RACIAL COVENANTS AND SHELLEY V. KRAEMER

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COMPANION TO "VENEERS OF HISTORY IN GREEN HILLS EAST", *NASHVILLE SCENE*

> FINDING
>
> When Buchanan v. Warley (1917) barred racial zoning, deed covenants filled the gap; when Shelley v. Kraemer (1948) ended judicial enforcement, Nashville's Green Hills league had already been building the next instrument for ten months.

SUPPORTS IN THE ARTICLE

- *the racial covenants under legal threat in 1947*
- *the league formed ten months before Shelley v. Kraemer*
- *what was enforced by private covenant would soon be enforced by public zoning*

ABSTRACT

When the Supreme Court struck down racial-zoning ordinances in 1917, private developers moved the same exclusion into deed covenants, where the Fourteenth Amendment did not obviously reach. Courts let the substitution stand for two decades. *Shelley v. Kraemer* (1948) ended that arrangement — but only in part. The ruling reached judicial enforcement and stopped there: a covenant remained lawful to write and lawful to honor voluntarily, and the cost-and-construction clauses that rode alongside the racial clause survived *Shelley* untouched. The exclusion the covenant had performed migrated into the instruments the decision could not reach: design standards, occupancy minimums, and zoning. The migration was already under way before *Shelley* ruled, which is why the Green Hills property-owners' league was building a zoning committee while the covenant still had twelve years to run.

SOURCES

Primary documents

- *Buchanan v. Warley*, 245 U.S. 60 (1917); *Corrigan v. Buckley*, 271 U.S. 323 (1926); *Shelley v. Kraemer*, 334 U.S. 1 (1948), with its companions *McGhee v. Sipes*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948); and *Barrows v. Jackson*, 346 U.S. 249 (1953). Read for holdings, reasoning, and the limits of each.
- Alfred L. Scanlan, "Racial Restrictions in Real Estate — Property Values Versus Human Values," 24 *Notre Dame Law Review* 157 (1949). A real-time legal-academic reading of *Shelley*, eight months after the decision; the source of the post-*Shelley* evasion typology and the "use versus user" distinction the analysis turns on.

- National Association of Real Estate Boards, Code of Ethics, Article 34 (adopted 1924). The professional norm prohibiting a Realtor from introducing into a neighborhood "members of any race or nationality … whose presence will clearly be detrimental to property values."

Scholarship

- Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Fisk University Press, 1947). The period's most direct challenge to the property-value rationale, written from Fisk University in Nashville the same year the Green Hills league organized.
- Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (University of California Press, 1959); and Jeffrey D. Gonda, *Unjust Deeds: The Restrictive Covenant Cases and the Making of the Civil Rights Movement* (University of North Carolina Press, 2015). On the NAACP litigation campaign behind *Shelley*.
- Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Harvard University Press, 2013); and Richard R. W. Brooks, "Covenants without Courts," *American Economic Review* 101, no. 3 (2011): 360–65. On the covenant's life as a social signal after it became judicially unenforceable.
- Michael Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115, no. 4 (2000–01): 541–68. On NAREB's standardized covenant and the device's national diffusion.
- Charles Abrams, *Forbidden Neighbors* (Harper, 1955); Robert C. Weaver, *The Negro Ghetto* (Harcourt, Brace, 1948); Luigi Laurenti, *Property Values and Race* (University of California Press, 1960), on the empirics of the property-value claim.
- Sarah Schindler, "Architectural Exclusion," 124 *Yale Law Journal* 1934 (2015); Krystyn Moon, "Rethinking Race, Housing, and Community … Alexandria, Virginia, 1900s–1960s" (City of Alexandria, 2023). On the migration of exclusion into race-neutral land-use and design rules.
- Aradhya Sood, William Speagle, and Kevin Ehrman-Solberg, "The Long Shadow of Housing Discrimination: Evidence from Racial Covenants" (working paper, rev. 2023), on the persistence of covenant-era value differentials.

THE COVENANT REPLACED THE RACIAL ZONING THE COURT HAD STRUCK DOWN

Buchanan v. Warley voided explicit racial-zoning ordinances on property-rights grounds: the ordinance restrained an owner's freedom to sell.[1] The Court left open whether racial segregation was itself unconstitutional, and that gap left a private route to the same end. The covenant moved segregation from the statute book into the deed, beyond the reach of a Fourteenth Amendment that binds only state action. The National Association of Real Estate Boards drafted and circulated

a standardized covenant, and the device spread through the industry as the legally safe substitute for the zoning *Buchanan* had voided.[7]

THE COURT LET THE SUBSTITUTION STAND IN 1926

Corrigan v. Buckley dismissed a challenge to a private racial covenant for want of a substantial federal question, holding that a private contract was not state action and so lay beyond the Fourteenth Amendment; the Court did not uphold covenants on the merits, finding only no constitutional hook to reach them.[2] Most state courts took the cue and enforced racial covenants for the next twenty-two years, often by reasoning — as Scanlan later put it — that a restraint on the *user* of a property was no different from a restraint on its *use*, the "no saloons, no slaughterhouses" building restriction courts had long upheld. Scanlan called the analogy "fallacious": the racial covenant was aimed "not at the use made of the property, but rather at the user of the property, the prohibited racial group."[6]

COVENANTS CAME IN TWO FORMS AND RAN WITH THE LAND

Some covenants restrained sale, lease, or ownership; others restrained use and occupancy; many did both. Some were perpetual, others durational. The Green Hills covenant was a durational use-and-occupancy restraint — it barred ownership or occupancy by "persons of African blood or descent … except in the capacity of servants" and ran until January 1, 1960 (see Plat 1, Covenant 4). Because the restriction attached to the land itself, it bound every subsequent owner for the life of its term without being renewed.

THE PROPERTY-VALUE RATIONALE WAS FALSE, AND BECAME TRUE ONLY BECAUSE THE GOVERNMENT ENFORCED IT

The appraisal profession and the Federal Housing Administration held that the entry of Black residents lowered property values, and the covenant was sold as the cure. Price studies from the period found the opposite: values in racially transitioning neighborhoods did not fall, and often rose.[12] By then the prediction had been federal policy for a quarter century. The covenant raised values in covenanted neighborhoods through the mechanisms it actually controlled — the FHA mortgage credit that flowed to restricted neighborhoods and not to open ones, and the cost and construction minimums that built a durable, appreciating housing stock. Race as such, the mechanism the industry claimed, had no effect (see The Racial Theory of Value).

NASHVILLE PRODUCED THE NATIONAL REBUTTAL

Herman Long and Charles Johnson wrote *People vs. Property* from Fisk University in 1947, the same year the Granny White–Belmont–Green Hills property-owners' league organized across the city.[8] Behind the developers' and the FHA's "protection of property values" line, they argued, the

covenants built a dual housing market: Black demand compressed into a constrained supply, raising Black rents and suppressing Black wealth. The book's title fixed the axis the cases would soon turn on — property rights set against human rights.

SHELLEY BROKE JUDICIAL ENFORCEMENT, AND ONLY JUDICIAL ENFORCEMENT

The covenant cases reached the Supreme Court through a coordinated NAACP campaign that funneled test suits from St. Louis, Detroit, and Washington into a single constitutional argument.[9][10] The Court granted certiorari on June 23, 1947, agreeing to decide whether the Fourteenth Amendment barred a state court from enforcing a racial covenant. On May 3, 1948, in *Shelley v. Kraemer*, the Court held that a court order evicting a family to enforce a racial covenant was state action subject to the Fourteenth Amendment, and therefore void; its companion *Hurd v. Hodge* reached the same result in the District of Columbia through the Civil Rights Act of 1866, where the Amendment did not apply.[3][4] A covenant was still lawful to write and lawful to honor voluntarily. What a court could not do was force the sale to stick. Five years later the Court closed the obvious workaround: in *Barrows v. Jackson* it held that a state court could not award damages against a covenantor who sold to a Black buyer either, because compelling him to pay would itself be state coercion of discrimination.[5] The doctrine drew its line at the courthouse door and held it there.

THE EXCLUSION MIGRATED TO THE INSTRUMENTS SHELLEY DID NOT REACH

Within a year the real-estate bar had a menu of replacements; Scanlan's 1949 article walks through eight and judges most constitutionally doomed, since their enforcement, too, would be state action. The exception he flagged is the one that mattered: cost-minimum, occupancy, and construction-quality covenants — design standards by another name — which he called "perfectly legal" and "socially advantageous in preserving the stability, appearance, and beauty of residential living," while conceding their "utility as added bulwarks against infiltration by 'non-Caucasians.'"[6] Those covenants survived *Shelley* untouched because they regulated the building, never the buyer. The same logic ran to zoning and to the neighborhood association, instruments that never named a race and so never triggered the doctrine.

Even the racial covenant kept working after it lost the courts. It stayed in the title record as a signal — to brokers, lenders, insurers, and title companies — that the neighborhood meant to remain white, and those private parties went on acting as though it bound them; new racial clauses were still being written into deeds in the 1950s.[11] The persistence shows up, too, in the facially race-neutral land-use and design rules that exclude in effect and often by intent,[13] and at the scale of a single Southern city in the covenant-and-zoning record of Alexandria, Virginia, from the 1900s to the 1960s.[14] In Green Hills the dates show the migration. The property-owners' league formed in July 1947 — eight days after the Court granted certiorari, ten months before it

ruled — with a standing committee "to keep abreast with zoning regulations," while the racial covenant still had twelve years to run (see The 1947 Property Owners' Protective League). The next instrument was being built before the old one fell.

Buchanan's logic in 1917 was property rights, not equality, so the decision that ended racial zoning accelerated the spread of the covenant that replaced it. The present-day value premium on covenanted parcels, on the order of 4 to 15 percent, has been measured for Hennepin County, Minnesota, not for Davidson; no Nashville differential has been measured.[15]

NOTES

1. *Buchanan v. Warley*, 245 U.S. 60 (1917) (voiding a municipal racial-zoning ordinance as a restraint on the owner's right to dispose of property). ↩
2. *Corrigan v. Buckley*, 271 U.S. 323 (1926) (dismissing a challenge to a private racial covenant for want of a substantial federal question; private contracts are not state action). ↩
3. *Shelley v. Kraemer*, 334 U.S. 1 (1948), decided with *McGhee v. Sipes*, 334 U.S. 1 (1948) (judicial enforcement of a racial covenant is state action barred by the Fourteenth Amendment). Certiorari granted June 23, 1947, 331 U.S. 803. ↩
4. *Hurd v. Hodge*, 334 U.S. 24 (1948) (barring enforcement of racial covenants in the District of Columbia under the Civil Rights Act of 1866, where the Fourteenth Amendment did not apply). ↩
5. *Barrows v. Jackson*, 346 U.S. 249 (1953) (an award of damages against a covenantor who sold to a non-white buyer would itself be unconstitutional state action). ↩
6. Alfred L. Scanlan, "Racial Restrictions in Real Estate — Property Values Versus Human Values," *Notre Dame Law Review* 24, no. 2 (1949): 157–96. ↩ ↩
7. Michael Jones-Correa, "The Origins and Diffusion of Racial Restrictive Covenants," *Political Science Quarterly* 115, no. 4 (2000–01): 541–68, on NAREB's standardized covenant and the post-*Buchanan* diffusion. ↩
8. Herman H. Long and Charles S. Johnson, *People vs. Property: Race Restrictive Covenants in Housing* (Nashville: Fisk University Press, 1947). ↩
9. Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959). ↩
10. Jeffrey D. Gonda, *Unjust Deeds: The Restrictive Covenant Cases and the Making of the Civil Rights Movement* (Chapel Hill: University of North Carolina Press, 2015). ↩
11. Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Cambridge, MA: Harvard University Press, 2013); and Richard R. W. Brooks, "Covenants without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements," *American Economic Review* 101, no. 3 (2011): 360–65. ↩
12. Luigi Laurenti, *Property Values and Race: Studies in Seven Cities* (Berkeley: University of California Press, 1960). ↩
13. Sarah Schindler, "Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment," *Yale Law Journal* 124 (2015): 1934–2024. ↩
14. Krystyn Moon, "Rethinking Race, Housing, and Community: A History of Restrictive Covenants and Land Use Zoning in Alexandria, Virginia, 1900s–1960s" (Alexandria, VA: City of Alexandria, 2023). ↩
15. Aradhya Sood, William Speagle, and Kevin Ehrman-Solberg, "The Long Shadow of Housing Discrimination: Evidence from Racial Covenants" (working paper, rev. 2023). ↩

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