

# A SHADOW OF OHIO'S RACIST PAST? OR A LINGERING, TANGIBLE IMPACT? AN EXAMINATION OF UNENFORCEABLE RESTRICTIVE COVENANTS

THOMAS SHEPHERD\*

## I. INTRODUCTION

On April 11, 1968, President Lyndon B. Johnson signed the Fair Housing Act into law, which prohibited discrimination in the sale or rental of housing based on “race, color, religion, . . . or national origin.”<sup>1</sup> Twenty years earlier, in 1948, the Supreme Court opinion in *Shelley v. Kraemer*, stated that it is a violation of the Fourteenth Amendment for state courts to enforce private agreements excluding people “from the use or occupancy of real estate” based on race or color.<sup>2</sup> Ohio followed the federal government through both the judiciary and the legislature in ensuring that Ohioans aren’t subject to housing discrimination on the basis of race.<sup>3</sup>

It’s no secret, though, that up until these protections were put in place by first the federal government and then by the state of Ohio, non-white minorities were subject to discrimination of all kinds, both north and south of the Mason-Dixon line. Much of the animus toward these groups was preserved in deeds recorded prior to the implementation of the aforementioned protections in the form of restrictive covenants, which prevented owners of land from renting or selling to others based on the

---

\* J.D. Candidate, Capital University Law School, 2020; B.A., The Ohio State University, 2014. Many thanks to all of those who’ve guided me and given me their feedback, including those at the Franklin County Recorder’s Office, Professor Dennis Hirsch, and many more friends and colleagues who lent an ear. This is a topic I believe everyone should be aware of, particularly those who don’t belong to a group historically impacted by it. The insight of others has helped me understand the issue on a deeper level. I’d finally like to note that the topic of housing discrimination is not limited to the arena of race. While all instances of housing discrimination are an important piece of history (based on nationality, sex, religion, sexual orientation, etc.), and some continue to this day, this article focuses on housing discrimination on the basis of race, as it is the most pervasive in the nation’s history.

<sup>1</sup> Fair Housing Act, 42 U.S.C. § 3604 (2012).

<sup>2</sup> *Shelley v. Kraemer*, 334 U.S. 1, 1, 20–21 (1948).

<sup>3</sup> OHIO REV. CODE ANN. § 4112.02(H) (LexisNexis 2019); *See Porter v. Oberlin*, 205 N.E.2d 363, 368 (Ohio 1965).

renter's or buyer's race.<sup>4</sup> Thankfully, this reprehensible language is given no legal effect today.<sup>5</sup> However, a deed is a legal document relied on by transacting parties with language that, if changed, can have big implications<sup>6</sup>; it has been recognized for centuries as an instrument "that conveys some interest in property."<sup>7</sup> For this reason, many states have left deeds untouched, even though there is language in some that is unenforceable by any court in the United States.<sup>8</sup>

There has been a growing movement throughout the United States to address these restrictive covenants by removing (or allowing the owner or occupant to remove), censoring, or otherwise editing deeds in the recording system.<sup>9</sup> Some states have considered legislation to achieve this goal.<sup>10</sup> In Ohio, at least one person has unsuccessfully attempted to remove restrictive

---

<sup>4</sup> Judy L. Thomas, *'Curse of Covenants' Persists – Restrictive Rules, While Unenforceable, Have Lingering Legacy*, KAN. CITY STAR (July 27, 2016), <https://www.kansascity.com/news/local/article92156112.html> [https://perma.cc/YUC9-YCD4].

<sup>5</sup> *Id.*

<sup>6</sup> See *Muirheard Hui LLC v. Forest. Pres. Dist.*, 2018 IL App (2d) 170835, ¶ 24, 117 N.E.3d 1166, 1171 (Permissive removal of a restrictive covenant allowed the District to "use the property however it saw fit.")

<sup>7</sup> *Deed*, BLACK'S LAW DICTIONARY (9th ed. 2010).

<sup>8</sup> See Randy Furst, *Measure Allowing Minnesota Homeowners to Renounce Racist Language on Titles Advances*, STAR TRIB. (Jan. 22, 2019), <http://www.startribune.com/measure-allowing-minnesota-homeowners-to-repudiate-racist-language-on-deeds-advances/504713512/> [https://perma.cc/2T5Z-87Z7]; Elliot Njus, *Racist Restrictions Linger in Property Deeds, and Historians Want Help Finding Them*, OREGONIAN (May 22, 2018), [https://www.oregonlive.com/expo/erry-2018/05/fcd13cb4387071/racist\\_restrictions\\_now\\_illega.html](https://www.oregonlive.com/expo/erry-2018/05/fcd13cb4387071/racist_restrictions_now_illega.html) [https://perma.cc/M5LF-ED5G]; Thomas, *supra* note 4; Opinion, *Racist Deeds Part of Ugly History*, COLUMBUS DISPATCH (July 27, 2016), <https://www.dispatch.com/content/stories/editorials/2016/07/27/racist-deeds-part-of-ugly-history.html> [https://perma.cc/Q24A-HY6X].

<sup>9</sup> See Furst, *supra* note 8; Njus, *supra* note 8; Editorial, *Here's Why Getting Rid of Unenforceable Racial Housing Covenants Matters*, BALTIMORE SUN (Sept. 14, 2017), <https://www.baltimoresun.com/news/opinion/editorial/bs-ed-0915-racial-covenants-20170913-story.html> [https://perma.cc/72CQ-H4U2]; Thomas, *supra* note 4; Opinion, *supra* note 8.

<sup>10</sup> See, e.g., S. 1844, 2013–2014 Leg., Reg. Sess. (N.Y. 2013); CAL. GOV'T CODE §§ 12956.1–2 (West 2019); COLO. REV. STAT. § 38-30-169 (2019).

covenants containing racist language through the courts in *Mason v. Adams County Recorder*.<sup>11</sup>

There are, no doubt, many valid reasons for wishing to remove this antiquated, offensive language from real, functioning legal documents. For some, such as Darryl Mason, these racially restrictive covenants “creat[e] a . . . feeling that [non-Caucasians] are unwelcome . . . .”<sup>12</sup> Indeed, there are a myriad of examples besides language in a deed that demonstrate why non-white minorities might feel unwelcome; in Upper Arlington, a suburb of Columbus, Ohio, an unknown white jogger told an African-American man walking his dogs “I don’t trust black people with those dogs,” for seemingly no other reason than discomfort with an African-American man in his neighborhood.<sup>13</sup> This incident did not occur prior to *Shelley v. Kraemer*, nor prior to the Fair Housing Act of 1968, but in 2017, nearly fifty years after the Fair Housing Act’s passage.<sup>14</sup> It is understandable that seeing racist language in the deed to one’s home could exacerbate this feeling of being an outsider.

However, removing this language is no simple task. Some skeptics note that this process would “require [county] recorders to make their own interpretation of what’s offensive” if they go about redacting documents.<sup>15</sup> There is also the extremely burdensome administrative and economic aspect of filing through thousands of deeds written prior to the Fair Housing Act, and going through the process of editing the document so that the language is rewritten or censored.<sup>16</sup> Still other skeptics worry that this part of history, while not something to be proud of, is part of history nonetheless, and “it shouldn’t be whitewashed.”<sup>17</sup>

In any case, Ohio has signaled that the unenforceable restrictive covenants will remain part of the record for the foreseeable future, as any potential remedy from the legislature or the judiciary has failed to

---

<sup>11</sup> See *Mason v. Adams Cty. Recorder*, 901 F.3d 753 (6th Cir. 2018).

<sup>12</sup> *Id.* at 755.

<sup>13</sup> Editorial, *Inclusion Movement Grows in Upper Arlington*, COLUMBUS DISPATCH (Jan. 19, 2018), <https://www.dispatch.com/opinion/20180119/editorial-inclusion-movement-grows-in-upper-arlington> [<https://perma.cc/PXM4-YAPE>].

<sup>14</sup> *Id.*

<sup>15</sup> Opinion, *supra* note 8.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

materialize.<sup>18</sup> The purpose of this article is to examine why attempts to remove racially restrictive covenants have so far been stalled in Ohio and to evaluate the arguments both in favor of and against implementation of such a plan. This article will then briefly explore other ways to address the housing discrimination that undoubtedly has survived beyond the days of restrictive covenants being enforced by the state of Ohio. Attacking housing discrimination achieved through means other than racially restrictive covenants would be a more effective way to assure more equitable housing in 2020.

## II. A BRIEF HISTORY

Before discussing how racially restrictive covenants came to be unenforceable, it is helpful to first examine how they came to be so common in America and specifically what they restricted. In the early twentieth century, “[d]evelopers of [affluent] residential areas began to use them regularly,” in addition to restrictive covenants that controlled other matters such as land use.<sup>19</sup> These “formal, legal route[s] to enforce residential segregation . . . flourished in new subdivisions and . . . neighborhoods” over the first half of the twentieth century, aided in their implementation “by real estate professionals, banking institutions, and . . . [even] the New Deal’s Federal Housing Administration.”<sup>20</sup> A good example of the language contained in these covenants lies in *Shelley v. Kraemer*, the very case that invalidated them.<sup>21</sup> The provision at issue there limited occupancy of the property to those of the Caucasian race, and specifically prohibited “people of the Negro or Mongolian Race” from occupying the premises for any period of time.<sup>22</sup>

As stated above, since the implementation and proliferation of these devices known as racially restrictive covenants, there have been a number of developments in removing the state as an active player in discriminatory housing practices. The mechanics and legal arguments of the decision in

---

<sup>18</sup> *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 755 (6th Cir. 2018) (affirming the lower court’s conclusion that the plaintiff lacked standing to challenge the unenforceable restrictive covenants under the Fair Housing Act). No legislation has been successful in the Ohio General Assembly that could retroactively alter deeds containing unenforceable restrictive covenants.

<sup>19</sup> RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD* 3 (2013).

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *See Shelley v. Kraemer*, 334 U.S. 1, 4–5 (1948).

<sup>22</sup> *Id.*

*Shelley v. Kraemer*, the Fair Housing Act, the Supreme Court of Ohio's decision in *Porter v. Oberlin*, and Ohio's statute prohibiting racial discrimination are examined in this section.

A. *Shelley v. Kraemer: The First Step Away from Discrimination Enforced by the State*

Prior to the Supreme Court's opinion in *Shelley v. Kraemer*, the Supreme Court of Missouri upheld the enforcement of the restrictive covenant at issue.<sup>23</sup> The restrictive covenant in this case was formed in 1911.<sup>24</sup> Of the thirty-nine property owners in the affected area, thirty owners endorsed the agreement.<sup>25</sup> The language of interest in "[t]he agreement, which was duly recorded in the office of the Recorder of Deeds," read:

[N]o part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purposes by people of the Negro or Mongolian Race.<sup>26</sup>

Although there were African-American property owners in this neighborhood at the time of the agreement's inception, the record shows no attempt to enforce the agreement against those owners.<sup>27</sup> The property known as 4600 Labadie Avenue was eventually sold through a real estate firm to a white buyer acting as a straw party, and then transferred to the Shelley family.<sup>28</sup>

Interestingly, before this case proceeded to the Supreme Court of Missouri, the lower court decided in favor of the Shelley family, finding that the restrictions were invalid.<sup>29</sup> However, in coming to this conclusion, the Circuit Court of St. Louis reasoned that the agreement never became "final and complete" because some owners of parcels affected by the agreement

---

<sup>23</sup> *Kraemer v. Shelley*, 198 S.W.2d 679, 683 (Mo. 1946).

<sup>24</sup> *Id.* at 680.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 680–81.

<sup>27</sup> *Id.* at 680.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

failed to sign it, making it unenforceable.<sup>30</sup> In reversing this decision, the Supreme Court of Missouri not only disagreed with the lower court's reasoning in dismissing the complaint, but went so far as to state that the court's enforcement of a facially discriminatory agreement does not amount to state action, and is accordingly out of reach of the Fourteenth Amendment's protections.<sup>31</sup>

The Supreme Court of the United States granted certiorari, and penned an opinion that appreciably expanded the reach of the Fourteenth Amendment by way of expanding the definition of what constitutes state action.<sup>32</sup> Reversing the Supreme Court of Missouri's decision, the Court reasoned that state action might occur through different agencies, be it legislative, executive, or judicial in nature.<sup>33</sup> It follows, the Court said, that state courts must "enforce property interests . . . within the boundaries defined by the Fourteenth Amendment"; an agreement dictating who may purchase property based on their race was no longer enforceable.<sup>34</sup>

#### *B. The Fair Housing Act*

The Fair Housing Act was conceived following the landmark implementation of the Civil Rights Act of 1964.<sup>35</sup> Although Congress initially failed to garner enough support to pass it, the assassination of a strong proponent of the bill, Dr. Martin Luther King, Jr., pushed it over the threshold needed in the House of Representatives.<sup>36</sup> After the Senate passed the Act without debate, President Lyndon B. Johnson signed the Act on April 11, 1968.<sup>37</sup>

The opening provision of the Fair Housing Act stated that "[i]t is the policy of the United States to provide, within constitutional limitations, fair housing throughout the" country.<sup>38</sup> The mechanics of the Act went further

---

<sup>30</sup> *Id.* at 681.

<sup>31</sup> *Id.* at 683.

<sup>32</sup> Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 31–32 (2016).

<sup>33</sup> *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

<sup>34</sup> *Id.* at 22.

<sup>35</sup> *History of Fair Housing*, U.S. DEP'T HOUSING & URB. DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/aboutfheo/history](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history) [<https://perma.cc/2RLF-9WBA>] (last visited Apr. 11, 2020).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81.

than the protections offered in *Shelley v. Kraemer* by deeming it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer . . . [of] a dwelling to any person because of race, color, religion, or national origin.”<sup>39</sup> As it stands today, the Act goes further, making it unlawful to advertise “with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on” the above classifications.<sup>40</sup> The Fair Housing Act grants the authority to enforce the Act to the Secretary of Housing and Urban Development through the findings of an administrative law judge,<sup>41</sup> to private individuals through civil action,<sup>42</sup> and to the United States Attorneys General.<sup>43</sup> The Act adds separate penalties for those found to have, with a discriminatory purpose, intimidated potential buyers or renters of property.<sup>44</sup>

In a matter of just over twenty years, federal protections against housing discrimination went from considering restrictive covenants a valid exercise of constitutional freedom of contract, to barring state courts from enforcing these covenants, to making it a federal offense to even write race-based restrictive covenants into or a deed or post advertisements favoring buyers of one race over another. Put another way, the Supreme Court rendered racist restrictive covenants powerless; Congress made it unlawful to write them in the first place.

### C. Porter v. Oberlin: *Ohio’s Pursuit of Fair Housing Through the Judiciary*

In 1965, the Supreme Court of Ohio decided a case that applied the Fourteenth Amendment as interpreted in *Shelley v. Kraemer* and expanded the guarantee of equal protection contained in the constitution of Ohio (Section 2, Article I).<sup>45</sup> “The ordinance [challenged in the Ohio case] ma[de] it a crime . . . for an owner of five or more dwelling units in [the city of] Oberlin ‘to discriminate against any potential buyer or renter purely because of race, creed or color . . . .’”<sup>46</sup> As defined in the ordinance, “dwelling unit” could be “a single room, [a] suite of rooms, or an apartment or a dwelling,

---

<sup>39</sup> *Id.* at 83.

<sup>40</sup> 42 U.S.C. § 3604(c) (2018).

<sup>41</sup> 42 U.S.C. § 3612(b) (2018).

<sup>42</sup> 42 U.S.C. § 3613(a) (2018).

<sup>43</sup> 42 U.S.C. § 3614(a) (2018).

<sup>44</sup> 42 U.S.C. § 3631 (2018).

<sup>45</sup> *Porter v. Oberlin*, 205 N.E.2d 363, 369 (Ohio 1965).

<sup>46</sup> *Id.* at 365.

occupied or intended for occupancy as separate living quarters . . . .”<sup>47</sup> The plaintiff seeking to invalidate the law was successful in the court of common pleas, which found that “the ordinance [was] unconstitutional and enjoined its enforcement.”<sup>48</sup> Specifically, the trial court held that the “ordinance ‘impose[d] restrictions on [the] freedom to dispose of . . . property by sale or lease,’ which constituted an ‘invasion by an Ohio city into the field of regulating private housing under the guise of constitutional home rule,’ having ‘no . . . relation to public health, morals, safety or welfare . . . .’”<sup>49</sup>

After the court of appeals reversed, finding the ordinance constitutional in its entirety, the Supreme Court of Ohio took the case and upheld the ordinance, but deemed the enforcement procedure ordered by the court of appeals unconstitutional.<sup>50</sup> The Supreme Court of Ohio’s reasoning for invalidating the enforcement provision is in the concurring opinion.<sup>51</sup> Because the Ohio constitution grants judicial power to specific named courts and allows the Ohio General Assembly to establish courts, municipalities lack the authority to create courts and exercise judicial power.<sup>52</sup> Applying this ruling to Oberlin’s ordinance, the court held that the council created by the ordinance was exercising judicial authority by determining whether to pursue or dismiss a complaint of housing discrimination.<sup>53</sup> However, in upholding the lower court’s finding that the rest of the ordinance was constitutional, the Supreme Court of Ohio set a precedent establishing that a legislative body is within its constitutional bounds in enacting an ordinance that seeks to address housing inequality by treating those who own five or more dwelling units different than those who own fewer than five dwelling units, as the former owner is a more dangerous threat to potential targets of discrimination than the latter owner.<sup>54</sup> With this decision, the Supreme Court of Ohio made it clear that preventing race-based discrimination in the context of selling and renting property is not an interference with the “right to acquire, or possess property,” but is a guarantee of that principle for all

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Porter v. Oberlin*, 209 N.E.2d 629, 630 (Ohio Ct. App. 1964).

<sup>50</sup> *Porter*, 205 N.E.2d at 370–71.

<sup>51</sup> *Id.* at 371 (Guernsey, J., concurring).

<sup>52</sup> *Id.* at 371 (citing *State, ex rel. Cherrington, Pros. Atty. v. Hutsinpillar*, 147 N.E. 647 (1925)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 369–70 (Taft, J., majority).

who seek to own property, as well as another step toward equal protection realized.<sup>55</sup>

*D. Ohio's Statutory Protections Against Housing Discrimination*

Today, the Ohio Revised Code makes it unlawful for anyone “to [r]efuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodation, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, military status, familial status, ancestry, disability, or national origin . . . .”<sup>56</sup> However, when this section of the Revised Code was first enacted in 1959, it was substantially slimmer. While it outlawed discrimination in a number of ways within the realm of employment, it offered no such explicit protection in the transaction of buying or renting property.<sup>57</sup> It was not until 1969 (notably, the year after passage of the federal Fair Housing Act) that the Ohio legislature added an explicit prohibition of discrimination on the basis of race (as well as a number of other classifications) in the selling and renting of housing.<sup>58</sup>

As detailed above, in the decades surrounding the turbulent era of the Civil Rights Movement, protections against housing discrimination were substantially increased at both the state and federal level. One way that proponents of this movement made progress was through the judiciary, where the equal protection clauses contained in both the Ohio and United States constitutions were applied, deeming discriminatory language unenforceable and upholding municipal ordinances aimed at making housing more fair. Another way that this goal was furthered was through legislatures, which made it unlawful in the eyes of Ohio and the United States to even write restrictive covenants into agreements.

This was certainly not a case of a solution to a non-existent problem. On the contrary, the movement was brought to the forefront because of people like the Shelley family, who were the victims of their neighbors' prejudice. The restrictive covenants that created the need for this progress were rendered (and are still) powerless. There are many who see these as an ugly reminder of a less tolerant past. However, others believe they do more

---

<sup>55</sup> *Id.* at 366.

<sup>56</sup> OHIO REV. CODE ANN. § 4112.02(H)(1) (LexisNexis 2019).

<sup>57</sup> *See* S. 10, 103d Gen. Assemb., Reg. Sess. (Ohio 1959).

<sup>58</sup> *See* H.R. 47, 108th Gen. Assemb., Reg. Sess. (Ohio 1969) (At that time, the legislature added race, color, national origin, religion, and ancestry to the classifications not to be used in housing transactions.).

damage than merely serve as a shameful memory. There's no doubt that their legal impact is long gone, but many argue that there is a lingering, peripheral impact that makes removing the unenforceable language worth the time, effort, and logistical costs associated with the process.

### III. REMOVING RESTRICTIVE COVENANTS: AN ARGUMENT IN FAVOR

Those in favor of removing racially restrictive covenants have succeeded neither judicially nor legislatively in Ohio.<sup>59</sup> However, proponents offer several valid points that are worth examination in order to come to a balanced conclusion. The first argument in favor of redaction of racially restrictive covenants is that the existence of this language might still be contributing to racial segregation. Second is the fact that the language is hurtful and offensive to many in society who should not have to see it. A third and final argument in favor of redaction is alleging that a recorder's office maintaining records of this sort amounts to state action. Upon examination of each of the three arguments, it is apparent that removal of the covenants is unlikely to succeed in knocking down the active societal barriers that are still keeping neighborhoods racially homogenous.

#### A. *Preservation of Segregation Despite Unenforceability*

One argument for removal is that, even without any enforceability, racially restrictive covenants encourage segregation. Some citizens of Baltimore, Maryland, have taken this position.<sup>60</sup> There, observers have noted that even though nearly seventy years have passed since the Supreme Court's decision in *Shelley v. Kraemer* rendered racially restrictive covenants unenforceable, the Baltimore neighborhood of Rodgers Forge (a neighborhood where many deeds contain restrictions banning non-whites from living there) remains about eighty-nine percent white, according to the 2010 census.<sup>61</sup> This statistic is even more persuasive when one considers that the percentage of white people living in Baltimore County (where Rodgers Forge is located) fell from seventy-four to sixty-four percent over the same period.<sup>62</sup> As housing prices are "relatively affordable," "crime is

---

<sup>59</sup> See *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 755 (6th Cir. 2018) (refusing to grant the plaintiff the remedy he sought); H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (proposed legislation in Ohio failed to progress through the Ohio General Assembly in 2017).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

rare,” and it is in an “excellent” location, these lingering restrictive covenants are offered as one possible cause for the continued segregation of Baltimore neighborhoods.<sup>63</sup> As the article gestures, “[l]egally enforceable covenants aren’t keeping minorities out of Rodgers Forge, but something is.”<sup>64</sup>

It’s easy in 2020 to forget the impact of these restrictive covenants. However, as they were “legal instruments, existing in official records, [they] took on the mantle of civic acceptability.”<sup>65</sup> This legality acknowledged by all in society “affected wider norms,” such as the idea “that minority neighbors would undermine . . . property values,” and that it was the responsibility of white property owners to ensure that such a thing did not happen.<sup>66</sup> These covenants were on shaky legal ground to begin with, as Anglo-American property law has generally favored free alienability of land, but their temporary existence in the American property law landscape (at their peak, roughly from 1910 to 1940) was long enough for the normative damage to be done.<sup>67</sup> Minority presence continues to correlate with decreased demand today, despite lawmakers’ efforts to reverse the correlation.<sup>68</sup> Today, the remaining language serves as a perpetual reminder of a past fraught with racially restrictive covenants, and remains within “the halls of the Recorder of Deeds.”<sup>69</sup> However, it is hard to show how the unenforceable language’s continued presence itself is maintaining racial homogeneity.

#### *B. A Hurtful Reminder of a Racist Past*

When Darryl Mason filed his complaint against the Adams County Recorder, he “included copies of [twenty-nine] land records . . . that contain[ed] racially restrictive covenants.”<sup>70</sup> Mr. Mason alleged that this language had “discouraged [him] and others from purchasing real estate [with] restrictive covenants” in the record, due to “a feeling [of being] unwelcome . . . in certain neighborhoods.”<sup>71</sup> It cannot be argued that this

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> BROOKS & ROSE, *supra* note 19, at 211.

<sup>66</sup> *Id.* at 212.

<sup>67</sup> *Id.* at 213–14.

<sup>68</sup> *See id.* at 214–18.

<sup>69</sup> *See id.* at 218.

<sup>70</sup> *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 755 (6th Cir. 2018).

<sup>71</sup> *Id.*

practice of writing racially restrictive covenants into property deeds was limited in prevalence; on the contrary, all twenty-nine of the examples cited by Mr. Mason were from different counties across Southwest Ohio.<sup>72</sup> The district court granted the defendants' motion to dismiss, stating that Mr. "Mason lacked standing for three reasons."<sup>73</sup> First, Mr. Mason was unable to show that he suffered an actual injury.<sup>74</sup> Second, the defendants named in the complaint (the county recorders) were not the cause of the alleged injury.<sup>75</sup> Third, the county recorders were unable to "redress the alleged harm, as they [lacked the] statutory authority to" alter documents they maintain.<sup>76</sup>

The Sixth Circuit agreed with the district court's finding that Mr. Mason failed to meet all three prongs required to achieve standing.<sup>77</sup> However, the concurring opinion (which agreed that Mr. Mason had not demonstrated a cognizable injury) recognized that, although the facts of the case at hand were not sufficient to find an injury, it was fathomable for one to claim injury arising out of "such racially discriminatory language, especially under circumstances that implicate governmental instrumentalities."<sup>78</sup>

Outside of the judicial opinions analyzing Mr. Mason's complaint, the unenforceable language isn't thought to be so benign. Zachary Gottesman, the attorney representing Darryl Mason in the action seeking to redact racially restrictive covenants, represented another plaintiff in a similar lawsuit in 2002.<sup>79</sup> In that action, Anthony Stevens was a buyer of property who was told by a real-estate agent to ignore the covenant excluding African-Americans from the property.<sup>80</sup> After he filed suit, the real-estate company settled with Mr. Stevens.<sup>81</sup> Although it's unknown whether the

---

<sup>72</sup> *Mason v. Adams Cty. Recorder*, No. 1:2016-CV-755 (WOB), 2017 U.S. Dist. LEXIS 71330, at \*5 (S.D. Ohio May 10, 2017).

<sup>73</sup> *See* *Mason*, 901 F.3d at 755.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 756.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 757.

<sup>78</sup> *Id.* at 758 (Clay, J., concurring).

<sup>79</sup> Earl Rinehart, *Lawyer Wants Racist, Pre-Fair Housing Act Language Removed From Real Estate Documents*, COLUMBUS DISPATCH (July 24, 2016), <https://www.dispatch.com/content/stories/local/2016/07/25/attorney-seeks-redaction-of-racist-statements-real-estate-documents.html> [https://perma.cc/BAB7-4RU9].

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

settlement was motivated by a belief that Mr. Stevens had a chance at winning a favorable outcome, or by a desire to avoid a public reminder of the real-estate company's tactless handling of a transaction, this suggests that the insult creates an injury that is more than purely nominal.

In Franklin County, there was special attention paid to lingering racially restrictive covenants and their impact on property inhabitants.<sup>82</sup> Franklin County Recorder Daniel O'Connor joined a legislative effort to remove offensive language from deeds.<sup>83</sup> The proposed legislation could have impacted five thousand deeds in Franklin County alone.<sup>84</sup> As Mr. O'Connor said, "[w]ords and symbols can have a harmful effect."<sup>85</sup> State Representative Hearcel Craig, who championed the proposed legislation,<sup>86</sup> believed that the preservation of "[s]uch language . . . undermines progress the community has made in addressing racial issues."<sup>87</sup> However, the most illustrative tool in showing that this language is hurtful comes from those seeking to remove it themselves. Gregory Lestini purchased a home in Bexley, Ohio, and discovered the deed to the property contained "offensive" language.<sup>88</sup> As Mr. Lestini frankly put it, "[t]hat's not part of the history (I want) of buying my dream house . . ."<sup>89</sup> If legislation enabling Ohioans to redact racially restrictive covenants is to be enacted, it should be for this reason; removing the negative emotional impact the covenants have on people is a sufficient justification. However, it is paramount to understand that relieving this negative emotional impact is the only goal such legislation can hope to achieve. The idea that redacting unenforceable racially

---

<sup>82</sup> See Kimball Perry, *Outdated, Discriminatory Deed Restrictions Could be Struck From Online Versions in Ohio*, COLUMBUS DISPATCH (Sept. 25, 2017), <https://www.dispatch.com/news/20170925/outdated-discriminatory-deed-restrictions-could-be-struck-from-online-versions-in-ohio?rssfeed=true> [https://perma.cc/T8Z5-72NF].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Although the legislation was proposed in 2017, it was not moved further along in the General Assembly. *Status: House Bill 412*, OHIO LEGISLATURE, <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-HB-412> [https://perma.cc/K4UL-H7WN] (last visited Apr. 11, 2020). As of the writing of this article, there is no publicized effort to reintroduce this legislation.

<sup>87</sup> See Perry, *supra* note 82.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

restrictive covenants would somehow alleviate actual housing discrimination, as is discussed further below, is unrealistic wishful thinking.

*C. Recorder's Office as "State Action"*

One of the more novel legal arguments for removing racially restrictive covenants from the recording system is by arguing that the county recorder maintaining records with unenforceable, unconstitutional language amounts to state action, in line with the logic behind the decision in *Shelley v. Kraemer*.<sup>90</sup> In support of this idea is the fact that a recorder is a public official, and a recorder's "stamp is [required] for inclusion in the public records."<sup>91</sup> Further, "the Fair Housing Act ma[kes] it illegal 'to make, print, or publish . . . any . . . statement . . . with respect to the sale or rental of a dwelling that indicates any preference . . . or discrimination based on race, color, religion, or national origin . . .'"<sup>92</sup> Although this view of a recorder's responsibilities as state action ultimately failed in the courts (as is discussed further below), it is important to note that a line has been drawn between the conduct of a court and the conduct of a county recorder as far as what constitutes state action for purposes of the Fourteenth Amendment.<sup>93</sup>

In *Mayers v. Ridley*, the plaintiffs owned houses with racially restrictive covenants in the historical deed.<sup>94</sup> They filed suit "against the Recorder of Deeds and the Commissioner of the District of Columbia, . . . alleg[ing] that the Recorder's action[ of] accepting . . . and maintaining" a record containing this unenforceable language constituted state action, and thus, following the logic in *Shelley v. Kraemer*, a violation of their due process guarantees guarded by the Fifth Amendment<sup>95</sup>, as well as a violation of the Fair Housing Act.<sup>96</sup> The D.C. Circuit Court of Appeals rejected this argument, holding that the recorder's action of maintaining records with racially restrictive covenants was not state action, as it lacked affirmative action of the state in developing or maintaining a list classifying individuals

---

<sup>90</sup> BROOKS & ROSE, *supra* note 19, at 218–20.

<sup>91</sup> *Id.* at 220.

<sup>92</sup> *Id.* at 221.

<sup>93</sup> See *Mayers v. Ridley*, 465 F.2d 630, 659 (D.C. Cir. 1972) (Tamm, L., dissenting).

<sup>94</sup> *Id.* at 655 (Skelly Wright, J., majority).

<sup>95</sup> As the suit was filed in Washington, D.C., the Fifth Amendment applied, as opposed to the Fourteenth Amendment, which applies when one of the fifty states is the actor. See *id.* at 657.

<sup>96</sup> *Id.*

by race.<sup>97</sup> But the argument that a county recorder's official actions amount to state action is not totally without merit; the D.C. Circuit was not unanimous in their decision of *Mayers*,<sup>98</sup> and the majority conceded that "it is no easy matter to determine where 'action of the State' leaves off and '[i]ndividual invasion of individual rights' begins."<sup>99</sup>

#### IV. REMOVING RESTRICTIVE COVENANTS: AN ARGUMENT AGAINST

Thus far, the widespread redaction of racially restrictive covenants in deeds has not succeeded in the United States.<sup>100</sup> This reluctance can be divided into four separate but related objections that have been raised in the national discussion surrounding this topic. First, opposition is largely fueled by a concern that a mistake might be made in the redaction process, which would have real-world, potentially devastating impacts.<sup>101</sup> Proposed legislation in Ohio would have created an option for property owners to submit a form which, if accepted, would have allowed the county recorder to change what is presented online.<sup>102</sup> This brings about the second concern, which is the worry that those looking up the deed to their property online cannot be sure that what they see on the screen matches what is physically filed with the county recorder.<sup>103</sup> Third, in the face of judicial challenges, courts have consistently held that the lingering language does not warrant a cognizable injury.<sup>104</sup> This means a plaintiff lacks standing, and a judicial remedy is not warranted.<sup>105</sup> Finally, there is the idea that action such as this rewrites history, removing parts of our past that not everyone is ready to forget.<sup>106</sup> The concerns voiced by those in opposition to an ability to remove racially restrictive covenants are convincing.

---

<sup>97</sup> *Id.* at 659–60.

<sup>98</sup> *See id.* at 661 (MacKinnon, J., dissenting).

<sup>99</sup> *Id.* at 637 (Skelly Wright, J., majority).

<sup>100</sup> Motoko Rich, *Restrictive Covenants Stubbornly Stay on the Books*, N.Y. TIMES (Apr. 21, 2005), <https://www.nytimes.com/2005/04/21/garden/restrictive-covenants-stubbornly-stay-on-the-books.html> [https://perma.cc/7EZ7-5DYT].

<sup>101</sup> *See* Opinion, *supra* note 8.

<sup>102</sup> H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

<sup>103</sup> *See* Opinion, *supra* note 8.

<sup>104</sup> *See* *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 757 (6th Cir. 2018).

<sup>105</sup> *Id.*

<sup>106</sup> *See* Perry, *supra* note 82.

*A. Avoiding Erroneous Redactions*

As former Franklin County Auditor Terry Brown noted, there is the possibility of a mistake occurring during this redaction process, perhaps such as removing a relevant portion of a deed not related to racial discrimination.<sup>107</sup> The proposed legislation in Ohio addressed this possibility explicitly by shielding the county recorder from liability: “[i]f, under this section, the attorney, title insurance company or agent, or homeowner of record causes to be recorded a modification form and attachments that contain modifications not authorized by this section, the county recorder shall not incur liability for recording the modification form and attachments.”<sup>108</sup> The proposed statute goes on to make clear that “liability . . . is the sole responsibility of the person who cause[s]” the mistake.<sup>109</sup>

For purposes of this proposed legislation, the odds of a material mistake are slim, as the law would have only empowered people to petition the recorder’s office to redact the offensive language that fits the definition of a “discriminatory covenant.”<sup>110</sup> Most people are unaware of “racially restrictive covenants in their deeds.”<sup>111</sup> Buyers “rarely see the original deed and real estate attorneys hardly ever point out the . . . restriction.”<sup>112</sup> Furthermore, because of the Fair Housing Act, this is only an issue with deeds recorded prior to 1968, twenty years after *Shelley* rendered the restrictions unenforceable.<sup>113</sup> It follows that, if enacted, legislation like that proposed in Ohio would create an insufficient volume of redactions to assume that an error is inevitable, as the only redactions a recorder’s office would be required to execute are those that are for deeds where: the recording occurred prior to 1968; the owner or inhabitant knows of the offensive language; the recorder’s office finds the language to fit its definition of a “discriminatory covenant”; and the owner or inhabitant

---

<sup>107</sup> See Opinion, *supra* note 8.

<sup>108</sup> H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Julie Rose, *Hidden in Old Home Deeds, A Segregationist Past*, NAT’L PUB. RADIO (Feb. 6, 2010), <https://www.npr.org/templates/story/story.php?storyId=122484215> [<https://perma.cc/W5VS-JQU8>].

<sup>112</sup> *Id.*

<sup>113</sup> Fair Housing Act, 42 U.S.C. § 3604 (2018); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

actually wants the language redacted.<sup>114</sup> While there are obviously cases where all of these requirements are met,<sup>115</sup> it is unlikely that the amount of requests would overwhelm a recorder's office, leading to an erroneous redaction. In other states where similar legislation has allowed people to redact racially restrictive covenants if they wish to, there are no signs of overwhelming, unorganized backlogs of requests.<sup>116</sup>

Another matter entirely is the kind of relief sought by Darryl Mason.<sup>117</sup> In that case, the plaintiff sought "injunctive relief to compel all Ohio county recorders . . . to remove all . . . records" containing racially restrictive covenants "from public view," with the eventual redaction of racially restrictive covenants.<sup>118</sup> The implications of a decision like this are wide-reaching; a single county recorder's office might have hundreds of thousands of deeds that were recorded prior to 1968, many of which are handwritten and thus incompatible with software used to search documents for specific language. Franklin County officials have voiced concerns surrounding the sheer volume of potential redactions.<sup>119</sup> Former Franklin County Auditor Terry Brown stated that he doesn't think it practical to complete what Mr. Mason sought in his action.<sup>120</sup> Old deeds are contained "in massive bound volumes in the . . . Recorder's Office."<sup>121</sup> Would a redaction order require workers to go through these volumes armed with black tape?<sup>122</sup> The logistics of such a process would amount to "a monumental task."<sup>123</sup> Simple math is enlightening; if a worker searched,

---

<sup>114</sup> See H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

<sup>115</sup> See *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 755 (6th Cir. 2018).

<sup>116</sup> California enacted CAL. GOV. CODE § 12956.2 (West 2020) in 1980, which provides people with an ownership interest in a property subject to an unenforceable restrictive covenant an avenue to redact the language. While there is scant information on the utilization of this law, the only material amendments made to the law since its implementation in 1980 have *added* to the number of potential claimants. As California has offered more protections against discrimination based on traits such as sexual orientation, gender identity, and genetic information, these have been added to the list of reasons a property owner can lawfully seek a redaction of previously enforceable but since powerless restrictive covenants.

<sup>117</sup> See *Mason*, 901 F.3d at 755.

<sup>118</sup> *Id.*

<sup>119</sup> See Opinion, *supra* note 8.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

read through, and redacted (where needed) “[twenty-five deeds] a day, it would take 258 years to” get through Franklin County’s approximately 2.4 million deeds.<sup>124</sup> It’s not hard to imagine mistakes running rampant in an operation like this.

In conclusion, the administrative burden of a process where an owner or inhabitant of property may, by request, seek a redaction of language in a deed might be substantial, but is an attainable task.<sup>125</sup> On the other hand, the administrative burden of all property deeds having unenforceable restrictive covenants removed, regardless of the owner or inhabitant’s wishes, invites opportunity for material errors and comes with a heavy price tag.<sup>126</sup>

### *B. Conflicting Versions of Title Records*

Among the responsibilities of a county recorder as laid out in the Ohio Revised Code, it is explicitly stated that “[t]he county recorder shall record all instruments in one general record series to be known as the ‘official records.’”<sup>127</sup> The legislation sponsored by Representative Hearcel Craig would have allowed the removal of “discriminatory covenant[s] from view by the general public on the internet.”<sup>128</sup> Thus, if this legislation had taken effect, what one saw when they viewed their deed online might have differed from what would be visible if one were to go to the county recorder’s office and view the deed in person. The Revised Code as it stands today enumerates exactly which records a county recorder is mandated to maintain.<sup>129</sup> Nowhere in Chapter 317 of the Revised Code (which governs county recorders) is it stated that deeds must be published online; a county recorder who posts records online does so as a courtesy.<sup>130</sup> However, the Hamilton County Recorder’s Office website has a notice at the bottom of the page stating that “[r]ecords contained online are the same records available on computer in the Recorder’s Office.”<sup>131</sup> Notices like this might

---

<sup>124</sup> *Id.*

<sup>125</sup> See Perry, *supra* note 82.

<sup>126</sup> See Opinion, *supra* note 8.

<sup>127</sup> OHIO REV. CODE ANN. § 317.08(A) (LexisNexis 2019).

<sup>128</sup> H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

<sup>129</sup> OHIO REV. CODE ANN. § 317.08(A) (LexisNexis 2019).

<sup>130</sup> A search of the text of Chapter 317 of the Revised Code (which governs county recorders) does not contain the words “online,” “internet,” or “web.” OHIO REV. CODE ANN. § 317 (LexisNexis 2019).

<sup>131</sup> NORBERT A. NADEL HAMILTON COUNTY RECORDER, <https://recordersoffice.hamilton-co.org> [https://perma.cc/G249-BWCM] (last visited Apr. 11, 2020).

have to be adjusted under a system where occupants of property are able to alter the record that is visible online. The ability to access records online has no doubt been an improvement, increasing the speed with which transactions can occur. However, these advantages only exist when those utilizing the online tool can be absolutely certain that what they are seeing online is an exact match with the document that is physically in the recorder's office. As an illustration of this concept, in a proceeding involving a discrepancy between the name of a home purchaser as written on the deed and the title insurance policy, the Court of Appeals of Ohio, Ninth Appellate District denied the title insurance company relief because they "could have verified that it had a valid lien on the property by performing a title search on the Stark County Recorder's Office website . . . ."<sup>132</sup> While this might be an extreme example, the general principle that those seeking it should have access to "an accurate, certified copy of any record in the recorder's office"<sup>133</sup> is not well served by any law that allows records that are shown online (the means by which people verify records with an increasing frequency) to differ in any way from those on file in the recorder's office.

It is necessary to note here that this would not be the only situation in which county recorders redact information online. In 2006, the Ohio General Assembly passed legislation enabling a county recorder to immediately redact an "individual's personal information" from a document filed with the office.<sup>134</sup> The General Assembly has, in this case, found reason to create a public version of a document that might differ from what is actually on record, but it is limited to redacting "personal information."<sup>135</sup> It is not too much of a stretch to imagine that, if all that is being redacted are provisions that have not been enforceable for decades, reliance on such redacted versions would still be practical. That being said, legislation mandating the removal of discriminatory language would both increase the amount of information being removed from public view and create a more subjective category of redactable language (when compared with social

---

<sup>132</sup> *First Merit Bank v. Guar. Title & Tr. Co.*, 2006-Ohio-3333, ¶ 15, No. 22894, 2006 Ohio App. LEXIS 3271, at \*15 (June 30, 2006).

<sup>133</sup> OHIO REV. CODE ANN. § 317.27 (LexisNexis 2019).

<sup>134</sup> OHIO REV. CODE ANN. § 317.082(B) (LexisNexis 2019).

<sup>135</sup> See H.R. 46, 127th Gen. Assemb., Reg. Sess. (Ohio 2008).

security numbers or driver's license numbers, for example), creating possibilities for error.<sup>136</sup>

### C. *Lack of an Injury*

Those who have sought to redact racially restrictive covenants in deeds through court action have so far had no luck in Ohio.<sup>137</sup> In *Mason v. Adams County Recorder*, the Sixth Circuit did not even get to the issue of whether a recorder's office's maintenance of records amounts to state action, because they found that the plaintiff lacked standing to sue the county.<sup>138</sup> The Sixth Circuit agreed with the reasoning of the district court and affirmed its finding that Mr. Mason lacked standing for three distinct reasons, which are addressed below.<sup>139</sup>

The constitutional test for standing contains three elements.<sup>140</sup> The first element requires that the plaintiff's injury be "concrete and particularized . . ." <sup>141</sup> The court found that Mr. Mason failed this first prong, because he did "not allege that he personally attempted to purchase, rent, or view any of the properties [containing] racially restrictive covenants" in their deeds.<sup>142</sup> Without a present intent to discriminate, Mr. Mason failed to demonstrate a particularized injury, even though precedent has required courts to construe standing in Fair Housing Act cases broadly.<sup>143</sup> The court found Mr. Mason's feeling that non-Caucasians are unwelcome in certain neighborhoods to be "the type of 'conjectural or

---

<sup>136</sup> There are many ways a racially restrictive covenant might be structured. For example, the recognized term applied to African-Americans has changed over time; an old deed might attempt to exclude African-Americans using these different, antiquated terms. A racially restrictive covenant could explicitly state its preference for one race, or it might do the same thing by prohibiting certain races. On the other hand, there is only one way to include a social security number in a recorded document; one cannot include this sensitive information by implication.

<sup>137</sup> See *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 757 (6th Cir. 2018).

<sup>138</sup> *Id.* at 755.

<sup>139</sup> *Id.*

<sup>140</sup> *Mason v. Adams Cty. Recorder*, No. 1:2016-CV-755, 2017 U.S. Dist. LEXIS 71330, at \*10 (S.D. Ohio May 10, 2017).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*11.

<sup>143</sup> *Id.* at \*11–12.

hypothetical' injury [that] the Supreme Court has said is insufficient to constitute an injury" for the purposes of standing.<sup>144</sup>

The court went on to apply the second prong of the constitutional standing test, concluding that the plaintiff failed that prong as well.<sup>145</sup> Mr. Mason could not establish that the party against whom he was filing suit was the cause of "any injury he suffered . . ."<sup>146</sup> The plaintiff filed suit against eighty-nine officials, as he was attempting to remove the language in all of Ohio's eighty-eight counties.<sup>147</sup> However, only thirty of these officials had "any connection[s] to the documents" of concern in the case, meaning fifty-nine of the defendants could not have possibly caused plaintiff's alleged injury.<sup>148</sup> Also preventing the plaintiff's claim from connecting an injury with the defendants was the fact that the "drafters of the documents" themselves caused any discouragement of non-white minorities from living in certain communities, as opposed to county recorders creating such discouragement.<sup>149</sup> Perhaps foreshadowing a court's inability to find state action, the court wrote that "the County Recorder did not create these documents or have any hand in incorporating the restrictive clause at issue."<sup>150</sup> Finally, the County Recorder's furnishing of the documents was actually caused by the Ohio legislature, as the recorder's office is a creature of statute.<sup>151</sup> It is the legislature who required county recorders to maintain these documents, the court reasoned.<sup>152</sup>

Mr. Mason failed the third and final prong of the standing test as well, according to the court.<sup>153</sup> That prong states that a "[p]laintiff must show that a favorable judicial ruling 'will remove the harm' he suffers."<sup>154</sup> The defendants in that case alleged that any relief provided by a court would fail to "alleviate any subjective feeling' of discouragement" experienced by the plaintiff when "reading . . . restrictive covenants."<sup>155</sup> Without addressing

---

<sup>144</sup> *Id.* at \*12.

<sup>145</sup> *Id.* at \*12–13.

<sup>146</sup> *Id.* at \*13.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at \*13–14.

<sup>152</sup> *Id.* at \*14.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* (quoting *Warth v. Sedlin*, 422 U.S. 490 (1975)).

<sup>155</sup> *Id.*

that contention directly, the court concluded that it lacked power to remedy the plaintiff's alleged injury, because the court cannot order the county recorder, a creature of statute, to redact documents after they have been filed.<sup>156</sup> Such action would go beyond the powers granted to county recorders by the legislature.<sup>157</sup>

The Sixth Circuit did suggest that Mr. Mason might have established sufficient economic injury, thus satisfying the first prong of the constitutional test for standing, had he been "interested in a property in a particular county," and, after examining records, "was discouraged from buying or renting a property" because of restrictive covenants contained in the historical deeds.<sup>158</sup>

#### *D. A Whitewashing of History*

One final argument in favor of preserving the language in the record is that scrubbing an ugly history of racism clean might be one way of erasing history and forgetting the past. As the author of an opinion piece from *The Columbus Dispatch* penned, "[t]his is part of American history; [and] shouldn't be whitewashed."<sup>159</sup> More than just preserving history for history's sake, this type of record can be used "to educate the younger generation about the hard-won gains of the civil rights movement."<sup>160</sup>

##### 1. *Mason v. Adams County Recorder Revisited*

The Sixth Circuit eloquently stated the importance of remembering past evils in order to observe the progression of society, and referred to ancient Rome as an illustration of the dangers of erasing history:

In ancient Rome, the practice of *damnatio memoriae*, or the condemnation of memory, could be imposed on felons whose very existence, including destruction of their human remains, would literally be erased from history for the crimes they had committed. Land title documents with racially restrictive covenants that we now find offensive, morally reprehensible, and repugnant cannot be subject to *damnatio memoriae*, as those documents are part of our

---

<sup>156</sup> *Id.* at 17.

<sup>157</sup> *Id.*

<sup>158</sup> See *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 756 (6th Cir. 2018).

<sup>159</sup> Opinion, *supra* note 8.

<sup>160</sup> *Id.*

living history and witness to the evolution of cultural norms.<sup>161</sup>

Rewriting history to sensitize the language is counter-productive.<sup>162</sup> “[S]anitiz[ing] American history is to deny [that] issues [like] slavery and gender inequality” have ever occurred.<sup>163</sup> It is difficult to “expect future generations” of Americans to learn from the mistakes of those that came before if all they are given is “a watered-down version of history[.]”<sup>164</sup>

## 2. *The Jim Crow Museum*

Preserving history that many others want to forget is the motivation behind the creator of a shocking and eye-opening project known as the Jim Crow Museum.<sup>165</sup> David Pilgrim founded the Jim Crow Museum, located at Ferris State University, in the hopes that objects of racial intolerance could be used to teach about race, race relations, and racism, with the ultimate goal being less racism.<sup>166</sup> The museum uses racist objects, once common and accepted by society, “to facilitate a deeper understanding of historical and contemporary patterns and expressions of racism.”<sup>167</sup>

The societal effort to forget a past we are not proud of is not lost on Pilgrim. As he notes, “[t]here is a growing desire among many Americans to forget the past and move forward.”<sup>168</sup> But, Pilgrim argues, not talking about historical racism does not make it go away; “[t]he United States remains a nation residentially segregated by race.”<sup>169</sup> Pilgrim believes that the way to actually move society away from its ugly, racist history “is to confront the historical and contemporary expressions of racism, and to do so in a setting where attitudes, values, and behaviors are intelligently and civilly critiqued.”<sup>170</sup> Although much of his book explores racist memorabilia in the form of literature, figurines, and art, the book does not ignore racially

---

<sup>161</sup> *Mason*, 901 F.3d at 757 (footnote omitted).

<sup>162</sup> Jeffrey S. Kinsler, *Politically Incorrect*, 48 SMU L. REV. 411, 421 (1995).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See DAVID PILGRIM, UNDERSTANDING JIM CROW: USING RACIST MEMORABILIA TO TEACH TOLERANCE AND PROMOTE SOCIAL JUSTICE (1st ed. 2015).

<sup>166</sup> *Id.* at 27.

<sup>167</sup> *Id.* at 172.

<sup>168</sup> *Id.* at 19.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

restrictive covenants as a product largely of the Jim Crow era.<sup>171</sup> “Most of the young people who visit the Jim Crow Museum have little or no knowledge about restrictive covenants, literacy tests, poll taxes, lynchings, and other oppressive features of the Jim Crow hierarchy.”<sup>172</sup> While there are undoubtedly differing opinions on whether it’s better for society to acknowledge a history fraught with racially restrictive covenants from behind museum glass, or through the actual documents in which they were originally recorded, one fact remains certain: the memory of the very real impacts that racially restrictive covenants had is fading with each generation.<sup>173</sup> In order to properly address these ills of society, we have to fully understand how they operated. Erasing offensive language from the public record hinders that progress.

### 3. *Shockoe Bottom*

A more somber illustration can be drawn from other examples of the difficult yet always relevant history of race in America. Shockoe Bottom in Richmond, Virginia, “function[ed largely] as [a] place of departure for enslaved Africans being sold,” destined for the Deep South during the era of American slavery.<sup>174</sup> Estimations are that “around a third of a million people were sold from Virginia, most of them [being] out of Shockoe Bottom”; thus, it is believed that “most African-Americans have some ancestors who

---

<sup>171</sup> *Id.* at 37.

<sup>172</sup> *Id.*

<sup>173</sup> It is useful here to note a recent analogy. A growing movement to remove Confederate statues has sparked controversy and debate throughout the country. See Meghan Keneally, *How Richmond is Addressing the Debate Over Confederate Monuments 1 Year After Charlottesville*, ABC NEWS (Aug. 3, 2018), <https://abcnews.go.com/US/richmond-addressing-debate-confederate-monuments-year-charlottesville/story?id=57009869> [https://perma.cc/G2NV-26ZW]. Some have noted that it would be more appropriate to relocate the statues to museums; this retains the historical value of the monuments without completely erasing them, while still stopping the “tyranny of the monuments’ permanent presence in public spaces.” See Maliha Ikram, *Long-Term Preservation of Public Art: From Cultural Heritage to the Confederacy*, 14 NW. J. L. & SOC. POL’Y 37, 85–86 (2018). If monuments on pedestals is one end of the spectrum, and artifacts in a museum is the other end, racially restrictive covenants are somewhere in the middle; they’re not in public parks for everyone to see, but they are visible in functioning, legal documents.

<sup>174</sup> Ana Edwards & Phil Wilayto, *The Significance of Richmond’s Shockoe Bottom: Why it’s the Wrong Place for a Baseball Stadium*, 15 AFR. DIASPORA ARCHAEOLOGY NEWSL. 5, 6 (2015).

passed through the auction houses and slave jails of Shockoe Bottom.”<sup>175</sup> As a place of “such cold, commercial brutality,” it has the potential to “become a place of understanding, of healing, of reconciliation born of a country finally facing the reality of its origins . . . .”<sup>176</sup> For this reason, activists resisted the transformation of the site into a baseball stadium as was proposed by the Mayor of Richmond.<sup>177</sup> Erasing hurtful language from racist deeds, drawn from the same historical ire, similarly allows a society to forget that the homes in which we live were not open to all a half-century ago.

## V. ADDITIONAL WAYS TO ADDRESS HOUSING DISCRIMINATION

As discussed above, “some [American] cities remain deeply segregated – even as the country itself becomes more diverse.”<sup>178</sup> Obviously, restrictive covenants are not being used by the courts to keep neighborhoods racially homogeneous, “but something is.”<sup>179</sup> In Columbus, Ohio, one study conducted by the National Community Reinvestment Coalition concluded that eighty-nine percent of what are considered Columbus’s “best” neighborhoods were ninety-one percent white.<sup>180</sup> If American cities want to get closer to achieving truly fair housing as envisioned by the Fair Housing Act, there are more effective solutions than allowing owners and occupiers to redact unenforceable racially restrictive covenants. Several of the continuing threats to fair housing and proposed solutions to mitigate them are explored briefly below.

### A. *Steering*

The United States Supreme Court has recognized “steering” as a practice by real-estate agents tending to encourage and preserve patterns of existing racial segregation by steering potential buyers toward neighborhoods largely

---

<sup>175</sup> *Id.* at 9.

<sup>176</sup> *Id.* at 11.

<sup>177</sup> *Id.*

<sup>178</sup> Aaron Williams, *America is more diverse than ever – but still segregated*, WASH. POST (May 10, 2018), <https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/> [https://perma.cc/6UFS-BGRV].

<sup>179</sup> See Editorial, *supra* note 9.

<sup>180</sup> Joel Oliphint, *Cover: The Roots of Columbus’ Ongoing Color Divide*, COLUMBUS ALIVE (June 22, 2018), <https://www.columbusalive.com/news/20180627/cover-roots-of-columbus-ongoing-color-divide> [https://perma.cc/BA9M-4UW9].

comprised of the same race and ethnicity as the buyer.<sup>181</sup> The Court found steering to be unlawful under the Fair Housing Act in *Havens Realty Corp. v. Coleman*, as it deprives potential buyers “of the benefits of interracial association arising from living in an integrated neighborhood.”<sup>182</sup> In that case, a realty company was telling African-American renters that there were no available apartments in particular apartment complexes while white renters were told there were apartments available in the same complexes.<sup>183</sup> The U.S. Department of Housing and Urban Development (HUD) concluded in 2000 “that, overall, ‘white homebuyers were significantly more likely than comparable blacks to be recommended and shown homes in more predominantly white neighborhoods.’”<sup>184</sup>

However, steering is not always as clear as an African-American renter or buyer falsely being told there are no vacancies. One example is a real-estate agent “accept[ing] the initial request[s made by a white buyer] as an accurate portrayal of [his] preferences, but adjust[ing] the initial request made by a[n African-American buyer] to conform to [the agent’s] preconceptions.”<sup>185</sup> In their 2000 study, HUD quoted one agent, who communicated to a buyer that an area was multicultural, and that the agent was prohibited from steering the buyer, but there were some areas the buyer “wouldn’t want to live in.”<sup>186</sup> According to the same study, white Americans “received favored treatment over African Americans [seventeen percent] of the time, and over Latinos approximately [twenty percent] of the time[; n]on-racial explanations for these patterns of differential treatment [have been] explored and rejected.”<sup>187</sup>

One proposed path forward in combating unlawful steering, which is fairly hard to detect, is an increase in resources at the Department of

---

<sup>181</sup> Michael B. de Leeuw, et al., *The Current State of Residential Segregation and Housing Discrimination: The United States’ Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 369 (2008).

<sup>182</sup> *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982).

<sup>183</sup> *Id.* at 368.

<sup>184</sup> de Leeuw, et al., *supra* note 181, at 370.

<sup>185</sup> *Id.* (citing Jan Ondrich et al., *Now You See It, Now You Don’t: Why Do Real Estate Agents Withhold Available Houses From Black Customers?*, 85 REV. ECON. & STAT. 854, 872 (2003)).

<sup>186</sup> *Id.* (quoting George Galster & Erin Godfre, *By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000*, 71 J. AM. PLAN. ASS’N 251, 262 (2005)).

<sup>187</sup> *Id.* at 371.

Justice.<sup>188</sup> Detection of steering can be best achieved through testing: two renters of differing race are sent to the same agent to see whether he treats them the same way.<sup>189</sup> Increased testing should be followed by concerted action by the DOJ; “the number of race-based housing and civil enforcement cases [must increase] to ensure that the [detected] violations . . . are remedied.”<sup>190</sup> Additionally, state and local governments might be able to alleviate this problem with efforts such as “[a]dopt[ing] inclusionary zoning ordinances,” which mandate that new developments provide “a certain amount of affordable housing . . . .”<sup>191</sup>

### *B. Discriminatory Lending in the Mortgage Industry*

Another area within housing where racial discrimination remains active is the mortgage industry. Private lenders in the mortgage industry wield immense power in controlling who is able to purchase homes, which may in turn have a significant negative impact on neighborhoods predominantly occupied by non-white minorities.

In 2000, where African-Americans and Latinos had home ownership rates under fifty percent, white Americans had a home ownership rate of seventy-six percent.<sup>192</sup> One likely explanation for these discrepancies lies in private lenders denying mortgages to African-Americans and Latinos at disproportionate rates.<sup>193</sup> Private lenders have discretion in approving loans, and this can manifest in unfavorable ways; “[l]oan officers [are] more likely to overlook flaws in . . . credit [scores] of white applicants or to arrange creative financing than they” are when working with African-American applicants.<sup>194</sup> “[W]hen people of color [do] obtain loans, they are more likely than [their] white[ counterparts] to receive higher cost . . . and subprime loans.”<sup>195</sup> This bias extends to the insurance industry, as quality homeowners insurance is often unavailable to those in neighborhoods composed predominantly of people of color.<sup>196</sup> All of these practices

---

<sup>188</sup> *Id.* at 384.

<sup>189</sup> *Id.* at 370.

<sup>190</sup> *Id.* at 384.

<sup>191</sup> *Id.* at 387.

<sup>192</sup> *Id.* at 371.

<sup>193</sup> *Id.* at 371–72.

<sup>194</sup> MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 139 (1995).

<sup>195</sup> de Leeuw, et al., *supra* note 181, at 372 (footnote omitted).

<sup>196</sup> *Id.*

combined have a detrimental impact on communities of color;<sup>197</sup> “[c]urbing minorities’ access to insurance markets and steering them towards home mortgage loans with more onerous terms has helped to perpetuate the wealth gap and harden patterns of racial segregation.”<sup>198</sup>

In this arena, the DOJ also has the potential to provide a remedy to victims of lending discrimination. “The federal government is better situated than are private individuals” to pursue relief through litigation, as the latter typically take the form of complicated class actions.<sup>199</sup> Strides toward a more equal lending industry have recently been made, such as the Consumer Financial Protection Bureau authority to draft regulations that prohibit “abusive or unfair lending practices that promote disparities among consumers of equal credit worthiness but of different race, ethnicity, gender, or age . . . .”<sup>200</sup> Some have even proposed amending lending discrimination laws to allow for criminal penalties, as the current remedy available is limited to monetary penalties under civil law.<sup>201</sup>

Lenders, brokers, or anyone who discriminates during the lending process, especially to the scale as seen in the housing and foreclosure crisis, should be subjected to prison sentences. The aims of the criminal code will be accomplished. First, society will be protected by not being subject to lending discrimination. Second, criminal prosecution would send a very clear message to lenders (and others) that lending discrimination is reprehensible and will not be tolerated. Third, the victims would likewise be entitled to retribution.<sup>202</sup>

It is unrealistic to expect that America’s neighborhood segregation problem can be cured overnight, but seeing as discriminatory lending has preserved the current status quo at best, and been a key cause of the problem

---

<sup>197</sup> *Id.* at 374.

<sup>198</sup> Sarah L. Rosenbluth, *Fair Housing Act Challenges to the Use of Consumer Credit Information in Homeowners Insurance Underwriting: Is the McCarran-Ferguson Act a Bar?*, 46 COLUM. J. L. & SOC. PROBS. 49, 51–52 (2012) (footnotes omitted).

<sup>199</sup> de Leeuw, et al., *supra* note 181, at 384.

<sup>200</sup> 15 U.S.C. § 1639(c)(3)(C) (2018).

<sup>201</sup> See Aleatra P. Williams, *Lending Discrimination, the Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Home Ownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601, 658 (2015).

<sup>202</sup> *Id.* at 659.

at worst, vigorously attacking this practice is a vital step in making Americans of all colors truly feel welcome in all neighborhoods.

## VI. CONCLUSION

### A. Action Through the Judiciary

Action through the judiciary is an unwise, if not unlawful path forward for removing racially restrictive covenants. First, in *Mason v. Adams County Recorder*, the district court said that even if the plaintiff had been able to demonstrate an individualized injury, the remedy would be required to come through Ohio's legislature, since the county recorders lack the power to make changes to its records after they are filed.<sup>203</sup>

Further, a finding of an individualized injury for a plaintiff in Mr. Mason's position swings the doors to the court room wide open. Standing has been emphasized as an important tool within the judiciary as a whole; more than just a mere "procedural technicality," determining whether plaintiffs have standing before allowing them to proceed with a lawsuit "affects the good order and efficiency with which the matter proceeds."<sup>204</sup> While experiences like Mr. Mason's are unfortunate and far from unique, allowing a case to proceed based on a general feeling is unwise policy. Had Mr. Mason been barred in any way from purchasing or renting property containing one of these restrictions, the court would have an ideal way to achieve a remedy; however, there is no allegation that Mr. Mason intended to purchase or rent any property.<sup>205</sup> Of course, the courts remain open and ready to those seeking redress against a realtor or landlord for housing discrimination under the Fair Housing Act.<sup>206</sup>

The attempt to characterize a county recorder's maintenance of records as "state action" is also an unwise path. On its face, this seems shaky logic; a county recorder's maintaining of records is a neutral act.<sup>207</sup> There is no enforcement action involved as there was in *Shelley v. Kraemer*. Looking deeper, this greatly broadens what might be considered state action in the future. The implications of considering a public official such as a county recorder as conducting state action by simply filing documents are far-

---

<sup>203</sup> *Mason v. Adams Cty. Recorder*, No. 1:2016-CV-755, 2017 U.S. Dist. LEXIS 71330, at \*17 (S.D. Ohio May 10, 2017).

<sup>204</sup> *Save the Bay, Inc. v. Dep't of Pub. Util.*, 322 N.E.2d 742, 748 (Mass. 1975).

<sup>205</sup> *Mason v. Adams Cty. Recorder*, 901 F.3d 753, 755 (6th Cir. 2018).

<sup>206</sup> Fair Housing Act, 42 U.S.C. § 3613 (2018).

<sup>207</sup> See *Mayers v. Ridley*, 465 F.2d 630, 659 (D.C. Cir. 1972).

reaching and difficult to predict. What other passive acts of public employees might be brought into the realm of state action? Would otherwise unenforceable language in state constitutions have to be removed, such as Ohio's ban on same-sex marriage,<sup>208</sup> because the state is "acting" by "maintaining its constitution?" Although this example seems far-fetched, it's hard to tell where the line denoting state action would lie if a dispassionate position such as a county recorder were said to be a state actor when maintaining records written by third parties.

### *B. Action Through the Legislature*

Legislation such as that proposed by Representative Hearcel Craig<sup>209</sup> is certainly worthy of debate. While its cons are noteworthy, especially the fact that this kind of process creates two different versions of the record (one redacted and one unredacted), similar legislation in other states has been relatively uncontroversial.<sup>210</sup> This type of legislation makes the owner or occupant of the property the one to decide whether to redact racially restrictive covenants. This corrects one possible problem that might have come about with a judicial solution; it's quite possible that some people occupying property with racially restrictive covenants in the record wish to have the language remain, even if they themselves are a part of the oppressed group. To remove the language whether or not the occupant even takes issue with its lingering presence simply assumes too much.

Seeing as there are so few people who even know that this language exists in their deeds, it is unlikely to be utilized very much. The simple fact that newspaper articles are necessary to inform most people that these covenants might exist on the record in the first place is enlightening.

If restrictive covenants are to be removed from the record, however, this is the ideal way to do so. It only allows property owners or occupants to redact restrictive covenants if they want them redacted, and similar measures appear to have been successful in other states. However, it is important to remember what this legislation can and cannot achieve. While it would allow people to remove incredibly hurtful language from the record, it would fall short if the goal is to actually mitigate housing discrimination.

### *C. Preserving History While Righting Wrongs*

Those seeking to remove racially restrictive covenants from the record have good intentions in putting forth legislation of filing suit against county

---

<sup>208</sup> See OHIO CONST. art. XV, § 11.

<sup>209</sup> See H.R. 412, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

<sup>210</sup> CAL. GOV'T CODE § 12956.2 (West 2019).

recorders. The covenants are a stain on American history, and a hurtful reminder to many non-white minorities that just a few generations ago, they might have been barred from living in their current homes. However, if the end goal is having neighborhoods where people of all races are welcome and feel that they're welcome, removing racially restrictive covenants might be more of a cosmetic fix than actually treating the cause of the illness.

One final alternative remedy offered by thought leaders in the area of housing discrimination is inserting language repudiating racially restrictive covenants, rather than removing language.<sup>211</sup> This kind of clause disavows the prior exclusion of occupants of certain races, while affirming that people of all races and ethnicities are in fact welcome.<sup>212</sup> This type of solution might keep the history of racially restrictive covenants intact, while ensuring that they're not only unenforceable by law anymore, but disavowed and rejected by the people who occupy the property today. As with removal of covenants, this should not be expected to reverse housing discrimination in one fell swoop, but it acknowledges the wrongs of the past while ensuring all who inquire that those wrongs have no place in today's world.

The practice of steering among real estate agents, discriminatory lending in the mortgage industry, and a general lack of enforcement of the Fair Housing Act ensure that racially homogenous neighborhoods remain that way even decades after the racially restrictive covenants that made them so have been rendered powerless. Scrubbing the record of societal wrongdoing may push America closer to racial equality in the housing sphere on the surface, but addressing unenforceable restrictive covenants while ignoring the ongoing, active (albeit difficult to reverse) practices furthering housing discrimination today gives a false sense of accomplishment at best, and further solidifies the invisible borders of racial housing segregation at worst. In a world where the only goal is to allow owners and occupiers of property to rest assured that any racially restrictive covenant in the record is no longer visible, then perhaps the movement to allow people to redact is good policy, even with its potential drawbacks. However, in order to achieve more equitable housing in Ohio and America, which is a more worthwhile goal, our efforts should be directed toward societal barriers other than unenforceable racially restrictive covenants.

---

<sup>211</sup> See Nancy H. Welsh, *Racially Restrictive Covenants in the United States: A Call to Action*, AGORA J. URB. PLAN. & DESIGN 130, 139 (2018).

<sup>212</sup> *Id.*

