

PROPERTY LAW AND INEQUALITY: LESSONS FROM RACIALLY RESTRICTIVE COVENANTS

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ABSTRACT—A long-standing justification for the institution of property is that it encourages effort and planning, enabling not only individual wealth creation but, indirectly, wealth creation for an entire society. Equal opportunity is a precondition for this happy outcome, but some have argued that past inequalities of opportunity have distorted wealth distribution in contemporary America. This article explores the possible role of property law in such a distortion, using the historical example of racially restrictive covenants in the first half of the twentieth century. I will argue that the increasing professionalization and standardization of real estate practices in that era included racial covenants to appeal to a predominately white market clientele, resulting in a curtailment of opportunities for African Americans to acquire wealth in real estate. Racial covenants have been unenforceable under constitutional law since 1948, but I will argue that they were also a distortion of standard property law and that they undermined the principles on which property law rests. Courts could have recognized this at the outset and later, but for some reasons that this article suggests, they did not, with long-lasting repercussions for racial wealth inequalities.

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INTRODUCTION: TWO PROPERTIES, TWO EQUALITIES

The relationship of property to equality depends on what one means by equality and property as well. Equality can mean many things, but two meanings are clearly on the list: equality as *equal opportunity* and equality as *equal outcomes*.¹ Property, too, can mean many things. An older theory of property, common in Europe well into the Enlightenment era, was what I have called property as propriety—that is, property ideally meant a set of assets that corresponded to a person’s or institution’s role in the “body politic.”² Thus the king, to take the example of the head of state, had a royal endowment that was supposed to fund his governing responsibilities; others had endowments suited to their roles. This is a static version of property, much associated with hierarchy in the past, and it had little to do with equality of any sort; by the nature of the era’s view of the body politic, persons with different roles had differing endowments and opportunities.³

¹ Wilfred U. Codrington III, *The Benefits of Equity in the Constitutional Quest for Equality*, 43 HARBINGER 105, 106 (2019); see also Vicki Been, *What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1028–84 (1993) (describing varying conceptions of the closely allied idea of fairness, some involving equal chances and others involving equality of outcome).

² CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 58–60 (1994).

³ *Id.*; cf. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 1–3 (1997) (borrowing the terminology of propriety as responsibility but applying it to modern issues of community and public good).

Since the eighteenth century, however, a much more dynamic theory of property has taken hold and remains familiar today: property as an institution that encourages labor, investment, and inventiveness. A leading proponent of this view of property was Jeremy Bentham, who argued that secure ownership assures the individual that she can take the gains of her effort and planning; this assurance induces her to make more effort and plan more carefully, with the implicit result that her growing wealth contributes to the aggregate wealth of society.⁴ This view of property departs radically from the older static and hierarchical understanding of property as propriety. Instead, it fits easily with equality of opportunity. But it does not fit so easily with equality of outcomes.⁵ If the idea of property is to encourage effort and planning, then the aspiration to wealth is the driver of those industrious actions, while the prospect of poverty is the whip that threatens the slothful and careless. Inequality is thus built into this understanding of property's role. Bentham asserted forcefully that yes, a society can achieve equality by disrupting secure property, but it will be the equality of primitive penury.⁶

In somewhat milder language, Madison's famous *Federalist No. 10* expressed a variant of Bentham's argument in saying that "the first object of government" is to protect "[t]he diversity in the faculties of men, from which the rights of property originate."⁷ However, even the ferocious Bentham thought that security of property tended toward equality over time, given the bad habits of the rich and the diligence of the less well-off.⁸ That same optimism (or perhaps pessimism)⁹ is embodied in the maxim "shirtsleeves to shirtsleeves in three generations."¹⁰ That is, wealth cannot be permanently concentrated, at least not in free and easy America. Instead, in the expected pattern, a first generation works hard, plans, saves, and acquires the assets that a second generation manages to keep, whereupon the third squanders it

⁴ See JEREMY BENTHAM, *Principles of the Civil Code*, in 1 THE WORKS OF JEREMY BENTHAM pt. 1, ch. 7, 11 (Bowring ed., Russell & Russell Inc. 1962).

⁵ See *id.* at pt. 1, ch. 11.

⁶ *Id.* More modernly, and with a libertarian angle, Robert Nozick echoes Bentham's argument that political attempts to achieve equality require violence or at least continual disruptions. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 160–74 (1974). Readers of both may dispute which is the more colorful.

⁷ THE FEDERALIST NO. 10, at 43 (James Madison) (George W. Carey & James McClellan eds., 2001).

⁸ See BENTHAM, *supra* note 4, at pt. 1, ch. 12.

⁹ See, e.g., Dennis Jaffe, *The 'Shirtsleeves-to-Shirtsleeves' Curse: How Family Wealth Can Survive It*, FORBES (Jan. 28, 2019, 1:38 PM), <https://www.forbes.com/sites/dennisjaffe/2019/01/28/the-shirtsleeves-to-shirtsleeves-curse-how-family-wealth-can-survive-it/?sh=34274f476c8d> [<https://perma.cc/G89M-KDPZ>] (describing ways to keep wealth in the family).

¹⁰ *Shirtsleeves to Shirtsleeves in Three Generations*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/shirtsleeves-shirtsleeves-three-generations> [<https://perma.cc/58TF-5V7A>] (describing the maxim and giving an English variation).

all on luxury goods, wild parties, utopian projects and the like; in the end, the great-grandchildren once again have to roll up their shirtsleeves and start over. Thus, according to the saying, given time, social mobility will trump inequality.

Yale Law Professor Daniel Markovits rejects this softening narrative. He argues that the shirtsleeves-to-shirtsleeves story may have described accurately a general social mobility in earlier decades, but that the account failed by the later twentieth century. By now, he argues, an upper-middle class has halted general social mobility by the very virtues that Bentham and Madison would have extolled, as well as by the political principles that protect those virtues. The current crop of the well-to-do works hard, plans carefully, lives relatively modestly but with attention to health and exercise—but then passes on its advantages to its own next generation, in the form of elite education, good health, and stellar examples to follow.¹¹ These bequeathed advantages take the form of human capital, and the resulting wealth may not be so easily squandered. Thus a virtuous upper-middle class perpetuates its own advantages, giving the lie to the illusion of a larger social mobility.

The Markovits thesis breaks decisively with any neat bifurcation of equality of opportunity and equality of outcomes; instead it depicts a society in which outcomes determine opportunity, and in which the political protections of property perpetuate those outcomes. Nevertheless, this thesis is based on a historical progression, and no doubt some will wonder whether things might not revert to the older cycle; perhaps today's exercise and self-improvement addicts will find themselves confronting a rebel generation of self-indulgent, profligate children, once again evening out intergenerational opportunity.

It does not take a great deal of perspicacity, however, to observe that in fact for some groups, things have not evened out over a very considerable number of generations. Minority groups in particular remain in the grip of what famed sociologist Charles Tilly has called durable inequality.¹²

Does property law play a role in this kind of long-lasting unequal state? In the Parts that follow, I trace one historical example in which property law did contribute to inequality both of opportunity and outcome: the proliferation of racially restrictive covenants in residential properties in the first half of the twentieth century. These covenants were very much a part of

¹¹ See DANIEL MARKOVITS, *THE MERITOCRACY TRAP* 3–11 (2019) (arguing that an earlier aristocracy of “leisured elite” has been displaced by a “meritocratic elite” of hard-driving, well-educated professionals who pass on their traits to their children).

¹² See generally CHARLES TILLY, *DURABLE INEQUALITY* (1998) (describing patterns in which social groups remain in unequal position vis-à-vis one another).

American property law in that era. While they have not been legally enforceable for well over seventy years, and while they are only one of several factors that have fed racial inequalities, their legacy continues to influence residential patterns to this day.

The larger question, however, is whether property law intrinsically fosters these kinds of pernicious inequalities, or whether property law is neutral or even a brake on them. To give a preview, my own view is that property law in general definitely has desirable elements to cabin the way prejudices may limit opportunity, but that we cannot expect property law to save us from our own worst impulses.

I. A PRIMER ON RACIAL COVENANTS

One might view racially restrictive covenants as a test case of the relationship of property law to equality—or inequality. These covenants were ostensibly private deed restrictions or neighborhood agreements; they aimed to exclude certain racial groups—particularly African Americans but also Asians in western cities—from purchasing or living in homes in the covenanted neighborhoods. Racial covenants had existed in scattered properties in the nineteenth century, but after about 1910, they became increasingly prevalent in cities and suburban areas all across the country.¹³ For decades, state court decisions generally upheld such covenants, but in 1948, the Supreme Court determined that the judiciary could not enforce them without violating the Equal Protection Clause of the Constitution’s Fourteenth Amendment.¹⁴ Twenty years later, the Fair Housing Act of 1968 made it flatly illegal to refer to racial restrictions in most real estate transactions, effectively outlawing new racial covenants while barring the enforcement or even the mention of the older covenants that remained in the records.¹⁵ Nevertheless, as will be described below, racial covenants contributed to continuing patterns of residential segregation and unequal access to real estate.

¹³ RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 3 (2013); ROBERT M. FOGELSON, *BOURGEOIS NIGHTMARES: SUBURBIA, 1870–1930*, at 67 (2005); see Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 *HARV. L. REV.* 1609, 1621–22 (2021).

¹⁴ *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948); see also *Barrows v. Jackson*, 346 U.S. 249, 258 (1953) (prohibiting a damages claim against a home seller for violating a racial covenant).

¹⁵ BROOKS & ROSE, *supra* note 13, at 207–08.

A. *Early Twentieth Century: Racial Covenants
and Emergent Real Estate Practices*

Charles Tilly argues that a phenomenon that he calls “opportunity hoarding” is central to durable inequality—that is, a pattern in which members of a group, when given the chance to recommend or award any kind of opportunity, consider only members of the same group.¹⁶ One could certainly understand the decades of enforceable racial covenants as an example: white property owners wanted to keep residential areas for themselves, and they used then-legal racial covenants to hoard these areas to the exclusion of minority citizens.

This characterization is true as far as it goes, but there was more to the racial covenant story. An additional factor of great importance was the early-twentieth-century transformation of real estate development into a set of standardized practices, put into effect by an increasingly professional real estate industry.¹⁷ These standardizing practices effectively turned the white home buyer into the model customer at the center of real estate development, finance, sales, and even rentals, with the effect of marginalizing persons of other races into niche real estate markets.¹⁸ In this context, what Tilly described as opportunity hoarding might better be described as “crowding out,” and racial covenants became a key element of this emerging trend.

During the early decades of the twentieth century, real estate developers increasingly began to create whole new areas of housing, as opposed to operating with one or a few lots at a time.¹⁹ High-end developers were early movers in this pattern; they created whole new subdivisions, often on the outskirts of cities or just beyond the borders, in quiet areas that had become more easily accessible with the increasing use of automobiles. After acquiring a development area, such a developer would divide it into lots and install the physical infrastructure such as roads and curbs. But the developer also added a legal infrastructure of deed restrictions that “ran with the land” to successive owners,²⁰ thus making certain that lot purchasers and their successors would follow the developer’s plan for a gracious and attractive community. Restrictive covenants in these deeds largely covered such

¹⁶ TILLY, *supra* note 12, at 91.

¹⁷ The most extensive description of this process is MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* (1987). For the history of the suburbs, see FOGELSON, *supra* note 13; and KENNETH T. JACKSON, *THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

¹⁸ Carol M. Rose, Raisin, *Race, and the Real Estate Revolution of the Early Twentieth Century*, in POWER, PROSE, AND PURSE: LAW, LITERATURE, AND ECONOMIC TRANSFORMATIONS 288–89 (Alison L. LaCroix, Saul Levmore & Martha C. Nussbaum eds., 2019).

¹⁹ WEISS, *supra* note 17, at 45.

²⁰ Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* 1038 (2d ed. 2012).

matters as building styles and sizes, setbacks, and landscaping, as well as limiting uses to one-family dwellings.²¹ By the 1920s, however, racial restrictions were common in luxury developers' lists of restrictions required for gracious living, limiting the residences to "Caucasians," as one common term had it.²²

This was an era in which southern Black people had begun to migrate in large numbers to cities, including mid-south and northern cities, but the "high-class"²³ real estate developers could reasonably assume that their chief clientele would still be white purchasers. They could further assume that many members of this white clientele would not wish to live near African Americans; as one real estate treatise put it, "[p]roperty values have been sadly depreciated by" the entry of even "a single colored family" to a white street.²⁴ The treatise authors went on to say that while African Americans enjoyed the "right to life, liberty and the pursuit of happiness . . . they must recognize the economic disturbance which their presence in a white neighborhood causes" and should refrain from moving beyond their own "established district[s]."²⁵

Even before this comment, several city governments, alarmed at the influx of southern Black migrants, had passed zoning ordinances to keep the races apart, claiming that segregation was necessary to keep the peace and maintain property values.²⁶ But the Supreme Court blocked racial zoning in 1917. In *Buchanan v. Warley*, a case orchestrated by the newly formed National Association for the Advancement of Colored People (NAACP), the Court ruled that this kind of governmental measure violated the Fourteenth Amendment.²⁷

Unlike zoning, real estate covenants were ostensibly private arrangements, outside the reach of the Fourteenth Amendment's limitations on governmental actions—or so ruled several important state supreme court

²¹ FOGELSON, *supra* note 13, at 14–19.

²² See BROOKS & ROSE, *supra* note 13, at 103–05. For background on the term "Caucasians," see CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 57–64 (1959) (describing NAACP efforts against racial covenants).

²³ See WEISS, *supra* note 17, at 15 (noting developers' use of "high-class" designation).

²⁴ STANLEY L. MCMICHAEL & ROBERT F. BINGHAM, CITY GROWTH AND VALUES 181 (1923).

²⁵ *Id.* at 181–82.

²⁶ BROOKS & ROSE, *supra* note 13, at 38–41; MCMICHAEL & BINGHAM, *supra* note 24, at 182.

²⁷ 245 U.S. 60, 79–82 (1917); see also Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 104, 126–28 (2002) (discussing the founding of the NAACP and the organization's involvement in the lawsuit challenging a Kentucky zoning ordinance); BROOKS & ROSE, *supra* note 13, at 41–42 (describing the NAACP as leading the challenge to the Kentucky ordinance).

decisions.²⁸ As a result, after *Buchanan*, racial covenants became the main legal vehicle through which housing discrimination could be accomplished. High-end developers began to use them routinely to assuage their white clients' fears of minority entrance; racially restrictive covenants became a kind of marketing tool along with other restrictions.²⁹ Sadly enough, they were very popular even outside the high-end subdivisions. In the 1920s and afterwards, restrictions on race migrated from the highest priced real estate developments to middle-class and even some working-class developments.³⁰

B. 1920s: Racial Covenants Expand

In older urban areas that were already built out, white residents could not deploy the new developments' deed restrictions to keep their streets segregated. But by the mid-1920s, real estate boards and neighborhood improvement associations (NIAs) in these older areas hit upon a different form: the racial covenant by petition. NIAs collected pledges through the blocks stating that none of the owners or their successors would sell or rent to minority members, and then recorded the petition documents.³¹ These covenants by petition had some weaknesses, however, particularly by comparison to the subdivision covenants. They often failed to include correct signatures of all the parties in the relevant blocks, and they lacked one of the formal property law requirements for covenants running with the land—that they originate with a lease or sale of the property. Because of the latter issue, they could only be enforced against later purchasers, ironically enough, by courts using their equitable powers.³²

Despite these vulnerabilities, however, increasingly professionalized real estate brokers in the 1920s led the efforts to cover neighborhoods with racial covenants. The National Association of Real Estate Boards (NAREB) was founded in 1908, with the trademarked name “Realtor” for its members.³³ By 1924, NAREB's “Realtor's Code of Ethics” included, among

²⁸ See *Los Angeles Inv. Co. v. Gary*, 186 P. 596, 597–98 (Cal. 1919); *Queensborough Land Co. v. Cazeaux*, 67 So. 641, 643 (La. 1915); *Porter v. Barrett*, 206 N.W. 532, 533 (Mich. 1925); *Koehler v. Rowland*, 205 S.W. 217, 220 (Mo. 1918).

²⁹ FOGELSON, *supra* note 13, at 119–27 (describing developers' deployment of deed restrictions, including racial restrictions, as a marketing tool).

³⁰ For a discussion of the use of racial covenants in different socioeconomic developments, see BROOKS & ROSE, *supra* note 13, at 104–05.

³¹ See *id.* at 106–07.

³² *Id.* at 78–83 (describing how neighbor-collected covenants were often sloppier than subdivision covenants and violated “horizontal privity,” a doctrine requiring covenants to be included in the original deed in order to give notice to later purchasers).

³³ WEISS, *supra* note 17, at 22, 24. NAREB is now NAR, for National Association of Realtors. *History*, NAT'L ASS'N REALTORS, <https://www.nar.realtor/about-nar/history> [<https://perma.cc/PCG7-XSDE>].

other things, a section stating that a realtor would not introduce into any neighborhood “members of any race or nationality . . . whose presence will clearly be detrimental to property values.”³⁴ Thereafter, NAREB affiliates accelerated their encouragement of local NIAs’ petition drives, with Chicago’s chapter offering a model petition for a racial covenant as well as a helpful pamphlet entitled “Choose Your Neighbors.”³⁵

Thus as the real estate industry professionalized, developers and brokers standardized their practices for a target clientele of white buyers and owners; racial restrictions were the contribution of property law to that standardization. White-centric standardization effectively turned housing for minorities into a niche market, offering smaller numbers and less profitability than the mainstream (and exclusionary) white market. There were certainly real estate entrepreneurs who served minority clients, and some did quite well. Chicago’s Carl Hansberry was known both for his civil rights activism and for converting larger apartments into smaller “kitchenettes.”³⁶ Earl Dickerson, general counsel and later president of the Supreme Liberty Life Insurance Company, was an important institutional player in mortgage finance for African Americans in Chicago and elsewhere.³⁷ But as niche-market entrepreneurs, minority real estate dealers were squeezed into limited areas with correspondingly limited opportunities. Unsurprisingly, some worked with local NAACPs in legal challenges to racial covenants, including Hansberry, Dickerson, and a group of Black real estate brokers in St. Louis.³⁸ Meanwhile, however, for their minority clientele, niche-market status meant higher priced residences of lower quality.

³⁴ ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 201, 221 (1969).

³⁵ BROOKS & ROSE, *supra* note 13, at 121. The NAR apologized in 2020 for its role in perpetuating discrimination. See *NAR Apologizes for Housing Discrimination*, REAL DEAL, (Nov. 20, 2020, 12:03 PM), <https://therealdeal.com/national/2020/11/20/national-association-of-realtors-apologizes-for-housing-discrimination> [<https://perma.cc/6NT7-4XE3>].

³⁶ Jay Tidmarsh, *The Story of Hansberry: The Foundation for Modern Class Actions*, in CIVIL PROCEDURE STORIES 233, 252–53 (Kevin M. Clermont ed., 2d ed. 2008). Hansberry was to become even better known as the father of playwright Lorraine Hansberry; for Lorraine’s unsettled childhood perspective on her parents’ activism, see IMANI PERRY, LOOKING FOR LORRAINE: THE RADIANT AND RADICAL LIFE OF LORRAINE HANSBERRY 11–13 (2018).

³⁷ See ROBERT J. BLAKELY & MARCUS SHEPARD, EARL B. DICKERSON: A VOICE FOR FREEDOM AND EQUALITY 95–100, 166–88 (2006); Tidmarsh, *supra* note 36, at 279 (describing Supreme Liberty as “the leading African-American business of its day”).

³⁸ Tidmarsh, *supra* note 36, at 252–56; BLAKELY & SHEPARD, *supra* note 37, at 95–101; JEFFREY D. GONDA, UNJUST DEEDS: THE RESTRICTIVE COVENANT CASES AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 60, 68–70 (2015).

C. 1930s: Racial Covenants Infiltrate the New Deal

Perhaps the most important steps in standardizing white-centric real estate practices came with the New Deal of the 1930s, and these too leaned on racial covenants. White real estate professionals who had emerged in the 1920s went to Washington in the 1930s, where they brought with them their views on race relations in housing. There they led the new federal agencies that were created to boost a deeply sagging housing market.³⁹ The Home Owners' Loan Corporation (HOLC) was created early in the new administration to make housing loans; as a part of its lending program, the HOLC created color-coded maps of many cities to reflect risk levels. Minority areas were considered most at risk and coded red, a color choice that would later give rise to the term “redlining,” although the HOLC itself did make loans in these areas.⁴⁰ By the later 1930s, however, the newer Federal Housing Administration (FHA) became the centerpiece of governmental housing support; instead of lending directly, the FHA insured bank-created mortgages, to be structured as long-term, self-amortizing loans with relatively low down payments.⁴¹ But the FHA very much took race into account in its assessment of the risk levels of the many mortgages it insured. In its later 1930s manual of criteria for loan approval, the FHA directed agents to look for restrictive covenants in new subdivisions—including racial covenants.⁴²

*D. The Postwar Period and Beyond:
Shelley, Barrows, and the Fair Housing Act*

Because FHA insurance was so important in supporting new home purchases, racial covenants became routine in new subdivisions from the later 1930s through the first years of the housing boom that followed the Second World War.⁴³ The first houses in the vast new Long Island Levittown

³⁹ WEISS, *supra* note 17, at 29, 146.

⁴⁰ JACKSON, *supra* note 17, at 196–202.

⁴¹ BROOKS & ROSE, *supra* note 13, at 108. Although this new system under the FHA was standardized and housing officials were not wielding it to discriminate directly, by “defin[ing] minority occupancy as a threat to property values,” it continued the tradition of discrimination in housing. DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 128–35 (2007) (describing the effects of the FHA’s racial policies).

⁴² BROOKS & ROSE, *supra* note 13, at 108–09. For more on both the HOLC’s and the FHA’s emphasis on race as a factor in mortgage risk, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 63–67 (2017) (describing the explicit references to race in HOLC mapping and FHA publications and policies).

⁴³ BROOKS & ROSE, *supra* note 13, at 108–11. The FHA manual removed explicit approval of racial covenants in 1947, although the agency later did little to encourage integration. *Id.* at 170–71; see also FREUND, *supra* note 41, at 132–35 (describing the long-term impact of FHA racial policies).

subdivision went on sale in 1947, and they included racially restrictive covenants.⁴⁴

By this time, however, racial covenants were coming under fire due to several significant factors. Civil rights advocates sharply criticized the segregation that met African-American soldiers upon their return from the war against Nazism.⁴⁵ The State Department, facing a rapidly developing cold war with the Soviet Union, became increasingly concerned over the embarrassment of racial discrimination, including housing discrimination.⁴⁶ Meanwhile, the NAACP, under the leadership of Charles Hamilton Houston and Thurgood Marshall, accelerated the legal battle against racial covenants, ultimately challenging them before the Supreme Court.⁴⁷

In 1948, the Supreme Court in *Shelley v. Kraemer* held that racial covenants were legally unenforceable by courts as “state action” in violation of the Fourteenth Amendment’s Equal Protection Clause.⁴⁸ Even though *Shelley* was unclear on how judicial enforcement of these covenants counted as state action, the case did at least slow the proliferation of racial covenants.⁴⁹ After *Shelley*, which had invalidated an injunction against African-American buyers, a follow-up case, *Barrows v. Jackson* (1953), made clear that damages were also unavailable, holding that a white seller could not be held liable for damages for selling a covenanted property to a minority buyer.⁵⁰ Even so, for a time, developers sometimes continued to insert racial restrictions into deeds; *Shelley* and *Barrows* did not outlaw racial covenants so long as they were simply voluntary, and as late as 1966, a real estate manual made a point of saying that racial covenants were still legal even if not enforceable, evidently useful as a signal of neighborhood preferences.⁵¹

⁴⁴ BROOKS & ROSE, *supra* note 13, at 138–39.

⁴⁵ RAWN JAMES, JR., *ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION 188–89* (2010) (describing Houston’s speeches comparing segregation to Nazi practices).

⁴⁶ Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61, 98–105 (1988).

⁴⁷ BROOKS & ROSE, *supra* note 13 at 136–39; VOSE, *supra* note 22, at 57–69; Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 *WASH. U. L.Q.* 737, 742–48 (1989).

⁴⁸ 334 U.S. 1, 19–21 (1948).

⁴⁹ B.T. McGraw & George B. Nesbitt, *Aftermath of Shelley Versus Kraemer on Residential Restriction by Race*, 29 *LAND ECON.* 280, 287 (1953) (describing how *Shelley* has resulted, “on balance, in the freer mobility of nonwhites throughout the housing supply” but recognizing the continuing existence of “resistances and obstructions of many sorts in acquiring suitable homes”).

⁵⁰ 346 U.S. 249, 259 (1953).

⁵¹ BROOKS & ROSE, *supra* note 13, at 171; Gabriel J. Chin, *Jim Crow’s Long Goodbye*, 21 *CONST. COMMENT.* 107, 124–25 (2004).

The 1968 Fair Housing Act finally put an end to new racial covenants, and among other matters the Act forbade reference to discrimination in the sale of housing, including advertising and finance—a provision covering reference to past covenants as well.⁵² Racial covenants live on, however, or at least their influence does.

II. THE AFTERLIFE OF RACIAL COVENANTS

The following Sections recount some of the most prominent patterns in which racial covenants are still with us—in the land records, in the geography of segregation, in white anxiety about housing values, and in persistent economic inequality.

A. Recording Issues

The most literal way in which racial covenants live on is in their continued presence in land records. Take a house built in, say, a 1941 suburban development: given the importance of FHA mortgage insurance for everyone involved at the time—the builder, the broker, the buyer, the mortgage banker, the title insurer—the house is very likely to have had a racial covenant in its initial documents of title, and that covenant is very likely to be written in such a way as to run with the land for so long as the house stands and possibly even longer.⁵³

As a consequence, when the property changes hands years later, all these participants may be confronted with racial restrictions—now not enforceable, not even legal to mention, but still part of the chain of title, as reflected in the past records of ownership and interests in the house. The parties most directly affected are title insurers, who are forbidden by the Fair Housing Act and comparable state legislation to refer to discrimination in housing transactions, but who also have a professional responsibility to disclose to home purchasers all claims against the property, on pain of liability for undisclosed but valid claims.⁵⁴ Title insurers who prepare

⁵² 42 U.S.C. § 3604(c); BROOKS & ROSE, *supra* note 13, at 207.

⁵³ See BROOKS & ROSE, *supra* note 13, at 110 (describing explicit references to FHA racial standards in deeds to new homes built in the early 1940s). Some subdivisions provided that racial restrictions would be permanent conditions on the lots even though other restrictions had a time limit. See, e.g., PIMA COUNTY RECORDER'S OFFICE, *Declaration of Establishment of Conditions and Restrictions*, in 20 MISCELLANEOUS RECORDS 238–39 (providing that racial restrictions would be a permanent condition for the Sam Hughes neighborhood of Tucson, Arizona).

⁵⁴ BROOKS & ROSE, *supra* note 13, at 223–26. As these pages relate, shortly after the passage of the Fair Housing Act, the Justice Department contacted several major title-insurance companies to seek their compliance. Title insurers were particularly concerned about one form of racial restriction whose validity might have escaped the *Shelley* ruling. This was the defeasible fee, which returned a property to the seller in case of breach; if not disclosed, this interest might conceivably have made title insurers liable. See BROOKS & ROSE, *supra* note 13, at 225–26.

documents of sale have taken various routes around this bind: some noting but crossing out references to discriminatory clauses, others annotating them as unenforceable, some simply deleting them or alternatively leaving their annotation in place.⁵⁵

For their part, home purchasers may well not bother to read deeds or title-insurance documents, given the reams of paper that they see at closings. When they do see references to past discriminatory restrictions, they too may have a variety of reactions: indifference, indignance to varying degrees, or something else. Former Chief Justice Rehnquist, when told of racial restrictions on one of his former homes, brushed the news aside with the comment that (a) he hadn't known and (b) they weren't enforceable anyway.⁵⁶ My coauthor Richard Brooks and I have been told by many people about their reactions when learning about old racial restrictions on their own properties. One, an African-American law professor in Los Angeles, thought them hilarious. Another, a serious civil rights activist, related that he had been outraged when he learned of old racial covenants on a house that he had been in the process of purchasing in Ann Arbor, Michigan; he wanted the covenant to be revoked, but he backed off when told by his attorney that the process would cost roughly ten percent of the purchase price.

This attorney may have been exaggerating the cost, but probably not by a great deal. The problem is that restrictive covenants of all kinds represent interests that other parties have in any given owner's property, and each of these interests must be legally untangled in order to be removed. The owner cannot unilaterally revoke another person's legal interests in her property, such as a driveway easement or a covenant to pay dues to the homeowners' association. Unless another method is authorized by statute or in the covenants themselves, the only by-the-book route to revocation is to gather the consents of all interested parties, and then to record the revocation—even for a claim as feeble as one given by a now-illegal racial restriction. In the case of multiple-owner subdivisions or common interest communities, even those with somewhat relaxed rules for amendment, such an effort can be prohibitively time-consuming and expensive for any objecting owner.⁵⁷

Since about 2010, some civil rights groups and other persons have revived public interest in racially restrictive covenants, treating them as a

⁵⁵ Jeremy Yohe, *Addressing a Painful Past*, TITLENEWS, Oct. 2021, at 12, https://digital.titlenews.org/titlenews/october_2021/MobilePagedArticle.action?articleId=1733443 [<https://perma.cc/QBN8-ME6C>]; BROOKS & ROSE, *supra* note 13, at 224.

⁵⁶ BROOKS & ROSE, *supra* note 13, at 1–2.

⁵⁷ See, e.g., *United States v. Univ. Oaks Civic Club*, 653 F. Supp. 1469, 1472–73 (S.D. Tex. 1987) (noting the difficulty of amending a condominium restriction); Wayne S. Hyatt, *Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 332 & n.126 (1998) (discussing the difficulty for many common interest communities in changing covenants).

part of the legacy of discrimination against minorities, and scouring old records in projects with names like *Mapping Segregation*.⁵⁸ One outcome of these projects is a call for state legislatures to change the by-the-book property rules, at least in the case of racial restrictions, and to make it possible for individual owners to revoke these restrictions unilaterally. Another is to forbid the recordation of any references to racial restrictions, including those in past documents.⁵⁹

Some states have responded to these efforts to renounce or even expunge references to racial covenants, but there are a surprising number of technical obstacles.⁶⁰ One problem is that recorders of deeds normally check only for matters such as signatures, notarization, and other such formalities, without considering the content of the documents that are recorded. Checking for racial restrictions would add considerably to their duties. Moreover, they might not easily recognize these restrictions, since racial covenants are often passed on through general phrases in deeds and title documents such as “subject to restrictions of record.” Checking for racial restrictions thus could involve a search through records from many years in the past. However odious they may be, old racial covenants most commonly appear in packages of subdivision restrictions such as building setbacks and association dues—restrictions that form the backbone of planned communities of all kinds. States with marketable title acts limit the effectiveness of older record claims, and they void property claims that are not reasserted periodically.⁶¹ But because subdivision restrictions are generally referenced at each subsequent property transfer, marketable title

⁵⁸ See, e.g., PROLOGUE DC, LLC, MAPPING SEGREGATION IN WASHINGTON DC, <https://mappingsegregationdc.org> [<https://perma.cc/7YJL-M6RN>] (visualizing racial covenants in Washington, D.C., including interactive maps); *About Us*, MAPPING PREJUDICE, <https://mappingprejudice.umn.edu/about-us/index.html> [<https://perma.cc/UKT4-3C5G>] (mapping a “comprehensive visualization of racial covenants” in Minneapolis); see also Colin Gordon, *Dividing the City: Race-Restrictive Covenants and the Architecture of Segregation in St. Louis*, J. URB. HIST. 1, 3 (2021) (discussing a historical mapping project of racial covenants in St. Louis, Missouri).

⁵⁹ See, e.g., CITY ROOTS CMTY. LAND TR. & YALE ENV'T PROT. CLINIC, CONFRONTING RACIAL COVENANTS: HOW THEY SEGREGATED MONROE COUNTY AND WHAT TO DO ABOUT THEM 36 (2020) (advocating for the removal of racial covenants, discussing several flaws in various state laws that address racial covenants, and suggesting potential improvements).

⁶⁰ *Id.* at 37–44; *Housing Discrimination: Addressing Illegal Covenants in Historic Land Records*, SPECIAL SUPPLEMENT TO TITLE NEWS, Oct. 2021, at 5, 7, https://digital.titlenews.org/titlenews/october_2021/MobilePagedArticle.action?articleId=1733444 [<https://perma.cc/44B8-PRG2>]. Federal legislation was introduced in July 2021 to encourage research into discriminatory land records. See Joshua Jamerson, *Senate Bill Aims to Create National Database of Restrictive Property Covenants*, WALL ST. J. (July 29, 2021, 1:22 PM), <https://www.wsj.com/articles/senate-bill-aims-to-create-national-database-of-restrictive-property-covenants-11627573734> [<https://perma.cc/JD6Z-75K5>].

⁶¹ See, e.g., Jason P. Seaver & Christopher R. Martella, *Potential Legislative Solutions to Issues with the Marketable Record Title Act After Public Act 572 of 2018*, 46 MICH. REAL PROP. REV. 43, 44 (2019).

acts have no effect on these restrictions. Unless there is some special provision, any racial restrictions that they contain slide by as well.⁶² Besides, even if voided by marketable title acts, old racial restrictions would linger in the record books.

These technical difficulties can no doubt be overcome by careful drafting, but important substantive issues remain. Probably the most important is the question of whether and to what degree history should be erased. Should the goal be to remove all racial restrictions from all recorded documents, present, future, and past? From a preservation perspective, it hardly seems desirable to alter the historical record. Even the current efforts to map segregation would be severely impeded if past land-record documents were redacted. Alternatively, should those who draw up and record title documents be required to drop all references to racial restrictions from this point on? Such a requirement would leave past records untouched. Might an even more forceful repudiation occur if current owners could file their own statements of renunciation? But then, what would it mean if some did and some did not? Might it be more productive to think outside the records office box, and to emulate the *Stolpersteine* movement in Germany—the placement of small plaques outside the last homes of Jewish families and others persecuted during the Nazi era?⁶³ Could some version of such “stumbling stones” act as a more powerful renunciation of past discrimination in so many American neighborhoods?

All of these are just some of the questions that roil the revocation issue today, and that have certainly shaken up the once-sleepy records and title offices. But the racial covenants of the past cast a present shadow in other ways as well.

B. *Patterns of Urban and Suburban Segregation*

“White flight” is a phenomenon well-known in the years after the Second World War—a situation in which white residents fled their urban homes for the suburbs.⁶⁴ Racial restrictions played a part in the resulting demographic division of the races, most directly because many suburban

⁶² See UNIFORM SIMPLIFICATION OF LAND TRANSFERS ACT § 3-303 (UNIF. L. COMM’N 1976) (exempting easements and restrictions when record location is given). Marketable title acts use a past deed of at least a certain age as a “root” of title, and recognize only claims mentioned therein or subsequently, subject to periodic renewal. For some current issues, see Seaver & Martella, *supra* note 61, at 43–44 (2019) (describing changes to an early marketable title act).

⁶³ See Florence Wagman Roisman, *Stumbling Stones at Levittown: What to Do About Racial Covenants in the United States*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 461, 463 (2022) (describing the *Stolpersteine* movement and potential applications to racially covenanted neighborhoods in the United States).

⁶⁴ BROOKS & ROSE, *supra* note 13, at 5, 133, 187.

developments included racial covenants up until the *Shelley* and *Barrows* cases of the early 1950s. Less directly, racial restrictions had become an ingrained practice by then. Even after explicit racial covenants dropped out of new title documents, suburban real estate developers continued to sell only to white purchasers. One of these was the Levitt Corporation, developer of the several huge “Levittown” subdivisions. After the *Shelley* decision, Levitt dropped racial covenants but still made initial sales only to white customers; as the development firm’s general counsel explained in a 1962 hearing before the U.S. Commission on Civil Rights, unless constrained by law, the company as a business matter could not “offend the customs and traditions of the locality in which our company operates.”⁶⁵

I will not dwell on this well-known pattern—white suburbs with minority and especially African-American inner cities—but I do want to bring up one of the less well-known ways in which racial covenants contributed to white flight. As described earlier, racial covenants took two forms: subdivision restrictions and neighborhood restrictions by petition.⁶⁶ Of the two, subdivision restrictions were much more formally correct, originating with a single owner (the developer) and then passing on to all the properties in any given subdivision. Moreover, subdividing usually involved large swaths of previously undeveloped land, which meant that they emerged at the outskirts of towns or outside the town borders—that is, in the suburbs.

Racial covenants by petition, on the other hand, because they lacked some of the formal character that covenants usually required, could only be enforced under a court’s equitable jurisdiction against persons who should have known about them from the land records.⁶⁷ More importantly, the petition covenants often came into being within urban areas at the margins of minority expansion, with signatures collected among white neighbors who were often panic-stricken at the prospect that Black entrants would ruin their property values.⁶⁸ The resulting petitions generally failed to gain signatures from all the owners, and they often stated a duration of twenty years, as owners hedged their bets on the future of the neighborhood.⁶⁹ Many of these

⁶⁵ *Housing in Washington: Hearings Before the U.S. Comm’n on Civ. Rts.*, 87th Cong. 244 (1962) (Exhibit H-2, letter from Ira Goldman, Vice President and General Counsel, Levitt & Sons, to Martin E. Sloane, Chief, Hous. Section, Comm’n on C.R.); *Ira G. Goldman, 55, Dies; Executive of Levitt & Sons*, N.Y. TIMES (Nov. 30, 1962), <https://www.nytimes.com/1962/11/30/archives/ira-g-goldman-55-dies-executive-of-levitt-sons.html> [<https://perma.cc/QWY7-32QY>].

⁶⁶ *Supra* notes 31–32 and accompanying text.

⁶⁷ BROOKS & ROSE, *supra* note 13, at 82–83.

⁶⁸ *See id.* at 81–82.

⁶⁹ *See id.* at 82; HERMAN H. LONG & CHARLES S. JOHNSON, PEOPLE VS. PROPERTY: RACE RESTRICTIVE COVENANTS IN HOUSING 16–17 (1947) (describing most Chicago petition covenants as

petition covenants simply fell apart under the pressure of minority influx, and when white neighbors tried to assert them against minority residents, lawyers for the latter could point out their many legal weaknesses.⁷⁰ St. Louis civil rights lawyer and later judge Scovel Richardson even wrote a short primer on the ways that these covenants could be attacked, describing their lack of co-owner signatures, signatures by nonowners, and other flaws.⁷¹

The picture, then, was one in which one neighborhood's petition covenants could collapse, leading to a breach in what Richardson called the "ring of steel" of racial covenants around overcrowded African-American areas.⁷² When such a breach occurred, an influx of minority homeseekers frightened white residents in nearby neighborhoods, who then tried to create petition covenants on their own blocks but who sometimes simply sold out and left.⁷³ By contrast, formally correct subdivision covenants gave the outskirts and the suburbs more substantial legal protections for whiteness, quite aside from the greater cost of homes in these areas.

The difference between weak, neighbor-organized petition covenants in the inner city and strong subdivision covenants on the outskirts thus contributed to a long-emerging pattern of stark metropolitan segregation.⁷⁴ By the 1950s, when racial covenants could no longer be enforced, the pattern had already been set, and would soon be sharply accelerated by shadowy "blockbusting" brokers, who frightened white residents into flight to the suburbs while opening up inner-city neighborhoods for minority residents.⁷⁵

lasting between twenty and twenty-four years; describing the St. Louis Real Estate Exchange model covenant as lasting twenty years with provisions for supermajority abrogation); *see also* THOMAS LEE PHILPOTT, *THE SLUM AND THE GHETTO* 407–10 (1978) (reprinting a model petition covenant published by the Chicago Real Estate Board, 1927, providing that the covenant would last until Jan. 1, 1949, with provision for abrogation thereafter by owners of 60% of parcels).

⁷⁰ BROOKS & ROSE, *supra* note 13, at 82–83, 86.

⁷¹ Scovel Richardson, *Some of the Defenses Available in Restrictive Covenant Suits Against Colored American Citizens in St. Louis*, 3 NAT'L BAR J. 50, 51–53 (1945).

⁷² *Id.* at 51.

⁷³ *See, e.g.*, Porter v. Johnson, 115 S.W.2d 529, 533–35 (Mo. Ct. App. 1938) (upholding a racial covenant adopted when African Americans bought land nearby); COLIN GORDON, *MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY* 80–81 (Glenda Gilmore, Michael Kazin & Thomas J. Sugrue eds., 2008) (describing an attempt to enforce a racial covenant that failed in court "because the original covenant had been so haphazardly assembled"); Gordon, *supra* note 58, at 10–11 (describing the collapse of many petition covenants in St. Louis, including examples of selling out); ARNOLD R. HIRSCH, *MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940–1960*, at 30 (Robert Fogel & Stephan Thernstrom eds., 1998) (describing the similar collapse of racial covenants in Chicago).

⁷⁴ Gordon, *supra* note 58, at 14–16, 18–19 (noting that the pattern of failing inner-city petition covenants, by contrast with more robust and continuing subdivision covenants, first influenced different ratings for the HOLC and later intensified segregation across the metropolis).

⁷⁵ BROOKS & ROSE, *supra* note 13, at 135–36, 189–90, 198. So-called blockbusters have had some defenders. *See id.* at 208–09 (discussing how blockbusters created housing opportunities for minorities,

The difference in these two types of covenants thus had an impact on the long-lasting division of American metropolises into minority cores with white outskirts.

C. *Fear of Integration*

The total time period within which racially restrictive covenants were legal and extensively used was relatively short—at most four decades, between 1915 and 1955. Yet this period helped to cement a thoroughly malignant attitude toward residential integration: that any influx of minority members, especially African Americans, would cause property values to drop in a white neighborhood.

This view predated the widespread use of racial covenants, but the burgeoning use of racial covenants, and the courts' favorable adjudication of them, reinforced it as a legitimate assumption. For example, in affirming a racial covenant in 1938, Maryland's highest court observed that, given the influx of African Americans to cities, "all agree[d that] something ought to be done," and because the Supreme Court had inexplicably ruled against racial zoning, it was no wonder that neighbors would take matters into their own hands.⁷⁶ A few years later, the Supreme Court of California, although unwilling to enforce a particular racial restriction, still referred to "damage" that had been done to a neighborhood by the "influx of negroes" on a nearby street.⁷⁷ Racial covenants helped to naturalize and rigidify assumptions of this sort. White Americans could see that major institutions—real estate professionals, the banks, the courts, even the federal government—upheld racial restrictions and appeared to approve of them. It was small wonder that these same white Americans came to believe that they were entitled to live in all-white communities and that their homes retained value *because* the communities were all white.⁷⁸

Sociologist Robert Merton coined the phrase "self-fulfilling prophecy" in 1948, and critics of racial covenants quickly dubbed the property-values trope a prime example: if enough people believed the commonplace that minority entry reduced housing value, then it would be reflected in market

despite unsavory practices); Dmitri Mehlhorn, *A Requiem for Blockbusting: Law, Economics, and Race-Based Real Estate Speculation*, 67 *FORDHAM L. REV.* 1145, 1165–74 (1998) (arguing that blockbusting's harms to Black communities are overstated).

⁷⁶ *Meade v. Dennistone*, 196 A. 330, 332–33 (Md. 1938).

⁷⁷ *Fairchild v. Raines*, 151 P.2d 260, 263 (Cal. 1944).

⁷⁸ BROOKS & ROSE, *supra* note 13, at 112–13; Thomas J. Sugrue, *Crabgrass-Roots Politics: Race, Rights, and the Reaction Against Liberalism in the Urban North, 1940–1964*, 82 *J. AM. HIST.* 551, 564 (1995).

prices and would thus become true.⁷⁹ *Shelley, Barrows*, and later fair housing legislation forbade discrimination based on this belief, but insofar as the belief itself was concerned, the genie was already out of the bottle. This sentiment is reflected in the depressing instances of move-in violence described in Jeannine Bell's *Hate Thy Neighbor*, including break-ins and vandalism, rock-throwing, and even gunfire directed at newly arriving Black residents in white areas.⁸⁰

The property-values trope undoubtedly has less force today than it did even twenty or twenty-five years ago, but the clues are still very evident. Several news outlets ran a story at the end of 2021 about an African-American couple who were surprised at the low sale valuation given to their home. They devised a test: they removed all the family pictures, asked a white friend to act as the seller, and requested a second valuation. This second assessment came in about one-third higher than the first.⁸¹ The assumption seems to have been that if an African-American family owned the home, it would sell for less on the market, whereas white ownership vouched for the home's value. This story and others like it are only anecdotal, but they suggest the continuing belief that minority entry lowers property values.

D. Intergenerational Wealth Differences

Racially restrictive covenants are sometimes cited as one of the factors contributing to the dearth of intergenerational wealth transfer in many minority families.⁸² The charge is that racial covenants prevented minorities, and especially African Americans, from purchasing the homes that so

⁷⁹ See, e.g., CHARLES ABRAMS, FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING 173 (1955) (citing Robert K. Merton, *A New Psychological Factor*, in RACE PREJUDICE AND DISCRIMINATIONS 510 (Arnold M. Rose ed., 1948)).

⁸⁰ JEANNINE BELL, HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING 1 (2013). For more on these incidents, see Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47, 48, 51 (2007).

⁸¹ *Black Couple Files Lawsuit Claiming Home Value Was Underestimated by Half a Million Dollars Because of Their Race*, CBS NEWS (Dec. 8, 2021, 12:40 PM), <https://www.cbsnews.com/news/home-appraisal-race-lawsuit> [<https://perma.cc/WWB3-KUER>]; see also Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, N.Y. TIMES (Aug. 27, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html> [<https://perma.cc/2TFZ-L3JY>] (describing a Gallup and Brookings Institution finding that a house in a majority-Black neighborhood was likely to be valued at 23% less than a very similar house in a majority-white neighborhood).

⁸² See, e.g., CITY ROOTS CMTY. LAND TR. & YALE ENV'T PROT. CLINIC, *supra* note 59, at 6–7 (citing racial covenants as part of the reason for the racial wealth gap); *Decades-Old Racist Covenants on Property Deeds Have Lasting Effect in New Jersey*, NEWS 12 N.J. (Feb. 14, 2022, 12:13 PM) <https://newjersey.news12.com/decades-old-racist-covenants-on-property-deeds-have-lasting-effect-in-new-jersey> [<https://perma.cc/RC2Z-FKCV>] (same).

frequently act as the major asset of any given family. My own view is somewhat different; I think it is risky to rely on home ownership as the chief route to lasting wealth, however appealing home ownership may be. A painful lesson of the 2008 housing crisis was that home prices can fall as well as rise; more diversified assets are a safer bet, and not just for African Americans, but for others as well. I also suspect that other forms of discrimination were more important in preventing many African Americans from acquiring wealth that they could pass on to the next generation. Employment discrimination is likely a major factor, along with discrimination and neglect in the provision of education, health, and public safety in minority areas.

Having said that, one cannot discount differential opportunity for home ownership as a contributor to larger unequal access to wealth, especially since government programs such as FHA insurance long favored white home buyers while stinting minorities, even after the FHA guidelines dropped the explicit preference for racial segregation.⁸³ Lending favoritism has been compounded by the income-tax advantages of home ownership—again, a benefit available to white homebuyers but not minority renters. Programs like these, by favoring white homebuyers over minorities, undoubtedly have caused a relative lag in public investment in minority neighborhoods, given the influence that homeowners are likely to exert over local politics.⁸⁴ And here, of course, racial restrictions did play a role in hemming minorities into those very neighborhoods. Thus, whatever one may think of homeownership as a vehicle for savings, racial covenants had an effect on families' differential ability to use that vehicle for investment; and somewhat more subtly, racial covenants undermined investment in the public goods that are more likely to be enjoyed in neighborhoods of homeowners.

III. WHAT WAS THE ROLE OF PROPERTY LAW?

Racially restrictive covenants denied large racial groups access to the most dynamic sector of residential property in the first half of the twentieth century: newly created subdivisions. They also severely limited residential opportunities in the central cities to which many minorities were migrating. In addition, even after these restrictions became formally illegal, they left an

⁸³ FREUND, *supra* note 41, at 128–35, 186–90, 195.

⁸⁴ WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 1 (2001); *see also* Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES, (Aug. 24, 2020), <https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html> [<https://perma.cc/2MMK-X3JZ>] (describing “redlined” minority neighborhoods lacking trees, parks, and open space that moderates heat).

attitudinal residue that continued to constrain residential opportunities for the same groups.

As covenants running with the land, these racial restrictions certainly fell under the rubric of property law. But was there something about property law that made this long episode of discrimination inevitable? I think not, but with the major caveat that like all law, property law is malleable, and the relevant actors may shape it in ways that in hindsight look like gross distortions. Nevertheless, even at the outset of the widespread use of racial covenants, there were many elements of property law that suggested that these covenants would not pass a test of legality.

One such element was nuisance law. Race as a nuisance category went nowhere. The best known case came from Kansas in 1883, where a white homeowner complained that a neighbor was taking revenge on him by creating a nuisance, that is, renting to “worthless negroes.”⁸⁵ The state supreme court rejected the argument out of hand.⁸⁶ No one could be a nuisance simply because of who she was; nuisance liability depended on action.⁸⁷ Even southern courts agreed, although the doctrine frayed at the edges at times when plaintiffs brought up thinly disguised discrimination in the form of complaints about noise or boisterous fun.⁸⁸

Racial zoning by public bodies fell by the wayside in the 1917 *Buchanan* case mentioned earlier, but even though this was a constitutional law case, the Court’s reasoning was largely based on the freedom that property law gives owners to buy and sell as they please.⁸⁹ Indeed, at the time, the distinction between public zoning and private covenants was not altogether certain; the NAACP’s later arguments against racial covenants routinely cited *Buchanan*’s zoning ruling, although unsuccessfully.⁹⁰

As to covenants running with the land specifically, in the late nineteenth and early twentieth centuries, courts did a good deal of huffing and puffing about “restraints on alienation” and how they were disfavored in the law, but in fact, American courts gave covenants in general a good deal of leeway. For example, unlike the British courts, they used equity jurisprudence to permit covenants to run with the land even when the original parties sold out

⁸⁵ Falloon v. Schilling, 29 Kan. 292, 295 (1883).

⁸⁶ *Id.* at 297.

⁸⁷ *Id.*

⁸⁸ BROOKS & ROSE, *supra* note 13, at 33–34; Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 516–19 (2006).

⁸⁹ *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917).

⁹⁰ The NAACP cited *Buchanan* in conjunction with *Gandolfo v. Hartman*, in which a lower federal court had discussed a racial covenant as if it constituted “state action.” 49 F. 181, 182–83 (S.D. Cal. 1892). However, many later cases distinguished or rejected this language. See BROOKS & ROSE, *supra* note 13, at 51–53 (describing *Gandolfo*’s later history in courts).

and no longer had any interest in the property.⁹¹ If the courts had not relaxed the doctrine in this way, we would not have seen the new large-scale housing developments that began to take shape in the early twentieth century, where covenants gave neighbors and homeowners associations the ability to enforce various obligations on one another, even after the original developer had moved on.

Could those obligations include racial covenants? Obviously many courts thought so, but there are many reasons they might have said “no.” Several state supreme courts sidled up to saying “no,” but then backed away. California and Michigan courts decided that racial covenants against *sales* were an unreasonable restraint on alienation; but in a formalism that preserved housing discrimination, they decided that covenants against minority *use* were permissible, meaning that a minority family could buy a house but not live in it.⁹² Later on, in the 1940s, when racial covenants were widespread and clearly affecting housing opportunities in central cities, several important judicial opinions began to assert that at “equity,” courts should extend the inquiry beyond the immediate parties to take into account the housing needs of affected minorities.⁹³

One particularly interesting argument against racial covenants appeared in a 1922 case in which the African-American would-be resident asserted that racial covenants treated him as a nuisance because of his person, not because of his actions.⁹⁴ He lost the case, but his argument seems entirely correct, and indeed it is an unspoken reference to the well-known principle that covenants running with the land must “touch and concern land”—that is, any such covenant must have some relationship to land uses rather than to the personal characteristics of the users.⁹⁵ Closer attention to this basic property law principle could have stopped racial covenants in their tracks.

The takeaway from all this is that racially restrictive covenants were basically a manipulation of a property law tool—the covenant running with the land—that was emerging in the early-twentieth century to deal with new forms of large-scale real estate transactions. Defanging racial covenants in *Shelley* then involved a different manipulation, this time of emerging

⁹¹ See, e.g., *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 795, 797–98 (N.Y. 1938) (allowing covenants beyond first sales and money dues to homeowners' associations to be enforced through liens on the property rather than personal liability).

⁹² *Los Angeles Inv. Co. v. Gary*, 186 P. 596, 597–98 (Cal. 1919); *Porter v. Barrett*, 206 N.W. 532, 536 (Mich. 1925).

⁹³ *Fairchild v. Raines*, 151 P.2d 260, 268–69 (Cal. 1944) (Traynor, J., concurring.); *Mays v. Burgess*, 147 F.2d 869, 873–75 (D.C. Cir. 1945) (Edgerton, J., dissenting).

⁹⁴ *Parmalee v. Morris*, 188 N.W. 330, 332 (Mich. 1922).

⁹⁵ *BROOKS & ROSE*, *supra* note 13, at 87–90 (describing the touch-and-concern doctrine and its implications for racial covenants).

constitutional law, but in the following years, no one quite knew what to do with *Shelley*'s sweeping determination that mere judicial enforcement turned these covenants into state action.⁹⁶

Given the constraints available in plain old property law, it did not have to be this way. But then, why was it this way? What made courts give racial covenants a pass in property law for several very significant decades in the development of American real estate practice? From my reading in this area, I have a few brief but definitely rebuttable suggestions.

First, I think that we tend today to underestimate the profundity of racial prejudice at the turn of the twentieth century, the time at which developers began to use racial covenants extensively. It is startling now to find out that the entire state of Oregon (in which I live today) had a constitutional provision against African-American entry from 1857 to 1926, although it was not particularly effective.⁹⁷ It is equally startling to learn that beginning in about 1890, just at the outset of the Great Migration to northern and midwestern cities, many “sundown towns” in northern and midwestern states attempted to keep out African Americans and expel those who were already residents.⁹⁸ Older cases (not to speak of older commentaries) are shocking to read today in their utterly casual racism. In one example, in a 1907 Kentucky case contesting the use of an adjacent burial plot in a cemetery, the judge discussed at some length whether the burial of an African American was comparable to the burial of a dog.⁹⁹

A second important factor was fear of violence. The influx of African Americans from southern rural areas to northern and midwestern cities was relatively new at the time that racial covenants began to be used widely, and racial conflicts broke out many times between 1900 and 1925.¹⁰⁰ While harassment and violence were the means by which many working-class white neighborhoods kept minorities out, racial covenants appealed to a middle class that sought peaceful and law-abiding ways to maintain separation between the races without resorting to violence themselves.¹⁰¹

A third was the self-fulfilling prophecy described earlier—the belief that minority presence caused property values to drop.¹⁰² This belief both

⁹⁶ See *id.* at 143–45, 144 & 264 n.10.

⁹⁷ R. Gregory Nokes, *Black History Month: Oregon's Exclusion Laws Aimed to Prevent Blacks from Settling Here*, OREGONIAN (Jan. 10, 2019, 4:26 AM), https://www.oregonlive.com/hillsboro/2014/02/black_history_month_oregons_ex.html [https://perma.cc/6NBC-7Y8M].

⁹⁸ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 47–50 (2005).

⁹⁹ *Hertle v. Riddell*, 106 S.W. 282, 286 (Ky. Ct. App. 1907).

¹⁰⁰ BROOKS & ROSE, *supra* note 13, at 38–40.

¹⁰¹ *Id.* at 81–82, 95–96.

¹⁰² See *supra* Section II.C.

rationalized racially restrictive covenants and was in turn strengthened by them. Given the fact that for most homeowners, the home is the most important family asset, anything that threatens it threatens not only personal tastes, but the family future as well. Indeed, personal tastes do not even have to play a role. The homeowner can say, sometimes truthfully, that the neighbor's race does not matter to her—but it does matter to the real estate market, and hence after her assessment of the attitudes of others, no, she does not want minority neighbors.¹⁰³

When one adds up these factors, they result in racial covenants as one among several denials of opportunity for minorities—and with the denial of opportunity, the denial of equal economic status over a longer run.

There is more, though, having to do with the symbolic significance of property. I have often argued that a property regime depends on the mutual respect and forbearance of the community; the members must be willing to forgo chances to cheat or take things from one another, and to leave others to acquire and deal with their assets as they please within the community's rules.¹⁰⁴ The sad fact is that many white persons and white-dominated institutions refused to recognize African Americans and Asians as full members of the political and economic community, and the limitations put on minorities to acquire and dispose of property were a mark of disrespect and of what some have called “othering.”¹⁰⁵

At the extreme was the terrible and disgraceful destruction of Tulsa's Greenwood neighborhood in 1921, an event so shameful that even white Tulsans would not speak of it for almost a century,¹⁰⁶ or on a smaller scale was the mean-spirited move-in violence that has so often greeted minority “pioneers” to a neighborhood.¹⁰⁷ This kind of behavior is not motivated by property law. It is anti-property and a complete rejection of any conceivable version of what property law stands for. It can only be understood as an unconscionable denial that a substantial number of our fellow citizens are full members of the rights-bearing community at all.

¹⁰³ See ABRAMS, *supra* note 79, at 173.

¹⁰⁴ See, e.g., Carol M. Rose, *Psychologies of Property (and Why Property Is Not a Hawk/Dove Game)*, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 272, 282–88 (James Penner & Henry E. Smith eds., 2013); Carol M. Rose, *The Law Is Nine-Tenths of Possession*, in LAW AND ECONOMICS OF POSSESSION 42, 46–49, 53 (Yun-Chien Chang ed., 2015).

¹⁰⁵ Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 33 (citing anthropological uses of this term).

¹⁰⁶ See Maggie Astor, *What to Know About the Tulsa Greenwood Massacre*, N.Y. TIMES, (June 20, 2020), <https://www.nytimes.com/2020/06/20/us/tulsa-greenwood-massacre.html> [<https://perma.cc/VCU8-YBLM>] (describing the Tulsa Greenwood Massacre and ensuing cover-up).

¹⁰⁷ BELL, *supra* note 80, at 4–5.

Racially restrictive covenants did not go so far as to destroy the existing property of minority groups. Instead, they curtailed normal opportunities to acquire property. But even these measures had little to do with the conventional modern reasons to have property regimes—that is, to encourage effort, planning and inventiveness, and indirectly to enrich the larger community. On the contrary, quite aside from the profound disrespect that racial restrictions showed to minority citizens, by foreclosing ownership to those citizens, they reduced market opportunities for everyone, even though most specifically and harmfully to minority members.

CONCLUSION

It is undeniable that racial covenants were constructed on a version of property law, however questionable or even spurious, and that they could not have existed without some successful manipulation of that body of law. The decades-long legal existence of racial covenants suggests that property law is indeed susceptible to perverse manipulation, as are other areas of the law. The long existence of these pernicious covenants thus raises the question whether we can expect our property law, or any area of the law, to be much better than the people and institutions that shape it. But in the end, it evades our own responsibility to blame property law for the failings of our predecessors, or for our own failings in correcting the consequences of their actions.

