

## REBELLIOUS LAWYERS FOR FAIR HOUSING: THE LOST SCIENTIFIC MODEL OF THE EARLY NAACP

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Historically rooted patterns of racial segregation in housing remain a significant contributor to racial inequities in health, intergenerational wealth, and life chances more generally. This Article uncovers a powerful but long-forgotten model for rebellious lawyers in the struggle for fair housing. I draw this model from archival research on the innovative early NAACP lawyers who litigated racially restrictive covenants from the 1910s to the 1940s. Facing a hostile judiciary, and with little legal precedent on their side, these lawyers turned their attention to a fundamental conceptual obstacle to their cause: what they termed “property in a sociological vacuum.” The vacuum view frames property ownership as an entirely private matter unrelated to the public interest and social context more generally. Under this logic, segregationist lawyers had convinced the courts that supporting racial covenants was a racially innocent defense of white homeowners’ property rights. The early NAACP lawyers countered this vacuum understanding of property on theoretical grounds and backed up their position with social-scientific findings that mapped out the pervasive use and devastating impacts of racial covenants in communities of color. Courts had never before been presented with such an enormous trove of social-scientific research in civil rights litigation. This strategy reached full expression in *Shelley v. Kraemer* (1948), the landmark U.S. Supreme Court decision that rendered racially restrictive covenants unenforceable.

The *Shelley* decision is a well-studied staple of the first-year law school curriculum, but far less attention has been given to the decades of legal efforts that made it possible. This Article traces that history in detail. I show how NAACP-affiliated lawyers identified the vacuum view of property as a central target in their litigation strategy and then worked with academics and other social movement allies to develop a record of empirical research. This strategy enabled these lawyers to fill the sociological vacuum around property. In this way, they forced the judiciary to see that racial covenants were more than purely private instruments of individual landowners but rather had formed a pervasive land policy of racial apartheid, slum conditions, and excluding people of color from homeownership. I conclude by arguing that this “lost scientific model” should be emulated by today’s fair housing lawyers, who continue to encounter the vacuum view of property as a core theoretical obstacle to racial integration and inclusion.

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## INTRODUCTION

Racially restrictive covenants (RRCs) were one of the most pernicious tools behind the formation of longstanding U.S. patterns of residential segregation and continue to underlie racial disparities in housing, health, education, intergenerational economic mobility, and life

chances more generally.<sup>1</sup> The lawyers who fought for decades to undo the American system of RRCs won a remarkable legal victory in the unanimous U.S. Supreme Court decision of *Shelley v. Kraemer*.<sup>2</sup> No longer could homeowners enforce servitudes that read, for example, “No persons of any race other than the Caucasian race shall use or occupy any dwelling or building or any lot except that this covenant shall not prevent occupancy by domestic servants of a different race domiciled with an owner or tenant.”<sup>3</sup>

The *Shelley* decision eliminated the last legal obstacle to willing interracial transfers of land<sup>4</sup> and was hailed by some commentators as portending an “end of restricted communities and ghettos and slums.”<sup>5</sup> Historians, in retrospect, have generally taken a less sanguine view of *Shelley*’s impact, portraying the decision as a doctrinal outlier with little effect on residential segregation patterns.<sup>6</sup> This Article suggests that the

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1. See, e.g., Eugenie L. Birch, Harriet B. Newburger & Susan M. Wachter, *Preface*, in *NEIGHBORHOOD AND LIFE CHANCES: HOW PLACE MATTERS IN MODERN AMERICA* xi, xii–xv (Harriet B. Newburger, Eugenie L. Birch & Susan M. Wachter eds., 2011) (noting that the recent emergence of “higher quality data and improved methodologies” has enabled researchers to disaggregate the substantial independent effects of residential segregation from other causal contributors to neighborhood disparities in health, education, employment, and crime); Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century?*, 11 *DU BOIS REV.* 205, 205–06 (2014) (finding that racial segregation, as measured by dissimilarity and isolation indices, has generally seen a moderate decrease in recent decades but remains remarkably high, particularly in historically hyper-segregated African American neighborhoods).

2. 334 U.S. 1 (1948). The *Shelley* decision consolidated the appeals of *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947), and *Kraemer v. Shelley*, 198 S.W.2d 679 (Mo. 1946), and was joined by the companion case from the District of Columbia, *Hurd v. Hodge*, 334 U.S. 24 (1948). This decision ended RRC enforceability in equity. Five years later, in *Barrows v. Jackson*, 346 U.S. 249 (1953), the Court proscribed the enforcement of RRCs for damages. The recording of RRCs was federally prohibited by the 1968 Fair Housing Act. See Fair Housing Act of 1968, 42 U.S.C. § 3604(a)–(b).

3. *Racial Restrictive Covenants*, SEATTLE C.R. & LAB. HIST. PROJECT, <https://depts.washington.edu/civilr/covenants.htm> [<https://perma.cc/28T2-TTRB>] (last visited Oct. 29, 2021) (choose “Hughes Beverly Park”).

4. RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 142 (2013).

5. TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 69 (2011) (quoting *Restrictive Covenants*, *ATLANTA DAILY WORLD*, May 6, 1948, at 6); Lem Graves, Jr., *Live Anywhere! High Court Rules*, *PITT. COURIER*, May 8, 1948, at 1, 5; Note, *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 *COLUM. L. REV.* 1241, 1245 (1948) (arguing that *Shelley* requires further clarification but that the decision “go[es] far towards effectuating the goals which the Fourteenth Amendment was designed to achieve”).

6. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 262–63 (2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 124–25 (1991); see also David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the*

assessment of *Shelley*'s significance should look beyond the question of whether immediate, measurable changes in social conditions are attributable to the decision.<sup>7</sup> I argue that the campaign against RRCs should be viewed as a key moment in the long-term struggle for racial justice in the property system. Thus, in the terms of the “myth-busting” literature on the history of mid-twentieth-century civil rights litigation, I aim to reveal how the lawyers who challenged RRC enforceability “illuminate[d] future paths” for the “central but unfinished goals of the civil rights movement.”<sup>8</sup>

More specifically, I consider how these lawyers addressed a deep-seated notion that has been central to American legal understandings since the Founding: “property in a sociological vacuum.”<sup>9</sup> I borrow this term from a 1945 law review article written by Harold Kahen, a prominent lawyer in the NAACP coalition against RRCs.<sup>10</sup> Kahen characterized the opposing lawyers’ view of property as an effort to erase the social context and public significance of property relations.<sup>11</sup> This vacuum view draws on a remarkably deep U.S. tradition of rhetorically claiming absolute owners’ rights under what progressive legal theorists have described as the

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*American Ghetto*, 107 J. POL. ECON. 455, 469–70 (1999) (noting that segregation, as measured by the dissimilarity index, generally increased across U.S. cities in the decades following *Shelley*, peaking nationally in 1970).

7. This approach is supported by a critical race tradition of questioning the narrowly formalistic pursuit of civil rights legal victories and instead promoting a vision of cause lawyering that “treat[s] legal advocacy as a means to political empowerment, not as an end in itself,” and that seeks not only immediate legal change but also “fundamental social transformation in the name of racial liberation.” Angela P. Harris, *Racing Law: Legal Scholarship and the Critical Race Revolution*, 52 EQUITY & EXCELLENCE EDU. 12, 17 (2019); see also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 13–14 (1992) (urging caution about civil rights laws and lawyers for generally failing to address deep-seated white supremacy and the needs of stakeholders in civil rights litigation); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 164 (1991) (noting that although law is inherently limited in addressing systemic racism, securing rights is nevertheless important for the long-term goals of racial activism, as rights constitute a “magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power”). This long-term lens on cause lawyering draws further support from the constitutive tradition of socio-legal scholarship, which considers how lawyers intervene in dominant frames and logics that span legal, political, and social movement discourses. See SCOTT L. CUMMINGS, *BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA’S PORT* 333–35 (2018).

8. Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 STAN. J. C.R. & C.L. 167 (2011); see also BROWN-NAGIN, *supra* note 5 (portraying a “long civil rights movement” that extends both earlier and later than the usual account focused on the 1950s and 1960s).

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

10. See *id.*

11. See *id.* at 201.

“ownership model” of property.<sup>12</sup> As the record of racial covenant litigation illustrates, the vacuum view can be objectionable not only because it is inaccurate, but also because it has a long history of providing a rhetorical foundation for residential segregation.

The historical emergence of the race-neutral, vacuum-view rhetoric in RRC litigation reflects a broader phenomenon of what critical race scholars have identified as “colorblind racism.”<sup>13</sup> Indeed, Professor Cheryl Harris has detailed the emergence, around the same time as the *Shelley* case, of the modern form of “whiteness as property,” wherein white Americans’ investment in privileged racial identity adapted to the post-World War II era of racially progressive public discourse by drawing on a race-neutral vocabulary.<sup>14</sup> Harris concludes that the proprietary investment in whiteness is “a ghost that has haunted the political and legal domains” and, consistently over the course of U.S. history, “warped efforts to remediate racial exploitation.”<sup>15</sup> I argue that the vacuum view of property has a similarly enduring and haunting effect as a ghost of early American traditions of absolutist property rhetoric. These spectral companions, the vacuum view of property and the modern colorblind manifestation of white supremacy, have complementary capacities to provide segregationists with facially non-racist logics of residential exclusion. These logics frame white homeowners as populist victims while masking the “epochal” subsidization and racial inequities underlying white American advantages in housing and wealth.<sup>16</sup>

This Article reveals how NAACP-affiliated lawyers drew on empirical research to mount a rare direct legal attack on the vacuum view of property. Up against settled law in favor of RRC enforceability, these lawyers furnished the *Shelley* Court with an unprecedented scope of social-scientific materials documenting how RRCs contributed to

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12. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 87–92 (2008); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 5, 51, 55, 144 (2003).

13. EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2 (3d ed. 2010); see also Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (arguing that colorblind jurisprudence has helped to sustain white supremacy throughout U.S. history).

14. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714–15, 1761–62 (1993) (describing the “subtle,” “modern” manifestation of whiteness as property, which uses race-neutral rhetoric to “mask[] the maintenance of white privilege and domination”).

15. *Id.* at 1714, 1791 (noting that “whiteness as property” serves to protect “the settled expectations of relative white privilege as a legitimate and natural baseline”).

16. ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND 130–31 (2003) (noting that the predominant postwar characterization of housing as a “classic free market” disregarded the “vast, even epochal, subsidies” directed toward all-white suburban development).

residential segregation.<sup>17</sup> They framed RRCs as a pervasive “land policy” of racial apartheid, limiting housing options for people of color to overcrowded slums in declining central cities.<sup>18</sup> To view RRCs as purely private interactions among neighbors would be, according to these lawyers, an “obliteration” of the “essence of property.”<sup>19</sup>

This empirical strategy emerged through an innovative, multidisciplinary coalition of social scientists and civil rights, religious, labor, governmental, and other organizations, which presented a reportedly record number (at the time) of amicus briefs in a civil rights case.<sup>20</sup> Although the vacuum view had previously been challenged in many ways over the course of U.S. history,<sup>21</sup> never before (or since) had lawyers presented such a comprehensive attack on its theoretical and empirical foundations.

The Article proceeds as follows. Part I provides a theoretical foundation for lawyers’ contributions to social-movement frames and public understandings of legal concepts. Part II gives an overview of the vacuum view of property as a fundamental legal concept with particular significance for racial inequities in housing. Parts III and IV review lawyers’ advocacy for opposing theories of property in RRC litigation. I focus on the case record of Los Angeles, which was “ground zero” in the national legal battle over RRCs.<sup>22</sup> Part V argues that fair housing lawyers should continue to target the vacuum view by drawing on the social-scientific model of the RRC cases.

## I. CAUSE LAWYERING AND SOCIAL CHANGE

The lawyers behind the victories in *Brown v. Board of Education*<sup>23</sup> and other major civil rights decisions have been charged by some legal historians with co-opting social movements, disconnecting movements from their grassroots, and distracting resources toward litigation rather

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17. See *infra* Section III.B.2.

18. Kahen, *supra* note 9, at 206–07.

19. Brief for Petitioners at 18, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87).

20. CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 163, 191–99 (1967) (observing that *Shelley* marked the first time “a substantial amount of factual data was presented to the Supreme Court in civil rights cases); see William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2085 (2002) (noting that the eighteen amicus briefs filed by this coalition was more than the Supreme Court had received in any prior civil rights litigation).

21. See *infra* Section II.A.

22. KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 203 (2012) (describing Los Angeles as “ground zero” in RRC litigation).

23. 347 U.S. 483 (1954).

than more effective direct action and legislative tactics.<sup>24</sup> Lawyers' tendency to "feast on formalism"<sup>25</sup> while pursuing a "myth of rights"<sup>26</sup> can have legalistic and de-radicalizing effects on social movements.<sup>27</sup> *Shelley*, like *Brown*, emerges from this literature as a cautionary tale of the shortcomings of cause lawyers as movement leaders.<sup>28</sup> Having had "little effect" in reducing residential segregation,<sup>29</sup> the *Shelley* decision is said to represent the general conclusion that courts are not strategic venues for advancing racial equality in housing opportunities.<sup>30</sup>

This skeptical account of movement lawyering has been contested in recent decades of socio-legal scholarship. Empirical and archival studies have increasingly portrayed movement lawyers as strategically sophisticated agents who thoughtfully consider the limits of the law and the interactions between legal and extra-legal movement tactics.<sup>31</sup> Some scholars continue to recommend that lawyers should take a back seat in

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24. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 94, 104 (2004) (noting that the limitations of racial reform in education owe in part to the legalistic "rigidity" of civil rights lawyers, who nevertheless "take most of the credit for change and reform"); ROSENBERG, *supra* note 6, at 70–71; STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 117–18 (1974).

25. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 467 (2001).

26. See SCHEINGOLD, *supra* note 24, at 6–7 (arguing that lawyers pursuing social change should discard the "myth of rights" in favor of a "politics of rights," which acknowledges the "contingent character of rights in the American system"); Michael W. McCann, *How Does Law Matter for Social Movements?*, in *HOW DOES LAW MATTER?* 76, 76–77 (Bryant G. Garth & Austin Sarat eds., 1998) (summarizing a convergence of socio-legal literature around the notion that "legal justice is a nefarious myth").

27. Eskridge, *supra* note 25, at 467 (arguing that in many cases "legal reform comes to dominate other types of action" such that social movements adopt a "lawyerly aura"); see also CUMMINGS, *supra* note 7, at 4 (summarizing the literature criticizing cause lawyers for converting collective struggles into individual grievances cloaked in "technical legal arcana," which grind through the legal system at a "glacial pace").

28. Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 4–6 (Austin Sarat & Stuart Scheingold eds., 1998); see also ROSENBERG, *supra* note 6, at 338, 341 (lamenting cause lawyers' attraction to courts as flies to "fly-paper" when in fact courts can "almost never be effective producers of significant social reform") (emphasis omitted).

29. U.S. COMM'N ON C.R., *TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING* 40–41 (1975); see also KLARMAN, *supra* note 6, at 264 (observing that *Shelley* was "an isolated decision" with "almost no integrative effect," which more broadly reflects the Supreme Court's refusal to "delve beneath the surface of residential segregation"); ROSENBERG, *supra* note 6, at 70 (noting that the 1959 Civil Rights Commission concluded that the *Shelley* decision had "little real effect").

30. KLARMAN, *supra* note 6, at 264 ("The justices probably lack the capacity, and rarely have they shown much inclination, to contravene dominant public opinion on housing segregation.").

31. See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1653.

the leadership of social movements and that law should be “de-centered” in deference to grassroots activism.<sup>32</sup> But other scholars have recently proposed that we move beyond these generalized debates about whether lawyers and the law can serve social movements and instead develop a nuanced theory of “integrated advocacy,” as reflected in the “new canon” of movement lawyering, which would outline what tools in what specific contexts enable lawyers to optimize their positive impact toward social change goals.<sup>33</sup>

These recent socio-legal perspectives draw on a constitutive view of law, which emphasizes how law shapes identities, rights consciousness, perceptions of discrimination, vocabularies for injustice, and social movement frames.<sup>34</sup> Of particular significance here, these scholars illuminate how cause-lawyering can advance a movement’s long-term conceptual efforts to expose contradictions in hegemonic frames.<sup>35</sup> Thus, law itself can provide principles and frames that enhance a movement’s impact in public discourse.<sup>36</sup> For such scholars, legal arguments provide “discursive resources for reshaping meanings” and are “part of our culturally conditioned ways of making sense of things.”<sup>37</sup> This approach finds support among some critical race theorists who suggest that legal activism should address “the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race.”<sup>38</sup> I contend that the vacuum view of property is precisely this sort of deep-seated way of “making sense of things” and a “shared cultural understanding” about the relationship between race and property and thus invites lawyers to contribute to public debates and social movement frames.

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32. Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 378 (2018) (observing that socio-legal theory over recent decades has “de-centered lawyers and courts as the essential agents of change” and as the focus of analysis).

33. See, e.g., SCOTT L. CUMMINGS, *LAWYERS AND MOVEMENTS: LEGAL MOBILIZATION IN TRANSFORMATIVE TIMES* (2021).

34. Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOCIO. 304, 307–10 (2003) (summarizing social-movement framing as a mechanism for identifying collective harms and mobilizing collective responses).

35. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1350–51 (1988) (describing Gramscian interventions in popular consciousness such that existing power relationships are exposed and made to seem less inevitable).

36. CUMMINGS, *supra* note 7, at 298 (“[L]aw itself provides principles of rights and justice that frame how social movements mobilize constituents and how lawyers make persuasive arguments on behalf of movement causes in and out of court.”).

37. MICHAEL PARIS, *FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM* 25–26 (2010) (“[T]he content of legal arguments [is] far more important in many social locations outside of courts.”).

38. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462 (1993).

## II. THE VACUUM VIEW OF PROPERTY

The notion of property in a sociological vacuum draws on a foundational tradition in American legal and political thought, which theorists label the “ownership model” of property.<sup>39</sup> Under this model, owners’ rights over their property are sacrosanct, natural, and purely private, as a “bulwark surrounding a sphere of individual liberty.”<sup>40</sup> Property is thus primarily an *in rem* relationship between a person and a thing, implying a narrow presumption of duties to nonowners.<sup>41</sup> Indeed, nonowners are treated by this doctrine with suspicion and hostility.<sup>42</sup> In this Part, I review theoretical accounts of the ownership model of property. Elsewhere in this Article, I describe this absolutist tradition of owners’ rights as “property in a sociological vacuum,” or the “vacuum view” for short. My emphasis on the sociological vacuum reflects the efforts of NAACP lawyers to contextualize property with social-scientific data and multidisciplinary collaboration.

*A. Historical Roots of the Vacuum View*

The rise of the ownership model is generally attributed to the French Revolution, eighteenth-century European legal codes, and a Lockean theory of property rights as natural, divine, pre-political, negative, absolute, individual, first-generation rights against the state.<sup>43</sup> Many of the principal Founders of the United States strongly adhered to the ownership model and believed that the protection of property rights was grounded in

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39. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in *PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 3, 3–8 (Charles Geisler & Gail Daneker eds., 2000) (describing the “classical conception” of what Singer terms the “ownership model of property” as an exaggeratedly individualistic picture of owners’ rights); see also Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 *VAND. L. REV.* 869, 889–90 (2013).

40. UNDERKUFFLER, *supra* note 12, at 142; see also SINGER, *supra* note 12, at 6.

41. SINGER, *supra* note 12, at 40, 92 (attributing to the ownership model the assertion that owners’ rights can be superseded by other rights and values “only in exceptional circumstances”).

42. NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 3–4 (2004) (noting that this hostility toward nonowners extends to “whole categories of people who do not enjoy the full exercise of private property rights, whether they be renters, occupants of social housing, or at an extreme, homeless”).

43. Morris R. Cohen, *Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 22 (1927) (citing French, Prussian, and Austrian codes of the eighteenth century and Italian and German codes of the nineteenth century that drew on the “absolutistic conception” of property, though the Italian and German codes added qualifying provisions); di Robilant, *supra* note 39, at 894, 929 (tracing roots of the ownership model to the French Revolution and the Napoleonic Code, which enshrined a “right of enjoying and disposing of things in the most absolute manner”) (quoting *CODE CIVIL* [C. CIV.] art. 544 (Fr.)).

the myth of discovery and was a primary purpose of government.<sup>44</sup> In Madison's words, "Government is instituted to protect property of every sort."<sup>45</sup> This view was more broadly reflected in an early American culture that was "almost maniacally devoted to maintaining the rights of individuals to property."<sup>46</sup> Blackstone's absolutist rendering of property became the "official view"<sup>47</sup> at the time of the Founding, as his *Commentaries* were "in every man's hand."<sup>48</sup> Although Blackstone discussed voluminous exceptions to the absolutistic view of property rights, his most widely cited statement on property emphasized its prima facie absolutist nature as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>49</sup>

The Founders acknowledged that their absolutist vision of property was contradicted by the need to regulate, restrict, and allocate property in practice.<sup>50</sup> Yet the same Founders seemed generally unwilling to acknowledge the contradictions between an absolute right to property and the treatment of women and slaves both as property and as classes who were denied access to holding property.<sup>51</sup> Furthermore, the colonial

44. See GORDON S. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 94 (2002) (noting that white male Americans at the time of the Founding saw themselves as a "people of property" such that "almost every man is a freeholder"); David Schultz, *The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence*, 13 W. NEW ENG. L. REV. 155, 159–60 (1991) (describing the centrality of absolutist property rights in the rhetoric of several key Founders, including Madison's view that property is an "essential object of the laws," Hamilton's emphasis on property in his discussion of liberty and republican government, Jefferson's belief in property as a natural right of mankind, and Paine's claim that the state was established to defend natural rights in property) (quoting PASCHAL LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY: WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE* 156 (1930)).

45. James Madison, *Property*, in 6 *THE WRITINGS OF JAMES MADISON* 101, 102–03 (Gaillard Hunt ed., 1906).

46. JAMES L. HUSTON, *CALCULATING THE VALUE OF THE UNION: SLAVERY, PROPERTY RIGHTS, AND THE ECONOMIC ORIGINS OF THE CIVIL WAR* 9 (2003).

47. Schultz, *supra* note 44, at 167 (citing Frederick G. Whelan, *Property as Artifice: Hume and Blackstone*, in *NOMOS XXII: PROPERTY* 101, 115 (J. Roland Pennock & John W. Chapmen eds., 1980)).

48. W. L. Penfield, *Recognition of a New State—Is It an Executive Function?*, 32 AM. L. REV. 390, 398 (1898).

49. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*2 ("There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property . . .").

50. See Schultz, *supra* note 44, at 174–75 (citing the Founders' awareness of contradictions in the absolutist view of property); see also 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 1 (1827) (describing "the right to acquire and enjoy property" as one of the "absolute rights of individuals" but acknowledging that nuisances and dangers to public health can limit owners' rights).

51. See Harris, *supra* note 14, at 1718, 1720 (describing slavery as a "mixed category of property and humanity," wherein slaves could be "transferred, assigned, inherited, or posted as collateral" and "stand[] in for actual currency").

rejection of Native American property claims rooted in first possession reflected a double standard that “embedded the fact of white privilege into the very definition of property.”<sup>52</sup>

### B. Theoretical Debate over the Vacuum View

The absolutist view of owners’ rights peaked around the time of the Founding and was soon thereafter “plagued by the ‘contradiction’ that the right to property was absolute in some respects and not in others.”<sup>53</sup> In spite of its relative decline over the course of U.S. history, the ownership model still prevails in legal, popular, scholarly, and social movement discourses as the “dominant understanding of property in the West since the Enlightenment.”<sup>54</sup>

In the legal academy, the ownership model polarizes American property theory.<sup>55</sup> Defenders of the model claim that ownership is fundamental to liberty and is the “most quintessentially absolute and the most quintessentially individualistic of legal rights.”<sup>56</sup> In this view, ownership is largely defined by a strong right to exclude, which is justified primarily on the grounds of maximizing efficient use of land.<sup>57</sup> As Professor Thomas Merrill concludes, “the right to exclude is more than

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52. *Id.* at 1721, 1724 (observing that *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), firmly “established whiteness as a prerequisite to the exercise of enforceable property rights”); see also Joseph William Singer, *The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke*, 1 RECONSTRUCTION 97, 102 (1991) (noting that “property and sovereignty in the United States have a racial basis” grounded in, among other historical roots, the fact that “the title of every single parcel of property in the United States can be traced to a system of racial violence”).

53. Schultz, *supra* note 44, at 174–75 (observing that, fifty years after the Founding, legal and political discourses around property had shifted away from a near-exclusive emphasis on absolutist ownership rhetoric to increasingly include a utilitarian framing emphasizing regulation).

54. di Robilant, *supra* note 39, at 877; see also SINGER, *supra* note 12, at 16 (“Our political rhetoric, court opinions, and scholarly discourse all revert to the ownership model with surprising frequency.”); Singer, *supra* note 39, at 3 (noting that the ownership model “remains powerful and exerts substantial determinative force in adjudicating and developing the rules of property law”).

55. di Robilant, *supra* note 39, at 873 (characterizing a sharp divide in property theory between adherents to the bundle-of-sticks model and the resurgence of the ownership model among “information theorists” and new essentialists).

56. SINGER, *supra* note 12, at 14–15.

57. JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 14–15 (2014) (summarizing the work of Professors Thomas Merrill and Henry Smith among others who advocate a strong right to exclude in order to give owners a “broad zone of discretion” over the use of their property and thereby to reduce information costs and allow owners to “put their property to its most productive use”).

just ‘one of the most essential’ constituents of property—it is the *sine qua non*.”<sup>58</sup>

Modern critics of the ownership model, in particular the scholars of the “New Progressive Property,”<sup>59</sup> contend that the absolutist vision fails to appreciate that property rights are “unavoidably allocative” and that the state “necessarily and affirmatively grants the acquisitive claims of some people, and denies the same claims of others.”<sup>60</sup> In Professor Joseph Singer’s “entitlement conception” of property, state action is inherent in all property relations, both to “create property rights and to adjudicate conflicts among owners and between owners and nonowners.”<sup>61</sup> These scholars frame property rights as a matter of “conflicting desires” for finite goods and thus inherently “social rights” that cannot be divorced from “choice, conflict, and vexing social questions.”<sup>62</sup> The absolutist approach, according to the progressive critique, encourages owners “to act as if no one existed but themselves”<sup>63</sup> and thereby gives owners undue and unchecked power “over the life of others.”<sup>64</sup>

This Article does not defend a robust position in this academic debate, and there is not space here for a lengthier and more nuanced theoretical treatment. But the Article does suggest that the extreme decontextualization of “property in a sociological vacuum,” as often framed in populist and segregation-aligned movements, has a harmful track record. In 1927, legal philosopher Morris Cohen blamed the formalism of lawyers for perpetuating the “absolutistic conception of property.”<sup>65</sup> This Article aims to demonstrate that the legal fight against RRCs provided a roadmap for lawyers to break with formalism and to expose the inaccuracy and inequity associated with the vacuum view of property.

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58. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

59. Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1112 (citing numerous scholars who identify with a “progressive” tradition of property theory as a response to the prevailing law-and-economics tradition of property scholarship).

60. Laura S. Underkuffler, *When Should Rights Trump?: An Examination of Speech and Property*, 52 ME. L. REV. 311, 321 (2000) (emphasis omitted).

61. SINGER, *supra* note 12, at 91–92 (arguing that owners’ interests cannot be viewed in isolation but rather should be considered in light of the “conflicting interests of everyone with legitimate claims to rights in the property in question”).

62. UNDERKUFFLER, *supra* note 12, at 143, 145.

63. SINGER, *supra* note 12, at 6.

64. Cohen, *supra* note 43, at 21 (emphasizing “[t]he extent of the power over the life of others which the legal order confers on those called owners” and characterizing the ownership model as inherently detrimental because “property, being only one among other human interests, cannot be pursued absolutely without detriment to human life”).

65. Cohen, *supra* note 43, at 13, 22.

## III. THE INTEGRATIONIST CAUSE: CONFRONTING THE VACUUM VIEW IN THE RRC CASES

This Part considers the integrationist lawyers—that is, the NAACP-affiliated lawyers who challenged RRCs as part of the larger social movement for residential integration. I discuss how these lawyers stretched traditional formalistic practice (in Section A), developed a contextualized theory of property through multidisciplinary collaboration (in Section B), and then presented the *Shelley* Court with a full-fledged attack on the vacuum view of property (in Section C).

*A. Cause Lawyering*

The lawyers challenging RRCs generally held deep personal convictions about the anti-covenant cause, taking dozens of these cases at a time and often paying out of pocket.<sup>66</sup> The majority of these lawyers were African American, and many had personal experiences of residential exclusion, including formative encounters with move-in violence.<sup>67</sup> Beyond their legal work on RRCs, many of these lawyers were vocal “evangelists” in the social movement for open housing,<sup>68</sup> and many held prominent religious and political positions, leadership roles in Black bar associations, and active memberships with the NAACP.<sup>69</sup> In contrast to the almost exclusively local scope of the segregationist lawyers, the campaign against RRCs included national figures of the NAACP.

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66. Jeffrey D. Gonda, *Litigating Racial Justice at the Grassroots: The Shelley Family, Black Realtors, and Shelley v. Kraemer (1948)*, 39 J. SUP. CT. HIST. 329, 330, 335, 338 (2014) (observing that even the lawyer-realtors who challenged RRCs pursuant to lucrative blockbusting practices appeared to be true believers in the anti-covenant cause).

67. See JEFFREY D. GONDA, UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 71 (2015) (describing the roots of Detroit lawyer Willis Graves’s “outrage and resolve” against residential segregation practices). As a young lawyer, Graves observed the prosecution of his close friend, a Black doctor, who killed a member of a violent white mob seeking to drive the doctor’s family out of the neighborhood. *Id.*; see also JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING 14–16, 33, 37, 42 (2013) (describing widespread “anti-integrationist violence” as an enduring theme of U.S. residential exclusion primarily directed against African Americans).

68. GONDA, *supra* note 67, at 72 (describing local integrationist lawyers’ “impassioned” speeches about fair housing and RRCs in churches and other community meetings).

69. *Id.* at 60, 73–74 (noting that St. Louis attorney George Vaughn, who brought the *Shelley* case, was a local politician, justice of the peace, Assistant Attorney General of Missouri, and a leader in his church, the Masons, and the Elks; also citing Detroit anti-covenant lawyers who served on the NAACP National Legal Committee and helped found the black bar association in Michigan); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 34–35 (1994) (citing a boost in NAACP membership and funding in the 1940s, including a tripling of the NAACP budget in 1944).

Thurgood Marshall, Charles Hamilton Houston, and Loren Miller were the chief architects of litigation strategy and led the coordination of the anti-covenant movement.<sup>70</sup>

Loren Miller deserves special attention as arguably the most important figure in the development of the *Shelley* strategy and as an illustration of how this strategy reflected lawyers' biographies and local activism. Miller's work centered on Los Angeles, which was "ground zero" for the national legal fight over RRCs.<sup>71</sup> In the years leading up to *Shelley*, Los Angeles was reported to have more RRCs and far more RRC lawsuits than anywhere else in the country.<sup>72</sup> Los Angeles had long been at the vanguard of residential segregation practices as an early adopter of both racial zoning (targeting the Chinese population) and the widespread use of RRCs.<sup>73</sup> As part of "the multiracial crucible of the American West,"<sup>74</sup> Los Angeles exemplified how these covenants affected people of all ethnicities deemed not white and inspired inter-ethnic activism.<sup>75</sup> Yet, the *legal* battle over RRCs, as reflected in the Los Angeles case record and in major RRC cases across the country, almost exclusively consisted of white plaintiffs seeking enforcement against Black defendants.<sup>76</sup> This emphasis on Black exclusion may reflect the demographic shifts specific

70. BROOKS & ROSE, *supra* note 4, at 129, 131, 137, 141.

71. MACK, *supra* note 22, at 203.

72. See VOSE, *supra* note 20, at 56–59 (suggesting that Los Angeles had more RRC cases at the end of World War II than any other city); Carey McWilliams, *Critical Summary*, 19 J. EDUC. SOCIO. 187, 196 (1945) ("[I]n 1945, more suits contesting the validity of [RRCs] were filed by Negroes in Los Angeles than were filed by Negroes in all the rest of the nation.").

73. See ROBERT M. FOGELSON, *BOURGEOIS NIGHTMARES: SUBURBIA, 1870–1930*, at 76, 78–79 (2005) (describing Los Angeles as an early adopter of RRCs); MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* 83–84 (2002) (noting that California's judicial support for anti-Chinese zoning ordinances laid the foundation for a citywide zoning ordinance in 1908).

74. Tom I. Romero, II, *The "Tri-Ethnic" Dilemma: Race, Equality, and the Fourteenth Amendment in the American West*, 13 TEMP. POL. & C.R. L. REV. 817, 831 (2004).

75. See Shana Bernstein, *Interracial Activism in the Los Angeles Community Service Organization: Linking the World War II and Civil Rights Eras*, 80 PAC. HIST. REV. 231, 231, 250–51, 266 (2011) (noting that Los Angeles was "unique in the depth of its inter-racial activism" around the time of World War II) (emphasis omitted); Jennifer Mandel, *Making a "Black Beverly Hills": The Struggle for Housing Equality in Modern Los Angeles* 100–01 (Dec. 2010) (Ph.D. dissertation, University of New Hampshire) (arguing that inter-ethnic conflict in the late RRC era was fomented by the mayor of Los Angeles, who supported Japanese internment, spread rumors about inter-ethnic violence, and sympathized with white attacks on Mexican American youth in the Zoot Suit Riots).

76. See BROOKS & ROSE, *supra* note 4, at 233 (noting that RRCs in the "major litigated cases" all targeted Black defendants, but the language of some of these covenants also named people of Asian ["primarily in the west"] and Mexican ["primarily in the southwest"] ancestry).

to the RRC era (the 1910s to 1940s), which saw two waves of “Great Migration” of African Americans out of the rural South to Northern (and Southern) cities.<sup>77</sup>

Beginning in the late RRC cases, as the Black population of Los Angeles doubled during World War II,<sup>78</sup> Miller emerged as the leading national attorney in RRC litigation and was widely thought to have defended against RRC enforcement in more cases than any other lawyer in the country.<sup>79</sup> At the time of *Shelley*, he estimated that he had “more than a hundred cases pending” involving RRC enforcement.<sup>80</sup> But for Miller, legal efforts were just one aspect of a larger strategic effort to address housing inequities—indeed, he expressed deep skepticism about the ability of law to bring about social change.<sup>81</sup> In 1947, he remarked that “the problem [with overturning RRCs] is not so much a matter of law as it is of inducing favorable public opinion.”<sup>82</sup> He recommended the publication of popular articles on RRCs and published three anti-covenant articles in 1947 himself.<sup>83</sup> In addition to his writing, Miller’s work as a “media activist”<sup>84</sup> was evident in his long-running weekly radio appearances in the Los Angeles area to discuss civil rights issues.<sup>85</sup> He further spoke out on residential segregation in his political activities, including his run for Congress and his support of fair housing legislation

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77. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 115, 145–47 (1993).

78. Mandel, *supra* note 75, at 79.

79. *See id.* at 116. It should be noted that while Miller’s docket of RRC cases appears to have consisted almost exclusively of Black clients, he was a prominent inter-ethnic activist. For example, Miller defended Japanese people against internment and played a leading role in the legal challenge of the California Alien Land Law, which restricted the property rights of “people not eligible to be citizens,” targeting Japanese Californians. *See* AMINA HASSAN, LOREN MILLER: CIVIL RIGHTS ATTORNEY AND JOURNALIST 150–51 (2015).

80. Mandel, *supra* note 75, at 116 (quoting Audio tape: Loren Miller Interview by Lawrence de Graaf (Mar. 3 & Apr. 29, 1967) (on file with The Lawrence de Graaf Center for Oral and Public History)).

81. Before Miller joined the RRC litigation campaign, he had spent years publicly criticizing NAACP lawyers for their excessive adherence to legal formalism, their lack of militant goals and tactics, and their generally “elaborate verbal sleight-of-hand performance instituted to serve the lawyers and not the citizens.” *See, e.g.*, Loren Miller, *On Second Thought*, CAL. EAGLE, Oct. 2, 1931, at 8.

82. HASSAN, *supra* note 79, at 158 (quoting Letter from Loren Miller to Lester Granger (Dec. 18, 1945) (on file with the Huntington Library in the Loren Miller Papers, Box 3, Folder 1) (alteration in original)).

83. *See* Loren Miller, *The Power of Restrictive Covenants*, 36 SURV. GRAPHIC 46, 46 (1947); Loren Miller, *Race Restrictions on Ownership or Occupancy of Land*, 7 LAWS. GUILD REV. 99, 111 (1947); Loren Miller, *Covenants for Exclusion*, 36 SURV. GRAPHIC 541, 541 (1947) [hereinafter Miller, *Covenants for Exclusion*].

84. HASSAN, *supra* note 79, at 158 (characterizing Miller as a “media activist” and an “agent of social change, fully aware of his task”).

85. *See id.* at 158–59.

while serving as vice president of the National Committee Against Discrimination in Housing.<sup>86</sup> These activities reflected a multidisciplinary vision of cause lawyering focused on the big-picture goals of racial and economic justice.

### *B. Pre-Shelley Cases and Coordination*

Over the course of the RRC cases, spanning primarily from the 1910s to the 1940s, the integrationist lawyers transitioned from an emphasis on owners' rights to an increasingly contextual theory of property backed by social-scientific research and multidisciplinary collaboration. I review this progression of legal arguments primarily through the lens of the Los Angeles case record.

#### 1. THE OWNERS' RIGHTS POSITION: 1910S TO 1930S

In the early cases, from the 1910s through the 1930s, the integrationist lawyers presented to the courts a vision of property that centered on owners' rights. In particular, they argued that RRCs unduly limited the use and alienation rights of the owner of a servient estate (a covenanted property). For example, in a 1919 California case, these lawyers emphasized that an owner's right to freely dispose of property was a fundamental "incident" of property and a "natural right."<sup>87</sup> Furthermore, where courts banned RRCs that restricted sales but enforced RRCs that restricted use and occupancy, the anti-covenant lawyers emphasized the rights of non-white buyers to occupy the land they had purchased.<sup>88</sup> This emphasis on owners' rights continued well into the 1930s, as these lawyers defined property as "synonymous with the 'right of ownership'"<sup>89</sup> and defined free "circulation of land as one of the inherent rights of a free people,"<sup>90</sup> which "governments were organized to protect."<sup>91</sup> Thus, the evil these lawyers were highlighting in the appellate arguments before

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86. *Id.* at 197 (noting Miller's support for the Rumford Fair Housing Act); see discussion of this legislation *infra* Part V.

87. Respondent's Brief at 4–5, *Title Guar. & Tr. Co. v. Garrott*, 183 P. 470 (Cal. Dist. Ct. App. 1919) (Civ. 2916) (quoting *State v. Darnell*, 81 S.E. 338, 339–40 (N.C. 1914)) (describing disposition as one of the "inalienable incidents [sic] to the ownership of property," which is "not confirmed by the constitution [sic] but exists of natural right").

88. *See id.* at 5–6.

89. Appellant's Opening Brief at 8, *Du Ross v. Trainor*, 10 P.2d 763 (Cal. Dist. Ct. App. 1932) (Civ. 4550) (quoting *Thompson v. Kreutzer*, 72 So. 891, 891 (Miss. 1916)).

90. Appellant's Closing Brief at 7–8, *Du Ross v. Trainor*, 10 P.2d 763 (Cal. Dist. Ct. App. 1932) (Civ. 4550) (quoting *Garrott*, 183 P. at 472).

91. Appellant's Opening Brief, *supra* note 89, at 8 (quoting *Thompson*, 72 So. at 891).

1940 was generally not the evil of racial inequality, but rather the evil of “tying up of real property.”<sup>92</sup>

In this early era, before the 1940s, these property-based arguments countered the explicitly racial policy arguments of the segregationist side, as summarized *infra* Part IV. Thus, in *Shelley* and the late RRC cases of the 1940s, when the integrationist lawyers turned to a sociological attack while the segregationist lawyers turned to the vacuum view of property rights, this roughly constituted a swap of strategic positions. Yet the early integrationist lawyers’ emphasis on strong property rights should not be mistaken for a vacuum view of property. These lawyers cited limits on owners’ rights in the name of the “common good”<sup>93</sup> and to “prevent enforcement of absolute restrictions.”<sup>94</sup> Furthermore, in contrast to the deracialized rhetoric of the later segregationist arguments, the early integrationist briefs included racial analysis. In particular, their arguments raised the specter of a slippery slope into a nation of ethnic “islands,” which would negatively affect all Americans.<sup>95</sup> These arguments suggest early stirrings of the contextual and sociological approach to property presented later in *Shelley*.

## 2. INCUBATING THE *SHELLEY* STRATEGY: 1940S

### *a. A Contextual Theory of Property*

In the early 1940s, the integrationist lawyers began to articulate an explicit attack on the notion of property in a sociological vacuum. On theoretical grounds, they argued that property is a matter of collective action and collective consequence.<sup>96</sup> They cited a jurisprudential shift away from the *Lochner*-era fortification of property rights, which had yielded to an increasing judicial acknowledgement that owners’ rights could “be required to take a place, somewhere else than at the head of the

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92. Appellant’s Closing Brief, *supra* note 90, at 7 (quoting *Garrott*, 183 P. at 472).

93. Appellants’ Opening Brief at 72, *Burkhardt v. Lofton*, 146 P.2d 720 (Cal. Dist. Ct. App. 1944) (Civ. 14117) (quoting *Letteau v. Ellis*, 10 P.2d 496, 497–98 (Cal. Dist. Ct. App. 1932)).

94. Respondent’s Brief at 13–14, *Letteau*, 10 P.2d 496 (Civ. 8277); *see also Letteau*, 10 P.2d at 497–98 (arguing against the longstanding judicial “disinclination to disturb vested property rights” and noting that to “prevent enforcement of absolute restrictions is consonant with nature and with the best interests of man”).

95. *See* Respondent’s Brief, *supra* note 94, at 42–43 (positing that the “spreading of the race-segregation idea” could lead the “reds or the British or the Japanese, or the Germans or any other group . . . [to] establish large colonies”); DELILAH L. BEASLEY, *THE NEGRO TRAIL BLAZERS OF CALIFORNIA* 198 (1919) (discussing *Jones v. Berlin Realty Co.*, where the plaintiffs warned that a large syndicate could buy up California land and prohibit white men from acquiring title).

96. *See* Appellants’ Opening Brief, *supra* note 93, at 70–72.

table.”<sup>97</sup> These lawyers argued that widespread use of RRCs empowered white homeowners to “legislate” residential patterns and thus to create a “new kind of land tenure directed solely against Negroes on the basis of race and color.”<sup>98</sup> Against the backdrop of this land tenure system, the RRC cases could not credibly be understood “as though they were between private litigants,” but rather involved “[s]ome persons of one race seek[ing] to fence in all persons of another race.”<sup>99</sup> This context was further underscored by referencing the growing public sentiment in favor of racial equality in the World War II context.<sup>100</sup>

RRCs were further contextualized by these lawyers’ assertion of the state action theory that ultimately persuaded the Supreme Court in *Shelley*. As articulated by University of California, Berkeley law professor, Dudley O. McGovney, in a highly influential 1945 law review article, the state action requirement attaching to the Fourteenth Amendment could be satisfied by the judicial enforcement of RRCs.<sup>101</sup> This argument analogized to the recent extension of state action doctrine in the white primary cases and in the racial zoning prohibition in *Buchanan v. Warley*.<sup>102</sup>

Loren Miller played a formative role in the development of the integrationist lawyers’ approach to property. Although never a confirmed communist, Miller’s views were deeply informed by Marxian economics.

97. *Id.* at 62–63 (Miller, along with attorney Thomas L. Griffith, Jr., argued that “courts of equity” have the same power as legislatures to “impinge upon the alleged absolute right of contract or of property, in the interests of the public good.”).

98. Brief of Amici Curiae Supporting Appellants at 23, *Fairchild v. Raines*, 151 P.2d 260 (Cal. 1944) (L.A. 18735) (“[T]his becomes legislation made in the first instance by lot owners . . .”).

99. Brief of the Attorney General of the State of California, as Amicus Curiae, *Anderson v. Ausetz*, L.A. 48408 (Cal. Sept. 4, 1946).

100. *See, e.g.*, Appellants’ Opening Brief, *supra* note 93, at 64–65 (citing President Roosevelt’s 1941 executive order against discrimination in defense industries, Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941); also citing the wartime sacrifice of Black soldiers: “Negro citizens who make proportionate sacrifice and efforts toward the winning of the war must win proportionate reward.” Wendell Wilkie, Address in Los Angeles (July 20, 1942)); *Negro Wins Right to Live in New Home*, L.A. TIMES, Jan. 18, 1946, at A3 (noting Miller’s citation of the United Nations charter as an expression of postwar racial progressivism).

101. D. O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional*, 33 CALIF. L. REV. 5, 15–17 (1945); *see also* Kahen, *supra* note 9, at 211; Miller, *Covenants for Exclusion*, *supra* note 83, at 543 (emphasizing that state action is inherent in judicial enforcement, as “racial covenants are private agreements but they are not self-executing”).

102. 245 U.S. 60, 81–82 (1917); BROOKS & ROSE, *supra* note 4, at 157 (summarizing the integrationist lawyers’ argument that “the neighborhood improvement associations, the real estate boards, [and] the major developers” had “appropriated a governmental function” by effectively [and unconstitutionally] racially zoning neighborhoods).

In his twenties and early thirties, before his turn to legal practice, he wrote for and edited prominent communist journals,<sup>103</sup> belonged to leftist organizations,<sup>104</sup> defended the rights of communists,<sup>105</sup> and traveled to the Soviet Union to collaborate with his longtime friend Langston Hughes on a propaganda film criticizing U.S. race relations.<sup>106</sup> Based on his leftist orientation, the young Miller saw civil rights as “poor substitutes for food, clothing and shelter.”<sup>107</sup> He argued that the problems of the “badly housed Negro” cannot be solved until the “profit system is abolished”<sup>108</sup> via “co-operative economics.”<sup>109</sup> In contrast, he noted that efforts to secure formal civil rights tended to overlook the “double burden of color and class exploitation.”<sup>110</sup> In this Marxian framing, Miller’s approach to property was starkly opposed to absolute owners’ rights.

As Miller began to take RRC cases in the late 1930s,<sup>111</sup> he adopted a somewhat more conventional view of property, although one still influenced by Marxian principles.<sup>112</sup> Rather than a total rejection of private

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103. HASSAN, *supra* note 79, at 9, 53, 112 (noting that Miller served as editor of the New Masses and wrote for the Liberator and the Crusader News Agency, all of which had communist ties).

104. *Id.* at 59 (noting that Miller belonged to the John Reed Club and League of Struggle for Negro Rights, among other leftist organizations).

105. *See id.*

106. *Id.* at 48–49.

107. Loren Miller, *On Second Thought*, CAL. EAGLE, Aug. 21, 1931, at 8; Loren Miller, *On Second Thought*, CAL. EAGLE, Mar. 11, 1932, at 8 (arguing that more attention should be paid to unemployed men who “must eat, sleep and wear clothing just as much” as employed men, calling the NAACP’s efforts “pathetic”).

108. Loren Miller, *On Second Thought*, CAL. EAGLE, Dec. 11, 1931, at 8.

109. Loren Miller, *On Second Thought*, CAL. EAGLE, Mar. 20, 1931, at 8; *see also* Loren Miller, *On Second Thought*, CAL. EAGLE, Aug. 7, 1931, at 8 (arguing that the solution to racial inequality can be found in a “system of consumer cooperatives”); Loren Miller, *On Second Thought*, CAL. EAGLE, June 30, 1933, at 12 (advocating “the redistribution of wealth”).

110. Loren Miller, *On Second Thought*, Dec. 25, 1931, at 8; Loren Miller, *Union Labor Shows Community Way to Success Through Co-operative Endeavor*, CAL. EAGLE, Dec. 19, 1930, at 12 (arguing that African Americans “live, think and dream economics”).

111. GONDA, *supra* note 67, at 84; *Court to Sift Attempt to Oust Negro Home Owners*, L.A. SENTINEL, Sept. 28, 1939, at 1.

112. HASSAN, *supra* note 79, at 10 (characterizing Miller as a lifelong adherent of Marxian economics). It should be noted that, although Miller’s strong Marxian commitments make him somewhat of an outlier among NAACP lawyers of the time, his centrality in the national RRC battle makes his political orientation especially relevant here. Houston did not share Miller’s Marxian views, although he did praise communists’ advocacy for Black workers and their resistance to the House Un-American Activities Committee. Houston’s support for communists appeared to have brought him under surveillance, although not to the extent of Miller, who was subjected to decades of FBI investigation. *See* GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 108, 204 (1983). Marshall in the 1940s claimed to have “no antagonism” toward communists and was clearly undeterred by Miller’s leftist

property, Miller defended the property rights of Black homeowners as a remedy to the deleterious effects of residential segregation. Miller saw RRCs as having “laid the foundation for an American ghetto system,”<sup>113</sup> which he viewed as “the greatest problem faced by cities in the United States.”<sup>114</sup> Even in this more moderate framing, Miller vehemently opposed the vacuum view of property. He emphasized that residential segregation was not a result of purely private property interactions but was “woven into the warp and woof of governmental housing policies, practices, and procedures.”<sup>115</sup> He opposed formalistic understandings of RRCs, arguing that the judiciary “cannot shut its eyes” to how these covenants impacted “adequate housing facilities.”<sup>116</sup> He was also an early adopter of Professor McGovney’s state action theory, emphasizing the role of the judiciary in enforcing a system of RRCs such that slum conditions “flourished and grew in the warm sunlight of Supreme Court approval.”<sup>117</sup>

Although Miller raised the state action theory in most of his RRCs cases, this line of attack was entirely unsuccessful before *Shelley* with the remarkable exception of the “*Sugar Hill Cases*,”<sup>118</sup> where Miller won what appears to be the only constitutional decision against RRCs in the decades leading up to *Shelley*.<sup>119</sup> At trial, Miller presented an innovative, anti-formalist attack on the vacuum view. He succeeded in a motion to “deny the introduction of evidence,”<sup>120</sup> furnishing the court only with two law review articles: McGovney’s piece on the state action theory and Kahen’s

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credentials, requesting that Miller take a central role in RRC litigation as well as later high-profile NAACP cases including *Brown*. See TUSHNET, *supra* note 69, at 45.

113. Bishop Shell & Loren Miller, *Assail Home Ban Agreements*, CHI. BEE, May 19, 1946, at 7.

114. HASSAN, *supra* note 79, at 199.

115. LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 255 (1966).

116. Appellants’ Opening Brief, *supra* note 93, at 71–72 (“This court cannot shut its eyes to the broad question of public policy . . . and become party to the social ills that flow from overcrowding and lack of adequate housing facilities for those who seek only to occupy their own homes.”).

117. MILLER, *supra* note 115, at 244, 322–25 (arguing that McGovney’s state action theory was necessary to resolve the ridiculous, anomalous situation where the court can enforce residential segregation while other branches of government may not, based on the easy fiction that court action is not state action).

118. L.A. 19,759 (Cal. Sept. 4, 1946).

119. The *Sugar Hill Cases* consisted of eight consolidated cases involving over one hundred minority defendants. The cases were consolidated under the name *Anderson v. Ausetz*, L.A. 19,759 (Cal. Sept. 4, 1946); see Mandel, *supra* note 75, at 64 n.61, 77 n.1 (noting that the original complaint was filed on April 15, 1943); Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 W. RSRV. L. REV. 101, 124 & n.113 (1955); cf. *California Court Gave First Decision on Race Covenants*, L.A. SENTINEL, May 6, 1948, at 9; *California Joins Georgia: Race Covenants Upheld by Court*, PEOPLE’S VOICE, Sept. 13, 1947, at 1.

120. GONDA, *supra* note 67, at 85.

piece that included the discussion of the vacuum view of property.<sup>121</sup> He presented an opening statement focusing on “acute housing shortage for Negroes in the city”<sup>122</sup> and invited the judge to visit the neighborhood of the RRCs in question.<sup>123</sup> This unconventional approach reflected Miller’s longstanding efforts to stretch legal formalism and persuade the judiciary to consider property in context. To the astonishment of legal observers across the country, the judge suspended proceedings after opening arguments, accepted Miller’s invitation to examine the neighborhood firsthand, and, following his visit to Sugar Hill, promptly rendered a constitutional decision against RRC enforcement citing the precise grounds Miller advocated.<sup>124</sup> The opinion referenced McGovney’s state action theory and emphasized the policy imperative against racial discrimination, noting that “[j]udges have been avoiding the real issue too long.”<sup>125</sup>

The decision in the *Sugar Hill Cases* was a “turning point” in the national RRC struggle and was hailed by NAACP leadership as the “greatest victory of its kind.”<sup>126</sup> Miller remarked that he had “succeeded in pulling a rabbit out of the hat.”<sup>127</sup> The decision received extensive national media coverage owing to the celebrity status of several of the Black defendants, most notably Hattie McDaniel, who had recently become the first African American recipient of an Academy Award.<sup>128</sup> Marshall and Miller viewed the case as having great potential for U.S. Supreme Court review, but to Miller’s stated regret the California court moved too slowly for the case to be included with *Shelley*.<sup>129</sup>

Following the trial, Miller used the appeals of the Sugar Hill decision to further develop his attack on the vacuum view of property. His appellate

121. McGovney, *supra* note 101; Kahen, *supra* note 9.

122. HASSAN, *supra* note 79, at 132.

123. Mandel, *supra* note 75, at 101–02.

124. *Id.* at 102.

125. BROOKS & ROSE, *supra* note 4, at 137–38 (reporting that the judge in the *Sugar Hill Cases*, Judge Thurmond Clarke of the Los Angeles Superior Court, concluded that African Americans should enjoy “their full rights under the Fourteenth Amendment”); see also Mandel, *supra* note 75, at 107 (quoting Judge Clarke as having said, “Certainly there was no discrimination against the Negro race when it came to calling upon its members to die on the battlefields in defense of this country in the war . . .”).

126. HASSAN, *supra* note 79, at 132 (quoting Walter White, Executive Secretary of the NAACP, on the Sugar Hill victory: “This is by far the greatest victory of its kind.”); Willis O. Tyler, *Defense Attorney Analyzes Historic ‘Sugar Hill’ Decision*, CAL. EAGLE, Dec. 13, 1945, at 1 (describing the ruling as a “turning point” in open-housing activism).

127. HASSAN, *supra* note 79, at 145.

128. Mandel, *supra* note 75, at 66–70, 80, 109–10 (noting that McDaniel helped Miller coordinate defendants and held strategy meetings in her home and citing coverage of the *Sugar Hill Cases* in *The New York Times*, *The New York Herald*, *The Chicago Defender*, *The Crisis* [magazine of the NAACP], and *Time Magazine*).

129. *Id.* at 119.

arguments suggested that RRCs inherently involve state action, not only in judicial enforcement, but also in “every step of the process” by which RRCs operated.<sup>130</sup> He described RRCs as communal devices that “determine where certain American citizens may live.”<sup>131</sup> He concluded that to deny the state action inherent in RRCs required “absurd” and “ingenious” arguments, as presented by the segregationist side.<sup>132</sup>

Miller’s multidisciplinary approach to litigation, his distaste for legal formalism, his efforts to promote contextualized property to the judiciary, and his deeply rooted commitment to racial equality in housing informed his theoretical attack on the vacuum view, which would later find expression at the Supreme Court in *Shelley*.

*b. Coordinating the National Anti-covenant Coalition*

In addition to local legal efforts, the integrationist lawyers nationally coordinated multidisciplinary allies, creating “the largest coalition of civil rights advocacy groups assembled in the Supreme Court’s history.”<sup>133</sup> After the Supreme Court denied certiorari in multiple RRC cases in the 1920s and 1930s,<sup>134</sup> Thurgood Marshall sought to employ a more “carefully planned program,” including the cultivation of sociological materials, before returning to the Court.<sup>135</sup> Integrationist lawyers collaborated with other fair housing activists while also receiving support from NAACP leadership.<sup>136</sup> As RRC cases worked their way up the appellate ladder, local attorneys could hand their cases over to the NAACP’s leading and most experienced appellate litigators.<sup>137</sup> This pattern was not followed, however, in the Missouri case of *Shelley v. Kraemer*, where local attorney George Vaughn defied the central NAACP leadership by petitioning for certiorari with the Supreme Court in a case that was disfavored by Marshall.<sup>138</sup> After a failed attempt to purchase Vaughn’s patience, Marshall quickly instructed lawyers with cases in

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130. Respondents’ Brief at 16, *Anderson v. Ausetz*, L.A. 19,759 (Cal. Aug. 30, 1946).

131. *Id.* at 20.

132. *Id.* at 16.

133. GONDA, *supra* note 67, at 12.

134. The Court avoided the constitutional question of RRC enforceability in *Hansberry v. Lee*, 311 U.S. 32 (1940).

135. TUSHNET, *supra* note 69, at 88.

136. GONDA, *supra* note 67, at 70 (observing that the integrationist lawyers shared “wisdom earned by a battery of their colleagues locked in similar struggles around the country,” ultimately “eyeing the larger goal of forcing a reconsideration by the U.S. Supreme Court”).

137. *Id.* at 128 (noting, for example, that Marshall persuaded local Detroit attorneys to allow Miller and Houston to take over the briefs and oral arguments when their case joined *Shelley* at the Supreme Court).

138. *Id.* at 128–30.

Michigan and the District of Columbia to join *Shelley* in appealing to the Supreme Court.<sup>139</sup>

The anti-covenant coalition was perhaps most visible in the three national strategic conferences on RRC litigation hosted by the NAACP between 1945 and 1947. These conferences were co-sponsored by labor, civic, religious, housing, and veterans groups, reflecting the broad, multidisciplinary nature of the coalition.<sup>140</sup> Miller and Houston argued that RRC litigation could serve the larger social movement for residential integration by using trial strategies that “broaden the issues just as much as possible on every single base.”<sup>141</sup> In Houston’s words, the courts should serve as a “forum for the purpose of educating the public on the question of restrictive covenants.”<sup>142</sup> At trial, these lawyers invited testimony from sociologists to discuss how RRCs impacted racial housing patterns.<sup>143</sup> They also extensively questioned white plaintiffs about their racial attitudes in order to reveal their ignorance and prejudice.<sup>144</sup> This strategy included efforts to shed doubt on the determinacy of racial categories by eliciting plaintiffs’ visual criteria for racial identification and then calling anthropologists to provide expert testimony about how visual traits do not reliably distinguish racial categories.<sup>145</sup> Houston explained at one of the national strategy conferences that this questioning was part of an “educational effort” with respect to racial prejudice.<sup>146</sup> These litigation tactics helped illustrate that RRCs were deeply implicated in maintaining systemic racial inequality rather than purely private and inconsequential expressions of individual property rights.

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139. *Id.*

140. Vose, *supra* note 119, at 131 & n.142 (summarizing the wide range of interest groups attending the RRC strategy conferences, including over forty such groups at the conference held in Chicago).

141. See TUSHNET, *supra* note 69, at 88 (quoting Houston and noting that Houston framed the litigation strategy of the opposing lawyers as an effort to narrow the issues as much as possible); see also MACK, *supra* note 22, at 203 (noting that Miller similarly proposed an attack on RRCs on the “broadest possible social and economic grounds”).

142. Vose, *supra* note 119, at 108.

143. VOSE, *supra* note 20, at 92 (noting, for example, sociologist E. Franklin Frazier’s testimony in several cases argued by Houston).

144. *Id.* at 84–86.

145. *Id.* (discussing Houston’s examination of a white plaintiff regarding her determination that her neighbors were non-white). The plaintiff cited to the neighbors’ “eyes and nose” as grounds that she could “simply . . . see they are colored.” Houston’s questioning led the plaintiff to admit that she would object to a Black neighbor even if the neighbor had only one percent Black ancestry and that she would prefer living next to a white ex-convict over a Black “Senator or Congressman.” *Id.*

146. This questioning of racial determinacy did not yet reflect a modern view of race as social construction, although these anthropological experts did cite environmentalist theories of race and questioned the notion of a pure racial category. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 247 (2004).

The educational efforts of the integrationist lawyers extended beyond the courtroom as these lawyers engaged in publicity drives for RRC litigation. Consistent judicial refusal to question RRC enforceability inspired “a massive infusion of popular energy into the anticovenant fight.”<sup>147</sup> In Detroit, following a state supreme court decision upholding the enforcement of an RRC, “[t]he local NAACP branch sponsored a rapid succession of public meetings to shore up popular support for the cause.”<sup>148</sup> These lawyers mobilized open housing activists to support RRC litigation by promising an eventual Supreme Court victory, declaring, “We are starting an avalanche that will not stop until we are at the doors of the United States Supreme Court.”<sup>149</sup> They framed their efforts to topple RRC enforceability as one component of the broader fight to “wipe out . . . ghetto walls.”<sup>150</sup>

The coordination of amici curiae against RRCs was remarkable, resulting in the *Shelley* Court reportedly receiving more amicus briefs than ever before in a Supreme Court civil rights case.<sup>151</sup> The amicus contributors reinforced the main briefs’ doctrinal, theoretical, and empirical conclusions. This included an effort to contextualize RRCs with social-scientific evidence, as discussed below, as well as religious, moral, and public policy objections.<sup>152</sup>

### *c. Developing Social-Scientific Support*

The national strategic conferences proved a fruitful venue for cultivating academic allies who could empirically document the “practical effect” of the RRC system on open housing.<sup>153</sup> Miller and Houston in particular advocated a sociological attack on the vacuum view rooted in

147. GONDA, *supra* note 67, at 99.

148. *Id.*

149. *Id.*

150. THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 181 (1996) (quoting an integrationist lawyer’s description of the anti-covenant campaign as an effort to “wipe out Detroit’s ghetto walls”); *see also* VOSE, *supra* note 20, at 72 (citing a flyer seeking support for RRC litigation and framing the anti-covenant cause as a matter of “protect[ing] everybody’s right to living space” and “buy[ing] freedom from SLUMS!”).

151. Eskridge, *supra* note 20, at 2085.

152. *See, e.g.*, Brief of the American Indian Citizens League of California, Inc., as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1947) (Nos. 72, 87), 1947 WL 30437, at \*4 (arguing for a right to “a place to live upon the continent which was once entirely theirs, all as a result of land restrictions prohibiting occupancy of premises by Indians and their descendants”); Brief of the Japanese American Citizens League—Amicus Curiae at 9–10, *Hurd v. Hodge*, 334 U.S. 24 (1948) (No. 290) (emphasizing the challenges faced by Japanese Americans in finding housing after internment); *see generally* VOSE, *supra* note 20, at 163.

153. Appellant’s Opening Brief, *supra* note 93, at 30.

their experimentation at the trial and appellate levels.<sup>154</sup> Against settled precedent in favor of RRC enforceability, these lawyers sought to make the “sociopolitical case for legal change” by demonstrating the “costs to the community” of a system of RRCs.<sup>155</sup> Furthermore, the sociological perspective supported the theory that RRCs were functional equivalents of unconstitutional racial zoning.<sup>156</sup> Underlying this position was a direct challenge to the vacuum view of property. These lawyers cited Kahen’s article, which argued that conceiving of property in a “sociological vacuum” tends to yield “socially undesirable doctrines” and should be countered by including “relevant sociological data in the record and briefs.”<sup>157</sup> Kahen would present this perspective in the strategy conferences and in his later service on the NAACP committee to collect social science materials relating to RRCs.<sup>158</sup>

The participants of the strategy conferences generally agreed to pursue a “full sociological presentation” in the courts documenting the link between RRCs and slum conditions.<sup>159</sup> They further agreed that the sociological materials should be developed in conjunction with the lawyers and prior to the writing of Supreme Court legal briefs. Several speakers emphasized the need to publish empirical findings in well-respected journals that could be cited in briefs.<sup>160</sup> A committee was appointed to oversee the development and publication of this research.<sup>161</sup> This committee also collected existing empirical sources, largely drawing from the Chicago School of sociology, which had documented the causes

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154. GONDA, *supra* note 67, at 138 (“Miller and Houston were determined to make social-scientific material a central point of contention” in NAACP litigation strategy.); Loren Miller, California, at 1–2 (July 9, 1945) (on file with Huntington Library in the Loren Miller Papers) (noting that empirical research had been vital in establishing change-of-character defenses in RRC cases, where Miller had cited “a good deal of testimony as to the social effects of covenants and on the question of population growth, over-crowding and areas of principal Negro occupancy”).

155. KLARMAN, *supra* note 6, at 216.

156. See TUSHNET, *supra* note 69, at 88 (citing Marshall’s assertion that sociological evidence would help demonstrate the equivalence between the social harms resulting from RRCs and from municipal segregation ordinances).

157. See, e.g., Consolidated Brief for Petitioners at 10–11, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291); Kahen, *supra* note 9, at 207.

158. Vose, *supra* note 119, at 132–33 (describing Kahen’s role in organizing the sociological record presented in *Shelley*).

159. *Id.* at 129–30 (quoting Phineas Indritz).

160. *Id.* at 132.

161. VOSE, *supra* note 20, at 162 (noting that the committee included both the president and director of community services of the American Council on Race Relations [ACRR] in Chicago, which functioned as a national clearinghouse for “research bearing upon basic factors underlying the problems of racial and cultural relations”).

and effects of racial housing inequities for decades.<sup>162</sup> The committee succeeded in producing a sociological compendium of several hundred pages, which was distributed to ally organizations for use in amicus briefs.<sup>163</sup> Materials from this compendium were heavily cited and excerpted in many of the briefs filed in *Shelley* and the companion cases in the Supreme Court.<sup>164</sup> *Shelley* attorney George Vaughn was a rare voice of dissent from the sociological strategy, instead preferring a morally rooted, a priori position against RRCs on the ground that “the evil tendency, not actual injury, is the true test of public policy.”<sup>165</sup> In spite of Vaughn’s reluctance, brief writing proceeded on a heavily sociological basis.

This emphasis on social science reflected a broader jurisprudential trend. While the application of empirical research to legal argumentation had been established long before *Shelley*, with roots extending even further back than the original Brandeis Brief in *Muller v. Oregon*,<sup>166</sup> sociologically oriented briefs had only recently been introduced in civil rights cases with an “initial dry run” in the 1946 California school desegregation case, *Mendez v. Westminster*.<sup>167</sup> *Shelley* would serve as “a full-fledged trial” of sociological strategy in NAACP litigation, six years before *Brown I*.<sup>168</sup> The preparations for *Shelley* coincided with the American Jewish Congress’s remarkably successful efforts to merge social science and law in the 1940s by producing studies of racial prejudice

162. Vose, *supra* note 119, at 115; *see, e.g.*, Dmitri N. Shalin, *Pragmatism and Social Interactionism*, 51 AM. SOCIO. REV. 9, 22–23 (1986) (noting that the Chicago School in the 1920s and 1930s drew on earlier environmentalist and symbolic interactionist scholarship emphasizing the central role of housing conditions in the production of social ills).

163. VOSE, *supra* note 20, at 162.

164. *See, e.g.*, Brief of American Civil Liberties Union, Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87), 1947 WL 30435, at \*iv–v (Authorities and Miscellaneous table). *But cf.* Brief of the American Indian Citizens League of California, Inc., as Amicus Curiae, *supra* note 152, at \*22–41 (citing primarily to earlier research on policies affecting American Indians rather than the research in the NAACP compendium).

165. TUSHNET, *supra* note 69, at 92.

166. 208 U.S. 412 (1908); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 65–71 (observing that the Brandeis Brief has deeper roots than *Muller*, including American eugenicists and early nineteenth-century British efforts to frame labor laws as health interventions); *cf.* David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9, 10–11 (2011) (noting that Brandeis’s *Muller* brief was not the first sociological brief, but it was “unique in focusing almost entirely on sociological argument to the exclusion of traditional legal argument”).

167. 64 F. Supp. 544 (S.D. Cal. 1946), *aff’d*, 161 F.2d 774 (9th Cir. 1947); JOHN P. JACKSON, JR., SOCIAL SCIENTISTS FOR SOCIAL JUSTICE: MAKING THE CASE AGAINST SEGREGATION 88 (2001) (noting that Los Angeles attorney and journalist, Carey McWilliams, played a prominent role in the *Mendez* litigation while advocating “active collaboration” between law and social science on the basis of these two fields’ shared “assumptions as to the nature and origin of racial discrimination”).

168. VOSE, *supra* note 20, at ix.

in collaboration with lawyers preparing for discrimination and desegregation cases.<sup>169</sup> This turn to social science was further rooted in a legal realist tradition, which enjoyed substantial support in the Supreme Court around the time of *Shelley*.<sup>170</sup>

### 3. DISSENTING TRADITION IN THE YEARS IMMEDIATELY PRECEDING *SHELLEY*

In the three years preceding *Shelley*, the integrationist lawyers began to find allies in the judiciary. Aside from Miller's singular trial victory in the *Sugar Hill Cases*, these favorable opinions were limited to appellate dissents and dicta.<sup>171</sup> The NAACP lawyers convinced this minority of judges to draw on their equity powers to consider the real-world effects of RRCs,<sup>172</sup> as most RRC enforcement suits were brought in equity for injunctive relief to prevent a sale or to remove non-white occupants rather than to seek damages at law.<sup>173</sup> Two of these dissenting opinions are particularly noteworthy because of their wide influence and their strong support for the anti-vacuum perspective. Justice Traynor of the California Supreme Court in 1944, in a case argued by Loren Miller,<sup>174</sup> commended the submission of sociological materials and concluded that RRCs were "contrary to the public interest in the use of land in urban communities

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169. JACKSON, *supra* note 167, at 64–66, 88, 103 (detailing how the American Jewish Congress produced a substantial volume of research on racial prejudice in the 1940s, followed by the collapse of the Congress's organizational structures that had merged lawyers and social scientists).

170. Note, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1611, 1619–20 (1995) (observing that in the 1940s, on the heels of the Court's approval of New Deal measures, the Supreme Court had a realist orientation and a "strikingly liberal cast").

171. See *infra* notes 175, 181–83 and accompanying text.

172. See, e.g., Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Michigan, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87), 1947 WL 30430, at \*35 (writ for certiorari to *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947)) ("The dangers to society which are inherent in the restriction of members of minority groups to overcrowded slum areas are so great and are so well recognized that a court of equity, charged with maintaining the public interest, should not, through the exercise of the power given to it by the people, intensify so dangerous a situation."); see also *Hurd v. Hodge*, 334 U.S. 24, 36 (1948) (Frankfurter, J., concurring) (noting that it was ironic for courts of equity to enforce RRCs, as "[e]quity is rooted in conscience" and involves "the exercise of a sound judicial discretion") (quoting *Morrison v. Work*, 266 U.S. 481, 490 (1925)).

173. BROOKS & ROSE, *supra* note 4, at 77, 83 (noting that injunctive relief was often the only means of enforcing RRCs developed in neighborhood signature drives because traditional property doctrine would have required horizontal privity for damage suits).

174. Miller presented this case along with another prominent NAACP-affiliated lawyer from the Los Angeles area, Willis O. Tyler, who started challenging RRCs more than twenty-five years earlier. See *Title Gaur. & Tr. Co. v. Garrott*, 153 P. 470 (Cal. Dist. Ct. App. 1919).

where people are concentrated in limited areas.”<sup>175</sup> Traynor’s concurrence adopted the NAACP position nearly wholesale, emphasizing that RRCs “must yield” to the public interest.<sup>176</sup> Three years later, Judge Henry Edgerton of the D.C. Circuit issued another influential dissent against the enforcement of an RRC. Like Traynor, Edgerton emphasized the effects of RRCs in creating housing shortages for people of color and a “ghetto system.”<sup>177</sup> He followed the NAACP briefs in defending the rights of non-owners to access the property market, noting, “Of the civil rights so conferred, none is clearer and few are more vital than the right to buy a home and live in it.”<sup>178</sup> Edgerton also commented favorably on the relevance of the social science materials presented by the NAACP.<sup>179</sup> This dissent may have been especially impactful in light of Edgerton’s strong track record of dissenting opinions that later led to Supreme Court reversals.<sup>180</sup>

In these same years immediately preceding *Shelley*, the NAACP position found further support, albeit markedly more tepid, among judges who upheld RRC enforceability in deference to precedent while noting their strong personal aversion to RRCs as legal instruments. For example, an Illinois judge enforced a Chicago RRC while lamenting that those who write RRCs are an “un-American group” who “would do violence to American laws and traditions.”<sup>181</sup> The Missouri Supreme Court sustained

175. *Fairchild v. Raines*, 151 P.2d 260, 267 (Cal. 1944) (Traynor, J., concurring) (concurring with a decision striking down an RRC on the grounds of a changed-conditions defense).

176. *Id.* at 269.

177. *Hurd v. Hodge*, 162 F.2d 233, 246 (D.C. Cir. 1947) (Edgerton, J., dissenting) (“Suits like these, and the ghetto system they enforce, are among our conspicuous failures to live together in peace.”); *see also Mays v. Burgess*, 147 F.2d 869, 876–77 (D.C. Cir. 1945) (Edgerton, J., dissenting) (“It is a matter of common knowledge that the emergency is now acute and that the shortage of decent housing, or any housing, for Negroes is particularly acute. We cannot close our eyes to what is commonly known. The conditions in which many of the 187,000 Negroes in the District of Columbia have long been obliged to live are now worse than ever.”) (footnotes omitted).

178. *Hurd*, 162 F.2d at 241 (Edgerton, J., dissenting).

179. *See id.* at 244–45 (Edgerton, J., dissenting) (criticizing the judiciary for failing to consider the social impacts of RRC enforceability); GONDA, *supra* note 67, at 86; *cf. Fairchild*, 151 P.2d at 269 (Traynor, J., concurring) (concluding that the trial courts should be required to make findings on housing needs).

180. *See VOSE*, *supra* note 20, at 99 (noting that, of the twenty-three Supreme Court cases in which Edgerton dissented in the D.C. Circuit, seventeen were reversed); *see also GONDA*, *supra* note 67, at 183 (arguing that the Edgerton dissent was particularly influential on Chief Justice Vinson’s receptivity to the arguments against RRC enforceability in *Shelley*).

181. *Tovey v. Levy*, No. 45-S-947 (Ill. Super. Ct. Nov. 28, 1947), *reprinted in* Wendy Plotkin, “Hemmed in”: *The Struggle Against Racial Restrictive Covenants and Deed Restrictions in Post-WWII Chicago*, 94 J. ILL. ST. HIST. SOC. 39, 58 (2001) (quoting Chief Justice Robert E. Crowe of the Cook County Superior Court, who noted that it was

RRC enforceability in the *Shelley* case while expressing “deep concern” for the “tragic” and “grave and acute problem” of residential segregation.<sup>182</sup> A Queens judge enforced an RRC in an opinion that expressed gratitude for the anti-covenant briefs focusing on slum conditions and observed that RRCs contradict the spirit of American efforts in World War II, but the judge ultimately concluded that the court was “constrained to follow precedent.”<sup>183</sup>

### *C. Shelley: The Culmination of the Attack on the Vacuum View*

The integrationist lawyers’ attack on the vacuum view found full expression in *Shelley*. These lawyers presented to the Court a contextual theory of property resting on, as summarized below, five claims about property relations. This Section will note several ways that these claims reflect observations of theorists in the progressive property tradition.

#### 1. THAT PROPERTY RELATIONS ARE NOT THE PURELY PRIVATE DOMAIN OF OWNERS

In response to the vacuum view, the integrationist lawyers in *Shelley* cited a recent Supreme Court opinion stating that “[o]wnership does not always mean absolute dominion.”<sup>184</sup> Property, for these lawyers, exists neither in a pure vacuum between a person and a thing nor in a slightly extended version of this vacuum that acknowledges only the interests of neighboring owners. The briefs against RRCs cited to Kahen’s article on property in a sociological vacuum, where he suggested that RRCs affect more than the “parties litigant” and a “parcel of land” but rather can harm the “entire community.”<sup>185</sup> Thus, *Shelley* did not present a question of “enforcing an isolated private agreement” but rather a democratic “test” as to whether American communities would be divided into “ghettos solely

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“unthinkable” that it would be the “public policy of the United States . . . that the courts may by judicial decision create ghettos or black towns for American citizens because of their religion or color”).

182. *Kraemer v. Shelley*, 198 S.W.2d 679, 683 (Mo. 1946), *rev’d*, 334 U.S. 1 (1948).

183. *Kemp v. Rubin*, 69 N.Y.S.2d 680, 683 (N.Y. Sup. Ct. 1947), *rev’d*, 81 N.E.2d 325 (N.Y. 1948); *see also Sipes v. McGhee*, 25 N.W.2d 638, 644 (Mich. 1947) (citing the value of sociological materials as “strong and convincing” evidence of the negative impact of RRCs but concluding that the court must “confine our decision to the matters within the record”), *rev’d*, *Shelley v. Kraemer*, 334 U.S. 1 (1948).

184. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

185. Kahen, *supra* note 9, at 207.

on racial or religious lines.”<sup>186</sup> Accordingly, these lawyers framed the vacuum view as an “uncritical distortion” of property reflecting a maze of legalisms and technicalities.<sup>187</sup> In contrast to the vacuum view’s emphasis on absolutist owners’ rights, these lawyers asserted the affirmative rights of non-owners to enter the market for property.<sup>188</sup> This position was grounded in traditional property doctrine, as well as the 1866 Civil Rights Act and then-recent proclamations by Presidents Roosevelt and Truman promising a universal American right to own a home.<sup>189</sup>

## 2. THAT PROPERTY RELATIONS INHERENTLY INVOLVE STATE ACTION

The integrationist lawyers’ constitutional attack on RRC enforceability centered on the claim that the *judicial enforcement* of RRCs constituted state action, which thereby created “state court imposed ghettos.”<sup>190</sup> Yet these lawyers also included the further theoretical insight that the operation of RRCs themselves inherently involved state action even in the absence of judicial enforcement. The NAACP coalition described RRCs as an illegal delegation of state authority to white homeowners, noting that “[p]roperty owners are not the group to determine whether property is to be sold to Negroes.”<sup>191</sup> Thus, in *Shelley*, these lawyers presented a “public takeover argument,”<sup>192</sup> contending that the pervasiveness of RRCs constituted land policy akin to “community zoning.”<sup>193</sup> Seemingly private property relations, such as writing and recording covenants, were, in the NAACP’s view, inherently backed by

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186. Brief for Petitioners, *supra* note 19, at 90–91. At oral argument in *Shelley*, Marshall emphasized that RRCs do not constitute a mere “private contractual dispute” but rather have important implications for “housing problems, crime and disease.” HASSAN, *supra* note 79, at 171.

187. Brief for Petitioners, *supra* note 19, at 11.

188. See VOSE, *supra* note 20, at 99 (citing Judge Edgerton’s assertion of an affirmative right to access the property market in the *Mays* dissent); see *Hurd v. Hodge*, 162 F.2d 233, 241 (Edgerton, J., dissenting) (“The right to buy and use anything that whites may buy and use is conferred upon Negroes implicitly by the due process clauses of the Fifth and Fourteenth Amendments and explicitly by the Civil Rights Act.”).

189. Brief for Petitioners, *supra* note 19, at 19–20; see 90 CONG. REC. 55, 57 (1944) (Roosevelt recognized “[t]he right of every family [regardless of station, race, or creed] to a decent home.”); PRESIDENT’S COMM. ON C.R., TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 67 (1947) (reporting, pursuant to Truman’s Executive Order 9808, that “[e]quality of opportunity to rent or buy a home should exist for every American”).

190. Brief for Petitioners, *supra* note 19, at 91.

191. Minutes of Meeting N.A.A.C.P. Lawyers and Consultants on Methods of Attacking Restrictive Covenants 11 (Sept. 6, 1947) (on file with the Library of Congress).

192. BROOKS & ROSE, *supra* note 4, at 159–60.

193. Consolidated Reply Brief for Petitioners at 2, *Hurd v. Hodge*, 334 U.S. 24 (1948) (No. 290); see also BROOKS & ROSE, *supra* note 4, at 157 (summarizing the integrationist lawyers’ position that RRCs were “racial zoning by another name”).

state action. This insight is more generally reflected in the progressive theoretical critique of the ownership model of property and the observation that property rights cannot exist in a purely private and unregulated space.<sup>194</sup>

### 3. THAT PROPERTY RELATIONS INHERENTLY INVOLVE COLLECTIVE PRIVATE ACTION

In addition to illuminating the *state* action behind RRCs, the integrationist lawyers argued that RRCs were also the product of collective *private* action. In the Supreme Court briefs, these lawyers attributed the pervasiveness of RRCs largely to neighborhood improvement associations, real estate boards, and major developers.<sup>195</sup> Furthermore, these lawyers characterized RRC cases in the terms of collective private struggle, as “contests between opposing forces rather than law suits between individuals.”<sup>196</sup> This position reflects the inherently collective nature of RRCs. Homeowners could benefit from limiting their own ability to sell their property only if their neighbors were similarly limited. Indeed, RRCs could be truly effective only with “neighborhood cohesion” to stave off blockbusting and prevent neighbors from selling to non-white

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194. JOSEPH WILLIAM SINGER, *NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 1–2* (2015) (arguing that property cannot exist without regulation, as government necessarily creates property rights and adjudicates property conflicts); UNDERKUFFLER, *supra* note 12, at 123, 141–43 (noting that property is “unavoidably allocative”); *see also* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (emphasizing the endorsing role of government in property relations in his definition of property: “To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen[.] Endorsed: The state[.]”).

195. *See* Supplemental Brief of Petitioners in Support of Review by Certiorari, *Shelley v. Kraemer*, 334 U.S. 1 (1947) (Nos. 72, 87), 1947 WL 44156, at \*10 (noting that the St. Louis RRC in question in the *Shelley* case was produced by a “conspiracy between the signers thereof, their privies, and the officers and members of the St. Louis Real Estate Exchange”); Brief in Support of Petition for Writ of Certiorari to the Supreme Court of Michigan, *Shelley v. Kraemer*, 334 U.S. 1 (1947) (Nos. 72, 87), 1947 WL 30430, at \*35 (observing that real estate agents, following their code of ethics, “organize, promote and maintain restrictive covenants” in collaboration with an estimated 150 property owner associations in the Detroit area); Brief of California Amici Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1947) (Nos. 72, 87), 1947 WL 30440, at \*5 (noting that, through the use of widespread RRCs, “[p]roperty owners and realty boards are gradually privately zoning residential property in Southern California”); *see generally* Wendy Plotkin, *Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago, 1900–1953*, at 73, 287–88 (1999) (Ph.D. thesis, University of Illinois at Chicago) (describing how neighborhood RRC signature drives were supported by real estate professionals, neighborhood improvement associations, and lawyers, among other private actors).

196. Vose, *supra* note 119, at 126 (quoting Miller from a personal letter to Vose on Nov. 25, 1953).

buyers.<sup>197</sup> Judicial enforcement was never entirely necessary, as RRCs functioned as “expressive focal points” and a “customary practice” signaling “neighbors’ normative commitments” to exclude on the basis of race.<sup>198</sup> This emphasis on the collective private action behind RRCs is supported by progressive property theory, wherein property relations are cast as a competition of “conflicting desires” among private actors for the same “finite goods.”<sup>199</sup>

#### 4. THAT PROPERTY RELATIONS CANNOT BE DIVORCED FROM THE CONTEXT OF RACIAL INEQUALITY

While the integrationist lawyers noted that RRCs injure “the community as a whole,”<sup>200</sup> they primarily framed this injury more specifically as a racialized harm faced by African Americans and other people of color. In particular, the *Shelley* briefs emphasized that RRCs confined non-white populations to “colored zones or ghettos . . . [with] abnormal over-crowding, congestion, and substandard facilities.”<sup>201</sup> In oral argument at the Supreme Court, racial context was raised several times, perhaps most effectively by George Vaughn, who brought the Missouri case (*Shelley*). Vaughn’s insistence on arguing that RRCs represented “badges and incidents of slavery,” as prohibited under the Thirteenth Amendment, infuriated Miller and Marshall, who had not included any reference to the Thirteenth Amendment in the *Shelley* briefs.<sup>202</sup> Yet Vaughn was remarkably impactful in his assertion that RRCs were an effort to send African Americans “back into slavery and

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197. BROOKS & ROSE, *supra* note 4, at 18, 95–96.

198. *Id.* at 13, 163, 171 (observing that RRCs signaled racial exclusion to minority home-seekers, real estate agents, and developers seeking to build homes on covenanted land). Based on these powerful signaling functions, RRCs operated as a “customary practice,” bolstering residential exclusion even when covenants were not enforced. *Id.* at 163.

199. UNDERKUFFLER, *supra* note 12, at 142–43.

200. Brief for Petitioners, *supra* note 19, at 9, 63–66 (suggesting that RRCs injure the “health, morals and safety” of the “community as a whole”).

201. Brief for the United States as Amicus Curiae at 28–29, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87). The use of the term “ghetto” in these arguments may have had particular resonance given the recent Jewish ghettos of Nazi occupation in Central and Eastern Europe. See Consolidated Brief in Behalf of American Jewish Committee B’nai B’rith (Anti-Defamation League) Jewish War Veterans of the United States of America Jewish Labor Committee as Amici Curiae at 5, *Shelley v. Kraemer*, 334 U.S. 1 (1947) (Nos. 72, 87), 1947 WL 44160, at \*5 (noting that “Jewish experience under European despotism gave rise to the word ‘ghetto’” and comparing this experience to the “growth in almost every major American city of racial restrictive covenants”).

202. See GONDA, *supra* note 67, at 130–33.

involuntary servitude.”<sup>203</sup> Vaughn dramatically brought the courtroom to silence with the entreaty: “Let me in, let me in, for I too have helped build this house.”<sup>204</sup> It was reported that this statement produced a moment of “drama in the courtroom, a sense of what the case was really all about rather than the technical legal arguments.”<sup>205</sup> In other oral arguments and in several of the briefs, the anti-covenant lawyers linked racial context to foreign policy concerns about fostering anti-American propaganda in the Cold War.<sup>206</sup> By consistently tying property relations to racial inequality, these arguments mirror the position of progressive theorists who emphasize the formative role of slavery, colonialism, and segregation in the U.S. system of property.<sup>207</sup>

##### 5. THAT PROPERTY RELATIONS CAN BE ACCURATELY CONTEXTUALIZED WITH SOCIAL-SCIENTIFIC DATA

The *Shelley* briefs attacked RRCs primarily on policy grounds and contended that “social science provided the policy.”<sup>208</sup> These briefs relied heavily on empirical sources and explicitly thanked social scientists for “technical assistance.”<sup>209</sup> For example, the brief submitted to the Supreme Court for the Detroit case referenced more than 150 articles, reports, and books in addition to several charts and maps.<sup>210</sup> The sociological materials supported the claim that pervasive RRCs constituted a policy of

203. *Id.* at 177–78 (“Despite the earlier admonitions of his colleagues in the NAACP legal office, Vaughn stood resolute behind his contention that residential segregation amounted to nothing less than a twentieth-century form of enslavement.”).

204. Philip Elman & Norman Silber, *The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 820 (1987); Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U. L.Q. 737, 766 (1989).

205. TUSHNET, *supra* note 69, at 92 (quoting Elman & Silber, *supra* note 204, at 820); LELAND WARE, A CENTURY OF SEGREGATION: RACE, CLASS, AND DISADVANTAGE 114 (2018) (“Vaughn ended [his oral argument] by rapping his hand on the podium. The sound of his knuckles cracking on wood resonated throughout the silent courtroom supplying a dramatic climax that mere words never could.”).

206. *See, e.g.*, Brief for the United States as Amicus Curiae, *supra* note 201, at 19–20 (emphasizing the Cold War imperative for civil rights); TUSHNET, *supra* note 69, at 92 (reporting that Houston’s oral argument emphasized that “racism in the United States must stop” if we are to have “racial unity” and avoid “endangering national security”).

207. *See* Harris, *supra* note 14, at 1724 (noting the deep historical roots of the race-property nexus in American colonialism and slavery).

208. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 672 n.258.

209. Consolidated Brief for Petitioners at 132, *Hurd v. Hodge*, 334 U.S. 24 (1948) (Nos. 290, 291); *see* Brief for Petitioners, *supra* note 19.

210. *See* Brief for Petitioners, *supra* note 19; *cf.* Consolidated Brief for Petitioners, *supra* note 209 (consisting of 132 pages and a fifteen-page appendix, including racial distribution maps).

segregation and fostered unhealthy slum conditions.<sup>211</sup> In this manner, the empirical references helped these lawyers respond to the acontextual framework of the vacuum view. At oral argument, Justice Frankfurter, himself a pioneer of sociological jurisprudence and mentor to Houston, acknowledged that the sociological materials were relevant to the “inequities of the case.”<sup>212</sup>

#### D. The Shelley Decision

The *Shelley* Court unanimously<sup>213</sup> concluded that judicial enforcement of RRCs constituted state action under the Equal Protection Clause of the Fourteenth Amendment.<sup>214</sup> While the opinion did not find a legal basis for prohibiting the writing and recording of RRCs,<sup>215</sup> the Court’s “sweepingly formulated” rendering of judicial enforcement of private agreements as state action was a remarkable decree.<sup>216</sup> Had this formulation been followed in later jurisprudence with respect to contracts and property agreements more generally, the *Shelley* decision could have “pulverized any distinction between private and public legal actions.”<sup>217</sup>

The *Shelley* Court appeared to substantially, but not entirely, endorse the integrationist lawyers’ five claims about property. In contrast to the vacuum view, which minimizes the rights of non-owners, the Court emphasized the “rights of those desiring to acquire and occupy property” (reflecting claim one, that property relations are not the purely private domain of owners).<sup>218</sup> The Court’s view that judicial enforcement of RRCs would constitute state action suggested that property relations play out in the shadow of governmental authority (modestly reflecting claim two, that

211. Brief for Petitioners, *supra* note 19, at 47–71.

212. TUSHNET, *supra* note 69, at 93–94 (reviewing oral argument dialogues between Frankfurter and Marshall, in which Marshall defended the use of sociological materials as “legally significant”).

213. Vose, *supra* note 119, at 144 (noting that three Justices recused themselves likely because they owned property covered by RRCs or had publicly advocated the use of RRCs).

214. *Id.*

215. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms . . .”).

216. BROOKS & ROSE, *supra* note 4, at 144.

217. *Id.* at 143–44 (noting that the *Shelley* Court brushed aside the “cautious distinctions between state action and private action” and thereby left “little room for any private legal rights at all” but observing that this expansion of state action has since been “juridically isolated—a kind of dead end”); see generally VOSE, *supra* note 20, at 177 (noting that the Court consisted entirely of recent Roosevelt and Truman appointees who had already expanded state action doctrine in several decisions prior to *Shelley* to protect civil rights and permit government regulation of the economy).

218. *Shelley*, 334 U.S. at 12.

property relations inherently involve state action).<sup>219</sup> The Court concluded that the authors of RRCs were delegated the “full coercive power of government” to deny non-white neighbors “enjoyment of property rights” (modestly reflecting claim three, that property relations inherently involve collective private action).<sup>220</sup> The opinion acknowledged the racial dimension of the constitutional mandate for “[e]quality in the enjoyment of property rights”<sup>221</sup> and the Section 1982 guarantee that all citizens shall enjoy the same rights as “white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property” (reflecting claim four, that property relations cannot be divorced from the context of racial inequality).<sup>222</sup> Although the Court did not explicitly reference social-scientific evidence, as it would six years later in *Brown*, commentators have long suggested that the *Shelley* decision appeared to discard black-letter law in order to intervene in the housing inequities illustrated by the integrationist lawyers’ sociological materials (modestly reflecting claim five, that property relations can be accurately contextualized with social-scientific data).<sup>223</sup>

#### IV. THE SEGREGATIONIST CAUSE: ADVOCATING FOR THE VACUUM VIEW IN THE RRC CASES

This Part reviews how segregationist lawyers developed their RRC litigation strategy and their account of the vacuum view of property. Mirroring the structure of the preceding discussion, this Part first considers

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219. KLARMAN, *supra* note 6, at 214 (noting that the *Shelley* holding portrayed a world where “all behavior occurs against a backdrop of state-centered common-law rules”) (emphasis omitted).

220. *Shelley*, 334 U.S. at 19.

221. *Id.* at 10 (noting that “[e]quality in the enjoyment of property rights” is “an essential pre-condition to the realization of other basic civil rights and liberties”).

222. *Id.* at 11 (quoting 8 U.S.C. § 42 (1946)); *see also Hurd v. Hodge*, 334 U.S. 24, 33–34 (1948) (citing Section 1982 of the 1866 Civil Rights Act as grounds for overturning RRC enforceability in the District of Columbia). *But cf.* KLARMAN, *supra* note 6, at 215–16 (arguing that the *Shelley* Court “jettisoned precedent” on the basis of the “personal values of the justices” where “broader social and political context trumped the traditional legal sources.” In particular, the Justices likely were influenced by racial progressivism rooted in the democratic ideology of World War II, the continuing foreign policy imperative to overcome discrimination, the federal government’s support for overturning RRCs, the expansion of Black political power and mobilization, the general housing shortage and its effects on the Black population, and a somewhat progressive shift in social-scientific views of race); VOSE, *supra* note 20, at 205–09 (noting that although some of the Justices had uneven records of support for racial equality and civil rights legislation, they appeared to be unanimously persuaded by the policy basis for the *Shelley* decision).

223. *See Shelley*, 334 U.S. 1; *see also Hovenkamp, supra* note 208, at 664, 671–72 (arguing that the Court was influenced by the dramatic recent shift in social-scientific opinion on race from scientific racism to environmental theory).

these lawyers' activism for residential segregation under a cause-lawyering framework (in Section A), the development of litigation strategies over the span of the RRC era (in Section B), and then the culmination of the vacuum-view approach in *Shelley* (in Section C).

### A. Cause Lawyering

In 1892, in what appears to have been the first appellate RRC case in the country, a California court refused to enforce an RRC against a Chinese American homeowner on the grounds of Fourteenth Amendment equal protection.<sup>224</sup> This decision, which predated the era of widespread RRCs (and widespread RRC litigation) by at least two decades, was almost entirely ignored in the later RRC jurisprudence.<sup>225</sup> Yet the case is worth noting here because it illustrates that the legality of RRCs was far from a foregone conclusion.<sup>226</sup> To establish the enforceability of RRCs, segregationist lawyers persuaded the courts to undergo a series of interpretive “contortions”<sup>227</sup> to overcome obstacles rooted in traditional property doctrine, including the presumption against restraints on alienation,<sup>228</sup> the touch and concern requirement,<sup>229</sup> public policy limitations on the enforceability of covenants,<sup>230</sup> and a growing judicial aversion to private devices that tied up land use for a significant period of time.<sup>231</sup> As discussed below (*infra* Section B), these lawyers succeeded in establishing RRC enforceability largely by presenting to the courts a

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224. *Gandolfo v. Hartman*, 49 F. 181, 181, 183 (C.C.S.D. Cal. 1892).

225. Kahen, *supra* note 9, at 199–200 (“In subsequent cases involving restrictive covenants against Negroes the *Gandolfo* case has generally been overlooked, or, when noticed, it has been distinguished away or disregarded.”). *But see Title Guar. & Tr. Co. v. Garrott*, No. B 33411 (Cal. Super. Ct. Apr. 18, 1916) (quoting extensively from *Gandolfo*).

226. BROOKS & ROSE, *supra* note 4, at 56–57.

227. *Id.* at 70 (discussing “the set of contortions that courts and lawyers had to undertake in order to avoid the very old-fashioned legal concerns that racial covenants raised”).

228. VOSE, *supra* note 20, at 2 (noting that RRCs clashed with the “free and unrestrained sale and use of property,” which was essential to American property doctrine with deep roots in Anglo-Saxon law).

229. BROOKS & ROSE, *supra* note 4, at 88 (suggesting that the touch-and-concern doctrine should have been a substantial hurdle to RRC enforceability, although it was “seldom” raised in these cases).

230. McGovney, *supra* note 101, at 7–8 (noting that, before roughly the 1920s, RRCs would have been clearly “void as against public policy”).

231. BROOKS & ROSE, *supra* note 4, at 3 (observing that traditional property doctrine before the 1920s was “chary of any private arrangements that purported to control land uses over long periods of time—and that chariness included racial covenants”).

robust record of racial science and white-supremacist policy arguments in favor of residential segregation.<sup>232</sup>

Widespread use of RRCs in all-white neighborhoods originated in the aftermath of the U.S. Supreme Court's invalidation of racial zoning ordinances in *Buchanan v. Warley*.<sup>233</sup> The core of the RRC era would span roughly three decades from *Buchanan* to *Shelley*. By the 1920s, the segregationist lawyers had largely convinced the courts to permit enforcement of RRCs.<sup>234</sup> In 1926, RRC enforceability was effectively authorized by the U.S. Supreme Court.<sup>235</sup> Although this authorization came in the form of dicta, lower courts generally cited to this dicta as settled law for the remainder of the RRC era.<sup>236</sup> Indeed, RRC enforceability appears to have been upheld in every state appellate court decision in the three decades before *Shelley*.<sup>237</sup> Some courts refused to enforce RRCs that put racial limits on the *sale* of property, concluding that these covenants unreasonably restrained alienation and the owner's "complete ownership" in fee simple.<sup>238</sup> But these courts still enforced RRCs restricting *occupancy and use* such that non-white property owners could be restricted from occupying their own covenanted properties.<sup>239</sup> In addition to the Supreme Court's judicial imprimatur,<sup>240</sup> RRCs enjoyed support from the underwriting practices of the Federal Housing Administration, the professional ethics requirements of the National Real

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232. *Id.* at 56–57 (arguing that these lawyers were an exception to the formalism practiced by most early twentieth-century lawyers, most of whom would have viewed RRCs as "logically incompatible with property itself").

233. 245 U.S. 60 (1917); see KLARMAN, *supra* note 6, at 91–92, 95–97 (arguing that racial zoning had little impact on residential segregation and instead primarily served to give segregationist politicians an electoral boost). Nevertheless, the demise of racial zoning appears to have coincided with the ascendance of RRCs as a legal device of residential exclusion. *Id.* at 96–97.

234. BROOKS & ROSE, *supra* note 4, at 3 (observing that "by the 1920s, courts began to relax their earlier strictures about all kinds of residential restrictions, including the racial ones").

235. *Corrigan v. Buckley*, 271 U.S. 323 (1926).

236. BROOKS & ROSE, *supra* note 4, at 54.

237. VOSE, *supra* note 20, at 28 (finding that RRCs were universally upheld in appellate courts when the covenants "were properly drawn, signed, and recorded and if conditions remained the same").

238. *Id.* at 21 (citing the West Virginia Supreme Court's conclusion in *White v. White*, 150 S.E. 531, 539 (W. Va. 1929), that RRCs restricting sale were "wholly incompatible with complete ownership" such that fee simple title "no longer would impart [sic] complete dominion in the owner").

239. BROOKS & ROSE, *supra* note 4, at 76–77, 140–41.

240. GONDA, *supra* note 67, at 5 (noting that the Supreme Court's *Corrigan* decision apparently led to a dramatic expansion of RRCs).

Estate Board, and, late in the RRC era, the legal profession's doctrinal endorsement of RRCs in the Restatement of Property (1944).<sup>241</sup>

In the two decades leading up to *Shelley*, over a period in which RRC enforceability was well established, the segregationist lawyers' formalistic courtroom presentations did not give the obvious impression that these were "cause lawyers" seeking to bend the arc of property theory and affirmatively promote racial separation in housing. At trial, these lawyers repeated a "simple pattern" of litigation strategy establishing that "a valid restrictive covenant existed for the property in question, that the restriction served an important purpose, and that the defendants had violated the terms of the covenant."<sup>242</sup>

Although this trial strategy was quite mechanical, many of these lawyers were committed repeat players in RRC enforcement and true believers in the underlying cause with "fierce devotion to housing segregation."<sup>243</sup> In Professor Jeffrey Gonda's historical analysis of pro-RRC lawyers' local activism, he notes that these were classic cause lawyers who "blend[ed] the boundaries of legal, political, and community opposition"<sup>244</sup> and who "came to see the neighborhoods they fought on behalf of not as clients but as causes."<sup>245</sup> These lawyers kept their legal fees to a minimum and built reputations as aggressive enforcers of RRCs.<sup>246</sup> Some of the segregationist lawyers wrote model "constitution-proof" covenants for homeowners to use in signature drives to cover existing neighborhoods with RRCs.<sup>247</sup>

241. See FED. HOUS. ADMIN., F.H.A. FORM NO. 2049, UNDERWRITING MANUAL: UNDERWRITING AND VALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT pt. II, ¶¶ 233, 283, 284(3) (1936) (recommending RRCs to avoid being "invaded" by "incompatible racial and social groups," which "generally leads to instability and a reduction in values"); 4 RESTATEMENT OF PROP. § 406 cmt.1 (AM. LAW. INST. 1944); see generally DAVID M. P. FREUND, COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICA 15–16 (2010); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 57–58, 60, 73 (1994) (describing the Federal Housing Administration policy to promote "one-race, one-class neighborhoods").

242. GONDA, *supra* note 67, at 92–93 (noting the repetition of these lawyers' trial language, including the phrase "irreparable injury" or "irreparable damages to their property" as a terse and narrow statement of the public policy implications of RRCs).

243. *Id.* at 88–89.

244. *Id.* at 92 (observing that these lawyers "floated between roles in the courts, neighborhood associations, and city governance").

245. *Id.* at 89.

246. See, e.g., VOSE, *supra* note 20, at 74, 79 (discussing the intimidation tactics of segregationist lawyers in communication with non-white occupants of covenanted property, as these lawyers boasted of "unbroken success" and a willingness to "bring injunction proceedings wherever necessary to do so").

247. BROOKS & ROSE, *supra* note 4, at 121 (citing the general counsel of the National Association of Real Estate Brokers, William MacChesney, who wrote the model "constitution-proof" RRC for use by Chicago homeowner groups, as well as "property owners, churches, and civic groups all over town" and outside Chicago).

Beyond their legal work, many of these lawyers were active local leaders in homeowners' associations, real estate boards, and city governance.<sup>248</sup> They often advocated for racial segregation in schools and other areas,<sup>249</sup> although their expertise in writing and recording RRCs made these lawyers particularly prominent in the movement for housing segregation.<sup>250</sup> As local residents of covenanted communities themselves, many of these lawyers had a personal investment in the legal battles they waged to maintain racial exclusion.<sup>251</sup> White homeowners rallied behind these lawyers, for example, in neighborhood petitions pledging cooperation with RRC litigation.<sup>252</sup>

Although the segregationist lawyers were deeply engaged in local activist networks, they made little effort to nationally coordinate litigation strategy.<sup>253</sup> Thus, they presented RRC cases in a "scattered" manner and lacked "strong allies, theoreticians, or an understanding of the new values of sociological jurisprudence."<sup>254</sup> These lawyers perhaps felt it unnecessary to develop a national campaign to support RRCs, which for decades enjoyed unyielding judicial support.<sup>255</sup>

#### *B. De-racializing the Policy Defense of RRCs*

While segregationist lawyers were narrowly formulaic in their trial presentations, their appellate arguments provided a more robust defense of RRC enforceability. Over the course of the RRC era, these lawyers developed a progression of ideas about property and race. They first generally advocated white racial purity and supremacy, then harmonious racial separation, then deference to segregationist lawmakers, and finally

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248. GONDA, *supra* note 67, at 89 (citing several examples of segregationist lawyers' leadership in organized homeowner groups, including Gerald Seegers, the lead attorney in the *Shelley* case, who was a member of the second generation of his family to serve in the leadership of the homeowner association behind the RRC in *Shelley*).

249. *Id.* at 91 (noting that segregationist attorney Henry Gilligan opposed racial integration in schools and even objected to a primarily white high school's decision to invite a Black singer to perform for students).

250. *Id.* at 89.

251. *Id.* at 89–90 (noting that both of the lawyers who brought the D.C. case to the Supreme Court lived "just around the corner" from the restricted properties in question).

252. VOSE, *supra* note 20, at 76–77 (citing a petition in which white homeowners "pledge[d] [them]selves to cooperate with attorney Gilligan in the prosecution of the [RRC] suit").

253. *Id.* at 251.

254. VOSE, *supra* note 20, at 28, 187, 251 (noting that, in *Shelley*, the segregationist lawyers could cite to only one recent law review article that supported RRC enforceability).

255. *Id.* at 28 (noting that the consistent judicial support for RRCs over the decades preceding *Shelley* constituted a "bulwark of legal doctrine" in favor of RRC enforceability).

the race-neutral logic of property in a sociological vacuum as presented in *Shelley*.<sup>256</sup> This narrative is not entirely clean and consistent, and some of these arguments can be found out of temporal sequence in some cases. Nevertheless, there appears to be a general over-time movement away from an explicitly racial rationale for RRCs. Consistent with the integrationist discussion above, I focus here on the Los Angeles case record in particular. Although Los Angeles is not representative of other jurisdictions in many respects, I contextualize this analysis within national cultural and legal trends that tend to support the general de-racializing arc of this historical narrative.

The early white-supremacy phase was especially evident in the Los Angeles cases of the 1910s and 1920s, when the segregationist lawyers described the separation of races as a necessity rooted in nature, divine providence, and racial science.<sup>257</sup> This approach reflected the popular concern, often fomented by white neighborhood protective associations, that “non-white ‘invasion’” of white neighborhoods would result in “miscegenation [that] would bring the demise of the white race.”<sup>258</sup> Anxieties about racial purity were similarly emphasized in the defense of racial zoning at the U.S. Supreme Court in *Buchanan*.<sup>259</sup> These segregationist arguments lost in the *Lochner*-era *Buchanan* Court on the grounds of property rights (the alienation rights of white property owners).<sup>260</sup> When the Supreme Court nine years later weighed in for the first time on RRCs in *Corrigan v. Buckley*,<sup>261</sup> the segregationist lawyers prevailed by emphasizing the “wisdom of the miscegenation laws” and warning that the “melting pot” of racial intermixture would lead to “the

256. See *infra* notes 257, 263, 268, 270 and accompanying text.

257. Defendant’s Brief, *Jones v. Berlin Realty Co.*, No. 89-346 (Cal. Super. Ct. 1914) (arguing that African Americans “cannot be assimilated into the white race” and that “nature did not intend the two races to intermingle”), reprinted in BEASLEY, *supra* note 95, at 198; Brief of Arthur Crum as Amicus Curiae on Behalf of Appellant at 41–42, *Title Guar. & Tr. Co. v. Garrott*, 183 P. 470 (Cal. Dist. Ct. App. 1919) (Civ. 2916) (describing segregation as a matter of “providential arrangement,” thus forbidding the court to “overstep the natural boundaries [God] has assigned to [the races]”); Appellant’s Opening Brief at 8–12, *Title Guar. & Tr. Co. v. Garrott*, 183 P. 470 (Cal. Dist. Ct. App. 1919) (Civ. 2916) (arguing that RRC enforceability is consistent with the general legal and political support for racial segregation in housing, schools, and other areas).

258. SCOTT KURASHIGE, *THE SHIFTING GROUNDS OF RACE: BLACK AND JAPANESE AMERICANS IN THE MAKING OF MULTIETHNIC LOS ANGELES* 44 (2010).

259. Supplemental and Reply Brief for Defendant in Error on Rehearing at 151–254, *Buchanan v. Warley*, 245 U.S. 60 (1917) (No. 33) (citing extensively to intellectual leaders on racial science and the dangers of racial intermixture).

260. *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (emphasizing property rights but acknowledging that “dominion over property springing from ownership is not absolute and unqualified”); see KLARMAN, *supra* note 6, at 143 (describing the Court’s strong *Lochner*-era tendency to invalidate laws “for interference with property or contract rights”).

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

mongrelization of America and the destruction of American civilization.”<sup>262</sup>

From the late 1910s to the 1930s, some segregationist lawyers argued that residential separation was necessary, not to promote white racial purity but, more pragmatically, to reduce racial friction. These lawyers claimed that enforcing RRCs was motivated by “a spirit of kindness and charity” to avoid the alleged “inharmonious result” of racially integrated neighborhoods.<sup>263</sup> In California cases in 1928 and 1932, these harmony arguments (to cultivate “a happier state of affairs upon the whole of both Caucasian and non-Caucasian peoples”<sup>264</sup>) seemed to displace white supremacy as the primary policy rationale for RRC enforceability.<sup>265</sup> This transition may have reflected white Americans’ growing public aversion to open racism following World War I—although World War II would have a far larger effect in this regard.<sup>266</sup>

In the 1940s, these appellate arguments tended to take another substantial step away from the rhetoric of white supremacy by advocating a deference canon. While overt racism continued to surface at the trial level,<sup>267</sup> these lawyers’ appellate arguments increasingly asserted an agnostic position on the wisdom of residential segregation while recommending that courts defer to the political process for determinations on housing policy.<sup>268</sup> This claim of race neutrality was explicit in these lawyers’ portrayal of the NAACP side as seeking not only to “overthrow

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262. Brief for Appellee at 34–35, *Corrigan*, 271 U.S. 323 (No. 104).

263. Appellant’s Opening Brief at 36, 52, *L.A. Inv. Co. v. Gary*, 186 P. 596 (Cal. 1919) (L.A. 5221); see also *Appeal Ruling on Race Issue: Ask Supreme Court to Decide Validity of Restriction*, L.A. SUNDAY TIMES, May 14, 1916, at II9 (claiming to keep “interests of the colored people . . . at heart” by promoting segregation in order to foster a “better feeling between the race[s]” and reduce “disorder and violence”).

264. Respondent’s Brief at 20, *Du Ross v. Trainor*, 10 P.2d 763 (Cal. Dist. Ct. App. 1932) (Civ. 4550).

265. Appellant’s Reply Brief at 6, 14, *Wayt v. Patee*, 269 P. 660 (Cal. 1928) (L.A. 9394) (arguing that RRCs assure that “the investments of white people would be protected” while also providing a “real benefit to the negroes who are encroaching upon the property [in the white neighborhood at issue]” because “[i]t would eliminate racial friction”); see also Brief of Amici Curiae in Support of Respondents at 1–2, *Fairchild v. Raines*, 151 P.2d 260 (Cal. 1944) (L.A. 18735) (raising the racial disharmony argument that RRC enforceability was necessary “to prevent discord between racial groups which experience has shown to have been engendered by their joint use of residential districts”).

266. See KLARMAN, *supra* note 6, at 187.

267. See, e.g., *Await Verdict on Westside Properties*, CAL. EAGLE, Aug. 7, 1941, at 1 (reporting on “[h]eated objections” by integrationist lawyers to the opposing counsel’s use of the term “darkies” to refer to African Americans and describing an uproar in the court when an African American woman was denied access to the courtroom while white observers were permitted to enter).

268. *Burkhardt v. Lofton*, 146 P.2d 720, 724–25 (Cal. Dist. Ct. App. 1944) (arguing that residential segregation is a matter of “public thought and conscience” best left to the “citizenry”).

the law” of RRC enforceability,<sup>269</sup> but also to stir up “racial antagonisms” by “inject[ing] the complexion of racial conflict into this case” and thereby “diluting reason with emotionalism.”<sup>270</sup> These lawyers further proclaimed their colorblindness by asserting that RRCs were not discriminatory because they could be used by whites and non-whites alike.<sup>271</sup>

In the mid-1940s, the transition away from racialized rhetoric culminated in the development of a race-neutral property-rights position, framed in the terms of the vacuum view of property.<sup>272</sup> This development was likely, in part, a response to the growing racial progressivism in U.S. scientific, political, and popular culture. Before the 1930s, the confinement of African Americans in declining urban ghettos was rationalized by white social scientists and many other white Americans who claimed that residential segregation was determined by “nature—not man, not power, not violence.”<sup>273</sup> Segregation in the pre-World War II era was “heaven’s first law.”<sup>274</sup> Dominant scientific opinion endorsed racial separation as a necessity to avoid the “horror of racial amalgamation,”<sup>275</sup> including the contamination of a superior race and the alleged genetic defects of mixed-race children.<sup>276</sup> Racial science was extensively questioned in the 1930s and more fully discredited with the support of American democratic ideology in World War II and popular revulsion to Nazi science.<sup>277</sup>

These shifts in public opinion likely influenced the *Shelley* Court.<sup>278</sup> More generally, many postwar white Americans appear to have experienced some moderation of their disparaging attitudes toward people

269. Respondent’s Brief in Reply to Appellants’ Petition and Briefs of Amici Curiae at 10–11, *Fairchild v. Raines*, 151 P.2d 260 (Cal. 1944) (L.A. 18735) (describing RRC enforceability as “so well settled that further citations of authority seem useless”).

270. Brief of Amici Curiae in Support of Respondents, *supra* note 265, at 1–2, 16.

271. *See, e.g.*, Brief of Amicus Curiae Supporting Respondents at 11–12, *Fairchild v. Raines*, 151 P.2d 260 (Cal. 1944) (L.A. 18735).

272. Brief of Amici Curiae in Support of Respondents, *supra* note 265, at 1–2, 16 (representing the Los Angeles Realty Board and characterizing RRCs as “simple realty covenant[s]” with no bearing on housing equity issues).

273. Harris, *supra* note 14, at 1745.

274. FREUND, *supra* note 241, at 8.

275. Hovenkamp, *supra* note 208, at 657.

276. *Id.* at 653–57 (citing anthropologist Lewis Henry Morgan’s Spencerian hierarchy of cultural progress, placing Caucasians far ahead of other races on the trajectory from savagery to civilization).

277. KLARMAN, *supra* note 6, at 174, 180–81 (noting that social scientists emerged from the war with new prestige owing to wartime service, as well as a new self-image as social engineers challenging racial prejudice).

278. *Id.* at 215–16 (noting that the justices of the *Shelley* Court, as members of an intellectual elite, would have been especially likely to be swayed by the transformation in scientific and political opinion on race).

of color as racism increasingly took on a “bad name.”<sup>279</sup> During and soon after the war, desegregation had occurred in national defense work, baseball and other sports, and the military (two months after the *Shelley* decision). President Truman was pursuing a transformative civil rights agenda. Southern white liberals were finally supporting federal anti-lynching legislation. Wartime service had fostered among racial justice activists a new “militancy,” as soldiers of color were “return[ing] home fighting.”<sup>280</sup> The NAACP grew nine-fold during the war.<sup>281</sup> Furthermore, the postwar years saw the emergence of a Cold War imperative to improve U.S. race relations, as American racism was a major theme in Soviet propaganda promoting communism in the competition over the developing nations.<sup>282</sup> As summarized by Professor Michael Klarman, “*Shelley* was decided in the same year that a national civil rights consciousness crystallized.”<sup>283</sup>

In spite of this growing public sentiment in favor of civil rights, white homeowners in the postwar moment of *Shelley* still generally preferred to keep their own neighborhoods segregated.<sup>284</sup> As American cities diversified in the 1940s with a vast migration of African Americans out of the rural South to Northern (and Southern) cities,<sup>285</sup> the stage was set for a long-term struggle over the racial distribution of the “postwar housing boom.”<sup>286</sup> President Truman’s promise of a “decent home” for “every American family” largely excluded African Americans and other people of color through rampant racial discrimination in federal housing subsidization programs.<sup>287</sup> Discrimination in the post-World War II era has generally been cloaked in a rhetoric of colorblindness, under what Professor Cheryl Harris has described as the modern phase of “whiteness as property.”<sup>288</sup> While the pre-modern approach of the racial science era created a “false linkage between race and inferiority,” the modern

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279. *Id.* at 174.

280. *Id.* at 180–82 (alteration in original) (quoting NEIL A. WYNN, *THE AFRO-AMERICAN AND THE SECOND WORLD WAR* 12 (2d ed. 1993)).

281. *Id.* at 177.

282. GONDA, *supra* note 67, at 157–58.

283. KLARMAN, *supra* note 6, at 215.

284. *Id.* at 193 (noting that most white people after World War II “opposed integrating their own neighborhoods” in spite of the “powerful impulses for progressive racial change that had been ignited by the war”).

285. *Id.* at 187.

286. SELF, *supra* note 16, at 97–98.

287. See MASSEY & DENTON, *supra* note 77, at 51–53 (discussing inequities in housing subsidies including the Federal Housing Administration, U.S. Department of Veterans Affairs, and the Home Owners’ Loan Corporation); see also FREUND, *supra* note 241, at 177 (quoting 42 U.S.C. § 1441); FED. HOUS. ADMIN., *supra* note 241.

288. Harris, *supra* note 14, at 1714 (describing how whiteness moved “from color to race to status to property as a progression historically rooted in white supremacy”).

definition of the postwar era “denies the real linkage between race and oppression under systematic white supremacy.”<sup>289</sup>

In addition to these contextual factors, the vacuum-view approach was also a direct response to the NAACP lawyers’ adoption of an increasingly sociological strategy in the RRC cases leading up to *Shelley*. At the trial level, the segregationist lawyers consistently objected to social-scientific data on RRCs and housing conditions.<sup>290</sup> These objections not only were an effort to narrow the courts’ focus to favorable precedential authority, but also were consistent with the segregationist lawyers’ emerging theory of property, which explicitly denied the sociological context of property relations.<sup>291</sup> This approach culminated in *Shelley* and the companion cases, wherein the segregationist lawyers, along with homeowner groups, realtors, and others joining as amici curiae, adopted the vacuum view as the core defense of RRC enforceability.

### C. *Shelley: The Culmination of the Vacuum Logic*

In *Shelley* and the companion cases that came to the Supreme Court in 1947, the segregationist lawyers no longer advocated racial separation and indeed sought to divorce RRCs from any association with racial housing patterns. Their briefs characterized RRCs as “private contracts relating to private rights in private property.”<sup>292</sup> Thus, these lawyers argued that RRCs did not constitute a public takeover of “land policy,” as asserted by the opposing side, but rather functioned as private contracts among “private individuals for their own purposes.”<sup>293</sup> More generally, these arguments framed property ownership as a domain in which the “general public” lacked any “direct interest.”<sup>294</sup> They applied this framework to homeowners in particular, noting that “use of a house as a private dwelling cannot be tortured into having any public significance.”<sup>295</sup> As these arguments related to RRCs, the segregationist lawyers concluded

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289. *Id.* at 1768.

290. See, e.g., Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 *How. L.J.* 1, 68–69 (2006).

291. See *id.*

292. Brief for Respondents in Reply to Brief for the U.S. as Amicus Curiae, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87), 1948 WL 31625, at \*9.

293. Brief of Arlington Heights Property Owners Association, et al., as Amicus Curiae at 8, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87) (arguing that homeowners who record RRCs “neither make nor control the law”).

294. Respondents’ Brief Opposing Issuance of Writ of Certiorari, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87), 1947 WL 30431, at \*41.

295. *Id.*

that private covenanting relationships should not be misunderstood as a “matter of high public interest.”<sup>296</sup>

These briefs further drew on a language of sacrosanct property rights.<sup>297</sup> In the early cases, the segregationist lawyers had been concerned with the “law of nature” regarding racial separation and white supremacy.<sup>298</sup> In *Shelley*, the segregationist arguments returned to the phrase “law of nature,” but applied it to the “fundamental human right and freedom of every free man to control and protect his privately owned property.”<sup>299</sup> This right would be “confiscate[d]” by the government if the Court were to strike down the enforceability of RRCs.<sup>300</sup> Although this rhetoric was almost entirely race-neutral, one segregationist lawyer in a lower appellate court cited the rights of white homeowners “to live and rear their families in white neighborhoods.”<sup>301</sup> Even in this instance, the policy stakes were framed primarily as a concern for property rights, as a means to support homeowners’ “constant vigilance to protect their homes.”<sup>302</sup>

The segregationist briefs derided the opposing lawyers’ “alleged facts,” rooted in sociological materials,<sup>303</sup> and “literary machination[s]” in service of converting property owners into “creature[s] of the State.”<sup>304</sup> The segregationists emphasized, to quote from oral argument in the Supreme Court, that “this is a law suit, this is a court of law” and that “the

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296. Brief for Respondents in Reply to Brief for the U.S. as Amicus Curiae, *supra* note 292, at \*12 (quoting *Nixon v. Condon*, 286 U.S. 73, 82 (1932)).

297. See, e.g., Motion of the Mount Royal Protective Association, Inc., for Leave to File Brief as Amicus Curiae and Brief of Amicus Curiae at 10, 17, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87) (claiming that striking down RRCs would bring about “deprivation of the most elementary rights of freedom of association and freedom of choice” and that “the right to regulate the occupancy and use of property by private contract . . . clearly existed at the date the Bill of Rights was adopted and nothing has since occurred to limit it”)

298. Maatman, *supra* note 290, at 88.

299. Brief of Arlington Heights Property Owners Association, et al., as Amicus Curiae, *supra* note 293, at 4, 27–28 (“There is no ‘human right’ nor ‘fundamental freedom’ involved here, other than the fundamental human right and freedom of every free man to control and protect his privately owned property and to choose his own associates and companions.”)

300. *Id.* at 28–29, 53.

301. VOSE, *supra* note 20, at 145 (quoting Answering Brief by Appellees at 2, *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947) (No. 90)); see also *Arguments Before the Court: Enforceability of Restrictive Covenants*, U.S.L.W. 3219, 3222–23 (1948) (arguing that the precedent in favor of RRC enforceability had established “the right of citizens to live in homes in a neighborhood of their own selection unhampered by the dealings of greedy real estate speculators posing as friends of the Negroes”).

302. Brief of: Ardmore Association, Inc. et al., Amicus Curiae at 24–25, *Sipes v. McGhee*, 25 N.W.2d 638 (Mich. 1947) (No. 90).

303. See VOSE, *supra* note 20, at 145.

304. Respondents’ Brief at 49, 79, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (Nos. 72, 87).

current housing problem is no justification for a judicial amendment of the Constitution.”<sup>305</sup> These lawyers framed the issue of RRC enforceability as a “purely legal question” unrelated to the “reams of arguments [sic]” from the other side.<sup>306</sup> Indeed, the appellate record in late RRC cases affirms that the integrationist briefs were often many times longer than the briefs filed by the segregationist lawyers.<sup>307</sup> Yet, although the segregationist briefs were relatively short, they were not mere formalistic recitations of precedential authority in favor of RRC enforceability. These lawyers affirmatively advocated a theory of absolutist owners’ rights in a sociological vacuum.<sup>308</sup>

#### V. REDEEMING THE LOST LESSONS OF THE RRC CASES

The *Shelley* decision had the immediate, tangible benefits of moderately alleviating minority housing shortages,<sup>309</sup> removing the “legal clouds” over covenanted properties occupied by people deemed non-white,<sup>310</sup> and providing habeas and eviction relief where courts had recently ordered the enforcement of RRCs.<sup>311</sup> But segregation lines grew brighter in the decades after *Shelley*.<sup>312</sup> RRCs were replaced by functionally equivalent devices, such as written agreements among neighbors to maintain residential exclusion.<sup>313</sup> These mechanisms of

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305. See VOSE, *supra* note 20, at 201 (citing the oral argument of Gerald Seegers).

306. See *id.* at 145, 198 (quoting Answering Brief by Appellees, *supra* note 301, at 6).

307. See GONDA, *supra* note 67, at 93 (contrasting Houston’s brief of over one hundred pages with Gilligan’s opposing brief of just ten pages).

308. See VOSE, *supra* note 20, at 144–46.

309. See Yana Kucheva & Richard Sander, *The Misunderstood Consequences of Shelley v. Kraemer*, 48 SOC. SCI. RSCH. 212, 221, 227 (2014) (summarizing the apparent statistical impact of *Shelley* on housing patterns and noting that “racially covenanted areas in Chicago and St. Louis had minimal black entry before 1949 and massive black entry immediately thereafter”).

310. See ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960*, at 31 (1983); BROOKS & ROSE, *supra* note 4, at 110 (citing a 1947 study showing a decrease in the number of RRCs in the post-WWII era).

311. VOSE, *supra* note 20, at 211–12 (citing a habeas release as well as two evictions that were averted following *Shelley*).

312. See KLARMAN, *supra* note 6, at 262–63 (“Whether or not *Shelley* opened formerly white neighborhoods to blacks, it had essentially no impact on the amount of residential segregation. Indices measuring such segregation reveal no significant changes in large northern cities between 1940 and 1970.”); *cf.* BROOKS & ROSE, *supra* note 4, at 139 (suggesting that the counterfactual history without *Shelley* may have seen exclusionary suburbanization “expand exponentially” in the mold of the massive all-white Levittown developments).

313. See BROOKS & ROSE, *supra* note 4, at 169–82 (describing a number of RRC replacement devices, including “mutual faith covenant[s]” promising not to sell to minorities, contracts assuring that sellers will use approved real estate brokers, property

segregation were supported by dramatic growth in organized homeowners' groups,<sup>314</sup> which "began their battle against open housing in the aftermath of *Shelley v. Kraemer*."<sup>315</sup> Re-framing fair housing laws as "forced housing," segregationist rhetoric drew heavily on an absolutist, owners'-rights vision of "freedom from interference" in the enjoyment of one's property.<sup>316</sup> Building on the "great fusion" of conservatism in the 1950s and 1960s, property rights would continue to serve as a rallying call in the 1970s and beyond for the conservative backlash against busing, environmental protection laws, and property taxes in the 1970s.<sup>317</sup> In the 1990s, amid a dramatic expansion in homeowner associations and the advent of a nationwide "private property rights movement," white homeowners continued to assert that their property rights were an essential "buffer from the power of the state."<sup>318</sup> In short, in the years since the *Shelley* decision, the vacuum view of property has grown even more prominent in the efforts to justify racial residential exclusion.

Today, hyper-segregation in housing persists across U.S. metropolitan areas and continues to foster racial inequities in health, education, earnings, and intergenerational wealth and mobility.<sup>319</sup> As outlined in this Article, the lawyers who combatted the American system

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owners' clubs requiring a majority of neighbors to approve sales, and cooperative housing exerting control over admission of new buyers).

314. See SUGRUE, *supra* note 150, at 211, 221 (finding that, "[b]etween 1943 and 1965, Detroit whites founded at least 192 neighborhood organizations throughout the city, variously called 'civic associations,' 'protective associations,' 'improvement associations,' and 'homeowners' associations,'" in addition to "[n]ew umbrella organizations" made up of as many as fifty neighborhood groups).

315. *Id.* at 221.

316. *Id.* at 226–27, 265 (quoting *Homeowner Safeguards Called Vital*, DET. NEWS, July 1, 1963, at 21-A, discussing a Detroit "Homeowners' Rights Ordinance" proposed to preserve the right to racially discriminate in real estate, framed as a "right to freedom from interference with [a homeowner's] property").

317. See Laura J. Hatcher, *Conservative Cause Advocacy: The Multiple Sites of Conservative Legal Ideology* 36 (2014) (Ph.D. dissertation, University of Massachusetts Amherst) (ProQuest); ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 10, 13, 16, 72–73, 163 (John M. Conley & Lynn Mather eds., 2008) (describing the emergence of the conservative public interest law movement in the 1970s, which saw itself as "an ally of small property owners," drew on "absolute conceptions of property rights," and aimed to "persuad[e] the public to view property rights as they do human rights or other individual rights").

318. Harvey M. Jacobs, *Social Conflict over Property Rights: The End, a New Beginning, or a Continuing Debate?*, 20 HOUS. POL'Y DEBATE 329, 329, 336 (2010); see also MCKENZIE, *supra* note 241, at 11 (reporting that homeowner associations expanded dramatically in the 1990s).

319. See discussion *supra* note 1 and accompanying text. See also Laura Kusisto, *Black Homeownership Drops to All-Time Low*, WALL ST. J. (July 15, 2019, 5:30 AM), <https://www.wsj.com/articles/black-homeownership-drops-to-all-time-low-11563183015> [<https://perma.cc/W8T8-KP8E>] (noting that Black homeownership rates having recently fallen to the lowest levels in the fifty years since the passage of the Fair Housing Act).

of RRCs made three key contributions in the long-term struggle against residential segregation. First, they identified the vacuum view of property as a formidable obstacle to open housing.<sup>320</sup> Although progressive property theorists have long challenged the deep American rhetorical tradition of claiming absolute owners' rights, the vacuum view persists in public discourse as a ubiquitous and often taken-for-granted understanding of property.<sup>321</sup> For some white homeowners, the vacuum view may serve to conceal implicit and explicit racial bias underlying efforts to “‘protect’ the white space”<sup>322</sup> and to “warehouse” people of color in separate districts of less desirable housing.<sup>323</sup> Other white homeowners may genuinely view residential exclusion as a non-racist effort to defend fundamental property rights, although these homeowners often ignore their racialized advantages rooted in a multigenerational history of racially disparate housing subsidy and wealth creation.<sup>324</sup> Thus, residential segregation finds rhetorical support from both “color-blind racism”<sup>325</sup> and a deep-rooted American logic of absolutist owners' rights. In the housing context, these race-neutral rationales contribute to what Professor Angela Harris terms the central paradox examined by critical race theory: the persistence of racism in spite of “its nearly universal condemnation by state policy and by the norms of polite society.”<sup>326</sup>

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320. It is important to note that, although the vacuum view has a substantial track record of supporting residential segregation, defending strong owners' rights can be supportive of fair housing and minority property interests. For example, owners' rights are critical to communities defending themselves against displacement via urban renewal, gentrification, and partition sales. See Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 859–62 (detailing the divestment and destabilization of minority homeownership as an enduring trend in U.S. history, including the recent subprime mortgage crisis); Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancy in Common Property*, 95 NW. U. L. REV. 505, 511–23 (2001) (finding that Black land gains in the South have been decimated by partition sales and noting that “land and place are important to working class and poor, minority communities in ways not common to mobile, middle class communities”).

321. See discussion *supra* Section II.B.

322. Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 10–11, 15 (2015) (describing the broadly perceived “white space” of predominantly white neighborhoods, schools, and public places, and the assumption that this space is opposite to the “black space” of the “iconic ghetto” with associated racial stereotypes).

323. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 107 (2001); see also MASSEY & DENTON, *supra* note 77.

324. See SELF, *supra* note 16, at 131 (noting that postwar white suburbanites came to “argue that their [segregationist] actions were not racist, even as their individual choices and advantages represented, in a sum, a version of apartheid”) (emphasis omitted).

325. See BONILLA-SILVA, *supra* note 13, at 54–55.

326. Angela P. Harris, *Critical Race Theory*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 266, 266 (2d ed. 2012),

The second key contribution I attribute to the campaign against RRCs is that it provided a theoretical framework for challenging the vacuum view. These lawyers framed property relations as inherently involving state action, collective private action, racial inequality, and the rights of non-owners.<sup>327</sup> These claims mirror the central tenets of the “new progressive property” theorists but have seldom found such explicit articulation in high-profile litigation.<sup>328</sup>

The third, and perhaps most important, contribution was the development of a multidisciplinary, empirically based approach to persuading courts to reject the vacuum view of property. They used social-scientific evidence to cut through the acontextual absolutism of vacuum-view rhetoric and to reveal the realities of racial inequality in the property system.<sup>329</sup> This empirical strategy is all the more enticing now amid the recent and ongoing explosion of new data on housing patterns and racial exclusion.<sup>330</sup>

The RRC case record urges some caution about relying on a heavily sociological approach. Just as social-scientific perspectives helped integrationist lawyers demonstrate negative effects of RRCs in the late cases, scientific racism was used by segregationist lawyers in the early cases to provide a public policy basis for racial separation.<sup>331</sup> Thus, over the span of the RRC era, the Court appears to have followed changes in dominant academic opinion on race.<sup>332</sup> To the extent that the judiciary relies on ever-shifting academic perspectives, it must be acknowledged that social science is not an objective, value-free endeavor but rather is a contested domain reflecting broader cultural and political forces.<sup>333</sup> Relying on empirical research in legal and policy advocacy can devolve

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<https://reader.elsevier.com/reader/sd/pii/B9780080970868860195?token=50FD4D4A18E12137763076B34C9BF0D9482E94F6A522F750E7DBBE4B087CA48E072963F26D9F462B7761DAF645AEA873&originRegion=us-east-1&originCreation=20211102003129> [https://perma.cc/F8WE-Y4ND].

327. See GONDA, *supra* note 67, at 84–87, 95–96, 99–101.

328. See Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 257–60 (2019).

329. GONDA, *supra* note 67, at 57.

330. See, e.g., MARIA KRYSAN & KYLE CROWDER, *CYCLE OF SEGREGATION: SOCIAL PROCESSES AND RESIDENTIAL STRATIFICATION* (2017).

331. See Hovenkamp, *supra* note 208.

332. See *id.*

333. See generally KNOWLEDGE AND REFLEXIVITY: NEW FRONTIERS IN THE SOCIOLOGY OF KNOWLEDGE (Steve Woolgar ed., 1988) (discussing historical and cultural influences in social-scientific research and recommending that researchers seek a reflexive understanding of their biases and the limitations of empirical findings). Some critical race theorists have argued that researchers’ claims of neutrality and objectivity tend to mask racial bias and exclusion. See Jerome M. Culp, Jr., Angela P. Harris & Francisco Valdes, *Subject Unrest*, 55 STAN. L. REV. 2435, 2436–37 (2003) (book review) (noting that critical race theorists emphasize the relationship of subordination implied in conventional research methodologies).

into an indeterminate and expensive “battle of experts.”<sup>334</sup> Yet without social-scientific insights, the judiciary’s efforts to “know the social world” may tend to rely on “common sense . . . accepted truths, [and] prejudices.”<sup>335</sup> Among these common-sense notions are deep traditions of white supremacy and a vacuum understanding of owners’ rights.

The legal campaign against RRCs suggests that social science can be effective against the vacuum view when empirical perspectives are paired with theoretically and historically informed insights on race and the relational nature of property rights. This approach finds support from Professors Devon Carbado and Daria Roithmayr, who have argued for a new “cross-fertilization” between critical race theory and empirical social science, wherein the limits on empirical generalizability and objectivity are acknowledged and social science is viewed as one of many ways of knowing about the social world.<sup>336</sup> This intersection of empiricism and critical race theory is reflected in the burgeoning field of “e-CRT” (empirical critical race theory).<sup>337</sup> Under this framework, even if some factual details about the causes and consequences of residential segregation remain in empirical dispute, social-scientific evidence can serve to counteract extreme notions of absolute property rights and related claims that residential segregation is a relatively innocuous and race-neutral matter of free choice.

The absolutist tradition of owners’ rights remains a central feature of current debates about residential inequities. Recent doctrinal, administrative, and legislative efforts to promote open housing suggest an innovative wave of attacks on the vacuum view. For example, the Supreme Court’s 2015 authorization of disparate impact claims under the Fair Housing Act countered the vacuum view by recognizing in the act an affirmative and collective mandate to avoid “perpetuating segregation.”<sup>338</sup>

334. Jonathan Yovel & Elizabeth Mertz, *The Role of Social Science in Legal Decisions*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 410, 418 (Austin Sarat ed., 2004).

335. *Id.* at 416; see also JACKSON, *supra* note 167, at 88 (noting social-scientific influence on public opinion on race).

336. Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 150–51 (2014) (noting a growing trend among critical race scholars to advocate the use of social science with a reflexive acknowledgment of limitations on objectivity and neutrality).

337. See Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443, 447–48 (discussing the origins and the development over the first six years of the e-CRT movement, rooted most clearly in an anti-subordination principle, while other principles and “porous boundaries” are still being worked out).

338. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 537 (2015) (noting that the Fair Housing Act requires affirmative efforts to prevent “discriminatory effects or perpetuating segregation”); see Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 99–100 (2017).

Yet in August 2019 (under the Trump administration), HUD published a proposed rule change that would impede disparate impact claims under the act by shifting burdens substantially to plaintiffs.<sup>339</sup> In a parallel timeline, the Fair Housing Act's desegregation mandate was also acknowledged in the 2015 introduction of the HUD Affirmatively Furthering Fair Housing Rule (AFFHR),<sup>340</sup> which required grantees to complete empirical impact assessments documenting efforts to promote racial integration.<sup>341</sup> AFFHR was hailed by some observers as the first “major effort to strengthen civil rights around housing” since the Fair Housing Act.<sup>342</sup> The rule has sparked public and congressional backlash and was terminated in July 2020. However, the rule is due to be reinstated in 2021 with some limitations under the Biden administration.<sup>343</sup> Opposition to AFFHR has been framed in vacuum-view terms as a matter of federal government encroachment on local control, property rights, and fundamental freedoms.<sup>344</sup>

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339. See Lola Fadulu, *Trump Proposal Would Raise Bar for Proving Housing Discrimination*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/us/politics/trump-housing-discrimination.html> [https://perma.cc/5YHK-YCQG].

340. *Affirmatively Furthering Fair Housing Final Rule*, HUD EXCH., <https://www.hudexchange.info/programs/affh/> [https://perma.cc/NF74-RA8Y] (last visited Nov. 1, 2021) (describing AFFHR as an effort to realize the “affirmatively furthering” language of the Fair Housing Act by taking “meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities”).

341. 24 C.F.R. § 5.152 (2017) (detailing the Assessment of Fair Housing requiring “an analysis of fair housing data, an assessment of fair housing issues and contributing factors, and an identification of fair housing priorities and goals”).

342. Emily Badger & John Eligon, *Trump Administration Postpones an Obama Fair-Housing Rule*, N.Y. TIMES: THEUPSHOT (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/upshot/trump-delays-hud-fair-housing-obama-rule.html> [https://perma.cc/LNU5-6627]; see also William F. Fuller, *What's HUD Got to Do with It?: How HUD's Disparate Impact Rule May Save the Fair Housing Act's Disparate Impact Standard*, 83 FORDHAM L. REV. 2047, 2052–54 (2015); cf. Zasloff, *supra* note 338, at 147 (suggesting that AFFHR's impact was inherently limited by its “toothless” omission of penalties).

343. See Tracy Jan, *HUD to Reinstate Obama-Era Fair Housing Rule Guttled Under Trump — Minus the 'Burdensome' Reporting Requirement*, WASH. POST (June 15, 2015, 6:00 AM), <https://www.washingtonpost.com/us-policy/2015/06/09/hud-biden-fair-housing-rule/> [https://perma.cc/37QJ-B2VR] (noting that the new version of the rule has removed the requirement “that communities undergo an extensive analysis of local barriers to integration and submit plans to dismantle them to the Department of Housing and Urban Development”).

344. See Marc A. Thiessen, Opinion, *Obama Wants to Reengineer Your Neighborhood*, WASH. POST (June 15, 2015), [https://www.washingtonpost.com/opinions/obama-wants-to-reengineer-your-neighborhood/2015/06/15/f7c0c558-1366-11e5-9518-f9e0a8959f32\\_story.html](https://www.washingtonpost.com/opinions/obama-wants-to-reengineer-your-neighborhood/2015/06/15/f7c0c558-1366-11e5-9518-f9e0a8959f32_story.html) [https://perma.cc/9VUG-A9TD] (describing AFFHR as “an assault on freedom” and arguing that “[l]ocal autonomy is essential to liberty”); Tom DeWeese, *Stop AFFH: Get S.103 to Trump's Desk*, AM. POL'Y CTR., <https://americanpolicy.org/2017/02/06/protect->

Innovative fair housing legislation has recently been proposed by (non-winning) Democratic presidential candidates, likely inspired by the salience of the Black Lives Matter movement.<sup>345</sup> The proposed legislation would provide financial assistance to “homebuyers living in formerly redlined or officially segregated areas.”<sup>346</sup> By taking the rare step of directly acknowledging the historically rooted forces behind residential segregation, these proposals suggest momentum for fair housing, although enacting such policies would require prevailing over opposition rooted in the vacuum view of property.<sup>347</sup>

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property-rights-home-rule-stop-affh/ [https://perma.cc/M543-EHRV] (last visited Nov. 1, 2021) (describing opposition to AFFHR as an effort to protect “property rights” and “home rule,” as AFFHR would “destroy . . . property rights, . . . [home] rule,” and the “choice of the kind of neighborhood you wish to live in”).

345. See Pia Deshpande, *Black Activists Try to Make Mark on 2020 Race*, POLITICO (July 25, 2019, 3:17 PM), <https://www.politico.com/story/2019/07/25/black-activists-2020-race-1435433> [https://perma.cc/W79A-HMBU] (noting that leading Democratic presidential candidates in preparation for both the 2016 and 2020 elections have met with representatives of Black Lives Matter); see also Russell Rickford, *Black Lives Matter: Toward a Modern Practice of Mass Struggle*, 25 NEW LAB. F. 34, 36 (2015) (noting that the scope of Black Lives Matter extends beyond police brutality to address, as summarized by founding leaders of the movement, “all of the ways in which Black people are intentionally left powerless at the hands of the state”).

346. Press Release, *Warren and Colleagues Reintroduce Historic Legislation to Confront America’s Housing Crisis*, ELIZABETH WARREN (Mar. 13, 2019), <https://www.warren.senate.gov/newsroom/press-releases/warren-and-colleagues-reintroduce-historic-legislation-to-confront-americas-housing-crisis> [https://perma.cc/WS2N-2X3Q]; see Press Release, *Cleaver, Warren Lead Coalition to Reintroduce Historic Legislation to Confront America’s Housing Crisis*, CONGRESSMAN EMANUEL CLEAVER (Apr. 23, 2021), <https://cleaver.house.gov/media-center/press-releases/cleaver-warren-lead-coalition-to-reintroduce-historic-legislation-to> [https://perma.cc/9VL4-9QL5] (citing American Housing and Economic Mobility Act of 2019, S. 787, 116th Cong. § 101(c)(3) (2019)) (acknowledging that the federal government has long denied mortgage subsidies to African Americans and other minorities, “stripping them of opportunities to build wealth”). This Act, proposed by Senator Elizabeth Warren, was substantially duplicated in the housing plan of fellow presidential candidate, Pete Buttigieg, under the Community Homestead Act. See also Dhruv Mandal, *How Portland’s “Right to Return” Is Indeed Right to Return Housing to the Underrepresented*, BERKELEY POL. REV. (June 1, 2018), <https://bpr.berkeley.edu/2018/06/01/how-portlands-right-to-return-is-indeed-right-to-return-housing-to-the-underrepresented/> [https://perma.cc/XB4B-J74G] (describing Portland’s “Right to Return” policy preference, which awards housing assistance to residents of historically redlined neighborhoods who are at risk of displacement).

347. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 200–01* (2017) (noting that AFFHR and other innovative remedies for addressing racial housing disparities are hindered by general public ignorance of racial inequality and the “de facto myth” that government has played a minimal role in patterns of residential segregation). In addition to vacuum-view opposition, fair housing innovations may increasingly face openly racist criticism amid resurgent white nationalism. See *What Is “White Nationalism”?*, ECONOMIST (Aug. 14, 2019), <https://www.economist.com/the-economist-explains/2019/08/14/what-is-white->

Lawyers working to counteract residential segregation can find an instructive model in the RRC cases. Loren Miller, the Los Angeles attorney at the center of legal strategy against RRCs, argued that the task of the open-housing lawyer is to show that government has done its “shameful, and successful, best” to bring about the “monumental wrong” of residential segregation.<sup>348</sup> Accordingly, government must be convinced to be as “vigilant and decisive” in the integrationist cause as it has been in the segregationist cause.<sup>349</sup> Yet for Miller, “[t]he lawyer’s problem” is that illuminating the governmental role in residential segregation is “enormously complicated by the fact that common law concepts of property rights tend to obscure judicial vision.”<sup>350</sup> Miller and his colleagues followed this prescription by barraging the vacuum view with direct theoretical and empirical attacks.<sup>351</sup> In this way, these lawyers defied the common scholarly concern that civil rights lawyers tend to narrowly pursue formal rights rather than substantive economic and racial justice. This brand of conceptual, long-term, counter-hegemonic impact is underemphasized in the literature on cause lawyering and social change. Indeed, this form of impact, by its very nature as an effort to intervene in multi-century discourses, is undermined when these lawyers’ innovative theories and methods are forgotten by subsequent generations.

Critics who charge civil rights lawyers with pursuing a myth of rights, thereby distracting resources from more effective social movement tactics, have suggested that this shortcoming is “embedded in . . . the education and professional socialization of lawyers.”<sup>352</sup> Similarly, Morris Cohen attributed lawyers’ perpetuation of the vacuum view of property to the formalistic nature of legal education.<sup>353</sup> It would seem, however, that even the most narrowly black-letter approach to property pedagogy should

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nationalism [<https://perma.cc/ZG9E-VPZS>]; Angela Onwuachi-Willig, *Policing the Boundaries of Whiteness: The Tragedy of Being “Out of Place” from Emmett Till to Trayvon Martin*, 102 IOWA L. REV. 1113, 1155, 1157 (2017) (noting that neighborhood efforts to exclude non-whites [combined with racially disparate policing among other mechanisms] serve to protect white space from racialized people who are deemed “out of place.” These mechanisms can even serve to constitute white space where the “whiteness” of a neighborhood comes into question.).

348. Loren Miller, *The Protest About Housing Segregation*, 357 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 79 (1965).

349. *Id.* at 78.

350. Loren Miller, *The Law and Discrimination in Housing*, 20 LAWS. GUILD REV. 123, 136 (1960).

351. Hadley Meares, *The LA Lawyer Who Won Housing Rights for All Americans*, CURBED L.A. (Apr. 18, 2018), <https://la.curbed.com/2018/4/18/17202950/loren-miller-attorney-black-history-housing-covenants> [<https://perma.cc/LJX6-8MPZ>].

352. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 6 (Austin Sarat & Stuart A. Scheingolds, eds. 2006) (suggesting that cause lawyers tend to pursue a myth of rights owing to their education and professional socialization).

353. Cohen, *supra* note 43, at 22.

position lawyers-in-training to oppose the absolutism of the vacuum view. Property law necessarily locates owners' rights in a web of concurrent, overlapping, and contested claims, as well as implied restrictions, future interests, substantive limits, takings, and other duties and liabilities that inherently contradict the absolutist vision of owners' rights. Yet in light of the persistence of the vacuum view, law students and the legal profession more generally may require further nudging to appreciate not only the inaccuracy of the vacuum view, but also its track record of supporting residential segregation. The concern that legal pedagogy tends to sustain the vacuum view can perhaps be somewhat allayed when property teachers include theoretical insights about the relational and allocative nature of property, critical and historical perspectives on the deep-rooted links between property and racial inequality, and social-scientific evidence relating to the causes and consequences of residential segregation. This approach may be particularly effective when students are offered models for activist legal practice, like the example of the legal campaign against RRCs, where lawyers have effectively advocated more accurate and equitable alternatives to the vacuum view of property.