

Racially Restrictive Covenants in the United States: A Call to Action

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ABSTRACT

This paper examines the history and structure of racially restrictive covenants in the United States to better comprehend their continued existence, despite their illegality. While unenforceable, racially restrictive covenants signal tone and intent, may be psychologically damaging, and perpetuate segregation.

*Racially restrictive covenants were widespread tools of discrimination used by white homeowners to prevent the migration of people of color into their neighborhoods during the first half of the 20th century. In its 1948 decision, *Shelley v. Kramer*, the U.S. Supreme Court held that racially restrictive covenants could not be enforced, but the practice of inserting such covenants into title documents remained common. Finally, in 1968, the Federal Fair Housing Act made the practice of writing racial covenants into deeds illegal.*

*However, nearly seventy years after *Shelley* and 60 years after the Fair Housing Act, racially restrictive covenants remain common features of deeds. This may be for several reasons. First, since covenants run with the land, they become part of the land title in perpetuity. Second, the process to remove covenants is expensive and time-consuming. Third, the majority of owners may not be aware that their properties are subject to racially restrictive covenants.*

Despite these challenges, it may be possible to adopt policies to improve removal rates. This paper calls lawyers, urban planners, and real estate professionals to action in light of their active role in the proliferation of racially restrictive covenants in the 20th century.

Seventy years ago, the Supreme Court of the United States held that racially restrictive covenants, discriminatory agreements inserted into deed instruments by community developers and white homeowners during the first half of the 20th century, were not enforceable in a court of law. Ten years later, the federal Fair Housing Act made it illegal to enter into such agreements. Nonetheless, racially restrictive covenants remain visible in deed instruments and continue to inflict harm on our society, particularly our communities of color. This article examines the history and structure of racially restrictive covenants in the United States in order to better comprehend their

continued existence, despite their illegality. This history evidences the active role that lawyers, urban planners, and real estate professionals play in the proliferation of racially restrictive covenants. Our unclean hands and the continuing harms inflicted by racially restrictive covenants compel actions to remedy.

SECTION I: UNDERSTANDING THE LEGAL MECHANICS OF COVENANTS

Before we can discuss the history and ramifications of racially restrictive covenants, we must first understand their

basic mechanics. A covenant is defined as a binding promise or obligation to do or not to do a particular act.¹ Covenants may be inserted into an instrument of contract or other binding agreement; in the case of real property, covenants are typically contained in a deed.² If the party promising to act in accordance with the agreement (the covenantor) fails to fulfill the promise, the holder of the promise (the covenantee) may sue to enforce the covenant in a court of law.³

Restrictive covenants are a subset of covenants that limit and qualify the use of real property.⁴ Restrictive covenants first emerged as a means to protect residential areas from commercial activity, and they continue to be used by homeowners' associations to "protect community esthetics."⁵ As long as these restrictive covenants do not run afoul of Constitutional protections, they are permissible.⁶ This is an important distinction from the subject of this paper: racially restrictive covenants.

As with restrictive covenants, racially restrictive covenants are agreements between buyers and sellers of property that limit the covenantor's property rights, usually appearing in the deed instrument. Specifically, racially restrictive covenants state that the covenantor will not sell, rent, or lease property to minority groups.⁷ Typical language is illustrated in the case of *Corrigan v. Buckley*, discussed further in Section II:

In consideration of the premises and the sum of five dollars (\$5.00) each to the other in hand paid, the parties hereto mutually covenant, promise, and agree each to the other, and for their respective heirs and assigns, that no part of the land now owned by the

parties hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given to, Negroes, or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents.⁸

The basic configurations of racially restrictive covenants are demonstrated in the companion cases of the landmark *Shelley v. Kraemer* decision. In *Shelley*, the covenant prohibited *ownership* and *occupancy* by African Americans.⁹ In *McGhee v. Sipes*, the covenant prohibited the *use* and *occupancy* by non-Caucasians.¹⁰ In *Hurd v. Hodge* and *Urciolo v. Hodge*, the covenants prohibited the *sale* of property to African Americans.¹¹

Racially restrictive covenants may be separated into two broad categories: proactive covenants and reactive covenants.¹² Proactive covenants are those that were written and applied by developers before new houses were sold, often as a condition to Federal Housing Authority (FHA) securitization and enforced by a homeowners' association.¹³ For example, over the course of three decades, the JC Nichols Co. built dozens of racially exclusive suburban developments in Kansas City, MO, most of which retain their racially restrictive covenants.¹⁴ Reactive covenants are those that were written by informal coalitions of neighbors "in response to an immediate threat of black movement into white middle-class neighborhoods."¹⁵ These covenants were organized door-to-door, neighbor-to-neighbor, with the sole and explicit purpose of racial exclusion.¹⁶ Brooks and Rose note that reactive covenants were more likely to contain flaws,

such as failure to obtain signatures from spouses, than proactive covenants, which rendered them more vulnerable to legal challenge.¹⁷

The legal properties of covenants render them particularly difficult to remove. Covenants are enforceable contracts between two or more people that run with the land, which present limited means to terminate the obligation or defend property from enforcement.¹⁸ Running with the land means that the agreement becomes a permanent feature of the property title, and that not only the contracting parties, but also their heirs and assigns, are bound by the agreement. In other words, covenants are effective in perpetuity unless the terms of the agreement include a specific time limit.¹⁹ As Olin Browder noted in his 1978 analysis, the concept of running covenants may be challenging for the unindoctrinated: “Why should any person be able to enforce a promise not made to him or be bound by a promise he did not make?”²⁰ Browder posits that this legal property stems from the history of covenants, which “long anteceded the modern elements of contract law; running covenants are in essence, therefore, a part of the law of property, not an adaptation or extension of contract principles to property law.”²¹

If a covenantor fails to fulfill the terms of the promise, the covenantee may sue to enforce – or require the covenantor to uphold – the covenant in a court of law.²² Generally, restrictive covenants are enforceable only by the benefitting party, although some states allow standing to individuals regardless of their ownership of neighboring property.²³ Defenses to a suit for enforcement include acquiescence (demonstrating that the covenantee

agreed to the violations by failing to seek enforcement in the past), abandonment (of the general agreement), laches (evidence that the covenantee’s undue delay in bringing a suit of enforcement caused the defendant damages), unclean hands (the covenantee also violated terms of the covenant), eminent domain (the government is not subject to private covenants), and change in condition (the circumstances have substantially changed such that it no longer makes sense to enforce the covenant).²⁴

If, however, our goal is the removal of a covenant rather than its enforcement, our options are more limited. Termination of a covenant typically requires written release by the covenantee(s), or the adoption of a new covenant that modifies or releases the obligations of the original covenant.²⁵ Even if a covenant is no longer enforceable, as in the case of racially restrictive covenants, they will still be visible in the chain of title, and even within the language of the deed. Brooks and Rose note that “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.”²⁶ While racially restrictive covenants can be eradicated from deed instruments, “it’s very time-consuming, and it can get very expensive.”²⁷ Nonetheless, as Section III discusses, the history outlined in Section II places a responsibility on lawyers, urban planners, and real estate professionals to address the lingering discrimination of racially restrictive covenants head-on.

SECTION II: A BRIEF HISTORY OF RACIALLY RESTRICTIVE COVENANTS IN THE UNITED STATES

Racially restrictive covenants were widespread tools of discrimination during the first half of the 20th century.²⁸ Although southern states are often identified as loci of racial violence and discrimination, racially restrictive covenants first appeared in California and Massachusetts at the end of the 19th century.²⁹ By the time the Supreme Court ruled them to be unenforceable in 1948, it is estimated that more than half of all residential properties built in the intervening decades were constrained by racially restrictive covenants.³⁰ This section offers a brief history of racially restrictive covenants in the United States to establish the active role played by lawyers, urban planners, and real estate professionals in the proliferation of discriminatory covenants and the continued segregation of U.S. cities.

A. The Emergence of Racially Restrictive Covenants

The first racially restrictive covenants emerged in California and Massachusetts at the end of the 19th century.³¹ Early racially restrictive covenants were limited agreements governing individual parcels.³² Within a decade, racially restrictive covenants had been enthusiastically embraced by the real estate industry.³³ The early 20th century was also marked by the rise of sundown towns (in which people of color were threatened with sanctioned harassment and violence after sunset) and the adoption of racial zoning ordinances.³⁴ Baltimore Mayor Barry Mahool captured the tone of the era when he opined that “Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance, to prevent the spread of communicable disease into the nearby White neighborhoods, and to protect property values among the White

majority.”³⁵

B. *Buchanan v. Warley* and *Corrigan v. Buckley*

Historians tie the surge in popularity of racially restrictive covenants to the Supreme Court’s 1917 decision that municipally mandated racial zoning was unconstitutional.³⁶ In *Buchanan v. Warley*, the Court overturned Louisville’s racial zoning ordinance on the grounds that it interfered with the core property right of alienation (the right to sell or otherwise transfer your property).³⁷ While the decision was shocking to contemporaries, the legal reasoning was consistent with the freedom of contract interpretation of the Fourteenth Amendment that marked turn-of-the-century judicial theory.

As speculative suburban development captured the market, community builders sought more secure means to protect their investment from the “economic threat” of racial mixing.³⁸ The Great Migration and the 1917-1921 racial uprisings may have further fueled this perceived threat from African American interlopers.³⁹ In this climate, racially restrictive covenants offered an attractive means of circumventing *Buchanan*.⁴⁰

Racially restrictive covenants became even more appealing in 1926, when the Supreme Court upheld their constitutionality as a form of private contract in *Corrigan v. Buckley*.⁴¹ In his opinion for the court, Justice Sanford stated that:

The constitutional right of a Negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private

property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals. The state alone possesses the power to compel a sale or taking of private property, and that only for the public use. The power of these property owners to exclude one class of citizens implies the power of the other class to exercise the same prerogative over property which they may own. What is denied one class may be denied the other. There is, therefore, no discrimination within the civil rights clauses of the Constitution. Such a covenant is enforceable, not only against a member of the excluded race, but between the parties to the agreement.⁴²

Under *Corrigan*, racially restrictive covenants were defined as a private action free of the imprimatur of the State, and developers and white homeowners were given free rein to construct racially exclusive communities through legal agreements.

C. The Rise of the Modern Real Estate Industry

The rise of the modern real estate industry in the 20th century was accompanied by the “development of brokerage and appraisal techniques, and the creation of specialized real estate education and research facilities” that “institutionalized the notion that racial homogeneity is a natural characteristic of residential neighborhoods.”⁴³ Indeed, in his case study of Kansas City, Kevin Scott Gotham argues that “Before the rise of the modern real estate industry and the creation of segregated neighborhoods, there is no evidence that residents in Kansas City

perceived a connection between race, culturally specific behavior and place of residence.”⁴⁴

Local real estate boards and national associations of real estate brokers were chief orchestrators in the widespread adoption of racially restrictive covenants. They produced and circulated standard restrictive covenants, encouraged the formation of homeowners’ associations, and stoked fears of racial integration.⁴⁵ Associations of real estate professionals adopted codes of ethics that characterized failure to “protect” white communities from integration through creation and enforcement of racially restrictive covenants as unethical.⁴⁶ Real estate brokers who did not comply with these policies could be expelled, which would result in the “loss of the network of contacts and information critical to the practice of the real estate broker.”⁴⁷ On the other hand, brokers who engaged in blockbusting (the practice of persuading a white owner to sell his home to a broker below market value by stoking fears of minorities moving into the neighborhood, and then making a profit by selling the same house to people of color at exorbitant rates), in clear violation of the code of ethics, enjoyed enormous personal gain.⁴⁸ In sum: real estate professionals directly profited from racially restrictive covenants, both by their creation and strategic deconstruction.

D. New Deal Era and FHA-Backed Mortgages

A signature program of the New Deal, the FHA sought to stabilize the housing market by insuring low-interest, fully amortized, twenty-year loans.⁴⁹ Prior to receiving an FHA-backed mortgage, a

property was required to meet appraisal standards, including racial exclusivity.⁵⁰ The FHA's 1935 underwriting manual stated, "If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in value."⁵¹ This language was not removed until 1947 – a politically expedient amendment that was not accompanied by policy change.⁵² In short, the FHA's underwriting standards advantaged white, deed-restricted, greenfield development, leading to the proliferation of homeowners' associations and exclusive suburban communities.⁵³

E. *Shelley v. Kramer*

In 1948, the Supreme Court revisited and overturned *Corrigan v. Buckley*. Dismissing the arguments of both defendants (that racially restrictive covenants were private agreements not subject to the Fourteenth Amendment) and plaintiffs ("that the freedom to purchase and use property, regardless of race or color, was a fundamental and basic freedom that was protected by the Constitution"⁵⁴) in *Shelley v. Kramer* and its companion cases, the Court held that judicial enforcement of racially restrictive covenants constituted discriminatory governmental action in violation of the Constitution.⁵⁵ The Court concluded that "the state may not accomplish indirectly through the courts what it cannot constitutionally do directly through the legislature."⁵⁶

Notwithstanding this landmark decision, racially restrictive covenants continued to proliferate. Brooks and Rose posit that this was due to *Shelley's* perceived fragility.⁵⁷ Not only were three of the justices forced

to recuse themselves because they occupied homes with racially restrictive covenants, but judicial enforcement as state action seemed too broad and potentially destabilizing to the legal system to last.⁵⁸ Finally, practitioners believed that, even without the power of an injunction (court-ordered enforcement), they could still sue for damages for failure to comply with the terms of a racially restrictive covenant.⁵⁹

The general dismissal of *Shelley v. Kramer* by white institutions may be captured by FHA Commissioner Richards's statement that the decision would "in no way affect the programs of this agency," which would make "no change in our basic concepts or procedures." Finally, it was not "the policy of the Government to require private individuals to give up their right to dispose of their property as they see fit, as a condition of receiving the benefits of the National Housing Act."⁶⁰ Gotham notes that Missouri courts continued to enforce racially restrictive covenants for at least five years after *Shelley*.⁶¹

F. Federal Fair Housing Act

While *Shelley* rendered racially restrictive covenants unenforceable, the practice of writing racially restrictive covenants into deed instruments was not illegal until 1968. The Federal Fair Housing Act made it unlawful to refuse to sell, rent to, or negotiate with any person because of that person's inclusion in a protected class.⁶² However, the Fair Housing Act did not prescribe appropriate methods of dealing with existing restrictions, a limitation that was predicted by some legal scholars long before the Fair Housing Act was enacted.⁶³

This brief history of racially restrictive covenants in the United States evidences

the active role played by lawyers, urban planners, and real estate professionals in the proliferation of discriminatory covenants and the continued segregation of U.S. cities. The next section describes the ongoing injuries caused by racially restrictive covenants, demonstrating that their harm did not end with Shelley and the Fair Housing Act.

SECTION III: RACIALLY RESTRICTIVE COVENANTS ARE HARMFUL

Most legal scholars would end here: *Shelley v. Kramer* rendered racially restrictive covenants unenforceable, and the Fair Housing Act made them illegal. While both statements are true, they ignore the harm that racially restrictive covenants continue to inflict on our society, particularly within our communities of color. Racially restrictive covenants directly contributed to segregation, and our country remains deeply segregated.⁶⁴ This harm is further compounded in our segregated educational system, which reinforces racial hierarchies and systems of power.⁶⁵ And “[a]lthough unenforceable, the language [of racially restrictive covenants] can be psychologically damaging, reinforcing old fears and sending a message that racism is alive and well in America.”⁶⁶ As demonstrated in the historical analysis above, lawyers, urban planners, and real estate professionals have unclean hands; we cannot now stand still and watch as systems of oppression continue to propagate.

To further understand the harm perpetuated by racially restrictive covenants, this paper will employ the framework of racial territoriality proposed by Elise C. Boddie.⁶⁷ Her conceptualization

of racial discrimination places space at the center of the legal conversation.⁶⁸ Boddie’s key thesis is that the law is overly concerned with the “racial dynamic between individuals,”⁶⁹ when “a primary vehicle for racial discrimination against people of color historically has been exclusion from white space.”⁷⁰ Boddie argues that:

The ability to choose space and to move unimpeded through and across the local spaces of everyday life are basic components of freedom, social belonging, status, and dignity. Being excluded from space or marginalized within a particular space is stigmatizing and degrading. Racial territoriality demeans the individual by prohibiting the full expression of the self because those who suffer it experience the world as outsiders, barred from full participation in society.⁷¹

“Racial territoriality occurs,” Boddie tells us, “when the state excludes people of color from – or marginalizes them within – radicalized white spaces that have a racially exclusive history, practice, and/or reputation.”⁷² The territorialization of space occurs in two stages. First, spaces are classified by and imprinted with social significance to certain groups.⁷³ Second, spaces are defended by:

“Creating, maintaining, or highlighting boundaries;” and then seeking to control “access to the area and to things within it, or to things outside of it by restraining those within.” Boundaries may be maintained by “signalling [sic] use or ownership through signs, markers, and label; or communicating warning of varying levels of indirectness and subtlety to potential intruders...” However, the

point of territoriality is not so much the defense of the area itself but controlling the people in the area and their interactions. Space, in this sense, reflects social power – since only those with power can co-opt space for the purposes of territorial behavior – but it also helps reinforce social hierarchies.⁷⁴

In short, racial territoriality is a product of proprietary power. Cheryl I. Harris takes this a step further in her seminal analysis of whiteness as property; not only are race and property historically entwined, they are inseparable.⁷⁵

The law – the creation of rules restricting behavior and allocating property rights in society – is “integral to maintaining this spatial system.”⁷⁶ In the United States, “[t]he power of the state has been deployed to ‘protect’ white space and to ‘contain’ nonwhite space, while regulating the movement of people of color within and across various racial borders in service of these objectives.”⁷⁷ Boddie recognizes that the legal system’s failure to account for the racial meaning of space may be connected to a (subconscious) unwillingness to remedy harms inflicted on people of color in any way that might adversely impact “innocent whites.”⁷⁸ Nonetheless, this failure limits our capacity to remedy acts of racial discrimination that extend beyond the observed dynamic between two individuals.⁷⁹

The framework of racial territoriality helps explain why owners of restricted property may “feel a kind of ethical obligation to abide” by racially restrictive covenants despite knowing that they are unenforceable.⁸⁰ It demonstrates the implicit power of a covenant, which may signal “the nature of the underlying covenants to observers, such as prospective

buyers,” through homogeneity.⁸¹ Seen through the lens of racial territoriality, the reluctance of people of color to live in a neighborhood scarred by restrictive covenants should not be a surprise.⁸² Finally, the racial territoriality framework offers justice in a legal system that has become too bloated with the minutiae of precedent to account for the spatialization of white power.

NEXT STEPS

The time to act is now, but how do we act? In his 1963 “Letter from Birmingham Jail,” Dr. Martin Luther King, Jr. stated that “In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices exist; negotiation; self purification; and direct action.” This paper has collected the facts and has demonstrated that injustices have been committed, and worse, have been allowed to continue. To rectify these injustices, lawyers, urban planners, and real estate professionals must engage in dialogue, recognize our role in the perpetuation of these injustices, and take direct action against them. Urban planners, with their experience in community engagement and commitment to faithfully serve the public interest,⁸³ are especially well-situated to bring awareness to this issue.

Nearly seventy years after *Shelley* and sixty years after the enactment of the Fair Housing Act, racially restrictive covenants are still common features of deed instruments.⁸⁴ Why? First, the majority of owners may not be aware that their properties are subject to racially restrictive covenants: “Homebuyers rarely see the original deed and real estate attorneys hardly ever point out the race restriction.”⁸⁵ Silence, however, does not render racially

restrictive covenants harmless, as discussed in Section III. Lawyers, urban planners, and real estate professionals have a responsibility to reengage public dialogue around the history and ongoing damages wrought by racially restrictive covenants.

Second, as noted in Section I of this paper, racially restrictive covenants, which become part of the land title in perpetuity, are extremely difficult and expensive to remove.⁸⁶ Here, again, the answer is unsatisfactory. Lawyers had the imagination to create racially restrictive covenants; they also possess the ingenuity to remove, or at least deal directly with, them. Rothstein offers one such solution. Rather than removing racially restrictive covenants, he recommends modifying the deed instrument by adding a clause disavowing the covenant:

We, [your name], owners of the property at [your address], acknowledge that this deed includes an unenforceable, unlawful, and morally repugnant clause excluding African Americans from this neighborhood. We repudiate this clause and are ashamed for our country that many once considered it acceptable, and state that we welcome with enthusiasm and without reservation neighbors of all races and ethnicities.

While Rothstein's suggestion is not one of removal, it has the benefit of being currently actionable under our legal system. Further, he argues that removal may not be the best course of action, as racially restrictive covenants are an "important reminder and educational device, which we still need."⁸⁷ This suggestion is analogous to one solution in the current debate

regarding statues of Confederate generals: rather than removing the statues, we may consider adding a plaque that educates readers on our nation's history. In light of a recent study by the Southern Poverty Law Center showing that nearly half of American high school students polled believed that the southern states seceded from the Union to protest taxes on imported goods, a little education may be exactly what we need.⁸⁸

This paper does not offer a fully formulated slate of policy recommendations. It is, however, a call to action. In the words of Brooks and Rose, "Ultimately the persistence of covenants, even in very attenuated form, should cause us to reflect on the question whether Americans really want residential integration, and if we do, what we mean by integration."⁸⁹ Lawyers, urban planners, and real estate professionals should take this opportunity to reflect on our role in the proliferation of a segregated society, and ask ourselves what our role will be in its remedy. ■

ENDNOTES

1. Aladar F. Siles, "Methods of Removing Restrictive Covenants in Illinois," 5 Chi.-Kent L. Rev. 100 (1968): 110.
2. Rejeev D. Majumdar, "Racially Restrictive Covenants in the State of Washington: The Primer for Practitioners," Seattle U. L. Rev. 30 (2007): 1095.
3. Ibid.
4. Siles, "Methods," 100.
5. Bernard Tomson, *It's the Law: Recognizing and Handling the Legal Problems of Private and Public Construction* (Channel Press, 1960), 295.
6. Ibid., 295.
7. Michel Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115 (December 2000): 541, 544.
8. Ibid., 544. This example is taken from Corrigan v. Buckley, further discussed below.
9. *Shelley v. Kraemer*, 334 US 1 (1948).
10. *McGhee v. Sipes*, 334 US 1 (1948).
11. *Hurd v. Hodge*, 334 US 24 (1948).
12. Kevin Scott Gotham, "Urban Space, Restrictive Covenants and the Origins of Racial Residential Segregation in a U.S. City, 1900-50," *International Journal of Urban and Regional Research* 24, no. 3 (September 2000): 616-33.
13. Ibid., 625-27, see also Clayton P. Gillette, "Courts, Covenants, and Communities," *University of Chicago Law Review* 61 (1994): 1375, 1383.
14. Judy L. Thomas, "'Curse of Covenant' persists—restrictive rules, while unenforceable, having lingering legacy," *Kansas City Star*. <http://www.kansascity.com/news/local/article92156112.html> (July 27, 2016).
15. Gotham, "Urban Space," 627.
16. Richard R. W. Brooks & Carol Rose, "Racial Covenants and Segregation, Yesterday and Today," Straus Institute Working Paper 08/10 (2010): 7.
17. Ibid.
18. To be enforceable, covenants must run with the land and "touch and concern" the land. Olin L. Browder, "Running Covenants and Public Policy," *Michigan Law Review* 77 (1978): 12, 13.
19. Clayton P. Gillette, "Courts, Covenants, and Communities," *University of Chicago Law Review* 61 (1994): 1375, 1395. This is, of course, part of their attraction. As opposed to zoning ordinances, covenants are not subject to politics. Ibid.
20. Browder, "Running Covenants," 12. This paper does not take up Browder's question of whether covenants *should* exist in perpetuity.
21. Ibid., 12-14.
22. In some cases, the covenantee may also sue for damages for breach of the covenant. However, enforcement is the main goal of covenant claims.
23. Siles, "Methods," 110.
24. Ibid., 104-08. In an example that is relevant to the subject of this paper, if no longer legally accurate in the particulars, Siles further notes that:

The mere fact that there have been some changes in the neighborhood is not enough. In *Burke v. Kleiman*, five hundred white persons entered into a restrictive agreement. The covenant contained therein provided against leasing or selling of any premises included in the agreement to any person of the colored race. Defendant leased an apartment to a Negro. The plaintiffs sought an injunction requiring that the defendants remove all persons coming within the description of the restrictive covenants. The defendant answered that since the agreement was signed conditions had so changed that the granting of the injunction would be inequitable. Four apartments had previously been rented in violation of the agreement. The court held that this was not sufficient evidence to show a change of conditions and that the restrictive agreements were still operative (Siles, 108).
25. Ibid., 101-102.
26. Brooks and Rose, "Racial Covenants," 14.
27. Thomas, "Curse of Covenant Persists," (2016).
28. Jones-Correa, "Origins," 544.
29. Richard Rothstein (*The Color of Law*, New York: Liveright, 2017), 42. Jones-Correa, "Origins," 548.
30. Gotham, "Urban Space," 616-33.
31. Rothstein, *Color of Law* 41-48. Jones-Correa, 548.
32. Gotham, "Urban Space," 617.
33. Ibid.
34. Rothstein, *Color of Law*, 42.
35. Ibid.
36. Ibid., 48.
37. *Buchanan v. Warley*, 245 US 60 (1917). Rothstein and others have noted that Buchanan did not end racial zoning. Other municipalities tried their luck with variations on the theme for decades following Buchanan, and Kansas City had a practice of guiding spot zoning decisions based on racial composition until 1987. Rothstein, 48.
38. Rothstein, *Color of Law*, 48.
39. Jones-Correa, "Origins," 543 (arguing that "the diffusion of racial restrictive covenants across the nation was spurred by a critical historical moment: the urbanization of black Americans and the consequent race riots from 1917-1921. The reaction to these events reinforced a number of policy alternatives,

- among them racial restrictive covenants.”). See also Brooks & Rose, 6 (positing that “[t]he 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.”).
40. Rothstein, *Color of Law*, 48.
 41. *Corrigan v. Buckley*, 271 U.S. 323 (1926).
 42. *Ibid.*
 43. Gotham, “Urban Spaces,” 621.
 44. *Ibid.*, 618.
 45. Jones-Correa, “Origins,” 564-65.
 46. Gotham, *Color of Law*, 616-33. A 1924 amendment to the NAREB charter read: “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 be clearly detrimental to property values in that neighborhood.” Jones-Correa, 564.
 47. Jones-Correa, “Origins” 564.
 48. Rothstein, *Color of Law*, (2017).
 49. *Ibid.*
 50. *Ibid.*
 51. *Ibid.*, 65.
 52. *Ibid.*, 65.
 53. *Ibid.*
 54. Tomson, “Curse of Covenants Persists,” 296.
 55. *Ibid.*
 56. *Ibid.*, 297.
 57. Brooks & Rose, “Racial Covenants and Segregation,” 10-12.
 58. *Ibid.*
 59. *Ibid.*
 60. Rothstein, *Color of Law*, 86.
 61. Gotham, “Urban Spaces,” 616-33.
 62. Rothstein argues that housing discrimination did not become illegal in 1968, but in 1866: “Indeed, throughout those 102 years, housing discrimination was not only unlawful but was the imposition of a badge of slavery that the Constitution mandates us to remove.” Rothstein, 86.
 63. R. Gordon Lowe, “Racial Restrictive Covenants,” *Alabama Law Review* (1948-1949): 15. There is some evidence that the U.S. Department of Housing and Urban Development “began requiring title companies to cross out the restrictions on copies of covenants or note in the margins that the provisions were to be considered deleted” in the 1980s. Thomas (2016).
 64. Thomas, “Curse of Covenants,” (2016).
 65. Zanita E. Fenton, “Disabling Racial Repetition,” *Law & Inequality* 31 (2012): 77.
 66. Thomas, “Curse of Covenants,” (2016)
 67. Elise C. Boddie, “Racial Territoriality,” *UCLA Law Review* 58 (2010): 401.
 68. *Ibid.*, 420.
 69. *Ibid.*, 406.
 70. *Ibid.*, 407.
 71. *Ibid.*, 420.
 72. *Ibid.*, 406.
 73. *Ibid.*, 443.
 74. *Ibid.*, 444.
 75. Cheryl I. Harris, “Whiteness as Property,” *Harvard Law Review* 106 (1993): 1707.
 76. *Ibid.*, 427.
 77. *Ibid.*, 425.
 78. *Ibid.*, 413.
 79. *Ibid.*
 80. Brooks & Rose, “Racial Covenants and Segregation,” 16. There even appear to be homeowners who believe the racial covenant restricting sale of their homes to black Americans to be in effect: In 2002, there was something of a flurry in the metropolitan area of Richmond, Virginia, where 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 thousand dollars and take a class in fair housing.
 81. *Ibid.*, 15-16.
 82. Gillette, “Courts,” 1408.
 83. Thomas, “Curse of Covenants,” (2016) (“Even though they cannot be enforced, covenants continue to keep minorities away from certain housing developments...I have been told by black people that they’re aware of what neighborhoods were once restricted, and often they still see those as hostile zones, so that they’d be more likely to purchase a house in one neighborhood versus another because of that....So these covenants then have more than simply symbolic meaning. They still have an impact!”).

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83. American Planning Association, *Ethical Principals in Planning* (1992).

84. "Here's why getting rid of unenforceable racial housing covenants matters." Baltimore Sun, <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-0915-racial-covenants-20170913-story.html> (Sept. 14, 2017).

85. Julie Rose, Hidden in Old Home Deeds, A Segregationist Past, NPR (Feb. 6, 2010).

86. Thomas, "Curse of Covenants," (2016).

87. Rothstein, *Color of Law*, 221-22.

88. Southern Poverty Law Center, *Teaching Hard History: American Slavery* (2018).

89. Brooks & Rose, "Racial Covenants," 1-2.