PANEL DISCUSSION ON *SAVING THE NEIGHBORHOOD*: PART I

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Saving the Neighborhood is a very fine book. It is a compact, very sinewy book, which is written with great clarity. And it has a kind of spare elegance. It has in short the engineering virtues.

It takes a familiar subject, on which a lot has been written, and seeks to put it in a new analytic framework, which you might call a comparative analysis of the legal anatomy and the actual effectiveness of diverse strategies of racial exclusion, with special emphasis on racial covenants running with the land.

So let me just point out some of the major central themes and virtues of the book. First of all, it takes legal doctrine seriously. At the same time it's a book fully written from a law-and-society perspective. Doctrine doesn't exist in a vacuum, but is soaked in social context. Even so, legal doctrine and legal norms have a "logic of their own."[1] The legal norms acted as a constraint, among other things, on some of the most open and egregious forms of racial exploitation and exclusion.

The doctrine that the book examines is not primarily the doctrine that is famous in *Shelley* v. *Kraemer*[2]—its surprising holding that judicial enforcement of racial covenants, apparently private contracts, was "state action" under the Fourteenth Amendment. That holding immediately opened up an enormous can of worms, which the next several generations of lawyers kept trying desperately to close. If judicial enforcement of racial covenants was state action, is all judicial enforcement of contracts state action? Is it all subject to the Fourteenth Amendment? Do the federal courts have to start supervising every aspect of private agreements in American society?

That possibility set off a kind of high-level lawyers' doctrinal panic, a bit like the panic that white neighbors felt when they thought African Americans might move into their neighborhood. And the lawyers really frantically tried to close off the radical implications of the doctrine. I've just been reading the fine new book by Sophia Lee at Pennsylvania, which shows that issues of the scope of

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1. RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 23 (2013).

2. 334 U.S. 1 (1948).

the private and public distinction remained live issues, not just in the ’40s, but in all of the administrative agencies throughout the 1950s, ’60s, ’70s, ’80s.[3]

When the Fair Housing Act (“FHA”) of 1968 comes along, the Supreme Court says, “Enough of this Fourteenth Amendment business. Let’s decide this on another ground.”[4] And they came up with the Thirteenth Amendment, holding that continued racial restrictions in housing were a vestige of the “badges” of slavery, which were outlawed by that Amendment. The great thing about the Thirteenth Amendment as a basis for legislation is it doesn’t require state action.

So, of course, everybody started thinking, “Well, that was the Thirteenth Amendment. It’s going to be used to invalidate all forms of racial discrimination.” And that probably would have been a good idea, but the Court decided, “No, that’s too radical,” and it scuttled backwards.

Anyway, the doctrine that is the main focus of the Brooks–Rose book is not the constitutional law of state action, but the private law of property and contract. The book pays very close attention to racial covenants and their alternatives as doctrines of property law. And in this way, it’s able to see how property doctrine both enabled and constrained the deployment of legal devices preventing ethnic and racial outsiders from buying into white neighborhoods. It precluded the use of some of the devices altogether. And it made others somewhat costly to deploy. The doctrines were of some use in restraining and in some cases precluding certain exclusionary strategies; yet the force and pervasiveness of the assumption that white homeowners were fully justified in taking whatever legal steps they could to protect their neighborhoods from contamination exerted a pressure on doctrine, stretching it to license practices that property law might otherwise have condemned.

So much of the book is about the autonomy of doctrine in the sense that not all doctrine could be recruited to the service of racial exclusion. But a lot could—a lot of longstanding legal doctrines buckled under social pressure. Many of the most important doctrines that might have prevented strategies of racial exclusion, the authors called “the big guns” that were silenced and the “ghosts” of older doctrines.

Some doctrines were too strict, however, to serve the cause of racial exclusion despite of a lot of pressure to do so. One of the first to go, and probably one of the most important, was racial zoning. This was the designation—usually by municipal ordinances—of certain neighborhoods as ones in which only African Americans, or only white people, could buy houses.

The NAACP produced a first-rate test case in *Buchanan* v. *Warley*.[5] The Supreme Court outlawed a racial zoning ordinance as an unconstitutional restraint on freedom to buy and sell property. The authors speculate on a very interesting counterfactual. If racial zoning had been upheld, might we have seen an entirely different course of urban development, much more along the lines that we have in

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3. SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (2014).

4. The case is Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

5. 245 U.S. 60 (1917).

Europe, in which the older white neighborhoods in the central city were kept white and African Americans relegated to shanty towns on the suburbs? Instead, of course, unable to zone the center city as white, whites fled to the suburbs and African Americans displaced whites in the older housing at the center of the city.

Another doctrine that might have served the purpose of racial exclusion, they point out, is nuisance. But few public officials were willing to say openly that African-American families constituted a nuisance per se, that they were like having, let's say, a tanning factory opened up in their neighborhood, that they were an obvious source of a kind of pollution or danger—although this is pretty clearly how many white neighborhoods regarded African Americans at the time.

One of the useful things about racial covenants is that they don't involve any actual homeowners saying face-to-face to African-American outsiders, "You don't belong in our neighborhood." Instead they say, "Our deeds say that you can't buy into our neighborhood. And this is not my personal covenant. You may be a perfectly fine human being. But the deeds register the belief which we can attribute to other people in the neighborhood, that if you move in, property values will suffer." So there is an advantage to their relative impersonality.

As for the idea that the covenants violated the Fourteenth Amendment, civil rights lawyers had argued this for years. But until *Shelley*, it was without effect. *Shelley* is in many ways a case quite a lot like *Brown v. Board of Education*.[6] Like *Brown*, it's a big case. Like *Brown*, not a whole lot happened after it was decided. Like *Brown*, it was followed by strategies of political mobilization and massive resistance against racially integrated neighborhoods. And like *Brown*, the long-term problem, which it hoped to address, has still not been solved, in housing as in education. There's an enormous amount of persisting racial segregation, in many cities as much as there was in the 1940s when the case was decided.

Still, you don't want to conclude that great cases make no law. There were actual consequences to the *Shelley* decision. But as Carol just related, it's all been a tortuous journey.

I won't go into all of the doctrinal moves of the book, although there are many of them and they're beautifully explained. One point which has been quite important, I think, which Carol stressed, is that racial covenants were among a whole bunch of *other* restrictions on land use that clearly did enhance value for the collective and didn't have any racial purpose. And probably one of the reasons that the racial covenants lasted so long was that these kinds of restrictive covenants, serving other purposes, were pretty much taken for granted as useful and necessary.

Now, although it takes legal doctrine seriously, the book also takes an appropriately legal-realist and sociological approach to doctrine's importance or influence in real life. It explores racial covenants in relation to nonlegal strategies of exclusion, and especially violence. This is one of the central themes of the book.

Covenants, they argue, are most useful to nonsolidary communities. In cities where you had very solid, longstanding, multigenerational, tightly knit ethnic

6. 347 U.S. 483 (1954).

neighborhoods, you didn't need racial covenants, because as soon as an African-American family tried to move in, their house would be stoned or bombed or set on fire. And the people would be beaten, and they wouldn't try it again.

In less cohesive communities, where people don't know each other well enough to coordinate their actions, you don't have the kind of solidarity that can produce that immediate sort of approved collective response. You can't necessarily use peer pressure or violence to keep out strangers. (I have a caveat here: the whole community doesn't need to come together to agree on a strategy of violence. A few hotheads willing to firebomb a house may be enough to do the job.) Where solidary ties were less strong, that's where law came in. And again, the most useful thing about covenants is that they absolve residents from having to make personal judgments about the newcomers. "I have nothing against this buyer—nothing against black people personally. But I'm bound by contract not to sell to them."

And the covenants do fulfill, obviously, purposes other than racial exclusion. Ironically, after *Shelley* v. *Kraemer* does away with racial covenants, middle-class blacks who buy into formerly white neighborhoods or new suburbs immediately resort to covenants that forbid multi-unit housing and prescribe maintenance requirements, to keep their neighborhoods safe from the influx of lower-class African Americans.

After *Shelley*, what happens? Covenants continue to have a life after the case that supposedly killed them off. After *Shelley*, neighborhood associations and developers play a cat and mouse game to find new legal devices that would survive policing of lower level norms by higher levels of the law. The covenants live on as signals even after their legal force is gone, just as racial zoning lived on after *Buchanan*.

It's a great irony that, notwithstanding *Shelley*, developers like William Levitt, the builder of the Levitttowns, restricted sales to whites. And, of course, FHA guidelines continued to redline mortgage loans to black neighborhoods. Restrictions, evasions, substitutions—you can change the words of the law, but it's hard to change the music.

After *Shelley*, the common argument made was that covenants were legal if voluntarily followed. They just couldn't be enforced in courts. Also, many developers assumed that *Shelley* might be qualified or overruled. And there was still the option of trying to get damages, rather than an injunction for violation of the covenant—maybe a judgment for damages wouldn't involve state action as much as granting an injunction would?

But I should add, I think, to the authors' narrative, that it often turned out that after *Shelley*, the collective action problem was not that hard for exclusion-minded forces to overcome. Many cities experienced very forceful political mobilizations to continue enforcing racial restrictions. And even middle class communities were willing to engage in violence. And candidates for municipal and state and, ultimately, national office were motivated by the backlash against efforts to integrate formerly white neighborhoods to campaign against Fair Housing laws.

Rick Perlstein's wonderful book *Nixonland*[7] is mostly about the amazing prominence of Fair Housing legislation and its supposedly obnoxious character as an issue in national as well as local elections throughout the 1960s and the 1970s. And indeed, it was one of the major factors that turned formerly liberal Democratic voters into new recruits for the Republican party.

The core theme here, of course, is the general perception that African Americans, no matter who they were individually, no matter what their bearing or background or class status or profession or occupation or conduct, would lower the value of property in the neighborhood. So even small numbers of impeccably middle class entrants of the wrong color would set in motion an exodus of panicked whites, and send the neighborhood into a downward spiral of values.

What gets incorporated into the covenants, of course, is this categorical conception of people not of the Caucasian race. There's this blanket stereotyping that every member of the group has the characteristics of the worst member of the group. Now, of course, if you did that with any other group, you'd never allow anybody to move into your neighborhood because every racial or ethnic group has its share of dangerous and disorderly people.

But the exclusion expresses a categorical judgment about all non-Caucasian people. It's a generalized statistical or sociological proposition: that wherever African Americans go, they bring with them crime, disorder, delinquency in schools, and so forth.

So it is, in a peculiar sense, rational discrimination, only to the extent that it's ever rational to attribute the worst behavior of the class to every member of the class. You use salient proxies even if this means, to quote from the book, "lumping the well-established black professional together with the unschooled black farmhand from the South."[8]

And then there's a fascinating section on busting the norm of racial exclusion. Who were the norm busters? Well, of course, the ones everyone knows about, the famous ones, the heroic ones. They're the NAACP and their workers who went on sustained campaigns to bust racial covenants. Before *Shelley*, they found what was a quite effective strategy. Many of these homeowners' covenants that were put together had a lot of imperfections. The organizers often got only 80% of signatures from people in the neighborhood. There were a lot of deeds on which they were amended and so forth. The NAACP lawyers became really adept at picking these apart and finding loopholes in them. But that was a case-by-case, hard-grinding strategy.

The other norm busters are, of course, the famous blockbusters. These are the people who will hire an African-American woman to push her baby carriage up and down the street. That's it—that's all they have to do. And people in the neighborhood just start going into a big panic. They think, "Oh, my god, is this somebody who is living here, who's going to bring up children here?"

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7. RICK PEARLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA (2008).

8. BROOKS & ROSE, *supra* note 1, at 26.

Through tactics like this, they get the community to panic. People sell out at lower and lower prices. They then sell the houses that had been selling at distress prices at a much higher markup, to the new bunch of entrants.

These blockbusters do push past restrictions on black ownership. These are the people whom respectable real estate brokers consider completely unethical and whom they legislate against in their codes.

The blockbusters did, of course, break the covenants. But they charged a heavy toll for the service, especially when they panicked white sellers into selling low and then charged a big markup for selling to the African-American newcomers. Often, by the way, the blockbusters offered only land contracts requiring a big down payment, where the agents would hold onto the title until contract buyers paid all the installments, which they often defaulted on because the installment payments were so big. The sellers then repossessed the house. The buyers lost all their down payment. And then the blockbusters resold it at a higher markup to the next set of buyers.[9]

What's kind of distressing about this is that these were deals that you'd think, in ordinary contract law terms, would be considered completely unconscionable.

I think my own critique of the book is that the kind of game-theoretical, rational-choice-based analysis that provides the skeletal structure of the book doesn't quite capture what makes racial panic so virulent. The authors, I think, would concede that cultural factors underlie the categorical stereotyping.

The whites had come to feel that having blacks other than menial servants as neighbors was a kind of pollution. What were the sources of fear that led whites to attribute to all blacks the behavior of the most dangerous and dissolute?

One of the sources Brooks and Rose led me to is this wonderful book by Rose Helper, who wrote it as a doctoral dissertation candidate in Chicago. Helper went out and conducted in-depth interviews of all the real estate brokers in the city.[10] The book is an incredible trove of material, unbelievably rich. In this Northern city, you could see that the mere presence on the street of a single black person could lead a resident or a perspective buyer to the fear that the neighborhood was collapsing.

And the interviews are full of the worst kind of stereotyping: African Americans are immoral and inclined to criminality, don't have a work ethic, expect a lot of free stuff to come their way—even though most of the brokers interviewed said that they personally didn't believe this themselves. The brokers knew plenty of individual exceptions to the stereotype: hardworking, respectable, ordinary people.

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9. *See* BERYL SATTER, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA (2009).

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

And other racial and ethnic groups gradually escaped this kind of stereotyping. Many of the original covenants—Grosse Pointe, Michigan, for example—ranked outsiders on a point system according to their degree of undesirability, which mostly correlated with skin color.

(One set of restrictions—this is an odd thing—had Mongolians in it. You wonder, was there a large influx of Mongolians who were seeking to buy into American urban neighborhoods? I doubt it. I expect "Mongolian" gets in there because it's one of the standard racial categories in the race science of the time.)

But the "ethical" broker in Helper's survey is one who takes white neighborhood preservation as a sacred trust, as opposed to the speculator or blockbuster who only wants to make a buck. And this bolstering of the practice of racial exclusion, as Carol says, turned into a sign of professional and ethical virtue.

Tom Sugrue's excellent book on Detroit tells us that the decision in *Shelley v. Kraemer* really excited black urban residents in the North—in much the way that *Brown* was to excite Southern blacks in the following decade.[11] They saw in the decision the possibility of an integrated future. And indeed, there were many movements of this time to try to integrate neighborhoods.

Yet the categorical judgments reflected in the covenants become generalized, hardened, and reinforced as they make their way into the FHA's underwriting guidelines, the property appraisers' manuals, and the real estate boards' codes of ethics. And, disappointingly, even into the august American Law Institute's Restatement of Property, which bought into the notion that restrictions on sale maintained property values and lessened ethnic tension. At each step, the judgments become more removed from any real person's personal judgment or views, but simply register the view of others that the entry of persons considered undesirable may affect market values.

Interestingly, experiments in collective action in the form of public policy to make housing available for black people in white neighborhoods were condemned as socialism, while collective policies to *exclude* black people, like the neighborhood associations, organized by real estate brokers to replace racial zoning and to concentrate blacks in all-black neighborhoods, were considered enlightened measures. Few of the important actors, public or private, charged with making housing policy ever considered what African Americans themselves might want. The location of black people was a "social problem" and not a matter in which the choices of those people counted for anything.

This book is really an analytic book about the doctrinal spine of racial exclusion. But that gives it at times a rather anodyne character, which understates the pervasiveness of violence as a strategy of racial exclusion. And violence certainly wasn't just confined to white working-class neighborhoods. It was extremely pervasive.

I remember the famous moment where Martin Luther King lead this series of Fair Housing marches in Chicago, in 1965–1967. King was just completely

11. THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (2005).

stunned by the level of violent reaction to this campaign, worse than anything he said he ever saw in Selma or Birmingham. It was just an incredible shock to the civil rights marchers, perhaps even especially when they were marching through dominantly Catholic neighborhoods with Roman Catholic priests, who often supported these open housing efforts. And the priests were being stoned and spat on and reviled along with the marchers. And there's this long history of riots, bombings, setting fire to places, beatings, and murders.

So I have a lot more to say about this book, but I think I've probably already exceeded my time. I did want to say one more thing. Though the book is, as I've said, not primarily about the constitutional issue in *Shelley*, the state action issue, it provides what I think is a somewhat novel and important sort of set of justifications for the controversial holding in the case that enforcement of racial covenants is state action.

Brooks and Rose are pointing out, first, that the covenants are obviously not just a set of private contracts, because they bind future buyers and sellers, whose only "agreement" to the covenants is that they bought into the property. The covenants are in the deeds already, not something that the sellers and buyers ever put into the deeds.

But, also, by assuming that the white purchasers prefer segregation, a court that enforces the covenants lends legal force to prejudice. They assume a background, a social norm of racism. And this preference is written into scores of public and quasi-public policies: the FHA underwriting guidelines, the homeowners associations' codes, the license by the state, real estate brokers' codes of ethics, this whole interacting system of enforcement.

Looking at this interlocking system, Brooks and Rose make a very nice analogy, which I wish they had pursued a little further. In some ways, these arrangements are classic concerted refusals to deal. This is an antitrust problem. When a custom is not only pervasive, but is reinforced by the presence of legal institutions and sanctions across the board, that becomes a public problem. And, at that point, it should become subject to constitutional controls.

My final point, speaking of counterfactuals: one really wonders what might have happened if more communities had been determined to resist the logic of this pervasive social norm and had tried to integrate.

It's clear that there was a lot of demand from the African-American side for integrated communities. There was certainly some demand from people on the white side. Some integrated housing communities already existed before *Shelley*, and more would be created after *Shelley*. There are a number of them today in our cities, but not that many. What if—you can't help wondering—what if the real estate boards and the city councils and everybody else had got together with these homeowners associations and simply promoted integration?

Whites were willing to live with the creation of new middleclass African-American suburbs. That's something that emerges in the post-World War II period. Whites, after some resistance (especially in craft unions where jobs had become a form of ethnic property, passed down from father to son and uncle to nephew), gradually got used to the idea of integration of workplaces. And workplace

integration increased in the prosperity of the postwar boom, as did the Civil Rights Act that gave more African Americans access to public employment and union membership and jobs in big companies like AT&T. But what about integration of schools and neighborhoods as a goal of public policy and private cooperation and working hand-in-hand? That had only very limited success. Because of the Civil Rights movements, most whites were eventually willing to accept the presence of blacks even in the upper levels of business, public offices, and the professions. But they continued to draw the line at the neighborhood. And that is the making of a great tragedy, because neighborhood in America determines so many other things: the quality of education, the presence of neighbors and friends and parents and potential mentors who care about education, the relative absence of seductions of crime and gang membership, the networks and connections that lead to higher education and jobs and mobility, the opportunity to accumulate capital in one's house. Restrictions on residential mobility help to explain why, 50 years after the great Civil Rights Acts, so many African Americans are still concentrated in urban environments that transmit inequality from generation to generation.[12]

To make matters worse, the legal system has not only given up on the ideal of racial integration, but declares it an impermissible goal. In the *Parents Involved* case of 2006, Chief Justice Roberts tells us that government policies pursuing racial integration (in schools at any rate) for its own sake violate the Constitution.[13] He suggests, rather incredibly, that Thurgood Marshall and his crew of NAACP Inc. Fund litigators would have agreed with this result! And you think, "Am I going crazy when I read this? Could Roberts possibly have said this?" It's there. Read the case.

I think that there was a propitious moment for integration there, after *Shelley* and *Brown*. Unfortunately, a lot of the political opportunities in that moment were pre-empted by demagogues like Louise Day Hicks in Boston, who built entire and quite successful political careers on stirring up racial hostility against school-integration orders. Fair Housing was probably the issue that, more than any other, drove Democrats to vote for conservatives.

One option, which people committed to integration tried to pursue—this is in the book too—until the *Starrett City* case in 1988[14] closed it down, was the possibility of planned, limited integration to try to overcome Tom Schelling's famous impasse resulting from a mismatch of perceptions of acceptable levels of integration—tipping points.[15] When African Americans are asked, "What's an integrated community," they respond, "About fifty-fifty." When whites are asked what an integrated community is, they say, "Well, maybe 80% white, 20% black."

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12. *See, e.g.*, PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013).

13. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

14. Starrett City Assocs. v. United States, 488 U.S. 946 (1988). This plan was defeated by the NAACP itself.

15. Thomas C. Shelling, *Models of Segregation*, 59 AM. ECON. REV. (PAPERS & PROC.) 488 (1969).

So how about trying to promote integration by benevolent quota systems, especially in newly built public housing? Well, that actually strikes me as a pretty good idea in some ways, an idea that really had some considerable promise. But the door to that was shut by the newly emerging doctrine that public policy must be color-blind, meaning that the state must not notice that neighborhoods are racially and spatially segregated, even though everybody else does notice it. The state must be color-blind to the fact that color—certain colors anyway—is still very consequential in the decisions people make about where to live and whom they will accept as neighbors.

I just want to end with this further praise for the book. The main contribution of this book, I think, is to locate the story of the strategies of racial exclusion in the legal doctrines that were used to enforce it, and then to demolish it; and in its great comparative analysis of legal and social norms, the legal methods of racial exclusion, or of overcoming racial exclusion, compared to other forms of social sanctions and pressures.

I wouldn't have thought, actually, before this book was written, that there was a lot that was interesting or new to say about this whole problem; but there is, and this book says it.