

PANEL DISCUSSION ON SAVING THE NEIGHBORHOOD: PART IV

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My initial reaction is that the book is wonderful. It's a jewel. It tells an important story about an important legal mechanism that ultimately had a lot of effects. It masterfully weaves together history, law, economics, and the intricacies of real estate practices.

I am a little bit of a restrictive covenant geek. I actually purchased on eBay what purported to be an original copy of a racial zoning ordinance from Kentucky. And I paid \$75 for it, so I hope it's real.¹

I think that restrictive covenants are still very important. I didn't have a direct personal experience with them like some of the people in the room. But in 1999 I lived in Cincinnati. And there, the Ohio legislature passed a law that said that the recorders in Ohio—the recorders of deeds—could not accept for filing any paper that had a restrictive covenant in it, or issue a copy of any document that they already had filed, without excising the restrictive covenant from it.²

And in my county, Hamilton County, the county attorney told the recorders, "It's too difficult for you to figure out whether any of those conditions are met, so you should just record or ignore this law." And they did. And just last year, the recorders in Ohio were sued by some folks who objected to the fact that their records were still full of restrictive covenants.³

One of the things that I think the book is about is heroes like Raphael Urciolo, who challenged the restrictive covenants in the District of Columbia, and the aptly named Rose Helper, who did the study of broker conduct.⁴ And implicitly, therefore, I suppose the book is about villains.

One hero, which I think the book undersells in a tiny way, is the opinion of Judge Erskine Ross in *Gandolfo v. Hartman* in 1892.⁵ Judge Ross, who ulti-

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1. See Fig. 1.

2. See Gabriel J. Chin, *Jim Crow's Long Goodbye*, 21 CONST. COMMENT. 107, 125 (2004) (discussing OHIO REV. CODE ANN. § 3953.29 (West 1998)).

3. Lauren Pack, *State's Recorders Sued over "Racist" Deeds*, JOURNAL-NEWS (May 6, 2013, 3:16 PM), <http://www.journal-news.com/news/news/states-recorders-sued-over-racist-deeds/nXgWY/>.

4. ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS (1969).

5. 49 F. 181 (S.D. Cal. 1892).

mately did become a judge on the Ninth Circuit, was a former Confederate officer. And his opinion invalidated a restrictive covenant used against the Chinese person in California.

And, as Risa said this morning, the opinion in *Gandolfo* used exactly the same theory that ultimately prevailed in *Shelley v. Kraemer*.⁶ From a teacher's perspective, the decision came to the right answer for the right reason, and that's pretty good work. The judge said, "Such a contract is absolutely void and should not be enforced in any court, certainly not in a court of equity in the United States."

So it's true, as the book says, that in a certain way, *Gandolfo v. Hartman* was not influential as law. It wasn't followed in a lot of jurisdictions. It wasn't, in a certain sense, a powerful precedent. But, on the other hand, it was influential in the same way as, for example, the dissent in *Plessy v. Ferguson*.⁷ It made a difference that it was on the books. It provided a model for the future. And it was meaningful that the opinion was there, because it suggested that a reasonable person could think this, a reasonable judge could hold it. And ultimately, of course, it became the law.

The book also observes in detail in Chapter Seven the problematic nature of *Shelley* itself as precedent. The idea that judgments of the Court were *ipso facto* state action was not carried to its logical extreme. And yet, I'm not sure that that's a bad thing. In some circumstances, maybe it does make a difference if the discriminatory judgment is made by a private person and enforced in the court—even to somebody who's anti-racist, even to somebody who cares about these things. You can understand this to an extent from a pro-civil-rights-law perspective.

So if we imagine that someone comes into court seeking a divorce, and puts in the pleadings, "I want to get a divorce because my spouse is of a certain race," I'm not 100% sure that we should say, "Everybody else gets to have a divorce. We're a no-fault divorce state. But you, because your motive is bad, you have to stay married." I'm not sure that that really helps the situation.

I don't think that the government should be making distinctions based on the content of speech and punishing people for some and approving of others. But I do think that it's different when Bashas', the supermarket here, allows my daughter Becca and her fellow Girl Scouts to sell cookies, but if somebody else wants to distribute political leaflets or something like that, Bashas' says no and calls 911 if they don't leave. It would be problematic to have the government discriminate against speech in those ways. But I don't necessarily think that it should be a defense to a trespassing claim involving private land that the person was exercising First Amendment rights.

It would be different if a private business owner were enforcing the trespass laws based on race. It would be different if a business were calling the police on people of one race, but not of others. And my sense is that the precedent, *Shelley v. Kraemer*, would go that far—that if it were clear that the trespass law was

6. 334 U.S. 1 (1948).

7. 163 U.S. 537 (1896).

being invoked by a private person because of race, a conviction on that basis, in some cases, would justifiably be regarded as state action.⁸

But, of course, the law was saved from having to figure out the full implications of *Shelley v. Kramer* in that context because of the Civil Rights Act of 1964. The Act made a lot of the difficult questions about the scope of *Shelley* go away because there was a positive law prohibition, for example, on discrimination in public accommodations on the basis of race.

But let's say *Shelley* was decided on a basis that didn't quite make sense, that it was decided on a basis that the Court, in other cases, wasn't really willing to endorse. Another thing that I would say that I think is consistent with the book, but not mentioned in the book, is that 1948 was a pre-modern period of American constitutional law in this context.

For example, *Shelley* was a unanimous six-zero decision; as the book mentions, three justices recused themselves, presumably because they had racial restrictions on their homes. Justice Stevens was clerking for Vinson at the time, and he confirmed in his recent book, *Five Chiefs*,⁹ that this was the reason that Justices Reed, Jackson, and Rutledge did not take part in the decision.

There were two other race and property cases decided by the Court that year: *Oyama v. California*¹⁰ and *Takahashi v. Fish and Game Commission*.¹¹ Both were divided decisions. Both gave relief to the non-white person, but in sort of tricky ways, not through invalidation of discriminatory laws plain and simple.

Michael Klarman and others have argued that many of the criminal procedure decisions in this era were nominally decided on some basis of doctrine or some application of some statute or constitutional law. But underneath, the real issue was race. And it's possible that that was going on in these cases too.

Oyama v. California challenged an application of the laws prohibiting Asian immigrants from owning land. It didn't challenge the laws on their face, but it said that this particular way that they were applied was unconstitutional. The Court had unanimously upheld the laws themselves in 1923.

In *Oyama*, there were four concurring votes that said that the alien land laws, because they discriminated on the basis of race, were unconstitutional. But from the conference notes, from the justices' private papers, it appears that, as late as 1948, five justices were willing to uphold the laws on the merits, if they were forced to make an up or down decision. So I wouldn't be surprised if the Court in *Shelley* had to engage in some jurisprudential gymnastics to come out to that result.

8. See *Bell v. Maryland*, 378 U.S. 226, 246–60 (1964) (Douglas, J., concurring).

9. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011).

10. 332 U.S. 633 (1948); see generally Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Race, Property and Citizenship*, 87 Wash. U. L. Rev. 979 (2010).

11. 334 U.S. 410 (1948).

Another hero who's mentioned in the book is Dudley O. McGovney. 1948 was a good year for his scholarship. McGovney had been the dean of the Iowa and Tulane Law Schools. From 1925 until his death in 1947, he was on the faculty of the UC Berkeley Law School. He appears in the book because of his influential 1945 article, three years before *Shelley*, which attacked restrictive covenants on the *Gandolfo* theory.

Now, back then, law professors knew how to write lawyerly article titles. His title was *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*.¹² There is no mystery what the paper is about.

His colleagues at Berkeley claimed that the U.S. Supreme Court in *Shelley* adopted his reasoning and language. *Oyama* cited his article, *The Anti-Japanese Land Laws of California and Ten Other States*.¹³ McGovney was a Spanish-American war hero, a football player at Indiana. He spent his career filing amicus briefs and writing about people of color. He was doing critical race theory before there was critical race theory, and winning. He's a hero of this book.

These figures who appear in the book make me wonder whether the taxonomy of actors and participants that the book describes in an early section—norm entrepreneurs, norm breakers, property claims, property law, neighborhoods, and the larger community—should include an additional category, whether a distinct part of the larger community category or whether a separate category: information gatherers, institutions like the U.S. Commission on Civil Rights, people like Rose Helper, scholars like Dudley McGovney, scholars like Carol Rose and Richard Brooks, whose work, while not being directly in play in the political and legal mechanism that the book describes, nevertheless will influence how society thinks about and addresses the aftermath of this history.

Another question I have is about the taxonomy of methods of exclusion that the book runs through in Chapter Five. The book talks about racial covenants, zoning, nuisance law, and harassment, by which I understand the book to mean private harassment. I'm curious about how much evidence you see of government harassment.

I ask because I'm working on a project involving a form of segregation which is a distant cousin of restrictive covenants. In 1909, after a widely publicized murder of a white Sunday school teacher by a Chinese restaurant worker, there was a wave of proposals in jurisdictions around the country to prohibit women from eating in or working in Chinese restaurants. There's a wonderful decision from the Massachusetts Supreme Judicial Court in 1911 saying that such a law would be unconstitutional, basically in the vein of *Buchanan v. Warley*.¹⁴

But before and after the decision, and before and after this and other laws were ruled unconstitutional, the newspapers were full of articles about the police in Pittsburgh and New York and Chicago and Philadelphia preventing women from

12. 33 Cal. L. Rev. 5 (1945).

13. 35 Cal. L. Rev. 7 (1947).

14. 245 U.S. 60 (1917).

going to Chinese restaurants. And there are also cases upholding the denial of various licenses that were necessary to operate Chinese businesses.

So my question is, could we reasonably imagine an alternative universe in which the clever lawyer who would have invented restrictive covenants instead did some other evil thing, became a doctor and invented filter-tip cigarettes or a chemist and invented leaded gasoline? And so we never would have restrictive covenants. After *Buchanan v. Warley*, there's this gap.

In this alternative universe, there are somewhat affluent, but not particularly cohesive, neighborhoods that want to exclude African Americans. Could they, did they, just get the police and building and health inspectors to run off prospective African-American home purchasers or builders? When we talk about buying homes, we're talking about expensive transactions, difficult transactions. And, for somebody moving into a neighborhood, the idea of the cost of moving is traumatic enough, but also to have to fight City Hall along the way might be an even greater deterrent—I'm curious as to whether that either was or could have been an effective tool in this process.

My big question is this: As I read the book, I became convinced of two things which are incompatible. One is that restrictive covenants were not important in maintaining racial segregation. And the other is that restrictive covenants were part of a system which was very important in maintaining racial segregation in housing.

The case for them being unimportant is pretty clear. The book itself says, "the covenants themselves appear to have been more significant as expressive focal points than as legal enforcement devices."¹⁵ And from the story the book tells, it's clear that there's an underlying social norm that is independent of and prior to any particular legal mechanism which is used to enforce it.

So, in *Buchanan v. Warley*, in 1917, the Supreme Court decides that racial zoning is unconstitutional, and yet, racial zoning resonates for decades. There are years of follow-on cases where the Supreme Court and other courts have to evaluate basically identical laws into the 1930s.

So racial zoning was formally impermissible, but it still affects the situation on the ground. The same story can be told with *Shelley v. Kraemer*. After they're invalid, they still have this zombie-like influence.

Jeannine Bell's recent book, *Hate Thy Neighbor*—wonderful title—is about anti-integration as violence. And I assume that, before and after racial zoning and restrictive covenants, that method was used. We can trace racial exclusion back to things like the 1857 Oregon Constitution, which prohibited migration of free blacks. Lots of other things.

What's significant about this story is that there's tool after tool, thing after thing, mechanism after mechanism, being trotted out and extinguished. And somehow the market, somehow society, brings another one into existence to take its place in more or less the same way.

15. RICHARD R. W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 13 (2013).

Therefore, what seems to be important and enduring is the norm, not necessarily any particular legal manifestation of it. And then we get a social science explanation why: Thomas Schelling, a social scientist, who says, according to the book, “Persons with fairly weak preferences for segregation, ‘I will stay as long as a third of my neighbors are of my race,’ will nevertheless gradually separate completely.”

I take that to mean that racial segregation is exactly what you predict without law, even in the absence of law. So long as there’s even a minimal level of racial consciousness, we’re going to have residential segregation. So law is unimportant. That’s one takeaway from the book.

The other thing is that this book is a systematic, comprehensive, irrefutable rejoinder to one of the most important legal concepts in constitutional law in recent years, and that is the notion of “general societal discrimination.” The Supreme Court has used the concept of general societal discrimination to say that almost anything that happens to anybody is the result of individual choices, not state action. An actor can remedy his own past discrimination, but not general societal discrimination. Therefore, most group disadvantages can’t be remedied through affirmative action or other governmental means.

In the *Parents Involved* case,¹⁶ Justice Thomas relied on general societal discrimination. *Croson*¹⁷ and *Wygant*¹⁸ also relied on the idea. It probably goes back to *Milliken v. Bradley*.¹⁹

And the book shows that the Court’s concept of general societal discrimination, that is, “it’s just this free-floating attitude that people have that leads them to do certain things, not an organized social structure,” doesn’t make any sense. There is a link between the National Association of Real Estate Boards, which created rules of ethics prohibiting racially incompatible sales which fostered segregation. These rules of ethics were sometimes adopted as positive law by states or localities, and enforced through licensing discipline. The executives of the National Association of Real Estate Boards became part of the founding leadership group of the Federal Housing Authority. The Federal Housing Authority did all of the things that we heard about this morning that made it basically essential for banks and builders who wanted to participate in financial markets to strongly consider having restrictive covenants in their operations.

So what we see is the federal government, state and local governments, including public housing agencies, working together with private industry, including real estate professionals, banks, and developers. This group together created America’s housing stock. And together they decided who would get to live where.

General societal discrimination has nothing to do with it. It’s laughable to think that residential segregation resulted from the free choice of private individuals, or from unconnected independent decisions of those involved.

16. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 748–82 (2007) (Thomas, J., concurring).

17. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

18. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

19. 433 U.S. 267 (1977).

So I don't understand why work like this hasn't completely destroyed the Court's unjustifiable concept of general societal discrimination. But I also have not completely reconciled in my own mind—and I'm sure I'm making an elementary mistake that someone will explain to me—but I take contradictory messages from the book about the role of law here. It seems simultaneously super important and entirely unimportant.

Figure 1: A photograph of the supposedly original copy of a Kentucky racial zoning ordinance.

