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Covenants without Courts: Enforcing Residential Segregation with Legally Unenforceable Agreements

By RICHARD R. W. BROOKS*

In 1917 the US Supreme Court ended the country's brief experiment with racial zoning laws, deeming them unconstitutional *state* action under the Fourteenth Amendment.¹ The Constitution, however, did not prohibit *private* parties, the Court declared in a later opinion, from agreeing to racially segregate neighborhoods.² In the wake of that opinion, a swell of activity among private actors filled deeds with restrictions prohibiting the sale, rental, use, and occupancy of properties by persons of designated races, ethnicities, nationalities, and religions—collectively known as racial or racially restrictive covenants. Racial restrictive covenants were extensively used in cities, like Chicago, where some estimates suggest that at one point they covered three-quarters of the city's residential housing stock.

No one doubts that covenants were widely used, but not everyone agrees they mattered much. Louis Wirth, the noted Chicago sociologist, felt covenants were ineffective because homeowners were simply too tempted by premiums they could garner selling to blacks. When neighbors sought judicial enforcement against these violators, historian Arnold R. Hirsch (1983) observed that the courts were largely unresponsive. Black housing opportunities, according to Hirsch, were mainly constrained by a general housing shortage and through violence, not by covenants. Gunnar Myrdal (1944) took the opposite view, saying that if the Supreme Court ruled covenants unconstitutional (which it did in 1948),³ “segregation in the North would be nearly doomed.” Of course, not only does segregation continue today, it is by many measures considerably worse than it was when Myrdal made this statement. Yet that

fact alone does not imply that covenants were ineffective in the first half of the twentieth century, or later.

The two opposing views expressed by Hirsch and Myrdal share one basic assumption. Judicial enforcement of covenants was the linchpin of their effectiveness. It was a common enough assumption,⁴ but one somewhat at odds with subsequent practice. Well after the Court ruled judicial enforcement of racial restrictive covenants unconstitutional, lawyers continued to write them into deeds. Realtors, banks, insurers, and government agencies continued to reference racial covenants in their decisions and policies. Title companies continued to report them for decades. Recorders of deeds today still continue their ministerial administration of these covenants, carrying them forward, notwithstanding a number of lawsuits in the 1970s and 1980s. Home buyers and sellers, finally, continued to be guided by them.⁵

Observing the behavior of these actors suggests a more complicated, less court-centric, account of covenants and legal agreements generally. Covenants were signals that coordinated the behavior of a variety of private individual and institutional actors—signals that remained effective without judicial unenforceability.

I. Conventional View of Covenants

The conventional view of covenants departs from an image of white homeowners in neighborhoods facing a threat of incursion by black buyers, who, initially, offer substantial premiums in order to gain entry into racially exclusive

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¹ *Buchanan v. Warley*, 245 US 60 (1917).

² *Corrigan v. Buckley*, 271 US 323 (1926).

³ See *Shelley v. Kraemer*, 334 US 1 (1948).

⁴ See, e.g., “The effectiveness of restrictive covenants depends in the last analysis on the court orders enforcing the private agreement,” from the Report of President Truman's Committee on Civil Rights, *To Secure These Rights*, 1947.

⁵ A homeowner recently lost a suit against a black buyer because, he claimed, “a deed restriction prevented him from selling to certain minorities” (Richmond Times Dispatch, December 9, 2005, B-1).

		<i>j</i>	
		sell	stay
<i>i</i>	sell	1 1	3 0
	stay	0 3	2 2

FIGURE 1

neighborhoods. Subsequent integration, however, leads to lower housing values, or so feared, which creates a strong first-movers advantage and a collective action problem. To illustrate, consider the stage game depicted in Figure 1, played between homeowners *i* and *j*, each having the option of selling to black buyers (sell) or not (stay).⁶ The payoff to *i* and *j* from living in an exclusively white neighborhood is 2; however, each would receive a premium, 3, if she sells to a black buyer when the other does not, leaving the other with a payoff of 0 from living in an integrated neighborhood. When both *i* and *j* sell to black buyers each receives 1, reflecting a lower market value when a neighborhood experiences racial transition. These payoffs generate a prisoner's dilemma, where each neighbor prefers to stay put and get 2 rather than selling to blacks for a payoff 1—an undesirable and yet seemingly inevitable outcome.

The self-defeating outcome results from the homeowners' inability to credibly commit to staying put or selling only to whites. The consequence of this inability is great: a selling spree of homes at prices below the ex ante values to the homeowners. Homeowners therefore have incentive to identify commitment mechanisms that counter the impulse to sell to blacks. Residential discrimination norms, backed by social sanctions—ostracism, threats, and violence—offer one route toward commitment. Legal sanctions, primarily racial restrictive covenants, provide another. Covenants were used to supplement norms thought too weak to maintain commitment. There is little doubt that legally enforceable covenants provided a useful commitment mechanisms for many homeowners. But that's not all they provided.

⁶ Homeowner *i* is an individual player, and let *j* represent another individual or some aggregation of other homeowners in the neighborhood. Strategies are (i) sell to blacks and (ii) stay in their homes or equivalently sell to white buyers, who by assumption offer no premium.

Covenants also coordinated behavior through other channels, none of which required subsequent judicial enforcement. Having at one time the imprimatur of binding law, covenants continued to receive a nod of validity among a number of salient institutional actors. Moreover, they were signals to realtors (who directed blacks to noncovenanted neighborhoods), to lenders (who would not grant mortgages to blacks for covenanted properties), to federal housing agencies (that would not issue or guarantee mortgages granted to blacks in covenanted homes), and to insurers (who would not insure blacks for covenanted sites). These intermediaries were able to use covenants to coordinate transactions in order to maintain neighborhood racial exclusivity, and therefore (in their view) sustain property values, an outcome in which they were all highly invested.

Between neighboring white homeowners, existing covenants could be part of a correlated equilibrium in the presence of multiple equilibria, as would be the case, for instance, if the payoffs from the {stay, stay} strategy combination were changed from 2 to 4. Here, the fact that covenants are said to “run with the land,” meaning they attach to the property and perpetuate even when the original signatories are long gone, implies that they remain observable signals, made all the more visible through registry of deeds and reports of title companies.

Between white homeowners and prospective black buyers, covenants served expressive functions, raising the transaction costs to many blacks seeking to buy into a neighborhood and the utility to whites who valued such expressions; covenants, enforceable or not, were signals to black purchasers of the community's resistance to their presence. To white homeowners, even those not personally committed to discriminating against black buyers, the public expression of covenants established norms of community expectation, making it harder to deviate from discriminating by inviting black buyers to make offers and openly investigate purchase.

Covenants served all of these functions before 1948, when they were judicially enforceable. When courts stopped enforcing covenants, these functions did not cease. The legal commitment mechanism of covenants was lost, but the conventional and coordination ends they served were not. Reliance on covenants was weakened without assurances from courts, yet covenants

remained an active mechanism in perpetuating racial residential segregation in the second half of the twentieth century. If this is the case, we might expect to see some changes in housing values and the racial composition of covenanted neighborhoods after 1948 (since, after all, a valuable commitment strategy was gone), but not full convergence since covenants were still at work. Observing this wouldn't prove that covenants continued to matter despite their unenforceability, but a failure to see this pattern would cut strongly against the claim they did.

II. Empirical Analysis

An impact of unenforceable covenants may be estimated by comparing housing and population characteristics of neighborhoods with covenants to those largely without covenants before and after the Court's 1948 ruling. Chicago, where covenants were extensively deployed (as previously mentioned) provides a useful basis for carrying out such a comparison.

A. Data

Neighborhood data for the analysis were organized by Wirth et al. (1930–1990) in the *Chicago Factbook*. The *Factbook* reports census data by Community Areas—neighborhood definitions constructed by Wirth and others that correspond roughly to commonly known Chicago neighborhoods. Decennial figures, from 1930 to 1990, on housing value and other aggregate characteristics of dwellings and residents are used.⁷ Reporting inconsistencies in *Factbooks* across decades necessitated some adjustments.⁸

⁷ The data include, *inter alia*, median age of housing units, units without toilets, indoor running water or hot water, the number of dilapidated units, average persons per room, units owner-occupied, and a variety of statistics concerning residents, including age, gender, race, nationality, income, education, and occupational, employment, and marital status (Louis Wirth et al., and the Chicago Fact Book Consortium 1930–1990).

⁸ A distinct housing value is reported in 1930, for example. Consequently, that year is excluded from the regression models, although it informs other aspects of the analysis. Additionally, while only 75 community areas are reported through 1970, two more are reported in later years. Community area #76 is excluded from the analysis because it sits on the outskirts (the western edge) of the city, consisting mostly of nonresidential airport land (O'Hare field). Community area #77 was constructed by carving the

Proxies for covenants in community areas are based on from various sources compiled by Wendy Plotkin (1999).

B. Methodology

A difference-in-differences estimator, δ , the main coefficient of interest, is derived through the following equation:

$$\begin{aligned} depvar_{i,t} = & \alpha + \beta year_t + \gamma covenant_i \\ & + \delta year_t \cdot covenant_i + \bar{\phi} \bar{X}_{i,t} + \varepsilon_{i,t}. \end{aligned}$$

The dependent variable ($depvar_{i,t}$) is the log median housing value or the percent black in community area i during time period t . The independent variables include year dummies ($year_t$), a covenant proxy ($covenant_i$)—equal to one if community area i was significantly covered by covenants and zero otherwise—and a vector of independent variables, \bar{X} , describing various neighborhood characteristics ($\varepsilon_{i,t}$ is the error term). Community area fixed effects are included in some models.⁹ The intercept, α , represents the average housing value (or percent black) in a community area *without* covenants in 1940; β reflects the change in the dependent variables between 1940 and $year_t$; the coefficient γ indicates the relationship between covenants and the dependent variable prior to 1950; and δ measures the mean difference between covenant and noncovenant community areas between the base year (1940) and $year_t$.

C. Results

Looking at the data for 1940, significant variation is observable among covenanted community areas. Some were upper or middle class while others were poor or working class; some were close to extant black neighborhoods while others were relatively far away.¹⁰

preexisting area #3 in two. The two areas are merged here and coded as area #3 for consistency going backward.

⁹ The drawback of that is the community area fixed effect absorbs all the variation from the *covenant* variable, rendering it unidentifiable because neighborhood covenants are (counterfactually) constant over time and space in the dataset.

¹⁰ It is an interesting story how, in many poor and working class neighborhoods, covenants came to be used along with violence and threats, a mix of strategy often born out

TABLE 1—BASIC RESULTS

Independent variables ^a	Dependent variable							
	ln(median housing value)				Percent black			
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Covenant	0.13 (0.10)	0.20* (0.10)	—	—	-1.79 (3.97)	-13.50** (5.28)	—	—
Covenant x 1950	-0.05 (0.05)	-0.06 (0.05)	-0.06 (0.05)	-0.05 (0.06)	1.45 (2.59)	2.59 (2.52)	2.75 (2.61)	2.71 (2.01)
Covenant x 1960	-0.11 (0.08)	-0.11 (0.08)	-0.11 (0.08)	-0.04 (0.09)	25.94*** (7.39)	26.04*** (7.41)	25.63*** (7.40)	25.12*** (6.47)
Covenant x 1970	-0.13 (0.08)	-0.13 (0.08)	-0.13 (0.08)	-0.02 (0.09)	39.01*** (8.19)	39.10*** (8.21)	38.70*** (8.20)	38.30*** (7.83)
Covenant x 1980	-0.18 (0.11)	-0.18 (0.11)	-0.18 (0.11)	-0.07 (0.12)	41.44*** (9.13)	41.53*** (9.14)	41.13*** (9.13)	42.32*** (9.06)
Covenant x 1990	-0.36*** (0.11)	-0.36*** (0.11)	-0.31*** (0.11)	-0.20* (0.12)	43.71*** (8.87)	44.89*** (8.83)	44.59*** (8.88)	46.49*** (8.78)
Proximity	—	0.09*** (0.03)	—	—	—	-15.62*** (2.42)	—	—
Owner-occupied	—	—	—	0.003 (0.003)	—	—	—	-0.85*** (0.27)
Percent black	—	—	—	-0.003*** (0.001)	—	—	—	—
Year dummies	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Com. area dummies	No	No	Yes	Yes	No	No	Yes	Yes
Observations	438	438	438	438	438	438	438	438
Adjusted R ²	0.32	0.37	0.62	0.64	0.26	0.50	0.45	0.47

Notes: Standard errors, clustered at community areas, are reported in parentheses.

***Significant at the 1 percent level.

**Significant at the 5 percent level.

*Significant at the 10 percent level.

Compared to neighborhoods where covenants were largely absent, covenanted areas tended to be closer to the principal concentration of black residency—three contiguous community areas jointly known as *Bronzeville* or the black belt. Otherwise, many covenanted and non-covenanted areas looked quite similar in terms of neighborhood class and proximity to black neighborhoods.

Results from the analysis of the pooled data (1940 to 1990) are reported in Table 1. The dependent variable for the first four models is the log median housing value and for the next four models it is percent black. Figures in the table indicate coefficient estimates (standard

errors are reported in parentheses below the coefficients). Consider the second model, which adds a variable, *proximity*, indicating whether a community area borders the black belt or is separated from it by some number of other areas. The significant coefficient on *covenant*, 0.20, suggests covenanted areas had a median housing value roughly 22 percent greater than noncovenanted areas when covenants were enforceable.

The impact of the Court's order rendering covenants unenforceable may be inferred from the coefficients on the interactions of *covenant* and *year*. As might be expected, the signs are negative, indicating a decline in the value of covenanted neighborhoods following the Court's order. However, the relative decline becomes meaningful, in magnitude and statistical significance, only in later decades. The coefficient on *covenant x 1990*, -0.36, is highly significant, but the results for the prior years are considerably weaker. The pattern survives

of mixed motives: it seems wealthy neighborhoods would facilitate covenants in white working class communities adjacent to black neighborhoods in an apparent attempt to firm up a buffer zone between themselves and black neighborhoods (Plotkin 1999).

the inclusion of neighborhood fixed effects and other controls (see Models 3 and 4).

Turning to the percent black dependent variable, the significant negative coefficient on *covenant* in Model 6 indicates that blacks were less likely (by 13.50 percentage points) to reside in covenanted areas. Following the Court's order, again as might be expected, the coefficients on the interactions of *covenant* and *year* show the percentage of blacks in covenanted neighborhoods increasing steadily and significantly. Departing from a relatively modest and statistically insignificant increase of 2.59 in 1950, the significant coefficient on *covenant x 1960*, 26.04, indicates a 26 percentage point increase in the black population of covenanted areas compared to noncovenanted ones between 1940 and 1960. The difference between 1940 and 1970, captured by *covenant x 1970*, is roughly 39 percentage points, suggesting another big leap the following decade. These patterns, again, survive inclusion of neighborhood fixed effects and other controls.¹¹

D. Discussion

Blacks moved into some covenanted areas in large numbers between 1950 and 1960, suggesting that *enforceable* covenants contributed to Chicago's racial residential structure, contrary to the assertion of some observers, although it would be surprising if otherwise. Further significant increases of blacks in covenanted neighborhoods observed in the 1970 census, moreover, suggest that black demand for housing in these neighborhoods remained unsatisfied for more than a decade after the Court's ruling. This suggestion along with the observed higher relative housing values in covenanted neighborhoods through the 1980s, together these observations point to potential lingering influences of *unenforceable* covenants.

A plausible counter argument may stress that differences in relative housing values persisted simply because blacks moved from the overcrowded (and hence artificially price-inflated) black belt, leading to lower housing values in both noncovenanted and covenanted

neighborhoods once covenants were no longer legally enforceable. Alternative accounts might also emphasize the role of violence, subsequent fair housing laws, suburbanization, and white flight—all of which no doubt played important roles in Chicago and elsewhere. Yet a significant hurdle exists for any argument claiming that covenants were irrelevant once unenforceable: how is one to make sense of the observed behaviors of real estate lawyers and agents, banks, insurers, and title companies, who along with others all continued to reference unenforceable covenants? These informed players acted *as if* covenants continued to matter, a conclusion that the data here supports.

III. Conclusion

In 1948 the Supreme Court ruled racial restrictive covenants henceforth unenforceable. However, the practice of incorporating such covenants into deeds remained lawful until the Fair Housing Act of 1968. In the intervening 20 years, and likely after, lawyers, lenders, insurers, and government agencies continued to rely on covenants as proxies for the racial exclusivity of neighborhoods.¹² Neighborhood associations and real estate boards sanctioned realtors who facilitated sales to blacks in covenanted neighborhoods. Black buyers were as discouraged by unenforceable covenants as segregationists were emboldened by them. None of this is to say that legal enforceability or the Court's change of heart were irrelevant; these things surely matter to the lives of millions of disadvantaged Americans, both practically and symbolically. When judges were taken out of the mix—no longer enlisted by private parties to enforce their segregationist preferences through covenants—residential integration faced one less obstacle, but only one less.

¹² Not long after the courts ruling, FHA commissioner Franklin D. Richards proclaimed "that the agency would [continue to] insure properties subject to racial restrictive covenants in the future" (Clement E. Vose 1959, p. 225). Under pressure from the NAACP and the American Jewish Congress, President Truman reach a compromise with FHA leadership wherein the agency would continue its discriminatory policy, but only with respect to covenants filed and recorded prior to February 15, 1950. The FHA thereafter toned down its vocal advocacy for covenants, but its continued implicit endorsement of them was lost on no one.

¹¹ Finally, a number of spatial models were run, attempting to account for proximity to the black belt. The results, reported by Brooks (2010), are largely the same.

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