BURIED MONUMENTS:
THE LEGACY OF RACIAL COVENANTS IN DUKE FOREST

Andrew Wagner*

ABSTRACT

For the thirty-year period between 1931 and 1964, Duke University sold around three hundred housing lots to members of its faculty and staff—the deed to every one of the lots contained a racially restrictive covenant. Relying on primary sources from the university’s archives, this Article traces Duke’s historical relationship to the covenants: Why it began writing them, why it continued to write them after they were deemed constitutionally unenforceable, and why they remain on the books today.

The Article concludes that the covenants are legal agreements serving a primarily extra-legal function. Like the confederate monuments carved into Duke’s limestone campus, the covenants exist as perpetual signals as to who is—and who is not—welcome at Duke University. Now, as Duke addresses the stone monuments to its racist past, this Article examine how it can also address the hundreds of inked monuments buried in Durham’s Registrar of Deeds.

* J.D. Duke University School of Law. Special thanks to Melissa Norton and Bull City 150, the Duke University Office of Counsel, the David M. Rubenstein Manuscript & Rare Book Library, Joseph Blocher, and Lia Wagner. This Article is dedicated to the memories of Ed Rickards and Dr. Samuel DuBois Cook.
INTRODUCTION

For eighty years, Robert E. Lee guarded the entrance to Duke University’s iconic chapel. From his stone monument above the chapel steps, the confederate general witnessed Duke University grow from a small college into an internationally-recognized institution of higher education. Finally, on August 19, 2017, the university saw him.

“"I authorized the removal of the statue of Robert E. Lee from the entrance of Duke Chapel early this morning," wrote President Vincent Price in an email to the entire Duke community that morning.¹ Price sent the email in response to his first campus crisis, a late-night vandalism of the Lee statue.² He removed the statue, he explained, “to protect Duke Chapel, to ensure the vital safety of students and community members who worship there, and above all to express the deep and abiding values of our university.”³ Price concluded his email with a promise that the “statue will be preserved so that students can study Duke’s complex past and take part in a more inclusive future.”⁴

The statue of Robert E. Lee was not Duke’s first monument to racism. Two years before installing Lee’s statue at Duke Chapel,⁵ in 1930, the

¹ Email from President Vincent Price, President, Duke Univ., to Duke Community (Aug., 19, 201, 8:01 EST) (on file with author).
² Id.
³ Id.
⁴ Id.
university broke ground on what would become the neighborhood of Duke Forest\textsuperscript{6}—a stretch of ten homes on Pinecrest Road that went by the modest name of “Pinecrest,’”\textsuperscript{7} or the more formal title, “the housing proposition.”\textsuperscript{8} The Pinecrest homes were part of an ambitious faculty recruitment plan: The university would sell new professors plots of land at deeply discounted rates; It would install sidewalks and sewage lines. It would even take a second mortgage on the property.\textsuperscript{9} All that a faculty member need to do, wrote Justin Miller, the first Dean of the Duke University School of Law, to potential faculty hire, is to abide by a small number of “building restrictions.” Among those restrictions named, the professor would have to build a house worth more than $6,000, set it fifty feet back from the property line, and agree not to erect a fence over six feet high.\textsuperscript{10} Duke faculty evidently found the requests reasonable. Over the next several decades, university faculty and staff signed more than three-hundred deeds containing such restrictions.\textsuperscript{11}

\textsuperscript{7} ROBERT F. DURDEN, THE LAUNCHING OF DUKE UNIVERSITY 421 (2d ed. 2005).
\textsuperscript{8} Letter from Justin Miller, Dean, Duke Univ. School of Law, to John M. Bradway, Professor, Duke Univ. School of Law (Aug. 8, 1931) (on file with David M. Rubenstein Manuscript & Rare Book Library, Duke University).
\textsuperscript{10} Deed of Nov. 17, 1931, (recorded Nov. 17, 1931) in 104 Durham County Deed Book 249, 249 (on file with the Durham County Register of Deeds) [hereinafter 1931 Deed].
\textsuperscript{11} See Instrument no. 2007046155, Waiver of Enforceability of Restrictive Covenants and Reversionary Interests of Oct. 4, 2007 (recorded Oct. 8, 2007) in 5764 Durham County Register of Deeds 793 (on file with the Durham County Register of Deeds) [hereinafter Waiver of Enforceability].
Yet those deeds contained another kind of restriction, one that was noticeably absent from Dean Miller’s recruitment letter. The university required every buyer to promise,

That the lot hereby conveyed shall not be sold, transferred, conveyed, leased, or rented to persons of the negro blood, proved that this shall not be construed to prevent the living upon the premises of any negro servant or servants whose time shall be employed for domestic purposes only be the occupants of the dwelling house.\(^\text{12}\)

Such restrictions, known as a “racially restrictive covenants” (or “racial covenants”), are common among deeds written in the early part of the twentieth century.\(^\text{13}\) In the 1917 case *Buchanan v. Warely*, the United States Supreme Court barred local governments from enacting overtly racist zoning laws.\(^\text{14}\) Undeterred, white property owners found a new way to enforce their exclusionary preferences.\(^\text{15}\) In deeds across the United States, they inserted covenants barring future owners from selling the property to non-whites.\(^\text{16}\) And in courts across the United States, judges upheld the covenants as constitutional.\(^\text{17}\) Unlike public zoning laws, judges reasoned, covenants


\(^{14}\) 245 U.S. 60 (1917).


required no “state action” and thus dwelt outside of the protections of the Fourteenth Amendment. 18 In other words, the judges considered covenants to be like all other contracts, purely private affairs. 19

In many ways, covenants are like other contracts. They “bind parties in the same manner as any other contract,” and, when breached, they “confer[] the same right of action as for any other contract.” 20 There is, however, one key difference: Covenants “run with the land.” 21 This means that covenants are not tied to the original parties that agreed to them. Instead, they will remain on the deed for as long as the deed is valid. And as the same deed is usually transferred from owner to owner, covenants can long outlast the original parties that struck a deal. So restrictive covenants—promises to refrain from doing something with the land, like selling it to “persons of the negro blood”—that were made in 1931 can remain in the deed books of the County’s Register of Deeds in perpetuity.

Racially restrictive covenants are no longer legally enforceable. 22 In 1948, the Supreme Court departed from earlier thought and decided that racial covenants did not escape the reach of the Fourteenth Amendment. In

---

19 See id.
20 20 Am. Jur. 2d Covenants, Etc. § 1.
21 Id. at § 5.
_Shelley v. Kraemer_, the Court held that while the creation of a restrictive covenant may indeed be a private act, its judicial enforcement was not.\textsuperscript{23} Under the ruling, parties could continue to draft racial covenants, but they could ask the courts to enforce the covenants’ terms. In 1968, Congress closed this gap with the passing of the Fair Housing Act, which outlawed private discrimination in housing.\textsuperscript{24} Yet in the twenty-year interim, private property owners like Duke University accepted the _Shelley_ Court’s invitation to continue writing legal, albeit unenforceable, racial covenants.

Duke’s Pinecrest project quickly expanded beyond the confines of Pinecrest Road. In the half-century following the neighborhood’s founding, Duke partitioned and sold nine sections of homesites to Duke Faculty and staff.\textsuperscript{25} A collection of architecturally eclectic homes sparsely arranged among gently-curving streets, the homesites of Duke Forest were—and are—an immensely desirable place to live.\textsuperscript{26} In the program’s prime, the 1950s and early 1960s, Duke staff and faculty would wait for years for the chance to buy a lot and nestle their family-home amongst the leaves of Duke Forest.\textsuperscript{27} When the wait list grew to extreme lengths, faculty members would politely petition the university sell more lots, and the university would do its best to

\textsuperscript{23} *Id.*


\textsuperscript{25} Waiver of Enforceability, *supra* note 11.

\textsuperscript{26} See, *e.g.*, Report of The Committee on Faculty and Staff Housing, Apr. 28, 1986 (on file with David. M. Rubenstein Manuscript & Rare Book Library, Duke University).

\textsuperscript{27} See *id*. (detailing the complaints and requests of the waiting faculty).
comply. 28 During the period between 1931 and 1964, Duke sold around three hundred lots in Duke Forest and nearby neighborhoods. 29 The deed to every one of the lots sold within this period contained a racially restrictive covenant. 30

Today, the homes situated within Durham’s Duke Forest neighborhood are attractive, “fashionable and impeccably maintained.” 31 They are also almost entirely deprived of African American residents. According to a 2013 survey, less than one percent of residents in the Duke Forest area are African American. 32 Compare this with the overall percentage of African American residents in the immediately adjacent neighborhoods, 31.4 percent, 33 and the discrepancy becomes blindingly clear. But the racially restrictive covenants, though odious, cannot have caused Duke Forest’s divide on their own. More than half of the covenants were signed after Shelley v. Kraemer and thus could never have been legally enforced. 34 And no evidence exists of Duke ever attempting to enforce the remainder. 35 Yet despite never having been

28 See e.g., Ed. Board, Duke to Develop 40-Acre Housing Subdivision Mile from West Campus, MORN. HERALD (Durham, N.C.), Feb. 18, 1953 (detailing one of the largest expansions of the homesites).
29 See Waiver of Enforceability, supra note 11, at 793 (listing 290 deeds with racial covenants).
30 Id.
33 Id.
34 See Waiver of Enforceability, supra note 11.
35 Interview with Duke University Office of Counsel (Nov. 2, 2017)
legally enforced, the racial covenants in Duke Forest were not without force.

Duke’s relationship with the covenants of Duke Forest presents a window into a hard-to-study aspect of covenants: their function as signals of community preference. A difficulty in studying racial covenants is their permanence in relation to a community’s transience. Most people who signed racial covenants in the 1930’s will not remain to face the cultural causes and effects of their actions. But Duke University is not most people. The same institution that first signed the covenants in the first half of the twentieth century was the institution that had to reckon them into and beyond the latter half. Moreover, Duke’s status as a university formalizes the power relationships in decision-making. Most decisions on racial covenants are made at a neighborhood or development level. Unlike the vague politics of a neighborhood, the politics of a university—of students and faculty, faculty and President, President and Trustees, Trustees and donors—are intimate and precise.

Like a statue of a long-dead confederate general can clearly display a community’s “deep and abiding values,” so too can the promises that a university elicits from its community. And like the values that led to General Lee’s installation, the values that led the university to write the covenants, and to keep writing them after Shelley, are subject to change. In 2007, Duke

[hereinafter Interview with Office of Counsel].
University waived and abandoned all rights detailed in the covenants, decrying them as a “product of a bygone era,” “morally abhorrent” and “contrary . . . to the goals, values and standards of Duke.” Yet the covenants remain. Buried in the dusty pages of the Register of Deeds, they lie as dormant monuments to the university’s racist past. Studying why Duke wrote them can help unlock what President Price called “Duke’s complex past”; studying why the covenants persist can help us all “take part in a more inclusive future.”

I. RACIAL COVENANTS AS TOOLS: A HISTORY OF THE DUKE FOREST COVENANTS PRE-SHELLEY V. KRAEMER

A. Racial Covenants Nationally

The legal history of housing discrimination begins to take formal shape in the beginning of the twentieth century with the urbanization and suburbanization of free African Americans. Prior to that, Americans paid little attention to separating the living spaces between members of different races “precisely because the social distance between the races was cavernous.” Yet this rigid social order could not persist; the antebellum period waned and the Great Migration waxed. Thousands of African Americans fled the abuses of the southern farms to find opportunity in

36 See Waiver of Enforceability, supra note 11.
38 Id.
39 Id. at 24.
northern and Midwestern cities. With urbanization came a breakdown of established social stratification and a need among race-conscious whites for physical separation.\textsuperscript{40} The white middle class realized that some African Americans, “might just have the means to move to the more attractive block next door—unless they could be contained.”\textsuperscript{41}

To contain those unwelcome neighbors, white residents used both social and legal methods. The social methods included such historic techniques as intimidation and violence, but “the impersonal urban setting may well have undermined the necessary social solidarity” to carry out coordinated attacks.\textsuperscript{42} A new legal tool was needed, and was provided by the Supreme Court in \textit{Plessy v. Ferguson}.\textsuperscript{43} “Separate but equal” became the rallying cry of segregationist neighbors, politicians and city planners.\textsuperscript{44} The arrival of the \textit{Plessy} framework and the Jim Crow laws it begat coincided with another new legal arrival, zoning laws.\textsuperscript{45}

By the early twentieth century, much of the regulation that had previously been the purview of informal discrimination became a matter of public

\textsuperscript{40} \textit{See id.} at 25 (“The relative plasticity of urban life meant that race-conscious white residents in the towns differed from their rural counterparts in at least one significant way they could not count on a clearly understood social distance or set of social norms to separate themselves from the members of a different race that they disdained.”).

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.} at 26.

\textsuperscript{43} 163 U.S. 537 (1896).

\textsuperscript{44} BROOKS & ROSE, \textit{supra} note 15, 35.

\textsuperscript{45} \textit{Id.}
regulatory concern. The petty disputes that previously might have been remediated by a nuisance suit or a neighborly brawl could now be prevented by a city’s zoning ordinance. Racial exclusion could be codified as a means of protecting residents from conflicts or as a means of protecting the property values of upscale neighborhoods. And it was. “[I]n fact, racial zoning chronologically preceded general land use zoning.” Justified by property values and public safety and protected by the “race neutral” separate-but-equal framework, racial zoning seemed like the perfect solution for excluding wealthy and middle-class African Americans from white communities. The city of Baltimore passed its racial zoning ordinance in response to one African American lawyer attempting to buy a home in a white enclave. Southern cities followed suit: “Norfolk, Richmond, Atlanta, Birmingham, Dallas, and Winston-Salem” all took advantage of racial zoning laws.

Racial zoning’s heyday, however, was not to last. Within years, state supreme courts began striking down the laws, not as violations of equal protection but as intrusions on property rights. By 1916, the NAACP had organized the perfect case to challenge the practice: an African American buyer invoking the ordinance in an attempt to escape the purchase of a home

---

46 Id. at 37.
47 Id. at 39.
48 Id. at 38.
50 BROOKS & ROSE, supra note 15, 41.
51 Id.
from a white seller. The case, *Buchanan v. Warley*, gave the NAACP its first major win. In its decision, the Supreme Court invoked the Fourteenth Amendment to invalidate the ordinances, distinguishing *Plessy* by saying that the ordinances denied owners a due process right to alienate their property. Segregationists needed a new, private tool for exclusion. Enter the restrictive covenant.

With the demise of racial zoning, restrictive covenants became the default means of exclusion. Yet they were not without their disadvantages. First, enforcing the covenants required community buy-in, thereby creating a collective action problem. Second, the covenants were immediately beset with legal challenges, among them difficulties with alienation of property and the Equal Protection Clause of the Fourteenth Amendment.

Racially restrictive covenants were difficult to enforce. The covenants run with the specific property to which they are attached. If a white homeowner wanted to sell her property to an African American buyer despite the existence of a covenant, “it was difficult (although not impossible) for a neighbor to establish standing in court to reverse the sale.” This was because the neighbor was never a party to any contracts regarding the land.

---

52 245 U.S. 60 (1917).
53 BROOKS & ROSE, supra note 15, 43.
54 Id. at 74.
55 Id.
56 ROTHSTEIN, supra note 49, 79.
The real injured party was the party who originally wrote the covenant and tied it to the land.\textsuperscript{57}

To circumvent this, covenants increasingly took on a community element. Neighborhoods drafted covenants for all of their members to sign.\textsuperscript{58} Other neighborhoods created white-only neighborhood associations and made membership a pre-requisite of purchasing a home.\textsuperscript{59} Both legally and practically, then, covenants required community buy-in. Legal scholars Richard Brooks and Carol Rose describe this phenomenon in terms of game theory by use of the hawk/dove game: “Covenants gave off the signal that minority entrants should back away—play dove—or face an expensive fight from the white hawks whose asserted ownership of the entire neighborhood. They also gave out a signal of respectability and entitlements—that the white homeowners had the law on their side, and that the rest of the community officially recognized their entitlement.”\textsuperscript{60} Even the facts of \textit{Shelley v. Kraemer} illustrate this: The covenant to be enforced was entered into by thirty of thirty-nine members of the St. Louis neighborhood in question.\textsuperscript{61} Of the nine dissenters, five were African Americans already living in the neighborhood.

As for the Fourteenth Amendment, the segregationist answer to that

\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} BROOKS \& ROSE, \textit{supra} note 15, 189.
\textsuperscript{61} See Note, \textit{Current Attacks}, \textit{supra} note 17, 196.
challenge is well captured in *Perkins v. Trustees of Monroe Avenue Church of Christ*, a 1946 case from the Supreme Court of Ohio.\(^{62}\) There, the court denied that governmental enforcement of racially restrictive covenants violated equal protection because the covenants themselves were equally applicable: “White may exclude black. Black may exclude white.”\(^{63}\) (This rationale recalls the famous satire of Anatole France: “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.”)\(^{64}\) It was under this legal understanding that Duke first began drafting its deeds.

B. *Duke’s Dirty Deeds – Racially Restrictive Covenants and the Founding of the Homesites*

In an irony of local history, Duke Forest, one of Durham’s most valuable neighborhoods, owes its existence to a funding shortage. In 1930, Duke University President William Few and Duke University benefactor J.B., “Buck” Duke, had just executed the largest land acquisition in Durham’s history.\(^{65}\) Few and J.B. Duke had originally intended to buy the land immediately surrounding the old Trinity campus—now Duke University’s East Campus.\(^{66}\) However, rates soared in that neighborhood after local

\(^{62}\) 70 N.E. 2d 487 (Ohio 1946).

\(^{63}\) Note, *Current Attacks, supra* note 17, 196.

\(^{64}\) *ANATOLE FRANCE, THE RED LILY*, Ch. 7 (1894).

\(^{65}\) See *JEAN BRADLEY ANDERSON, DURHAM COUNTY: A HISTORY OF DURHAM COUNTY, NORTH CAROLINA* 282-83 (2d ed. 2011).

\(^{66}\) *DURDEN, supra* note 6, 421.
landowners discovered that “Buck Duke” was behind the purchases.\textsuperscript{67} Frustrated by high prices and hold-outs, J.B. Duke and Few turned their attentions instead to the farmland and forest about one mile west of the Trinity campus.\textsuperscript{68} J.B. Duke saw something beyond the future home of Tudor Gothic architecture. In the Piedmont’s rolling hills, pine and dogwood trees, he saw an opportunity to build an access road connecting the Greensboro-Durham highway to the Chapel Hill-Durham Highway.\textsuperscript{69} Such a road would make Duke University accessible to greater populated areas of the state.\textsuperscript{70} In buying the land for the seven-mile access road, university Provost Robert Lee Flowers ended up purchasing 5,000 acres of Piedmont forest and farmland.\textsuperscript{71} This would eventually grow to 8,000 acres.\textsuperscript{72} Almost by accident, Duke University had bought itself a forest.

J.B. Duke and President Few intended to transform Duke University from a respectable but regional liberal arts college into a national university.\textsuperscript{73} Before J.B. Duke’s untimely death in 1925, the benefactor had tasked President Few with building and staffing a medical school, law school, women’s college and hospital.\textsuperscript{74} Yet more important than merely growing the

\textsuperscript{67} \textit{Id.}\textsuperscript{67}
\textsuperscript{68} \textit{Id.}\textsuperscript{68}
\textsuperscript{69} \textit{Id.} at 421.
\textsuperscript{70} \textit{Id.}\textsuperscript{70}
\textsuperscript{71} \textit{Id.} at 422-23.
\textsuperscript{72} \textit{Id.} at 32.
\textsuperscript{73} ROBERT F. DURDEN, THE DUKES OF DURHAM, 1865-1929 at 231-35 (7th ed. 2001).\textsuperscript{73}
\textsuperscript{74} \textit{Id.}\textsuperscript{74}
university in size, Few had to grow the university in excellence. From the outset, President Few recognized that would require attracting a “superior teaching force.” Yet attracting top talent was not, itself, enough: “If we are to build a great university,” wrote Justin Miller, Dean of the Law School in a letter to Few, “we must not merely call great men to our faculty, but we must make reasonable efforts to keep them happy, contented and productive.” Among such efforts, the university offered to pay faculty members’ moving expenses and to help procure housing.

The University had grand plans for faculty housing. It intended to build homes all along the stretch of road connecting the university’s two campuses—what is now Campus Drive. The University built ten such homes and sold them to faculty and staff, Few and Flowers included. Then the university ran out of money for the program. Faced with a shortage of funds and an abundance of land, the university made a shrewd decision. At the recommendation of a Duke Endowment official from New York, it

---

75 ANDERSON, supra note 65, at 283.
76 DURDEN, supra note 6, 67 (quoting an undated memorandum from the Few Papers, Rubenstein Library).
77 Memorandum of Justin Miller, Dean, Duke Univ. School of Law to William Few, President, & Robert Flowers, Provost, Duke Univ. Sept. 9, 1931 (on file with David. M. Rubenstein Manuscript & Rare Book Library, Duke University) [hereinafter Memorandum of Justin Miller].
78 Letter from Justin Miller, Dean, Duke Univ. School of Law, to Leslie Craven, Professor, Duke Univ. School of Law, 8 Jan, 1932 (on file with David. M. Rubenstein Manuscript & Rare Book Library, Duke University).
79 DURDEN, supra note 6, 424.
81 DURDEN, supra note 6, 423.
decided to cease building homes and instead spend $50,000 to install “streets, sidewalks, and sewer and water lines” in Duke Forest; it would then then sell off the lots to faculty for a “nominal fee.” As described to a new hire,

The University is selling lots in a sub-division which it has recently opened called “Pinecrest” at a price of $1500. This price is considerably less than [what] similar lots are being sold for in other real estate developments in the neighborhood of Durham and the university . . . . There is no recapture provision in favor of the university, but the university does request that if you have an opportunity to sell, you give the university the first chance to buy. The University charges 6% interest and is willing to take a second mortgage on the property, so that you could give a first mortgage in order to finance the building of your house . . . . The University has nothing to do with arranging with the contractor for the building of the house, for making plans, for supervising the building, or in any way with the construction of the house. It merely sells you the land, takes a second mortgage if you wish them to do so, and you then deal with the architect, the contractor, and the financier.

And with that, the Duke Homesites program was launched.

During the months that followed the announcement of the homesites—and their advertisement to prospective professors—“a great deal of trouble developed in attempting to work out th[e] house-building plan; bitterness developed upon the part of faculty members about the allocation of lots, the working out of plans and other matters, and . . . the university officials became thoroughly sick of the whole program.” As a result, for a time the university changed the homesite model. No longer would the university allow

---

82 Id.
83 Id.
84 Memorandum of Justin Miller, supra note 77.
faculty members to select lots and build; it would build the houses themselves and offer them to faculty “to take or leave as they pleased.” The faculty were not pleased, as illustrated in the particularly tragic account of Professor and Mrs. Maggs.

Professor Maggs was one of Dean Miller’s earliest recruits to the law school, and Miller offered him the same housing terms described in the letter above: Pick a lot, build a house. Yet by the time Professor and Mrs. Maggs arrived in 1930, the terms had changed. Dean Miller had to “breach” the terms in his offer letter and instead require the Maggs to wait for the university to build homes itself. After Mrs. Maggs was “nervously wrecked” by poor treatment at the university hospital—a “harassing experience” of “incompetency and inefficiency” that amounted to “criminal negligence”—the couple decided to leave town until the university finished their home, including several agreed-upon modifications to the standard design. The Maggs recuperated in Europe and returned to Durham “in a very happy, cheerful frame of mind”—until, that is, the couple discovered that the university’s contractors had ignored the Maggs’ requested modifications. A beleaguered Mrs. Maggs refused the house.

---

85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id.
now faced with an exhausted supply of houses in the community,” the MA forced to endure both “a drab, unattractive little duplex” and “a thoroughly miserable, pressed condition of mind.”

Figure 1: Dean Miller’s hand-drawn map of Duke University with the projected area of the new Faculty Residences, 1931

Understanding the homesites’ roles as a recruitment tool is critical to understanding why Duke decided to include racially restrictive covenants in their deeds. The covenants were not a means of enforcing an existing community prejudice: They exist in the earliest of the homesite deeds—the ten homes on Pinecrest Road—and thus preceded the community itself. Nor were the covenants written by a developer as a means of attracting white

---

91 Id.
92 See 1931 Deed, supra note 10.
middle-class buyers. The homesites were not a speculative real estate venture, and, financially speaking, Duke had little to gain selling off land at cost. Duke’s purpose for writing the covenants is revealed in Duke’s purpose for building the homes, attracting and pleasing the “great men” of academia.

To create a community for such men, Duke would need to both control the neighborhood and signal its desirability. The covenants helped with both aspects.

From Duke Forest’s outset, the covenants provided the university a direct means of control over the neighborhood’s development. Most of the covenants controlled the appearance of the neighborhood: The homes must cost at least $6,000, sit fifty feet back from the property line, and not have a fence over six feet high. In his letter to prospective faculty, Dean Miller also signaled that the university would control the neighborhood by asking purchasers of homesites to offer Duke a right of first refusal when the purchasers decided to sell. (This was later formalized as a purchase option.).

The second motivation was likely to signal a sense of safety and stability to the homeowners. No account exists of the university telling

---

93 Id.
94 See ARCHITECTURAL INVENTORY, supra note 31.
95 Memorandum of Justin Miller, supra note 77.
96 1931 Deed, supra note 10.
97 Letter from Justin Miller to John Bradway, supra note 7.
faculty about the racial covenant in advance. In fact, Dean Miller’s letters to prospective faculty mention almost every other restriction on the property. Perhaps it seems paradoxical to think that an omission could indicate a signal. However, Dean Miller evidently considered the terms in his faculty letters to be the terms of a contract, hence describing the Maggs incident as a “breach” by the university. Although excluding only the racially restrictive covenant during contract negotiations could indicate that Dean Miller was embarrassed about the covenant, it could also indicate that that covenant, unlike those about fence heights and setbacks, was an immaterial provision. Like Robert E. Lee’s statue in the chapel alcove, the racial restriction broadcast a signaled a preference that was presumed to be already shared by all who would be invited into university’s community. Over the next forty years, the covenants’ signal would continue to broadcast even as the community shifted.

II. RACIAL COVENANTS AS SIGNALS,
A HISTORY OF THE DUKE FOREST COVENANTS POST-SHELLEY V. KRAEMER

A. President Edens Era—The Covenants Are Continued

University President Arthur Hollis Edens began his 1954 address to Duke University’s faculty in a familiar manner—highlighting the successes of a recent fundraising campaign. The university, reported President Edens,

---

98 Letter from Justin Miller to John Bradway, supra note 7.
99 Memorandum of Justin Miller, supra note 77.
100 President Arthur H. Edens, Address to Duke University Faculty 9-10 (Oct. 28, 1954) (Transcript available in the Faculty Archives in the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) [hereinafter Edens 1954 Speech].
had just completed a new administrative building; renovated the Divinity School and the student activities building, and updated the Duke Marine Laboratory in Beaufort and the Highland Hospital in Asheville.\textsuperscript{101} Yet in describing this last point, Edens veered sharply from the beaten path. As of reminded by his own description of the Highland Hospital’s psychiatric patients—“troublemakers and cause-serving religious fanatics”—Edens abruptly began talking about another, potentially more troublemaking crew: the Warren Court.\textsuperscript{102}

Months earlier the Supreme Court had decided \textit{Brown v. Board of Education}.\textsuperscript{103} Since then, reported Edens, “all but 4 of 17 southern states formally recognizing segregation have now admitted negroes to their state institutions.”\textsuperscript{104} Edens then reminded the faculty that the Fourteenth Amendment did not extend to private universities like Duke, and thus Supreme Court’s recent decision “pose[d] no immediate problem for Duke University except that of increased pressures.”\textsuperscript{105}

President Edens’ allusion to “pressures” makes clear why desegregation shared the same breath with University development. Due to market inflation and the university’s growth, J.B. Duke’s original contribution was no longer

\textsuperscript{101} Id.  
\textsuperscript{102} Id.  
\textsuperscript{103} 347 U.S. 483 (1954).  
\textsuperscript{104} Edens 1954 Speech, \textit{supra} note 99, 10.  
\textsuperscript{105} Id.
meeting Duke’s development needs. Duke, for the first time in the school’s history, was dependent on outside donations. ¹⁰⁶ A native southerner and executive to the Rockefeller Foundation, Edens had been hired by the university to launch its first “capital gifts program and a national development campaign.”¹⁰⁷ The Warren Court was not making his job easy.

“[P]ublic opinion, is, as would be expected, divided,” continued Edens.¹⁰⁸ For public image’s, and presumably funding’s, sake, “we ought to consider how best to prevent Duke University from being maneuvered into an embarrassing position either by delaying too long or moving too swiftly.”¹⁰⁹ “Certainly,” assured Edens, “I cannot foresee the necessity at any time in the foreseeable future of admitting negroes at the undergraduate level.”¹¹⁰ However, Edens found it equally unrealistic to think that Duke could “remain permanently an island of refuge from the effects of de-segregation.”¹¹¹ Edens’ proposed solution? “Some small gesture toward de-segregation,” namely the admission of “one or two negroes” into the school where they would cause “the least amount of friction.”¹¹² Perhaps, suggested Edens, the “Graduate Department of Religion in the Graduate School of Arts and

¹⁰⁶ Id.
¹⁰⁸ Edens 1954 Speech, supra note 99, 10.
¹⁰⁹ Id.
¹¹⁰ Id.
¹¹¹ Id. at 11.
¹¹² Id.
Yet President Edens was aware that even that small admission would cause waves among the faculty. He made a non-apology to the members of the faculty supporting full desegregation: “I suppose I should apologize to those of you who are more idealistically inclined for approaching the problem in such a realistic way.” He geared his main message, however, toward those who opposed any concessions to desegregation.

To those of you who may be alarmed at the trend of my thinking, I would reply that the effect of non-segregation in universities is no longer significant in comparison to the developments elsewhere. The real change is taking place closer to you. More and more negroes are going to grade school and high school, they are serving on school boards, they are getting better jobs and earning more money as they disappear from the home and kitchens of white employers, they are driving good cars and paying for the best accommodations on non-segregated public transportation. I could continue to spell out the change that is taking place. This is to say that university people generally do not look upon the admission of an insignificant few negroes with the same jaundiced eye as does the average man outside who is being faced with more revolutionary changes closer to home.

Edens’ message was clear: Do not worry about protecting the university, worry about protecting your neighborhoods.

President Edens’ reaction to Brown v. Board, mirrored his reaction to an earlier landmark decision, Shelley v. Kraemer. To recap, the Court’s 1948

---

113 Id.
114 Id.
115 Id.
116 Id.
116 334 U.S. 1 (1948).
decision in *Shelley* did not declare the drafting of racially restrictive covenants to be unconstitutional.\textsuperscript{117} The Court concluded that racially restrictive covenants were private agreements beyond the reach of the Constitution, but also that judicial enforcement of them amounted to governmental discrimination.\textsuperscript{118} Courts, especially those in the south, resisted the ruling and read it narrowly.\textsuperscript{119} Five years after deciding *Shelley*, the Supreme Court had to clarify that granting damages for a violation of a racial covenant, like granting an injunction, was also unconstitutional state action.\textsuperscript{120} And even after that decision, the North Carolina Supreme Court validated a covenant that caused ownership of a park to “automatically revert” if non-whites used the whites-only golf course on the property.\textsuperscript{121} So just like *Brown* did not directly force Duke to desegregate, *Shelley* did not directly force Duke to stop drafting its racially restrictive covenants. Legally speaking, Duke was free to draft as many unenforceable covenants as it wanted. And so it continued to do so until the spring of 1964, sixteen years after the Court’s decision in *Shelley v. Kraemer*.\textsuperscript{122}

\textsuperscript{117} *Id.* at 21-23.
\textsuperscript{118} *Id.*
\textsuperscript{120} See Barrows v. Jackson, 346 U.S. 249, 251 (1953) (“Can such a restrictive covenant be enforced at law by a suit for damages against a co-covenanctor who allegedly broke the covenant?”)
\textsuperscript{122} Letter to the Editor, *Discrimination! Chron.* (Durham, N.C.), Apr. 17, 1964,
Why did Duke, in the face of mounting criticism both internal and external, continue to draft unenforceable racially restrictive covenants? Evidence suggests a number of interconnected possible answers, but all of them echo the themes of the Edens’ talk: fear of institutional embarrassment and fear of a changing racial landscape.

One theory is that Duke simply forgot that the covenants existed.\textsuperscript{123} The university had purportedly printed out a big stack of form deeds prior to 1948 and continued to use them until the pile ran out.\textsuperscript{124} This answer has potential merit. The *Shelley* decision was published in the midst of big changes at the university. President Robert Lee Flowers was being replaced by President Edens,\textsuperscript{125} and the university was in the midst of constructing the properties along Cranford road.\textsuperscript{126} It is entirely possible that in the transition of administrations, path dependency prevailed and no one managed to update the deeds to faculty housing lots. The theory, though, has problems.

The theory’s primary flaw is the sheer size of the Duke Forest neighborhood. By 1953, the homesites had grown from a haphazard plan into a strategic development. On February 17, 1953, Duke authorized construction

---

\textsuperscript{123} Interview with Office of Counsel, supra note 35.
\textsuperscript{124} Id.
\textsuperscript{125} Duke Presidents, supra note 107.
\textsuperscript{126} See Ed. Board, *Duke to Develop*, supra note 28; President Arthur H. Edens, Address to Duke University Faculty 9 (Nov. 10, 1959) (Transcript available in the Faculty Archives in the David M. Rubenstein Manuscript and Rare Books Library, Duke University).
on “Section Two” of the homesites, an ambitious 40-acre plot of land housing 57 half-acre plots.\textsuperscript{127} Two years later, the university had sold all of those lots, and the faculty was demanding more.\textsuperscript{128} The University broke ground on “Section Three,” and by 1957 the university signed the deeds to 37 new plots.\textsuperscript{129} Although path dependency could perhaps explain the covenants remaining unnoticed in the deeds for Cranford road and other early properties, the magnitude of the later developments requires a level of attention not consistent with simple oversight. Duke had a strategic plan of growth, and the homesites, covenants included, were part of it.\textsuperscript{130}

Any lingering doubts about the intentionality of the covenants must disappear by the early 1960s.\textsuperscript{131} During the first half of that decade, Duke began signing deeds for Duke’s biggest sections yet, Sections Four and Five.\textsuperscript{132} The deeds of those sections leave no doubt that the racially restrictive covenants were intentionally included, because the deeds

\textsuperscript{127} Editorial Staff, \textit{Duke to Develop}, \textit{supra} note 28.


\textsuperscript{130} See Edens 1955 Speech, \textit{supra} note 126.

\textsuperscript{131} \textit{Compare} Deed of May 6, 1958 (recorded May 7, 1958) in 249 Durham County Deed Book 503, 503 (on file with the Durham County Register of Deeds) \textit{with} Deed of Feb. 25, 1964 (recorded Feb. 25, 1964) in 299 Durham County Deed Book 299, 299 (on file with the Durham County Register of Deeds) [hereinafter 1964 Deed].

\textsuperscript{132} Edens 1957 Speech, 128, at 17.
themselves changed.\textsuperscript{133}

![Figure 2: Map of Faculty Homesites Section Five, Undated]

After 1958, Duke added a new clause to its deeds that explained how covenants could be removed. Under the new clause, a covenant could only be removed with the written consent of (a) the owners of all the lots adjoining the lot upon which the restrictions are to be changed; (b) the owners of two-thirds of the lots within the area covered by the restrictions; and (c) Duke University.\textsuperscript{134} Finally, the new language made clear that the removal or

\textsuperscript{133} 1964 Deed, supra note 131.
\textsuperscript{134} Id.
unenforceability of one covenant did not void the remaining restrictions.\footnote{Id.}

This removal clause is perplexing, because it supports a number of possible motivations. Even if not designed \textit{solely} for the racially restrictive covenant—the university kept it in its homesite deeds even after removing the racial covenant\footnote{Draft Homesite Deed from E.C. Bryson, University Counsel, Duke Univ., to Douglas Knight, President, Duke Univ., (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University).}— the removal clause demonstrates that the university was aware that some owners would likely want some covenants removed. Yet it is unclear whether Duke intended the clause to weaken the covenants by giving a clear mechanism for removal, or to strengthen it by making the removal arduous. This ambivalent messaging is consistent with President Edens’ attitude toward segregation. Like Edens’ reaction to \textit{Brown v. Board}, the clause seems carefully designed ‘to prevent Duke University from being maneuvered into an embarrassing position either by delaying too long or moving too swiftly.’\footnote{Edens 1954 Speech, \textit{supra} note 100, 10.} Path dependency cannot explain the persistence of the covenants under President Edens. They were more likely maintained out of intentional ambivalence.

\textit{B. President Hart Era – The Covenants Are Challenged}\n
President Edens resigned in 1961, ostensibly to make way for a president “who could see the University through the expansion and development
planned for the ten-year period that lay ahead.” However the open-secret cause of the resignation was discord between President Edens and the faculty. The faculty, according to the Duke student newspaper, *The Chronicle*, thought Edens “lacked forcefulness” and could not reconcile differing views on, among other things, desegregation and “the role and position of the university.” In the wake of Edens’ resignation, Duke University’s Board of Trustees chose Deryl Hart to serve as President Pro Tem. A Professor and Chairman of Duke’s Department of Surgery, Hart was a respected and liberal-leaning member of the Duke community. It would be under his direction, and at his urging, that Duke would begin admitting African American students to the undergraduate schools. President Hart’s achievement in integration would occur toward the end of his term, in the summer of 1962, but in the beginning of his term, President Hart and the university were given the first recorded opportunity to address another facet of racial inequality at Duke: the racially restrictive covenants in the Duke Faculty homesites.

As later detailed in a report to the University Council, “[i]n May 1960 a group of nine faculty members, owners of lots purchased from Duke University, addressed a letter to Mr. C. Henricksen, Business Manager and

---

138 Tom Campbell, *Disputes Mark Four President Decade*, CHRON. (Durham, N.C.), Jan 8, 1970, at 9.
139 *Id.*
142 *Id.*
Comptroller, asking that the covenants in the customary deeds regarding sale of property to Negroes be removed. Reasons for the request were given.”¹⁴³ The members of the University Executive Committee twice denied the homeowners’ request, both times without giving any justification.¹⁴⁴ Thwarted and frustrated, the homeowners brought the matter before the University Council.¹⁴⁵ The Council, per a decision by President Hart, appointed two members of the Council to serve as a special committee and answer the homeowner’s request. The committee—pithily named the “Special Committee to Consider the Request of Several Faculty Members with Regard to the Covenant about Selling to Negroes Which appears in the Deeds of Land Sold by the University to Faculty and Staff”—flatly rejected the homeowners’ request.¹⁴⁶

The Special Committee began its report by reminding the professors of their place in at the university: “[I]t should be pointed out to our colleagues that control of the physical property of a university must be vested in the trustees of that university. Questions about academic policy with which a faculty must have some say have to be separated from questions about

¹⁴³ Frank T. DeVyver, Robert Bolich, Report of a Special Committee to Consider the Request of Several Faculty Members with Regard to the Covenant about Selling to Negroes Which appears in the Deeds of Land Sold by the university to Faculty and Staff. May 17, 1961 (on file with the David M. Rubenstein Manuscript and Rare Books Library, Duke University) [hereinafter 1961 Committee Report].
¹⁴⁴ Id.
¹⁴⁵ Id.
¹⁴⁶ Id.
property.”

The Special Committee then turned to the merits of the homeowners’ proposal: “Thus far 337 lots have been sold and the deed for each one of them contains the restrictive covenant objected to in this case. We do not believe that several hundred faculty members would agree with the nine who have brought this action.” (On this point, the committee spoke with personal experience; the Special Committee’s chairman, Frank T. DeVyver owned a faculty housing lot and had signed a deed containing a racial covenant.) And even if the rest of the faculty members wanted to remove the covenants, the Special Committee continued, Duke would not be able to do anything about it: “Duke has signed contracts in good faith each containing the restrictive clause. We believe Duke University does not have the right to strike from [sic] this covenant from any deeds.” The Special Committee then summed up its position: “In other words, nothing can be done about the past.”

The Special Committee’s report highlights the unique situation of the Duke Faculty homesites. On the one hand, the report told the homeowners that as faculty they had no right to dictate Duke’s policies on its properties. Yet in the next paragraph, the report told them that the decision ultimately

---

147 Id.
148 Id.
150 1961 Committee Report, supra note 143.
151 Id.
152 Id.
rests in their community. The university’s administration, the Special Committee claimed, had total autonomy to dictate the homesite community’s policies, but once the polices were dictated, only the community could affect change.

During the Special Committee’s deliberations, Robert Bolich, a member of the Special Committee member prepared a private legal memorandum for President Hart that elucidates the Special Committee’s reasoning. Whereas the Special Committee’s public report focused on community preferences, the private memo focused on community control. Under North Carolina law, explained the memo, courts will only enforce restrictive land use covenants within a “general plan of development.” The faculty homesites constituted just such a plan. “However,” the author continued, “it seems doubtful that such a general plan would exist if Duke University had the legal right to abrogate any of the restrictions without the written assent of individual lot owners.” Although the recent covenants could be removed according to the procedures therein, the older covenants, lacking any internal procedure, could only be removed by assent of all the property

---

153 See Robert Bolich, Memorandum of Law Relating to Abrogation of Restriction Against Transfer of a Lot to or Use by a Negro, May 16, 1961 (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) [hereinafter 1961 Committee Legal Memo].

154 Id. at 1 (citing Craven co. v. First City Bank and Trust Co., 237 N.C. 502 (1953); Reed v. Elmore, 246 N.C. 221 (1957)).

155 Id.

156 Id. (citing Humphrey v. Beall, 215 N.C. 15 (1938)).
owners.\textsuperscript{157} The memo concluded by reemphasizing the legality of the covenants, “they are valid under the laws of this State,”\textsuperscript{158} and “by rule of the United States Supreme Court also they are not illegal or unlawful, but simply not judicially enforceable because it would constitute state action violative of the equal protection clause of the fourteenth amendment.”\textsuperscript{159} To attempt to rid itself of the racial covenants, therefore, Duke would not only subject itself to the potential ire of “hundreds of faculty,” but would also risk losing the enforceability of the other restrictive covenants contained in the deeds. Duke relied on these aesthetic covenants to create “an atmosphere of satisfaction in the faculty” and to “secur[e] good men on the faculty.”\textsuperscript{160}

Although it is possible to read the Special Committee’s reasoning as a flimsy justification of existing racial prejudice, it is a worthy exercise to take President Hart and the Special Committee at their word. Given Hart’s eventual role in desegregating the university, perhaps his administration sincerely felt trapped by the situation and honestly believed that “nothing [could] be done about the past.”\textsuperscript{161} Duke first established the norms in an earlier era, an era in which white homogeneity was as much of an aesthetic perk as an attractive set back and guaranteed sight lines. Having established

\begin{footnotes}
\item[157] \textit{Id.}
\item[158] \textit{Id.} at 2 (citing Sheets v. Dillon, 221 N.C. 426 (1942)).
\item[159] \textit{Id.} (citing Shelley v. Kraemer, 341 U.S. 1 (1948); Barrows v. Jackson, 346 U.S., 249 (1953)).
\item[160] Edens 1957 Speech, \textit{supra} note 128, at 17.
\item[161] 1961 Committee Report, \textit{supra} note 143.
\end{footnotes}
the norms, Duke gave them over to the community to “run with the land.” And as Duke began to move away from the norms, the land and the community held them back. Effectively Hart was faced with two options to remove the covenant: (a) convince hundreds of homeowners to remove only the racial covenant, or (b) surrender Duke’s control of the community by abandoning all the covenants. Both options would subject Hart to immense internal pressure from the majority of faculty homeowners and external pressure from the majority of donors. Even if he personally disagreed with the covenants, is it surprising that he opted out? Duke would only address the covenants when the balance of public opinion tilted against their favor and when their continuation, not removal, became a liability.

C. President Knight Era – The Covenants Are Discontinued

On Friday, November 2, 1962, the Board of Trustees announced Douglas Knight would replace Deryl Hart as University President. The 41-year-old President of Lawrence College in Wisconsin, Knight was “likely intended to be a compromise candidate” between the conservative and liberal factions on the Board. But Knight’s personal beliefs skewed more to the left, and, during the course of his tenure, Knight managed to pull Duke in that direction primarily through attracting to the university, “[a] new kind of student, more

---

162 Campbell, supra note 138, at 11.
163 Id.
curious, more critical, more cosmopolitan, and more socially aware.” 164 This “new kind of student” would ultimately succeed where nine faculty homeowners had failed.165

Six months into Knight’s presidency, on April 12, 1963, The Chronicle ran a “Special Report” on desegregation at Duke University.166 Thanks in part to the efforts of Deryl Hart, the university had just sent out its first undergraduate admission letters to African American students.167 (As Edens had earlier recommended, the university had already been admitting African American graduate students into “unobtrusive” programs.) Perhaps in preparation for the integration, The Chronicle’s special report highlighted existing “RACIAL DISCRIMINATION” on campus.168 The report detailed existing disparate treatment of African American staff and visitors, and it noted that the newly admitted African American students would be barred from many fraternities and sororities whose national organizations banned black members.169

The Chronicle’s allegations alarmed members of the Duke community. “Dear Sirs:” wrote graduate student Rupert Buchanan to the university Board

164 Id.
166 See Ed. Board, Special Report, supra note 141.
167 Id. at 1.
168 Id. at 3.
169 Id.
of Governors, “I should like to inquire whether there are policies at Duke, at any level of the administration, that involve unequal treatment of Negro students. It was the April 12, 1963, issue of the “Chronicle” that suggested this to me.”

“[T]hank you for your recent letter,” responded President Knight. “First, you must learn to read all newspapers with due caution—even the august Duke Chronicle. Second, you should have some reasonable confidence in the administration of the University which has, after all shown a very genuine and understanding concern for some time in the proper integration of the University.”

Less than one month after President Knight replied to the Buchanan letter, he received another letter on the same topic, this time from Dr. Peter Klopfer, a Quaker faculty member who had protested the racial discrimination under Presidents Edens and Hart. “Almost daily,” wrote Dr. Klopfer, “am I reminded of the insulting (though legally unenforceable) restrictive covenant attached to deeds for faculty lots sold by the university; of discrimination (apparently) in employment and salary levels; of continued racial restrictions in certain areas of the hospital,” wrote Klopfer in words

\footnote{See Letter from Robert Buchanan, Student, Duke Univ. to Douglas Knight, President, Duke Univ., Sept. 1963, (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) (containing copies of the response and original letter).}

\footnote{Id.}

\footnote{Letter from Peter Klopfer, Professor, Duke Univ. to Douglas Knight, President, Duke Univ., Oct. 9, 1963, (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University).}

\footnote{Id.}
unknowingly familiar to Knight. Yet Dr. Klopfer went further than Buchanan in his tacit condemnation. Invoking Klopfer’s own moral obligations as a member of The Society of Friends, he charged directly at President Knight’s morality: “Do you not share this shame?” he asked, “May we hope that you will exercise the prerogatives of your office to elimination the last vestiges of intolerance?”

If less paternal than in his earlier response to Buchanan, President Knight’s response was equally cagey. He again asked for “confidence in [the university’s] willingness to do what we can.” And, as for personal morality, Knight expressed sympathy with Klopfer’s views but constrained his support to the limits of his office: “The problem is not simply one of abstract justice, but of justice and history interacting; and somehow we must live with both.”

President Knight was true to his principles and to his word. The semester after he received the Buchanan and Klopfer letters, Knight sent a letter to University Counsel Ed Bryson regarding the covenants. “Here I am as usual pestering my wisest friends for help,” he began.

Since the restrictive covenant in our University Deed of Sale to Faculty Members is no longer enforceable in a court of law, is there

---

176 Id.
any reason why we can’t simply drop it quietly from the contract in future cases? I can see that there would be a good deal of smoke and steam if we were to go back and rewrite all the contracts we have made in the last thirty-five years, and I have no desire to that—particularly at this moment! I do wonder, however, whether the other step might not be a sound one, and thoroughly in accord with conservative legal practice.\footnote{Id.}

In his response, Bryson included Robert Bolich’s 1961 legal memorandum and agreed that nothing could be done about the existing covenants without the full assent of the Duke Forest community. However, Bryson agreed with President Knight that the covenants could be removed from future deeds “in a quiet way, without any ‘smoke and steam.’”\footnote{Letter from E.C. Bryson, University Counsel, Duke Univ. to Douglas Knight, President, Duke Univ., March 19, 1964 (on file with the David M. Rubenstein Manuscript and Rare Books Library, Duke University) [hereinafter 1964 Bryson Letter].} Bryson then moved beyond the scope of his assignment. He reminded President Knight about the university’s policy—first established in 1931 under President Few\footnote{See supra Part I.}—that the buyer offer Duke a right of first refusal on future resale of the property. “While such an agreement is not binding on third parties who might purchase without notice, it has worked very well.”\footnote{1964 Bryson Letter, supra note 178.} To ensure that in the future the agreement would be binding, however, Bryson made a suggestion: “Instead of this letter agreement we could require that our grantees execute a formal option to resell to Duke at the highest bona fide offer. Such an option, when recorded, would be binding upon all parties, since
under North Carolina law registration of such an instrument is notice to the entire world.”

Under Bryson’s new plan, Duke could use its wealth to block any potential sale of homesite for any reason. It “could control the developments” and “keep the property within the university family.”

President Knight accepted both of Bryson’s recommendations. Duke drafted new deeds that excluded the racial covenants, and it formalized the purchase options. Now, even without the racial covenants, Duke University could protect its image—and the image of Duke Forest—through exclusion and control. All without facial discrimination.

“Discrimination!” the title read. The date was April 17th, 1963. One week earlier, fresh off of his victory in “quietly” removing the covenants from future deeds, President Knight boldly proclaimed in an interview with *The Chronicle*, “no policy of racial discrimination exists at Duke.”

Now, an open letter the *The Chronicle* told President Knight that not all of his

---

181 *Id.*
182 *Id.*
185 See Letter from Terry Sanford, President, Duke Univ., to Rufus Powell, Dean, Duke Univ. School of Law, Aug. 22, 1980 (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) (discussing the regulations regarding the homesites and including the relevant pages of the Duke University Faculty Handbook).
186 *Discrimination!*, supra note 122.
students agreed. “On the same day that President Douglas Knight reassured the community . . . that ‘no policy of racial discrimination exists at Duke,’” stated the editorial, “a deed signed by President Knight conveying a Duke Faculty Homsite was recorded at the County Court House.”188 The editorial then listed five more deeds to faculty homesites that President Knight had signed during his brief tenure, each containing an odious covenant. 189 The editorial was unconcerned with the enforceability of the racial covenants; it cared more about the ramifications of their signal. “The public record leaves open the question of whether the University merely discriminates in housing, or also in faculty recruitment . . . [the covenants] prove [] that Duke will not offer a prospective Negro faculty member the same inducement—an expensive site on which to build a home—as a white faculty member. . . . There’s obviously no room for Negro faculty members at this Christian Inn.”190

The open letter was signed by five graduate students, but its tone bore the signature style of one. Ed Rickards, then a law student at Duke University, had been challenging the existence of the covenants and other racial discrimination since his time as an undergraduate during the President Hart

188 Discrimination!, supra note 122.
189 Id.
190 Id.
During his seven years at Duke, and well beyond, Rickards demanded equality for all members of the university’s community and poured contempt on the university administration’s persistent requests for patience. From his editorial post at *The Chronicle* and his position as a founding member of the “Students for Liberal Action,” Rickards mounted an aggressive and relentless assault on racial discrimination at Duke University, including on the covenants in the faculty homesites. For his efforts, Rickards was derided by the administration, labeled a communist sympathizer by campus police, and—at least as it relates to the covenants—vindicated by history.

---

193 For a sense of Rickards’ style, consider the following exchange from one of his many letters to President Knight, “I am surprised at your suggestion that there has ‘never’ been an ‘intention or indication’ by the official of Duke to ‘abrogate’ their responsibilities in the field of race relations. I know all too well the abdication that took place during 125 segregated years.” This was in response to a letter in which Knight accused Rickards of “Professional negativism.” Letter from Ed Rickards, Reporter, Daily News to Douglas Knight, President, Duke Univ., Jul. 19, 1965 (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) (emphasis in original).
194 *See* Doherty, *supra* note 192.
195 *See* Letter from Douglas Knight, President, Duke Univ. to Wright Tisdale, Ford Motor Company, undated (on file with author) (commenting that “[t]he young man writes miserably”).
196 *See* Letter from W.C.A Bear, Chief of Security Division, Duke Univ. to Douglas Knight, President, Duke Univ., Sept. 13, 1965 (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University) (insinuating Rickards, then a third-year law student, was a communist sympathizer).
197 *See infra* Part III.
Shortly after Rickards and his cohorts published their April 17th “Discrimination!” letter, they met with University Counsel Bryson who explained that Duke would cease writing the covenants in its deeds. Rickards responded by calling Bryson to address the symbolic significance of the covenants. He demanded Duke’s “continued concern and consternation” toward the covenants, “with a view toward someday eradicating this black mark on the public record.” Rickards then called for Duke to announce publicly the opening of a new, racially unrestricted portion of the homesites. Rickards evidently understood that to recruit and retain African American faculty members, the university had to do more than change its policy, it had to change its symbols.


A. “No discrimination at Duke University”

In 1966, Dr. Samuel DuBois Cook became the university’s first black member of the faculty. ‘When I came here Duke had less than twenty-five black students,’ recalled Dr. Cook in a student interview. ‘[T]here were a lot of racists around, including some on the Board of Trustees . . . [when the Board heard Dr. Cook was hired] they said: I understand you have a Negro

\[198\] Letter from Ed Rickards, Student, Duke Univ. to E.C. Bryson, University Counsel, Duke University, Sept. 29, 1964 (on file with the David. M. Rubenstein Manuscript and Rare Books Library, Duke University).

\[199\] Id.

\[200\] Id.

\[201\] Id.
on the faculty. What's he doing here?” At times Dr. Cook must have asked himself the same question.

And It Is Guaranteed And Agreed by the part A.B.C. of the second part. to their heirs, and assigns, as a part of the consideration and as an inducement to the execution of this deed by the party of the first part, and as a condition thereunto, as follows:

1. All lots shall be known and described as residential lots and shall be used for residential purposes only, and no structure shall be erected on any lot other than one detached single-family dwelling not to exceed two and one-half stories in height and a one- or two-car garage, which garage may include servants' quarters, and such other outbuildings as are ordinarily incidental to residential use of the lot. No such structure, once erected, shall be used, or suffer, or licensed to be used, as a shop, store, factory, hotel, or place of public resort or business house of any kind, or as a hospital, asylum or institution of like or kindred nature, or for the purpose of carrying on any kind of trade or business whatsoever, but shall be used solely for residential purposes; and nothing shall be done therein which may or may become an annoyance or nuisance to the neighborhood.

2. Only one residence shall be constructed upon a lot and each residence so constructed shall consist of a minimum of 1600 square feet exterior measurement of contiguous enclosed living area.

3. No building shall be erected on any lot nearer the property line on any street than 40 feet nor nearer than 10 feet to either side line, except a detached garage located on the rear one-half of a lot shall not be located nearer than 3 feet to either side line.

4. The residence on any lot shall be erected to face the street abutting the front of said lot, which as to a corner lot shall be the street upon which the lot has the least frontage. Except the residences erected on lots A-13 and lots A-1 and B-1 shall front on McDowell Street.

5. No trailer, tent, shack, garage, or other outbuilding erected on a lot shall at any time be used as a residence temporarily or permanently, nor shall any residence of a temporary character be permitted, except as herein otherwise provided with respect to garages and outbuildings. No livestock shall be kept on any lot, but dogs, cats and household pets may be kept on same upon written permission of control and sanitation as provided that they do not become a nuisance to the other owners in the development, and further provided that they are not kept, bred, or maintained for commercial purposes.

6. Each dwelling house built upon the premises shall be connected with a common sewer.

7. No fence higher than 2 feet above the ground shall be built within 20 feet of the property line on any street.

8. The lot hereby conveyed shall not be used, transacted, conveyed, leased, or assigned to persons of Negro blood, provided that this shall not be construed to prevent the living upon the premises of any Negro servant or tenant whose time shall be employed for domestic purposes only. Any other of its covenants by judgment or court order shall be to no wise affect any of the other paragraphs, which shall remain in full force and effect.

9. The lots hereinabove described, reservations, agreements and covenants or any change hereof shall apply to the lots shown on the plat hereof to and shall run with the land and shall be binding on all parties or persons claiming under them, their heirs, executors, administrators, successors, and assigns; and all provisions herein contained shall bind and inure to the benefit of and be enforceable by the owner or owners of any lots shown on the plat herein above and their heirs, executors, administrators, successors and assigns, and failure of any property owner to perform any of such restrictions, covenants, provisions, and agreements herein contained shall in no event be deemed a waiver of the right to so do. Initiation of any of these covenants by judgment or court order shall be to no wise affect any of the other paragraphs, which shall remain in full force and effect.

In Testimony Whereof, the said party of the first part has caused this deed to be sealed with its common seal, signed in its name by its president and attested by its secretary, the day and year first above written.

Dr. Cook experienced firsthand the conservative pressures captured in

Figure 3: Excerpt of a Homosite Deed, February 1964

President Eden’s 1955 address. He encountered internal racism every day.

For Dr. Cook and the few African American students on campus, even a trip

---


203 See, e.g., Dr. Samuel Dubois Cook on Dissecting Inequality, YOUTUBE.COM, https://www.youtube.com/watch?v=X1xyByb71AU.
to a Duke football game could become a harrowing experience: people in the stands would waive confederate flags near them and “they still sang Dixie,” Dr. Cook would have also seen the sign above an area of seats, labeling the “colored section.” The external racism, meanwhile, preempted any efforts to change race relations on campus. Although President Knight had ‘the humane concern and interest’ to more-fully embrace integration, he lacked, according to Dr. Cook, the requisite ‘moral courage or toughness essential to making the decision.’ Dr. Cook noted that one of the primary obstacles to proper integration was Duke’s financial dependence on alumni who opposed social reform. “President Knight said two or three things had hurt fundraising, had hurt him. One was my coming here, a black professor.” Yet Dr. Cook encountered little overt racism at work. That was left for the home.

We went to one [home] that we liked, [Dr. Cook] recalled, but the owner said, “I will not sell this house – you know, they’re n*****s.” This was in Duke Forest. . . . After we bought the house, in the deed was a restrictive covenant. Could you imagine? “Do not sell this house to Negroes”

Dr. Cook’s story captures the power of an “unenforceable” racially restrictive covenant. In that moment, it did it matter that the covenant was not
enforceable; Dr. Cook still keenly felt its sting. He still understood the covenant to mean that he and his family were not welcome in their home, in their community. Equally important, the home’s original owner understood the message of the covenant. He felt empowered by community norms to exclude, insult and belittle a distinguished university professor. Unenforceable or not, both the buyer and the seller still received the covenant’s signal, loud and clear.

In April 1969, almost exactly five years after Duke ceased writing racial covenants, the university had an opportunity to affirmatively counter their signal. Dr. Louis Budd, chairman of the Committee on Faculty and Staff Housing of the Academic Council, reached out to President Knight with a problem: “One of the less-discussed yet still painful and pressing problems for the Negro community of Durham,” began Budd, “is that of housing for its more affluent citizens. They too have felt the penalties of segregation in housing and continue to do so.”210 Although, Budd came short of indicting Duke University for contributing to segregation, he nonetheless tacitly reminded President Knight of the university’s reputation. “By acting positively,” Budd suggested, “the University could help to erase the impression that many of the Duke faculty live in a privileged, essentially

white enclave.”

As an “affirmative approach” to counteracting both Duke’s reputation and segregation itself, Budd made two suggestions to make it easier for current homosite owners to sell their lots to African Americans outside of the Duke faculty: He asked the administration to formalize its buyback option and to declare that it would not use the option to prevent a sale to an African American buyer; Budd also asked that any faculty-member intending to sell his lot, “indicate on a simple form (only if he was willing, of course) that he would not object to any buyer on the basis of race.” So indicated, the listing would then be shared with the Durham Open Listing Service, an agency working to combat segregation.

In his reply letter, President Knight enthusiastically endorsed the ideas. Knight even went further, suggesting that Duke extend second-mortgages to upper and middle-class African American families who would like to purchase a home in Durham. “We have made one such arrangement,” President Knight explained, “and it works to the benefit of a family which would not have bought a house in the homsites, and yet is well above the

---

211 Id.
212 Id. at 2.
213 Id.
215 Id.
poverty level.” Here was an opportunity to correct some of the harm caused by the covenants and drown out their signal of exclusion with one of welcome.

Unfortunately, it does not seem that such a program ever got off the ground. In his responding letter, Budd thanked President Knight for his enthusiasm and asked several clarifying questions. However Budd’s letter went unanswered. It, and the possibilities it carried, likely got lost in the tumult of the spring of 1969.

The very day that Budd sent his response letter, April 29, 1969, President Knight received a public verbal lashing from President Richard Nixon. President Nixon, a Duke Law alumnus, was upset with President Knight for the latter’s response to student protests on campus. In February of that year, African American students at Duke University forcibly took over an administrative building at Duke and demanded the university take steps to

---

216 Id.
217 There is no mention of it in the subsequent minutes of the Academic Council, nor anywhere else in the Homesite materials at the Duke Archives.
219 See id. (containing the previous back and forth, but no response).
221 Id.
address racial inequality within its community. The protest itself lasted only one day, but its repercussions undid the Knight administration. President Knight received immediate local criticism for inviting the Durham police to retake the building— a decision that resulted in forty-three students being sent to the emergency room. Knight then received ongoing national criticism for his decision to nonetheless meet most of the students’ demands, including the creation of a Black Studies Program at Duke. Facing criticism on all sides, President Knight publicly resigned on March 31, 1969, agreeing to keep his post through June 30 of that year. And with President Knight’s resignation, Duke lost its chance to distance itself from the stigma of the Duke Forest covenants while they were still fresh in the institutional memory.

---


223 See e.g., Ralph Karpinos & Clay Steinman, 1000 Confront Knight, CHRON. (Durham, N.C), Feb. 16, 1969 at 1 (reporting that an angry crowd of one thousand faculty and students crowded outside of President Knight’s home in immediate response to his handling of the takeover); Clay Steinman, Where to Now?, CHRON. EXTRA ED. (Durham, N.C), Feb. 16, 1969 at 2 (calling President Knight a “frightened little m[a]n”).

224 Jensen & Newman, supra note 222 at 1.

225 See id.; Ed. Board, President Knight Resigns, CHRON. (Durham, N.C), Mar. 31, 1969, at 1.

226 Ed. Board, supra note 225.
B. A Stigma Forgotten

In 1969, Duke University hired Professor Walter Burford to lead the newly-and-hastily created Black Studies Program, and, in 1975, the university denied Burford tenure.227 The university’s administration explained that it could only look to Professor Burford’s part-time teaching record to evaluate his performance, so it urged him leave his administrative post and focus on teaching full-time.228 Burford complied with the recommendation.229 Yet the university again denied him tenure.230 After exhausting all internal mechanisms of appeal,231 Burford sued Duke University for racial discrimination.232

As evidence of Duke’s discrimination, Professor Burford’s lawyer pointed to the racially restrictive covenants in the faculty homesites.233 Although accurate on most counts regarding the covenants, the lawyer

228 Id.
229 Id.
230 Id. At the heart of the controversy was Duke’s treatment of the Black Studies Program, itself. It was not granted departmental status and thus could not itself grant tenure; the religion department was then left to judge Professor Burford by his work in that department, something that occupied only one-third to one-half of his actual duties at the university. See Id.
231 See Edward Fudman, Burford Appeal Fails; Tenure Denial Upheld, CHRON. (Durham, N.C), Oct. 28, 1976, at 1.
232 Avis Sanders, Students React to Burford, Examine His Work as Teacher, CHRON. (Durham, N.C Jun. 23, 1977), at 1.
publicly and erroneously claimed that Duke had continued writing the covenants into the early 1970s.\textsuperscript{234} Responding to the claims in an interview with \textit{The Chronicle}, Charles Huestis, Vice President of Business and Finance, assured the student body that no such deeds existed.\textsuperscript{235} To support this assertion, Huestis explained that he had checked deeds dating back to 1966,\textsuperscript{236} the year he began working at Duke.\textsuperscript{237}

Assuming he spoke in earnest—and there is no reason not to—Vice President Huestis’s statement was remarkable. Within two years of the last racial covenant being signed, a newly-hired senior official did not know they had ever existed. Eleven years into the job, and he still had no idea.\textsuperscript{238} And this was not limited to Huestis. So pervasive was the institutional amnesia that Ed Bryson, the man who, with President Knight, was directly responsible for ceasing the racial covenants, told \textit{The Chronicle} in 1977 that “he could not recall who acted to eliminate the restrictive clause.”\textsuperscript{239} To Bryson, the deeds were long gone—only one of countless matters that he worked on as University Counsel. Duke Professor of Law, Arthur Larson, summed up the general sentiment in his comments to \textit{The Chronicle} in the same article: “The

\begin{itemize}
\item \textsuperscript{234} Barry Bryant, \textit{Burford’s Lawsuit Answered}, CHRON. (Durham, N.C), Jun. 30, 1977, at 1.
\item \textsuperscript{235} Id.
\item \textsuperscript{236} Id.
\item \textsuperscript{238} Bryant, \textit{supra} note 234, at 1234.
\item \textsuperscript{239} Goldberg, \textit{supra} note 233, at 1.
\end{itemize}
covenants are ‘unenforceable’ . . . ‘They’ve been a dead letter so long I don’t think anyone thinks anything of it.’"\textsuperscript{240}

Professor Larson’s comments may have been accurate with regards to the white members of the Duke community, but the university’s African American members could not afford the luxury of amnesia. The covenants were obviously on the mind of Professor Burford. He knew of them despite arriving at Duke five years after the last one had been signed;\textsuperscript{241} he—or his counsel—even thought the policy had only recently ended.\textsuperscript{242} Similarly, Dr. Cook’s account of his personal experience with a covenant—given in a 1985 interview—testifies that the covenants, though buried, were not forgotten.\textsuperscript{243}

Moreover, the covenants were not truly gone from the Duke community. At the time of Dr. Larson’s comments, at least twelve active faculty members lived on homesites with a racial covenant in the deed.\textsuperscript{244} One of the owners, Chancellor John Blackburn, was a named defendant in Professor Burford’s lawsuit.\textsuperscript{245} Despite Professor Larson’s insistence that the covenants were ‘unenforceable,’ they were still actively affecting the Duke community. And the university still had done nothing in response. When asked why, Bryson—retired and no longer speaking for Duke—was direct: “There were many,

\begin{flushleft}
\textsuperscript{240} \textit{Id.}
\textsuperscript{241} \textit{See} Newman, \textit{supra} note 227, at 1.
\textsuperscript{242} Goldberg, \textit{supra} note 233, at 1.
\textsuperscript{243} \textit{See}, Yanella, \textit{supra} note 202, at 6.
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{Id.}
\end{flushleft}
Forty years later, Duke has still never attempted to remove the covenants and for the same reason shared by Ed Bryson, it would be “nearly impossible to go back and remove them.” 247 This is not an overstatement. Although a few states have provided a statutory mechanism for striking racially restrictive covenants from deeds, most, including North Carolina, provide no such path. 248 At least as to removing existing covenants, the situation now is as it was when the Committee on Faculty Housing addressed the issue in 1961: The covenants with a removal clause require a two-thirds vote of all homesite owners, and those without such a clause likely require a unanimous vote. 249 As in 1961, “Duke University acting alone has no power to abrogate or change the racial restriction in question.” 250 Unlike the statue of Robert E. Lee, Duke could not (and cannot) simply pull down the covenants. However, that does not mean Duke has “done nothing about the past.” 251

C. A Stigma Addressed

246 Id.
247 Interview with Office of Counsel, supra note 35.
248 For an example of a state-made remedy, see generally Rajeev D. Majumdar, Racially Restrictive Covenants in the State of Washington: A Primer for Practitioners, 30 Seattle U. L. Rev. 1095 (2007).
249 1961 Committee Legal Memo, supra note 153.
250 Id.
251 1961 Committee Report, supra note 143.
In the Spring of 1989, Duke University, under the leadership of President H. Keith Brodie, first tried to alleviate the stigmatic harm of the racial covenants. Channeling President Knight’s fear of ‘smoke and steam,’ Duke first sought a quiet resolution. Jeffrey Potter, Director of Real Estate Administration, sent a letter to the owners of 290 Duke University homesites developed before 1965. “As you are probably aware,” the letter explained, “in that era it was common practice to include racially restrictive covenants in deeds to property in many neighborhoods. Duke was no exception to that regrettable rule.” The letter then assured homeowners that they had done nothing wrong and that no action was required on their part. “[Y]ou need not do anything to keep it from having any legal effect. It remains a part of the original deed to your property as a matter of historical record only.”

If a homeowner did wish to address the covenants, Potter offered several options. First, he suggested that homeowners keep a copy of the letter with their title papers, “to avoid offense or embarrassment from the covenant when you sell or rent your home.”

---

252 Letter from Jeffrey H. Potter, Director of Real Estate Administration, Duke Univ., to Professor Thomas D. Rowe, Professor of Law, Duke Univ., Mar. 22, 1989 (on file with the David M. Rubenstein Manuscript and Rare Books Library, Duke University) [hereinafter 1989 Letter].
253 Id. at 2.
254 Id.
255 Id.
256 Id. (emphasis in original).
257 Id.
legal advice, Potter suggested that homeowners can disclaim the covenant in future deeds of conveyance and draft their title insurances “in such a way as to minimize offense.”

Potter also used the letter to distance Duke from the covenants. In language presaging President Price’s email concerning the Lee statue, Potter wrote that Duke “can and hereby does make it clear that it repudiates racially restrictive covenants and regards them as morally wrong in addition to being legally void.” Speaking for Duke, Potter also came close to apologizing for the covenants, saying that the university “regrets the presence of this ugly specter from the nation’s and the University’s past.” Potter also, for apparently the first time in Duke’s history, accepted responsibility for the covenants and their harm: “Just as Duke must bear responsibility for its prior action in creating these covenants, we now wish to do what we can to eliminate their vestiges.” Having privately accepted responsibility for the covenants with individual homeowners, Duke apparently forgot about them for eighteen years.

In 2007, Kristin Butler, a student editor of The Chronicle, assumed the

---

258 Id. at 2-3.
259 Id. at 2.
260 Id. at 4.
261 Id.
262 See Interview with Office of Counsel, supra note 35 (saying that Duke only publicly addressed the covenants in 2007 because that was when they were raised to the university’s attention).
mantle of her friend and sometimes co-author Ed Rickards. In a series of three articles over the course of her Junior and Senior years, Butler lambasted Duke for either inaction or “unsatisfactory half-measures” regarding the covenants. In her first article, in January of 2007, Butler gave a brief account of Duke University’s history with the covenants and chastised the university for failing to “follow[] through on its promise to eliminate these ‘vestiges’ of racism.” Butler urged Duke to seek a “judicial declaration” to undo the covenants, and to do so quickly: “How much longer,” Butler questioned, “must members of this community wait before the right thing is done?” Three months later, Butler directly charged President Richard Brodhead, President Brodie’s successor: “Why are you and your administrators actively supporting and defending racial prejudice in our midst? Why are your most senior employees refusing to remove racially restrictive covenants from deeds in the Duke faculty homesites?”


265 Butler, Take 3, supra note 263.

266 Butler, Era, supra note 264.

267 Id.

268 Butler, Erase Racism, supra note 264.
Here, again, it was Duke’s students calling the university toward retribution. Both Rickards in 1964 and Butler in 2007 pushed the university to publicly acknowledge and remedy the covenants’ harms. Yet the students’ differing demands show that although the covenants themselves remained the same over the years, their signal had changed. In 1964, Rickards and his companions had fought to stop the university from drafting new covenants—for, in 1964, drafting even unenforceable covenants sent a racist signal.\textsuperscript{269} In 2007, by contrast, Butler fought to compel the university to remove the covenants—for, in 2007, “refusing to remove” even long-buried covenants sent the same message.\textsuperscript{270} The was not that the monuments were erected, but that they still stood.

Spurred by the articles, Duke moved to publicly disclaim the covenants in 2007.\textsuperscript{271} University Counsel Pam Bernard, with the help of outside counsel, sought a public and inexpensive way for Duke to redress the harm caused by the mere presence of the racially restrictive deeds.\textsuperscript{272} Recognizing the near-impossibility of unilaterally “removing” the covenants, Bernard and her team arrived at a solution: They filed a waiver of enforceability with the Durham County Register of Deeds.\textsuperscript{273} The “Waiver of Enforceability of Restrictive

\textsuperscript{269} See Discrimination!, supra note 122.
\textsuperscript{270} Butler, Erase Racism, supra note 264.
\textsuperscript{271} Interview with Office of Counsel, supra note 35.
\textsuperscript{272} Id.
\textsuperscript{273} Waiver of Enforceability, supra note 11.
Covenants and Reversionary Interests” identified over two hundred deeds containing racially restrictive covenants, and it incorporated by reference any that it had failed to enumerate.\(^{274}\) Acknowledging “the legal unenforceability” of the covenants and their corresponding reversionary interests, Duke nonetheless waived its non-existent right to enforce them.\(^{275}\) The covenants, said the waiver, “are the product of a bygone era, are morally abhorrent, and are contrary to the goals, values and standards of Duke.”\(^{276}\) Hence, “Duke forever waives, disclaims, and abandons all rights and interest associated with the specified [c]ovenants.”\(^{277}\) (The waiver makes clear that Duke waived only the racially restrictive covenant and corresponding reversionary interests in each of the deeds; it left the remaining aesthetic restrictions intact.)\(^{278}\)

Duke accompanied the waivers with a press release.\(^{279}\) In the release, Duke recognized that the waiver was “largely symbolic,” but said that it was, nonetheless, “an important statement.”\(^{280}\) “Even though we have no reason to expect the covenants ever to be enforceable in the future,” said President

---

\(^{274}\) Id. The list is, indeed, incomplete. For instance, it fails to include the five deeds signed in 1964 that were referenced in *The Chronicle*. Compare Waiver of Enforceability, *supra* note 11, with *Discrimination!*, *supra* note 122.

\(^{275}\) Waiver of Enforceability, *supra* note 11.

\(^{276}\) Id.

\(^{277}\) Id.

\(^{278}\) Id.


\(^{280}\) Id.
Brodhead, “we have revised each deed to disavow symbolically the language that is a reminder of the segregation of a past era.”

Although legally correct, President Brodhead’s statement is a touch misleading. The waiver applies to each deed mentioned and symbolically changes, or revises, them, but it does not remove or even alter the language in the deeds themselves. It does not so much remove the monuments as it puts a plaque next to them. And at the time the waiver was filed, at least one member of the Duke Community found this to be an insufficient measure.

“Today,” wrote Butler in April, 2008, “I write to review the unsatisfactory half-measures Brodhead has finally taken.” Butler accurately criticized Duke’s actions as “waiving enforcement rights it maintains it doesn’t have,” but she failed to offer any true alternatives to the university’s action. She again called for a “judicial declaration” to “fully cleanse homeowners’ deeds of the racist language,” but it is unclear what that would actually entail or accomplish. The true source of Butler’s ire, however, becomes more clear when she offered Duke reluctant praise for making the press release and unreluctant criticism for “not contact[ing] a single affected homeowner.” For Butler, the waiver of enforceability likely

---

281 Id.
282 Butler, Take 3, supra note 263.
283 Id.
284 Id.
285 Id.
felt like an unsatisfactory half-measure because, although public, it was less obvious than the harm it was intended to correct. When placed next to a statue that brims with vile significance, a plaque can be easily overlooked. Sometimes the statue must be removed.

**CONCLUSION**

After months of deliberation by the entire Duke community about who or what should occupy Robert E. Lee’s place on campus, President Price announced in August 2018 that Lee’s pedestal at Duke Chapel would remain empty.\(^{286}\)

In the almost ten years since Butler’s last article, the University Office of Counsel has received no complaints about the adequacy of the waiver of enforceability.\(^{287}\) But Butler’s criticism remains valid. Would Dr. Cook have felt less harmed if, upon discovering a racially restrictive covenant in his deed, he learned that Duke had disavowed it? Perhaps. But he still would have suffered an indignity that no institution or person ever had a right to give—not in 1931, not in 1964, and certainly not today.

To unilaterally remove the covenants is beyond Duke’s power. But Duke is not powerless. Although the university no longer exerts direct control over

---


\(^{287}\) Interview with Office of Counsel, *supra* note 35.
the community, it still maintains a relationship with the residents of the Duke Forest homesites. If it chose, it could at least try to organize the community around this cause. To heal the wounds caused by the signals Duke’s covenants sent into the greater community, Duke must embrace that greater community. Only by looking beyond its gothic walls can Duke University fully address its history. Only by inviting the surrounding community into its complex past, can it move toward a truly inclusive future.

* * *