PANEL DISCUSSION ON *SAVING THE NEIGHBORHOOD*: AUTHOR'S INTRODUCTION

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Saving the Neighborhood is a book that has been a rather a long time in the making. Rick Brooks and I talked about writing it together for several years after the mid-2000s, when we both found that we shared an interest in racially restrictive covenants.

My own interest began not long after I started teaching property law several decades ago, when it occurred to me that the famous 1948 constitutional law case about racially restrictive covenants, *Shelley v. Kraemer*,[1] might have said a good deal more about the property aspects of the case. In the early 2000s, I was asked to contribute a chapter to a book about iconic cases in property law, and I decided to have a real go at *Shelley*.[2] In the course of that project I learned a good deal more about these racial covenants, and about how pervasive they became in residential areas during the first half of the twentieth century.

Meanwhile, Rick was working in Chicago, and he learned some things about racial covenants in that city. What particularly interested Rick was that references to racially restrictive covenants continued to appear in real estate transactions even after the *Shelley* case made them unenforceable in court.

Once we discovered our mutual interest, we of course decided that we needed to write a book. And then we procrastinated. We didn't do much about it at all until 2010, but at that point we got to work. *Saving the Neighborhood* is the result.

And so, on to the book: We begin the book with an 1986 incident about an Arizona native, Justice William Rehnquist, at the time that he was being vetted for promotion from Associate to Chief Justice of the U.S. Supreme Court. The Federal Bureau of Investigation found that Rehnquist owned a summer home in Vermont that had once been subject to restrictive covenants against residence by Jews. On further investigation, the information emerged that Rehnquist had also once owned a house in Phoenix that included the most common kind of racially restrictive

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1. 334 U.S. 1 (1948).

2. Carol M. Rose, *Property Stories:* Shelley v. Kraemer, *in* PROPERTY STORIES 189 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009).

covenants—those that excluded African Americans. Justice Rehnquist claimed that he had not known about these restrictions, and that they were meaningless anyway, since they had not been enforceable for decades (thanks to *Shelley v. Kraemer*). Of course, Justice Rehnquist was not alone in owning property that had racial restrictions lurking in older title documents. In short order, Rehnquist's Republican defenders dug up racially restrictive covenants in a number of prominent Democrats' past, including discriminatory restrictions on houses that had been owned by John F. Kennedy and then-Senator and later-Vice-President Joseph Biden.[3]

The incident revealed the odd staying power in American housing of these once-legal but now-eschewed racial restrictions. But quite aside from the incident itself, Rick and I had developed an interest in racial covenants because they offered a compelling look at the interplay between social norms and legal norms, in an area of particular concern in American history and social science.

To a certain degree we hoped to challenge some of the social norm theory literature of the last couple of decades. The first point we hoped to make was that legal norms can interact with social norms, and can even make social norms possible. Racially restrictive covenants were legal instruments in their day, and during the time that they were legally enforceable, and even beyond that time, they helped to organize social norms in loose-knit communities; these were communities without the cohesion or taste to engage in the violence through which some other neighborhoods kept out racial minorities. Legal racial covenants enabled otherwise loosely-interacting white residents to coalesce around the same common, if noxious, social goal: keeping neighborhoods all white, albeit in a more genteel fashion than the overt violence of more close-knit neighborhoods. Bob Gordon's contribution to this symposium especially stresses the interactions between racial covenants and the background of violence, which leads to the second point we wanted to make: that is, that social norms are by no means all positive, but can be pernicious indeed.

There was still another point that we wanted to make about property in particular: that property norms are designed to last, but that they can sometimes have a kind of stickiness even past what should be their lifetime. Property norms can come back to haunt current owners and residents, long after they seem to be gone forever. That has been the case with racially restrictive covenants, supposedly defunct but still sounding an echo, albeit ever fainter.

Before I go on, I need to say a quick word about restrictive covenants in general—not the racial kind, but the more normal range of covenants that one finds in many neighborhoods today. Most restrictive covenants are quite innocuous and have nothing to do with race or ethnicity or religion. Many people at this conference probably live in houses that include restrictive covenants in the form of deed restrictions—not about race, but about other matters altogether, usually having to do with buildings and common spaces. Anyone who owns a condominium is undoubtedly subject to these kinds of restrictions. They include many requirements about use of the clubhouse, setbacks from the street, roof lines, parking places, association dues, exterior paint colors, and on and on.

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3. RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 1–2 (2013).

With that, let me quote a couple of deed restrictions from University Manor, a 1922 development in the Sam Hughes neighborhood just east of the University of Arizona campus:

> 1. Said property and the whole thereof shall be used for private residential purposes only; no business of any nature shall be conducted thereon; no building or structure intended for or adapted to business purposes and no apartment house, flat building, lodging house, double house, hotel or billboard, shall be erected, placed, permitted or maintained on said property or any part thereof.
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> 2. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, placed, or permitted on any part of said property, nor shall any oil, natural gas, petroleum, asphaltum, or hydrocarbon products or substances be produced or extracted therefrom.[4]

But here is No. 3 in the same set of deed restrictions:

> 3. No part of said property shall be sold, conveyed, rented, or leased, in whole or in part, to any person of African or Asiatic descent or by any person not of the white or Caucasian race, except such as employed thereon as domestic servants by the owner or tenant in any lot in said property.[5]

The next section prohibited the use of any property for the manufacture or sale of alcoholic beverages, and the following sections included more restrictions about matters like setbacks and outbuildings. It is all very matter of fact, as if the racial restriction were simply an ordinary expectation in a nice upper middle class neighborhood like Sam Hughes.

In the book, Rick and I track these packages of restrictions, beginning early in the twentieth century with quite high-end residential developments like the Country Club District in Kansas City, or Palos Verdes Estates near Los Angeles—new developments that blossomed especially when the introduction of automobiles allowed wealthier persons to leave the central city behind. Racial provisions rapidly came to be part of these new developments' subdivision restrictions, apparently as part of contemporary views about the requirements of gracious living. Racial provisions soon migrated from the wealthiest new communities to upper middle class neighborhood developments like Sam Hughes, and they eventually took hold in lower middle class and even some working-class neighborhoods. By the later 1920s, racial restrictions were being introduced into many already built-out urban neighborhoods, not by subdividers *ex ante*, but rather by petitions circulated by the neighbors themselves, often with the encouragement of real estate professionals.

Back at the beginning of the twentieth century, it had not been so clear that the courts would accept *any* subdivision restrictions or covenants, even the ones about setbacks and lot sizes or roof lines, let alone racial restrictions. There were a number of strongly stated doctrines against what were called "restraints on

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4. Pima County Recorder of Deeds, *Declaration of Establishment of Conditions and Restrictions*, *in* 20 MISCELLANEOUS RECORDS 238 (Apr. 13, 1922).

5. *Id.*

alienation" in property law, and some lawyers thought that the courts might also find constitutional objections to racially restrictive covenants, even though all these covenants originated with private actors. Risa Goluboff especially elaborates on the latter subject in her contribution to this symposium: that is, the fraught distinctions between public and private actions and their implications for the constitutional doctrine of "state action."

But by the 1920s, concerns about judicial interference were more or less a thing of the past for proponents of discriminatory residential covenants. There was a major race riot in Chicago in 1918, and anxieties about racial violence may have induced the courts to distinguish "private" restrictive covenants from "public" zoning, and to permit the former to exclude minority races from white neighborhoods even though governmental zoning could not do so. And so, between their high-end beginning in the early twentieth century and the demise of their legal enforceability in the 1948 *Shelley* case, racially restrictive covenants got the approval of all the state supreme courts that heard them. Even the U.S. Supreme Court seemed to approve of racial covenants in a 1926 decision on a jurisdictional issue.[6]

Racially restrictive covenants also got the very strong approval of real estate professionals in the first half of the twentieth century. The National Association of Real Estate Boards included a provision in its Code of Ethics that admonished brokers not to introduce persons into a neighborhood whose race would be "detrimental to property values." Some of these professionals then staffed the New Deal agencies that were created to revive the housing industry, bringing with them their views about race and real estate. In the later 1930s, the Federal Housing Administration ("FHA") very influentially advised its agents to look favorably on racially restrictive covenants in determining the insurability of mortgages.

As Gerry Torres notes in his contribution to this symposium, we need to be cautious about attributing evil motivations to actors in other times and places. However reprehensible we may now find racial covenants, real estate professionals in an earlier era apparently did believe that their professional responsibility required them to protect their clients' property values, and that segregation was a key element in that effort. For their part, the FHA officials too apparently thought that segregation would preserve property values and thus would also protect the federal funds that insured mortgages, so that these funds could be recycled into new projects to revive the flagging housing industry.

Nevertheless, throughout this period, other actors raised competing democratic values to contest these discriminatory racial covenants. The National Association for the Advancement of Colored People kept up a drumbeat of cases against racially restrictive covenants, even though the organization lost all the major cases for decades. But the Second World War changed things: The fight against fascism, together with the service of many minority men and women in the war effort, ushered in a newly sharpened criticism of these legal devices. And so did the Cold War: The State Department found itself on the defensive when Soviet

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

propaganda pointed to housing segregation as a feature of the American political order.

Many new subdivisions were built immediately after World War II, and many of these included racial restrictions. The first of William Levitt's mass "Levittown" housing projects sold houses with racial restrictions. Rick and I have found several subdivision restrictions from 1946, 1947, and early 1948, and they include racial restrictions. Some of these must have been written in full knowledge of the fact that the U.S. Supreme Court had racial covenants under review. The Country Club District here in Tucson filed its subdivision restrictions, including racial restrictions, in March 1948, just months before *Shelley* was decided.[7]

It was in the context of all these new subdivisions that the U.S. Supreme Court accepted a group of cases challenging racially restrictive covenants. The Court's decisions are now collectively known as *Shelley v. Kraemer*, and they held that, under the Equal Protection Clause of the Constitution, no court in the United States could enforce racially restrictive covenants—or more technically, judicial action in enforcing these ostensibly private restrictions counted as state action under the Constitution's Fourteenth Amendment and its requirement that no state deny equal protection of the law to its residents.

Thus, racial restrictions had followed an arc of doubtful legality early in the century, followed by legal acceptance, followed by *Shelley*'s removal of enforceability, to be followed later by flat-out illegality under the Fair Housing Act of 1968. But racial restrictions left tracks. Social norms against housing integration had preceded racially restrictive covenants, but legality reinforced those social norms. Legality also had helped to cement the idea that maintaining property values depended on segregated housing, and that was an idea that did not go away with *Shelley*.

Indeed, racially restrictive covenants themselves did not go away with *Shelley*. This was the aspect of these covenants that first attracted the attention of my co-author Rick Brooks. Rick is an economist and a game theorist, and he wanted to figure out why developers and others would continue to write covenants into deeds and title documents when no court could enforce them.

So what happened? Why would racial covenants continue past the *Shelley* decision? A number of factors were in play, some prosaic, some strategic. First, *Shelley* itself only made racial covenants unenforceable in court, not flatly illegal. But that raises the further question: Why would anyone adopt them voluntarily? One major motivation of racial covenants was to contain a collective action problem: the defection of white owners when minority buyers might offer favorable terms. Without legal enforcement, racial covenants would appear to be pointless: White defectors could not be stopped from selling to minorities, and minorities could not be stopped from buying, so why bother to write racial covenants into new title documents?

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7. COUNTRY CLUB ESTATES, TUCSON, ARIZONA, DECLARATION AND ESTABLISHMENT OF CONDITIONS AND RESTRICTIONS ¶ 11 (Mar. 27, 1948).

In the short term, one answer is that the real estate industry simply did not believe that *Shelley* would stick. They thought the case would be overturned or evaded, so that in the meantime, they might as well include these restrictions in new deeds; it would be easier to do so in advance than to wait until after the properties had sold. And why did they think that the *Shelley* case would not stick? One reason was simply the sweep of the decision. If ostensibly private racial covenants could not be enforced under the constitution, then a great number of other kinds of private legal arrangements—like contracts and trespass actions—might be in jeopardy. Some pullback was only to be expected. More specifically, another reason was that only six of the nine Supreme Court justices decided the case, presumably because the other three had racial restrictions on their own properties. This could mean that the case stood on fragile ground, and that slight tweaks on racial covenants would gain the Court's approval. And even more specifically, real estate professionals thought that they had some tweaks ready to try out. The major one was this: *Shelley* was an injunction case, a type of case in which judges take a broad view of fairness and equity. But a case for damages, especially one against the white seller rather than the African-American buyer, might make the covenants look more enforceable under the strict letter of contract law. But when a damages case came before the Court in 1952–1953,[8] the Justices decided against this ruse, with the upshot that it was clear that tweaks were not going to make racially restrictive covenants enforceable.

Still, there was another, longer-run reason for writing racial restrictions into title documents. This is the one that most interests my co-author Rick: the pure signaling function of these covenants. Even without enforcement, racial covenants could tell African Americans and other minorities that they were not welcome in a given community; and from the perspective of the insiders, covenants could reinforce the white neighbors' views that the other residents all agreed on the value of segregation. While we were writing the book, Jack Chin referred us to a real estate publication that appeared well over a decade after *Shelley*: The author, a recognized real estate expert, observed that racial restrictions were not illegal, but only unenforceable—and presumably they might be valuable because segregation preserved housing values. That would be for white owners, of course.

Even without new racial covenants, the old ones stayed in the records. These were of the type that tripped up Justice Rehnquist, at least momentarily: Some recopying of old restrictions, or a reference to "restrictions of record," which, on inspection, included some old racial restriction of the 1920s or 1930s. Historian Phyllis Palmer investigated Washington, D.C.'s Shepherd Park neighborhood, where the residents in the 1950s and 1960s made a great effort to swim against the tide and to maintain the area as an integrated residential community.[9] Purchasers of homes there specifically crossed out references to racial restrictions in their transfer documents, but real estate professionals insisted on putting them back. What they said was, first, don't worry, they are not enforceable; second, we can't take out this

8. Barrows v. Jackson, 346 U.S. 249 (1953).

9. PHILLIS PALMER, LIVING AS EQUALS: HOW THREE WHITE COMMUNITIES STRUGGLED TO MAKE INTERRACIAL CONNECTIONS DURING THE CIVIL RIGHTS ERA (2008).

language because it would create a "cloud" on the title; and third, with a "cloudy" title, no lender will give you a mortgage.

The 1968 Fair Housing Act finally made it flatly illegal to refer to racial restrictions in almost all residential real estate transactions. But even that was not the end of racially restrictive covenants. They have continued to appear in various ways. For one thing, even if racial restrictions are no longer written into new deeds, they often can be found in title documents of older properties. Title searchers and real estate agents have long been nervous about racial covenants: Their professional obligations require them to reveal information about the claims against any given property, but the Fair Housing Act prohibits references to discriminatory restrictions. As a result, title searchers have no firm practice on this matter; sometimes they decide against mentioning them, or sometimes they may mention the restrictions but cross them out or annotate them with the information that they are not enforceable.

Another form in which racially restrictive covenants continue to appear is in planned communities with homeowners associations. Some of these developer-created communities are fairly old, and may have racial restrictions incorporated in the "covenants, conditions and restrictions" ("CC&Rs"). The CC&Rs are incorporated by reference in every deed in such communities, and each new buyer normally gets a copy—including any old racial restrictions. This means that buyers of such older properties are very likely to encounter racial provisions, even today. They are of course not enforceable, but they cannot be expunged easily because CC&Rs generally have their own rules for amendment. Often these amendment processes are quite complicated, including such requirements as supermajorities and notarized ballots. As a consequence, owners are often surprised and offended to find the CC&Rs' open references to past discrimination, but no one bothers to take the time and expense to get rid of them.

To be sure, racially restrictive covenants are by now something of a relic. Rick and I are acquainted with an African-American law professor in Los Angeles who told one of us that her community's CC&Rs included sections prohibiting African-American residents. And then she laughed. But these covenants are not always a laughing matter. In the early 2000s, an African-American woman inquired about a house that appeared to be for sale in Norfolk, Virginia. The owner, an older white man, told her that he could not sell it to her because of a racial restriction. She then reported the matter to a local fair housing organization, which investigated and found that the owner apparently believed the restriction was still valid. The incident wound up with an order to him to pay her a few thousand dollars and take a class in fair housing, while his neighbors shook their heads over this holdover from an earlier age.

In a case from the early 1970s, some residents of Washington, D.C. sued the city's Recorder of Deeds, seeking to prevent the office from accepting documents that referred to racially restrictive covenants. While recorders of deeds are rarely if ever required to peruse the documents that they are recording, the Federal D.C. Circuit agreed with the plaintiffs. As one of the judges observed, the presence of these covenants in the recorded documents could have "a discouraging psychological effect," even if unenforceable; and as another judge remarked,

recorded racial covenants could give these racial restrictions "a legitimacy and effectiveness in the eyes of laymen that they do not have in law."[10] The observations of these federal judges mirror Rick's and my own that covenants are a signaling device. That is, they give a signal of what the owner's neighbors expect and want, and what the minority buyer will face if she goes ahead with the purchase.

The signal was much more forceful when legally acceptable, but remains modestly influential even to this day. All this leads Jack Chin in his contribution to this symposium to question whether law mattered or not. We think that it did, but so did the social norms that law helped to reinforce. The continuing signaling function of racial covenants gives a reason why such covenants should be expunged. Some states have moved in this direction, by passing legislation that enables individuals and planned communities to renounce racial restrictions without the complex amendment processes that are normally required. In these states, owners can change title documents so that they no longer send even attenuated signals of racial discrimination.

Racially restrictive covenants have had a long and reprehensible impact in supporting the "self-fulfilling prophecy" that housing values fall if neighborhoods are integrated.[11] Happily, this pernicious view has lost much of its force. It is of course obvious that the United States has not yet overcome the legacy of residential segregation that racial covenants helped to create and reinforce. But rejecting their symbols and signals of discrimination is one step toward that goal.

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10. BROOKS & ROSE, *supra* note 3, at 222.

11. *See* CHESTER RAPKIN & WILLIAM G. GRIGSBY, THE DEMAND FOR HOUSING IN RACIALLY MIXED AREAS: A STUDY OF THE NATURE OF NEIGHBORHOOD CHANGE 70 n.6 (1960) (early use of the phrase "self-fulfilling prophecy").