# AFTER SHELLEY: THE INSTRUMENTS OF RESIDENTIAL EXCLUSION

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

FINDING

Shelley v. Kraemer (1948) barred judicial enforcement of racial covenants but left them lawful to write, and exclusion migrated into instruments naming no race — zoning, mortgage policy, homeowner associations — which rulings through the 1970s placed largely beyond constitutional challenge.

SUPPORTS IN THE ARTICLE

- *Shelley v. Kraemer ended judicial enforcement of racial covenants, not the exclusion they produced*
- *exclusion moved into instruments that named no race and survived the challenges the covenant had failed*
- *the courts barred damages enforcement in 1953 and then required proof of discriminatory intent in the 1970s*

## ABSTRACT

*Shelley v. Kraemer* disabled one instrument of residential exclusion and left the rest of the system intact. The covenant stayed lawful to write and lawful to honor voluntarily; only judicial enforcement fell. Enforcement had been one support among several — neighborhood pressure, reputation, and the signal a recorded covenant sent about who belonged — and those supports did not end in 1948. Over the next two decades the same exclusion moved into instruments that named no race: exclusionary zoning, federal mortgage underwriting, urban renewal, real-estate steering, and the homeowner association. The doctrine of *Shelley* did not reach them. A 1953 ruling barred the last method of enforcing a racial covenant in court; decisions in the 1970s required proof of discriminatory intent to challenge a race-neutral land-use rule, placing the successor instruments largely beyond constitutional reach.

## METHODOLOGY

The legal history is read from the controlling Supreme Court opinions (*Shelley*, *Hurd*, *Barrows*, and the 1970s equal-protection and standing cases) and from the contemporaneous legal-academic record, chiefly Alfred Scanlan's 1949 analysis of the industry's response to *Shelley*. The institutional history draws on the modern scholarship on racial covenants and their afterlife and on federal housing policy. The Nashville material is taken from the companion evidentiary briefs.

## SOURCES

Court decisions

- *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).
- *James v. Valtierra*, 402 U.S. 137 (1971); *Warth v. Seldin*, 422 U.S. 490 (1975); *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

Contemporaneous legal record

- Alfred L. Scanlan, "Racial Restrictions in Real Estate — Property Values Versus Human Values," 24 *Notre Dame Lawyer* 157 (1949). A law professor's reading of *Shelley* eight months after the decision, with a catalog of the evasion methods the real-estate industry had begun to use.

Scholarship

- Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Cambridge, MA: Harvard University Press, 2013).
- Jeffrey D. Gonda, *Unjust Deeds: The Restrictive Covenant Cases and the Making of the Civil Rights Movement* (Chapel Hill: University of North Carolina Press, 2015).
- Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959).
- David M. P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* (Chicago: University of Chicago Press, 2007).
- Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017).
- Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993).
- Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960* (Chicago: University of Chicago Press, 1998 [1983]).
- Sabre J. Rucker, "The Highway to Segregation." M.A. thesis, Vanderbilt University, 2016.
- Ansley T. Erickson, *Making the Unequal Metropolis: School Desegregation and Its Limits* (Chicago: University of Chicago Press, 2016).
- Sarah Schindler, "Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment," 124 *Yale Law Journal* 1934 (2015).

## FINDINGS

### AFTER *SHELLEY*, THE COVENANT KEPT EXCLUDING THROUGH SOCIAL NORMS

The holding was specific. A state court's enforcement of a racial covenant is state action, and the Fourteenth Amendment forbids it; *Hurd v. Hodge* reached the federal courts of the District of Columbia the same day through the Civil Rights Act of 1866, where the Amendment did not apply.[1] The covenant stayed lawful to write and lawful to honor by choice. Legal enforcement had never been its only support. It worked also through the social norms of a neighborhood, the reputation of owners who signed and buyers who complied, and the signal a recorded covenant sent about who belonged.[2] Those supports did not depend on a court, and they did not end in 1948. The covenant's exclusionary effect outlasted the power to enforce it.

### THE COVENANT CASES WERE WON BY A NATIONAL CAMPAIGN

*Shelley* was the product of a planned NAACP litigation effort, carrying the cases of six Black families in St. Louis, Detroit, and Washington through the courts with social-science briefs and the United States government's own argument against the covenants.[3][4] The industry moved to preserve the result the covenant had delivered.

### *BARROWS V. JACKSON* (1953) BARRED THE LAST WAY TO ENFORCE A COVENANT IN COURT

*Shelley* stopped a court from ordering a Black family out of a house. It did not, by its own terms, stop a neighbor from suing the white seller for money damages for breaking the covenant. The real-estate bar noticed the opening, and Alfred Scanlan catalogued it among the industry's options in 1949.[5] In *Barrows v. Jackson*, 346 U.S. 249 (1953), the Court closed it: a damages award is also state action, and the Fourteenth Amendment bars a court from imposing it.[6] After *Barrows*, no court could enforce a racial covenant by any means. The reasoning followed the distinction Scanlan had drawn in 1949, that the racial covenant was aimed "not at the use made of the property, but rather at the user of the property, the prohibited racial group."[5] A restriction on the user required a court to discriminate; a restriction on the use did not.

### EXCLUSION MOVED INTO RACE-NEUTRAL INSTRUMENTS, AND THE COURTS PROTECTED THEM

The instruments that replaced the covenant set no racial test. Zoning, minimum-lot and minimum-floor-area requirements, single-family districts, and the recorded rules of a homeowner association all governed the property and said nothing about the race of the buyer, so no challenge under *Shelley* or *Barrows* reached them.[17] In the 1970s the Court made them harder still to challenge on other grounds. In *Washington v. Davis* (1976) it held that disparate racial impact does not by itself make a

law unconstitutional under the Equal Protection Clause; a challenger must prove that the government acted with discriminatory purpose.[7] The next year, in *Village of Arlington Heights*, the Court applied that rule to a suburb's refusal to rezone for racially integrated housing and found no violation, because intent had not been proved.[8] In *Warth v. Seldin* (1975) it had already denied the residents of a Rochester suburb standing to challenge a zoning scheme that reserved most of the town's land for single-family houses.[9] A facially race-neutral land-use rule became hard to defeat in federal court, whatever its result on the ground. The Fair Housing Act of 1968 opened a separate statutory route these constitutional rulings did not foreclose.

## THE FEDERAL GOVERNMENT CONTINUED THE SAME LOGIC IN NEW LANGUAGE

The Federal Housing Administration had treated a racial covenant as close to a condition of mortgage insurance. It went on favoring covenants after *Shelley* and changed the rule only in 1950, when it announced that it would not insure a property whose covenant was recorded after February 15, 1950, while leaving the millions of existing covenants in place.[10] The same period brought a second federal instrument. Title I of the Housing Act of 1949 funded the clearance of neighborhoods designated as slums, and between 1949 and 1973 the program displaced over a million people, most of them Black.[11] The stated rationale changed throughout: the explicit racial hierarchy of the 1920s appraisal manuals gave way to the language of markets, property values, and neighborhood compatibility, which carried the same judgment without naming it.[12]

## THE SUCCESSOR INSTRUMENTS FORMED A NATIONAL SYSTEM

Exclusionary zoning — large-lot, minimum-floor-area, and single-family-only requirements — raised the price of entry without naming a buyer. Federal and private mortgage practice, the redlining of insured credit, directed loans to white neighborhoods and starved the rest. Real-estate steering and blockbusting sorted buyers by race inside an ostensibly open market. Urban renewal and the routing of highways cleared and split Black neighborhoods.[14] The homeowner association, with its recorded covenants, conditions, and restrictions, descended directly from the cost-and-construction covenant that Scanlan in 1949 called "perfectly legal" and "socially advantageous in preserving the stability, appearance, and beauty of residential living," while conceding its "utility as added bulwarks against infiltration by 'non-Caucasians.'"[5] Taken together, these instruments held urban segregation in place long after the Fair Housing Act of 1968.[13]

## NASHVILLE FOLLOWED THE NATIONAL PATTERN

The local record matches the national calendar. White owners were still recording racial covenants in 1947, among them the O.B. Hayes Subdivision covenant filed on August 5, 1947 (Davidson County Deed Book 1512, page 564).[18] That July, four hundred residents of the Granny White, Belmont, and Green Hills sections had formed a property-owners' league with a standing committee to monitor

zoning, eight days after the Court granted certiorari in *Shelley* and ten months before the decision, while the Green Hills covenant still had twelve years to run. In 1951, three years after *Shelley*, a racial-covenant matter, *Kain v. Lewis*, came before Chancellor Thomas A. Shriver in the Davidson County chancery, the same Shriver who had spoken at the 1947 league meeting.[19] The national urban-renewal program reached the city as well. In the 1960s, Interstate 40 was routed through the Jefferson Street corridor of North Nashville, the center of the city's Black community, and the construction displaced homes and businesses along it.[15] Restrictive covenants barring sale to Black buyers, and informal agreements among lenders, persisted in the city into the mid-1970s.[16] The covenant, the zoning committee, and the post-*Shelley* chancery suit are set out in The 1947 Property Owners' Protective League and From Covenant to Code: Nashville's 1933 Zoning Map.

The continuity between the cost-and-construction covenant and the present-day design guideline is one of instrument and legal logic, not of any present actor's intent.

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## NOTES

1. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 24 (1948). ↩
2. Richard R. W. Brooks and Carol M. Rose, *Saving the Neighborhood: Racially Restrictive Covenants, Law, and Social Norms* (Cambridge, MA: Harvard University Press, 2013). ↩
3. Jeffrey D. Gonda, *Unjust Deeds: The Restrictive Covenant Cases and the Making of the Civil Rights Movement* (Chapel Hill: University of North Carolina Press, 2015). ↩
4. Clement E. Vose, *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases* (Berkeley: University of California Press, 1959). ↩
5. Alfred L. Scanlan, "Racial Restrictions in Real Estate — Property Values Versus Human Values," 24 *Notre Dame Lawyer* 157 (1949), at 167 (use versus user) and 185–86 (cost-and-construction covenants). ↩ ↩ ↩
6. *Barrows v. Jackson*, 346 U.S. 249 (1953). ↩
7. *Washington v. Davis*, 426 U.S. 229 (1976). ↩
8. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). ↩
9. *Warth v. Seldin*, 422 U.S. 490 (1975); see also *James v. Valtierra*, 402 U.S. 137 (1971), upholding a state requirement of a local referendum before low-rent public housing could be built. ↩
10. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017), on the FHA's continued endorsement of covenants after *Shelley* and the February 1950 recording rule. ↩
11. Housing Act of 1949, Title I (urban renewal); on the displacement totals, 1949–1973, see Rothstein, *The Color of Law*. ↩
12. David M. P. Freund, *Colored Property: State Policy and White Racial Politics in Suburban America* (Chicago: University of Chicago Press, 2007). ↩
13. Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1993). ↩
14. Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960* (Chicago: University of Chicago Press, 1998 [1983]), on the postwar construction of segregation through urban renewal and the siting of public housing. ↩
15. Sabre J. Rucker, "The Highway to Segregation" (M.A. thesis, Vanderbilt University, 2016), esp. 16–24, on the routing of Interstate 40 through the Jefferson Street corridor of North Nashville. ↩
16. Ansley T. Erickson, *Making the Unequal Metropolis: School Desegregation and Its Limits* (Chicago: University of Chicago Press, 2016), on the persistence of restrictive covenants and lender agreements barring sale to Black buyers in Nashville into the mid-1970s. ↩
17. Sarah Schindler, "Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment," 124 *Yale Law Journal* 1934 (2015), on facially race-neutral land-use rules and physical design that exclude in effect, and often by design. ↩
18. Davidson County Register of Deeds, Book 1512, page 564 (O.B. Hayes Subdivision covenant, August 5, 1947). See The 1947 Property Owners' Protective League. ↩
19. The July 1947 league, its zoning committee, and the 1951 *Kain v. Lewis* matter before Chancellor Thomas A. Shriver are documented in The 1947 Property Owners' Protective League; the docket of *Kain v. Lewis* has not been retrieved. ↩

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