Indignity Perpetuated: Race-based Housing Post-Reconstruction to the Fair Housing Act's Impact on the Digital Age: Where Do We Go from Here?

STEVIE J. SWANSON[†]

ARTICLE CONTENTS

I. INTRODUCTION 127
II. HISTORY OF RACE-BASED LAND OWNERSHIP 130
A. Jim Crow Laws 130
B. *Shelley v. Kraemer* and its Implications 134
III. THE FAIR HOUSING ACT 139
A. Application of 3604(c): 139
1. Who does it apply to? 139
2. Use of 3604(c) and Publication of Racially Restrictive Covenants 140
B. Creative Applications of § 3604(c) 143
C. Extension of the Fair Housing Act to Online Searchable Databases 146
1. Communications Decency Act 147
D. Does the Fair Housing Act apply to local government actors? 148
1. Standing 149
IV. REMOVAL OF RACIALLY RESTRICTIVE COVENANTS/EXPLORATION OF BEST PRACTICES 151
A. Impact of Inaction 151
B. Repudiation 152
C. Notification 154

[†] Stevie J. Swanson is an Associate Professor of Law at Lincoln Memorial University Duncan School of Law. She graduated from Yale University in 1997 with Distinction in the Major in African and African American Studies. She graduated from the University of Michigan Law School in 2000 where she was an Associate Editor on the Michigan Journal of Race & Law. Professor Swanson was voted the 2022 Professor of the Year by the student body at LMU. She teaches Property, Secured Transactions, and Real Estate Discrimination at LMU. Professor Swanson wishes to thank her research assistants Tenaya Winkelman, Mitchell McClurg, and Matthew McClurg for their tireless work ethic and spectacular attitudes.

D. Modification 156
E. Redaction 157
V. CONCLUSION 161

I. INTRODUCTION

Racially restrictive covenants are an abhorrent reminder of the checkered history of the United States. In the past sixteen years, I have had many law students ask why they need to learn about the ugly reminders of injustice and inequality in land ownership. My response is always the same: "What would you do if you represented real estate developers and one of the properties they wanted to develop contained a racially restrictive covenant?"

I share with my Property students a situation that occurred when I was in practice. My client, a non-profit housing development corporation in Detroit that was run by a Board of Directors with all African American members, asked me to help them acquire land to develop into affordable housing. The title search turned up a covenant in the chain of title for a piece of property that they wanted to purchase. The covenant stated that the property could only be owned by "members of the Caucasian race." My client contacted me and wondered if they could still purchase this piece of property given that neither they, nor their likely purchaser, were Caucasian.[1]

I ask my students whether they might expect to see such a covenant once they are in practice or when they are preparing to purchase their own homes. I share that there was one in the title to a home that I purchased in 2007. Most students are shocked to discover that race- based covenants are still on the books.

This article first explores the legal history behind the rise of race-based covenants in the United States. It looks at the use of race-based land use controls through municipal regulations and examines the Supreme Court's holding that race-based municipal regulations were unconstitutional in *Buchanan v. Warley* in 1917.[2] The article then explores the impact of *Corrigan v. Buckley* where the Supreme Court held that racially restrictive covenants were "individual invasion[s] of individual rights" and not the subject of the 13th and 14th Amendments.[3] *Corrigan* paved the way for the rise of race-based covenants.[4] Next, the article examines the end of the legal enforceability of race-based covenants with the Supreme Court's decision in

[1] The population of the City of Detroit was 81.2% black in the year 2000. *See* Kurt Metzger & Jason Booza, *African Americans in the United States, Michigan and Metropolitan Detroit*, CTR. FOR URB. STUD. WAYNE STATE UNIV. 1, 8 (2002).

[2] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[3] Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

[4] RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 3 (2013).

Shelley v. Kraemer.[5] It then explores the continuation of the use of racially restrictive covenants in America after *Shelley*.

Crucial to this article is the interplay between Section 3604(c) of the Federal Fair Housing Act[6] and the publishing of race-based covenants by local government offices through online searchable media. Section 3604(c) states that

> it shall be unlawful . . . [t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[7]

The premise of this article is that local government offices are violating the Fair Housing Act through the publishing of racially restrictive covenants.

When the Register of Deeds (or other local government public records office) makes records searchable through an online database, this is a patent violation of Section 3604(c). By creating a searchable online database for land records (containing deeds with racially restrictive covenants) local governments are "publishing" statements which contain discriminatory language concerning a protected class. The court in *Mayers v. Ridley* held that "[t]he additional proscription against 'publication' should therefore be read more broadly to bar all devices for making public racial preferences in the sale of real estate, whether or not they involve the printing process."[8] Despite the fact that online searchable databases did not exist in 1972 when *Mayers* was decided, the Court was forward thinking regarding the application of Section 3604(c).[9]

This article looks at the application of § 3604(c) of the Fair Housing Act in terms of both when it would apply and when it could be used. Next, the article examines the intersection of the Fair Housing Act and the publication of racially restrictive covenants in searchable online databases. Then, it explores creative applications of § 3604(c) in conjunction with the opportunity for fair housing organizations to have standing to file suit. Later, it examines compensable damages for

---

[5] Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

[6] 42 U.S.C. § 3604(c).

[7] *Id.*

[8] Mayers v. Ridley, 465 F.2d 630, 633 (D.C. Cir. 1972).

[9] *See* History.com Editors, *World Wide Web (WWW) Launches in the Public Domain*, HISTORY, https://www.history.com/this-day-in-history/world-wide-web-launches-in-public-domain (last visited June 19, 2022) ("On April 30, 1993, four years after publishing a proposal for 'an idea of linked information systems,' computer scientist Tim Berners-Lee released the source code for the world's first web browser and editor").

distress suffered as a result of viewing housing advertisements with all White models. It examines who, other than just landlords and sellers, can violate the Fair Housing Act. The article explores the damages which have been found available in civil suits but also discusses possible recovery through actions of the Attorney General or the Secretary of Housing and Urban Development. Next, the article shifts to exploring whether or not public records offices have immunity under the Communications Decency Act. It analyzes whether or not federal law abrogates the States' rights and determines that the Fair Housing Act does apply to local government actors. It examines who has standing to file suit to allege a violation of § 3604 of the Fair Housing Act. Finally, it looks at the impact of inaction as it pertains to the existence of racially restrictive covenants remaining both on the books and in searchable online media.

The article concludes by examining the penalties proscribed by the Fair Housing Act, in addition to possible remediations for those injured by the republication of racially restrictive covenants. It explores remedies like compensable damages for aggrieved parties through analogy to the New York Times case where the Times was found to have violated the Fair Housing Act.[10] In *Ragin*, The Times violated the Fair Housing Act by using all White models in thousands of housing advertisements and plaintiffs were awarded damages.[11] It also weighs the feasibility, costs, and advantages of removing the racially restrictive covenants from recorded documents. It explores the alternative of attaching a disclaimer to racially restrictive covenants with either a trigger warning or statement indicating that that covenant is null and void and discusses locations where this technique is employed. It addresses statutory efforts to remediate racially restrictive covenants as well.

II. HISTORY OF RACE-BASED LAND OWNERSHIP

A. Jim Crow Laws

The Civil War in the United States ended on April 9, 1865, at Appomattox Court House in Virginia, and the Reconstruction era began shortly thereafter.[12] During the Reconstruction era the country brought "itself together and also trie[d] to come to terms with the consequences of the abolition of slavery."[13] The Reconstruction era was political; "it underpinned the Jim Crow system of the South, which lasted well into the

[10] Ragin v. N.Y. Times Co., 923 F.2d 995, 1004–05 (2d Cir. 1991).

[11] *Id.*

[12] JOYCE APPLEBY ET. AL., UNITED STATES HISTORY & GEOGRAPHY COLONIZATION TO RECONSTRUCTION 526, 527 (Teacher's ed. 2020).

[13] Terry Gross, *Historian Eric Foner on the 'Unresolved Legacy of Reconstruction'*, NPR, https://www.npr.org/2020/06/05/870459750/historian-eric-foner-on-the-unresolved-legacy-of-reconstruction (last visited July 5, 2022).

1960s."[14] Jim Crow laws legalized segregation in nearly every aspect of American life from the late 1870s to the 1960s; housing was no exception.[15] Initially, segregationist laws were not codified in the post-Reconstruction era.[16] As stated by Frederick Douglass, in a letter to an unknown recipient on November 23, 1887, "[o]ur wrongs are not so much now in written laws which all may see—but the hidden practices of a people who have not yet abandoned the idea of Mastery and dominion over their fellow man."[17]

As Reconstruction ended, "the small economic achievements with respect to land ownership were checked and partially reversed."[18] During the post-reconstruction era, "many towns across the country adopted policies forbidding African Americans from residing or even being within town borders after dark."[19] Racialized zoning emerged around 1910 in Baltimore, Maryland to divide up cities into regions based on color.[20] The codification of race-based zoning was infectious. It soon spread to "Atlanta, Birmingham, Dade County (Miami), Charleston, Dallas, Louisville, New Orleans, Oklahoma City, Richmond (Virginia), St. Louis, and others."[21] While there were racialized zoning ordinances across the nation, they were initially concentrated in the South because of the large percentages of African Americans living there.[22]

In 1917, the Supreme Court struck down race-based zoning in *Buchanan v. Warley*.[23] In *Buchanan*, a zoning ordinance in Louisville, Kentucky prohibited an African American person from buying and occupying a home on a block that was majority White (and the reverse also applied for Whites who could not purchase and occupy a dwelling on a block that was majority African American).[24] The Court held that the right abridged by the ordinance was "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such a disposition to a white person."[25] The Court further held that the ordinance "was not a legitimate exercise of the police power of the State, and is in direct violation of the

---

[14] *Id.*

[15] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 6–7 (2d ed. 1966).

[16] THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, *Frederick Douglass on Jim Crow, 1887*, https://www.gilderlehrman.org/history-resources/spotlight-primary-source/frederick-douglass-jim-crow-1887 (last visited June 19, 2022).

[17] *Id.*

[18] DAVID BRION DAVIS, INHUMAN BONDAGE 328 (Oxford Univ. Press ed. 2006).

[19] RICHARD ROTHSTEIN, THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 42 (Liveright Pub'g Corp. eds, 1st ed. 2017).

[20] CHRISTOPHER SILVER, THE RACIAL ORIGINS OF ZONING IN AMERICAN CITIES 24 (June Manning Thomas & Marsha Ritzdorf eds., Sage Publ'n Inc. 1997).

[21] ROTHSTEIN, *supra* note 19, at 45.

[22] SILVER, *supra* note 20, at 25.

[23] Buchanan v. Warley, 245 U.S. 60, 82 (1917).

[24] *Id.* at 71.

[25] *Id.* at 81.

fundamental law enacted by the Fourteenth Amendment to the Constitution preventing state interference with property rights except by due process of law."[26] The Supreme Court's decision in *Buchanan* was more of a reflection of its beliefs that a White man should be able to sell his property to whomever he chose than it was a demonstrative statement by the Court that segregation was unconstitutional.[27]

While the legality of race-based zoning was short-lived (1910-1917), its tenure was long-lasting and impactful. Race-based zoning was "not just an historical aberration of the pre-civil rights era, but a central feature of the American planning history throughout the twentieth century."[28] Government sanctioned segregation paved the way for privatized housing segregation efforts. It set the standard. Unfortunately, racial zoning did not end in 1917 with the Court's ruling in *Buchanan.* A full twelve years after *Buchanan*, West Palm Beach adopted a racial zoning ordinance which was maintained until 1960.[29] Through creative use of spot zoning, both Kansas City and Norfolk utilized racialized zoning until 1987.[30] "Racial zoning still operated in practice, if not in law, reinforced by a planning process that supported the creation of a racially bifurcated society."[31]

After *Buchanan*, local governments turned to urban planners to assist them in creating zoning plans that achieved the goals of race-based zoning, furthering segregation of the races, without the explicit use of racial terminology. Several urban planners made efforts to promote race-based planning as beneficial for bolstering and improving the African American community. Ultimately, this was ineffective and just succeeded in enhancing segregation.[32] Urban planners used zoning as a social control device.[33] Where urban planners left off with zoning to facilitate residential segregation, private individuals picked up with restrictive covenants in deeds as the next method of control.

Restrictive covenants that limited the individuals who could own or occupy a dwelling based upon race were used to discourage sales and rentals to African Americans.[34] Having outlawed racialized zoning in 1917 with *Buchanan*, the Supreme Court paved the way for private race-based restrictive covenants in 1926 with *Corrigan v. Buckley*.[35] In *Corrigan*, thirty White landowners in Washington, D.C. covenanted that no portion of their

---

[26] *Id.* at 82.
[27] ROTHSTEIN, *supra* note 19, at 45.
[28] SILVER, *supra* note 20, at 27.
[29] ROTHSTEIN, *supra* note 19, at 47.
[30] *Id.* at 48.
[31] SILVER, *supra* note 20, at 32.
[32] *Id.* at 33.
[33] *Id.* at 35.
[34] Garrett Power, *Eugenics, Jim Crow, and Baltimore's Best*, 49 MD. BAR J. 4, 11 (2016).
[35] Corrigan v. Buckley, 271 U.S. 323, 323 (1926).

land should be sold or leased to an African American for a twenty-one year period.[36] When one of the White land owners (Corrigan) entered into a contract to sell her dwelling, which was subject to the restrictive covenant, to an African American woman (Curtis), a White neighbor (Buckley) sued to enforce the covenant seeking an injunction to prohibit the sale of Corrigan's home to an African American woman.[37] Corrigan alleged that the covenant denied Curtis equal protection of the law and was forbidden by the Constitution.[38] The Court held that the Constitution did not "in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."[39]

This case, more than any other, is credited with opening the floodgates for race-based land use controls in the form of restrictive covenants.[40] In fact, "the practice of using racial covenants became so socially acceptable that in '1937 a leading magazine of nationwide circulation awarded ten communities a shield of honor' for an umbrella of restrictions against the wrong kind of people."[41] Subsequent to *Corrigan*, courts across the nation upheld the use of private racially restrictive covenants and evicted African Americans from homes with race-based restrictive covenants.[42] "State supreme and appellate courts upheld the practice [of using racially restrictive covenants] when it was challenged—in Alabama, California, Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, West Virginia, and Wisconsin."[43]

Private individuals were not the only proponents of racially restrictive covenants. The use of racially restrictive covenants was "powerfully encouraged by real estate professionals, banking institutions, and an array of other institutions, including perhaps most importantly the New Deal's Federal Housing Administration."[44] The Federal Housing Administration ("FHA") advanced the notion that

---

[36] *Id.* at 327.

[37] *Id.*

[38] *Id.* at 328–29.

[39] *Id.* at 331.

[40] *Historical Shift from Explicit Policies Affecting Housing Segregation in Eastern Massachusetts*, FAIR HOUS. CNTR. GREATER BOS., https://www.bostonfairhousing.org/timeline/1920s1948-Restrictive-Covenants.html (last visited Jun 28, 2022) ("Racially restrictive covenants became common after 1926 after the U.S. Supreme Court decision, Corrigan v. Buckley, which validated their use.").

[41] *Id.* (quoting *Understanding Fair Housing*, U.S. COMM'N ON C.R. CLEARINGHOUSE PUBLICATION 42, February 1973).

[42] ROTHSTEIN, *supra* note 19, at 81.

[43] *Id.* at 81–82. *See also* Meade v. Dennistone, 173 Md. 295 (Md. App. Ct. 1938).

[44] BROOKS & ROSE, *supra* note 4, at 4, 9. ("Some institutions, like the National Association of Real Estate Boards and its local branches, along with the Federal Housing Administration, actively promoted racially restrictive covenants.").

racially restrictive covenants would increase property values.[45] The "most powerful endorsement" of racially restrictive covenants came from the federal government in the form of redlining.[46] The FHA was confident that race-based covenants were not unconstitutional because they were "mere private agreements."[47]

The use of racially restrictive covenants in America also expanded because of the National Housing Act of 1934 ("Housing Act").[48] The Housing Act introduced the practice of redlining,[49] which occurs when lines are drawn on "city maps delineating the ideal geographic areas for bank investment and the sale of mortgages."[50] Redlining is problematic because redlined districts "were considered risky for mortgage support and lenders were discouraged from financing property in those areas . . . The Housing Act encouraged land developers, realtors, and community residents to write racial restrictive covenants to keep neighborhoods from being redlined."[51] This made homeownership increasingly difficult for non- Whites because mortgages were unavailable for the only dwellings not subject to racially restrictive covenants.[52] In fact, the FHA, through its underwriting manuals and appraisers, not only favored mortgage applications when there were no African Americans in the neighborhood, but they also were more likely to lend when properties had racially restrictive deed covenants.[53] The government's power and influence over the use of race-based deed restrictions did not stop there. After World War II, when the Veterans Administration ("VA") began to guarantee mortgages, it "recommended and frequently demanded that properties with VA mortgages have racial covenants in their deeds."[54]

B. Shelley v. Kraemer *and its Implications*

With the popularity and widespread government support of racially restrictive deed covenants metastasizing after *Corrigan*, it was a shock when the Supreme Court upended things with *Shelley v. Kraemer* in 1948.[55] In the 1930's, J.D. Shelley, an African American man, with his wife and six children, migrated north to St. Louis in an effort to leave the racial oppression

---

[45] ROTHSTEIN, *supra* note 19, at 77.
[46] *Id.* at 82.
[47] *Id.* at 77.
[48] Catherine Silva, *Racial Restrictive Covenants History: Enforcing Neighborhood Segregation in Seattle*, SEATTLE C.R. & LAB. HIST. PROJECT, https://depts.washington.edu/civilr/covenants_report.htm (last visited June 25, 2022).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] ROTHSTEIN, *supra* note 19, at 83.
[54] *Id.* at 85.
[55] Shelley v. Kraemer, 334 U.S. 1 (1948).

of the South behind.[56] Louis Kramer, a White neighbor who lived ten blocks away from the Shelley house, sought to enforce the racially restrictive covenant in the deed.[57] After the Supreme Court of Missouri upheld the covenant, the U.S. Supreme Court held that "the Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."[58] Chief Justice Vinson said it best when he stated in the opinion that "equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[59] Equal protection under the Fourteenth Amendment had previously been extended to situations involving state action in *Strauder v. West Virginia*.[60] In *Strauder*, Justice Strong stated in the Opinion that the Fourteenth Amendment was designed to assure to the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation.[61]

The *Shelley* case was undoubtedly a huge victory in the war towards equal property rights for all, but it fell short of solving the problem of racially restrictive covenants permanently.

Racially restrictive covenants continued to illustrate preferences of real estate brokers and lenders, despite being unenforceable in court.[62] Even after the Court's ruling in *Shelley*, restrictive covenants continued to govern where minority individuals were able to reside.[63] Often, the approach to racially restrictive covenants in the period from 1948 (when *Shelley* was decided) to 1968 (when the Fair Housing Act was passed)

---

[56] *Missouri: The Shelley House*, NAT'L PARK SERV., https://www.nps.gov/places/missouri-the-shelley-house-l.htm (last visited June 19, 2022) (Langston Hughes described the journey of those, like the Shelley family, who went North for a better life. His poem "The Kinder Mistress" speaks to the experience. Hughes writes, "The lazy laughing South, with blood on its mouth . . . passionate, cruel, honey-lipped, syphilitic—that is the South. And I, who am black, would love her but she spits in my face…so now I seek the North—the cold-faced North, for she, they say, is a kinder mistress." Quoted in ISOBEL WILKERSON, THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION, 223 (Random House eds., 1st ed. 2011).).

[57] Erica Taylor, *Shelley vs. Kraemer*, BLACKAMERICAWEB.COM, https://blackamericaweb.com/2012/04/06/shelly-vs-kraemer/ (last visited June 19, 2022).

[58] *Shelley*, 334 U.S. at 38–39.

[59] *Id.* at 37–38. Many thanks to my research assistant, Tenaya Winkelman, for highlighting this quote.

[60] Strauder v. West Virginia, 100 U.S. 303 (1879), *quoted in* Shelley v. Kraemer, 334 U.S. 1 (1948).

[61] *Strauder*, 100 U.S. at 306–07.

[62] Carol Rose, *Shelley v. Kraemer Through the Lens of Property*, Yale Law School Public Law & Legal Theory Research Paper Series, Research Paper No. 66, 44 (2003), https://ssrn.com/abstract=477463.

[63] Silva, *supra* note 48, at 3.

was that the covenants were not legally enforceable but were still legal to establish and privately enforce.[64]

Racially restrictive covenants were utilized post-*Shelley* by the Federal Housing Administration, realtors, bankers, developers, and private landowners.[65] The FHA, since its establishment, had always preferred loans for homes with racially restrictive covenants.[66] For more than a year post-*Shelley*, the FHA insured homes in subdivisions that had new racially restrictive covenants.[67]

The Code of Ethics for the National Association of Realtors, which was enforced in some jurisdictions in the early 1950's, stated that a realtor "should never be instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to the property values in that neighborhood."[68] "Real estate brokers through the 1950s and 1960s were almost universally convinced that minority entrance into a previously white neighborhood would lower property values."[69] Realtors continued to use racially restrictive covenants because segregation of the races was thought to maintain property values and make property more marketable.[70]

Nationwide, in the post-*Shelley* era, bankers advanced the notion that removing racially restrictive covenants would create a cloud in the chain of title.[71] "A cloud on title is a claim or encumbrance that affects the ownership of a property."[72] Cloudy title is undesirable because it impacts the marketability of title—making it harder for the property to be bought and sold. It is ironic that bankers successfully used an argument that taking out a restriction on alienability (to only one race of persons) would make property less alienable. Some bankers admitted that "the cloudy title warning was an excuse to refuse minority loans so as to protect white neighborhood values."[73]

Developers also used racially restrictive covenants post-*Shelley*. As suburbanization expanded housing away from city centers, suburban

---

[64] *Id. See also* BROOKS & ROSE, *supra* note 4, at 171. ("As late as 1966, Edmund O. Belsheim, a well-respected lawyer and legal educator, included models of the standard Caucasian-only racial covenants in the book *Modern Legal Forms*, making the familiar observation that while covenants could not be enforced in court, they were legal if voluntarily followed." "Surprisingly, racial covenants of one sort and another continued to be written into title documents, until they were finally flatly outlawed by the Fair Housing Act of 1968.")

[65] BROOKS & ROSE, *supra* note 4, at 5–6.

[66] *Id.* at 5.

[67] *Id.*

[68] Silva, *supra* note 48, at 5.

[69] BROOKS & ROSE, *supra* note 4, at 183.

[70] Silva, *supra* note 48, at 5.

[71] BROOKS & ROSE, *supra* note 4, at 183.

[72] Wex Definitions Team, *Cloud on Title*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/cloud_on_title (last visited on June 19, 2022).

[73] BROOKS & ROSE, *supra* note 4, at 183.

developers utilized mechanisms to sell exclusively to White purchasers.[74] One successful developer, William Levitt, indicated in 1954 that his firm did not sell its large suburban tracts to African Americans because White purchasers would not buy his homes if he created integrated communities.[75] Ultimately, for some developers, it was a business decision to create segregated communities. Some felt that *Shelley* would be overturned quickly and thought that it was more efficient to get the racial restrictions in place at the outset of the development.[76]

Private landowners continued to create racially restrictive covenants post-*Shelley* because they "sent a signal to buyers about the racial preference of the neighbors."[77] While legally unenforceable, race-based covenants were a very public statement about local preferences.[78] In addition, not everyone in the post-*Shelley* pre-Fair Housing Act era (1948-1968) was aware that the covenants were unenforceable.[79] Even when potential non-White purchasers knew that the covenants were unenforceable, "there were still costs associated with knowing that one was moving to an area where the residents had recently attempted to keep one out by legal means, and where some might now resort to harassment or even violence."[80] The mere existence of the covenants on the public record was a reminder of the hatred and ostracism of the era and was thus an effective deterrent to integration.

One creative attempt at enforcing race-based covenants after the Supreme Court's decision in *Shelley* was for the disgruntled White neighbor to sue the White seller for money damages when they violated the race-based covenant by selling to a non-White buyer. The difference between this idea, litigated in *Barrows v. Jackson*,[81] and *Shelley* is that one seeks a money damage remedy and the other an injunction. The significance is that, traditionally, money damages were available for the breach of a real covenant and injunctive relief was available for the breach of an equitable servitude.[82] Historically, the primary difference in the elements necessary for the creation of the two was the absence of

---

[74] *Id.*

[75] *Id.* at 185.

[76] *Id.* at 5.

[77] *Id.* at 6.

[78] Racially restrictive covenants were placed in deeds. Most deeds are recorded at public records offices where not only are they available to be viewed by the public, but the public is presumed to know about them through the legal doctrine of record notice.

[79] As noted in the introduction, I had a non-profit housing corporation for a client between 2002 and 2005 who was unaware.

[80] RICHARD W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD 189 (Harv. Univ. Press eds., 1st ed. 2013).

[81] *See* Barrows v. Jackson, 346 U.S. 249 (1953).

[82] JESSE DUKEMINIER ET AL., PROPERTY 842 (9th ed. 2018).

privity of estate.[83] The crux of the issue is that privity is not required for an equitable servitude, but it is for a real covenant. Practically, this means that two (or potentially more) neighbors can enforce an agreement made between them to run with the land by an injunction in equity but cannot enforce the same agreement at law through a money damage remedy.[84] Because there is no horizontal privity between the neighbor (benefitting from the covenant) and the purchaser (burdened by the covenant), traditionally, money damages would not have been available.

Barrows was not decided based upon fundamental property law principles. It looked at two primary issues: (1) "[w]hether judicial involvement in a damage suit against a white seller would count as state action," and (2) "whether the white seller could defend against the neighbors' claim by raising the issue of racial discrimination."[85] The Supreme Court held in *Barrows* that "[t]he action of a state court at law to sanction the validity of the restrictive covenants . . . would constitute state action as surely as it was state action to enforce such covenants in equity . . . ."[86] The Court further held that denying the right to "purchase, own, and enjoy property on the same terms as Caucasians" would violate the Equal Protection clause of the Fourteenth Amendment.[87] Finally, the Court departed from its typical rule denying standing to raise another's rights and allowed the White seller to defend against the White neighbors' claim because of the need to protect fundamental rights.[88] Quoting *Shelley*, the Court stated "[t]he Constitution confers upon no individual the rights to demand action by the State which results in the denial of equal protection of the laws to other individuals . . . ."[89] After *Shelley* and *Barrows*, it was not possible for racially restrictive covenants to be enforced at law (money damages) or in equity (injunctive relief), but technically they weren't illegal until the Fair Housing Act was passed in 1968.[90] "If Jim Crow was dead, however, his ghost still haunted a troubled people and the heritage he left

---

[83] *Id.* at 836–37, 841–42.

[84] Note that today most states have merged courts of law and equity. *Id.* at 842.

[85] BROOKS & ROSE, *supra* note 4, at 173.

[86] *Barrows*, 346 U.S. at 254.

[87] *Id.* Much has been written about the extent of the application of the Equal Protection Clause of the Fourteenth Amendment. Perhaps one of the most illustrative and insightful documents on this topic is a letter written by Supreme Court Justice Joseph Bradley to Federal District Judge William Woods on March 12, 1871. Justice Bradley described to Judge Woods what he thought was the meaning of the Fourteenth Amendment in this letter. Justice Bradley stated, "Congress has a right, by appropriate legislation, to enforce and protect such fundamental rights, against unfriendly or insufficient state legislation. I say unfriendly or insufficient for the XIVth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen; but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action. And denying the equal protection of the laws includes omission to protect, as well as the omission to pass laws for protection." RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT xv (Belknap Press Harvard Univ. Press, 1st ed. 2021).

[88] *Barrows*, 346 U.S. at 260.

[89] *Id.* at 260 (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

[90] BROOKS & ROSE, *supra* note 4, at 177.

behind would remain with them for a long time to come."[91]

Numerous historical events pertaining to ending segregation in housing occurred in the Spring of 1968. First, Reverend Doctor Martin Luther King, Jr. was assassinated in Memphis, Tennessee on April 4.[92] On April 10, a day after Dr. King's funeral, the Civil Rights Act of 1968, better known as the Fair Housing Act, was passed.[93] A month later, the United States Supreme Court held, in *Jones v. Alfred H. Mayer Co.*, that 42 U.S.C. § 1982 "bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."[94] 42 U.S.C. § 1982 was originally the Civil Rights Act of 1866.[95] The *Jones* case was over one hundred years in the making. It rarely gets its fair share of pomp and circumstance because it was decided about a month after the Fair Housing Act's passage. It was still an impactful decision though, as the Court "helpfully decided that the dusty old 1866 civil rights legislation, which bars racial discrimination in contractual matters—by individuals—could be supported under the Thirteenth Amendment's ban on slavery and 'badges' of slavery."[96]

In *Jones*, Joseph Lee Jones, an African American man, and Barbara Jo Jones, his White wife, were denied the opportunity to purchase a home in the Paddock Woods Community of St. Louis County for the sole reason of Mr. Jones's race.[97] The Paddock Woods Community was owned by the Alfred H. Mayer Co. The Court of Appeals for the Eighth Circuit affirmed the lower Court's decision to sustain Alfred H. Mayer Co.'s motion to dismiss.[98] The Court of Appeals had held that § 1982 only applied to state action.[99] Section 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[100] In *Jones*, the Supreme Court held that when Congress stated, in § 1982, that the right to buy and rent property was to be enjoyed equally by African Americans and Whites, "it plainly meant to secure that right against interference from

---

[91] WOODWARD, *supra* note 15, at 191.

[92] DeNeen L. Brown, *The Fair Housing Act was languishing in Congress. Then Martin Luther King Jr. was killed* WASH. POST (Apr. 11, 2018, 12:28 PM), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress- then-martin-luther-king-jr-was-killed/.

[93] *Id.*

[94] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968).

[95] *Civil Rights Act of 1866*, FAIRHOUSINGJUSTICE.ORG, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.fairhousingjustice.org/wp-content/uploads/2021/01/Civil-Rights-Act-of-1866.pdf (last visited May 18, 2023).

[96] BROOKS & ROSE, *supra* note 4, at 208.

[97] *Jones*, 392 U.S. at 412.

[98] *Id.*

[99] *Id.*

[100] 42 U.S.C § 1982.

any source, whatever, whether governmental or private."[101]

The Supreme Court in *Jones* identified the primary constitutional issue in the case as whether "the authority of Congress to enforce the Thirteenth Amendment 'by appropriate legislation' included the power to eliminate all racial barriers to the acquisition of real and personal property."[102] The answer to that question was "plainly yes."[103] Justice Stewart said it best in the Spring of 1968

> [j]ust as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.[104]

III. THE FAIR HOUSING ACT

A. Application of 3604(c):

1. Who does it apply to?

What new progress did the Fair Housing Act achieve and how was it applied? Section 3604(c) made it illegal to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[105]

This section of the Act is not subject to any of the exceptions of the Fair Housing Act.[106] This means that even if you were renting out a room in your own home, or your duplex (when you occupy the other half), or a unit in a small four-unit apartment which you also occupy you still cannot discriminate in terms of making, printing, publishing or causing to be made printed or published discriminatory statements based upon the protected classes under the act. This section of the Act also finally outlawed the creation of racially restrictive covenants.

---

[101] *Jones*, 392 U.S. at 423–24.

[102] *Id.* at 439.

[103] *Id.*

[104] *Id.* at 441–43.

[105] 42 U.S.C. § 3604(c).

[106] In some circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family housing sold or rented without the use of a broker and housing operated by organizations and private clubs that limit occupancy to members. U.S. DEP'T HOUSING & URBAN DEV., FAIR HOUSING – EQUAL OPPORTUNITY FOR ALL (2011), https://www.hud.gov/sites/documents/FHEO_BOOKLET_ENG.PDF (last visited May 18 2023).

Now that discriminatory language regarding protected classes was illegal in many contexts, the application of § 3604(c) in case law would illustrate just how expansive the Fair Housing Act would be. In April of 1972, the U.S. Court of Appeals decided *United States v. Hunter*.[107] In *Hunter*, a local newspaper in Prince George's County, Maryland published an advertisement, in 1970, for a furnished apartment in a "white home."[108] The question, a novel one at this point in jurisprudence, was whether the Act extended beyond the actions of Landlords, and Sellers of real property, to others, namely newspapers. The Court of Appeals held that "the congressional prohibition of discriminatory advertisements was intended to apply to newspapers as well as any other publishing medium."[109] This article contends that § 3604(c) extends to online searchable databases at public records offices which "publish" deeds with racially restrictive covenants. In *Hunter*, the Court of Appeals extended the application of § 3604(c) to "any other publishing medium."[110] Certainly online searchable databases for public records offices qualify as "any other publishing medium."

2. Use of 3604(c) and Publication of Racially Restrictive Covenants

In June 1972, the landmark case *Mayers v. Ridley* was decided at the United States Court of Appeals.[111] In *Mayers*, a group of Washington, D.C. residents, whose property was burdened by racially restrictive covenants, filed suit to enjoin the Recorder of Deeds from accepting racially restrictive covenants for recording.[112] They also sought an injunction to prevent the Recorder of Deeds from providing copies of deeds containing racially restrictive covenants to anyone unless the deeds had an attached notice indicating that the racial restrictive covenants were null and void.[113] Finally, they sought to have the court require the Recorder of Deeds to attach a sticker on each liber (book volume) that indicated that the racially restrictive covenants located within the liber were null and void.[114]

Judge Skelly Wright, in his opinion in *Mayers*, stated that it is "too late in the day to argue that it is burdensome to correct these historic wrongs, or that government officials lack statutory authority to do so."[115]

---

[107] United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).
[108] *Id.* at 209.
[109] *Id.* at 211.
[110] *Id.*
[111] Mayers v. Ridley, 465 F.2d 630, 630 (D.C. Cir. 1972).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 632.

Quoting *Jones*, Judge Wright reminded the country that racial discrimination in housing has "no place in the jurisprudence of a nation striving to rejoin the human race."[116]

Judge Wright found that racially restrictive covenants fell within the scope of § 3604(c) and that the Fair Housing Act was not limiting its prohibitions on discrimination to advertisements.[117] He further elaborated that when the public records office filed restrictive covenants it made, printed, or published them.[118] And when the public records office caused them to be reproduced for purposes of preservation and inspection, Judge Wright stated that an argument could be made that it printed and published them.[119] Judge Wright stated that the "additional proscription against 'publication' should therefore be read more broadly to bar all devices for making public racial preferences in the sale of real estate, whether or not they involve the printing process."[120] Since "most states and counties maintain online databases of public records in which you can easily search records," it is logical to extend § 3604(c) to online searchable databases for title records.[121]

One of the most interesting references made in *Mayers* is to a letter sent by Jerris Leonard, Assistant Attorney General, Civil Right Division, on November 26, 1969, to eighteen major title companies.[122] In this letter, Assistant Attorney General Leonard, on behalf of the Department of Justice ("DOJ"), stated that it was the view of the DOJ that the inclusion of racially restrictive covenants in deeds and title insurance violated § 3604(c) of the Fair Housing Act.[123] Assistant Attorney General Leonard situated in the letter that the DOJ believed that § 3604(c) had "broadened the *Shelley* prohibition to cover not only judicial enforcement of such covenants, but also their inclusion in public documents such as deeds or insurance policies."[124] General Leonard further stated in the letter that the Fair Housing Act eliminated "such vitality as racially restrictive covenants retained after *Shelley* and made all such covenants void and their inclusion in documents affecting title unlawful."[125] Moreover, he added that 42 U.S.C. § 1982, as construed in *Jones*, "also prohibits private discrimination in housing,

---

[116] *Id.*
[117] *Id.* at 633.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Carissa Rawson, *How to Do a Title Search*, THE BALANCE, https://www.thebalance.com/how-to-do-a-title- search-5221910 (June 29, 2022).
[122] Letter from Jerris Leonard, Former United States Assistant Att'y Gen., Dep't Just., to Herman Berniker, President, Title Guarantee Co. (Nov. 26, 1969) (on file with Lincoln Memorial Duncan Sch. of L. Libr.).
[123] *Id.* at 1–2.
[124] *Id.* at 2.
[125] *Id.*

including the use by individuals or companies of racial covenants and restrictions in deeds."[126]

Assistant Attorney General Leonard urged title companies to eliminate racial restrictions from future policies and take reasonable efforts to eliminate the continuing effect of racial restrictions in existing policies.[127] All eighteen of the title companies to whom the letter was addressed agreed to comply. Judge Wilkey stated in his concurring opinion in *Mayers* that if the § 3604 applied to title companies, it applied

> with even more obvious logic to the Recorder himself. If a deed can be considered a publication, it can only be an effective publication when it is recorded for the world to see. The title abstracts and recitals of restrictions in title insurance policies are but republications, taken from the Recorder's official records. If the title companies' publications are covered by § 3604(c), so must be the Recorder's publications. [128]

The DOJ effectively lobbied title companies to comply with § 3604(c) in the 1969 letter. Their interpretation of 3604(c) also extended to deeds and other public documents. Deeds recorded at the public records office are public documents and, when containing racially restrictive covenants, are in violation of the Fair Housing Act pursuant to the 1969 letter from General Leonard.

Judge Wright indicated that the public records office did not perform a merely ministerial task, but rather should be subject to judicial review.[129] The public records office "has not been invested with the authority to break the law."[130] Local statutes which set forth the powers of the public records office do not preempt the Fair Housing Act.[131] Section 3615 of the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be discriminatory housing practice under this subchapter shall to that extent be invalid."[132] As a matter of public policy, Judge Wright pointed out that "the most outrageous deprivations of equal rights are those perpetrated by the state itself."[133] Judge Wright was "unwilling to believe that the legislators who voted for that Act intended to exempt the most serious offenses from its coverage."[134]

---

[126] *Id.*

[127] *Id.* at 3.

[128] Mayers v. Ridley, 465 F.2d 630, 649–50 (D.C. Cir. 1972).

[129] *Id.* at 636.

[130] *Id.* at 637.

[131] *Id.* at 636.

[132] 42 U.S.C. § 3615. Section 3602 defines discriminatory housing practice as "an act that is unlawful under section 3604 . . ." 42 U.S.C. § 3602.

[133] *Mayers*, 465 F.2d at 635.

[134] *Id.*

A public records office is "no longer permitted to be a passive repository when it comes to recording—and thus publishing—racially restrictive covenants."[135] When the public records office publishes a deed containing a racially restrictive covenant, it is engaging in an unlawful act under § 3604(c) and is engaging in a discriminatory housing practice under § 3602.[136] This language from *Mayers* is applicable to the modern era regarding online searchable databases as well.

B. Creative Applications of § 3604(c)

In *Spann v. Colonial Village, Inc.*, a developer and an advertising agency were sued by an individual and two non-profit organizations dedicated to equal housing in Washington, D.C.[137] The defendants were "charged with running discriminatory ads regularly in *The Washington Post* from January 1985 through the spring of 1986."[138] The ads featured "repeated and continued depiction of white models and the complete absence of black models."[139] Judge Ginsburg (prior to her appointment to the Supreme Court), quoting *Havens Realty Corp. v. Coleman*[140] found sufficient standing for the non-profits to sue (alleging violation of § 3604(c) of the Fair Housing Act) if they were able to show that the "purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action."[141] The resources that were impacted by the "white models only" advertisements involved increased money, time, and effort devoted towards educating black buyers, the public, and the D.C. real estate industry that racial preferences in housing were illegal.[142] The court held that the interests of the plaintiffs and the public interest (in fair housing) overlapped and this allowed the plaintiffs to have standing to file suit.[143] The *Spann* case is an interesting interpretation of § 3604(c) because it broadens the range of potential plaintiffs. Section 3604 is more effective if a wide range of individuals and organizations can utilize it to seek justice.

The last creative approach to § 3604(c) to be examined comes from *Ragin v. N.Y. Times Co*., 923 F.2d 995 (1991). *Ragin* dealt with the opportunity for injured parties to receive compensation for damages suffered when looking at "white models only" advertisements.[144] *Ragin* is similar to *Spann* in that it is concerned with whether the use of advertisements

---

[135] *Id.* at 650.
[136] *Id.*
[137] Spann v. Colonial Village, Inc., 899 F.2d 24, 26 (D.C. Cir. 1990).
[138] *Id.*
[139] *Id.* at 28.
[140] *Id.* at 27 (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)).
[141] *Id.*
[142] *Id.*
[143] *Id.* at 31.
[144] Ragin v. N.Y. Times Co., 923 F.2d 995, 999 (2d Cir. 1991).

featuring "all white models" violates § 3604(c) of the Fair Housing Act.[145] The court in *Ragin* held that the use of models (in a written advertisement–here the New York Times ran the ads) can be an expression of racial preference.[146] While expressing sympathy for The Times's predicament, the court acknowledged that it would be possible for a newspaper reader, of a race different from the models used, to establish a prima facie case for damages if the reader was sufficiently insulted and distressed.[147] This court encouraged future courts to exercise judicial control over the size of damage awards for emotional injury but did not find the possibility of damage awards to be a reason to immunize publishers from any liability under § 3604(c).[148]

The fact that damages are available to a newspaper reader who sees advertisements with all White models inspires hope that there could be an opportunity for damages for a homebuyer who discovers a racially restrictive covenant in the title search for the home they are trying to purchase. The purchase of a home is a deeply personal experience. The realization that past inhabitants of one's neighborhood did not historically (and may still not) embrace one's inclusion into the neighborhood seems like a highly compensable damage when compared to the injury suffered from looking at a newspaper advertisement.

How are damages and other types of relief obtained from violations of the Fair Housing Act? The Fair Housing Act can be enforced by the Secretary of Housing and Urban Development, private citizens, and the Attorney General.[149] In fact, an administrative law judge has determined that if discrimination has occurred, he has the power, as well as the duty, to use any available remedy to make good the wrong done.[150] As an example of damages awarded to aggrieved parties, in Richmond, Virginia, in 2005, a Black woman was awarded $4,500 in a bias lawsuit because a man refused to sell his home to her and the equal housing organization that worked with the woman was also awarded $7,500.[151] Given that Assistant Attorney General Jerris Leonard, in his November

---

[145] *Id.* at 998.

[146] *Id.* at 1000.

[147] *Id.* at 1005.

[148] *Id.*

[149] Note that under the Fair Housing Act enforcement can come through the Secretary of Housing and Urban Development (where damages are capped at $10,000 for no prior discriminatory housing practice). 42 U.S.C. § 3612(3)(A). Relief under the Fair Housing Act can also come through enforcement by private persons (where actual and punitive damages as well as injunctive relief are available). 42 U.S.C. § 3613(c)(1). Finally, enforcement under the Fair Housing Act can come through the Attorney General when there is a pattern or practice of discriminatory housing practices (where injunctive relief and monetary damages are available to the aggrieved party as well as a civil penalty not exceeding $50,000 for the first violation of the Act). 42 U.S.C § 3614(d).

[150] Edward Jeffre, HUDALJ05-90-0258-1 (Dep't Hous. & Urb. Dev., Dec. 18, 1991) (Initial Decision).

[151] BROOKS & ROSE, *supra* note 4, at 282.

26, 1969 letter,[152] was so instrumental in persuading title companies across the country to cease "making, printing, or publishing" racially restrictive covenants, it seems logical that a similar initiative by the Department of Justice in the modern era might address the publishing of racially restrictive covenants in online searchable databases at public records offices. If the Department of Justice is disinclined to pursue such an initiative, the Fair Housing Act provides opportunities for relief of aggrieved parties through 42 U.S.C § 3612–14. Punitive damages are also available under the Fair Housing Act.[153] A $2,500 award of damages for emotional distress suffered by each African American plaintiff for viewing housing advertisements with only White models was deemed appropriate in *Ragin v. Harry Macklowe Real Est. Co.*[154] Relief can include compensable damages for emotional distress, embarrassment, humiliation, inconvenience, and tangible out-of-pocket losses, among other things.[155] There are also penalties for violations of the Fair Housing Act set forth in Section 3631, which include both fines and imprisonment.[156]

C. Extension of the Fair Housing Act to Online Searchable Databases

Public records offices are violating the Fair Housing Act when they upload or "publish"[157] deeds containing racially restrictive covenants to their online searchable databases. Most places allow for the searching of real property records online.[158] When the public records office publishes the racially restrictive covenant, it is "engaging in an act unlawful under § 3604(c)" and "is also engaging in a discriminatory housing practice as defined by § 3602 . . . ."[159] The Act extends to publishing deeds containing racially restrictive covenants in an online format. The court in *Ragin v. N.Y. Times Co.* held that the Act "did not limit the prohibition to racial messages conveyed through certain means."[160]

Reexamining the Department of Justice's interpretation of the Fair Housing Act's application to title companies in the Jerris Leonard letter,[161] the court in *Mayers v. Ridley* stated that if a deed can be considered a publication, it can only be an effective publication when it is recorded for the world to see. The title abstracts and recitals of restrictions in title insurance policies are but republications, taken from the Recorder's official

---

[152] Leonard Letter, *supra* note 122, at 1–3.
[153] Wharton v. Knefel, 562 F.2d 550 (8th Cir. 1977).
[154] *See generally* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993).
[155] Chris Hope, HUDALJ 04-99-3640-8; 04-99-3509-8 (Dep't of Hous. and Urb. Dev., May 8, 2002) (Initial Decision).
[156] 42 U.S.C. § 3631.
[157] 42 U.S.C. § 3604(c).
[158] Rawson, *supra* note 121.
[159] Mayers v. Ridley, 465 F.2d 630, 650 (D.C. Cir. 1972).
[160] Ragin v. N.Y. Times Co., 923 F.2d 995, 1000 (1991).
[161] Leonard Letter, *supra* note 122, at 1.

records. If the title companies' publications are covered by § 3604(c), so must be the Recorder's publications.[162]

This argument counteracts the notion that public records offices are a mere repository for information. The court in *Mayers* stated that the public records office is more than a mere repository. It is designed not so much to store deeds for posterity as to give them some legal effect. Such a purpose with respect to restrictive covenants is violative of both the Fair Housing Act and the Fourteenth Amendment. If the courts cannot enforce racial covenants, then surely the Recorder cannot effectuate them by administrative fiat.[163]

This argument does not imply any ill will, discriminatory intent, or malevolence upon the public records office or its employees, but it does acknowledge the illegality of their acts. The court in *Ragin v. N.Y. Times* stated that the Fair Housing Act "prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent."[164] Giving the public records offices, and their employees, the benefit of the doubt, and assuming that they are not intending to violate § 3604(c) of the Fair Housing Act when they publish deeds containing racially restrictive covenants on their online searchable databases, does not change the fact that they still break the law when they do so. The court in *Mayers* stated that "whether the Recorder's duties are viewed as discretionary or ministerial, it should at least be clear that he has not been invested with authority to break the law."[165]

1. Communications Decency Act

The Communications Decency Act does not provide immunity to public records offices who publish deeds containing racially restrictive covenants in their online searchable media. The Communications Decency Act ("CDA") "provides immunity only if the interactive computer service does not create or develop the information 'in whole or in part.'"[166] The CDA defines an "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service."[167] The court in *Fair Housing Council* presents a definition of "development" as "making usable or available."[168] Public records offices are entirely responsible for

[162] *Mayers*, 465 F.2d at 649–50.
[163] *Id.* at 639.
[164] *Ragin*, 923 F.2d at 1000.
[165] *Mayers*, 465 F.2d at 636.
[166] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008). *See also* 47 U.S.C. § 230(f)(3).
[167] 47 U.S.C. § 230(f)(3).
[168] *Roommates.com, LLC*, 521 F.3d at 1168.

publishing (making available) recorded information from the public record on their online searchable databases, and, as such, are not immune from liability.

"A website . . . falls within the exception to § 230, if it contributes materially to the alleged illegality of the conduct."[169] Section 3604(c) of the Fair Housing Act states that it is illegal to make, print, or publish a discriminatory statement related to one of the protected classes or cause such a statement to be made printed or published.[170] Race is a protected class.[171] Public records offices who publish deeds containing racially restrictive covenants are "contributing to the alleged illegality of the conduct" by disseminating the discriminatory statements in violation of § 3604(c).[172] "Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost."[173]

HUD has concluded, in the Greene Memo to Fair Housing and Equal Opportunity Regional Directors (dated 9/20/2006), that the "CDA does not make Web sites immune from liability under the [FHA] or from liability under state and local laws that HUD has certified as substantially equivalent to the [FHA]."[174] It is appropriate that HUD does not make websites immune from the FHA because § 3604 should be interpreted broadly to bar discrimination.[175]

D. Does the Fair Housing Act apply to local government actors?

Most of the case law that pertains to § 3604 deals with private actors, but local governments may be sued under the Fair Housing Act as well.[176] The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

---

[169] *Id.*

[170] 42 U.S.C. § 3604(c).

[171] 42 U.S.C. § 3604(a).

[172] The Communications Decency Act does not define "publish," but a case has defined publisher as "one that makes public, and reproducer of work intended for public consumption . . ." Klayman v. Zuckerburg, 753 F.2d 1354, 1359 (D.C. Cir. 2014). The publishing of deeds containing racially restrictive covenants in an online searchable database is distinguishable from *Woodward v. Bowers,* (where the U.S. District Court for the Middle District of Pennsylvania held that accepting a deed for recordation which contained a racially restrictive covenant was not a violation of § 3604(c) because a Recorder is merely a custodian of documents who does not publish), because the inclusion in the online searchable database is "disclosing" or "declaring publicly." The court in *Woodward* acknowledged that if the recorder were "to declare publicly" or "disclose" the racially restrictive covenant it would be publishing it. Woodward v. Bowers, 630 F. Supp. 1205, 1208 (M.D. Pa. 1986).

[173] *Roommates.com, LLC*, 521 F.3d at 1174.

[174] Memorandum from Bryan Greene on Fair Housing Act Application to Internet Advertising to FHEO Regional Directors (Sept. 20, 2006) (quoted in Chi. Laws.' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 692 n.9 (N.D. Ill. 2006)).

[175] Residential Advisory Bd. v. Rizzo, 425 F. Supp. 987 (E.D. Pa. 1976).

[176] *See generally* United States v. City Black Jack, 372 F. Supp. 319 (E.D. Mo. 1974).

another State, or by Citizens or Subjects of any Foreign State."[177] Congress can abrogate the immunity of the States if it "makes its intention unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment."[178]

Congress acted within its constitutional authority when it abrogated the States' immunity in the Fair Housing Act. Section 3615 of the Fair Housing Act states that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."[179]

Section 3615 was interpreted by the United States Court of Appeals for the Sixth Circuit in *United States v. City Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981). The court held that §3615 was "not self-executing and would require legal action against the offending state or political subdivision for its enforcement."[180] The *Parma* court also stated that they believed it was "the intent of Congress to provide for actions against states and political subdivisions" for violations of the Fair Housing Act.[181] The court further expounds upon the applicability of the Fair Housing Act to the States by reminding the country that the Fair Housing Act was enacted pursuant to § 2 of the Thirteenth Amendment and that Congress acted within its constitutional authority in making the Fair Housing Act applicable to the states and their political subdivisions.[182] The court in *Parma* agreed "with the courts which have applied Title VIII [Fair Housing Act] to municipalities" and concluded, "that the comprehensive purpose of the Act would be diluted if it were held to apply only to the actions of private individuals and entities."[183] The United States Court of Appeals for the Eighth Circuit affirmed part of the District court's holding in *United States v. City Black Jack* that found that local governments are not "immune from the proscriptions" of the Fair Housing Act.[184]

1. Standing

In order to successfully combat housing discrimination under the

---

[177] U.S. CONST. amend. XI.

[178] Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 726 (2003). "Two provisions of the Fourteenth Amendment are relevant here: Section 5 grants Congress the power 'to enforce' the substantive guarantees of § 1—among them equal protection of the laws—by enacting 'appropriate legislation.'" *Id.* at 727.

[179] 42 U.S.C. § 3615.

[180] United States v. City Parma, 661 F.2d 562, 572 (6th Cir. 1981).

[181] *Id.*

[182] *Id.* at 573. Section 2 of the Thirteenth Amendment states, "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

[183] *City Parma*, 661 F.2d at 572.

[184] United States v. City Black Jack, 508 F.2d 1179, 1183 (8th Cir. 1974).

Fair Housing Act, it is necessary to establish who is eligible to file suit and when. The court in *Unites States v. Space Hunters* pointed out that nothing in the Fair Housing Act "limits the statute's reach to owners or agents or to statements that directly effect a housing transaction."[185] The court in *Wentworth v. Hedson*, stated that "[a] plaintiff need not be a member of a protected class in order to bring suit" under § 3604(c) of the Fair Housing Act. It has long been held that whites have standing to sue under § 3604(c) for discriminatory statements made against non-whites."[186] *Space Hunters* and *Wentworth* add additional breadth to what *Spann*[187] illustrated earlier: that non-profit organizations dedicated to equal housing have standing to file suit under § 3604(c). In summary, people, entities, municipalities, and States can be sued under the Fair Housing Act by people who are and are not part of protected classes and by non-profit fair housing organizations.

Unfortunately, there have been some limits placed on who has standing to sue. In *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018), Darryl Mason, an African American resident of Ohio, sued all of the county public records offices in Ohio to compel them to "stop printing and publishing historical documents that contain racially restrictive covenants, to remove all such records from public view, and to permit the inspection and redaction of such documents."[188] Mr. Mason was unsuccessful because the court found that he lacked standing.[189] The court held that Mason's injury needed to have been particularized to him.[190] Mason did not allege that he intended to purchase, rent, or pursue any property in Ohio.[191] "Mason failed to allege that any racially restrictive covenant affected him in a personal way. Instead, he sued every county recorder in the state of Ohio, claiming generally that keeping such covenants on the books violates federal law."[192] The result in *Mason* is not as disheartening as it may seem, as the majority indicated that Mason could have established individualized injury through economic injury.[193] The court even offered a suggestion as to how future plaintiffs might succeed in a similar claim: "[t]o establish economic injury, it could have been sufficient for Mason to allege that he was interested in a property in a particular county, examined some records, and was discouraged from buying or renting a property by reading the restrictive covenants."[194] Here, Mason failed because he did not allege any economic

---

[185] United States v. Space Hunters, Inc., 429 F.3d 416, 424 (2d Cir. 2005).

[186] Wentworth v. Hedson, 493 F. Supp. 2d 559, 566 (E.D.N.Y. 2007).

[187] Spann v. Colonial Village, Inc., 899 F.2d 24, 267 (1990) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982)).

[188] Mason v. Adams Cnty. Recorder, 901 F.3d 753, 755 (6th Cir. 2018).

[189] *Id.*

[190] *Id.* at 757.

[191] *Id.* at 755.

[192] *Id.* at 757.

[193] *Id.* at 756.

[194] *Id.*

harm.[195] In the concurring opinion, Judge Clay added that he did not "read the majority opinion as foreclosing a properly pleaded claim arising out of such radically discriminatory language, especially under circumstances that implicate governmental instrumentalities."[196] Judge Clay further stated that if, and when, a plaintiff shows a cognizable injury, "this Court will have to reconcile the importance of maintaining our recorded history with our vision of government speech that promotes—not hinders—a free and equal society."[197] The guidance of both the majority and concurring opinions in *Mason* lend credibility to the premise of this article and the hope that it could be feasible.

While this author firmly believes that public records offices are violating § 3604(c) of the Fair Housing Act by publishing racially restrictive covenants, she acknowledges that finding suitable plaintiffs, with standing, to file suit in counties across the country would result in positive change with molasses-like speed. As Dr. King once wrote in *Why We Can't Wait*:

> We need a powerful sense of determination to banish the ugly blemish of racism scarring the image of America. We can, of course, try to temporize, negotiate small, inadequate changes, and prolong the timetable of freedom in the hope that the narcotics of delay will dull the pain of progress. We can try, but we shall certainly fail. The shape of the world will not permit us the luxury of gradualism and procrastination. Not only is it immoral, but it will also not work . . . It will not work because it retards the progress . . . of the nation as a whole.[198]

It is necessary to next address what happens if no progress is made.

IV. REMOVAL OF RACIALLY RESTRICTIVE COVENANTS/EXPLORATION OF BEST PRACTICES

A. Impact of Inaction

Now that this article has established that it is possible to sue local governments for violations of § 3604(c) of the Fair Housing Act, it turns to the impact of inaction. What happens if society sticks with the status quo? Imagine the status quo is defined as the presence of racially restrictive covenants in deeds readily available both in person and online at public records offices across America without trigger warnings, cover

---

[195] *Id.*
[196] *Id.* at 758.
[197] *Id.*
[198] MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 129 (PENGUIN GROUP EDS.,1964).

sheets, or disclaimers.[199] The court in *Mayers* found that the presence of deeds containing racially restrictive covenants in public records offices "is likely to give them legitimacy and effectiveness in laymen which they do not have in the law."[200] So even though it is illegal to enforce the covenants, not everyone may be aware of it. The *Mayers* Court went on to state that "[i]t is certainly not beyond the realm of possibility that a black person might be reluctant to buy a home in a white neighborhood when government itself implicitly recognizes racially restrictive covenants as 'affecting the title or ownership of real estate.'"[201] Referencing Washington, D.C. in 1972, the *Mayers* court found that "the white character of that part of the District where recorded covenants abound stands as mute testimony to their continued effectiveness."[202]

While there is always a possibility that a homebuyer will not understand that racially restrictive covenants are legally unenforceable, "[a] certain percentage of blacks no doubt refuse to buy property burdened with such restrictive covenants . . . because they do not want to go where they appear to be unwanted."[203] If a prospective purchaser is unaware whether racial attitudes in the neighborhood where they are considering purchasing a home have changed, the covenant could be a strong deterrent. A home is likely to be the single largest purchase of one's lifetime. The idea of living next to people who do not want you as neighbors because of the color of your skin would likely impact most people's decision to purchase.

Racially restrictive covenants are additionally problematic because they hinder the marketability of the property. To the extent that any individuals (White or Non-White) decline to purchase property because of the existence of racial restrictive covenants in the chain of title, "the marketability of that property suffers."[204] According to ncrealtors.org, "the availability of buyers is one of the more important factors that affects marketability."[205] They also note that it is a buyer's "willingness to pay that is hands down the *most important factor* that drives value."[206] As a seller of real property, one's goal is to make the property as marketable as possible. Any negative impact on marketability can impact value.

The court in Mayers summed up the impact of the presence of racially restrictive covenants nicely when it found that

---

[199] Of course, this is not entirely accurate, as the next section of this article will acknowledge. It is still the case in most jurisdictions, however.

[200] Mayers v. Ridley, 465 F.2d 630, 640 (D.C. Cir. 1972).

[201] *Id.*

[202] *Id.*

[203] *Id.* at 641.

[204] *Id.*

[205] Scott Wright, *Factors That Affect Marketability*, NC REALTORS, https://www.ncrealtors.org/factors-that-affect- marketability/ (last visited June 25, 2022).

[206] *Id.*

> [w]hile it is true that racially restrictive covenants cannot be enforced, and thus might be thought to be harmless, it is nevertheless true that it is the premises of the legislation [the Fair Housing Act] . . . that a mere 'notice, statement, or advertisement' indicating a racial preference . . . is *ipso facto* harmful.[207]

Given the harmfulness of racially restrictive covenants, States across the nation are slowly starting to take action to come to terms with them. There is not currently a nationwide uniform approach to dealing with racially restrictive covenants in deeds on the public record.[208] According to the American Land Title Standards Association ("ALTA"), there are four general types of techniques to lessen the harm of racially restrictive covenants: repudiation, notification, modification, and redaction. This article will assess and examine each technique to determine their efficacy.

B. Repudiation

ALTA describes the repudiation technique as "recording a declaration in the land records of the illegal and unenforceable nature of discriminatory covenant(s) associated with a particular property."[209] Repudiation was a technique sought by the appellants in *Mayers* who wanted "to require the Recorder to affix a sticker on each existing liber volume stating that restrictive covenants found therein are null and void."[210]

Indiana has a recently enacted law, July 2021, which allows for repudiation.[211] In Indiana, a person who discovers a recorded racially restrictive covenant may, if all parties to the transaction agree, include in the deed (or other document containing the covenant) the following language:

> [t]he chain of title for the real property described herein contains a racially restrictive covenant that, if enforced, would discriminate against individuals based upon their race, color, sex, religion, familial status, disability, or national origin. The covenant is invalid, unenforceable, and antithetical to American values of equal justice and equality

---

[207] *Mayers*, 465 F.2d at 654. *See Ipso Facto Definition*, BLACK'S L. DICTIONARY (11th ed. 2019).

[208] Jeremy Yohe, American Land Trust Association, *Housing Discrimination: Addressing Illegal Covenants in Historic Land Records*, ALTA TITLE NEWS, Oct. 2021, at 15, https://www.alta.org/title-news/2021/october_2021.pdf.

[209] Wright, *supra* note 205.

[210] *Mayers*, 465 F.2d at 630. It is noteworthy that this was 1972. Little advancement has been made since then.

[211] IND. CODE § 32-21-15 (2021).

under the law.[212]

California uses an approach that combines repudiation with other method(s). The other method(s) will be discussed below. In California, a repudiation is mandatory, not optional like in Indiana.[213] California Code states that a county recorder, title company, escrow company, real-estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person shall place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following:

> If this document contains any restriction based upon age, race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, genetic information, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code by submitting a '***Restrictive Covenant Modification***' form, together with a copy of the attached document with the unlawful provision redacted to the county recorder's office.[214]

California's repudiation statute expands the number of protected classes beyond what the Fair Housing Act provides and requires a full slate of real estate professionals to comply. Repudiation of racially restrictive covenants is necessary. As referenced above, not all states repudiate in the same manner. California's approach is preferable because it is mandatory and requires the participation of a wider variety of real estate professionals. As Brooks and Rose concluded in *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms*,

> [r]epudiating racial covenants is a way of remembering the past but refusing to accept its constraints, sending a different signal to those to come. After all, racially restrictive covenants had a legal life, but they had an even more important life as signals, acting as rallying points for coordinating the segregation of neighborhoods. In their primary official life as legal requirements, but even more in the secondary life as signals, covenants did much damage. Changing the signals is a step toward repairing the

---

[212] *Id.*
[213] CAL. GOV'T CODE §12956.1(b).
[214] *Id.* §12956.1(1)(b)(1) (emphasis added).

damage.[215]

The repudiation technique is essentially a "trigger warning" placed at the start of or, on the cover sheet for, individual documents that contain race-based covenants.

Identifying certain documents as containing null and void illegal racially restrictive covenants would be relatively simple and inexpensive. As the court held in *Mayers*, "relief could be effectuated by the purchase of a large rubber stamp—surely not too great a price to pay for vindication of constitutional rights."[216] If public records offices do not have the personnel to devote to reviewing and stamping documents, certainly there would be an abundance of attorneys looking for pro bono opportunities. This technique is perhaps not the most effective to remediate the harm of the covenants, but it is an inexpensive and relatively simple method that largely avoids controversy.

C. Notification

Notification is a lot like repudiation but is more general in nature. Notifications are posted on county "websites and at record access points indicating the historical land records may contain harmful content in illegal and unenforceable discriminatory covenants."[217] The difference between notification and repudiation is that notices "do not identify specific recorded instruments" and repudiation is tied directly to the document.[218] While this approach is low cost and less controversial than other methods, it is not as targeted as repudiation and other methods. If a potential homebuyer forgets about the notice by the time they get to the racially restrictive covenant, there is a risk that they will still be unsure of its enforceability. Additionally, the search process will still result in a shocking surprise if a race-based covenant is discovered. It is doubtful that an individual searching title will remain on high alert anticipating discovering a race-based covenant at any moment. Repudiation better prepares the person discovering the race- based covenant because the warning is directly attached to the offensive document.

Some states use statutes to notify the public generally about the illegality of discriminatory covenants. Florida utilizes the notification approach in this manner. Specifically, Section 712.065(1) of the Florida Statutes defines "discriminatory restrictions" as provisions in recorded

---

[215] BROOKS & ROSE, *supra* note 4, at 230.

[216] Mayers v. Ridley, 465 F.2d 630, 642 (D.C. Cir. 1972).

[217] Yohe, *supra* note 208, at 16.

[218] Kevin Nincehelser, *Housing Discrimination: Addressing Illegal Covenants in Historic LandRecords*, ALTA TITLE NEWS, 16 (Oct. 2016), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.alta.org/title-news/2021/october_2021.pdf.

title transactions which restrict ownership, occupancy, or use of real property based upon a characteristic that is protected under the United States Supreme Court or the Florida Supreme Court.[219] Later, the Florida statute states in 712.065(2) that [a] discriminatory restriction is not enforceable in this state, and all discriminatory restrictions contained in any title transaction recorded in this state are unlawful, . . . unenforceable, and . . . null and void. [220]

Section (3) of the same statute allows for a modification of sorts, but only after approval of an amendment by the majority vote of the property owners' association.[221] Florida's notification approach is not as effective as repudiation because the notification is published in the Florida Statutes, a location that the average homebuyer is unlikely to see. A repudiation approach would have attached the null and void language to each offensive covenant document. There are many states that do not address racially restrictive covenants at all though, so notification is at least a step in the right direction.[222]

Virginia statutes have a notification provision as well at Va. Code Ann. § 36-96.6. It states: "Any restrictive covenant and any related reversionary interest, purporting to restrict occupancy or ownership of property on the basis of race, color . . . included in an instrument affecting title to real or leasehold property, are declared to be void and contrary to the public policy of the Commonwealth."[223] Virginia has expanded the protected classes beyond those of the Fair Housing Act, but its notification provision is less helpful to laypersons than a directly attached repudiation statement would be.

Georgia's approach to notification is brief and seemingly applies only to new restrictive covenants. It states "[n]o covenant that prohibits the use or ownership of property within the subdivision may discriminate based on race, creed, color, age, sex, or national origin."[224] While Georgia's statutory notification provision has less protected classes than other States and does not address historical race-based covenants, it does provide a general mechanism for terminating covenants if at least fifty-one percent of people owning land pertaining to the covenant agree.[225] The obvious challenge to

---

[219] FLA. STAT. § 712.065(1) (2022).

[220] *Id.*

[221] *Id.*

[222] One of those states is Tennessee. In a telephone conversation on 6/27/2022 with Carl Dowdy, a Tennessee licensed attorney who specializes in title searches, Mr. Dowdy confirmed that he has searched title to real property both online and at public records offices in Tennessee. He stated that in neither location has he seen evidence of notification or repudiation regarding the racially restrictive covenants he has come across.

[223] VA. CODE ANN. § 36-96.6(A) (Lexis Advance through the 2022 Regular Session).

[224] GA. CODE ANN. § 44-5-60(d)(3) (Lexis Advance through the 2022 Regular Session of the General Assembly).

[225] *Id.* at (d)(2).

eradicating race-based covenant language where a majority of impacted landowners must consent is that some will not find the language offensive, and the covenant will remain.

D. Modification

Modification is a more progressive statutory approach to racially restrictive covenants because it does not just warn the public about the presence of the covenants, it actually removes the covenants. Modification is achieved "through judicial or public official action, of the land record(s) containing an identified discriminatory covenant, resulting in the creation of a superseding document without the discriminatory language."[226] Essentially, modification allows a property owner to amend their deed, on the public record, so that it no longer contains the discriminatory covenant. Modification is becoming an increasingly popular approach to deal with race-based covenants in the modern era. Illinois, Washington (State), California, Texas, South Carolina, Maryland, Missouri, and Massachusetts all have statutes or pending legislation which include modification provisions.[227]

Texas has a codified modification approach.[228] Section 5.026 of the Texas Property Code states:

> If a restriction that affects real property, or a provision in a deed that conveys real property or an interest in real property, whether express or incorporated by reference, prohibits the use by or the sale, lease, or transfer to a person because of race, color, religion, or national Origin, the provision or restriction is void.[229]

While this provision appears more like the notification approach, a subsequent section, § 5.0261, allows an owner, or someone with permission of the owner, to request the removal of the discriminatory provision from the instrument that contains it.[230] The statute sets forth a

---

[226] Yohe, *supra* note 208, at 16.

[227] 55 ILL. COMP. STAT. 5/3-5048 (2022) (Illinois); WASH. REV. CODE § 49.60.224 (2020) and WASH. REV. CODE § 49.60.227 (2021) (Washington); A.B. 1466, 2021 Assemb., Reg. Sess. (Cal. 2021) (California); S.B.30, 2021 Legis. 87th Sess. (Tex. 2021) (Texas); H.B. 4517, 124th Sess. Gen. Assemb. (2021) (South Carolina); Md. Code Ann., Real Prop. 3-112 (Maryland); Rebecca Rivas, *Missouri poised to remove unenforceable discriminatory housing restrictions in deeds*, MISSOURI INDEPENDENT (June 9, 2022), https://news.stlpublicradio.org/government-politics-issues/2022-06-09/missouri-poised-to-remove-unenforceable-discriminatory-housing-restrictions-in-deeds (Missouri); Lauren Reznick, *Taking on Past Injustices: New Land Court Procedure Offers Solutions to Homeowners for Racially Restrictive Covenants in Land Records*, BOSTON BAR JOURNAL (Feb. 18, 2022), https://bostonbarjournal.com/2022/02/18/taking-on-past-injustices-new-land-court-procedure-offers-solutions-to-homeowners-for-racially-restrictive-covenants-in-land- records/ and House Docket, No. 1232 Filed on 2/3/21 (Massachusetts).

[228] S. 30, 87th R.S. ch. 532 §.0261(b) (codified as Tex. Prop. Code Ann. § 5.0261 (2021)).

[229] Tex. Prop. Code § 5.026 (West 2021).

[230] Tex. Prop. Code § 5.0261 (West 2021).

detailed procedure and suggested form to initiate the process.[231] Section 5.0261 also provides that no filing fee is to be collected for motions to remove discriminatory language.[232] This Act took effect September 1, 2021.[233] It is refreshing to see a southern state like Texas adopt a fairly streamlined process for modification. It's mind-blowing to think that it took seventy-three years post-Shelley for them to do it.

E. Redaction

Redaction is removal of discriminatory covenants in identified documents within the public land records through judicial or public action.[234] Redaction is different than modification in that the original documents containing offensive language are actually removed from the public record. One of the advantages to redaction is the "full elimination of the discriminatory covenants from the public land records."[235] Many feel that it is past time for this language to be eradicated. "'We don't need to maintain that language in a document to understand the history of where we've come from,' said Nikole Hannah-Jones, founder of The 1619 Project, which aims to reframe American history by including the contribution of black Americans."[236] Hector De La Torre, a former state lawmaker in California stated that leaving the racially restrictive covenants on the public record is "akin to leaving up in the South . . . the 'no coloreds' or the 'white only' signs at water fountains, bathrooms, other facilities and saying, 'Oh, just ignore the sign. You can drink out of either one. Just ignore it.'"[237]

Criticism for redaction usually takes the shape of preserving history.

The Court in *Mason*, supra, stated that [i]n ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed upon felons whose very existence, including the destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants now found to be offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoraiae*, as those documents are part of our living history and witness to the evolution of our cultural norms.[238]

Historian Kirsten Delegard, is a founder of the Minneapolis-based Mapping Prejudice project, "which researches the covenants that barred

---

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] Yohe, *supra* note 208, at 16.

[235] *Id.* at 21.

[236] Nick Watt & Jack Hannah, *Racist language is still woven into home deeds across America. Erasing it isn't easy, and some don't want to*, CNN (Feb. 15, 2020, 12:21 PM), https://www.cnn.com/2020/02/15/us/racist-deeds- covenants/index.html.

[237] *Id.*

[238] Mason v. Adams Cnty. Recorder, 901 F.3d 753, 757 (6th Cir. 2018).

nonwhites from buying property in the city's most desirable neighborhoods."[239] Delegard feels that "[w]e need to know where these restrictions were put in place if we're ever going to dismantle the system of racism in a logical, consistent way."[240] Delegard doesn't want to redact the racially restrictive covenants, instead, she wants to "use this language as a launch pad for making restitution."[241] Additional criticism for redaction (removal of documents or information from the land records) involves creating "breaks in the chain of title, which can result in ownership disputes, a loss of property rights or an inability to buy, sell, or refinance property."[242]

Washington State has a redaction approach.[243] Like Texas, it has a notification provision and then outlines a procedure for removal of the discriminatory provision.[244] In its notification provision, Washington Code states:

> Every provision in a written instrument relating to real property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race, creed, color, sex, national origin, citizenship or immigration status, sexual orientation, families with children status, honorably discharged veteran or military status, or with any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled, and every condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of race, creed, color, sex, national origin, citizenship or immigration status, sexual orientation, families with children status, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person who is blind, deaf, or physically disabled is void.[245]

Washington's statute is among the most inclusive as it has significantly more protected classes and includes future interest provisions which could be triggered by a violation.[246]

---

[239] Watt & Hannah, *supra* note 236.

[240] *Id.*

[241] *Id.*

[242] Yohe, *supra* note 208, at 15.

[243] Wash. Rev. Code Ann. § 49.60.224 (West 2022).

[244] *Id. See also* Wash. Rev. Code Ann. § 49.60.227 (West 2022).

[245] Wash. § 49.60.224 (West 2022).

[246] Possibilities of reverter and rights of entry are future interests retained by the grantor in the conveyance of a defeasible fee. Defeasible fees include the fee simple determinable and the fee simple subject to condition subsequent. The fee simple determinable's future interest in the grantor

The redaction provisions in the Washington statute were amended January 1, 2022, to resolve some statutory ambiguities that had resulted in litigation. The case, *In re That Portion of Lots 1 &2*, involved "the delicate balance required in addressing the elimination of morally repugnant covenants and the preservation of the documented history of the disenfranchisement of a people."[247] The Washington statute at issue, RCW 49.60.227, permits the court to strike a racially restrictive covenant from the public records and "eliminate the covenant from the title."[248] The question in the case was whether this language meant that the public records office actually had a duty to remove void provisions from the record, or whether a court order declaring the covenant void was sufficient.[249] The lower court and the Court of Appeals both held that there was no such duty.[250]

In between the Court of Appeals decision and the decision of the Supreme Court of Washington, the legislature amended the statute to clarify that there was a duty.[251] Specifically, the amended statute creates a multi-step process whereby: the court enters an ordering striking the void provision and eliminating the void provision from the title or lease; a copy of any document affected by the order is made an exhibit to the order and sets forth the void provision to be struck; the order also includes a certified copy of the document upon which the court has redacted the void provision; the public records office records the order and the corrected document(s) which contain the book and page number of the original document, a notation that it was corrected, the case number and the date the order was entered; the index is updated and indicates that the original record is no longer the primary official record and is removed from the chain of title; the original record is maintained separately in the county's records or can be sent to the state archive.[252] The Washington Supreme Court in *In re That portion of Lots 1 & 2* cited the Washington State Legislature which wrote "[t] the legislature

---

is the possibility of reverter. The possibility of reverter functions automatically. The phrases typically designating a fee simple determinable are "so long as," "while," "during," and "until." If the fee is written in a manner that a transfer to a person of a certain race is prohibited, then the possibility of reverter will automatically transfer the property back to the grantor. The fee simple subject to condition subsequent's future interest in the grantor is the right of entry (called a power of termination in some States). The right of entry does not function automatically, but instead requires some affirmative action on the part of the grantor to re-enter and re-take the property. The phrases typically designating a fee simple subject to condition subsequent are "but if," "provided however that," and "on the condition that." If the fee is written in a manner that transfer to a person of a certain race is prohibited, then the right of entry will allow the grantor to take back the property if the condition is violated. It was important for Washington to include these future interests in their statute because if they had not been eliminated, they could have allowed a loophole for the continued use of racially restrictive covenants.

[247] *In re* That Portion of Lots 1 & 2, 199 Wash. 2d 389, 391 (2022).

[248] *Id.*

[249] *Id.* at 391, 394.

[250] *Id.* at 394.

[251] *Id.* at 399–400.

[252] WASH. REV. CODE. ANN. § 49.60.227 (West 2022).

finds that the existence of racial, religious, or ethnic-based property restrictions or covenants on a deed or chain of title for real property is like having a monument to racism on that property and is repugnant to the tenets of equality."[253] The court held that "[r]emoving all traces of these discriminatory covenants would not effectuate the legislature's intent to eradicate discrimination."[254] Quoting the Court of Appeals, the Washington Supreme Court stated "[a] policy of whitewashing public records and erasing historical evidence of racism would be dangerous. It would risk forgetting and ultimately denying the ugly truths of racism and racist housing practices."[255]

Washington's redaction approach has the benefit of eradicating visual reminders of the vestiges of racism while preserving the historical record in another, less public, location. The benefit of having the original document intact is that it eliminates the possibility of error in amending and deleting void provisions. With the court overseeing the elimination of the void covenants in what will become certified copies on the public record, there is less of a chance that inoffensive provisions in the covenants will be unintentionally deleted.[256] The downside to this approach it that it will likely take more time and be more burdensome to the courts and public records offices.

California also has a redaction approach. Their amended redaction approach took effect July 1, 2022.[257] It authorizes a "title company, escrow company, county recorder, real estate broker, real estate agent, or other person to record a Restrictive Covenant Modification."[258] The broad category of individuals allowed to record a modification makes this approach one of the most progressive in the nation. The California amended act also imposes a duty upon real estate professionals to notify homebuyers of the presence of a restrictive covenant and their ability to remove it.[259] The amended Act states:

> Beginning July 1, 2022, if a title company, escrow company, real estate broker, or real estate agent has actual knowledge that a declaration, governing document, or deed that is being directly delivered to a person who holds or is acquiring an ownership interest in property includes a possible unlawfully restrictive covenant, they shall notify

---

[253] *In re* That Portion of Lots 1 & 2, 506 P.3d 1230, 1236 (2022).

[254] *Id.* at 401.

[255] *Id.*

[256] When I purchased a home subject to a racially restrictive covenant in 2007, there was a covenant that allowed Fred to pick apples on the property during apple season on the same document as the racially restrictive covenant. If improperly amended, that process could have cost Fred some apples.

[257] Cal. Assemb. Res. 1466 (2021).

[258] *Id.*

[259] *Id.*

> the person who holds or is acquiring the ownership interest in the property of the existence of that covenant and their ability to have it removed through the restrictive covenant modification process.[260]

While the actual procedural processes are still being ironed out by the local county public records offices, the California combination approach has the ability to effectuate widespread change. It involves repudiation (in the cover sheets attached to documents containing racially restrictive covenants), notification (in the statute), modification (which homebuyers are required to be informed about), and redaction (while still preserving the original documents in another location).[261]

V. CONCLUSION

This article began with over one hundred years of government-sponsored and endorsed legalized housing discrimination. It is going to take a very long time for the nation to recover from that history. Progress will have to take many forms. The form advocated here is a confrontation of racially restrictive covenants. The primary proposition of this article is that the government itself continues to violate § 3604(c) of the Fair Housing Act by making, printing, or publishing, or causing to be made printed or published discriminatory statements based on race.

There are a plethora of ways to confront racially restrictive covenants. The first, and most obvious, is to hold public records offices accountable for publishing racially restrictive covenants. The government could be held accountable through injunctive relief or payment of money damages. Precedent exists where damages were awarded to individuals who have suffered emotional distress from seeing advertisements for housing featuring White models only. This could and should be extended to the emotional distress suffered by potential homebuyers when they discover a race-based covenant in their deed.

This article has explored the four most utilized approaches to confronting race-based covenants. Notification could be achieved with almost no effort. A sign could be put on the wall of the public records office and a pop-up notification could appear on the homepage of the online searchable database. While not the most effective method, notification is cheap, easily accomplished, and simply states the obvious that "all racially restrictive covenants are null and void."

Repudiation requires more effort because the notification is physically attached to each document containing a racially restrictive covenant, but it is also more effective because it attaches the statement that the covenant is

---

[260] *Id.*

[261] *Id. See also*, CAL. DISCRIMINATION PROHIBITED CODE § 12956.1 (West 1982).

null and void physically to the covenant itself.

Modification is gaining momentum and allows for a property owner to feel good about the fact that their deed does not include a race-based covenant, but it is an involved protocol to establish and maintain.

Redaction is impactful because it removes the offensive language from the public view throughout the chain of title, but it could be seen as "whitewashing" history. The processes necessary for redaction are even more extensive than for modification.

So, what should be done about race-based covenants? Many think that they should be unearthed, and their locations identified.[262] Efforts are underway in Minneapolis, Charlottesville, Seattle, and St. Louis to map out the locations of racially restrictive covenants.[263] The idea is that the mapping out racially restrictive covenants will "raise awareness of racist practices" that shaped the nation. At the federal level, Senate Bill 2549 has been introduced to provide grants "to institutions of higher education to analyze, digitize, and map historic housing discrimination records."[264] If passed, HUD will "use data submitted by institutions under the bill to create a publicly available national database of historic housing discrimination records."[265] Historic housing discrimination records are defined as either "deeds or historic property records that demonstrate housing discrimination," or "state or local ordinances that permitted housing discrimination." This is valuable information about the nation's past, but what will be done with it? Will children and young adults be allowed to learn about it in public schools across the nation? Could it be the basis for remedying income inequality through the form of some sort of reparations? It will be most useful if it can be effectively collected and then widely disseminated.

What's the ideal combination of remedies? Damages for those injured by discovering racially restrictive covenants in their chain of title; mandatory immediate notification at public records offices and on searchable online databases; funding established for a swift and efficient mandatory repudiation process; free streamlined modification and redaction processes for homeowners; and publicly available and widely publicized data on the location of racially restrictive covenants would be a great start. After all, as Dr. Cornel West once said, "you can't really move forward until you look back."[266]

---

[262] Watt & Hannah, *supra* note 236.

[263] *Id.*

[264] Mapping Housing Discrimination Act, S. 2549, 117th Cong. § 1 (2021).

[265] *Id.*

[266] *Cornel West Quotable Quotes*, GOODREADS.COM, https://www.goodreads.com/quotes/486358-you-can-t-really-move-forward-until-you-look-back-from (last visited July 5, 2022).