

Project: RACING PROPERTY.

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## I. The Story

In the summer of 1986, when then-Associate Justice William Rehnquist was facing hearings in the Senate in connection with his nomination to the position of Chief Justice of the U.S. Supreme Court, some embarrassing facts came to light. In 1974, Rehnquist had purchased a vacation home in Vermont whose title documents included a covenant that barred sale to any person “of the Hebrew race.” Even before that, in 1961, he had purchased and later sold a house in Phoenix, Arizona, whose title documents excluded all persons who were not of the “Caucasian” race, usually a code word for African Americans and sometimes Asians. In the ensuing political controversy, conservative defenders of Justice Rehnquist unearthed the information that Democratic Senator Joseph Biden (then a member of the Senate Judiciary Committee and now Vice-President in the Obama administration) as well as deceased President John F. Kennedy had also owned or lived in residences with racially restrictive covenants.

Politicians are not the only ones who may live in locations whose title documents reveal past racial exclusions: several of us in this seminar live at Peter Cooper Village, and PCV also had racially restrictive covenants at the outset of its existence.

What are these racial covenants? Why do they show up so regularly as singularly unpleasant ghosts of the past, when no one seems to take them seriously any more?

The answer is that racially restrictive covenants were once a standard part of real estate transactions in the United States (see the examples).

These covenants began to appear toward the end of the nineteenth century, and they had a distinct arc in legal history. At the outset, U.S. courts were quite chary of these and other covenants that purported to control land uses over long time periods. But by the early decades of the twentieth century, the courts had relaxed the earlier strictures, and they became increasingly permissive until 1948, when the U.S. Supreme Court abruptly declared that any court that enforced racial covenants violated the equal protection clause of the United States Constitution. Many who had opposed racial covenants hoped that this case, *Shelley v. Kraemer*, would put an end to racial segregation in residential neighborhoods, because it meant that racially restrictive covenants were no longer legally enforceable. But while minority neighborhoods expanded, integration did not, and even racial covenants continued.

My project during my time in the Straus Institute is to inquire into the legal history of racially restrictive covenants during the era in which they were most actively used. Their historical arc—judicial suspicion, followed by relaxation, followed by *Shelley*’s denial of legal enforcement, followed by new but unenforceable covenants—suggests a unique topic for investigating the relationship between social norms and law. I am undertaking this project together with my Yale Law colleague Richard Brooks; it expands on a short book chapter I wrote about *Shelley v. Kraemer*, as well as on an article that Rick wrote on post-*Shelley* covenants.

The social norms of many white persons in the United States, particularly in urban areas, had long opposed residential racial integration. Some informal methods that white persons used to exclude racial minorities – particularly African Americans– could include anything from

warnings through threats to physical violence. Indeed, the most cohesive white urban neighborhoods never used formal racial covenants at all. But not every white neighborhood was so cohesive, or so willing to use threats and violence. In a sense, racial covenants were a formal legal substitute for the more vigorous and potentially vicious informal means used by closer-knit social groups.

Proponents of legal means of residential segregation tried several different routes in the early twentieth century. One was nuisance law, but this got nowhere in the courts. Another was racial zoning, but this was ruled to be unconstitutional in the Supreme Court case *Buchanan v. Warley* in 1917. What was left as a formal, legal route to residential segregation was racially restrictive covenants, which in the early twentieth century were regarded as private arrangements that were not subject to Constitutional strictures.

Racial covenants flourished in urban neighborhoods and new subdivisions in the decades after 1917, and they were powerfully encouraged by real estate professionals, banking institutions and an array of other institutions. But uneasiness about racial restrictions also grew in this period. These racial restrictions came under pressure from three major sources. Foremost was the physical expansion of minority presence in American cities during and after the First World War, and especially during the Second World War. Second, a larger public opinion grew wary of racial restrictions in light of the Nazi and fascist actions in Europe, again especially during and after the Second World War, in which many minority members fought and died in service to the United States. Third, the legal segregation of residential neighborhoods was a profound embarrassment to American foreign policy in the early years of the Cold War. Fanning the discontent was a steady drumbeat of anti-covenant litigation by the National Association of Colored People.

When *Shelley* was decided in 1948, the NAACP and others had high hopes for greater residential integration. This did not occur, nor did covenants end. The Federal Housing Administration, which had favored racial restrictions in making home loans, continued to do so for at least a year or two after *Shelley*. Real estate professionals continued to write racial covenants into new deeds, and they continued to copy old racial covenants upon sale of older properties.

Why did so little change? One reason is that the social norms against integration continued. White people had long feared that their properties would lose market value if minorities moved into the neighborhood, and they continued to believe this – and to act on their belief – after the *Shelley* case. A related reason was that real estate professionals continued to hold that total real estate values would be higher if neighborhoods were segregated racially. Some developers include racial covenants at least for a few years after *Shelley* because they thought that *Shelley* was so much of an outlier case that it would be overturned or sharply limited. Still other developers continued to write and copy racial restrictions, not because these restrictions were legally enforceable – and by 1953 it was clear that they would not be – but because covenants sent a signal to buyers about the preference of their neighbors.

It is this signalling function of racial covenants that is of most interest to Rick's and my project. The fact that racial covenants continued to be written after *Shelley* suggests that even before that case, the major function of racial covenants was to signal neighbors as to one another's preferences and intentions, and to signal outsiders of the same. Actual legal enforceability may never have mattered all that much. And hence *Shelley*'s denial of

enforceability did not matter much either. Congress implicitly recognized that pattern when it outlawed the overt signals of residential segregation in the Fair Housing Act of 1968.

## II. The Cast of Characters

With that overall story, let me go back to identify some of the features of this story that most interest us.

A. Property law. At the outset of this tale, the courts were fairly hostile to any kind of long-lasting covenants. Anglo-American property law, and especially American property law, has its own internal logic that property should be directed by the living, not the dead. Moreover, American courts should have been particularly hostile to constraints on who can own and use property, as opposed to the uses that owners or occupants can make. Constraints on land uses can solve problems of externality (e.g., restraints on burning trash), whereas constraints on ownership has no basis outside rank prejudice. This should have been particularly suspect in the early twentieth century, when many continued to believe that property ownership would be the vehicle by which former slaves would improve their status and become full participants in the larger community. It is something of a puzzle, therefore, why courts were willing to allow racial residence restrictions through the device of covenants running with the land. We suspect that even if Shelley had not been decided on constitutional grounds, courts would increasingly have found that traditional property law principles should dispose of racial covenants as cognizable property interests.

B. Neighborhoods. As mentioned above, tightly cohesive neighborhoods did not resort to racial covenants. They operated through their own norms of exclusion, and they did their own enforcing. The same was true of all-white smaller communities, the so-called “sundown towns,” where no black person was supposed to allow the sun to set upon him or her. Racial covenants, on the other hand, seem to have been a by-product mobility and perhaps civility – they were adopted in white neighborhoods where the neighbors did not have such strong internal norms among themselves. In these somewhat ambiguous circumstances, racial covenants served to inform these neighbors of one another’s views, as well as informing minority members that the neighbors would not accept them gladly.

C. Norm entrepreneurs. Perhaps because covenanted communities were looser-knit, much of the impetus for establishing and enforcing racial covenants came from what are now being called “norm entrepreneurs,” persons or institutions with a special interest in promoting some set of norms. Some institutions, like the National Board of Realtors, several local boards of realtors, the Federal Housing Administration, and established urban institutions like the University of Chicago and the Newberry Library, did a great deal to promote racially restrictive covenants and to assist in their enforcement, insofar as they were enforced at all. The St. Louis Board of Realtors made itself a party to covenants in order to assure their enforcement, largely to protect interior neighborhoods that were buffered by the neighborhoods that bordered expanding minority areas. Other persons and organizations were norm followers; a developer like Arthur Leavit had no particular brief for segregation, but he wanted to sell houses at the best prices he could get, which he thought required racial exclusion. But norm followers also reinforced the

view that property values depended on segregation.

D. Norm breakers. Norm breakers are particularly interesting. Among the most important were organizations representing other normative communities, notably the NAACP, which continually challenged the legality of racial covenants. The nation's major African American newspaper, the Chicago Defender, was another major voice against racial restrictions, deploring their presence and applauding their violation. Some normbreakers were individuals ostensibly driven by idealism, like the black entrepreneur Carl Hansberry, who set off an integration controversy –devastating to his family –by moving into a residence in a covenanted Chicago neighborhood. Perhaps most poignant norm-breakers were the handful of urban communities in which white and black residents tried, largely unsuccessfully, to stave off real estate interests and to form stable, integrated neighborhoods. Needless to say, most of these norm breakers, from a different perspective, were norm entrepreneurs in a different cause. On the other hand, a highly controversial subset of norm breakers were individuals motivated by economic opportunity, notably the “blockbusting” real estate developers who continually sought weak spots in white neighborhoods, so as to be able to make money by buying cheap from white persons and selling high to minorities.

E. Larger communities. Racial restrictions came under increasing fire as the early twentieth century moved toward its middle decades. The impact of fascism, the alliances of Jewish and African-American organizations, the service of minority members during the second world war, the Cold War – all contributed to a climate in which formalized residential segregation seemed increasingly unacceptable, giving further encouragement to the norm breakers.

### III. Social Norms and Legal Norms

Our larger interest in this project is to explore the relationships between informal social norms and legal norms. There has been much interest in social norms in legal literature in the last decade, much of it laudatory to informal norms in close-knit communities. Our project illustrates that not all social norms are attractive problem-solving mechanisms; some may be odious indeed. More centrally, our project explores the importance of legal norms as a means of organizing less close-knit communities.

To begin with norms: What we mean by norms is a set of enforceable preferences about actions. As a preference, I might like to smoke. But my friends might prefer that I not smoke. Their preferences about my actions becomes a norm for me when they tease me for smoking or wrinkle their noses at the smell of my clothing, or insist that I go outdoors to smoke, and when I, seeking their approbation, comply if I can. Anti-smoking is a norm of the group, enforceable informally even against those who would like to smoke. On the other hand, a formal norm, including a legal norm, might be a rule against smoking in a public building, expressing a formally enforceable preference for non-smoking. A formal norm could assist my group in enforcing the anti-smoking norm informally, because group members could remind the nonconformist of the rule, even if they did not call the supervisor of the building. On the other

hand, if I am very close to the group, they scarcely need to call on the formal rule.

Turning to racially restrictive covenants: Racial covenants were a formal, legal norm during the period when both constitutional and property law permitted both their creation and enforcement. It seems clear that covenants acted in some ways to reinforce informal social norms. But restrictive covenants were more likely to be used in “loose-knit” communities, than in the strongly cohesive neighborhoods, which did not need them. Indeed, in the case of covenants initiated by developers, there was no community at all prior to the development, and as we shall illustrate, neighbor-initiated covenants were also fraught with difficulties.

Some recent legal scholarship has argued that law functions at least as much as to coordinate activities – signalling the “right thing to do” in coordination games—as it does to enforce norms on the Austinian model. [McAdams, 2009] We expect to use racial covenants to explore that argument, and we will analyze some of the simple “games” implicit in the relationship between covenanted communities and minority groups, as well as the relationships among the neighbors within covenanted communities. (For those who are interested, the chief “games” within the communities are “Stag Hunt” and to a lesser degree “Prisoners’ Dilemma”; and the game between the entire neighborhoods and minority members was “Hawk/Dove.”) We will argue that in all these “games,” the chief function of legal racial covenants was as a signaling device. Covenants were formal statements within the formal systems of records. They allowed the neighbors to call on formal norms to signal their attitudes vis-a-vis one another and to remind potential violators of the norm. But the more important signal may have been to the outsiders—to the minority members who might have wanted to move into a covenanted neighborhood, but who were not looking for trouble. The Shelley case got rid of racial covenants’ enforceability, but not of their signaling functions. The power of these signals was effectively recognized in the Fair Housing Act, when these signals too were outlawed.

As a coda on this story, our last chapter will return to the Rehnquist story, and to his difficulty in getting rid of the antisemitic covenants on his Vermont home. As it turns out, covenants have a “stickiness” that makes them difficult to eradicate even though they are illegal. One factor is that real estate professionals and lawyers are nervous about the unilateral abrogation of obligations, even if those obligations are not enforceable, and even if the professionals are not allowed to speak about them openly. Several states have passed legislation to ease the renunciation of racial covenants, but that does not mean that they will in fact be renounced. Once again, getting rid of these devices takes effort, and as long as they seem to be only symbolic, who will bother? Well, Justice Rehnquist did: he sold his Vermont property to his lawyer for a dollar, and then bought it back with a deed that left out the restrictive covenant. Of course, the deed did continue to subordinate itself to “restrictions of record.”

