



Discriminatory Covenants

Past, Present, Future

MLTA Fall Convention 2022 | Ocean City, Maryland

Presented by:

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historical arc
continuing legacy
modern responses

Historical arc

1900s	1917	1920s	1948-1953	1968	2000-20s
discriminatory covenants begin spread	<i>Buchanan v. Warley</i> (1917) discriminatory zoning unconstitutional	widespread use of discriminatory covenants <i>Corrigan v. Buckley</i> (1926) covenants upheld	<i>Shelley v. Kraemer</i> (1948) <i>Hurd v. Hodge</i> (1948) <i>Barrows v. Jackson</i> (1953)	Federal Fair Housing Act state housing discrimination laws title industry responses	state laws to address legacy ALTA 2021 policy forms Uniform Law Commission
					 

Methods of Exclusion

Informal & illegal

Other legal devices

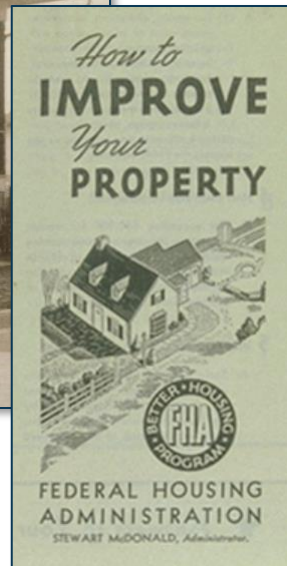
“Running” covenants

Demographic “flight”

“Communicative” methods



Role of Government



Pre-covenant era

- Extralegal means
-
- Private nuisance law
 - Rejected in *Diggs v. Moran College*, 105 A. 157 (Md. 1918)
-
- Zoning ordinances
 - Originated in Germany (1890s)
 - “Euclidean” zoning
 - Baltimore zoning ordinance (1911) invalidated: *State v. Gurry*, 88 A. 546 (Md. 1913)
 - Violates Due Process (Fourteenth Amendment): *Buchanan v. Warley*, 245 U.S. 60 (1917)



Legal hurdles for discriminatory covenants



- **Constitutional law**
 - Fifth Amendment
 - Thirteenth Amendment
 - Fourteenth Amendment

- **Property law**
 - Unreasonable restraints on alienation
 - Rule against perpetuities
 - Real covenants - "horizontal privity"
 - Equitable servitudes - "notice"
 - "Touch and concern" requirement
 - "Changed circumstances" defense
 - Laches/statute of limitations
 - Maxims of equity
 - "Equity is equality"
 - "Those who seek equity must do equity"

- **Corporations law**
 - Cannot have a "race"

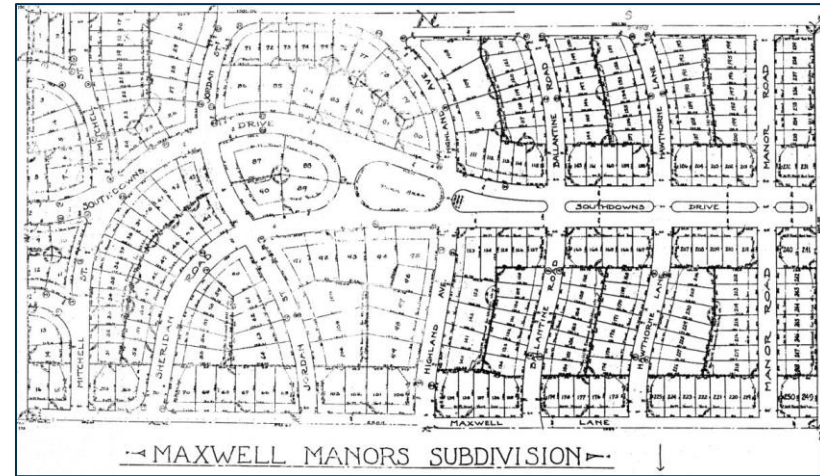
Types of discriminatory covenants

○ Developer-initiated

- New subdivisions, suburbs and “additions”
- Appear in first deed out (often repeated) or on recorded subdivision plat
- Later appear in CC&Rs
- Enforceable as *real covenants*

○ Neighbor-initiated

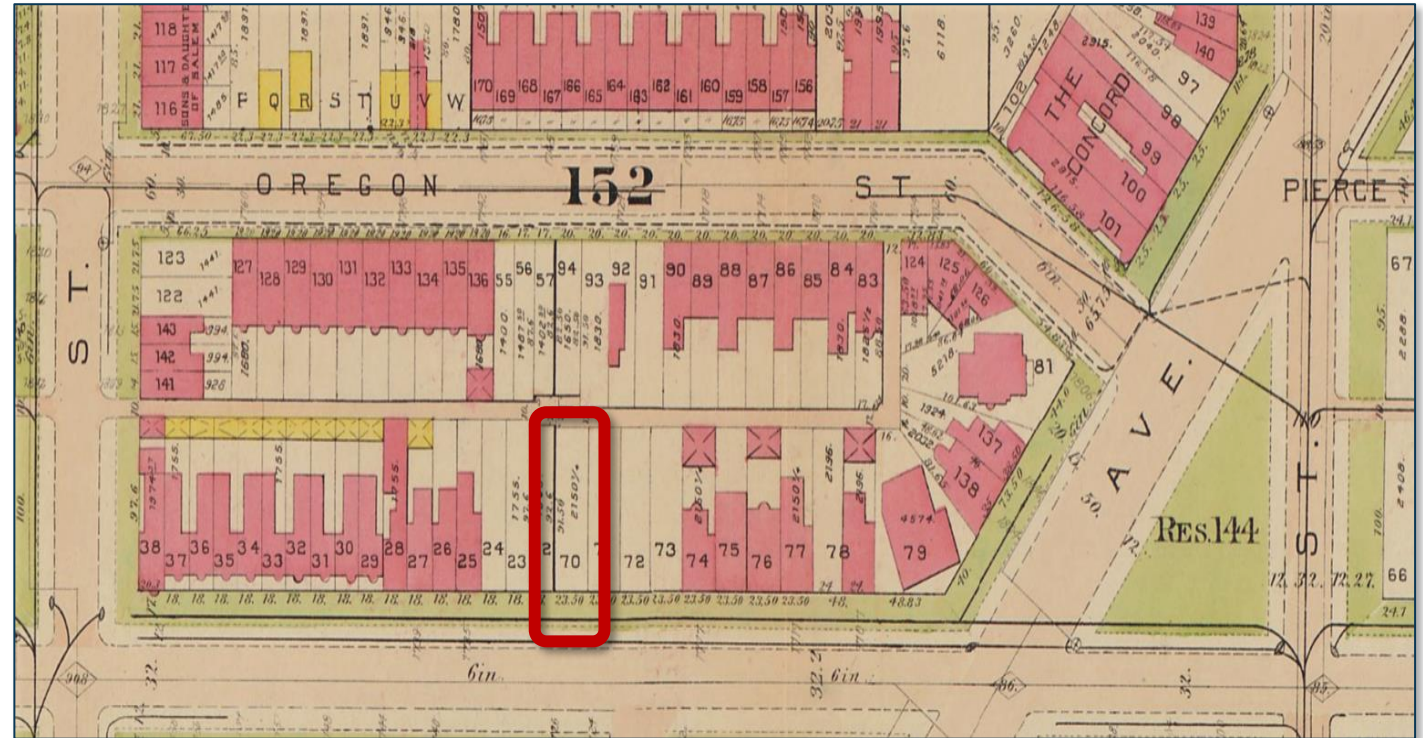
- After-the-fact in existing (mainly urban) neighborhoods
- More widespread from 1920s
- Acknowledged & recorded agreements (aka by petition)
- Only enforceable as *equitable servitudes*
 - Lack of “horizontal privity”
 - Question of “notice”
 - Upheld by ***Meade v. Dennistone***, 196 A. 330 (Md. 1938)



2227 Barclay Street, Baltimore, MD

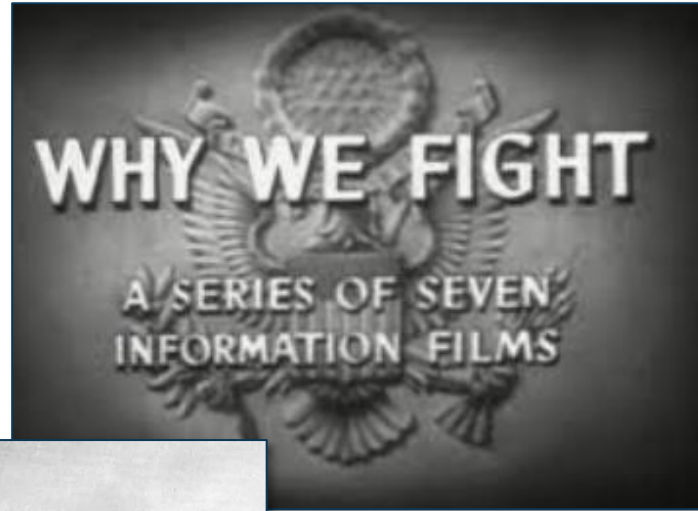
Corrigan v. Buckley, 271 U.S. 323 (1926)

1727 S Street, NW – Square 152, Lot 70

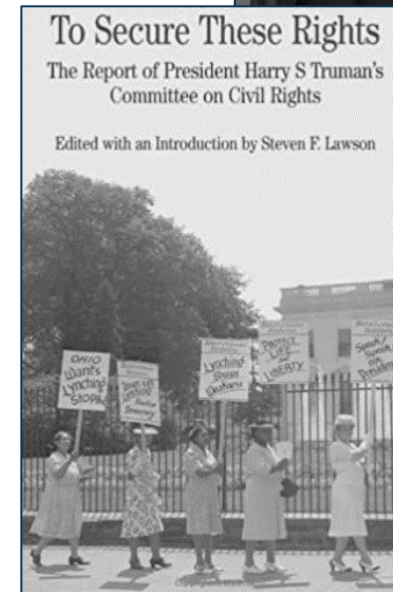
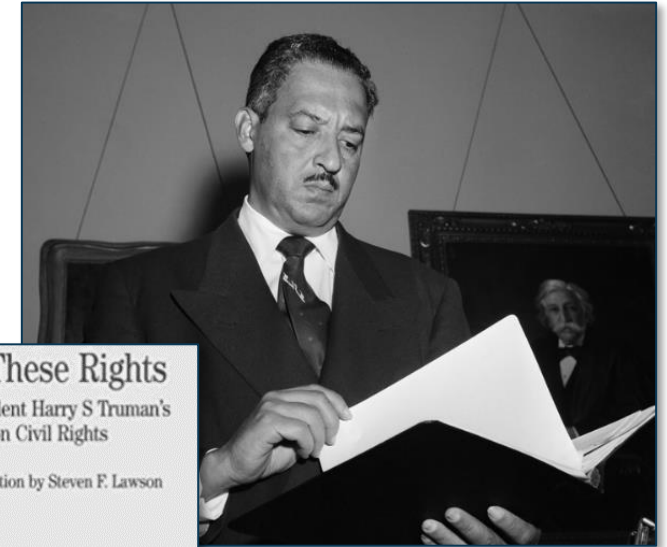


- No “state action” under Fifth Amendment

Mid-century changes in majority opinion



International politics



Domestic politics

Shelley v. Kraemer, 334 U.S. 1 (1948)

- Judicial enforcement of discriminatory covenants ("race or color") turns them into "state action"
- Unenforceable under Equal Protection Clause – but not illegal



Hurd v. Hodge, 334 U.S. 24 (1948) – companion case extends holding to D.C.

- Violation of public policy as "manifested" in Fourteenth Amendment
- Violation of Civil Rights Act of 1866, § 1

Post-*Shelley* evasions

- Neighborhood “tipping points”
- Continued use of covenants
- Search for “substitutes”
 - Legal ploys and evasions
 - Extralegal methods
 - “Steering” by brokers
 - Lenders’ refusal to lend



Shepherd Park neighborhood in D.C.

Legal plays and evasions

Spring Valley neighborhood in D.C.



Sen. John Sparkman



Richard Nixon

- Sue violating seller for damages?
 - ***Barrows v. Jackson*, 346 U.S. 249 (1953)**
- “Mutual faith covenant” / Homeowners’ bond
- Co-op ownership
- Possibility of reverter (no “state action”?)
- Collective neighborhood approval
- Developer approval
 - W.C. & A.N. Miller Co. (Spring Valley)

Making discriminatory covenants illegal

Fair Housing Act of 1968, § 804 (now 42 U.S.C. § 3604 + 24 C.F.R. § 100.80)

- Illegal to:
 - refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental
 - make, print, or **publish**, or cause to be made, printed or published any notice, statement, or advertisement
- Commerce Power + Fourteenth Amendment
- So now illegal to create or mention or represent or enforce discriminatory covenants

Civil Rights Act of 1866, § 1 (now 42 U.S.C. § 1982)

- All citizens "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"
- Applies to *private* conduct - ***Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)**
- Thirteenth Amendment "appropriate" legislation to address "badges" of slavery
- Court distinguishes from *Corrigan v. Buckley*



Making discriminatory covenants illegal

Following federal Fair Housing Act of 1968, § 804

- MD. CODE, STATE GOV'T ART., § 20-705
- D.C. CODE § 2-1402.21
- Additional protected classes

The graphic depicts a real estate sign for a "Nice One Bedroom Near U Street. Close to Shops." with the phrase "American Citizens Preferred." in red. A red, torn-paper-like overlay covers the bottom half of the sign. On this overlay, the text reads: "Housing discrimination based on race or national origin is illegal: Report It!". Below this, it says: "If you believe you've been discriminated against, visit or call the **DC Office of Human Rights**." The contact information for the DC Office of Human Rights is provided: "441 4th St. NW, Suite 570N", "Phone: 202.727.4559", and "Website: ohr.dc.gov". The logo for the "Office of Human Rights DISTRICT OF COLUMBIA" is also present.

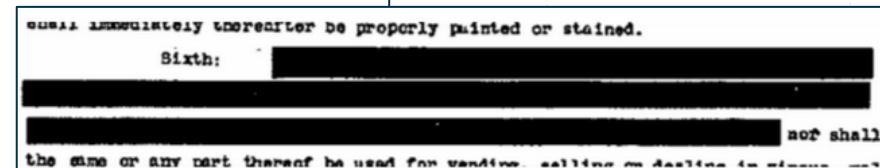
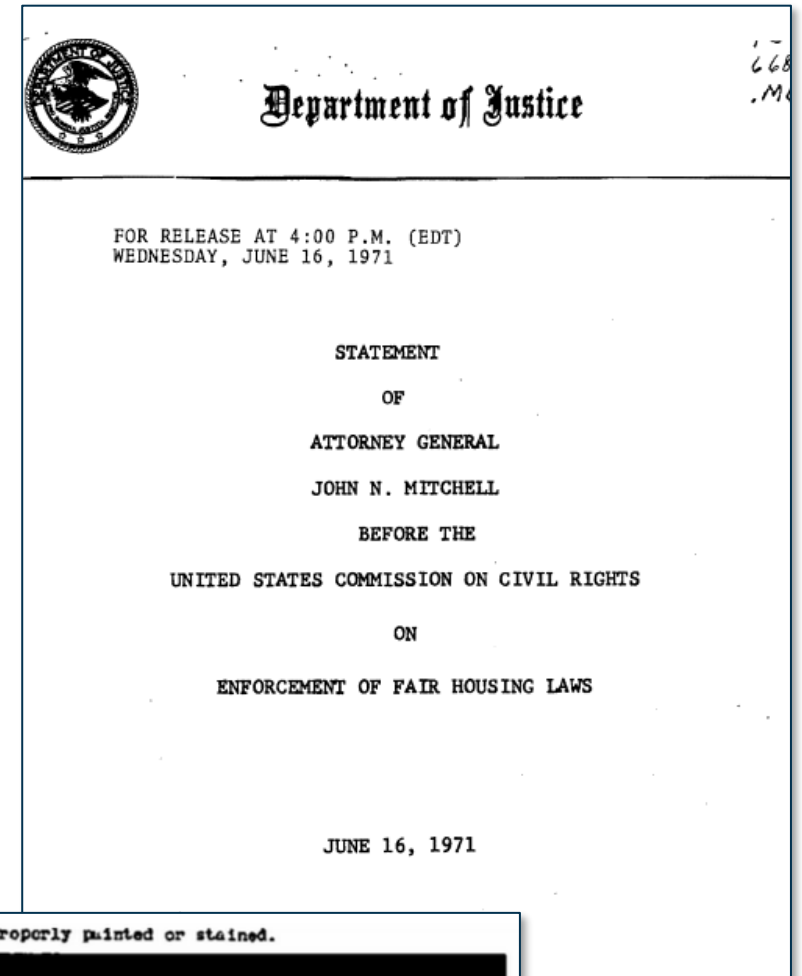
Discriminatory covenants and title insurance

DOJ letter to 18 title insurance companies (1969)

"Particularly significant notice letters of this kind were sent to eighteen major title insurance companies, which agreed to **eliminate racially restrictive covenants from their title insurance policies** In the letters to title insurance companies noted above, and in several consent decrees, the United States has also made the point that the **publication** and use of racially restrictive covenants **violates the fair housing statute.**"

No uniformity of approach

- Need to report legal, enforceable covenants
- Is *possibility of reverter* "state action"?
- Disclaimers in products
- Stamped legends on copies
- Redaction of copies



2021 ALTA policy forms

Disclaimer and notice at top of Schedule B

Some historical land records contain Discriminatory Covenants that are illegal and unenforceable by law. This policy treats any Discriminatory Covenant in a document referenced in Schedule B as if each Discriminatory Covenant is redacted, repudiated, removed, and not republished or recirculated. Only the remaining provisions of the document are excepted from coverage.

Effects

- “Discriminatory Covenant” defined
- No “republishing”
- Not excepted from coverage
- Coverage against attempted enforcement

American Land Title Association
Owner's Policy of Title Insurance
[2021 v. 01.00 (07-01-2021)]

ALTA OWNER'S POLICY OF TITLE INSURANCE
Issued by
BLANK TITLE INSURANCE COMPANY

This policy, when issued by the Company with a Policy Number and the Date of Policy, is valid even if this policy or any endorsement to this policy is issued electronically or lacks any signature.

Any notice of claim and any other notice or statement in writing required to be given to the Company under this policy must be given to the Company at the address shown in Condition 17.


COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, [Blank Title Insurance Company], a [Blank] corporation (the "Company"), insures as of the Date of Policy and, to the extent stated in Covered Risks 9 and 10, after the Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. The Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. Covered Risk 2 includes, but is not limited to, insurance against loss from:
 - a. a defect in the Title caused by:
 - i. forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
 - ii. the failure of a person or Entity to have authorized a transfer or conveyance;
 - iii. a document affecting the Title not properly authorized, created, executed, witnessed, sealed, acknowledged, notarized (including by remote online notarization), or delivered;
 - iv. a failure to perform those acts necessary to create a document by electronic means authorized by law;
 - v. a document executed under a falsified, expired, or otherwise invalid power of attorney;
 - vi. a document not properly filed, recorded, or indexed in the Public Records, including the failure to have performed those acts by electronic means authorized by law;
 - vii. a defective judicial or administrative proceeding; or
 - viii. the repudiation of an electronic signature by a person that executed a document because the electronic signature on the document was not valid under applicable electronic transactions law.
 - b. the lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
 - c. the effect on the Title of an encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment (including an encroachment of an improvement across the boundary lines of the Land), but only if the encumbrance, violation, variation, adverse circumstance, boundary line overlap, or encroachment would have been disclosed by an accurate and complete land title survey of the Land.
3. Unmarketable Title.
4. No right of access to and from the Land.

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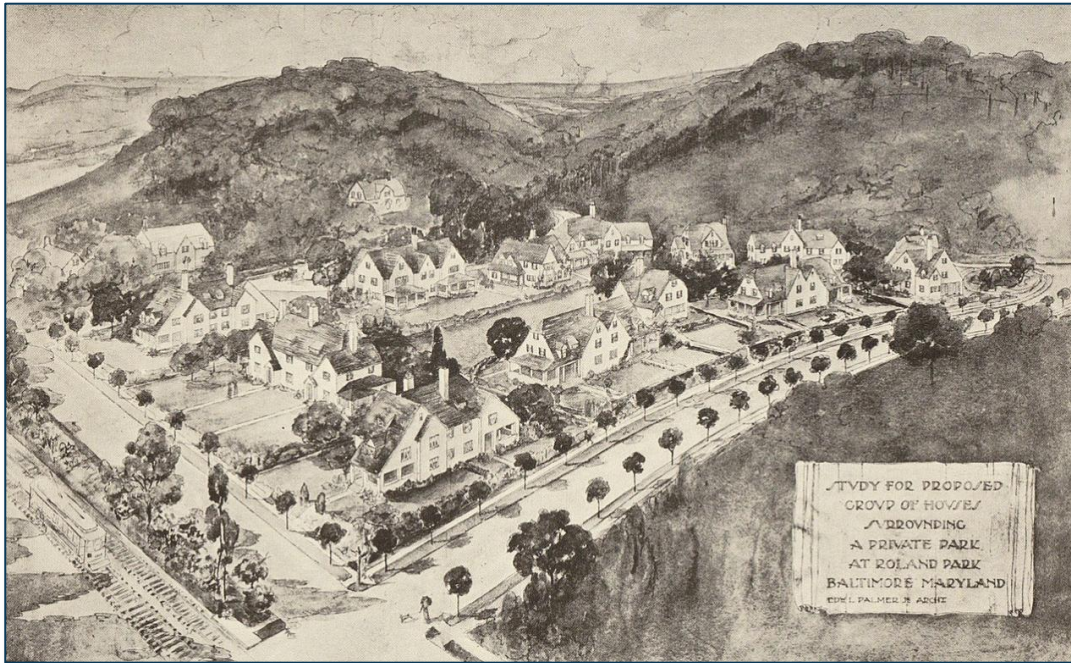




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continuing legacy

How widespread?



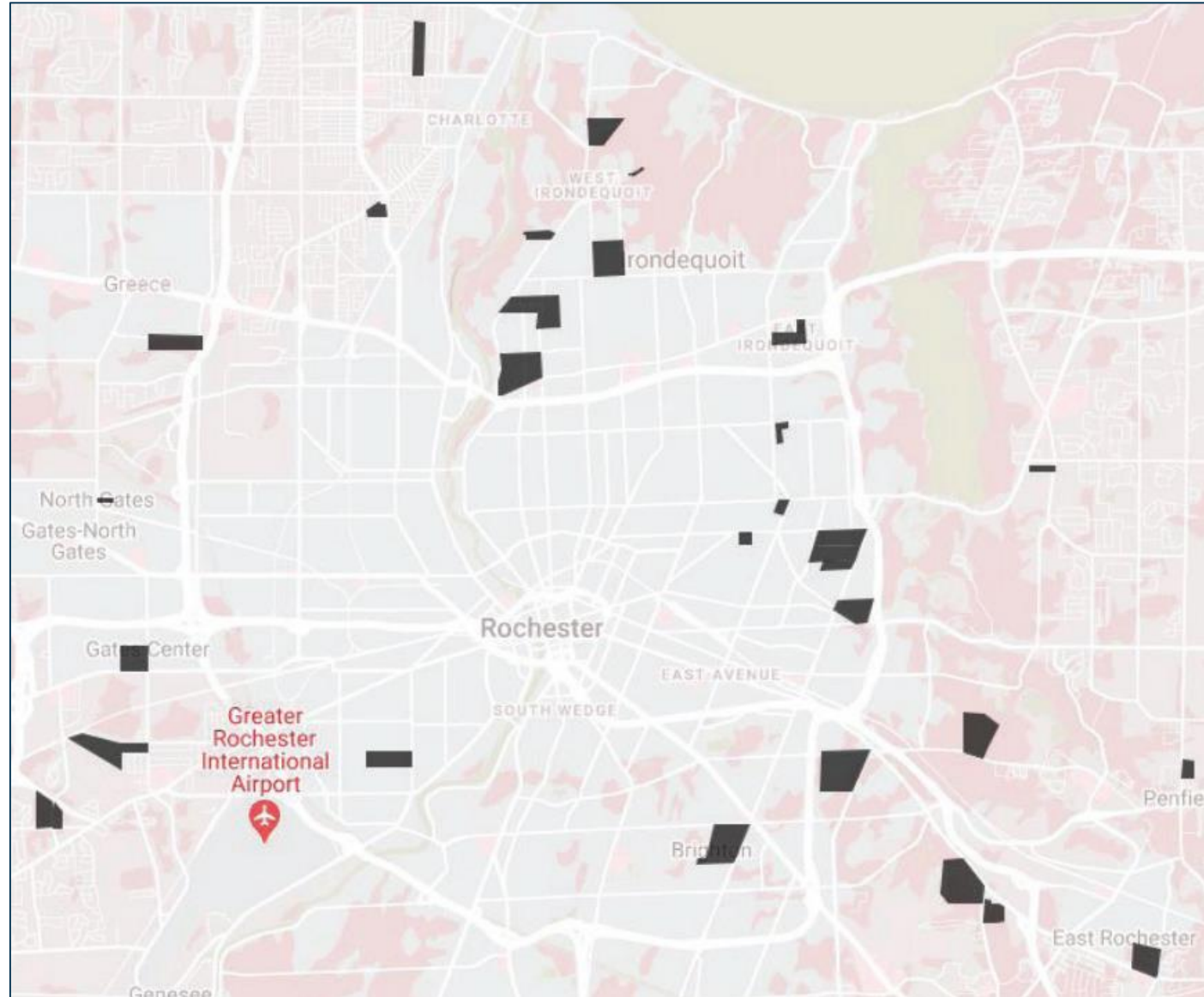
Plan of Roland Park neighborhood

- Nobody knows
- Earliest known covenant:
 - Brookline, Mass. (1843)
- Earliest known appellate cases:
 - California (1892), D.C. (1905)
- Early questions on legality
 - Roland Park, Baltimore (1893-1913)
- Heyday: 1920s-1940s
- 1970 census: 57 million total U.S. households

How widespread?

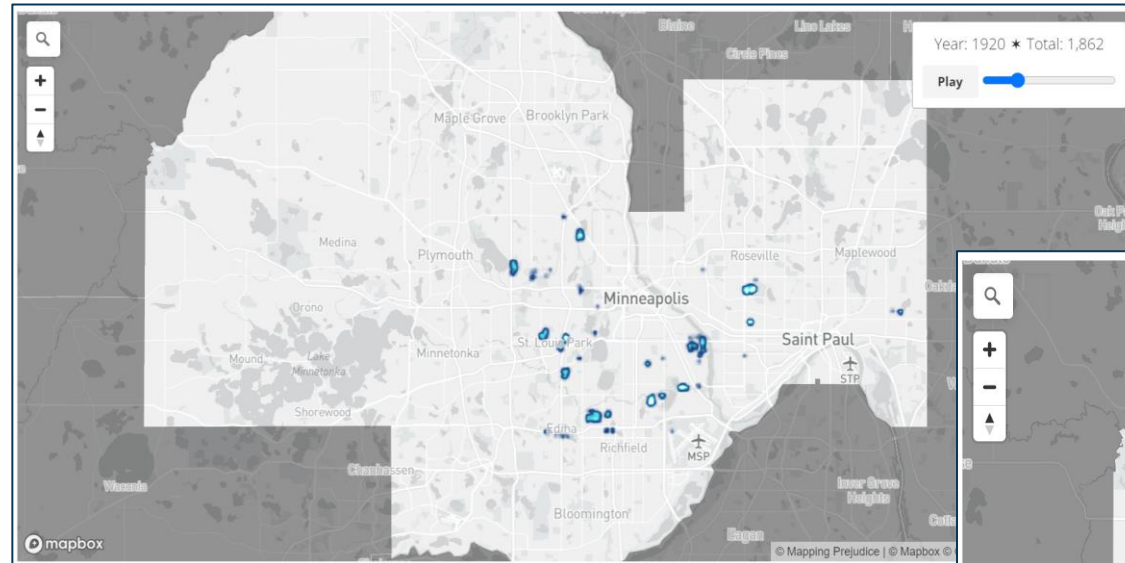
Minneapolis	4 (1910) → 1,862 (1920) → 26,949 (1950)
Philadelphia	3,800 properties (1920–1932)
St. Louis (city + county)	1,804 documents, est. 105,000 properties (1890–1952)
Seattle	416 documents (1927–1948)
D.C.	13,000 properties (1921–1948)

Rochester, New York

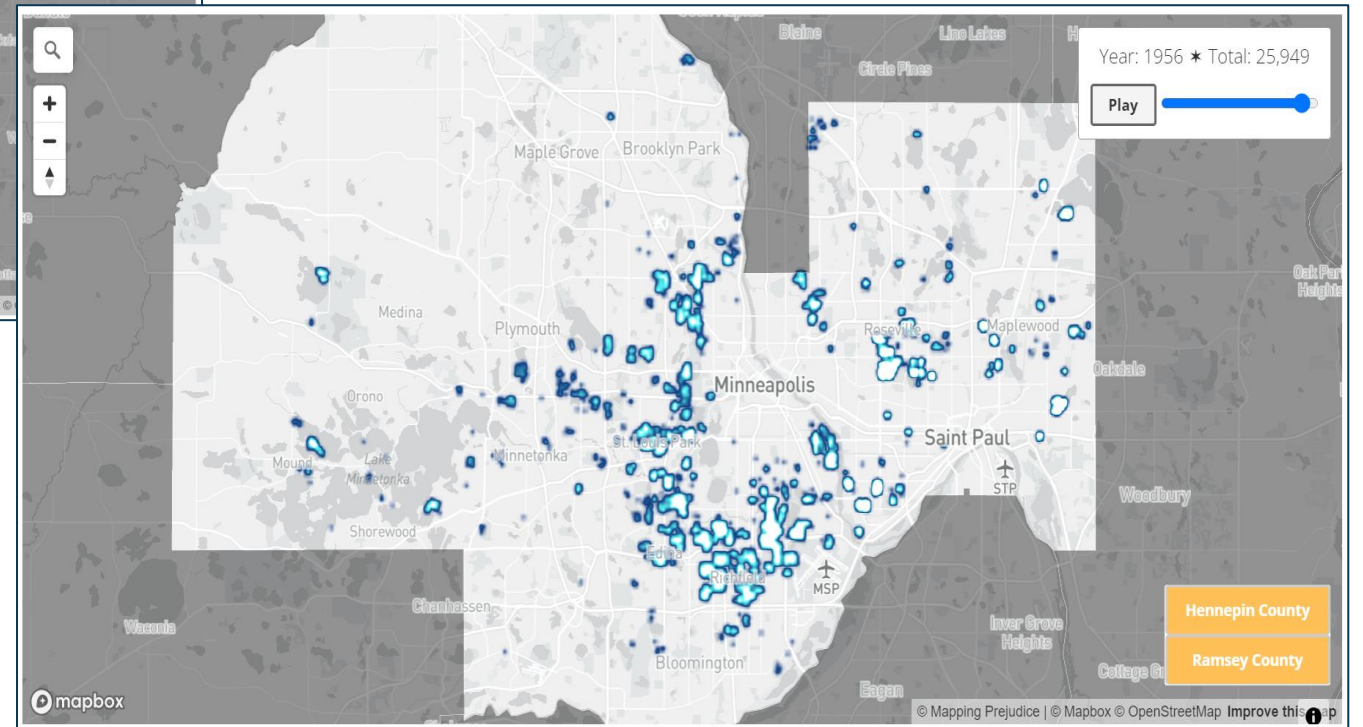


Minneapolis & St. Paul, Minnesota

<https://mappingprejudice.umn.edu/>



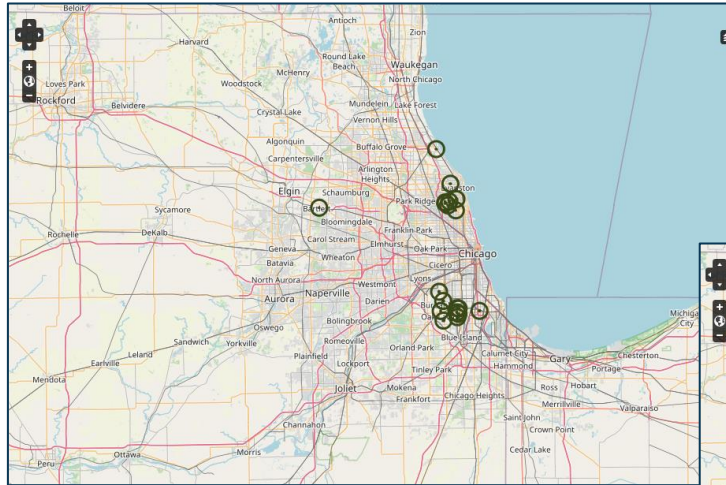
1920



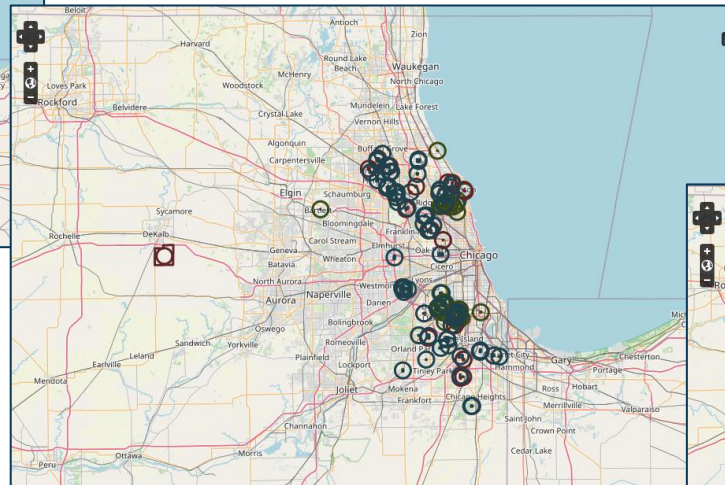
1956

Chicago, Illinois

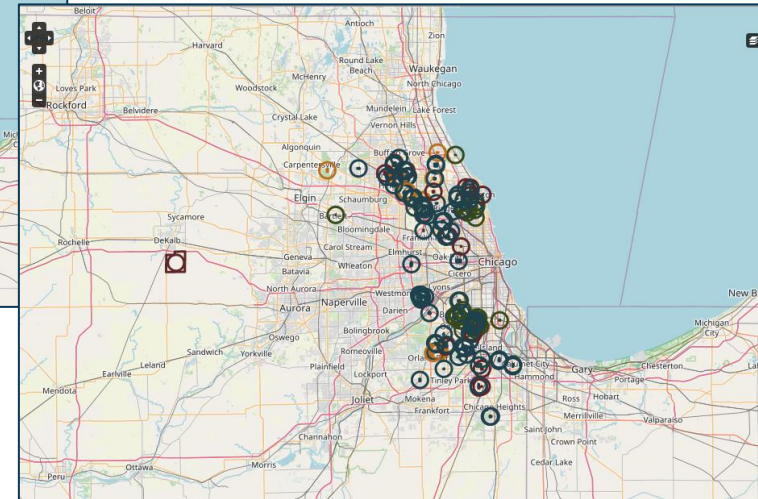
<https://digitalchicagohistory.org/exhibits/show/restricted-chicago/chicago-map>



1926



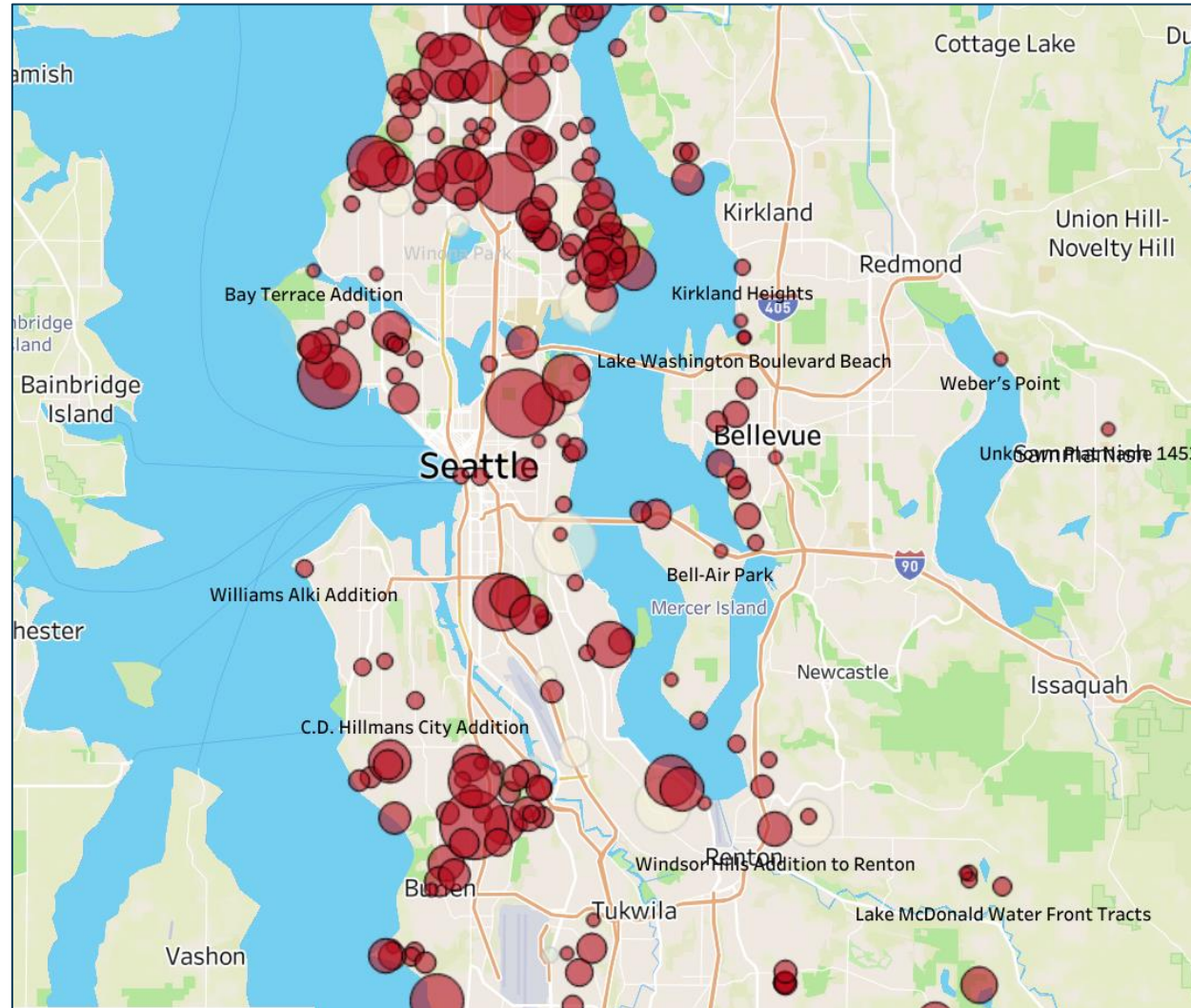
1948



1960

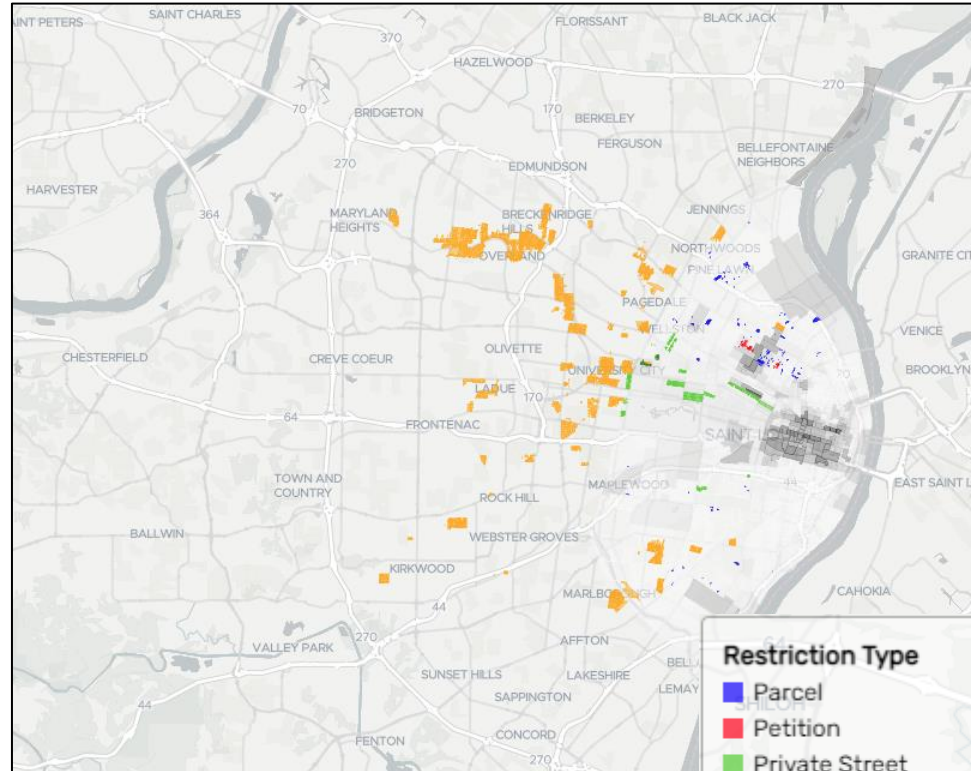
Seattle, Washington

http://depts.washington.edu/civilr/covenants_database.htm

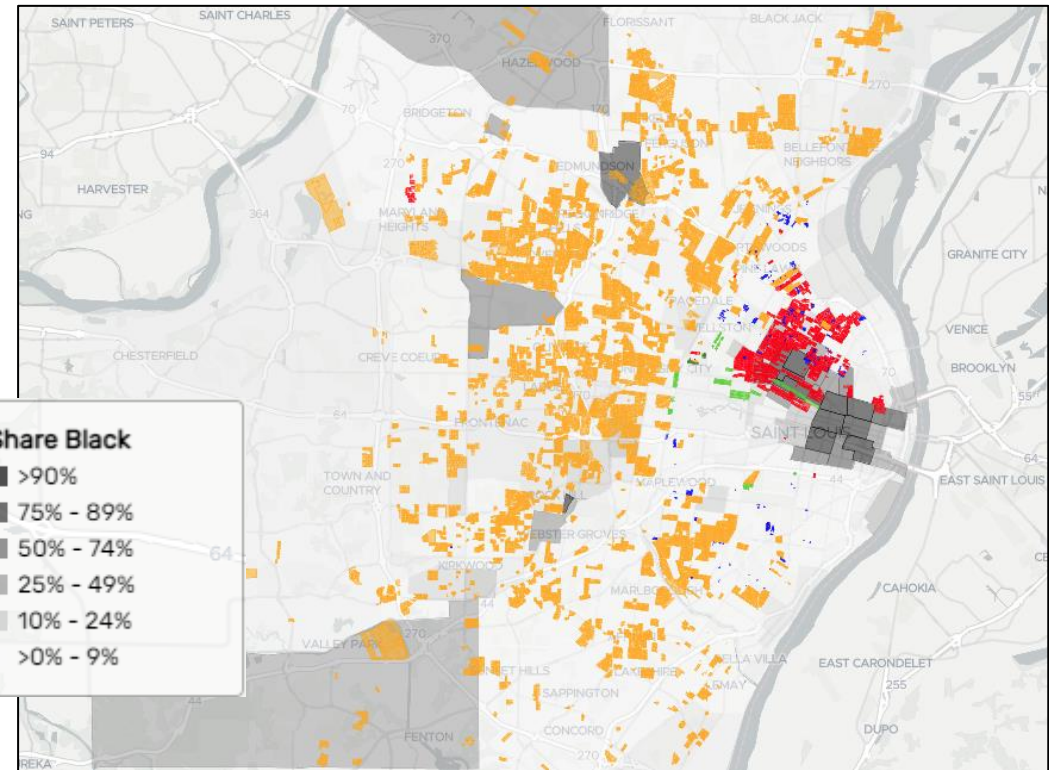


St. Louis, Missouri

<https://dsps.lib.uiowa.edu/thedividedcity/>



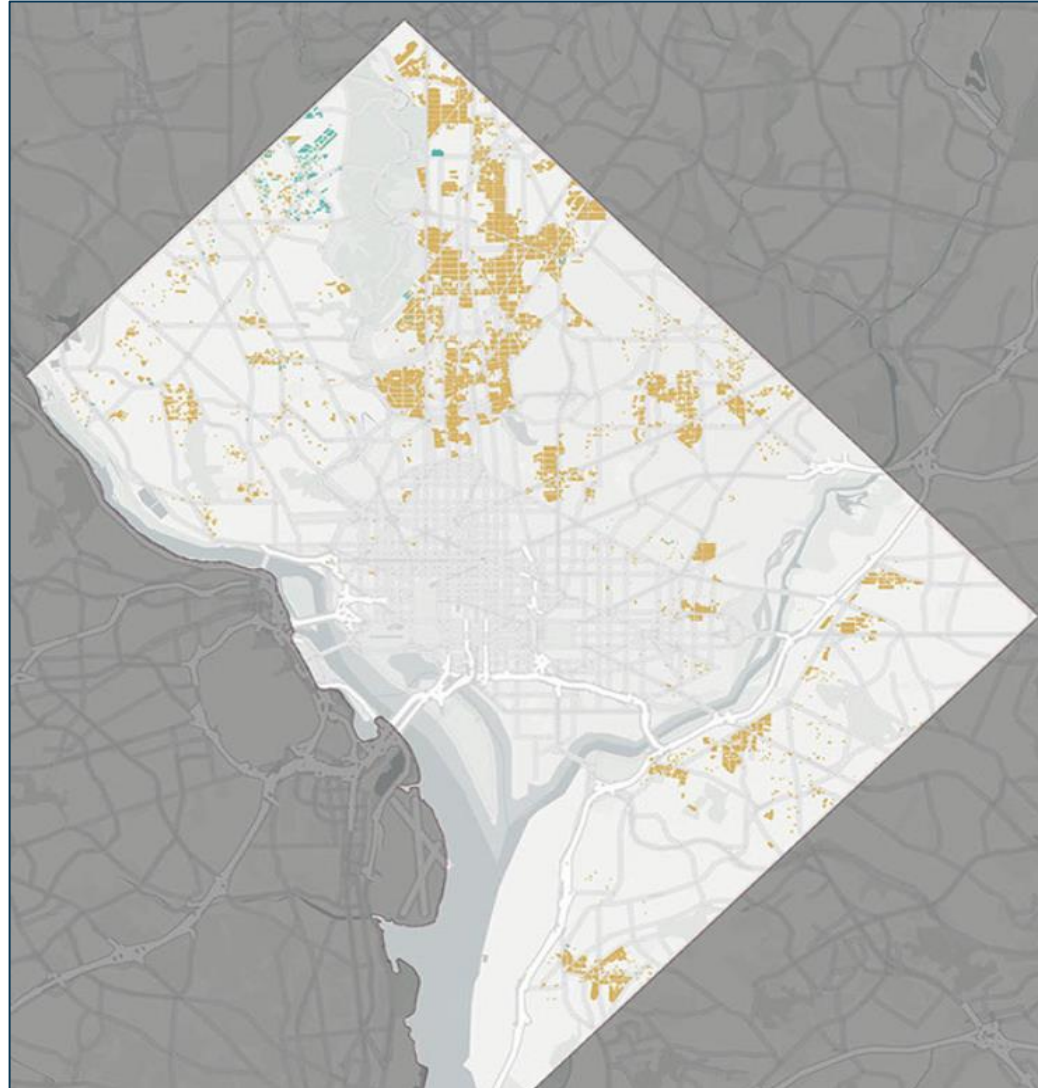
1914



1952

Washington, D.C.

<https://www.mappingsegregationdc.org/>



Federal initiatives?

Mapping Housing Discrimination Act of 2021 (S.2549)

- Federal grants to support:
 - university research, digitization, and mapping projects
 - digitization of local land records
 - creation of national, public database
 - focus on period 1850-1988
- Appropriation: \$50 million over 10 years + \$750,000 thereafter
- 13 Senate (D) cosponsors, but no movement on bill since introduction

modern responses

What to do?

Six distinct “drivers” or “values”

- “Disputatious” person
- “Expressively harmed” person
- “Economically harmed” person
- “Hippocratic/history-minded” person
- “Unconcerned” person
- “Confused” person

“Removing” discriminatory covenants

What does that *mean*?



Five Legislative Approaches

- Notice
- Repudiation
- Modification
- Redaction
 - public-facing/copies?
 - original records?
- Expungement

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 - *Simple solution; easy to implement*
 - *Considered “insufficient”?*
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 - *Stronger effect - no longer visible to public*
 - *Costs of redaction, multiple databases*
 - *Multiple formats (paper, microfilm, digital)*
- Expungement

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 - *Destroys historical record*
 - *Enforceable provisions also removed*

Maryland – Modification Approach

History of enactments

- H.B. 764 (1971) – declared “null and void” but removed modification language
- S.B. 692 (2004) – HOA modification with 85% consent
- S.B. 621 (2018) – removed 85% requirement; property owner may record
- H.B. 1077 (2020) – no recording fees for modification forms

Current law

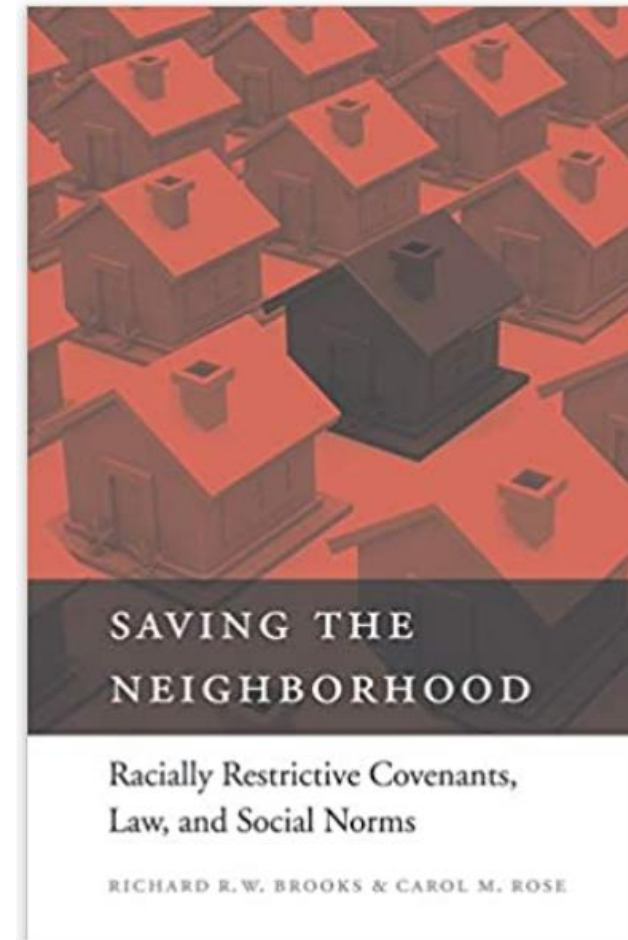
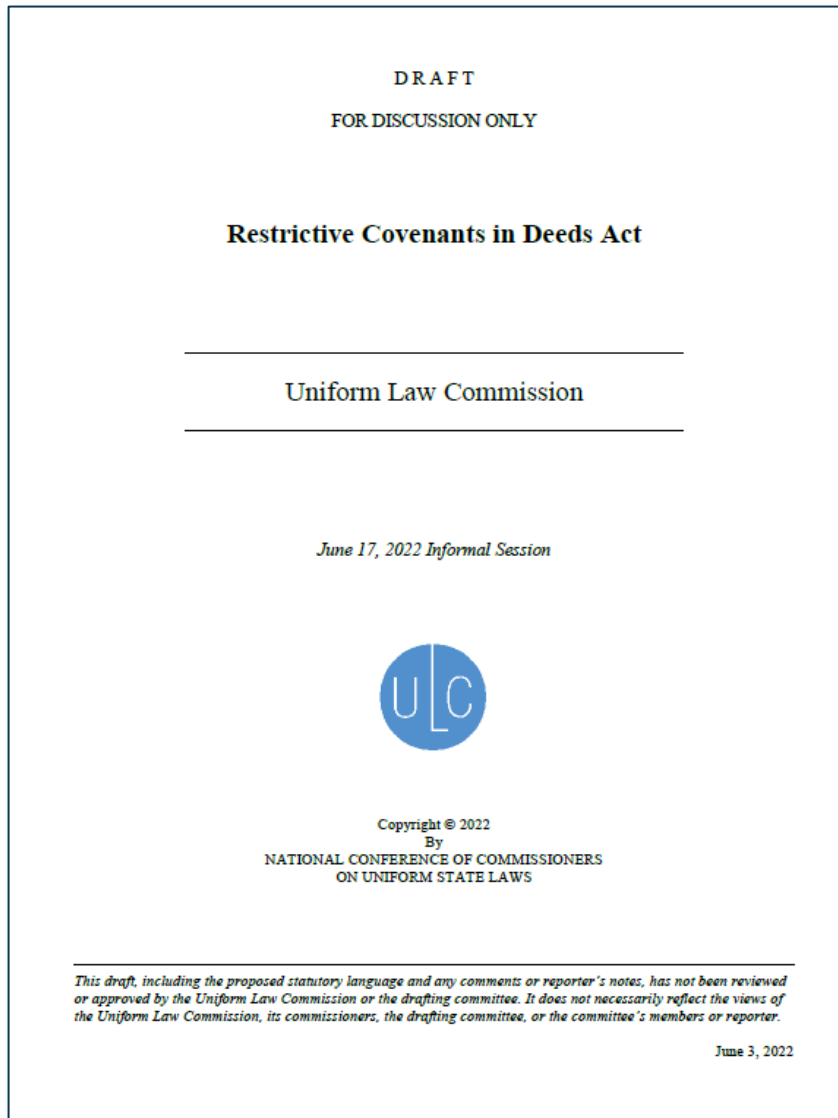
- **MD. CODE, REAL PROP. ART., § 3-112** – for individual owners/nonprofits
 - county attorney review for accuracy (like California’s law)
- **MD. CODE, REAL PROP. ART., § 11B-113.3** – HOA must “delete” upon request
- only applies to: “race, religious belief, or national origin”

ALTA Discriminatory Covenants Work Group

DISCRIMINATORY COVENANTS IN LAND RECORDS – LEGISLATIVE APPROACHES							
Approach Type	Description	Cost to Implement	Preservation of Historic Record	Process / Implementation	Impact on the Transfer of Property and Title Reliability	Liability Concerns	Workability for all document types (paper, digital, microfilm, etc.)
Notification	Notification by county offices to those accessing land records of harmful content in illegal and unenforceable discriminatory covenants generally contained in various recorded documents without identifying specific recorded instruments.	Minimal	Yes	Simple	None	None	Yes
Recorded Repudiation	Recorded Repudiation of the discriminatory language and declaration of the illegal nature and unenforceability of the covenant (s) in particular identified documents under existing state and federal laws, as asserted by an owner or homeowners' association, but not verified by any legal authority.	Moderate	Yes	Simple	None	None	Yes
Modification	Modification of the land records containing an identified discriminatory covenant by creation of a superseding document restated without the discriminatory language, based on verification by a statutory public authority.	High	Yes	Complex	Minimal	Moderate	Yes
Redaction	Redaction of discriminatory covenants in identified documents within the land records, initiated by a request, transaction, or search process and based on verification by a statutory public authority.	High	If specified in legislation	Complex	Moderate	High	No
Expungement	Expungement from the land records of the entire record containing an illegal covenant.	High	No	Unadvisable	High	High	No



Uniform Law Commission Drafting Committee (2022)



Questions?

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