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RACIAL COVENANTS AND SEGREGATION, YESTERDAY AND TODAY

By Richard R.W. Brooks[*] and Carol M. Rose[♦]

Abstract

This paper is to be part of a volume on "Race and Real Estate," edited by Kim Scheppele and Valerie Smith of Princeton University. The paper explores the role of privately-created racially restrictive covenants in American housing segregation, and many of its themes will be expanded in a book that the authors are now writing, with a probable completion date sometime in 2012. Racial covenants began to become common in residential deeds in the early twentieth century, typically purporting to prevent future owners from selling or renting to "non-Caucasians." Although there were a number of potential legal objections to the real estate covenants, based both on constitutional and property law considerations, they were treated increasingly leniently in the courts for the first forty years of the century. That pattern changed abruptly with the 1948 U.S. Supreme Court's decision in Shelley v. Kraemer, which rendered racially restrictive covenants unenforceable in the courts. Despite Shelley, however, racial covenants continued to be written into new deeds until the practice was made illegal through the Fair Housing Act of 1968. Even thereafter, however, racial covenants continued to appear in real estate records. Today, overt racial restrictions are widely ignored, but they are still very difficult to eradicate from the old records, and they occasionally seem to matter to owners. It is a matter of some interest why racial covenants persisted even after they became unenforceable and, to a more limited degree, even after they became illegal. This paper gives some possible answers, including the "sticky" characteristics of Ango-American property law, as well as the response of real estate and finance professionals to what they have considered to be market demand. Ultimately the persistence of covenants, even in very attenuated form, should cause us to reflect

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on the question whether Americans really want residential integration, and if we do, what we mean by integration.

1. Introduction

"Racially restrictive covenants"– the phrase has the ring of some long ago practice, a distasteful reminder of a past in which residential segregation was a part of our law. But weren't racially restrictive covenants banned back sometime in the 1940s? or maybe later, in the 1960s? Can't we just forget about them? Why do they continue to pop up to bite unwary celebrities or political figures, as they did in a routine investigation of Justice William Rehnquist, just as he was about to be promoted from Associate Justice to Chief Justice of the Supreme Court?[1] (As it turned out, Republican lawmakers quickly noted that not only Rehnquist but also Senator Joseph Biden, one of Rehnquist's most aggressive questioners, as well as deceased President John F. Kennedy, had resided in houses with these restrictions somewhere back in their chains of title).[2]

It is no doubt a good thing that racially restrictive covenants have receded into a set of increasingly vague memories. But they are part of the past of housing segregation in the United States, and their role as legal instruments undoubtedly helped to shape both physical patterns and social attitudes about segregation and integration–attitudes that to some degree persist today. They were widely used from the beginning of the nineteenth century up to and beyond Shelley v. Kraemer,[3] the 1948 Supreme Court case that rather abruptly made them unenforceable in court. Indeed, one of the particular oddities about these racial covenants is that they continued to appear in deeds and title documents even after they were made unenforceable by Shelley in 1948, and even after they were flatly outlawed by the Fair Housing Act of 1968. The peculiar relationship of racial covenants to legality–first lawful, then unenforceable, then illegal but still continuing--thus makes them a particular intriguing subject for anyone interested in the interactions between law and social norms. Does legality reinforce social norms, or rein them in, or both? does the law shape social norms, or is it the other way around, or are social norms simply impervious to law? The path of racially restrictive covenants suggest different answers at different times.

[1]Alan S. Oser, "Unenforceable Covenants Are in Many Deeds," New York Times, Aug. 1, 1986, A9.

[2]"Senator Biden Linked to a Restrictive Deed," New York Times (from Associated Press), Aug. 8, 1986, A7 [re Biden]; "William Rehnquist on Trial," U.S. News and World Report, Aug. 11, 1986, 18 [re J.F.K.]

[3]Shelley v. Kraemer, 334 U.S. 1 (1948)

I. A brief history of racially restrictive covenants.

Racial restrictions on sale or occupancy of residential property began in the nineteenth century. But these racialized "deed restrictions" and "covenants" became much more prevalent all over the country after the turn of the twentieth century, at a time when the whole country was urbanizing rapidly and African Americans in particular were moving out of the rural South and into major cities.

This was the era in which American real estate developers first started systematically to plan out subdivisions–small by modern standards, but considerably larger than the prior practices of building urban houses more or less on a lot-by-lot basis.[4] These early developments tended to be at the high end of residential real estate, and while some were at a distance from the city, many were actually part of existing cities. As Helen Monchow, a land economics researcher, observed in 1928, cities were more or less composed of subdivisions that had been planned and platted by developers.[5] The new subdivisions had deed restrictions on each lot–restrictions that would pass on to subsequent owners–imposing limits to assure, e.g., that the only structure on a given lot would be a one-family house, set back a certain distance from the lot lines, no more than some specified height, and so forth.

But soon after the turn of the twentieth century, the packages of deed restrictions in new subdivisions often began to include racial covenants, the most common being a requirement that the residence be owned or occupied by "Caucausians only," often with an exception for servants. Here is an example, taken from an early 1900s deed in a Los Angeles development:

"It is hereby covenanted and agreed by and between the parties hereto and it is a part of the consideration of this indenture, * * * that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of

[4]For the history of these early subdision developments, see, e.g., Robert M. Fogelson, Bourgeois Nightmares: Suburbia, 1870-1930 (New Haven & London: Yale University Press, 2005); Marc A. Weiss, The Rise of the Community Builders: The American Real Estate Industry and Urban Planning (Washington, D.C.: Beard Books, 1987)

[5]Helen Monchow, The Use of Deed Restrictions in Subdivision Development (Chicago: Institute for Research in Land Economics and Public Utilities, 1928), 5.

Caucasian race be permitted to occupy said lot or lots...." [6]

Although this particular deed does not reflect it, on the west coast, racial restrictions were likely to extend to Asians as well as African Americans. [7]

The early 1900s were an era in which racial segregation was becoming common in all kinds of activities and locations, particularly after the Supreme Court upheld a state law that required "equal but separate" facilities in rail transportation.[8] Unlike the laws requiring segregation in parks, schools and other facilities, racially restrictive covenants in residential areas were created by private parties. They constituted only one legal route to housing segregation at the time, and at the outset they probably did not seem to be entirely promising for that purpose. Indeed, developers might well have been nervous about the courts' frequent statements that condemned, as "restraints on alienation," all kinds of covenants restricting property, and that required covenants of all kinds to jump through various legal hoops.[9]

Other possibilities for the legal enforcement of housing segregation might have seemed more favorable, including (possibly) nuisance law and more importantly the then-newfangled law of zoning. The idea that someone could be a nuisance simply because of his or her race never really got off the ground, however; even Southern courts would not hear of it.[10] Zoning was another matter, and beginning with Baltimore in 1911, a number of cities passed zoning ordinances that would have had the effect of making neighborhoods all white or all black.[11] The public policy rationale for these ordinances was that residential segregation would preserve the peace, maintain property values, and even prevent miscegenation. They started to pass at a time when race riots had already broken out in some cities, including riots in 1910 that followed in the

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[6]Los Angeles Inv. Co. v. Gary, 186 P. 596, 597 (Cal. 1919)

[7]See, e.g. Foster v. Stewart, 25 P. 2d 497 (Cal. App. 1933) (concerning covenant prohibiting occupancy by "Negro, African or Asiatic" races)

[8]Plessy v. Ferguson, 163 U.S. 537 (1896).

[9]Monchow, Deed Restrictions, page 15 (describing courts' caution in enforcing deed restrictions of all types). The courts' barks were sometimes worse than their bites, however, since many did enforce deed restrictions even after cautionary words. For an older example, see Brouwer v. Jones, 23 Barb. 153 (N.Y. Sup. 1856) (enforcing covenants as equitable matter against later purchaser).

[10]Falloon v. Schilling, 29 Kan. 292 (1883); Rachel D. Godsil, "Race Nuisance: The Politics of Race in the Jim Crow Era," Michigan Law Review 105 (2006): 505, 516-19.

[11]David E. Bernstein, "Phillip Sober Controlling Phillip Drunk: Buchanan v. Warley in Historical Perspective," Vanderbilt Law Review 51 (1998): 797, 834-36.

wake of black prizefighter Jack Johnson's victory over the "Great White Hope," James J. Jeffries.[12]

As it turned out, zoning failed to work for residential segregation. The new National Association for the Advancement of Colored People (NAACP) challenged the racial zoning ordinance of Louisville, Kentucky, and won an early Supreme Court victory in 1917 in the case Buchanan v. Warley,[13] a somewhat surprising outcome considering the leniency that other segregation laws received at the time. But the Court obviously thought that property was different. It brushed off the arguments proposed for racial zoning, and held this kind of zoning to be a violation of the Constitution's Fourteenth Amendment. The reason was that this public ordinance placed too great an imposition on the rights of private property owners.[14]

All this meant that after the Buchanan case in 1917, racial covenants were the only option left as a legal method to enforce neighborhood racial segregation– and some earlier judicial statements about covenants made these seem somewhat doubtful too. But within two years, another major event occurred that may have influenced the courts to soften their earlier suspicions of racial housing covenants: in 1919, a major race riot broke out in Chicago. The rioters swirled out of control for a week, and at the end, thirty-eight people had died and a great deal of property had been damaged or destroyed.[15]

The Chicago riot made integration seem dangerously problematic, and perhaps under its influence, several major state supreme courts decided cases favorably to racial covenants on both constitutional and property rights grounds. Thus the Michigan and California courts joined earlier approvals from Louisiana and Missouri, and they were followed in 1926 by a U.S. Supreme Court opinion, Corrigan v. Buckley, that from all appearances gave a definitive

[12]Geoffrey C. Ward, Unforgivable Blackness: The Rise and Fall of Jack Johnson (New York: Alfred E. Knopf, 2004), 216-17. Jackson was notorious for ignoring racial taboos; he often appeared in the company of white women, several of whom he married; perhpas in retaliation, he was famously prosecuted under the Mann Act. See Ward, at 99, 117, 138-39, 296-349 and passim.

[13]Buchanan v. Warley, 245 U.S. 60 (1917).

[14]Id., 80-82.

[15]Allan H. Spear, Black Chicago: The Making of a Negro Ghetto, 1890-1920 (Chicago & London: University of Chicago Press, 1967), 214-16.

constitutional ruling in favor of racial covenants.[16] The NAACP tried in vain to say that these covenants were simply zoning in disguise, and thus invalid under Buchanan v. Warley, but the courts rejected that argument again and again. Their uniform view was that while zoning was public, and thus subject to the Constitution's requirement that "state action" treat persons equally, racially restrictive covenants were merely private arrangements, outside the Fourteenth Amendments's purview.

In the early 1920s too, the courts began to allow a rather irregular form of racial covenant–one that was not inserted by a developer into every deed at the outset of a new subdivision, but was rather organized by some enterprising residents of already-settled neighborhoods, who collected as many signatures as they could from their white neighbors. These neighbor-generated covenants were single-purpose affairs, and they had nothing to say about setbacks or roof lines or anything else in the standard packages of development restrictions. Instead, they focused entirely on racial exclusion as the means to keep the neighborhood "nice." They typically began when some neighborhood person responded to a threatened expansion of a nearby minority area; that person would gather as many signatures as he or she could and then record the document.[17] These documents often had many "whereas" and "now, therefore" phrases, along with token exchanges of money, evidently in an effort to bolster their formal credibility. But in fact they often had flaws–irregular signatures, failure to include the spouse, ambiguities about the numbers of signatures required to take effect, etc.– that local NAACP lawyers could later exploit on a case-by-case basis.[18]

Meanwhile, other institutional players got on board the racial covenant train, as the

[16]For the relationship between the Chicago riots and judicial lenience toward racial covenants, see Carol M. Rose, "The Story of Shelley v. Kraemer," in Property Stories (New York: Foundation Press, 2d ed. 2009), 189, 194-95. The major state cases were L.A. Investment Co. v. Gary, 186 P. 596 (Cal. 1919); Parmalee v. Morris, 188 N.W. 330, 331 (Mich. 1922); two other major state cases were decided prior to the riots: Koehler v. Rowland, 205 S.W. 217 (Mo. 1918); and Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915). The Missouri and California courts, however, confined racial covenants to restraints on occupancy rather than sale. The U.S. Supreme Court case decided indirectly, on jurisdictional grounds, that racial covenants did not raise constitutional issues: Corrigan v. Buckley, 271 US 323 (1926).

[17]See, e.g. Porter v. Johnson, 115 S.W.2d 529 (Mo. App. 1938) (upholding 1921 neighbor agreement adopted when African American purchased nearby)

[18]Scovel Richardson, "Notes and Comments: Some of the Defenses Available in Restrictive Covenant Suits Against Colored American Citizens in St. Louis," National Bar Journal 3 (1945): 50.

business of urban real estate became increasingly professionalized. On the view that white residents wanted racial separation, developers extended racial covenants into less and less fancy subdivisions.[19] The National Association of Real Estate Exchanges (later Boards) or NAREB was founded in 1908 as an umbrella group for local real estate professionals,[20] and by 1924 NAREB had promulgated a "Realtor's Code of Ethics" that included the directive that "A Realtor should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." [21]

Most important of all was the role of the New Deal's Federal Housing Administration (FHA) from the 1930s onward. Following the lead of the real estate professionals, the FHA adopted as one of the criteria for loans that it would guarantee the question whether a new neighborhood had covenants that "prohibited the occupancy of properties except by the race for which they are intended." [22] All these institutions took the view that racial exclusion enhanced property values, and that they were obligated to do as much as possible to promote racial covenants– for the developers and realtors, as part of their duties to their customers, and for the FHA, as an obligation to the public fisc. These institutions represented a viewpoint that was to persist through the 1950s and 1960s, and to some degree to our own day: that there was no such thing as a stable, integrated community.[23]

II. The Shelley case and its aftermath

The NAACP waged a continuous but losing war against racially restrictive covenants from the 1920s into the 1940s, with the major litigation focusing on particular cities: Washington, D.C., St. Louis, Detroit, and Los Angeles. Other cities had their litigation too;

[19]Fogelson, Bourgeois Nightmares, pages 77-78.

[20]Weiss, Community Builders, page 22.

[21]Rose Helper, Racial Policies and Practices of Real Estate Brokers (Minneapolis: University of Minnesota Press, 1969), 201.

[22]Federal Housing Administration, Underwriting Manual: Underwriting and Valuation Procedure under Title II of the National Housing Act (Washington, D. C.: U.S. Government Printing Office, 1936), paragraph 284.

[23]Phyllis Palmer, Living As Equals: How Three White Communities Struggled to Make Interracial Connections During the Civil Rights Era (Nashville: Vanderbilt University Press, 2008), 95, 100.

Chicago in particular had a very active NAACP and many local anti-covenant activities, but aside from one major case that got caught up in procedural issues, Chicago did not produce the major precedents.[24]

For all its efforts, the NAACP lost these cases time and again, most importantly in Corrigan in 1926, the Supreme Court case that let stand some racial covenants in Washington, D.C., and that seemed to give a major constitutional imprimatur to racial covenants. After Corrigan, it was widely accepted that these covenants were merely private, and not subject to the constraints of the Fourteenth Amendment on "state action."

In spite of a string of legal defeats for the NAACP, however, public attitudes about legal racial segregation gradually began to change, and especially so during and just after World War II. Minority vets were coming back from the war–and of course, some did not come back–only to be fenced into limited spaces in inner cities in what seemed to be legal pens. Gunnar Myrdahl's influential book presented racial covenants as part of a larger "American Dilemma" about racial equality.[25] In the courts, a few dissenting or concurring judges began to cast about for ways to modify what seemed to be the overwhelming precedent that permitted racial covenants to continue.[26] In a newly-developing Cold War, the State Department became concerned that racial covenants gave the United States a black eye in many parts of the world.[27] Foreigners, even more than Americans, were unlikely to parse the details of the constitutional "state action" doctrine and instead would simply take note of the fact that the law of America would enforce residential segregation. Meanwhile, William Leavitt created the enormous new suburb of Levittown near New York: the first houses went on sale late in 1947, and they

[24]The case was Hansberry v. Lee, 311 U.S. 31 (1940). For an excellent history of racial covenants in Chicago during this era, see Wendy Plotkin, "Deeds of Mistrust: Race, Housing, and Restrictive Covenants in Chicago, 1900-1953" (Ph.D. diss., University of Illinois at Chicago, 1999). It is to be hoped that Plotkin's book project from this dissertation will be published soon. For a history of the NAACP's general strategy against covenants, see Clement E. Vose, Caucasions Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases (Berkeley: University of California Press,1959).

[25]Gunnar Myrdal, An American Dilemma (New York and London: Harper & Brothers, 20th Anniv. ed. 1962 [1944]).

[26]See, e.g. Mays v. Burgess, 147 F.2d 869, 875-76 (D.C. Cir., 1945) (Edgerton, dissenting); Fairchild v. Raines 151 P.2d 260, 267-69 (Cal. 1944) (Traynor, concurring)

[27]Mary Dudziak, "Desegregation as a Cold War Imperative," Stanford Law Review 41 (1988): 61, 100-101 (describing State and Justice Departments involvement in Shelley case).

included racially restrictive covenants. Levittown looked like the new face of suburban America, and it was for whites only.[28]

In 1947, the Supreme Court accepted two cases challenging racially restrictive covenants, one from St. Louis and the other from Detroit. The two cases came to be known by the name of the St. Louis case, Shelley v. Kraemer, and they generated a huge number of briefs, including those from civil rights organizations, labor unions, and the Justice Department. In the end, the Court decided in Shelley that judicial enforcement of racially restrictive covenants was "state action" after all.[29] It seemed that the whole edifice of housing segregation would come crashing down.

Of course, as everyone knows, it did not. There are many ways to enforce housing segregation other than racially restrictive covenants, and they had probably been more important than racially restrictive covenants all along. Shelley did not stop the whole range of social practices and attitudes behind racial segregation. But what was even more odd, and quite depressing, was that Shelley did not even stop racially restrictive covenants.[30]

What happened? Why did racial deed restrictions continue to be written long past Shelley, including deeds in new subdivisions? There are a number of factors to explain this peculiar development. First of all, Shelley itself only invalidated the judicial enforcement of racial restrictions, not the restrictions that were adopted voluntarily and were never brought to court. But then the question becomes, why would anyone bother? The whole point of racially restrictive covenants was to give neighbors legal leverage over one another's sales and rentals. It would seem that the removal of legal enforceability would render the exercise of writing covenants pointless. Under that circumstance, why continue to write them?

On reflection, one can think of several explanations. Most obvious, at least in the near term, was simply the point that real estate professionals did not think that Shelley was going to stick. They thought it would soon be overturned, modified, or evaded. In the meantime, why

[28]Rose, " Shelley," 211.
[29]Shelley v. Kraemer, 334 U. S. 1 (1948)
[30]Richard R. W. Brooks, "Covenants and Conventions ," (forthcoming)

not just include the racial restrictions in deeds?[31] It was not illegal to do so, and inserting them at the outset was much easier than adding them after the fact.

Then, of course, the question is why Shelley seemed so fragile. Here too there are several reasons. Shelley's equation, "judicial enforcement = state action" seemed far too vast a formulation, potentially turning all kinds of private dealings into some kind of official act. [32] That interpretation would have had serious repercussions for private contract and even tort actions, where many actors want to act in a way that would be off limits to public officials – bequeathing money to a church, for example. And indeed, over the years, Shelley has had only limited effectiveness as a doctrine that carries over from racially restrictive covenants to other legal areas; it has proved to be too sweeping for easy use without other supporting precedents.

A more specific reason for thinking that Shelley would not stick was that it was only a six-Justice decision, with three Justices recusing themselves. Given the prevalence of racial restrictions at the time, it is possible that at least some of the other three recused themselves because their own homes had such restrictions.

Still more specifically, real estate professionals thought that they might be able to do an end run around the Shelley case. The two actual cases in Shelley both involved neighbor-generated restrictions, created after the respective houses were built; these kinds of restrictions had never been so legally solid as the developer-generated restrictions, which went straight into all the deeds before the first house was sold. While racial restrictions of all types were usually enforced by injunctions, which involved the courts' "equitable" jurisdiction, the neighbor-generated restrictions were entirely dependent on the "equitable" enforcement of injunctions, given that they had a very weak basis in strict legal form.[33] Moreover, enforcing these covenants as injunctions meant kicking the African-American residents out of homes they had purchased, or preventing them from taking possession. But after Shelley, it seemed that their might be some wiggle room through a more legalistic remedy, that is, an action for damages

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[31]See Palmer, Living as Equals, 108.

[32]See, e.g. Marc Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961 (New York: Oxford University Press,1994), 86.

[33]Rose, "Shelley," 201-202. See also Judge Edgerton's discussion in Mays v. Burgess, 147 F.2d 869, 875-76 (1945) (Edgerton, dissenting).

against the seller rather than an injunction against the buyer.

If the neighbors could collect those damages, then perhaps that would be a sufficient deterrent to keep current white owners from selling or renting to minority purchasers. Apparently a number of people thought so, including real estate professionals and the FHA too. The FHA did not substantially change its tune on racial covenants until a year or so after the Shelley case, and then only at the insistence of an enraged NAACP leadership.[34] And even then, it limited the new policy to newly created restrictions.

Meanwhile, the issue of damages wound its way up to the Supreme Court. A second racial covenant case, Barrows v. Jackson (1953), settled that issue.[35] The Court decided that the neighbors could not collect damages from white owners who had violated the racial covenants when they sold their property, on the ground that the white sellers more or less represented the interests of minority purchasers.[36] Interestingly, Chief Justice Vinson, who had written for the Court in Shelley, dissented in part on the ground that Shelley did not extend so far as ordinary contract damages.[37]

Although Barrows seemed to close the last loophole against the legal enforceability of racially restrictive covenants, this case, like Shelley, had no impact on racial covenants that were simply a matter of voluntary acceptance by the signors and their successors. The FHA still insured residences with pre-Shelley covenants in the chain of title, so that homes with older racial restrictions ran no risk of losing out on mortgage finance. If anything, the reverse was the case, simply because any effort to alter earlier obligations might rock the boat with lenders. Some covenants were written in the same form that the Barrows covenants had been, not only prohibiting the owner from selling to minority members, but requiring the owner to re-write the racial covenant in any new deed at the time of sale. Real estate professionals simply copied the racial prohibitions, and they warned any purchasers who objected that the failure to include these provisions would pub a cloud on the title. Historian Phyllis Palmer has investigated the

[34]Vose, Caucasians Only, 226

[35]Barrows v. Jackson, 346 U.S. 249 (1953).

[36]The defendant sellers had covenanted to include racial provisions in the deed to any successor purchasers, but they did not do so and sold to an African American buyer.

[37]Barrows v. Jackson, 267-68.

Shepherd Park neighborhood in Washington, D.C., an area in which the neighbors undertook great efforts in the 1950s and 1960s to maintain themselves as a stable, integrated community. Purchasers there, including white purchasers, specifically crossed out provisions in transfer documents that might restrict their homes racially, only to find that real estate brokers reinserted these clauses.[38] Apparently their advice, roughly speaking, was, (a) don't worry, these are not enforceable, and (b) failure to include them will make your title "cloudy," and (c) with a "cloudy" title you won't be able to get a mortgage.[39] Palmer's view is that the Shepherd Park residents felt themselves to be the victims an unshakable opinion among real estate professionals, an opinion that held that either a neighborhood was white or it was black, or if it was mixed at the moment, it was in "transition" from white to black.[40] As a consequence, the realtors would only show houses in integrated Shepherd Park to black clients. This meant that the Shepherd Park residents found themselves seeking out white purchasers, something of an irony for this integration-minded community.[41]

One might ask why the real estate industry seemed to care so much to continue with racial covenants. One answer is that they reflected a view that racial covenants had helped to foster in the first place: that segregation, however effected, would bring higher housing prices, particularly by satisfying the tastes of white purchasers, who would in any event not wish to purchase in minority or "changing" neighborhoods. Realtors no doubt thought that they owed it to their clients to try to maintain housing values, but it bears noting that higher housing prices for this majority group of home purchasers would also mean higher payoffs for the brokers themselves. Racial restrictions, even if they were not enforceable, could effect a useful signal in this regard – a signal to white purchasers that the neighbors did indeed prefer to live in an all-white community, and a signal to minority purchasers that they would not be welcome. [42] An unenforceable covenant obviously could not give out the sense of legal entitlement and general

[38]Palmer, Living as Equals,107-108.

[39]See, e.g. "Realty Groups Still Barring Minorities in U.S. Cities, Washington Post," Jan. 17, 1949, pages 1, 7 (news article referring to ignoring racial covenants as putting cloud on title, impeding mortgage).

[40]Id., 100; see also 101 (re real estate ads); 118-19 (broker actions).

[41]Palmer, Living as Equals, 106.

[42]Brooks, "Covenants and Conventions."

imprimatur that an enforceable covenant used to give, but it was still something and not nothing.

III. The end of legality – more or less.

In the end, the 1968 Fair Housing Act made racially restrictive covenants flatly illegal, even if they were voluntary. With the exception of a few owner-occupied activities, Section 3604 (a) prohibits discrimination by race (among other matters) in selling or renting a residence; and section 3604(d) even prohibits any statement or publication that indicates a racial limitation, a prohibition that one might think would include racial covenants.[43] This should have been the end, right? Wrong. Even after the Fair Housing Act, racial restrictions continued to be included in deeds, as they were in the embarrassing case of Justice Rehnquist, among others.

Moreover, even if these covenants are not simply copied from old deed to new deed, they still crop up in the chain of title. This "sticky" quality is an artifact of the Anglo-American conveyancing system, which looks to the history of past transactions to ascertain the claims against any given title. Covenants of any kind are a claim against a property, and unless they explicitly expire after some period of years, they normally cannot be eradicated without the consent of the beneficiaries. This feature of all covenants creates a conundrum for real estate professionals involved in title searches and title insurance. These professionals are supposed to report to the purchaser all claims against a property, which presumably would include the racial covenants; but the Fair Housing Act makes it illegal to advert to this kind of restriction when selling a property. Hence nervous title searchers might report the racial covenants, but strike through them, or perhaps add an annotation that they are no longer enforceable.

In planned subdivisions, another "sticky" factor keeps these racial restrictions in view even now. Many housing developments have "covenants, conditions and restrictions" (CC&Rs), documents that have been likened to "constitutions" of the subdivision or condominium. In the usual pattern, there is a reference to the CC&Rs in each deed to a properties purchased in the community, and all homeowners are supposed to be bound by the CC&Rs. For the most part, the

[43]Fair Housing Act, 42 United States Code, secs. 3406(a) and (d); the very limited exemptions are given at sec. 3603(b).

CC&Rs concern matters having to do with physical structures and governance arrangements–paint colors, pet policies, fence heights, homeowner association dues, composition of the homeowners' association board, and so on. Unfortunately, older subdivisions' CC&Rs often included racial restrictions, and now these cannot be altered easily. That is because the CC&Rs, like political constitutions, have their own procedures for amendment, and these can be quite arduous, often involving notice, supermajorities of owner consents, notarized signatures and so forth.[44]

Thus it may be time-consuming and expensive to expunge racial restrictions, and subdivision homeowners are not necessarily willing to take those efforts. The attitude is likely to be, yes, these paragraphs are distasteful, even extremely distasteful. But why bother to chase down all those homeowner signatures when no one pays any attention to these provisions anyway? One African American law professor at a California university recently told one of the authors that there is a racial restriction in the subdivision in which she lives. Then she laughed.

This professor's attitude may be very common, even among those who were once the targets of such restrictions. Unfortunately, every once in a while, they turn out not to be laughing matters. In 2002, there was something of a flurry in the metropolitan area of Richmond, Virginia, when an African American woman inquired about a house that had a "for sale" sign in front of it. The owner was an older man, not well-educated and apparently not up on the news, and he told her that he could not sell her the property because of a racial covenant on the property. She took the matter to a fair housing council, who sent some "testers" (both black and white) around to the house, and he once again told the African American tester that he could not sell the house because of the racial covenant. At this point the original would-be purchaser sued him for $100,000, and the matter ended up with an order for him to pay her a few

[44]See, e.g. Stephen Magagnini, "Purging Racist Property Records: The Bill Would Make it Easier for Homeowners to Have the Offensive Language Removed, Sacramento Bee," Sept. 12, 2005, A3 (describing difficulties of removing racial restrictions from CC&Rs). California did pass legislation requiring homeowners associations to expunge racial restrictions from their CC&Rs, and permitting individual homeowners to expunge racial restrictions without the consent of any promissees. See California Government Code, secs. 1352.5, 12955-56.

thousand dollars and take a class in fair housing.[45]

This unfortunate incident may reflect somewhat buried attitudes on the part of other owners as well. Ian MacKenzie, who has written extensively on covenanted communities, argues that owners may know that racial covenants are unenforceable, but that they may still feel a kind of ethical obligation to abide by them.[46] If MacKenzie is right, these covenants are still acting as signals; the owner reads the covenants as a signal of what his neighbors want and expect of him.

This is why MacKenzie argues that these covenants should be expunged. As signals, they may not be so meaningless after all. Indeed, several states are now moving in this direction, interestingly enough, including Missouri in 2005, the state of origin of the Shelley case.[47] California too requires homeowner associations to remove racial restrictions from their governing documents, notwithstanding any procedural rules governing amendments to these documents, and this state has also created an administrative process to permit individual owners to eliminate any racial restrictions (as well as those concerning religion, sex, national origin etc) from any documents of title.[48] Ohio prohibits county recorders from issuing documents with racial restrictions, and requires to expunge those restrictions when they come across them.[49] And a few other states have also joined this bandwagon with their own efforts to suppress racial restrictions.

But of course, racial restrictions will remain in the record books. They may recede ever further into the past, but it is not really practicable to expunge all trace of them. And one might well think that they should remain there. They are a reminder of our history, as well as a reminder of the complicity of great numbers of Americans in restricting the availability of housing opportunities for fellow citizens.

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[45]Julian Walker, "$4,500 Awarded in Bias Lawsuit," Richmond Times-Dispatch, Dec. 9, 2005, B1; Julian Walker, "Woman Seeks $100,000 in Damages in Housing Bias Suit," Richmond Times-Dispatch, Dec. 8, 2005, B2; Julian Walker, "Man Faces Trial in Fair Housing Case," Richmond Times-Dispatch, Dec. 7, 2005, B2.

[46]Motoko Rich, "Restrictive Covenants Stubbornly Stay on the Books," New York Times, Apr. 21, 2005, F1 (quoting MacKenzie)

[47]Missouri Annotated Statutes, sec. 213.041.

[48]California Government Code, secs. 1352.5, 12955-56.

[49]Ohio Revised Code Annotated, sec. 4112.02.

With the passage of this kind of legislation, explicit racial covenants may no longer act as signals of current neighborhood preferences for racial segregation. There may be other kinds of signals, however. Lior Strahilavitz, a law professor at the University of Chicago, thinks that golf course communities have an implicit racial signaling function.[50] He notes that a number of golf course communities include members who do not play golf at all, which means that they are paying a substantial premium for an activity in which they do not engage. He argues that at least some think that minority members don't like golf and will not pay for it, and hence the golf course has a segregating function. Of course, in the age of newly emergent African American and Asian golf stars, any such expectations may be chimerical.

The enormous remaining question is this: What do we really want from fair housing policies? Are expanded opportunities for minority housing enough, or do we really want integrated communities--and if the latter, what do we mean by integration? Getting rid of the legal enforceability of covenants, as per Shelley and Barrows, did increase housing opportunities, but certainly did not bring about housing integration. Planned integration of particular neighborhoods, as in Shepherd Park in D.C. and other communities, has the problem of engaging the community planners in somewhat unseemly efforts to maintain racial quotas, albeit benevolent ones, and those kinds of measures now are likely to run into problems under the Fair Housing Act.[51] Sherrill Cashin, a law professor at Georgetown University, has studied middle class black suburbs like Prince George's County, but she is also interested in more integrated communities. Cashin thinks that the answer may lie in edgy, relatively cheap, multiracial communities like Adams Morgan in Washington, D.C.– communities that attract immigrants along with experimentalists, often young people who are positively attracted by the mixed, polyglot character of these neighborhoods. This kind of neighborhood, she thinks, could be a kind of beacon of the possibilities for integrated living.[52]

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[50]Lior Jacob Strahilevitz, "Exclusionary Amenities in Residential Communities," Virginia Law Review 92 (2005): 437, 464-76.

[51]A major case rejecting benevolent quotas in housing was United States v. Starrett City Associates, 840 F.2d 1096 (2d Cir. 1988).

[52]Sheryll Cashin, The Failures of Integration: How Race and Class Are Undermining the American Dream (New York: Public Affairs, 2004), 44-45, 52-57, 303.

The trouble is that despite Cashin's hopes for these "multicultural islands," edgy is often the first step in gentrification. In turn, gentrification may or may not sustain integrated neighborhoods, but it is likely to raise new conflicts based on class. Obviously, housing integration is a problem that we have not yet solved in America, but beyond that, emergent class issues suggest that we are not quite sure what our goals should be. Making racial covenants first unenforceable, and then illegal, were steps in the direction of opening up more minority housing opportunities, but they turned out to be disappointingly small steps toward racial integration. Moreover, while many white Americans now seem to be at least marginally more relaxed about integration by race,[53] that fact (if it is a fact) confronts us with the question about what we want integration to be. Is it simply integration by race? If so, gentrification may actually be a partial answer. Or do we want integration by class too? Cashin's multiracial islands to the contrary notwithstanding, class integration is actually quite unusual, not only in the United States but also in other parts of the world. People generally tend to sort themselves out residentially by income and assets, except insofar as the mixing is a hierarchical mix of masters and servants, with masters in the big house and servants in the attic quarters or the alley dwellings out back.

Or finally, should we really be concentrating on integration at all, whether by race or by class or both, instead of simply concentrating on a fair availability of housing opportunities for everyone? This may seem to be a somewhat defeatist stance, but it has a precedent in the demise of racial covenants. That demise was more important in simply opening up housing opportunities than it was for housing integration. But this too was something and not nothing, even if disappointing from the perspective of more idealistic hopes. The weakening of covenants at least allowed minority families to move into once-covenanted urban neighborhoods, even as the old white residents fled.

But over the last several years, perhaps the most intriguing glimmer of the future has emerged from the news that at least some of those who once fled have started to move back.[54]

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[53]See, e.g. Cashin, Failures of Integration, 39-40, 43-45.

[54]Lynette Holloway, Brokers Said to Exploit Fear to Stir Queens Home Sales, N.Y. Times, May 5, 1995, 1 (noting that while some brokers were stirring fears that immigrants would move in, others were trying to find houses for numerous middle-class returnees).

Move over, edgy kids, some of your elders may be looking for new kinds of neighbors too.