PANEL DISCUSSION ON *SAVING THE NEIGHBORHOOD*: PART II

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Of the many audiences for this book, the one I will talk about today, perhaps unsurprisingly, is the audience of legal historians, and especially historians of race, civil rights, and the Constitution. Historians who think about racial inequality and the Constitution have thought some, but in my view, not enough, about one of the main subjects of this book: the state action requirement and the relationship between state-mandated and privately enforced racial inequality. In my remarks today, I will briefly review how *Saving the Neighborhood* treats those issues and identify lessons of the book for historians and constitutional law scholars who can learn much from them.

The basic insight begins with the Fourteenth Amendment. As most of you know, that Amendment says, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is generally settled constitutional law today that the language that "[n]o state shall" creates the "state action requirement." Some governmental actor must be responsible for, or at least involved in, an alleged constitutional violation in order for the Equal Protection Clause to apply.

One of Rick and Carol's key arguments in the book is that, even though the Amendment says, "[n]o state shall . . . ," we can and should think of racially restrictive covenants as operating as a kind of state action. Although covenants were private contracts between individuals, the existence of social norms, the prevalence of social sanctions, and the violence that stood always in the background (if not the foreground) made people feel compelled to abide by covenants. Because social and legal norms operated together, we should view their joint efforts as state action.

Rick and Carol are obviously not the first scholars to discuss the interactions between social and legal norms, and this is not the first time each of them has addressed the subject. But what sets *Saving the Neighborhood* apart from previous work is their explanation of how the mechanics of such norm enforcement relate to the state action requirement. Norms supporting the enforcement of racially restrictive covenants did not develop spontaneously. They were the product of what Rick

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and Carol call "norm entrepreneurs." These were the real estate brokers and developers who anticipated a white desire for racially segregated neighborhoods. Such norm entrepreneurs created the instruments to allow for such neighborhoods. They inserted them into new developments. They encouraged homeowners, on their own, to put covenants into existing neighborhoods. Realtors, realty boards, developers, property owners, homeowners and neighborhood associations, and even the Federal Housing Administration all took part in "reinforcing and extending a social norm—not just a preference but an *enforceable* preference—that had developed over decades and spread so widely . . . to count as a customary practice."[1] That customary practice, with the backing of violence and the pressure of social norms, could count as state action in Rick and Carol's view. Indeed, in their rendering, such linked legal and social norms might even be more powerful than legal norms alone.

This central insight—that social and legal norms operating together can be properly thought to constitute state action—offers three lessons for historians and constitutional scholars about the nature of Jim Crow and its demise. One lesson concerns our most basic assumptions about Jim Crow and the construction of the "public" and "private" themselves. The second relates to the nature of state action and how we have historically talked about the state action requirement. And the third is about our constitutional imagination concerning civil rights, state action, and racial equality.

So first: the nature of Jim Crow. A lot of people think of Jim Crow as a system of formal, legal segregation of public places and public facilities. When Jim Crow emerged after Reconstruction in the late 19th century, legislatures passed laws restricting access to and usage of modes of transportation, hotels and motels, restaurants, theaters, parks, amusements parks, schools, water fountains. In the American legal and historical imagination, we generally think that this system began to crumble with *Brown v. Board of Education*[2], even if we don't think *Brown* actually ended segregation. The conventional narrative takes *Brown* as marking the beginning of the end of formal, legal segregation.

In fact, as I've written elsewhere, the approach of the NAACP Legal Defense Fund ("LDF") to challenging Jim Crow, and specifically segregation, in part led the Supreme Court to foster that view of Jim Crow. When the LDF was thinking about how to challenge Jim Crow in the 1940s, it eventually—though not originally—decided that its main target was *Plessy v. Ferguson*[3]. *Plessy* had said in effect that if the state says that the races must be kept separate, and that makes you African Americans feel inferior, that's your problem. It is not that the state is doing that to you. The state hasn't done anything to you. You are putting that meaning on it. That meaning is not intrinsically there.

So when the LDF challenged *Plessy* in the *Brown* cases, it was trying to isolate the question of whether state-mandated segregation, on its own, aside from material inequalities, aside from what happens in the private sphere, actually caus-

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1. RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 163 (2013).
2. 347 U.S. 483 (1954).
3. 163 U.S. 537 (1896).

es harm. If you assume equality but separation, does that separation create a harm that violates the Fourteenth Amendment to the Constitution?

Posing the question that way meant that the LDF bore the burden of isolating and proving the harm of state-mandated segregation. In fact, much in both the briefs and the opinion in *Brown* emphasized the public nature of education and the importance of the government's role in mandating segregation. Moreover, that was the purpose of the Clark doll studies: to show that children had a feeling of inferiority that resulted directly from state-mandated segregation. A major point of the doll studies was that that feeling of inferiority did not just come from the air. It came from government segregation of public schools. In its opinion, the Supreme Court then emphasized the importance of state-mandated segregation and reflected it back. In so doing, it fostered a legal and historical imagination about Jim Crow that placed considerable weight on the government's role, and that really depicted Jim Crow as a formal, legal, government-mandated system.[4]

Saving the Neighborhood is not about that kind of Jim Crow. It is not about the kind of Jim Crow in which at time one laws mandated segregation, discrimination, and exclusion, and at time two the Constitution eliminated those laws. Although Rick and Carol do not use the same language that historians of civil rights and race have generally used, they nonetheless echo a recent practice of defining Jim Crow quite differently from the image *Brown* projects. A number of historians, including Tom Sugrue, Eric Arnesen, and Robert Korstad, have identified a much broader definition of what Jim Crow was and also, as a result, where it operated.[5] These historians have identified Jim Crow as a public and private system, a system of material and economic inequality as well as legal and formal inequality, a system of exploitation as well as oppression.

As a follower of that tradition, I described Jim Crow in similar terms in my first book, *The Lost Promise of Civil Rights*.[6] I want to quote it at some length not only because it is exemplary of this view of Jim Crow, but also because now that I've read *Saving the Neighborhood*, I realize how lacking it is. Just before this quote, I note that after the Civil War white Southerners face two problems: a race problem and a labor problem.

> How, they asked themselves, would they prevent the newly freed African Americans from contaminating the white race and debasing white politics? And how would they find a replacement for the cheap labor black slaves had previously provided and on which the southern economy was largely based?

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4. *See generally* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 238–70 (2007).

5. ROBERT RODGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003); ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY 101 (2001); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2009).

6. GOLUBOFF, *supra* note 4.

> The answer to both questions was the complex of laws and customs that arose in the late nineteenth century and eventually came to be called Jim Crow. When southern states managed through both violence and legal chicanery to nullify the vote blacks had so recently won, they made it possible to inscribe Jim Crow into legal and political structures for generations. When railroads decided to segregate their railroad cars and local school boards decided to allocate fewer tax dollars to black schools than to white ones, they helped create Jim Crow. When white planters preferred black to white farm hands and tenants because they could get more work out of black workers for less pay, they drew on and reinforced Jim Crow. When unions excluded black workers and companies refused to hire them, they perpetuated Jim Crow. When the Ku Klux Klan, often with the acquiescence of law enforcement officers, lynched black men and women, they enforced Jim Crow. Jim Crow existed because every day, in ways momentous and quotidian, governments, private institutions, and millions of individuals made decisions about hiring, firing, consuming, recreating, governing, educating, and serving that kept blacks out, down, and under.
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> Outside the South, African Americans could usually vote, and social isolation and terror were less ubiquitous. But Jim Crow as a system of economic exploitation, if not complete segregation and political exclusion, was very much in evidence across the country during the first half of the twentieth century. For black workers trying to make a living, Jim Crow North and South meant job announcements addressed specifically to white or "colored" workers. It meant that whole swaths of industry, whole sectors of the workplace were off limits. It meant inadequate schooling, inaccessible labor unions, and unavailable government benefits. Black workers usually performed the worst work for the lowest pay. They could not eat in lunchrooms or use bathrooms on site. They worked in segregated gangs and were forced to join segregated unions or found themselves excluded from unions altogether. They had limited, and usually segregated, access to tolerable housing and other services.[7]

As I said, I used to be pretty proud of those paragraphs as capturing this more complex view of Jim Crow. But when I reassessed them after reading *Saving the Neighborhood*, all I could think was, "Where is housing? How did I miss housing? Why didn't I talk more about housing?" I briefly mention housing at the end, and I do talk about *Shelly v. Kraemer*[8] in the book. Perhaps I can be excused because the book was predominantly about labor-related civil rights. But I don't think I should be excused. That is because Rick and Carol have shown me that my description is a problem. It's not a problem just because I should make housing

7. *Id.* at 6–7.
8. 334 U.S. 1 (1948).

more prominent. It's a problem because of what the norm entrepreneurs reveal about the mixed public and private nature of Jim Crow that it was my goal to elucidate.

As Rick and Carol have shown, the housing context is the perfect example of how Jim Crow was public and private at the same time. Their book highlights in exquisite and painful detail how Jim Crow existed because of the combined force of private and public action. In fact, one of the most important contributions of the book is the way it destabilizes and explodes the notion of the public–private distinction that undergirds the narrow vision of Jim Crow. Usually, when we say something is private and not public, we imagine an individual making an individual decision. And maybe there are a lot of individual people making individual decisions. So we have an aggregation of private decision-makers all making decisions that end up being problematic if we adopt a broad conception of racial equality.

But what *Saving the Neighborhood* shows is that such a leap from completely public to individually private is not necessary for the argument. The public and the private are hard to separate. It is not just individual decisions, and it's not just an aggregate. Norm entrepreneurs are not just any individuals. They are professionals creating professional bodies to create covenants and enforce them. In part, their very jobs and very self-conceptions are about maintaining what they think Jim Crow is, and what benefits they will get, or they think they will get, from Jim Crow. More importantly, Rick and Carol go beyond individuals to show the contributions of large private institutions like the National Association of Real Estate Brokers to the maintenance of Jim Crow. Such organizations created manuals that instructed real estate brokers on how to insert a racially restrictive covenant into every property deed they created. *Saving the Neighborhood* reveals how realty boards, homeowners associations, and developers exercised power in institutional and coercive ways.

Crucially, these private individuals and private entities often exercised their coercive private power in tandem with state power. The book shows the dynamic back and forth between what's going on in the private sector and what's going on in the Federal Housing Administration. For one thing, the books shows how people from the national real estate boards started working for the Federal Housing Administration. Thus, people—and not just any people, but especially norm entrepreneurs—literally moved between private and public. For another thing, private norms became public law, as racial preferences got incorporated into redlining, into providing loans on favorable terms only in segregated neighborhoods or only in neighborhoods that had covenants. The dynamics also worked in reverse. Private parties began saying, "Well, let's see. Look what's in the Federal Housing Administration guidelines. Those guidelines include racial restrictions. We should use those as a guide for how we think about selling real estate and what covenants should look like."

So this story really shows a fundamental public and private intertwining in Jim Crow. It significantly undermines the very way that we think about the categories of public and private. In doing so, it shows us what a national story racial inequality was, what a national phenomenon Jim Crow was. If you think about Jim

Crow as more than a system of state-mandated laws, you can see quite easily how it operates not only in the South, but elsewhere as well. In fact, without such an understanding of Jim Crow, one might well be surprised that many of the places that Rick and Carol discuss in the book are not in the old Confederacy. They are not in the Deep South. They are in the North, the West, the Midwest. They are all over the country. The housing story, and the way Rick and Carol tell it, thus explodes many of our assumptions about both the content and the geography of Jim Crow.

The second lesson that comes out of Rick and Carol's insight is the destabilization of the way we tell the history of the state action doctrine. In particular, the book discusses a case from 1891 called *Gandolfo v. Hartman*.[9] A half-century before *Shelley v. Kraemer*, *Gandolfo* foreshadowed *Shelley*'s holding when it said that a private agreement had become state action when it was judicially enforced. Rick and Carol discuss *Gandolfo* as an outlier. They tell us that not very many people followed it. Those who did take account of *Gandolfo* tended to cabin it to its particular context of a treaty with China. They did not generally address this big question whether a court enforcing a private agreement really makes the private agreement state action.

But Rick and Carol's discussion of *Gandolfo* raised a new question for me. *Gandolfo* was decided in 1892, nine years after the *Civil Rights Cases*[10] of 1883. That was the case in which the Court struck down the Civil Rights Act of 1875 and held that the Fourteenth Amendment has a state action requirement. The Court concluded that Congress can only act on the states and not on private parties. In other words, the Civil Rights Act of 1875, which had prohibited discrimination in public accommodations much like the Civil Rights Act of 1964, was held unconstitutional because it violated the state action requirement.

The usual story we tell is that in 1883, the Court announced an already textually immanent state action requirement, and then in the 1940s—and Rick and Carol talk about this—there is momentary skepticism about the doctrine. There are a few, experimental expansions of what can be considered state action, with *Shelley* as the high point of more generous interpretations of state action. But this story views *Shelley* as a blip on the state action radar, and then, with *Brown*, the hard edge of government-imposed harm reasserts itself.

But the temporal proximity of *Gandolfo* to the *Civil Rights Cases* makes me think that maybe we're missing something. I've always been skeptical of saying things like, "There is a state action requirement in the Fourteenth Amendment." There are, as the Court has sometimes suggested, many ways to think about what it means that "[n]o state shall . . . deny to any person . . . protection of the laws." If a state stands by as private parties deny the protection of the laws, is that not some form of state action, for example? As a result, I usually phrase the requirement this way: The Supreme Court has read the Fourteenth Amendment to require state action in order to make out an equal protection violation.

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9. 49 F. 181 (S.D. Cal. 1892).
10. 109 U.S. 3 (1883).

Gandolfo suggests that the conventional story might need revision. Maybe there's actually a minor chord even between 1883 and *Shelley*. I wouldn't go so far as to say that a more capacious understanding of state action was a major historical chord. But maybe there really was a constant, if low-level, chafing at the state action requirement. Scholars have shown that there was considerable criticism of the *Civil Rights Cases*. Then, eight years later, *Gandolfo* adopted a more lenient definition of state action. Moreover, in the 1930s, in the course of New Deal legislation, very fundamental questions about the relationship between the public and private and how state action operates arose. On an intellectual level, legal realists were simultaneously thinking about the relationship between the public and the private. They were questioning the very notion of a private sphere separate from the everpresent threat of state power and coercion.

The gap between *Gandolfo* and the New Deal is some 25 years shorter than the conventional gap between the *Civil Rights Cases* and *Shelley*. Moreover, Rick and Carol's excavation of *Gandolfo* raises the question of whether there were other cases, scholarly writings, legal understandings that adopted similar approaches to state action in the interim. Are there other things we are missing when we assume that in 1883 a state action requirement was simply and definitively divined from the Fourteenth Amendment? Moreover, if we were to identify an enduring, if sporadic and minor, chord in constitutional history of a more capacious definition of state action, it might last beyond *Shelley* as well. Historians and legal scholars have noted the questions the justices faced during the sit-ins of the civil rights movement. They usually mention them to conclude that state action questions remained unresolved. But once one begins constructing a long history of state action skepticism that outlasted both the *Civil Rights Cases* and *Shelley*, such skepticism becomes far more important than it currently appears.

That seems to me particularly the case in light of the history that Rick and Carol have told us. Given the ways in which the public and the private were so intertwined on the ground, it seems odd, though not impossible, that there would be such a huge temporal gap in our questioning of the state action requirement. In light of such a disjuncture between the way we experience the world as an amalgam of public and private, and the way we talk about the state action doctrine, one might expect to find ruminations, if not legal doctrine, about the tension.

All this makes me wonder whether we should revise the way we talk about state action in our post-*Shelley*, post-*Brown* world. We usually say something like, "State action was a fixed star that we briefly questioned in *Shelley* in the mid-twentieth century." Perhaps we should replace that statement with a question: "Did people living in a world in which they could see the public and the private intertwined all the time have a legal consciousness about what state action might mean that we have somehow lost today?"

The third and final lesson that I draw from the book's description of how social and legal norms worked together in the history of racially restrictive covenants concerns our constitutional imagination of civil rights, state action, and racial inequality. The question here is what *Shelley* tells us about *Brown* and constitutional civil rights more generally. I've often been puzzled by the relationship between *Shelley* and *Brown*. *Shelley* comes six years before *Brown*. In *Shelley*, the

Court presumed that racial discrimination and racial segregation were a problem. That was not the hard question for the Court. The hard question in *Shelley* was whether there was any state action that will justify constitutional liability. But then the hard question for the Court in *Brown* was whether racial segregation violated the Equal Protection Clause, even when state action was clear. The Court seemed to be wrestling with something in 1954 that it had not found difficult six years earlier.

I've often wondered what was going on there. Though Rick and Carol do not ask precisely this question, their critique of *Shelley* and their counterfactuals about how it might have been decided shed light on it. *Shelley* concluded that judicial enforcement turned a private agreement into state action. Without judicial enforcement, the private parties would not have been able to do what they did. As a number of scholars have noted, few post-*Shelley* cases followed *Shelley*'s logic because that logic was simply too revolutionary. Rick and Carol put it this way, "*Shelley*'s very breadth was its jurisprudential undoing."[11]

Saving the Neighborhood suggests that both the LDF and the Supreme Court had other options. Rick and Carol describe how they could have, as pioneering but rogue civil rights lawyer George Vaughn did, argue the Thirteenth instead of the Fourteenth Amendment. Because the Thirteenth Amendment did not have a state action requirement, that problem would have disappeared. Alternatively, and more centrally for Rick and Carol, the book suggests an answer in the relationship between social norms and legal norms, the background of violence, and the coercive nature of these apparently private actions. The case might have "link[ed] legal norms to social norms, treating racially restrictive covenants as state action precisely because their enforcement solidified a set of pervasive social norms."[12]

Building on this suggestion, my question is what would have happened after *Shelley* if the LDF and the Court had chosen such a path. In particular, how would that very different image of Jim Crow have changed the LDF's legal strategy going forward? On the one hand, I don't think that anything much changes. The LDF was not particularly excited about the state action question before *Shelley*. The LDF lawyers probably would not have been particularly excited about it afterward. As Carol and Rick say in the book, the LDF lawyers kind of got dragged along in *Shelley*. They did not think the Court was ready in the late 1940s. George Vaughn was out there on his own, and they decided that they had to come in and support the litigation.

After *Shelley*, the LDF renewed its focus on state-mandated segregation. Though Sophia Lee has shown that the membership-based NAACP wrestled with state action in administrative settings after *Brown*,[13] the ultimately separate legal organization of the LDF largely left the issue alone in the courts until they felt they had to react to the sit-ins of the mid-1960s. The LDF went after *Plessy*. The lawyers chose public education in part because it involved clear, obvious state-mandated segregation. But what if *Shelley* had relied on the kinds of arguments

11. BROOKS & ROSE, *supra* note 1, at 145.

12. *Id.*

13. Sophia Z. Lee, *Hotspots in a Cold War: The NAACP's Postwar Workplace Constitutionalism, 1948–1964*, 26 LAW & HIST. REV. 327 (2008).

that Rick and Carol suggest, and had created an image of Jim Crow as this public–private amalgam? Making sensible, coherent, and articulate that this was what Jim Crow looked like would have enabled the Court to project a very different vision of Jim Crow and enabled lawyers to think differently about how one might go about attacking it. Perhaps the LDF might have seen fit to build on that and to build on these more expansive visions of state action.

Taken together, these lessons from *Saving the Neighborhood* go far toward destabilizing our conventional conceptions of state action, our ideas of public and private. The history Rick and Carol describe undergird a much more complete understanding of Jim Crow. It allows for a renewed constitutional imagination—with room for more expansive constitutional protections for civil rights.