them into a few neighborhoods that quickly became overcrowded and unsanitary. Scholars and journalists of the era described these neighborhoods as "wretched" and "dismal."[25] President Hoover's Conference on Home Building and Home Ownership wrote in 1932 that racial segregation had led to neighborhoods that were "fatally unwholesome places, a menace to the health, morals and general decency," and pointed out housing in Washington, D.C., that suffered from "[f]ire risk, insanitation, [and] poor repair."[26] This overcrowding would also lead to serious public health problems, including the rapid spread of tuberculosis.[27] For the NAACP, the scarcity of housing made the fight to ban restrictive covenants crucial, both in Washington, D.C., and throughout the nation.[28]

## III. Restrictive Covenants: Creating and Enforcing Residential Segregation

### *A. Characteristics of Racially Restrictive Covenants*

Racially restrictive covenants are private agreements between parties that prohibit the sale or rental of specific parcels of property to non-white buyers.[29] While historically aimed at keeping Black individuals out of white neighborhoods, some restrictive covenants also prevented Asians and Jews from occupying homes in white neighborhoods.[30] In their most common form, restrictive covenants were appended to deeds.[31] In neighborhoods where developers had neglected to incorporate covenants in deeds, they could also take the form of a contract signed by a group of neighbors.[32] If a

---

Francis A. Allen, *Remembering Shelley v. Kraemer: Of Public and Private Worlds*, 67 Wash. U. L. Q. 709, 713 (1989).

[24] Vose, *supra* note 20, at 104; *see also* Allen, *supra* note 23, at 717–18. Allen notes that in Baltimore at the time, 20% of the city's population was Black, yet they occupied 2% of the homes in the city. *Id.* at 718.

[25] Agnes E. Meyer, *Negro Housing: Capital Sets Record for U.S. in Unalleviated Wretchedness of Slums,* Wash. Post, Feb. 6, 1944, at B1.

[26] President's Conference On Home Building And Home Ownership, Report On Negro Housing 26, 45–46 (1932), https://babel.hathitrust.org/cgi/pt?id=UC1.b3603729&view=1up&seq=9, *archived at* https://perma.cc/JE9T-TR49.

[27] *See* Frank Krutnik, *Critical Accommodations: Washington, Hollywood, and the World War II Housing Shortage*, 30 J. of Am. Culture 417, 418–19 (2007).

[28] *See Plan National Attack on Housing Barriers: Map Strategy in All-Out War on Covenants*, Chi. Defender, Sept. 13, 1947.

[29] Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 Pol. Sci. Q. 541, 541 (2001).

[30] *Id.* at 544.

[31] *Id.*

[32] *See* Carol M. Rose & Richard R. W. Brooks, *Racial Covenants and Housing Segregation, Yesterday and Today, in* Race and Real Estate 161, 164 (Adrienne Brown & Valerie Smith eds., 2015).

homeowner violated a restrictive covenant by trying to sell her property to a non-white buyer, the covenant could be enforced through suits brought by neighbors or homeowners' associations.[33] The Hundleys' deed had a restrictive covenant appended, and it used the typical language of the time: "Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars ($2,000) which shall be a lien against said property."[34] While restrictive covenants caused clear economic harm, their dignitary harm should not be understated: These covenants were a formal message that Black families were undesirable neighbors.[35]

### *B. Rise to Prominence*

Restrictive covenants became a popular method for enforcing spatial segregation throughout the country following the Supreme Court's 1917 decision in *Buchanan v. Warley*.[36] The Court held in *Buchanan* that municipal ordinances preventing Black residents from living in certain parts of a community were unconstitutional under the Fourteenth Amendment.[37] Particularly concerning to the Court was the government's interference with private property; they emphasized that municipal ordinances "annulled . . . the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person."[38] While restrictive covenants existed to a limited extent prior to *Buchanan*, they spread rapidly following the case, coinciding with the northern migration of Black families.[39] In a sense, restrictive covenants were the natural progeny of municipal ordinances: Because they were grounded in private contracts instead of local government law, courts could enforce them

---

[33] *Id.* Even if neighbors were not a party to a restrictive covenant in a deed, they could still bring suit to enforce the restrictive covenant, alleging that they were the intended beneficiaries of the restrictive covenant. *See, e.g.*, Henry Upson Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L. Q. 1, 35–36 (1944) (discussing covenants and the third-party beneficiary doctrine); *see also* Aladar F. Siles, *Methods of Removing Restrictive Covenants in Illinois*, 45 CHI.-KENT L. REV. 100, 101 (1968) (noting that restrictive covenants are enforceable by those for whom the benefit was intended).

[34] *Hundley*, 132 F.2d at 23 (internal quotations omitted).

[35] *See* Richard R. W. Brooks & Carol M. Rose, Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms 54, 114 (2013).

[36] 245 U.S. 60 (1917).

[37] *Id.* at 82 (holding racially discriminatory municipal ordinance was "not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law").

[38] *Id.* at 81.

[39] *See* Jones-Correa, *supra* note 29, at 551

without confronting the problem of discriminatory state action prohibited by *Buchanan*.[40]

Despite their status as contracts between private parties, racially restrictive covenants still could have posed a problem from a property law perspective because they were restraints on alienation. Alienation—the right of an owner to dispose, sell, or transfer property at will—is a critical quality of property ownership in the United States.[41] Restrictive covenants written into deeds limited the right of an owner to sell their property at will. While a few courts struck down individual restrictive covenants because the restrictions within them were "wholly incompatible with complete [property] ownership,"[42] far more upheld restrictive covenants, citing the racial restriction as necessary and reasonable.[43] Both within and outside the courts, lawyers were key players in the proliferation of restrictive covenants: By 1944, the American Law Institute endorsed racially restrictive covenants as a valid exception to restraints against alienation in the Restatement of Property, the legal field's most influential property law treatise.[44] With this legal hurdle seemingly overcome, racially restrictive covenants were soon given a stamp of approval by the federal government via the Federal Housing Administration

---

[40] David Delaney, *Geographies of Judgment: The Doctrine of Changed Conditions and the Geopolitics of Race*, 83 Annals Ass'n Am. Geographers 48, 52 (1993); *see also* Brooks & Rose, *supra* note 35, at 54 (suggesting that "[i]f anything, *Buchanan* might have even seemed to work against the NAACP's attacks on racially restrictive covenants, because a central feature of the *Buchanan* decision was the Court's effort to insulate private property owners' decisions from undue governmental intrusion").

[41] *See* W.W. Allen, *Validity of Restraint, Ending Not Later Than Expiration of a Life or Lives in Being, On Alienation of An Estate in Fee*, 42 A.L.R.2d 1243, § 2 (1955). Restraints on alienation were disfavored in English common law and have also been historically disfavored in the United States. *See, e.g.*, 3 Thompson on Real Property § 29.03(b) (2019); Merrill I. Schnebly, *Restraints Upon the Alienation of Legal Interests: I*, 44 Yale L. J. 961, 961 (1935).

[42] White v. White, 150 S.E. 531, 539 (W. Va. 1929) (striking down racially restrictive covenant on alienation grounds and noting that "[i]f large numbers of possible buyers are cut off by the hand of the grantor, then . . . the grantee ceases to be in control of his own property"); *see also* Title Guar. & Tr. Co. v. Garrott, 183 P. 470, 473 (Cal. Ct. App. 1919) (striking down racially restrictive covenant and stating that "[n]o matter how large or how partial and infinitesimal the restraint may be," limits on alienation are forbidden by "the principles of natural right, the reasons of public policy, and [ ] principle[s] of the common law").

[43] Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 19–22 (1959); *see also* Carol M. Rose, *Property Law and the Rise, Life, and Demise of Racially Restrictive Covenants* (Univ. of Arizona Coll. of Law, Legal Studies Discussion Paper No. 13-21, 2013), https://ssrn.com/abstract=2243028, *archived at* https://perma.cc/C8NC-AR55 (noting that some states viewed racial restrictions as reasonable, "apparently on the easy assumption that racial restrictions would enhance property values, and analogizing them . . . to restrictions on factories, gas stations or liquor establishments").

[44] Restatement of Prop. § 406 cmt. 1 (1944) ("In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is reasonable and hence valid if the area involved is one reasonably appropriate for such exclusion . . . ."); *see also* Ware, *supra* note 9, at 738.

Underwriting Manual, which stated that a stable neighborhood needed properties "occupied by the same social and racial classes."[45]

By the 1940s, civil rights lawyers understood restrictive covenants in Washington, D.C., as the brainchild of stalwart segregationists, facilitated by the structure of homeowners' associations. NAACP lawyer Spottswood W. Robinson III described these homeowners' associations as composed of "agitators, whose purpose and function is to stir the neighborhood into the execution of segregation agreements."[46] Homeowners' associations were not subtle about their aims. One association in Washington, D.C.'s Bloomingdale neighborhood published a flyer to inform homeowners that Bloomingdale was "threatened in certain quarters by an invasion of undesirable residents, but this invasion has been checked by the efforts of the Executive Committee of Bloomingdale Owners."[47] Henry Gilligan, the lawyer who would eventually fight to evict the Hundleys, expressed his support of the association and shared a letter he had sent to a Black homeowner:

> You will understand, of course, that this committee is organized for the purpose of maintaining white ownership of all property in our community. I hope you will believe me when I say that we have no animosity towards you, or any other negroes. I wish it were possible to solve this perplexing question of property ownership amicably.[48]

However, homeowners' associations were just part of the picture—developers, real estate boards, and even newspapers also mobilized to support and enact restrictive covenants.[49] For example, the Washington *Evening Star* refused to print advertisements offering restricted property for sale to Black purchasers.[50] Segregationist agitators may have led the charge, but they were assisted by their neighbors' complicity: White citizens' prevailing attitudes at the time helped maintain segregated neighborhoods, and lawyers and judges cooperated every step of the way, developing powerful pro-segregation

---

[45] FED. HOUS. ADMIN., UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT § 937 (1938), https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Housing-Administration-Underwriting-Manual.pdf, *archived at* https://perma.cc/7DHW-CB6W.

[46] Vose, *supra* note 20, at 106.

[47] *Bloomingdale An Ideal Place for Homes*, N. CAPITOL CITIZEN, Jan. 9, 1925, *in* NAACP Papers, Folder 001521-004-0381, ProQuest History Vault.

[48] Henry Gilligan, *Some Facts About a Covenant Prohibiting the Sale, Rental, or Leasing of Property to Colored in Deeds*, N. CAPITOL CITIZEN, Jan. 9, 1925, *in* NAACP Papers, Folder 001521-004-0381, ProQuest History Vault. For more on Gilligan's multi-decade legal career working to make sure that Black purchasers were kept out of neighborhoods subject to restrictive covenants, see VOSE, *supra* note 43, at 74.

[49] *See, e.g.*, VOSE, *supra* note 43, at 77; Ware, *supra* note 9, at 748 n.55.

[50] VOSE, *supra* note 43, at 77.

grassroots infrastructure.[51] Restrictive covenants were thus part of a collective strategy to embed racial segregation throughout the capital.[52]

### *C.* Corrigan v. Buckley *and Complexion Changes*

The NAACP started challenging restrictive covenants in the 1920s, arguing that they violated the Fourteenth Amendment and that they were unlawful restraints on alienation.[53] However, in 1926, the Supreme Court dismissed the NAACP's appeal in *Corrigan v. Buckley*[54] and upheld a restrictive covenant in Washington, D.C.[55] *Corrigan* involved a white property owner, Irene Hand Corrigan, who attempted to sell her home to a Black purchaser, Helen Curtis, the wife of a prominent Black ophthalmologist.[56] Corrigan's neighbor, John Buckley, sued to enforce a restrictive covenant previously signed by twenty-eight residents, including Corrigan.[57] Curtis and Corrigan's lawyer, James Cobb, sought help from NAACP lawyers, Moorfield Storey and Louis Marshall, in arguing the case before the Court.[58] While Cobb was optimistic about their chances of success, Storey and Marshall were concerned with the technical challenges and imperfections in the record.[59] They were right to be concerned. The Court held in *Corrigan* that the Fourteenth Amendment and the Fifth Amendment's due process protections applied only to government conduct, and not the conduct of private parties—meaning that racially restrictive covenants between private individuals were valid and enforceable.[60] In defeat, the NAACP began a nationwide

---

[51] Ware, *supra* note 9, at 748 n.55 ("This aggregate of power, *i.e.*, the real estate board, the leading newspaper, and the citizens' associations, clearly establishes that the covenants were not private agreements between consenting parties. They were, in reality, the result of the activities of organized forces which would have been unconstitutional under *Buchanan* . . . if the municipal government had performed the same functions."); *see also* Delaney, *supra* note 40, at 52 (describing grassroots collectives as taking on the function of private governments).

[52] *See* Delaney, *supra* note 40, at 52.

[53] *See, e.g.*, Corrigan v. Buckley, 271 U.S. 323, 324, 326 (1926) (arguing that restrictive covenants "deprive [Black buyers] of their liberty and property without due process of law" and are restraints on alienation "contrary to public policy").

[54] 271 U.S. 323 (1926).

[55] *Id.* at 332.

[56] *Id.* at 327; *Bar Mrs. Helen Curtis from Home: Must Fight in Order To Buy a Home*, CHI. DEFENDER, Nov. 25, 1922 (noting that Mrs. Corrigan first told neighbors that she "did not know that Mrs. Curtis was a [Black] woman," but later changed her position and "informed her objecting neighbors that she . . . intended to go through with the sale"); Mara Cherkasky, *For Sale to Colored: Racial Change on S Street, N.W.*, 8 WASH. HIST. 40, 48 (1996).

[57] *See* Louis R. Lautier, *Supreme Court Hears Segregation Plea: Highest U.S. Tribunal Hears Case*, PITT. COURIER, Jan. 16, 1926, at 1–2.

[58] *See* VOSE, *supra* note 43, at 52–53.

[59] *See* Sec'y, NAACP Nat'l Bd. of Dirs., Report of the Secretary for the May Meeting of the Board 6 (May 1924), *in* NAACP Papers, Folder 001412-004-0444, ProQuest History Vault ("Mr. Cobb feels that the [*Corrigan*] case will be won."); VOSE, *supra* note 43, at 53 (discussing Storey's and Marshall's concerns with *Corrigan*).

[60] *See Corrigan*, 271 U.S. at 329–31.

push against restrictive covenants and began to strategize on how to accompany constitutional claims with policy arguments.[61]

Ironically, the specific restrictive covenant aimed at keeping Black residents out of the 1700 block of S Street at issue in *Corrigan* proved ineffective. While the case was pending, Black families continued to move into the disputed area.[62] One such individual was Emmett Jay Scott, Secretary-Treasurer of Howard University, who bought the house three doors down from the *Corrigan* property and moved his furniture in overnight.[63] A white neighbor, Louis Fosse, brought suit against Dr. Scott for restrictive covenant violation, but the case fizzled when Fosse sold his own home to a different Black purchaser.[64] By 1925, attorney William Houston—father of Charles Hamilton Houston—had also moved onto S Street with his family.[65] The street, filled with handsome rowhouses, soon became known as a cohesive upper–middle class Black community.[66]

*Corrigan* and the cases that followed in the late 1920s and early 1930s sowed the seeds of the change of neighborhood doctrine in a very a public way, as Black newspapers analyzed and commented on the futility of restrictive covenants in certain parts of the city. The *Baltimore Afro-American* had a succinct headline for the phenomenon: "COURT SO SLOW WHITE BLOCKS TURNED COLORED."[67] The *Chicago Defender* described the situation in *Corrigan* as a "complexion change[ ]," noting that appellee Buckley had left the neighborhood and Buckley's attorney had sold his own property on S Street "to members of our Race."[68] By the time of *Corrigan*'s resolution, there were only two or three signers of the restrictive covenant still living on the street.[69] This neighborhood shift prompted backlash from white Washingtonians, who were fearful that formerly all-white enclaves

---

[61] *See* VOSE, *supra* note 43, at 57–58.

[62] *See* Louis Lautier, *While Lawyers Argue Block Becomes Black: Famous Curtis Segregation Case Took Three Years to Reach Supreme Court*, BALT. AFRO-AM., Jan. 16, 1926, at 1.

[63] *See Outwits D.C. Whites*, BALT. AFRO-AM., Apr. 20, 1923, at 6; *see also* ASCH & MUSGROVE, *supra* note 15, at 246.

[64] *See* Letter from George E.C. Hayes, Attorney, to James Weldon Johnson, Exec. Sec'y, NAACP (Dec. 31, 1926) *in* NAACP Papers, Folder 001423-006-0365, ProQuest History Vault ("All of this neighborhood, as you know, has since gone colored and it is more or less apparent that nothing will be further done in this case especially since the plaintiff, Louis J. Fosse, has recently himself sold to a colored purchaser. The dismissal of the suit is consequently anticipated in the immediate future.").

[65] *See* Cherkasky, *supra* note 56, at 49.

[66] *See id.*; *see also* Shoenfeld & Cherkasky, *supra* note 22, at 31.

[67] *Court So Slow White Blocks Turn Colored: Third Court Action to Keep Colored Folk from Bloomingdale Section Filed*, BALT. AFRO-AM., Aug. 14, 1926, at 2.

[68] *Washington Ignores High Court Ruling: Citizens Continuing to Take over Homes*, CHI. DEFENDER, June 19, 1926, at 2.

[69] *See id.*

would diversify.[70] While some fled to the suburbs, others doubled down on restrictive covenants as a form of racial solidarity.[71]

## IV. The NAACP's Strategy for Challenging Restrictive Covenants

The NAACP fought restrictive covenants through a national, multi-decade litigation campaign.[72] As early as the 1920s, NAACP leadership emphasized, "We have been laying the ground for a nationwide campaign on this issue and particularly to arouse colored people to a realization of the necessity of fighting these cases to the bitter end."[73] NAACP lawyers brought cases challenging covenants all over the country,[74] and the organization held a conference on the issue in Chicago in the summer of 1945 to discuss strategy and collaboration.[75]

The Chicago Conference highlighted the variety of approaches that NAACP lawyers used to fight restrictive covenants in court. These strategies included public policy arguments based on the quality and availability of housing in cities; property law arguments about change of neighborhood and unlawful restraints on alienation; constitutional challenges under the Fourteenth Amendment; and attempting to invalidate covenants based on technical or procedural grounds.[76] The argument that would ultimately win the day in *Shelley v. Kraemer* was based on state action—the idea that even if ra-

---

[70] *See* Asch & Musgrove, *supra* note 15, at 244, 246 (arguing that the rapid change around S Street following *Corrigan* "confirmed the fears" of white citizens that neighborhoods would start to diversify).

[71] *See, e.g.*, *Bloomingdale an Ideal Place for Homes*, *supra* note 47.

[72] *See* Vose, *supra* note 43, at ix.

[73] Letter from Walter White, Exec. Sec'y, NAACP, to Archibald Grimké, President, NAACP Washington, D.C. Branch (Oct. 28, 1924) *in* NAACP Papers, Folder 001521-001-0865, ProQuest History Vault.

[74] *See, e.g.*, Stone v. Jones, 152 P.2d 19, 23 (Cal. Dist. Ct. App. 1944) (upholding restrictive covenant against NAACP challenge); Burkhardt v. Lofton, 146 P.2d 720, 725 (Cal. Dist. Ct. App. 1944) (same); *What the Branches Are Doing*, Crisis, Sept. 1946, at 280 (describing restrictive covenant challenges filed by the Michigan NAACP branch in the early 1940s).

[75] *See* Letter from Thurgood Marshall, Special Counsel, NAACP, to Oscar Brown, President, NAACP Chicago Branch (June 12, 1945) *in* NAACP Papers, Folder 001521-020-0495, ProQuest History Vault (noting that "[t]he problem of restrictive covenants is increasing and for that reason we believe it necessary to get together as many lawyers as possible who are handling these cases in a meeting where we can exchange viewpoints on the question of the law and necessary procedure involved" and requesting space for a Chicago gathering); *see also* Meeting Minutes, NAACP Conference on Restrictive Covenants 1 (July 9, 1945), *in* NAACP Papers, Folder 001521-020-0495, ProQuest History Vault.

[76] *See generally* Meeting Minutes, NAACP Conference on Restrictive Covenants (July 9, 1945), *in* NAACP Papers, Folder 001521-020-0495, ProQuest History Vault; Meeting Minutes, NAACP Conference on Restrictive Covenants (July 10, 1945), *in* NAACP Papers, Folder No. 001521-020-0495, ProQuest History Vault. For examples of cases in which the NAACP utilized these strategies, see Sipes v. McGhee, 25 N.W.2d 638, 644 (Mich. 1947) (addressing arguments against restrictive covenant based on alienation, constitutional rights, and public policy), *rev'd sub nom.* Shelley v. Kraemer, 334 U.S. 1 (1948); Kraemer v. Shelley, 198 S.W.2d 679, 681 (Mo. 1946) (addressing argument that the restrictive covenant should be invalidated on technical grounds if not signed by all neighbors), *rev'd*, 334 U.S. 1 (1948).

cially restrictive covenants were private agreements between parties, judicial enforcement of these covenants meant that the state was involved, and thus acting in violation of the Fifth and Fourteenth Amendments.[77] However, the court of public opinion was almost as important to the NAACP's lawyers and organizers as the legal battle, and a significant part of the fight against restrictive covenants was a national educational campaign, aimed at teaching both courts and the public about the effects of restrictive covenants on Black citizens and the necessity of fighting them.[78]

The change of neighborhood doctrine, as articulated by Houston, was a pragmatic strategy for challenging restrictive covenants—it could showcase public policy concerns about the lack of available housing for Black residents, but it was not an argument about constitutional rights.[79] Change of neighborhood is a property law doctrine that holds that a restrictive covenant may be invalid or unenforceable by a court in equity when there has been such a radical neighborhood change that "enforcement would not tend to, or have any effect toward, the carrying out of the original purpose for which the restriction was imposed."[80] This doctrine "recognizes a certain public policy that land shall not be unnecessarily burdened with permanent or long-continued restrictions."[81] Houston suggested using the doctrine in situations where the covenanted property was in a neighborhood that was already becoming predominantly Black-occupied.[82] It had limited application: Other NAACP lawyers attempted to use the argument but noted its unavailability in situations where Black residents were among the first to move into a majority-white neighborhood.[83] In Washington, D.C., where Houston litigated, courts were amenable to the argument in theory but applied it narrowly, focusing whether or not the arrival of Black residents had caused such a change to the neighborhood that there would be a pecuniary advantage to the white property owners to removing the restrictive covenant.[84] *Hundley*, dis-

---

[77] *See Shelley*, 334 U.S. at 19 ("We have no doubt that there has been state action in these cases . . . but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."); *see also* VOSE, *supra* note 43, at ix.

[78] *See* Meeting Minutes, NAACP Conference on Restrictive Covenants 5 (July 10, 1945), *in* NAACP Papers, Folder No. 001521-020-0495, ProQuest History Vault. Public education was one of the focuses of the Chicago Conference, which included discussions on how lawyers had been using the "court as a forum" to "get[ ] the public educated on just who are parties to covenants." *Id.*

[79] *See generally* Houston, *supra* note 1.

[80] *See Change of Neighborhood in Restricted District as Affecting Enforcement of Restrictive Covenant*, 54 A.L.R. 812 (1928).

[81] *Id.*

[82] *See generally* Houston, *supra* note 1, at 3.

[83] *See* Michigan Report, NAACP Conference on Restrictive Covenants (July 9, 1945), *in* NAACP Papers, Folder No. 001521-020-0495, ProQuest History Vault ("Since all of our suits have been brought against the first Negro to enter the subdivision . . . [w]e have to avoid [the change of neighborhood] argument as much as possible . . . .").

[84] *See* Grady v. Garland, 89 F.2d 817, 819 (D.C. Cir. 1937) (declining to strike down a covenant on change of neighborhood doctrine grounds); *see also* Alfred L. Scanlan, *Racial*

cussed in more detail below, was the primary success story of the change of neighborhood doctrine as used by the NAACP.

## V. *Hundley v. Gorewitz*

Looking back, Charles Hamilton Houston would say that the *Hundley* case "was won by maneuvering."[85] The Hundleys purchased their home at 2530 Thirteenth Street from a white seller, Nelson D. Holmes.[86] At the time of purchase, they were aware that the deed contained a restrictive covenant, but relied on their real estate agent, who represented that the restrictive covenant was invalid.[87] Mary Hundley knew that another Black family had already moved into the street, which also persuaded the Hundleys that they would have no trouble living there as well.[88] The racially restrictive covenant on 2530 Thirteenth Street dated back to 1910.[89] Five other homes on the block had been built by the same builder, four of which featured identical restrictive covenants in their deeds.[90] However, the whole block was not covenanted—an attempt had been made in 1928 to have all individuals on both sides of the block sign a new contract-based restrictive covenant, but it had failed.[91]

On April 7, 1941, two sets of white neighbors, the Gorewitzes and the Bogikes, brought suit against the Hundleys in federal court, demanding enforcement of the property's restrictive covenant.[92] Despite Houston's best attempts, D.C. District Court Judge Matthew McGuire enjoined the Hundleys from "ever owning, occupying, selling, leasing, transferring, or conveying" the property.[93] The Hundleys were evicted. Angry and saddened, they rented the home to a white tenant while Houston filed an appeal.[94] Houston's

---

*Restrictions in Real Estate—Property Values Versus Human Values*, 24 Notre Dame L. Rev. 157, 164 (1949).

[85] Houston, *supra* note 1, at 4.

[86] Brief for Appellants at 2, Hundley v. Gorewitz, 132 F.2d 23 (D.C. Cir. 1942) (No. 8154), *in* Papers of Mary Gibson Hundley, Box 2, Folder 17, Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study [hereinafter Brief for Appellants].

[87] App. to Brief for Appellants at 74, Hundley v. Gorewitz, 132 F.2d 23 (D.C. Cir. 1942) (No. 8154), *in* Papers of Mary Gibson Hundley, Box 2, Folder 17, Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study [hereinafter App. to Brief for Appellants].

[88] *Interview with Mary Gibson Hundley*, *supra* note 2, at 3:20; *see also File Appeal In D.C. Covenant Fight*, Chi. Defender, Dec. 20, 1941 (reporting that "two houses in the block are owned by Negroes, although not encumbered by covenants, and . . . the neighborhood is becoming 'mixed'").

[89] Brief for Appellants, *supra* note 86, at 4–5.

[90] *Id.* at 2–3.

[91] *Id.* at 3–4.

[92] *Id.* at 4–5.

[93] *Id.* at 19–20.

[94] The Hundleys were not even allowed to enter the property to get keys from their renter. *See* Letter from Charles Hamilton Houston to Mary and Frederick Hundley (June 26, 1942), *in* Papers of Mary Gibson Hundley, Box 2, Folder 17, Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study (noting that "Mr. Gilligan has

change of neighborhood argument prevailed at the D.C. Circuit Court of Appeals, and over a year after the Gorewitzes sought to remove them, the Hundleys moved back into their home.[95]

### *A.* Hundley *as a Public Policy and Educational Tool*

At the Court of Appeals, Houston advanced creative arguments under the umbrella of change of neighborhood doctrine, designed to highlight the public policy argument that restrictive covenants were exacerbating the city's housing crisis for Black citizens. Houston also used the doctrine as an educational tool to highlight the illogical segregationist views of his opponents.

Houston took the view that policy-based arguments invoking the change of neighborhood doctrine should start by "establish[ing] the pattern of growth of the city" and then depicting the harms caused by restrictive covenants' interference.[96] Consequently, the policy argument he lays out in the *Hundley* appellate briefing argues that restrictive covenants in Washington, D.C., are a futile and inadvisable attempt to "freeze the civic pattern" of the city at one particular moment in time.[97] He points out that restrictive covenants have led to overcrowding in the few neighborhoods where Black residents can live, meaning that they have to "pile more persons into a house" to pay rent.[98] This phenomenon in turn leads to the creation of "slum and depressed areas."[99] Houston emphasizes that white citizens are also suffering from the existence of covenants in the form of "crime, immorality, disease and fear of violence" generated by these slums.[100] With this background established, he argues that application of the change of neighborhood doctrine would be the just and practical policy solution. Its application would increase the number of accessible housing units and would create long-term economic benefits for the city because "Negro home purchasers tend to peg the falling values or even increase them because the demand of Negroes for homes always exceeds the supply."[101] Houston also notes that the request is small: Black residents are "not asking the courts to compel white people to sell property to them against their will," but simply asking that "when a white person voluntarily makes up his mind to sell to a Negro, the sale should not be enjoined because [of a prior owner's restrictive covenant]."[102]

---

arranged with the US Marshal to accept the keys from you and hold the premises . . . [a]s the property passes into and under control of the law, you cannot enter the premises").

[95] *See Court Refuses to Enforce Deeds Barring Negroes*, WASH. Post, Dec. 16, 1942.

[96] Houston, *supra* note 1, at 3.

[97] Brief for Appellants, *supra* note 86, at 17.

[98] *Id.* at 17.

[99] *Id*.

[100] *Id.* at 18.

[101] *Id.* at 21.

[102] *Id.* at 19.

Houston backed up his statements with expert testimony. At the district court, he introduced James Ring, an administrative officer with the Alley Dwelling Authority,[103] to speak to the dire housing shortage in Washington, D.C., and the movement of the city's Black population up the Thirteenth Street corridor, "covenant or no covenant."[104] The judge prevented Houston from introducing testimony from his second expert, sociologist Dr. E. Franklin Frazier, on how neighborhoods cycle from renter- to owner-occupied and how Black homeowners increase property values,[105] but Houston would use Frazier as an expert in later cases to emphasize this point.[106] *Hundley* marked the beginning of Houston's use of sociological and economic experts in restrictive covenant cases, which allowed him to better display the "network of interests" that created and enforced segregated housing in Washington, D.C.[107] In so doing, he forced courts to leave behind the notion that restrictive covenants were simply private contracts between two consenting parties—rather, they were pernicious tools that furthered the city's housing crisis.

Houston also used change of neighborhood in the *Hundley* case as an educative tool to make white individuals reflect on their illogical views about segregation. This tactic can be best seen in his cross-examinations of the Hundleys' neighbors. Below are examples from Houston's questioning of Rebecca Gorewitz:

> Q. You have not had any trouble with the Hundleys?
> A. No, sir.
> Q. They have minded their own business, and so far as you know they have been respectable neighbors?
> A. . . . They are respectable people, yes, they are schoolteachers.[108]

> Q. And your objection is that when Negroes come in your property depreciates?
> A. Exactly.
> Q. Is that your only objection?
> A. That is my first objection, and the second objection is that we do not want to live next to colored people.[109]

---

[103] The Alley Dwelling Authority was a congressional program created to research and make recommendations to address the problems associated with slums and alley-based housing in Washington, D.C. *See* Bell Clement, *Wagner-Steagall and the D.C. Alley Dwelling: Authority: A Bid for Housing-Centered Urban Redevelopment, 1934–1946*, 78 J. Am. Plan. Ass'n 434, 435–38 (2012).

[104] App. to Brief for Appellants, *supra* note 87, at 64–65.

[105] *Id.* at 83.

[106] *See* Ware, *supra* note 9, at 749–50 (noting that Dr. Frazier was an expert in Hurd v. Hodge, 162 F.2d 233 (D.C. Cir. 1947)).

[107] *See id.* at 748.

[108] App. to Brief for Appellants, *supra* note 87, at 33.

[109] *Id.* at 34–35.

> Q. Mrs. Gorewitz, if you were shown and it was proven to you that the moving in of Negroes into a neighborhood would not depreciate the value of your property, would that overcome one of your objections?
> A. I do not understand.[110]

Houston also showcased the irrationality of segregationist views through an argument based on the "one drop rule": If one drop of blood was enough for a person to be considered Black, a court should be willing to find that a neighborhood became predominantly Black and apply the change of neighborhood doctrine upon the arrival of one Black family.[111] He described this argument as "play[ing] whites on their own prejudices."[112] In the *Hundley* brief, Houston asks the court for uniformity:

> [A]ppellants respectfully call attention to the difference between the way prejudice works on human beings and on property. When it comes to human beings one drop of Negro blood classifies the entire person a Negro for purposes of discrimination and segregation. Yet when it comes to property that white people wish to keep[,] Negroes have to preponderate before the neighborhood becomes black. We appeal to reason and the latent sense of fairness in the Court to wipe out such inconsistencies.[113]

Houston believed that pointing to these discrepancies would sow seeds of doubt, eventually causing white individuals to question their preconceived notions of race.[114]

While judges acknowledged and wrote about the public policy implications of restrictive covenants, they did not address the irrationality of racism in *Hundley* or in the cases that followed, making it difficult to gauge this argument's effectiveness.[115] However, considering that the restrictive covenant cases were in the public eye and frequently in the news, Houston was likely speaking to a wider audience than the D.C. Circuit and aiming to make the general public grapple with their own segregationist ideologies. He viewed the courts as "forum[s] for the purpose of educating the public on the question of restrictive covenants . . . ."[116]

---

[110] *Id.* at 37.

[111] For information on the origins of the "one drop" rule, see Winthrop D. Jordan, *Historical Origins of the One-Drop Racial Rule in the United States*, 1 J. Critical Mixed Race Stud. 98, 103–04 (2014).

[112] Houston, *supra* note 1, at 3.

[113] Brief for Appellants, *supra* note 86, at 43.

[114] Houston, *supra* note 1, at 3–4.

[115] *See, e.g.*, Mays v. Burgess, 147 F.2d 869, 875 (D.C. Cir. 1945) (Edgerton, J., dissenting) (discussing public policy implications of restrictive covenants).

[116] Houston, *supra* note 1, at 1.

### *B.* Hundley *as Pragmatic Lawyering*

In *Hundley* and the restrictive covenant cases that followed, Houston employed a pragmatic approach. To win cases and keep Black families in their homes, he was willing to employ arguments that temporarily accepted residential segregation, and he was also willing to work with self-serving covenant breakers if necessary. For Houston, the ultimate goal was a nation without restrictive covenants, and the immediate path to getting there was less important. He encouraged NAACP lawyers to use any tactics they could to get restrictive covenants invalidated.[117] Invalidating as many covenants as possible would start to address the housing crisis for Black families, create a body of favorable case law, and allow lawyers to figure out which tactics were worth pursuing to the Supreme Court. In addition, Houston's choice to represent the Hundleys might also speak to his pragmatic lawyering—as cultured, highly educated teachers, Mary and Frederick Hundley personified W.E.B. DuBois's idea of a "Talented Tenth" who would lead the Black community and had the potential to be very sympathetic plaintiffs.[118]

Scholars have painted Houston as a legal pragmatist in other contexts, including in his development of the NAACP's school desegregation campaign, which challenged segregation in education in incremental steps.[119] In the years after *Shelley v. Kraemer*, the organization shifted under Thurgood Marshall's leadership towards a strategy that only accepted frontal attacks on segregation, leaving less room for Houston-style pragmatic strategies that could be criticized for prioritizing ends over principles.[120]

---

[117] *See, e.g.*, *id.* at 1, 4–5.

[118] *Cf.* W.E.B. DuBois, *The Talented Tenth*, *in* The Problem of the Color Line at the Turn of the Twentieth Century 209, 209–10 (Nahum Dimitri Chandler ed., 2013). On the NAACP's plaintiff-selection strategy, see Kirk A. Kennedy, *Thurgood Marshall's Enduring Legacy: A Prescription for the 1990s Public Interest Lawyer*, 38 Howard L.J. 383, 397–401 (1995) (book review).

[119] *See, e.g.*, Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. Am. Hist. 884, 901–03 (1987). Houston is not the only twentieth-century civil rights lawyer to have pursued a course that scholars have characterized as pragmatic. Tomiko Brown-Nagin has written about the pragmatic civil rights approach taken by NAACP lawyer A.T. Walden in the face of a housing crisis in Atlanta; she notes that his strategy "privileged politics over litigation, placed a high value on economic security, and rejected the idea that integration . . . and equality were one and the same." Tomiko Brown-Nagin, Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement 2 (2011).

[120] *See* Mark Tushnet, The NAACP's Legal Strategy Against Segregated Education, 1925-1950 115 (1987) (discussing 1948 NAACP Board policies prohibiting cooperation in any case that "purports to recognize the validity of segregation statutes or ordinances"); *see also* Brown-Nagin, *supra* note 119, at 453 n.4 (discussing pragmatism and Tushnet's characterization of the NAACP's shifting strategy).

### *1. The Change of Neighborhood Doctrine and Ideological Compromise*

As an argument, change of neighborhood is an ideological compromise because it takes as a given the separation of races and segregated neighborhoods. Even when considering whether the doctrine applied, courts did not stray from the premise that white and Black individuals should not be neighbors.[121] Howard University sociologist William Henry Jones wrote prior to the *Hundley* case that neighborhood change occurs because "[w]hite people with considerable social and economic status . . . do not prefer to live in culturally heterogeneous communities."[122] The language of the *Hundley* decision and the following change of neighborhood cases emphasize this ideology. White sellers are considered reasonable for wanting to leave as neighborhoods shift, and Black newcomers are described by courts as an "invasion" or "infiltration" of white spaces.[123] Houston himself strategized using a variant of this idea—he described the movement of Black residents as a "tide . . . taking block after block."[124] Houston's briefs in *Hundley* never speak to the idea that an integrated neighborhood could be the end goal. *Hundley* is about assessing where the boundary is located between Black and white spaces, and if the boundary is shown to be unstable or moving, the doctrine can be applied.[125]

Houston knew this argument was a compromise: He remarked at the Chicago Conference that one way to knock down the ghetto was to broaden it to fill the whole city. He took the following stance: "I don't think that in the interim in which we are trying to build our technique for knocking [restrictive covenants] out that we should neglect making any progress we can."[126] In the *Hundley* briefing, Houston notes that the neighborhood is diversifying regardless of the restrictive covenants in place, and reminds the court that "injunctions had not served to prevent the [Hundleys'] neighborhood from changing from white to colored."[127] Houston was aided by the fact that the *Hundley* restrictive covenant was particularly weak—only five houses had restrictive covenants, and the surrounding streets did not.[128] A sense of inevitability drives the change of neighborhood doctrine: If the street is not going to stay white anyway, courts need not bother upholding segregation enforcement mechanisms.

---

[121] *See, e.g.*, *Hundley*, 132 F.2d at 24–25.
[122] JONES, *supra* note 19, at 59.
[123] *See* Delaney, *supra* note 40, at 56.
[124] Houston, *supra* note 1, at 3.
[125] *See* Delaney, *supra* note 40, at 56.
[126] Houston, *supra* note 1, at 1.
[127] Brief for Appellants, *supra* note 86, at 6.
[128] *Id.* at 10.

### 2. *Converging Interests: Black Buyers, White Sellers, and Blockbusters*

The theory of interest convergence offers a possible insight into the invalidation of restrictive covenants in *Hundley* and similar cases because of the role played by covenant-breakers. Critical race theorist Derrick Bell described interest convergence as the idea that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[129] The actions of white residents and blockbusters were key to the change of neighborhood argument, and both groups contributed to the fight against restrictive covenants when financial incentives aligned. Interest convergence does not account for every instance of restrictive covenant invalidation—the NAACP attacked the covenants through a variety of strategies and faced substantial hostility in doing so—but judges were sympathetic to the problem posed by restrictive covenants when framed as an economic issue for white homeowners. Houston capitalized on this sympathy and took advantage of aligned interests whenever possible.

Houston had a clear theory of who was responsible for neighborhood change: "Negroes do not break the covenants. They are broken by whites when the property becomes less desirable for white occupancy . . . ."[130] He developed this idea in *Hundley*, arguing in the briefing that "it is a fallacy to speak of Negroes causing a change in the neighborhood . . . . [T]heir appearance is a result of previous changes in the neighborhood antedating their presence."[131] By emphasizing the role played by white individuals in this process, Houston was able to show courts that neighborhood change was part of a city's natural development. He was also able to emphasize that restrictive covenants caused harm to white homeowners who actively wanted to sell their property.

White residents who helped break restrictive covenants were generally motivated by financial considerations, often accompanied by the belief that it was impossible to preserve all-white neighborhoods in certain urban areas. Washington, D.C.'s patchwork of restrictive covenants meant it was rare for every house in a specific geographic area to be covenanted; thus, as Black residents moved into non-covenanted properties, white neighbors tried to sell and get out.[132] By the 1930s, many white homeowners were attempting to be released from restrictive covenants or breaking them outright.[133]

---

[129] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[130] Houston, *supra* note 1, at 5.

[131] Brief for Appellants, *supra* note 86, at 20.

[132] Shoenfeld & Cherkasky, *supra* note 22, at 32; *see also* BROOKS & ROSE, *supra* note 35, at 58 (noting that "white owners sometimes found themselves prevented by covenants from renting or selling to the only persons—minority members—who would realistically bid on their properties").

[133] Shoenfeld & Cherkasky, *supra* note 22, at 32.

There were several ways that white individuals assisted Black homebuyers in changing neighborhoods. First, some Black homebuyers used white "strawmen" to acquire property—a white intermediary would purchase a covenanted property and then immediately resell it to the Black buyer.[134] Other white sellers simply ignored restrictive covenants and sold their covenanted property to Black purchasers, without strawmen involved.[135]

Some white homeowners negotiated with their homeowners' associations and even begged to be released from restrictive covenants when they could not find white buyers for their property. In 1929, the *Baltimore Afro-American* reported on a homeowners' association meeting where a white homeowner could not find a white purchaser because of "the nearness of colored people" around his property.[136] With relish, the paper noted that "the man was almost in tears as he told his story of unwillingness to sell to colored persons and inability to sell to whites."[137] Economic pressures were a consistent theme echoed by individuals trying to withdraw from restrictive covenants. In a letter to the Bloomingdale homeowners' association, one white couple, the Russells, lamented:

> We find it absolutely necessary to withdraw our signatures from the covenant you persuaded us to sign last fall. We feel that we have for years done all that we possibly could to assist you in maintaining a white neighborhood. We signed with the understanding that the covenant was null and void unless everyone in the block signed. We know that everyone has not signed. Moreover, we signed after being assured that some of the residents concerned had signed, who have since advertised and sold. Every effort on our part has been put forth to avoid this, we have wasted money, time and strength, not to mention hours and hours of anxiety, and now we cannot meet our obligations.[138]

The Russells sold their home to Black purchasers and were subsequently sued by their neighbors.[139] They sought legal assistance in their case from the NAACP.[140] The D.C. Circuit ultimately held that the Russells' letter did not

---

[134] Ware, *supra* note 9, at 742.

[135] *Id.*

[136] *CANNOT SELL TO WHITES; WON'T TO NEGROES: D. C. Segregationists 'Carry On' in Protest Meeting*, BALT. AFRO-AM., Oct. 5, 1929, at 1.

[137] *Id.*

[138] Russell v. Wallace, 30 F.2d 981, 982 (D.C. Cir. 1929).

[139] *Id.* at 981.

[140] Letter from George E.C. Hayes, Attorney, to James Weldon Johnson, Exec. Sec'y, NAACP (Apr. 4, 1928) *in* NAACP Papers, Folder No. 001521-004-0613, ProQuest History Vault ("The [w]hite sellers in [the *Russell*] case are bearing half of the expenses as the communication will indicate . . . .").

operate as a withdrawal from the restrictive covenant, and forced the new Black homeowners to vacate the premises.[141]

Lastly, blockbusters occupied a controversial space in the breaking of restrictive covenants and changing of neighborhoods. Blockbusters were real estate speculators, both white and Black, who broke restrictive covenants by convincing white property owners to sell their houses, often by generating fear that Black people would be moving into the neighborhood.[142] Blockbusters would then turn around and proceed to sell those same houses to Black families at a very large profit, undeterred by scorn from all sides.[143] In the *Hundley* case, it is likely that the white seller who sold the Thirteenth Street property to the Hundleys was a blockbuster—the seller, Nelson Holmes, is described by opposing counsel Henry Gilligan as "a very excellent real estate dealer. He has done some things I would not do, but he is a very excellent real estate dealer."[144] During his cross-examination by Houston, Holmes conceded that he never really considered living in the property himself but noted that the Hundleys' improvements increased the property value.[145] To Gilligan, he added: "I would rather live next door to the Hundleys than Mrs. Gorewitz."[146]

NAACP leadership was conflicted on how to address blockbusting, but Houston, operating again from a pragmatic space, viewed the blockbusters as performing a necessary service in the campaign against restrictive covenants.[147] At the Chicago Conference, NAACP lawyer David Grant brought up that "[t]here is a lot of community disapproval on profiteering," likely because blockbusters were responsible for price inflation.[148] Houston asserted that regardless, NAACP lawyers should "go completely to their aid."[149] Overall, Houston's strategy can be described as a process of attacking restrictive covenants from all angles and working with whoever he needed to in order to see where a court would be willing to bite.

## VI. *Hundley*'s Outcome and Aftermath

In *Hundley*, Houston prevailed. The D.C. Circuit struck down the restrictive covenant on 2530 Thirteenth Street, holding that the neighborhood had "so changed in its character and environment" that enforcement would "substantially lessen the value of the property."[150] Still, it took months

---

[141] *Russell*, 30 F.2d at 982–83.

[142] *See* Richard Rothstein, The Color of Law 95–96 (2017); Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 Fordham L. Rev. 1145, 1145, 1151–53 (1998).

[143] Mehlhorn, *supra* note 142, at 1145, 1151–53.

[144] App. to Brief for Appellants, *supra* note 87, at 47.

[145] *Id.* at 45–48.

[146] *Id.* at 48.

[147] Brooks & Rose, *supra* note 35, at 135–36.

[148] Houston, *supra* note 1, *at* 6.

[149] *Id.*.

[150] *Hundley*, 132 F.2d at 24.

before the Hundleys could move back in. Mary Hundley stated that their neighbors attempted "various subterfuges" to prevent them from taking possession of the property, including conspiring to have the Hundleys arrested for breaking into their own house.[151]

The ideological compromises Houston made in arguing change of neighborhood doctrine are reflected in the language of the decision. For one, the court's reasoning relies on the assumption that segregated neighborhoods are still a valid and desired end goal.[152] The opinion's language is racialized and derogatory; Chief Judge Groner describes the movement of Black Washingtonians as a "constant penetration into white neighborhoods" and notes that on Thirteenth Street, enforcement of a restrictive covenant would "establish a virtually uninhabitable section of the city."[153] In addition, the court's reasoning indicates that the economic interests of white residents are the primary issue driving its decision, not conceptions of social equality. The *Hundley* facts established that removing the restrictive covenant would be to the financial benefit of white sellers: The restrictive covenant was over thirty years old, only five of the sixteen houses in the neighborhood were covenanted, and neighbors had proven themselves unwilling to establish a new restrictive covenant.[154] This information satisfied the D.C. Circuit that "the effect [of the restrictive covenant] . . . is to make the market value of property on Thirteenth Street, in this particular block and nearby, greater for colored occupancy than for white."[155] The court cites to specific examples, noting that one of the appellees had even purchased a house on the street for $2000 less than a Black bishop had been willing to pay.[156] The Hundleys may have won the case, but the opinion is no example of sweeping rights vindication; rather, it lends support to the theory that converging white interests were key to striking down formalized residential segregation.

Houston and the NAACP argued for the application of change of neighborhood doctrine in cases after *Hundley*, but they had limited success.[157] The

---

[151] *Interview with Mary Gibson Hundley*, *supra* note 2, at 5:45.
[152] *Hundley*, 132 F.2d at 24.
[153] *Id.* at 24.
[154] *Id.*
[155] *Id.*
[156] *Id.* at 24–25.
[157] *See* Hurd v. Hodge, 162 F.2d 233, 234 (D.C. Cir. 1947), *rev'd* 334 U.S. 24 (1948) (upholding restrictive covenant and holding that "[t]he infiltration of four colored families would not have required our applying the rule we did in *Hundley* . . ."); Gospel Spreading Ass'n v. Bennetts, 147 F.2d 878, 879 (D.C. Cir. 1945) (invalidating restrictive covenant and allowing application of change of neighborhood doctrine where the covenant has already reached "complete frustration" and enforcement would depreciate property values); Mays v. Burgess, 147 F.2d 869, 870–71 (D.C. Cir. 1945) (upholding restrictive covenant and denying application of change of neighborhood doctrine because "penetration" of Black citizens had not reached the block in question); Bogan v. Saunders, 71 F. Supp. 587, 592 (D.D.C. 1947) (upholding restrictive covenant where "[t]here has been no showing that the one change from white to colored occupancy in the general neighborhood since the execution of the agreement . . . constitutes such a change in conditions as to result in depreciation of the value of the [properties] for white occupancy").

problem with utilizing such a technical doctrine was that technicalities were enough to prevent its application. Judges were conflicted—were there really enough Black families in a neighborhood to have changed its character? How many families were enough? How substantial would the pecuniary disadvantage need to be to the white homeowner? Despite Houston's attempt to make the *Hundley* court see the hypocrisy in defining people and neighborhoods as "[b]lack" through entirely different metrics, the D.C. Circuit subsequently held that one Black family was not enough and even four families were insufficient "infiltration" to change a neighborhood.[158] Additionally, the D.C. Circuit moved towards a narrower definition of "neighborhood," holding in *Mays v. Burgess*[159] that despite broad trends of diversification around the property in question, change of neighborhood doctrine was inapplicable because "no colored people occupy any property in the particular block with which we are concerned, nor in the block adjacent."[160] Overall, courts had a difficult time with applying the change of neighborhood doctrine post-*Hundley*, and more often than not, erred on the side of the status quo in keeping the restrictive covenants in place.

However, the vitality of the NAACP's strategy in *Hundley* can still be seen in the cases that followed. *Mays* is notable for its scathing dissent, in which D.C. Circuit Judge Henry White Edgerton argued that the neighborhood *was* trending towards "colored ownership and occupancy; it is evident that the neighborhood has lost the exclusively white character which the agreement sought to preserve."[161] Edgerton went on to assert that restrictive covenants should be invalidated as a matter of public policy:

> It is a matter of common knowledge . . . that the shortage of decent housing, or any housing, for Negroes is particularly acute . . . . Since restrictive contracts and covenants are among the factors which limit the supply of housing for Negroes and thereby increase its price, it cannot be sound policy to enforce them today.[162]

His comments here mirror Houston's policy arguments in *Hundley* almost identically.

A few years later, Judge Edgerton would write a similar dissent to the D.C. Circuit's enforcement of a restrictive covenant in *Hurd v. Hodge*,[163] stating that racially restrictive covenants "are void because [they are] con-

---

While Houston was the primary proponent, NAACP lawyers in other localities, including Loren Miller in California, also used the change of neighborhood doctrine to argue for invalidation of restrictive covenants in the years following *Hundley*. *See, e.g.*, Fairchild v. Raines, 151 P.2d 260, 263 (Cal. 1944) (discussing competing evidence of change of neighborhood).

[158] *See Hurd*, 162 F.2d at 234.

[159] 147 F.2d 869 (D.C. Cir. 1945).

[160] *Id.* at 871.

[161] *Id.* at 873 (Edgerton, J., dissenting).

[162] *Id*. at 876–77 (Edgerton, J., dissenting).

[163] 162 F.2d 233 (D.C. Cir. 1947).

trary to public policy."[164] He added in a footnote: "The record shows that Negroes will pay much more than the whites for the property and that the neighborhood is no longer white. Enforcement of the covenants defeats their economic purpose and does not accomplish their other purpose. The rule of *Hundley* therefore applies."[165] The Supreme Court later struck down the *Hurd* restrictive covenant along with the covenant at issue in *Shelley v. Kraemer*, relying on the state action doctrine.[166] While the Court did not speak to shifts in neighborhood demographics or public policy, it did note in *Shelley* that restrictive covenants prevent an economic transaction between two willing parties from going forward—a nod to the pecuniary interests at stake.[167]

## VII. Conclusion

Historian Clement Vose suggested that "[i]n the perspective of time, the significance of the [restrictive covenant cases] may lie in what went into them rather than in what came out."[168] The change of neighborhood doctrine is something significant that "went into" the NAACP's multi-decade litigation campaign. The use of this doctrine in *Hundley v. Gorewitz* demonstrates how the NAACP, and Houston in particular, strategized about fighting restrictive covenants. *Hundley* shows a desire to ground judges in public policy concerns and to force them to reckon with the real-world impacts of restrictive contracts on the city's housing supply. The case also highlights Houston's pragmatic approach to litigation, and the tradeoffs he and other NAACP lawyers were willing to make in this time period to win cases—both in terms of who they worked with and the kind of arguments they furthered. The change of neighborhood doctrine was not intended to be the ultimate solution to the national problem of racially restrictive covenants; rather, it was one tool among many, to be used when practical to help a family keep their home.

As a result of Houston's pragmatic lawyering, the Hundleys kept their home. Mary Hundley went on to teach at Howard University, to serve as a docent for the Smithsonian Institution, and to write a book about the achievements of alumni of her high school (including Charles Hamilton Houston).[169] She received the Radcliffe Alumnae Recognition Award in 1979, which honored her service as an "educator and courageous citizen."[170] However, she remained less than pleased about *Hundley v. Gorewitz*'s rele-

---

[164] *Id.* at 235 (Edgerton, J., dissenting).
[165] *Id.* at 237 n.11 (Edgerton, J., dissenting).
[166] Hurd v. Hodge, 334 U.S. 24, 36 (1948); *Shelley*, 334 U.S. at 19.
[167] *Shelley*, 334 U.S. at 19 (noting that restrictive covenants prevent "the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell").
[168] Vose, *supra* note 43, at ix.
[169] Knowles, *supra* note 3.
[170] *Id.*

gation to a footnote in the later restrictive covenant cases. In 1949, she wrote to Houston: "Although publicity is often unpleasant, I can't help regretting that the case was not mentioned in the papers and that our fight for the right to live where we can afford is never mentioned when restrictive covenants are discussed publicly . . . . I suppose we will be recognized after we are dead!"[171]

[171] Letter from Mary Gibson Hundley to Charles Hamilton Houston (Mar. 10, 1949), *in* Papers of Mary Gibson Hundley, Box 2, Folder 17, Schlesinger Library on the History of Women in America, Radcliffe Institute for Advanced Study.