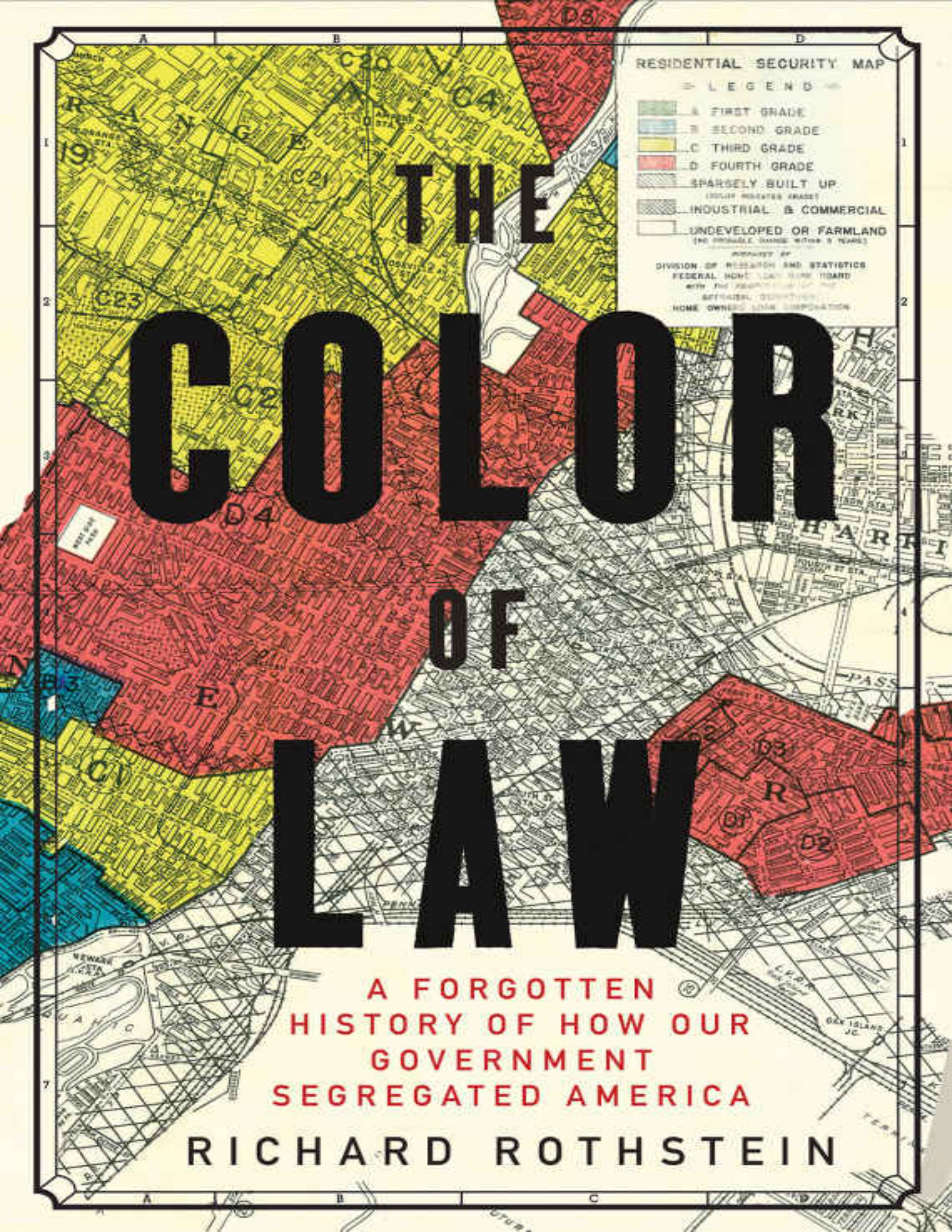


# THE COLOR OF LAW

## A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA

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# PRIVATE AGREEMENTS, GOVERNMENT ENFORCEMENT

*Daly City, California, 1949. FHA district director D. C. McGinness drives a spike to inaugurate construction of a shopping center, part of the segregated Westlake housing development.*

BEFORE THE FHA sponsored whites-only suburbanization in the mid-twentieth century, many urban neighborhoods were already racially exclusive. Property owners and builders had created segregated environments by including language both in individual home deeds and in pacts among neighbors that prohibited future resales to African Americans. Proponents of such restrictions were convinced that racial exclusion would enhance their property values and that such deeds were mere private agreements that would not run afoul of constitutional prohibitions on racially discriminatory state action. The FHA adopted both of these theories.

But when the Supreme Court ruled in 1948 that racial clauses in deeds and mutual agreements, if truly private, could not depend on the power of government to enforce them, the FHA and other federal agencies evaded and subverted the ruling, preserving state-sponsored segregation for at least another decade.

# I

AS EARLY as the nineteenth century, deeds in Brookline, Massachusetts, forbade resale of property to “any negro or native of Ireland.” Such provisions spread throughout the country in the 1920s as the preferred means to evade the Supreme Court’s 1917 *Buchanan* racial zoning decision.

The deed clauses were part of what are commonly termed “restrictive covenants,” lists of obligations that purchasers of property must assume. The obligations included (and still do include) such matters as what color the owner promises to paint the outside window trim and what kind of trees the owner commits to plant in front. For

the first half of the twentieth century, one commonplace commitment in this long list was a promise never to sell or rent to an African American. Typical restrictive language read like this from a 1925 covenant on a property in suburban northern New Jersey:

> There shall not be erected or maintained without the written consent of the party of the first part on said premises, any slaughter house, smith shop, forge furnace, steam engine, brass foundry, nail, iron or other foundry, any manufactory of gunpowder, glue, varnish, vitriol, or turpentine, or for the tanning dressing or preparing of skins, hides or leather, or for carrying on any noxious, dangerous or offensive trade; all toilet outhouses shall be suitably screened, no part of said premises shall be used for an insane, inebriate or other asylum, or cemetery or place of burial or for any structure other than a dwelling for people of the Caucasian Race.

Almost all such documents created exceptions for live-in household or childcare workers, like this passage from a 1950 covenant on property in the Westlake subdivision of Daly City, California:

> The real property above described, or any portion thereof, shall never be occupied, used or resided on by any person not of the white or Caucasian race, except in the capacity of a servant or domestic employed theron as such by a white Caucasian owner, tenant or occupant.

The effectiveness of a house deed that contained a racial covenant was limited, however. If a white family sold a property to an African American, it was difficult (although not impossible) for a neighbor to establish standing in court to reverse the sale and have the black family evicted, because the covenant was a contract between the present and previous owner. If the contract was violated, the original owner, not a neighbor, was the directly injured party. The subdivision developer who initially inserted the clause in the deed might have had

standing, but in most cases once he had sold each of the homes, he no longer had much interest in who the subsequent buyers might be.

So increasingly in the twentieth century, racial covenants took the form of a contract among all owners in a neighborhood. Under these conditions, a neighbor could sue if an African American family made a purchase. Sometimes owners created such contracts and persuaded all or most of their neighbors to sign. But this was also not fully satisfactory, because anyone who didn't sign might sell to an African American with little fear of being successfully sued.

To get around this problem, many subdivision developers created a community association before putting homes up for initial sale, and they made membership in it a condition of purchase. Association bylaws usually included a whites-only clause. In the 1920s, this tactic gained national prominence when developer J. C. Nichols constructed the Country Club District in Kansas City, which included 6,000 homes, 160 apartment buildings, and 35,000 residents. Nichols required each purchaser to join the district's association. Not only did its rules prohibit sales or rentals to black families, but this racial exclusion policy could not be modified without the assent of owners of a majority of the development's acreage. Nichols's developments were a racial model for the rest of Kansas City, which was soon covered by such agreements.

In the Northeast the pattern established in Brookline was pervasive. Around suburban New York City, for example, a survey of 300 developments built between 1935 and 1947 in Queens, Nassau, and Westchester Counties found that 56 percent had racially restrictive covenants. Of the larger subdivisions (those with seventy-five or more units), 85 percent had them.

It was also the case in midwestern metropolises. By 1943, an estimated 175 Chicago neighborhood associations were enforcing deeds that barred sales or rentals to African Americans. By 1947, half of the city's residential area outside its African American areas had such deed restrictions. In Detroit from 1943 to 1965, white homeowners, real estate agents, or developers organized 192 associations to preserve racial exclusion.

And so it was, too, in the Great Plains. The Oklahoma Supreme Court in 1942 not only voided an African American's purchase of a

property that was restricted by a racial covenant; it charged him for all court costs and attorney's fees, including those incurred by the white seller.

Cities and their suburbs in the West were also blanketed by racial covenants. Between 1935 and 1944 W. E. Boeing, the founder of Boeing Aircraft, developed suburbs north of Seattle. During this period and after World War II, the South Seattle Land Company, the Puget Mill Company, and others constructed more suburbs. These builders all wrote racially restrictive language into their deeds. The result was a city whose African American population was encircled by all-white suburbs. Boeing's property deeds stated, for example, "No property in said addition shall at any time be sold, conveyed, rented, or leased in whole or in part to any person or persons not of the White or Caucasian race." An African American domestic servant, however, was permitted to be an occupant. Within Seattle itself, numerous neighborhood associations sponsoring racial covenants were also formed during the first half of the twentieth century.

In Oakland, California, DeWitt Buckingham was a respected African American physician who had been a captain in the Army Medical Corps during World War II. After the war he established a medical practice serving the city's African American community, and in 1945, a white friend purchased and then resold a home to him in Claremont, a Berkeley neighborhood where many University of California professors and administrators lived. When the identity of the true buyer became known, the Claremont Improvement Club, a neighborhood association that controlled a covenant restricting the area to those of "pure Caucasian blood," sued. A state court ordered Dr. Buckingham to vacate the residence.*

In Los Angeles from 1937 to 1948, more than one hundred lawsuits sought to enforce restrictions by having African Americans evicted from their homes. In a 1947 case, an African American man was jailed for refusing to move out of a house he'd purchased in violation of a covenant.

The Westwood neighborhood, bordering the Los Angeles campus of the University of California, was segregated by such methods. In 1939, George Brown, later a congressman but then a nineteen-year-old UCLA student, was president of a cooperative housing

association seeking a property. None was available to a group that refused to exclude African Americans. The association, however, went ahead and purchased a piece of property with a racial covenant that had the usual exception for live-in domestic servants. Brown's cooperative included a rule that each student must contribute five hours a week of cleaning, cooking, and shopping, so the student group obtained a legal opinion that each member of the cooperative was actually a domestic servant, and an African American student was then able to join. However, this gimmick did nothing to desegregate Westwood generally.

## II

GOVERNMENT AT all levels became involved in promoting and enforcing the restrictive covenants. Throughout the nation, courts ordered African Americans evicted from homes they had purchased. State supreme courts upheld the practice when it was challenged—in Alabama, California, Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, West Virginia, and Wisconsin. In the many hundreds of such cases, judges endorsed the view that restrictive covenants did not violate the Constitution because they were private agreements.

Local governments aggressively promoted such covenants, undermining any notion that they were purely private instruments. For example, following the 1917 *Buchanan* decision, the mayor of Baltimore organized an official "Committee on Segregation," led by the city's chief legal officer. One of the committee's activities was to organize and support neighborhood associations that would adopt such agreements. In 1943, Culver City, an all-white suburb of Los Angeles, convened a meeting of its air raid wardens—their job was to make sure families turned off lights in the evening or installed blackout curtains to avoid helping Japanese bombers find targets. The city attorney instructed the assembled wardens that when they went door to door, they should also circulate documents in which

homeowners promised not to sell or rent to African Americans. The wardens were told to focus especially on owners who were not already parties to long-term covenants.

The most powerful endorsement, however, came not from states or municipalities but from the federal government. In 1926, the same year that the U.S. Supreme Court upheld exclusionary zoning, it also upheld restrictive covenants, finding that they were voluntary private contracts, not state action. With this decision to rely upon, successive presidential administrations embraced covenants as a means of segregating the nation.

At President Hoover's 1931 conference on homeownership, Harland Bartholomew's committee on planning subdivisions recommended that all new neighborhoods should have "appropriate restrictions." To define "appropriate," the Bartholomew report referred conference participants to an earlier document, a 1928 review of deeds showing that thirty-eight of forty recently constructed developments barred sale to or occupancy by African Americans. The review observed that racial exclusion clauses were "in rather general use in the vicinity of the larger eastern and northern cities which have experienced an influx of colored people in recent years." These prohibitions, it explained, benefited both the developer (by making his project more desirable to prospective buyers) and the owner (by protecting his property from "the deteriorating influence of undesirable neighbors"). The 1928 review assured planners that the racial clauses were legal because they required only private action in which the government was not involved.

What is remarkable about this assurance was its acknowledgment that any governmental involvement in segregation would violate the Constitution. There was evidently some defensiveness about the recent Supreme Court opinion that "private" racial deed language was constitutionally permissible. This may explain why the Bartholomew report recommended racial exclusion only obliquely, by referring conference participants to the 1928 report without itself repeating the recommendation verbatim. But this indirection could not mask that the federal government took a step toward involvement when the conference report adopted a recommendation that "appropriate" rules for new subdivisions included racial exclusion. It remained, however,

for the Franklin D. Roosevelt administration to turn this recommendation into a requirement.

## III

FROM THE FHA's beginning, its appraisers not only gave high ratings to mortgage applications if there were no African Americans living in or nearby the neighborhood but also lowered their risk estimates for individual properties with restrictive deed language. The agency's earliest underwriting manuals recommended such ratings where "[p]rotection against some adverse influences is obtained by the existence and enforcement of proper zoning regulations and appropriate deed restrictions," and added that "[i]mportant among adverse influences . . . are infiltration of inharmonious racial or nationality groups."

The manual explained that if a home was covered by an exclusionary zoning ordinance—for example, one that permitted only single-family units to be constructed nearby—it would probably deserve a high rating, but such an ordinance itself was inadequate because it could not prevent middle-class African Americans from buying houses in the neighborhood. So the FHA recommended that deeds to properties for which it issued mortgage insurance should include an explicit prohibition of resale to African Americans. The 1936 manual summarized instructions to appraisers like this:

> 284 (2). Carefully compiled zoning regulations are the most effective because they not only exercise control over the subject property but also over the surrounding area. However, they are seldom complete enough to assure a homogeneous and harmonious neighborhood.
>
> 284 (3). Recorded deed restrictions should strengthen and supplement zoning ordinances. . . . Recommended restrictions include . . . [p]rohibition of the occupancy of properties except

by the race for which they are intended [and a]ppropriate provisions for enforcement.

By “appropriate provisions for enforcement,” the FHA meant the right of neighbors to seek a court order for the eviction of an African American purchaser or renter.

In developments with FHA production financing for builders, the agency recommended—and in many cases, demanded—that developers who received the construction loans it sponsored include racially restrictive covenants in their subdivisions’ property deeds. When the federal government commissioned David Bohannon to build the all-white Rollingwood subdivision outside Richmond, California, it not only barred him from selling to African Americans but required that he include a racial exclusion in the deed of each property. When FHA racial policy made it necessary for Wallace Stegner’s Peninsula Housing Association to disband its integrated housing cooperative, the private developer who purchased the Ladera property received FHA approval for a bank loan that obliged him to include restrictive covenants in his sales. When the St. Louis developer Charles Vatterott procured FHA-sponsored financing for his St. Ann suburb, he had to include language in the deeds stating that “no lot or portion of a lot or building erected thereon shall be sold, leased, rented or occupied by any other than those of the Caucasian race.” And when the agency authorized production loans for the construction of Levittown, its standards included a racial covenant in each house deed.

In the FHA’s finance program, a production builder who gained preapproval for loans frequently inserted language in property deeds with preambles such as “Whereas the Federal Housing Administration requires that the existing mortgages on the said premises be subject and subordinated to the said restrictions . . .” And when the VA began to guarantee mortgages after World War II, it also recommended and frequently demanded that properties with VA mortgages have racial covenants in their deeds.

## IV

THEN THE Supreme Court issued a ruling that was as much of an upheaval for housing policy as *Brown v. Board of Education* would be, six years later, for education. In 1948 the Court repudiated its 1926 endorsement of restrictive covenants and acknowledged that enforcement by state courts was unconstitutional. It was one thing, the Court ruled in *Shelley v. Kraemer*, for private individuals to discriminate. But deeds that barred sales to African Americans could be effective only if state courts enforced them by ordering black families to vacate homes purchased in white neighborhoods. Racial covenants' power depended upon the collaboration of the judicial system and as such violated the Fourteenth Amendment, which prohibits state governments from participating in segregation.

The Court, in a companion case decided on the same day, also banned the use of federal courts to enforce covenants in federal territory like Washington, D.C. A logical consequence of this decision was that if complicity in racial discrimination by federal courts constituted *de jure* segregation, then surely discrimination by executive branch agencies, like the FHA, also did so. Nonetheless, the federal government responded to *Shelley* and its federal companion case by attempting to undermine the Supreme Court decisions.

As would happen later with *Brown*, the response to the Court's ruling was massive resistance. But in the case of *Shelley*, the resistance came not so much from states as from federal agencies.

Two weeks after the Court announced its decision, FHA commissioner Franklin D. Richards stated that the *Shelley* decision would "in no way affect the programs of this agency," which would make "no change in our basic concepts or procedures." Richards added that it was not "the policy of the Government to require private individuals to give up their right to dispose of their property as they [see] fit, as a condition of receiving the benefits of the National Housing Act." Six months later, when Thurgood Marshall, then the NAACP legal counsel (and later a Supreme Court justice), challenged the FHA policy of requiring restrictive covenants in deeds of the massive Levittown development, Richards responded, "I find nothing in the [*Shelley* decision] to indicate that in the absence of statutory authority the government, or any agency thereof, is authorized to

withdraw its normal protection and benefits from persons who have executed but do not seek judicial enforcement of such covenants."

A year after the *Shelley* decision, Berchmans Fitzpatrick, the chief counsel of the FHA's parent organization, the Housing and Home Finance Agency, revealed the contempt of federal officials for the ruling. Explaining that owners in a particular neighborhood would no longer be deemed ineligible for FHA insurance on the basis of inhabitants' race, he stated that henceforth "there must be some concrete, objective set of standards on which a writing down because of race is permitted." Fitzpatrick did not explain what objective standards could possibly justify denying mortgage insurance "because of race," but he was doubtlessly referring to the FHA's conviction that property values invariably declined if African American families lived nearby.

FHA field staff understood perfectly what Fitzpatrick had in mind. In 1948, a group of families had formed a cooperative to build and occupy sixty homes in Lombard, Illinois, a suburb about twenty miles west of Chicago. Like the cooperative that Wallace Stegner had helped lead in California, the Lombard group was racially inclusive, counting two African American families among its members. As it did when beseeched by Stegner and his colleagues, the FHA refused to insure mortgages for the cooperative because of its refusal to bar nonwhites. William J. Lockwood, the assistant commissioner of the FHA, wrote to the cooperative that the agency could not insure the project because "infiltration [of Negroes] will be unacceptable to the local real estate market." As Thurgood Marshall pointed out in a memo to President Truman, allowing local real estate markets to trump constitutional rights was no different from racial zoning ordinances found unconstitutional twenty years earlier, in which a vote of residents on a block could determine whether black families could move in.

In 1949, after the Supreme Court's *Shelley* decision, the leaders of the Lombard cooperative tried to persuade the FHA to reconsider. They met with the chief of the Chicago area FHA office and with the agency's chief underwriter for that region. The leaders protested that the federal government was creating the kind of segregation that *Shelley* was intended to prevent. The officials responded that they

had “no responsibility for a social policy,” that they were “just a business organization” that could consider only “the cold facts and the elements of risk,” and that “an interracial community was a bad risk” that the FHA could not insure.

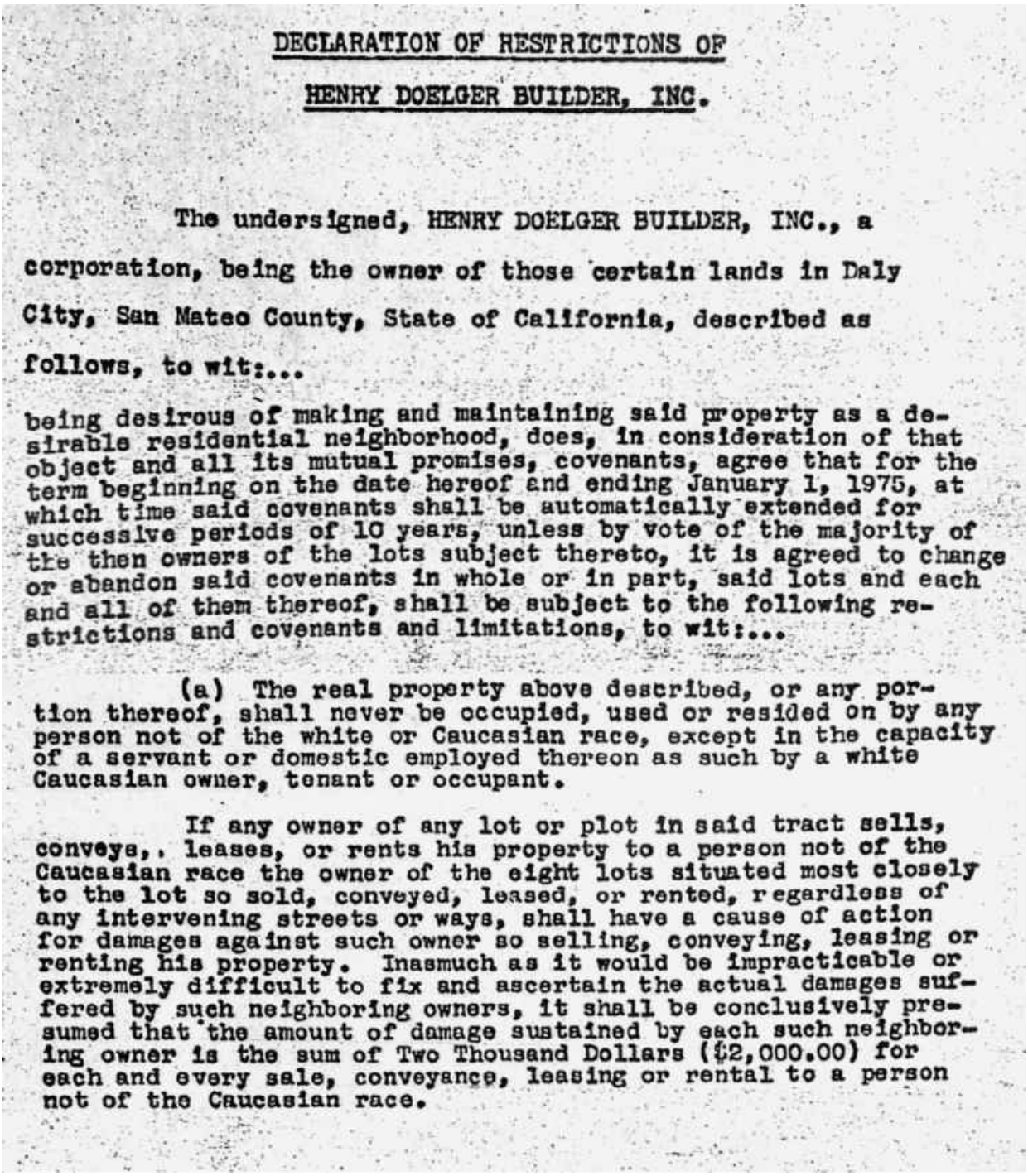
On December 2, 1949, a year and a half after the *Shelley* decision, U.S. solicitor general Philip Perlman announced that the FHA could no longer insure mortgages with restrictive covenants. But he said the new policy would apply only to those executed after February 15, 1950—two and half months after his announcement and nearly two years after the Supreme Court’s ruling. This delay could only have been designed to permit property owners to hurry, before the deadline, to record restrictions where they hadn’t previously existed. The new rules, the solicitor general stated, would “not [a]ffect mortgage insurance already in force and will apply only to properties where the covenant in question and the insured mortgage are recorded after the [two-and-half-month delay].” Upon hearing the solicitor general’s announcement, the FHA executive board announced that it would ignore it, resolving that “it should be made entirely clear that violation [of the new ban on insuring mortgages with restrictive covenants] would not invalidate insurance.”

The day after Perlman’s announcement, FHA commissioner Richards sent a memo to all field offices emphasizing that they should continue to insure properties with new restrictive covenants that were not recorded with counties but were, as he put it, “gentlemen’s agreements” and that the new policy would not apply to any FHA commitments for insurance that had already been made nor to properties where applications were pending. Then, to emphasize how much the agency opposed the spirit of the new rules, Richards’s memo added that the agency “will not attempt to control any owner in determining what tenants he shall have or to whom he shall sell his property.” Officials’ disdain for the Supreme Court’s ruling was apparent. An article in *The New York Times* reporting on the memo was headlined, “No Change Viewed in Work of F.H.A.”

When in February 1950, the FHA began its lackluster compliance with *Shelley*, it continued to insure properties with covenants that were not explicitly racial. Instead, these agreements were designed to evade the Court’s intent by requiring neighbors or a community board

to approve any sale. Another year and a half later, an assistant FHA commissioner stated that “it was not the purpose of these Rules to forbid segregation or to deny the benefits of the National Housing Act to persons who might be unwilling to disregard race, color, or creed in the selection of their purchasers or tenants.”

When Solicitor General Perlman made his 1949 announcement, unnamed “FHA officers” told *The New York Times* that the agency would go beyond the *Shelley* decision and not insure developers who, even without restrictive covenants, refused to sell or rent to African Americans. This was plainly untrue, as the agency continued to finance developments (Westlake in Daly City, California, is one example) through the 1950s that excluded African American purchasers. Only in 1962, when President John F. Kennedy issued an executive order prohibiting the use of federal funds to support racial discrimination in housing, did the FHA cease financing subdivision developments whose builders openly refused to sell to black buyers.



DECLARATION OF RESTRICTIONS OF

HENRY DOELGER BUILDER, INC.

The undersigned, HENRY DOELGER BUILDER, INC., a corporation, being the owner of those certain lands in Daly City, San Mateo County, State of California, described as follows, to wit:...

being desirous of making and maintaining said property as a desirable residential neighborhood, does, in consideration of that object and all its mutual promises, covenants, agree that for the term beginning on the date hereof and ending January 1, 1975, at which time said covenants shall be automatically extended for successive periods of 10 years, unless by vote of the majority of the then owners of the lots subject thereto, it is agreed to change or abandon said covenants in whole or in part, said lots and each and all of them thereof, shall be subject to the following restrictions and covenants and limitations, to wit:...

(a) The real property above described, or any portion thereof, shall never be occupied, used or resided on by any person not of the white or Caucasian race, except in the capacity of a servant or domestic employed thereon as such by a white Caucasian owner, tenant or occupant.

If any owner of any lot or plot in said tract sells, conveys, leases, or rents his property to a person not of the Caucasian race the owner of the eight lots situated most closely to the lot so sold, conveyed, leased, or rented, regardless of any intervening streets or ways, shall have a cause of action for damages against such owner so selling, conveying, leasing or renting his property. Inasmuch as it would be impracticable or extremely difficult to fix and ascertain the actual damages suffered by such neighboring owners, it shall be conclusively presumed that the amount of damage sustained by each such neighboring owner is the sum of Two Thousand Dollars ($2,000.00) for each and every sale, conveyance, leasing or rental to a person not of the Caucasian race.

*After the Supreme Court prohibited enforcement of restrictive covenants, the FHA continued to subsidize projects that penalized sellers of homes to African Americans. In Westlake, Daly City, California, the total fine, $16,000, was greater than the typical home sale price.*

Although the 1948 *Shelley* ruling forbade courts from ordering evictions, parties to restrictive covenants continued for another five

years to bring suits for damages against fellow signatories who violated their pacts, and two state supreme courts upheld the propriety of such damage awards. One was the Supreme Court of Missouri, the state where the *Shelley* case originated. The court took the position that neighbors of a homeowner who violated a restrictive covenant could sue the seller for damages, even though they could no longer obtain a court order evicting the purchaser. The other was the Oklahoma Supreme Court, which went a step further, finding that *Shelley* did not preclude neighbors from suing both seller and purchaser for engaging in a conspiracy to diminish a community's property values. In this Oklahoma suit, the complaining white owners alleged that "it is well known generally . . . that the purchase, rental, or leasing of real property by [African Americans] will always cause the remainder of the property in the same block to decrease in value at least from fifty to seventy-five percent."

In some cases, the FHA continued to insure developments with racially explicit covenants that provided for violators to pay exorbitant damages rather than cancel sales and evict African American residents. In the case of the subdivision in Westlake, the first homes were sold in 1949 for about $10,000. By 1955 the typical price was about $15,000. The covenant provided for damages of $2,000 to each of the eight closest neighbors, a prohibitive amount that exceeded the value of the property itself.

In 1953, the Supreme Court ended this circumvention of *Shelley*. It ruled that the Fourteenth Amendment precluded state courts not only from evicting African Americans from homes purchased in defiance of a restrictive covenant but also from adjudicating suits to recover damages from property owners who made such sales. Still, the Court refused to declare that such private contracts were unlawful or even that county clerks should be prohibited from accepting deeds that included them.

It took another nineteen years before a federal appeals court ruled that the covenants themselves violated the Fair Housing Act and that recording deeds with such clauses would constitute state action in violation of the Fourteenth Amendment. As the court observed, such provisions, even if they lacked power, still would make black purchasers reluctant to buy into white neighborhoods if the recorded

deeds gave implicit recognition of the racial prohibition and gave an official imprimatur to the message that the purchasers should not live where they were not wanted. Since the 1950s, new restrictive covenants have rarely been recorded, but in most states old ones, though without legal authority, can be difficult to remove from deeds without great legal expense.

The Supreme Court decision in *Shelley v. Kraemer*, banning court enforcement of restrictive covenants, had been unanimous, 6–0. Three of the nine justices excused themselves from participating because their objectivity might have been challenged—there were racial restrictions covering the homes in which they lived.

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* The court order was under appeal when, in 1948, the Supreme Court forbade state court enforcement of restrictive covenants, so the Claremont Improvement Club was unable, in the end, to evict Dr. Buckingham.