2/26/08

Colleagues:

This is more than you want to read, but I didn’t know how far you might want to take it. It is the introduction and first two chapters of a book that my Yale colleague, Richard Brooks, and I are writing on racially restrictive residential covenants. I am responsible for the first draft, so at this point, it is pretty much me, particularly in these early chapters.

I would suggest reading the Intro and Chap. 1 (re Reconstruction era background & preview of tactics), or if you are more interested, Chap. 2 (re unsuccessful legal routes before covenants: nuisance and zoning). Both are just a prelude to covenants, but I will be happy to talk about those with anyone who likes.

FYI, at the very end you can find a Table of Contents of the whole book. I have the draft up to Chap. 11, but some parts are more rickety than others (as with these early chapters)
INTRODUCTION

The Shelleys and the Sipes. In the middle of August 1945, an African American couple, J.D. Shelley and his wife Ethel, bought a house on Labadie Avenue in St. Louis. Their white neighbors Louis and Fern Kraemer were not pleased. Neither was the local “improvement association.” With the association’s very active support, the Kraemers filed suit to prevent the Shelleys from taking possession of what they had thought would be their new home.¹ The Kraemers based their claim on a restrictive covenant that supposedly ran with the Shelley’s property— that is, its obligations were supposed to pass on to each new owner in succession. The covenant itself was of a type that ran with the property in many American residential areas at that time: the house was not to be used or occupied by Aany person not of the Caucasian race.@

¹Shelley v. Kraemer, 334 U.S. 1, 5 (1948) Clement E. Vose, Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases 109-114 (1959). Vose gives the date of purchase and moving in as September 11, 1948, but describes the Kraemers’ action as one to keep the Shelleys from taking possession. Id. at 109, 114.
Some months earlier – in November 1944– a similar story played out in a neighborhood in Detroit. Orsel and Minnie McGhee, another African American couple, purchased a house and got somewhat further than the Shelles. The McGhees got somewhat further than the Shelles – they actually moved in. But their white neighbors, Benjamin and Anna Sipes, were just as displeased as the Kraemers would be a few months later. The Sipes sued the McGhees to remove them from possession, basing their claim on a restrictive covenant very similar to that on the Shelley’s property: it prohibited the use or occupancy of the house by any person except Athose of the Caucasian race.\(^2\)

\(^2\) *Shelley*, at 7.
The National Association for the Advancement of Colored People (NAACP) was heavily engaged in combating racially restrictive covenants in the 1940s, while national real estate groups were highly interested in defending them. The two groups threw their legal staffs behind their respective sides as the Shelley and Sipes lawsuits wound their way through the judicial systems of Missouri and Michigan. Eventually both states' highest courts upheld the covenants. But that was not the end of either story, because further judicial review was in store. In 1948 the United States Supreme Court decided to consider both suits as companion cases, and henceforth the two suits were generally referred to simply as Shelley v. Kraemer. The Supreme Court reversed the outcome in both cases. In a major departure from what most people thought was the clear legal precedent, the Court held that no state courts could enforce these racially restrictive covenants. They could not do so, the Supreme Court reasoned, because judicial enforcement of racially restrictive covenants would be an exercise of “state action” contrary to the Fourteenth Amendment to the United States Constitution. This Amendment prohibits any state from denying its residents the “equal protection of the laws,” and since judicial enforcement of racial covenants counted as “state action” according to Shelley, a state would deny equal protection to African Americans (or other racial groups) if its courts enforced these covenants.\(^3\) Having disposed of the Michigan and Missouri decisions with this very controversial interpretation of “state action,” the Court turned its attention to a pair of cases that had originated in Washington, D.C. Washington is a federal city, and not a state, and hence the Fourteenth Amendment’s

\(^3\)Shelley, at 20-21.
prohibition on certain state actions does not apply in Washington, at least not directly. Nevertheless, the Court held that it would violate public policy to permit Federal courts to enforce racial covenants in Washington when the same devices were not judicially enforceable in the states.4

Shelley was a bombshell both practically and legally—or so it seemed. As a practical matter, the case summarily denied legal enforcement to all racially restrictive covenants. Until Shelley, these kinds of covenants had been uniformly upheld in state and federal courts, and even in an earlier decision of the Supreme Court itself.5 They had enjoyed the support of local neighborhood organizations and realtors, the national real estate industry, and even the Federal Housing Administration, on the ground that they reduced racial conflict and stabilized housing values. Moreover, racially restrictive covenants had become very widespread in urban areas throughout the country, and they were beginning to pop up in the burgeoning suburban developments of the postwar period.

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4Hurd v. Hodge, Urciolo v Hodge, 334 U.S. 24, 34-35 (1948). An alternative ground was the Civil Rights Act of 1866, discussed as applicable in D.C. by analogy to the Shelley=s construction of the Fourteenth Amendment with respect to the state courts; id at 33.

5Corrigan v. Buckley, 271 U.S. 323 (1926) (leaving covenants intact on jurisdictional ground that they presented no federal question); see also the citations to Corrigan in Mays v. Burgess, 147 F.2d 869, 870-71 (D.C. Cir. 1945), cert. denied 325 U.S. 868 (1945)(citing Corrigan and more recent cases); Kraemer v. Shelley, 198 S.W.2d 679, 683 (Mo. 1946) (same) Sipes v. McGhee, 25 N.W. 2d 638, 643-44 (Mich. 1947) (citing Corrigan and noting the court knew of no court of last resort overturning private racial covenants on constitutional grounds);
Not that racially restrictive covenants had enjoyed uniform support. Far from it: these restrictions had long dismayed civil rights groups like the NAACP and its supporters, as well as the black press, notably the very outspoken Chicago Defender. Moreover, in an increasingly tense Cold War environment, restrictive covenants were a sore spot in American efforts to convince other nations of the democratic character of the United States. Even friendly critics from abroad lingered over the balefully racist appearance of restrictive covenants. Indeed, housing discrimination seemed to be the key to discrimination of many other kinds – in education, health, commercial establishments, even streets and sanitation. But with Shelley, it seemed, all this would change. Restrictive covenants were the last legal means for enforcing housing segregation, and once those fell, segregation would have to loosen on those other fronts as well.

It was not to be. To be sure, housing segregation to a very considerable degree is the key to segregation in other areas. But as has become completely obvious by the beginning of the twenty-first century, housing segregation has survived Shelley in the United States, and it persists robustly to this day, with only slight unraveling around the edges. Even the entry of substantial numbers of African American families into the middle class has not ended segregation, but has rather created a number of interesting, affluent, but still segregated enclaves for middle-class and wealthier African-Americans,

6CITE MYRDAHL
7GET CITE: MYRDAHL? JOHNSTON?
8See, e.g. Susan Welch, Lee Sigelman, Timothy Bledsoe, and Michael Combs, Race and Place: Race Relations in an American City (2001) (study of positive impact of interracial contacts on racial attitudes).
as in the much noted Prince Georges County in suburban Washington.9

Shelley and the Law  But what about Shelley’s legal impact?  This too seemed potentially monumental at the time, a major victory for the NAACP legal team, particularly in the Court’s very expansive reading of the “state action” doctrine under the Fourteenth Amendment.  Here a bit of background is in order concerning the Reconstruction-era constitutional amendments on which Shelley rested.  The Thirteenth Amendment was the first of these post-Civil War amendments. It banned slavery, and it applies to all actors, public or private; no person may enslave another, as a matter of federal constitutional law.  Despite the efforts of one of the Shelleys’ original St. Louis lawyer, however, as we shall see, the NAACP legal team rested the case’s the civil rights arguments not on the Thirteenth Amendment but rather the Fourteenth.  This brings us to the Fourteenth Amendment: this Amendment is directed not at individuals but at states, in that it prohibits the states from denying the equal protection of the laws to any of their residents.

Because of this “state action” foundation for Fourteenth Amendment claims, a moderate but conventional legal analysis prior to Shelley might well have taken the following line of argument: “Racially restrictive covenants reflect a deplorable prejudice that is clearly forbidden to public bodies and officials, but the Fourteenth Amendment nevertheless countenances private discrimination. While we may find this morally repellent, it is not necessarily illegal.”

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9CITE CASHIN – ARTS OR NEW BOOK
Upon reflection, even civil libertarians might well concede that there are indeed some plausible reasons for the persistence of this conventional analysis. However frail and contested the divide in between Apublic@ and Aprivate@ in theory,\textsuperscript{10} the distinction assures a space for personal decisions, letting people do things as Aprivate@ actors that would be off limits to public actors – for example, giving preference to one's friends and family in contracts, or contributing to particular religions, or excluding unwanted solicitors from one’s property. None of those activities would be legitimate for public officials, but it is certainly understandable that individuals might want to engage in them. Moreover, however much we might dislike any given individual’s choices, many believe that it is important that individuals – including ourselves – continue to have these choices. Even if we do not want our officials to commit public funds to, say, the mayor's brother's swimming pool or to his own local Lutheran Sunday School, we think we should be able to commit our own funds to our brother's recreation or our favorite church activity.

Hence despite much trenchant criticism, our constitutional law has continued to distinguish Astate action@ that is subject to constitutional constraints on public bodies and officials, from the Aprivate actions@ that are not, even though the cost of the distinction is that private individuals can behave in discriminatory ways that would be grounds for lawsuits against official actors.

But Shelley seemed to brush aside all this cautious distinction between Astate action@ and private action. It did not matter that no public legislature had adopted a

neighborhood=s racially restrictive covenants, or that no local or state official took part in an official capacity in their creation or enforcement. It did not matter that the only thing that appeared to have happened was that at some point private developers had reached deals with home purchasers to exclude certain races, or home owners had agreed with other home owners to do the same, and that they or the persons who had bought their houses had used the courts to vindicate these ostensibly private agreements. After all, lots of people go to court to, say, sue for an auto injury or enforce a sale contract, and their acts scarcely seem "official" when they do so. Racially restrictive deals may have looked mean-spirited and un-civic-minded, but they still looked private, initiated and enforced by private parties rather than public officials. Nonetheless, according to Shelley, judicial enforcement had turned these agreements into “state action.” Clearly courts are public bodies, and in that sense it is obvious that judicial enforcement entails the power of state. But insofar as there is anything at all that is considered Aprivate law@ between unofficial actors, be it contract or tort or simple trespass, then those actors of necessity must be able to resort to the courts to vindicate their private rights.

Shelley, then, seemed to leave little room for any such Aprivate@ legal rights. After this case, the touchstone for Astate action@ seemed to be nothing more than resort to the courts. With that, it seemed, every private claim, when vindicated in court, could be labeled Astate action,@ subject to the same constraints that apply to official actors and policies. Such a view would have enormously expanded the scope of federal authority over discrimination, bringing federal antidiscrimination law right down to individual actions – a refusal to rent a single room in one’s home, for example, or refusal to offer membership in a club.
But this too was not to be. The “judicial action equals state action” formula would have simply pulverized any distinction between private and public legal actions.\textsuperscript{11} The courts of the United States soon proved themselves unwilling to take that radical a step. Later decisions by the Supreme Court backtracked from Shelley’s broad formulation and suggested that the bare potential for judicial enforcement, taken alone, would not transform what we consider private arrangements or preferences into state action, even when those private relationships entailed something as distasteful as racial discrimination.\textsuperscript{12} The judicial retreat seemed to mean was that Shelley itself was a legal dead end, precisely because of its sweeping pronouncement that judicial enforcement of covenants was state action. It was just too much.

Shelley’s ineffectiveness extended to the legislatures as well. In the 1960s, at the urging first of President John F. Kennedy and then of Lyndon Johnson, Congress wrestled with its first serious efforts to pass a broad swath of federal antidiscrimination legislation, ultimately covering the areas of employment, housing, and “public accommodations” such as restaurants or hotels. But the Shelley case gave no substantial jurisprudential support for these legislative efforts. While the wide range of new Congressional legislation probably made the state action question less salient over the long run, the new laws still made a nod to the state action/private action distinction,

\textsuperscript{11} See, e.g., Tushnet, supra note—, at 86 (noting that judicial enforcement as state action would collapse entire doctrine of state action).

\textsuperscript{12} See, e.g. Moose Lodge; cf. Peterson v. Greenville, 373 U.S. 244 (1963) (reversing trespass conviction in antisegregation sit-in case in restaurant, but on the grounds that official state policy supported segregation). The 1964 Civil Rights Act later banned racial discrimination in such public accommodations.
steering clear of simple one-on-one instances of personal prejudice, such as a racial preference in renting one apartment in a residence.\textsuperscript{13} The Congressmen could have done the same if \textit{Shelley} never been decided.

\textsuperscript{13} The 1960s civil rights legislation were based on the Commerce Clause as well as the Fourteenth Amendment, which meant that the laws only applied after some commercial threshold had been passed, e.g. in the case of housing, advertising an apartment in a newspaper or listing it with a broker.
Thus Shelley’s very breadth was its jurisprudential undoing, undermining the traction that it might have had as a legal weapon against discrimination. And after subsequent judicial interpretations and legislative actions, it was unclear just what the case meant. Whatever it did mean, its broadest reading had clearly been rejected – and no obvious alternative reading took hold, though several were offered. To be sure, Shelley continued to be cited, and it continues to be cited today – but never alone. Any constitutional claim that has nothing behind it but Shelley is, to put it bluntly, a loser. In the harshest light of hindsight, one might understand the case simply as an ad hoc expedient to get rid of one type of private action that particularly embarrassed the United States in its Cold War diplomacy another example of the old adage that hard cases make bad law.

Despite its early promise as a practical and jurisprudential advance for civil rights, then, Shelley ultimately seemed to lead nowhere. Housing opportunities for minorities increased, but housing segregation barely suffered a blip. In the courts, civil rights advocates could never leverage Shelley by itself into a broad attack on private discrimination. What is perhaps most surprising of all, racially restrictive covenants continued to appear in deeds even though Shelley had supposedly made them unenforceable.

To be sure, there are indeed other ways that Shelley did matter in the long history of this nation’s dismantling of legal segregation, and this book will go into some of them. But the underlying argument of this book is that the practical and jurisprudential

14See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988) (describing postwar Federal desegregation efforts in context of international opinion).
disappointments of Shelley are linked. What can link them together is an exploration of the role of social norms, and particularly the relationships between between social norms and legal norms, and most particularly the relationship of both kinds of norms to claims of property. At bottom, racially restrictive covenants aimed to turn a neighborhood into the group property of its white residents, but group property claims like these only work if they are enforceable through either social or legal norms, because those norms have to constrain what are usually thought to be the rights of individual property ownership.

Social Norms and Legal Norms. A short preliminary excursion is in order here on the subject of social norms, as well as legal norms and the relationship of both to property claims. Let us begin prior to norms, with what economists call preferences or tastes (even though these nouns seem somewhat thin as a name for our desires and principles) and let us also begin with a relatively frivolous example before coming back to the more serious matters of racial discrimination. As a matter of individual preference, I may very much like to wear baggy jeans, but my individual preference does not spill over to you, because I do not care what you wear. Somewhat different is my preference about what you wear: I like baggy jeans, and I feel more comfortable wearing them if others (let us say, including you) wear them too – that is, I would like you and some set of other people to behave in a certain way.

Notice that my preferences about other people’s acts can set up potential conflicts. Perhaps you may not like baggy jeans; or perhaps you may like them but you strategically pretend not to, so that I have to do you some favor to entice you to agree; or perhaps you may want everyone else to wear baggy jeans while you wear slim ones, so as to stand out from the crowd. Thus you may not want to go along when I and some
others like me would prefer that you too would wear baggy jeans. Those of us with the baggy-jeans preference have what this book will call a “social preference,” that is, a group of us have a preference about our own behavior as well as yours. But our social preference may go for naught unless there is some way that we can induce you and others like you to do what we would like you to do. Thus our social preference gives us what academics often call a collective action problem, or rather two collective action problems: first, you do not necessarily want to cooperate with our wishes, and second, as among ourselves, no one may want to take on the role of the persuader.

A number of legal academics have taken an interest in social norms over the last decade, precisely because they have realized that social norms can overcome collective action problems considerably more difficult than this one. Much of the legal literature has focused primarily on the reasons why people follow social norms and secondarily, why particular people take the effort to enforce them. One school of thought attributes these sometimes costly activities to a kind of habituation and psychological “internalization” of norms. Another holds that norm-following and norm enforcement springs from an underlying desire for the esteem of other people. Still another treat norms as simply the name for behaviors that signal a willingness to cooperate with others. Much of this fixation on motivations stems the effort to square cooperative behavior with “rational actor” models of self-interested human activity, a model in which the first steps toward cooperating with others are quite mysterious.

15CITE COOTER
16CITE MCADAMS, FOLLOWING LEAD OF HUGH PETTIT; MAYBE ALSO ROBERT FRANK
17 CITE E. POSNER, FRANK AGAIN.
18CITE L & HUMS.; DE JASAY; ELSTER
Interestingly enough, the scholars who have done some of the most important actual case studies of social norms have been more agnostic about ultimate origins, simply taking as a fact that the first step has already been taken, and that this first step gives people reason to reciprocate and cooperate at least some of the time.\textsuperscript{19} Although this book will be interested in motivations for particular actions, it will follow the case studies’ agnostic attitude with respect to the very most ultimate motivations to follow and enforce norms. There is additional justification for taking this path, too: the agnostic or naive approach also mirrors the common law, which assumes that people mix self-interest together with a modicum of cooperative behavior.\textsuperscript{20}

By social norms, then, we mean social preferences–group wishes about the behavior of ourselves and others–that are in some way enforceable. Enforcement may be quite mild, e.g. an appeal to conscience or to conformance with fashion. Such mild strictures may entail no more than what has been called “first-party” enforcement, indicating that you as the subject enforce the norm on yourself.\textsuperscript{21} Second-party enforcement means that someone with whom you are dealing directly encounters you in some way: if you go along, she gives you her business or esteem, but if you do not, she threatens to cut ties or perhaps to annoy you on some other front. Third-party enforcement brings in other parties – everything from the classmates who will giggle and gossip behind the back of an unfashionable student, to the police and the courts.

Those classmates are operating on informal social norms of a group, as opposed to the police and the courts, whose actions entail legal norms–that us, rules enacted

\textsuperscript{19}CITE ELLICKSON, LISA B  
\textsuperscript{20}CITE WM & MARY  
\textsuperscript{21}CITE ELLICKSON
formally by a larger society or institution. Moreover, just as some informal social norms may contradict each other (the norm to wear fashionable baggy jeans versus a norm of neatness), so too may legal norms sometimes reinforce but sometimes run counter to social norms. In the case of baggy jeans, for example, the school rules are likely to reinforce the norm of neatness while eschewing the stylish but slightly menacing baggy jeans that student social norms demand.

Social norms about baggy jeans are trivial, but many of the same patterns appear in much more serious matters—like race discrimination. Many of these patterns have already been discussed in the legal literature on norms— for example, the implicit weighing of costs and benefits in following or not following a given social norm; the importance of the parties’ ability to signal cooperation on the one hand and to observe and monitor other people’s behavior on the other; the multi-faceted interactions between informal social norms and formal legal norms. The short but fraught history of legally enforceable racially restrictive covenants will afford numerous opportunities to reexamine all these dimensions of the ways that social norms emerge, persist, and in some cases, break down.

Most strikingly, however, this history exemplifies another point made by the existing academic literature on social norms: while social norms can enhance cooperation, cooperation is not always directed toward good ends. Certainly in the case of racial covenants, the white neighbors’ norms to “do the right thing” among themselves had severely deleterious consequences for would-be minority residents. In Shelley, the law, speaking for the legal norms

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22E POSNER
23E POSNER, R MCADAM, E OSTROM
24E POSNER, R MCADAM, C SUNSTEIN, RECYCLING PAPER
of a larger society, ultimately took the side of the minority residents.

But as was observed above, Shelley’s legal intervention was remarkably ineffective, both as a lever for desegregation in fact and as a springboard for innovation in civil rights law. A social norms perspective can give one greater insight into these disappointing results, while in turn offering new insights on social norms themselves.

As a practical matter, anyone who expected Shelley to end housing discrimination underestimated the tenacity of social preferences and social norms, even when legal support vanished. While some scholars have observed that signalling is a critical component of a social norm, they have focused on the signal of cooperativeness given by would-be group member to the group. This book will illustrate that an equally important signal runs in to opposite direction: group members give off signals to tell themselves and others what behavior is expected. Racially restrictive covenants acted as signals like this throughout their history—indeed, signaling may have been their most important function. Thus even after Shelley, when racial covenants were no longer legally enforceable, real estate practitioners wrote racial covenants into deeds as a kind of code, serving to coordinate the actions of brokers, lenders, homebuyers and their neighbors. All these players thought that restrictive covenants maintained property values in white neighborhoods, and thus they had a strong interest in continued neighborhood segregation. They could use covenants—even legally unenforceable ones—to announce their intention to maintain a given neighborhood as white-only, while warning off minority members and anyone else who might prefer a more integrated environment.
As in this scenario, the signaling of social expectations can spill over from mere coordination into the regulation of behavior: social norms can nudge people to act in ways that they might not act if left to themselves. Both before and after Shelley, this was clearly the case with norms of segregated housing in white neighborhoods. Sometimes segregationist social norms operated simply in a “first-party” manner: white sellers felt guilty if they failed to meet the expectations of the neighbors that they would only sell or rent to white persons. Meanwhile, a point perhaps not sufficiently noted in the norms literature, the outsiders to the group, the minority renters and buyers, also themselves felt bound by the norm, hesitating to move to areas where they were not wanted or where they could be legally excluded.25

But of course social norms of segregation were enforced by more than mere first-party pangs of guilt. We all know of instances in which norm-violators are met by enforcement from others: social disapprobation by others in the group; gossip, shaming, shunning, or in more shocking cases, vandalism and serious violence. The social norms of “keeping the neighborhood white” certainly included a number of these extra-legal or illegal enforcement strategies, perpetrated both on outsiders and backsliding insiders in the group.

Before Shelley, racial covenants were the chief legal arm of this norm-enforcement activity, and their legal character was aimed at reinforcing or replacing informal norm enforcement. Covenant-enforcing lawsuits, like harassment and violence, clearly inflicted costs on the nonwhite outsiders who attempted to breach the color bar,

25 CITE NORMS STUFF TREATING SEGREGATION AS 3RD PARTY EFFECTS, NOT INTERNALIZED BY VICTIMS
as well as on the renegade white insiders who otherwise would have sold to them. On the other hand, covenant enforcement, like violence and harassment, was not a free good for the conforming enforcers either. Sometimes no one wanted to bother to undertake a lawsuit or pursue a threat very far, particularly if the cause looked hopeless, and if the best financial offer came from a minority member. In the face of unwanted integration, white homeowners could also sell out and move, putting even more pressure on the remaining covenanted neighborhoods. Perhaps that was why in some instances, the collapse of segregation in one neighborhood frightened and galvanized others, whose owners feared a drop in their property values all the more. Long after Shelley halted the legal enforcement of covenants, norms of white “neighborhood ownership” persisted. Covenants themselves, in spite of their loss of legal teeth, continued to signal the neighbors’ intentions to hold the neighborhood for themselves, while “informal” harassment and violence continued too, contributing mightily to the practical disappointment that the case came to represent.

Social norms and legal norms also interacted in complex ways in Shelley’s impasse as a jurisprudential matter. As was observed earlier, the problem with Shelley’s sweeping “state action” formulation—judicial enforcement is state action—was that its incredible breadth made it unusable, seemingly folding in all kinds of personal activities that American courts, legislators and citizens have strongly preferred to treat as “private,” and not subject to the constitutional legal constraints that bind public actors. But as this book will illustrate, as a matter of property law, racially restrictive covenants depended critically for their enforcement not on simple individual preference but on social preferences—that is, groups’ preferences about other peoples’ behavior—and on
the social norms that could enforce those social preferences.

In that sense, then, the case can be understood as a kind of a missed opportunity, where the Court might have strengthened its practical legal impact by sharpening its holding, particularly by focusing on the elements of social practice that underlay the legal enforcement of covenants. Social norms can have coercive force, and it is precisely that coercive aspect that makes social norms assimilable to “state action”-- particularly when exercised over a wide area, as was the case with restrictive covenants. The strength of segregationist residential preferences and norms would probably have defeated immediate housing desegregation, no matter what Shelley had said about state action. But if the judicial reasoning in Shelley had zeroed in on the norm-directed aspect of segregationist covenants, and focused on the way that these legal instruments reinforced social norms, the case might at least have generated a principled and persuasive state action doctrine that could have been deployed in other civil rights areas.

Armed with a social-norm basis for the application of the state action doctrine, the courts might have addressed with greater facility many of the other civil rights issues that confronted them from the 1940s through the 1960s, particularly in areas where the segregationist decisions were ostensibly simply “private”—for example, discrimination in political “clubs,” employment discrimination and public accommodations like hotels and restaurants. If Shelley had focused on state action as social norm enforcement, it might have bolstered the legal case against those practices too. By the same token, such a doctrinal basis might also have made Congress’ job easier in the 1960s, as the national legislature struggled to find the appropriate constitutional bases for civil rights legislation
in voting rights, employment, and business practices. Finally, courts and legislators might also have found a jurisprudence of social-norms-as-state-action helpful in more recent developments in civil rights, such as gender discrimination or discrimination based on sexual orientation or disability.

_Norms and Property._ This was a path not taken, however, even though at the time of _Shelley_, there were hints that it could have been. Interestingly enough, one reason it was not taken was that a social norm analysis would have had to deal seriously the fact that racially restrictive covenants purported to be a form of property right. As this book will illustrate, property claims of all kinds are particularly closely meshed with social understandings and norms. This was true in segregated neighborhoods too. Through various social signals of segregation, white neighbors asserted that they informally “owned” the neighborhood as a whole; insiders were expected to understand and do their part, but outsiders were supposed to get the message too.

Game theorists have analogized property arrangements to a “Chicken” or “Hawk/Dove” game, where conflicts can be avoided when one party acts as Hawk with respect to a given item, and all others play the “Dove” role for that item.²⁶ In that sense, with their various forms of intimidation and harassment of nonwhite outsiders (and nonconforming insiders), white residents tried to signal and enforce their Hawk position about the neighborhood as a whole. With covenants, they hoped to convert those informal property claims into legal ones, and for a considerable time they succeeded in the courts.

As we shall see, however, the law of property is an arena in which the _formal legal_
norms in effect ride herd on informal social norms. Property law usually reinforces some social norms while reining in others, and in particular, property law has a very decided preference for keeping decisions in the hands of individual owners who are presently on the property. Group property, and especially informal or custom-based group property, has not fared well in traditional American property law, among other reasons because of the burdens that group property imposes on individual owners and the impediments it causes to new owners and uses. There are exceptions in traditional property law, and a considerable part of the brief legal history of racial covenants revolved around whether those covenants could form a legal exception or not. Though the opportunity was largely bypassed, property law's policing capacity might have been deployed with considerably more bite to curb some of the most venomously discriminatory social norms of residential segregation.

26Zerbe & Allen re hawk/dove
27CITE TO DRAMA OF THE COMMONS OR ROMANS/ROADS
But in the early part of the twentieth century, for a variety of reasons, the various parties protesting against racial covenants more or less backed away from mounting a serious set of property-based arguments. Property rights seemed too conservative, too regressive, too narrow, and for some, perhaps, too strongly associated with a despised capitalism.\textsuperscript{28} Besides, segregationists had seemingly hijacked the property analysis to support racial covenants, a factor that cannot but have dampened more intense discussion of property law issues. Not that those issues every entirely dropped from view. Local NAACP lawyers in particular learned to chip away at the property basis of covenants in a number of promising ways. A law review article that some have seen as particularly influential in Shelley included a property law discussion as a prelude to its big constitutional arguments.\textsuperscript{29} But leading civil rights lawyers in major cases continually stressed the more sweeping constitutional principle of equality over what must have seemed more pedestrian and unpromising property arguments. Unfortunately, in downplaying property arguments, they missed a property path to social norms, and therewith they lost the chance to develop a powerful set of jurisprudential ideas about the constitutional relevance of widespread social norms. At least some of those ideas might have bolstered the constitutional attack on other forms of discrimination.

It is a part of the effort of this book to reconstruct links that were not made in Shelley-- particularly between social norms and legal norms, and between both and constitutional principles. For this we turn to the history of racially restrictive covenants as a tactic for keeping residential areas in white hands. Property in various guises runs

\textsuperscript{28}note socialist interests of early NAACP leaders. Continue later?
\textsuperscript{29}cite McGovney – analysis of restraints on alienation
through this reconstruction. The defense of property values was a major reason why white neighbors turned to residential segregation in the first place, creating white-only neighborhoods that were in turn a species of white group property, defended by social norms and reinforced by covenant law. Formal property law, however, put up obstacles to this kind of group property – obstacles that civil rights lawyers might well have used more effectively in their constitutional case against racial covenants. Finally, even after racial covenants were rendered legally unenforceable, white neighbors attempted to incorporate covenants into informal social norms of segregation, using them as signals of their intent to keep the neighborhoods for themselves.

Thus racial covenants, and the legal and practical odyssey that they have traveled, offer a striking example of the way that property considerations have impeded residential integration, but also the way that dowdy old property law might have been understood as an unexpected ally of civil rights – and how it might still be so understood in our own time. Beyond that, the study of racially restrictive covenants can act as a vehicle to investigate more deeply how legal norms can reinforce, undermine, influence (or fail to influence) social norms – and how social norms can do the same to legal norms.
I. BEFORE COVENANTS: RESIDENTIAL CHANGE AND DISCRIMINATION AT THE TURN OF THE LAST CENTURY

In early nineteenth century America, nobody seemed to want to have racial minorities living next door. Nobody who counted, that is – that is to say, majority, white Americans. Oh, certainly, it might be all right if minority group members lived in the vicinity if they were servants, or if they were slaves in the case of African Americans. But even the Abolitionists in large part thought that after the slaves were freed, they should go “back” to Africa, a place totally unknown to the prospective new residents. Hence prior to the Civil War, while some African Americans might be free in name, when they gravitated to urban areas (as they often did) they were not so free in fact to live where they pleased, North or South. In Northern cities, free African Americans slipped into the poorest sections of town, overcrowded shantytowns with names like “Little Africa” in Cincinnati or “New Guinea” in Boston (to mention only the more polite appellations.) Conditions were appalling in those locations, where supposedly residential structures sometimes lacked floors or any more than the most barely minimal space. Those conditions exposed the generally poverty-stricken residents to disease, cold and damp, no doubt contributing to mortality rates that were far above the local averages. Southern white visitors to the North gloated over the squalid conditions in

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30 Percentages of urbanized free black persons were consistently higher than the general population through all the censuses from 1800 through 1860, e.g. at 19.5% in 1830 (to the general U.S. figure of 8.8%), and 33.1% in 1860 (to the general figure of 19.8%). See A Population History of North America, table 10.5, at ---- (ed. Michael R. Haines & Richard H. Steckel, 2000).
32 Id. [Litwak], at 168-69.
these urban enclaves, and they felt themselves all the more justified in keeping black people enslaved.\textsuperscript{33}

\textsuperscript{33} id. [Litwak], at 169.
Meanwhile, local white people objected ferociously to any African Americans’ attempts to escape from the shanties to other parts of town. Why? Because their presence, it was said, would lower property values. As early as the 1790’s, in a complaint that still echos down over the centuries, a Salem (Massachusetts) minister complained that the presence of an African American’s residence would injure the neighborhood, drive out the respectable folk, and, of course, push down property values.34 Fears like this meant that as far as white Americans were concerned, black residents had to be kept where they were, crowded and miserable though they might be. As historian Leon Litwak recounts one pre-Civil War incident, “When a Boston Negro schoolmistress thought of moving a better neighborhood, the inhabitants of the block ... resolved either to eject her or to destroy the house.”35 This too is a comment that echoes down the years. As we will see, violence or the threat of violence has played a significant role in the racial segregation of American residential areas, giving off an especially sharp signal of the claim that the neighborhood “belonged” to its white residents to the exclusion of minorities.

34 Id., [Litwak] at 169
35 Id. [Litwak], at 179.
To be sure, even in those days very poor whites did mingle with African Americans in some city neighborhoods. One was New York’s infamously squalid Five Points area in lower Manhattan, where African Americans rubbed shoulders with—and were ultimately replaced by—immigrants from Ireland, Germany and Eastern Europe.³⁶ And to be sure as well, in that exotic and scandalous hotbed of racial mixing, New Orleans, white gentlemen contracted to support and live with their black mistresses at least part of the time, while elsewhere in the deep South, white residents were quite indulgent when a handful of their freed kissing cousins from across the color line grew wealthy and moved into town.³⁷ Indeed, one might speculate that whites in the lower South were more relaxed than their border state and northern counterparts precisely because in the Antebellum period, the social distance between the races was cavernous. Even those black persons who became well-to-do had to depend on white relatives and patrons, and as such they were unthreatening to the existing social order.³⁸ Nevertheless, North or South, most respectable white townsfolk in the pre-Civil War era wanted no part of residential integration with the free members of minority populations.

³⁶ Id. [Litwak] at 168; Gilbert Osofsky, Harlem: The Making of a Ghetto 9-12 (2d ed. 1971). Five Points was the area in Lower Manhattan where Park, Worth, and Baxter Streets intersected. Archeological excavations in 1991 in the vicinity of the Foley Square Courthouse have revealed much about the area’s pre-Civil War history; for more information and a “guided tour” see <http://r2.gsa.gov/fivept/wifp.htm>.

³⁷ Loren Schweninger, Prosperous Blacks in the South, 1790-1880, 95 Am. Historical Rev. 31, 34-35, 44-47 (describing deep South’s antebellum cohabitation contracts, familial relations between whites and affluent blacks, urban location of latter; contrasting prosperous free blacks further north, who had fewer familial and patronage connections with whites); for more on New Orleans’ white gentlemen’s placage or contractual liaisons with free black or mixed race women, see <http://www.frenchcreoles.com/CreoleCulture/quadroons/quadroons.htm>.

³⁸ Schweninger, supra note --- at 40.
Before the Civil War, of course, these issues of urban black residential location were a relatively small-scale affair. Most African Americans at that time did not live in cities, and they were not free. They were slaves, and the great majority lived in the Southern countryside, where their presence was more or less taken for granted as an especially low-status servile work force.\textsuperscript{39} Moreover, for many years after the Civil War concluded, this rural demographic pattern continued. In the familiar Reconstruction history, former slaves never got the forty acres and a mule that many had expected along with emancipation, and they had to make do with what they had, which in most cases was precious little. In the absence of other opportunities, many black people continued to work in Southern agriculture. Some became owners in their own right, but in the deep south in particular, by far the greater part worked as tenants and sharecroppers, often on or near the very lands where they had once been slaves.\textsuperscript{40}


\textsuperscript{40}See, e.g. Claude F. Oubre, Forth Acres and a Mule: The Freedman’s Bureau and Black Land Ownership, Table 2, at 179 (1978) (showing seven deep south states’ black farm operators ownership of farms in 1900, ranging from high of 30.8% (Texas) to low of 13.7% (Georgia), with overall farm operators’ ownership at 19.1% for the seven states). GET CITE RE LOCATION OF FORMER SLAVES NEAR OLD PLANTATIONS.
One reason for their depressed state, again especially in the deep south, came from the efforts of white landowners, who came home from the war with the settled intent to keep African Americans at work in the fields for low wages. Perhaps their best-known effort was the founding of the infamous Ku Klux Klan in 1866, an organization that notoriously intimidated and brutalized ex-slaves. But southern whites turned to the law as well. Immediately after the end of the Civil War, their legislatures passed a wide variety of so-called “Black Codes” that sharply curtailed the ability of newly-freed slaves to move or work as they wished, to assemble and speak in public without permission, to handle firearms, and especially to own property and contract freely. Under the black codes of Mississippi, for example, any black worker who walked out on a labor contract was subject not only to forfeiture of wages but also to arrest by “every person” for return to his employer. Though other states too curtailed black rights too, outraged Congressmen saw these Codes as a practical reestablishment of the conditions of slavery—recently outlawed by the Thirteenth Amendment—and quickly passed the Civil Rights Statute of 1866 to secure to freedmen the same right “as is enjoyed by white citizens” to enter contracts and own property. Since many doubted whether the Thirteenth Amendment could serve as a basis for the statute, Congress soon composed the Fourteenth Amendment and sent it to the states for ratification—with the threat that the ex-Confederate states would not be readmitted unless they accepted it. With the

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41 For a brief description of the Black Codes and Congressional response, see Michael Kent Curtis, St. George Tucker and the Legacy of Slavery, 47 Wm & Mary L Rev 1157, 1200-1202 (2006)
turn to “Radical Reconstruction,” ex-slaves did come to exercise some influence in state legislatures. But southern backlash, Republican divisions, and weakening national support spelled the end to Reconstruction by 1877, the year that federal troops withdrew from the former Confederacy. Thereafter, erstwhile white masters had freer rein to reassert control over their ex-slaves.

44 GET ERIC FONER FOR RECONSTRUCTION HISTORY; Theodore BRANTNER WILSON, THE BLACK CODES OF THE SOUTH (1965)
Control in the economic sense meant cutting off black opportunities on several fronts. First, white landowners sharply resisted any efforts of former slaves to buy land, threatening violence to any of their own number who might think of selling land to black farmers. Second, they agreed among themselves not to hire away one another’s laborers, thus discouraging black farm workers from shopping around for better pay; and as they came to dominate Southern legislatures and effectively disfranchised black citizens, they passed laws to penalize themselves if they themselves defected. Third, they passed laws other laws that penalized outside agents who tried to lure away black workers. In all these ways they squelched any competitive activities among landowners or employers that might have helped to raise workers’ wages or help them to secure independence.45

These measures deserve a pause, because they reflect on some of the relationships between social norms and legal norms. In threatening one another and in passing self-constraining legal measures, white planters revealed that they were only partially successful at overcoming the conflicts that can emerge between individual preferences and social preferences. Any given landowner, for example, would be likely to prefer the scenario in which he as an individual could raid other employers’ low-wage workers, but in which none of the others would raid his own employees. If that were the case, he could get all the labor he needed by paying just a fraction higher pay than the other landowners were paying. But if others played the same game, competition would drive up wages—the very scenario that the white landowners collectively wished to avoid. It is perhaps a straw in the wind even in the deep south, where the vast majority of black rural residents never acquired land of their own, the absolute numbers of rural black landowners nevertheless rose significantly during the reconstruction period. Someone had to be selling that land. Then too, there is evidence that white landowners did “cheat” and hire workers away from one another. Evidently, social solidarity was not enough to keep southern white landowners from conveying land to blacks or from poaching on one another’s labor sources – hence they used both threats of violence and legal norms to reinforce their own social norms. These are patterns that we will see again in housing segregation and especially in racially restrictive housing

46This kind of scenario has come to be called a “prisoners’ dilemma,” named for a game in which two suspects would be collectively better off if neither confesses, but each individually would be better off by confessing—going free if the other stays silent, and minimizing the sentence if the other confesses. The structure of the game drives both parties to confess.
47Schweninger, supra note ---- BOOK, at 148-49 (noting increases in black farm ownership).
covenants: a collective effort to control neighborhoods, together with the use of violence at some times and law at other times to reinforce social norms—norms that were never altogether reliable bulwarks against defection.

Taken together, these patterns suggest a meta-pattern that we will also see again in racially restrictive covenants: that was the white owners’ effort to capture for themselves a kind of informal group property right. The property right at issue in the post-war rural south was a collective claim to the labor of African-American rural farmer workers.49 Prior to the Civil War, planters of course had enjoyed formal ownership rights to slave labor, but after the war, that kind of formal individual entitlement was finished. Hence in the postwar era, white landowners used social norms, violence, and labor laws to re-create a similar kind of entitlement, but now on a collective basis. Through their agreements with one another, as one white Alabama landowner boasted, he and his fellow landowners were going to make serfs of their former black slaves.50

In the game-theory language mentioned in the Introduction, these landowners collectively intended to play Hawk with respect to black labor, and they tried to intimidate black people to pay Dove even with respect to their own work. But white landowners now had to act in concert to recreate their status of entitlement— that is, by joining together to prevent black farmers from owning their own land, by forbidding outsiders from entry into the employment market for black workers, and by constraining their own behavior with respect both to selling land to blacks and to hiring away one another’s black labor.

48Roback, supra note —, at 1161-62.
49cf. Roback, supra note —, at 11-62 (describing laws as effort to establish a labor-market cartel)
Schweninger BOOK, supra note — at 146 (boast).
In attempting to carry out these measures, white landowners were pursuing a strategy that is familiar to natural resource economists. In common property regimes all over the world, whether it is legal or not, communities guard against outsiders’ encroachment at the same time that they regulate insiders’ behavior, so as to preserve some common renewable resource like a sheep meadow or a fishing ground. But fishing grounds and sheep meadows are a very different matter from group-based property claims to the labor of another group, particularly in American law. The Civil War and the postwar period took specific aim at the idea owning other people’s labor and banned any such claims through the Thirteenth Amendment’s prohibition on slavery.

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51CITE OSTROM, ACHESON
The Thirteenth Amendment ultimately did suppress some of the southern legislatures' labor laws, though not of them, perhaps because in some, the analogy to enslavement was too ambiguous and too well-disguised. The measures that fell afoul of the Amendment were the less subtle ones, those that directly regulated black labor. Alabama attracted particular notice in the years just before and just after the turn of the century, when the state legislature tried several different legal approaches to imposing penalties on black sharecroppers who backed out of their sharecropping or tenant farming contracts. One version made it a criminal offense for a contract laborer to accept an advance from one landowner, and then to leave for another job before the end of the contract term, without either repaying the debt or disclosing the matter to the second employer. This law fell afoul of the courts, which treated it as peonage (criminal punishment for nonpayment of a debt). The court made two especially salient observations in these Peonage Cases: the first was that a sharecropper generally lived close to the edge and was very unlikely to be able to repay the debt when the crops had not yet come in. The second point was even more interesting, suggesting that the disclosure requirement was aimed at reinforcing social norms among white landowners. According to the court, mandatory disclosure to the next employer was a way to help white landowners to blacklist uncooperative tenants, thus effectively forcing the sharecropper to stay with the first employer or face starvation.

But when the Federal courts knocked out that law, Alabama tried another legal route toward the same end -- that is, treating the tenant's departure as more or less unrebuttable evidence of intent to commit a criminal fraud. Alabama's contract fraud law

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52Peonage Case, 123 F. 671 (D.C. Alabama, 1903)
also ran aground, this time in the U.S. Supreme Court in 1910, when the Court ruled in Bailey v. Alabama that this use of this criminal law amounted to peonage too, and that as such it too was a violation of the Thirteenth Amendment’s prohibition on enslavement.53

And no wonder: under such a law if a sharecropper, say, accepted seed money and later left before the contract year was out, not only could he land in jail, but thereafter he might be leased out for farm labor; or, more commonly, he would be faced with a contract through the jailhouse bars, requiring him to go back to his old boss to work off the debt that was now enhanced by fines and court costs.54 More subtly, laws like these could act as a signal, intimidating rural agricultural workers by threatening them with jail time—or even worse, the landowners’ self-help punishment—if they quit early.55 The pattern, once again, added up to legal reinforcement of an informal norm: by following that norm, white landowners as a group would own black labor, and the laws would prevent defection both from whites within and blacks outside the group.

54Roback, supra note —, at 1170 (describing convict leasing system); for jailhouse contracts, see Pete Daniel, The Shadow of Slavery: Peonage in the South, 1901-1969, at 26 (noting inter alia that the contract terms enabled the landowner to use force to keep a laborer from leaving).
55Daniel, supra note —, at 29-30 (describing intimidation of southern farmworkers)
Alabama’s peonage laws illustrate some of the intricate interactions between legal and social norms. The statutes aimed to reinforce social norms among a planter class, as well as norms of obedience among those that the planters wanted to dominate. The Thirteenth Amendment-based invalidation of these laws is an illustration of the way that formal legal norms can police lower-level legal norms, and to some degree social norms. But the cases also show some of the limitations on this higher-level legal policing capacity. Even without the direct regulation of labor, southern planters found numerous other routes, both legal and illegal, through which white people continued to control rural African Americans. For example, one legal menace came from the rather surprising direction of family law. While still slaves, African Americans had never known for certain that their family relationships would last, and many had formed informal sexual partnerships or become involved with more than one person – in short, engaging in familial relationships considered irregular for solid citizens. Conveniently enough for the owners of the old plantation, criminal enforcement of bigamy laws, like criminal enforcement of contract debts, could once again land former plantation slaves in jail, where they would presumably be available to be contracted out as farm laborers.\footnote{Katherine Franke} Vagrancy laws had the same effect.\footnote{Roback, supra note —, at 1168.} Even changes in wildlife laws adversely affected the rural freedman’s economic independence; as later-nineteenth century sportsmen got state legislatures to pass laws protecting game from “unsporting” rivals who hunted or trapped for meat, one target was “darkies” with snares or cheap “three-dollar rifle[s].”\footnote{Thomas Lund, Nineteenth Century Wildlife Law: A Study of Elite Influence, 33 Az.St.L. J. 935, 962 and fn. 161 (2001).}
Much more purposeful in constraining black independence, of course, was the outright violence that racked the rural South in Reconstruction and post-Reconstruction years – the cross-burnings, the beatings, the lynchings – though in undertaking violence, white landowners could not externalize enforcement costs onto the taxpayers in general, and while some no doubt found it “fun,” violence can be costly to the perpetrators, and it can sometimes spin out of control. Even in the South, some white people found violence horrifying and repellant.

Southern legislation to constrain black economic independence can in some ways be seen as an alternative to violence, and thus this legislation strongly suggested that informal social norms alone would not be enough to do the job. By social norms alone, white planters could not contain the outside recruiters for black labor, or even prevent all of their own members from selling land to black persons. Nor, as revisionist reconstruction historians have emphasized, could these measures contain black people’s assertion of their own agency.

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59 For violence as primary enforcer of peonage, see Daniel, supra note —, at 28; cost externalization vel non is discussed in Roback, supra note —, at 1163; see also David Bernstein GET CITE RE BUCHANAN & RACIAL ZONING.

60 GET CITE – FONER; ALSO MAYBE SOMETHING RE ATLANTA’S EFFORT TO COVER OVER RACE RIOT
Recent scholarship argues that rural black people continued to acquire land through all this period.\textsuperscript{61} Hence it may have been agricultural economic depression, perhaps even more than legal and illegal intimidation, that made life in the countryside increasingly less tenable for African Americans. One after another, they left the farms for the towns and cities, withdrawing their labor from white landowners’ control by the simple strategem of exit. In town there might be jobs that were less back-breaking and more remunerative, and perhaps too there might be more chances to own valuable property of their own. \textsuperscript{62} In town there might even be a whiff of political influence, even if not fully equal citizenship. In town there might be less threat of physical intimidation, even though some in-town lynchings were to prove that racial intimidation was not just a rural matter.

\textsuperscript{61}Shweninger, supra note ---- BOOK at 183.
\textsuperscript{62}Schweninger, supra note — BOOK, at 154-55, 166-70, 177-82 (noting substantial increase in urban black property ownership especially in upper south, greater urban economic possibilities in towns).
Much has been written of the Great Migration beginning around 1900, when so many black persons and their families headed north to the Great Lakes cities and their jobs in the factories. Those major African American migrations to cities like Chicago and Detroit were to emerge sometime after the turn of the twentieth century, especially when the First World War and the newly-emergent automobile industry opened up a seemingly endless cornucopia of job opportunities. But the exodus from the rural south began decades earlier, and though they had probably been slowed by southern labor laws, rural African Americans nevertheless found urban destinations both in the south and the north. Between 1860 and 1890, the percentages of black Americans living in cities increased from just over four percent to just under twenty percent. New York’s African-American population grew from — to — during the years between — and —, causing black people to spill out of the horribly overcrowded Five Point district and into the as-yet largely white streets of Harlem. Baltimore, Maryland’s, black population increased by forty-seven percent between 1880 and 1900, from 54,000 to 79,000, although the city’s white population increased even more – by fifty-four percent. After 188--- Washington, D.C. became a particularly attractive site for African American migration; the federal city promised the possibility of employment not only in the professions and trades, but also in

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63Roback at 1190-91.
64Garrett Power, Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913, 42 Md L. Rev. 289, 290 (1883) **GET BETTER CITE – START W/ THIS ARTICLE BUT NB SOC & ECON STATUS BOOK AT 7 SAYS THAT 1890 WAS 1ST CENSUS FOR WHICH URBAN / RURAL DATA WERE AVAILABLE FOR AF-AMS.
65Osovksy **GET STATS
66Power, supra note —, at 290.
a civil service that was committed to some version of equal treatment.67

It was here in the cities that issues of residential segregation took shape. Turn-of-the-century European sociological thinkers pointed out – with some Angst – that larger urban areas were more socially fluid than smaller ones or rural areas. People did not know each other so well in the larger cities, and presumably longstanding local hierarchical relationships between them were less obvious and less engraved in the personal knowledge of all the individuals involved.68 Members of the lower status groups might venture to get “uppity,” though still at risk, as was to be terribly shown several decades later in the lynching of Emmit Till.69

68CITE DURKHEIM, TOENNIES.
69**GET TILL STORY. GET RABINOWITZ ART. 75 J AM HIST 842
The relative plasticity of urban life meant that race-conscious white residents of the towns differed from their rural counterparts in at least one significant way: they could not count on a clearly understood social distance to separate themselves from the members of a different race that they despised. Residence in town could blur or even obliterate the face-to-face contacts, the long intertwined personal histories that bolstered hierarchy in the country. What was left was physical distance: where social hierarchy grew hazy, physical separation must have taken on much greater significance. When an African American family wanted to move next door in the later nineteenth century, white townsfolk still did not like it, just as they had not liked it in the eighteenth. But by the turn of the twentieth century, there were a lot more of those African Americans, and some of them might well want to escape the now-jammed-up urban “Little Africas” or “Pigtowns” and alley shacks, and they might just move onto the block – unless they could be contained. How were they to be contained? Informal intimidation might be one way to take “ownership” of the neighborhood, but the impersonal urban setting may well have undermined the necessary social solidarity even among white neighbors, making it difficult for them to establish and enforce social norms of exclusion. Under those circumstances, legal methods—including racially restrictive covenants—may have seemed comparatively more attractive, even though, as we shall see in the next chapter, in 1900 it could hardly have been predicted that racial covenants would soon become the major legal route to residential segregation.

70PIGTOWN THE NICKNAME IN BALTIMORE–POWER AT 290
It is notable that at the time, white Americans, especially in the South and near-South, were turning to the law to enforce physical separation in a whole range of interactions, and not just in housing. This was the era when Jim Crow legislation emerged, separating the races throughout a great spectrum of what had once been common spaces, both public and commercial.\textsuperscript{71} Transportation facilities were among the first to be segregated by law—to the great irritation of train and trolley companies, who had to pay more to buy separate cars for the different races.\textsuperscript{72} Segregation on trains got an early test in the courts, and the Supreme Court majority permitted it in the notorious case of Plessy v. Ferguson (1896). This case allowed states to require the segregation of the races in public transportation, so long as the two sets of facilities were “equal but separate,” a phrase that was soon to be transposed into “separate but equal” as the doctrine was applied to more and more public facilities.\textsuperscript{73}

\textit{Plessy’s} majority operated on a certain understanding of what rights are all about. It is an understanding that now seems almost incomprehensibly archaic, but at the time, it was not unusual. In this older view, rights can be divided into three types: civil, political and social. Civil rights were related to the natural rights that a person brought with him (and to a limited extent, her) into civil society in the first place. Those natural rights most prominently included the right to acquire and own property: while a person gave up his (or her) natural rights of self defense in civil society, s/he received in return the right to civil protection of his or her property. Things that one does with one’s

\textsuperscript{71}See, e.g., Jack Temple Kirby, Darkness at the Dawning: Race and Reform in the Progressive South 23-25 (1972).
\textsuperscript{72}Barbara –, Kenneth – re train segregation
\textsuperscript{73}Plessy v. Ferguson, 163 U.S. 537 (1896) GET PAGE FOR EQUAL BUT SEP

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property – buying, selling, contracting – were among the other civil rights, the bedrock entitlements that one receives as a part of one’s participation in civil society.

Political rights were quite different– important, to be sure, but in this traditional understanding, the name “right” was something of a misnomer, since political rights were more properly designated privileges rather than rights. They had to be earned or deserved, and political bodies could set criteria for their exercise – criteria such as the ability to read, or to pay a certain amount in taxes. While these criteria could not unfairly exclude any given individual—including black citizens— they could be valid if they were applied even-handedly. Notice that on this theory, the prudent exercise of civil rights could bring about the reward of political rights. Husbanding one’s property should lead to the wealth, independence and respectability from which political participatory rights would flow. As we shall see, this idea seems to have influenced early twentieth-century American courts’ understandings about the legality of various measures undertaken to prevent African Americans from dealing with their property.

A third category, social rights, finally, were not really rights at all. On this view, whether your neighbor likes you or not is purely an individual matter between you and your neighbor, and not a proper subject for legal intervention—which would be ineffective anyway—and certainly not for constitutional second-guessing. State legislatures, on the Plessy analysis, were free to pass legislation to protect health, safety and morals, and if this legislation impinged only on social matters, the Supreme Court would not be likely to touch it. Why not? Because social relations engaged no genuine issues of

74 **CITE RE GRANDFATHERING RULES – RECENT DAVID BERNSTEIN
75 **CITE PLESSY
In the wake of Plessy, Southern states and communities segregated public facilities of all kinds – public schools, hospitals, parks, among others. Private owners got in on the act as well: hotels and restaurants refused service to African Americans; movie theaters relegated African Americans to the balcony spaces, and individuals gave legacies to parks or schools for the use of white persons only. The South was not alone in this pattern; a Chicago-area cemetery, for example, changed its policies to white-only in 1907, and thereafter the officers refused to sell a burial plot to a black man for his deceased wife’s body, even though the remains of four of his children were already been buried there. It was not that the cemetery managers had any animus against the black race, they averred, but simply that their white customers just objected much too strenuously to having African-American bodies nearby– an observation, incidentally, that suggests one way that social norms can work, where a social preference influences even those who might not share those preferences themselves.

The Illinois Supreme Court refused to disrupt the cemetery’s action, ruling that it was not covered by the Illinois law that required equal treatment in public accommodations. But at least Illinois had a public accommodations equality law, narrowly though it might be read–unlike the Southern states that positively required separation of the races.

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76 Charlotte Park case, also Evans v. Newton
78 Id[Gaskill], at 220. Of course, the explanation that “my customers make me do it” could also just be a cover story.
The federal government took note of Plessy too: President Woodrow Wilson, newly elected in 1912, had a Princeton pedigree, a generally progressive agenda, and a debt to the newly-founded National Association of Colored People (NAACP), which had supported his candidacy after his promises of fair treatment. But he was a Virginian by birth, and he gave in to the segregationists in Congress and the bureaucracy, who themselves must have been dismayed at the magnetic force that Washington D.C. then exercised on southern blacks. With some vague comments on the goal of decreasing tensions in the civil service, Wilson cut back on patronage to black officials and permitted the most segregationist federal agencies to downgrade black workers at the same time that they segregated work spaces, cafeterias and restrooms. All these segregationist moves roiled the black intellectual community. Older leaders like Booker T. Washington had urged separate development for black people, but the bitter pill of enforced separation enhanced the reputation of the new and more militant NAACP, whose leaders were determined to fight segregation laws, and who energetically and to some degree successfully protested Wilson’s betrayal.

Many years later, at the dawn of a new struggle over civil rights in the 1950s, the humorist Harry Golden observed that all the segregation laws stemming from this earlier era seemed to involve black people sitting down with whites— in school, in restaurants, on the job, in parks and presumably in cemeteries at the end of life. His tongue-in-cheek

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solution to the great integration struggles of the day, therefore, was what he called the Vertical Negro: lawmakers should simply require everyone to stand up in schools, theaters, buses, etc., and all objections to integration would evaporate. This was not quite the case, however. The utterly charming Delaney sisters, well over one hundred years old when they published their memoirs in the 1993, had been children in Raleigh, North Carolina, when the Jim Crow laws fell down around their heads in the wake of Plessy. Among their more dismaying memories of childhood, they recalled the sudden introduction of segregated water fountains in the parks. One does not sit down to drink at a water fountain; one merely bends over. Verticality, or at least standing up, would not have been a complete answer to the integration issue after all.

On the other hand, Golden had a point. Segregation laws in very large measure were about the maintenance of physical distance from those regarded as social unequals, and the concern was greatest when space was to be shared over some period of time – the implication of sitting down together. Then too, sitting down together implies a kind of equality and a blurring of class and status lines – the perfect hot button to accelerate the racial fears of status-anxious white urbanites. With the possible exception of burial sites, no kind of sitting down together seems more permanent than a residence. Even the word reside derives from the Latin sedere, to sit. No wonder, then, that even though residential segregation was by no means the only area in which white Americans were thinking about separating themselves physically from blacks at the turn

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80 ID, CHECK ON PATLER RE BOOKER WASHINGTON
81 Harry Golden [goldin?] For Two Cents Plain (1957? 1958?)
of the twentieth century, it came in high on the priority list.

The question was how to do it. For a time, there were quite a number of ways to do it, but all of them were a bit iffy. As we shall see, they were iffy because residential property was after all property, and property ownership has had a special role in American jurisprudence, perhaps no time more than at the turn of the twentieth century. Even in that era of Plessey, messing about with people's rights to buy and own property—any people’s rights, including those of black men and women—had implications for constitutional equality that distinguished property from other rights.

Not that white Americans failed to try. The next chapter outlines the ways that some of them tried to use the law—and sometimes go outside the law—to separate their own homes from what they saw as the perils of African-American and other minority neighbors.
Chapter 2. FROM NUISANCE TO ZONING: EARLY DEAD ENDS IN THE QUEST TO “SAVE THE NEIGHBORHOOD”

Racially restrictive covenants in housing emerged in significant numbers roughly at the turn of the twentieth century. Given the whole array of segregationist legislation and activity at the time throughout the United States, restrictive covenants might easily be classed simply as one more instance of the social preference that many white Americans had to separate themselves physically from minorities, and of their turn to legal means to effectuate that preference in an increasingly impersonal urban environment. But even for the narrower purpose of simply walling off residential property from minorities and keeping it for the exclusive use of white residents, racially restrictive covenants were far from the only legal method, and probably not the one that best suited for racist motivations. For that, racial zoning probably would have been the method of choice, for reasons that we will see shortly. Another attempted method was nuisance law. Then too, there were the extralegal means of enforcement as well. The most visible of those were violence, ranging from petty harassment to threats, and then to arson, riot, and homicide—all serving as escalating signals of exclusionary social norms. As it turned out, within two decades of the turn of the century, only racially restrictive covenants remained standing as legal devices for racial exclusion, although the extralegal means persisted and eventually lasted much, much longer.

Nuisance law must have occurred to segregationists very early, since it was a well-established and well-known legal category in the early years of the twentieth century, one that attracted the attention of several authors in that great age of legal
treatise-writing. Nuisance law was and continues to be a private remedy for persons whose neighbors overreach the bounds of normal activity on their property. Every man’s home may be his castle, but nuisance law requires him to pay some attention to the owner of the castle next door. The basic gist of nuisance law is that you may use your property as you please, so long as you do not harm others or preclude them for enjoying their property just as you do.

What it means to “harm” the neighbor is a bit vague, of course. The usual subjects of nuisance suits are often rather airy – noise, fumes, smoke, and other such things that cross the boundary through the air. Pollution can be a nuisance too, either through the air or the water, even though the sources of pollution might not always be easy to find. Drunkenness and lewd behavior are candidates too. But you need not worry about a nuisance suit from your neighbor whose ears quiver with horror when you hit a B-flat instead of an A on your harmonica, for example, because nuisance law is not really about the harms suffered by those with specially sensitive ears (or noses either, for that matter). On the hand, if you amplify your harmonica to play a string of B-flats at rock-concert level at three o’clock in the morning, your neighbor may well have a case.

The usual pattern of nuisance law is that you may use your property “reasonably,” that is to say, pretty much the way other people do. Your neighbor should be expecting that kind of behavior anyway, and nuisance law will generally not say he was “harmed” by it.

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Was it a nuisance for minority group members to move in next door? Some property owners clearly thought so. Those old and repeated complaints that African-American neighbors brought down the property values “sound in nuisance,” as the lawyers say, because it counts toward a nuisance claim if your neighbor’s activities diminish the value of your property. And there is no question but that some turn-of-the-century courts were sympathetic to the claim that African Americans in the vicinity would cause discomfort to white people and devalue their property. Another case about a cemetery—this one from Kentucky in 1907, yielded a particularly striking example. The owner of a burial plot in Louisville’s main white cemetery sued the adjacent plot owners and the cemetery itself to require that the body of a dog be removed from the neighboring plot. The court ruled in the complaining plot owner’s favor, but not before pointedly comparing the burial of a dog to the burial of an African-American, and noting that the latter would almost completely destroy the value of a plot for white persons. If a “non-Caucasian” human burial aroused such distaste, the court observed, a dog would do so all the more. The court noted that in the case both of the dog and the hypothetical black person, white people’s attitudes might well result from an “unreasoned prejudice” rather than any physical nuisance, but given their contractual relationship with the cemetery, they nevertheless were entitled to have their prejudices safeguarded by the cemetery management.84

84Hertle v. Riddle, 106 S.W. 282, 286 (Ky. 1907)
Despite judicial musings like this—quite shocking to a modern reader—nineteenth
and early twentieth nuisance law never did give much traction to racial exclusion, and
segregationists never really tried to use nuisance law in anything more than a half-
hearted way. Even the Kentucky cemetery case, for all its appalling comparison of a
black person’s body to a dog, would not have regarded the burial as an “physical
nuisance,” actionable independently of the plot owner’s contractual relationship with the
cemetery. Much earlier, some very old cases from the Ante-Bellum south had raised
the nuisance flag about race. For example, one early-nineteenth century case in
Washington D.C. allowed a fine against a liquor establishment as a “common nuisance”
because the businesses attracted crowds of “negroes and slaves,” ostensibly noisy and
boisterous ones, who apparently compounded their transgressions by committing them
on the Sabbath.85 But in a case like that, repeated occurrences of noise and carrying-
on would have counted as a nuisance all by itself, no matter who the customers might
have been. A Georgia case in 1858, shortly before the outbreak of the Civil War,
described as a “nuisance” the presence of newly-freed African-Americans, presumably
because they might give their enslaved compatriots some dangerous ideas about
freedom for themselves.86 But cases like this, though still in the books, were not only
far in the past; they were also far too closely linked to the law of slavery to survive with
any authority after the Civil War and the Thirteenth Amendment.

85U.S. v. Coulter 25 F. Cas. 675 (D. C. Cir. 1805) (affirming fine against establishment as a
common nuisance for selling liquor to Anegroes and slaves, assembled in considerable
numbers@ on the Sabbath)
86Sanders v. Ward, 25 Ga. 109 (1858) (allowing will that emancipated slaves outside the state,
describing freed slaves within the state as a Agreat nuisance@).
In the later nineteenth century, probably the best-known case in which an owner tried to use nuisance law for racial exclusion was Falloon v. Schilling, a Kansas case of 1883. The plaintiff in the case had refused to sell his property to a neighboring owner, and he complained that the neighbor was harassing him and creating a nuisance by renting the adjacent property to Aworthless negroes.” But the Kansas Supreme Court categorically rejected the idea that any person could be a nuisance simply because of his or her race. This decision was cited favorably in Joyce on Nuisance, one of the major nuisance treatises of the day, and over the next decades, other state courts took the same position, including southern and border state courts. The pattern was consistent: in 1903, when a Kentucky town’s governing board denied a building permit for an African American church, the state supreme court overturned the action, saying that the town council could not declare something a nuisance that was not. In 1918, the Maryland Supreme Court held that the construction of residences for African Americans could not “of itself” be counted as a public nuisance. Even white complainants got the message. Although they certainly mentioned race in nuisance suits, they generally raised additional factors such as noise or overcrowding.

87 29 Kan. 292 (1883).
88 Joyce, supra note —, at 49, n. 22 (citing Falloon for the proposition that it was not a nuisance for a neighbor to introduce “a different class of people socially” onto his property).
89 See, e.g. Boyd v. Bd. of Councilmen of Frankfort, 77 S.W. 669 (KY 1903).
90 Diggs v. Morgan College, 133 Md. 264, 105 A. 157 (1918).
It may well be, of course, that the courts gave a tacit "plus" factor to nuisance claims that included a racial element, or it may just be that the parties thought the courts would do so. Well into the twentieth century, parties continued to insert racial overtones into their nuisance claims, along with the standard counts of noise, fumes, traffic and liquor. Some courts seemed to respond, others did not. A Tennessee court in 1917 agreed that a saloon was a nuisance after a protracted discussion not simply of its noise but also of its African American clientele;\(^91\) but another Tennesee court four decades later flatly rejected a plaintiff's claim that he should get damages because his neighbors sold their house to a black family.\(^92\) But in none of these case was race alone enough to get a nuisance claim off the ground. As Ernst Freund’s magisterial and much-cited \textit{Police Power} had put it back in 1904, there could be no nuisance liability for a “natural condition not in any way traceable to positive human action.”\(^93\) Unless there were some purportedly noxious activity to set the wheels rolling, the neighbors’ race alone simply would not count as a legally cognizable nuisance.

\(^{91}\)See, e.g. Fox v. Corbitt, 194 S.W. 88 (Tenn. 1917).
\(^{92}\)Stratton v. Conway, 301 S.W.2d 332 (Tenn. 1957) (rejecting neighbor=s claim for damages due to sale of house to African Americans).
\(^{93}\)Ernst Freund, \textit{The Police Power: Public Policy and Constitutional Rights} (1904), sec. 616, at 639. Freund was discussing such matters as floods and weeds, but he took a chary view of racial segregation, e.g. sec 700, at 720-21 (arguing that laws distinguishing between races were in practice discriminatory).
For the proponents of racial segregation, the newly-invented regulatory device of zoning seemed much more promising, even though zoning too would soon go up in smoke as a legal basis for residential racial exclusion. Zoning came to the United States by way of Germany, where it had been in use since the 1890s. In the United States, the zoning concept came along just as a number of Progressive-era trends created a favorable climate for ratcheting up public planning and control of urban growth. Chicago was a central location for all this, with its blazingly rapid growth and its then-recent experience with rebuilding after the devastating 1871 fire. The dazzling Chicago World’s Fair in 1893 invigorated the idea that cities could and should be developed according to rational plans. So did the Fair’s intellectual follow-up in the early Twentieth Century, the “City Beautiful” movement that engaged some of the same architects who worked out the World’s Fair’s “White City,” notably Chicago architect Daniel Burnham. Ideas of urban zoning arrived at about the same time. Zoning was to be the practical means to meet to meet the demand for rationally-controlled urban growth. New York that took the lead in the move from planning to zoning: from the city’s early planning efforts in 1911 to the comprehensive zoning ordinance of 1916, the idea was that a city plan would come first, and then the establishment of zones to carry it out. Here as elsewhere, both the general plan and the zoning scheme would give

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94 Anthony Sutcliffe, Towards the Planned City: Germany, Britain, the United States, and France, 1780-1914, at 32-33 (1981) (German zoning in 1890s and following years); cf id, at 184-85 (raising question “how German” American zoning patterns were).
95 Sutcliffe, supra note —, at 97-98, 102-110. Cf. William H. Wilson, The City Beautiful Movement 53-74 (1989) (describing Chicago Columbian Exposition at length but attributing planning aspects of City Beautiful movement to landscape architects’ ideas more than to the Fair)
public officials the opportunity to guide otherwise haphazard land uses toward a mosaic of mutually harmonious locations.96

As it turned out over a longer run, many cities' tended to be satisfied with zoning ordinances that served the considerably more mundane goal of preserving a pre-existing status quo in already-developed areas, and that more generally defended the single family home from the “lower” uses of multiple dwellings, commerce and manufacturing, in that descending order.97 Over time, a secondary function would also emerge: zoning could enhance the powers (and sometimes the purses) of the local regulators who could grant exemptions from theoretically fixed but practically quite elastic zones.98

96Sutcliffe, supra note —, at 116-125.
But at the turn of the century, the zoning idea was fresh and new and full of promise. Zoning plans generally simplified the more ambitious City Beautiful ideas, collapsing them into two notions: first, that land uses could be graded on a hierarchy from "higher" to "lower"; and second, that the higher land uses could be protected from the lower by physically separating them. By our own times, land use thinking has long since abandoned this “Euclidean” zoning model – so nicknamed for the landmark Supreme Court case that upheld zoning in Euclid, Ohio, in 1926 – and has adopted a much greater tolerance for and even promotion of mixed uses.99 Not so, however, in the early days of American zoning, when separation seemed the appropriate way to deal with land uses then thought incompatible.

The early twentieth century developments in land use regulation were not ostensibly focused on race, and it is hard to say that there was anything inherently racist about early zoning ideas. But race (and class) considerations were in the air, and certainly there was little to keep anyone from taking over those early zoning ideas for racist purposes.100 Indeed, a striking aspect of the Euclidean model is the ease with which its main elements could dovetail with the segregationist legislation of the day. Zoning’s pattern of hierarchy—albeit a disguised hierarchy—together with a protective physical separation—these were also very much the hallmarks of the post-Plessy institutions that called themselves “separate but equal.” For those substantial segments of the white population who saw black people’s presence as incompatible with

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good order, racial zoning was a natural.

100–, supra note —, at 409-414.
Racial zoning, however, was a municipal matter, and municipal regulations faced some fairly longstanding legal obstacles. In the later nineteenth century many people regarded city governments as hotbeds of corruption, and much state law became quite hostile to municipal initiatives. One much-noted constraint was the so-called “Dillon’s Rule,” named for the 1872 treatise in which it first appeared: municipal corporations could only legislate on subjects specifically delegated to them by state legislatures and/or essential to their stated purposes. Nevertheless, as cities grew, a number of them had passed ordinances that pushed the limits of Dillon’s Rule. Many passed ordinances that permitted locally unwanted land uses to be placed only in specified parts of the cities. Livery stables and animal butchering facilities were among the major targets, with all their odors, noise, and flies. These businesses’ owners objected when cities pushed their enterprises to the outskirts of town, and armed with Dillon’s Rule, some attacked the municipal regulations as overreaching. But cities successfully defended their control measures on grounds of public health and safety, a longstanding legal justification for regulatory interference with the decisions of private property owners.

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102 One particularly famous constitutional law case involved such regulations: Slaughter-house Cases, 83 U.S. 36, 62-63 (1873)
In any event, the foul smells and loud sounds of these kinds of land uses put them in a category not far removed from traditional public nuisances—roughly speaking, nuisances that affected everyone or large numbers of people—which local authorities had long had the power to abate. Around the same time that they shunted slaughterhouses to the outskirts, some cities began to regulate physical structures, especially the so-called tenements that housed immigrants and other low-income laborers. The goal here was not exactly nuisance abatement of a traditional sort, but rather the assurance that these dwellings provided some minimum of air, light and sanitation to the residents. As with the slaughterhouses and livery stables, however, the justification was public health and safety, and commentators expended many pages on the diseases and disabilities that could be avoided by requiring better housing for the urban poor. By the early 1900s, and perhaps inspired by the Chicago World’s Fair, cities had taken a further step on the regulatory road; they had begun to regulate such matters as the height and setback of structures. The justification here was still harder to supply, since the courts still rejected regulation for “merely aesthetic” purposes. The judicial view was that aesthetic regulation would lack standards, simply passing over governing authority to public likes and dislikes – not enough reason, in the contemporary judicial account, to impede a man from using his property as he pleased.

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103 New York City began to regulate tenement housing in 1867, amending its ordinance in 1887; see Health Dept. v. Rector, 39 N.E. 833 (1895) (describing legislation in case upholding fine against Trinity Church for failure to provide water to tenement). New York State passed its own tenement law in 1901, upheld in Tenement House Dept. v. Moeschen, 72 N.E. 231 (N.Y. 1904). BUILDING REGULATION RELATED TO HEALTH IN PLACES OTHER THAN NYC? WASHINGTON’S ALLY DWELLINGS? GET HAFETZ IN WM & MARY

104 See, e.g. Tenement House Dept. v. Moeschen, at 233-34; Health Dept. at 839. GET J. RIIS
Hence when the City Beautiful movement itself drew attention to the “look” of the urban form, it emphasized urban design in a way that could have led to trouble in the courts. But municipalities defended the new building regulations too on traditional grounds of public health and safety. Were height restrictions simply a matter of taste, of the city’s “look”? Certainly not. If a building were too tall, the problem was not just that the neighbors hated it, or that it blocked the sunlight they had previously enjoyed. No, the city lawyers argued, the problem was that the fire companies could not put out a blaze in such a tall building. In years to come, this public safety rationale was to cover a multitude of what might seem to have been primarily aesthetic regulations. How to justify billboard regulation? Why, it was crime control: robbers might hide behind billboards and jump out on unsuspecting auto drivers.

The larger point is that by 1900 and the next decade, the earlier hostility to municipal regulation had weakened at least with respect to land use regulation, and courts were not so stringently guarding the subjects and justifications for municipal regulation. The lynchpin of municipal land use authority is what we now think of as zoning—i.e., separating incompatible uses from one another across an entire municipality—and large-scale zoning duly arrived in 1916, when New York passed its first major comprehensive zoning ordinance.

105 GET CITE RE MERE AESTHETICS
106 GET CITE – FIRE PROTECTION
107 GET CASE– SIGN CONTROL + ROBBERY OR THEFT
108 CITE FOR NY. ALSO EARLIER ORDINANCES?
Racial zoning was a part of this picture, and in fact, racial zoning chronologically preceded general land use zoning. It may have gone first because urban white majorities were particularly anxious to separate themselves along racial lines, but it might also have gone first because at the time, zoning along racial lines might have seemed to present even fewer legal problems than other kinds of zoning. Race, after all, brought up the perennial and closely-related issues of property values and violence. Just as much as in the early nineteenth century, racial mixing could trigger peoples’ fears about loss of property value, and those fears in turn could trigger unrest, disruption, fights. Baltimore was a city that had hitherto been relatively mixed racially, but when some of the black middle-class families began to move into nicer neighborhoods—and were then followed by less well-to-do black families--white homeowners were aghast. The protested vigorously, and some threw stones. In response to these disturbances, Baltimore’s city council passed the first racial zoning ordinance in 1910, effectively adding legal sanction to an emergent social norm of exclusion. Several other cities quickly followed, particularly in the south and lower midwest; among them were such cities as Norfolk, Richmond, Atlanta, and Winston-Salem. Two other racial zoning copycats were two cities from which we will hear more shortly: Louisville, Kentucky, and St. Louis, Missouri, the former with respect of zoning and the latter with respect to private restrictive covenants.

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109 GET ART BY CHRISTOPHER SILVER, 6 PLANNING PERSPECTIVE 189 (1991)
110 Power, supra note —, at 290-91, 297-98,
The rationale for these ordinances was certainly not that they merely reflected aesthetic considerations or public tastes. That would have been the kiss of death in the property-conscious courts of the day. Nor was the rationale that racially-drawn zones suppressed a nuisance – few public officials were willing to say upfront that African-American families constituted a nuisance per se. Instead, the ordinances were justified in large measure as a matter of public welfare and safety: the separation of the races, it was said, would help to preserve property values and to prevent racial tensions and ultimately violence.\footnote{\textsuperscript{112}}

When one pushes on the property-values or anti-violence rationales, however, they fall back rather close to the aesthetic rationale, and to the nonrational social tastes that roused the suspicions of contemporary courts about “merely aesthetic” regulation. If you move next door, my property values will fall. Why? Because no one likes you or wants to live next to you. As to violence, well, I threaten to start throwing bricks if you move in. Why? because I hate you, or even if I don’t hate you, I know that other people do and your presence will make my property values plummet. If it is not enough to ground a regulation directly on social desires and hates, it is at least somewhat disingenuous to ground a regulation on the threat of property losses or violence, both of which emerge from social desires and hates.\footnote{\textsuperscript{113}}

Still, violence especially is a serious public matter whatever the cause, and it certainly must have seemed so at the time, given the increasing rumble of racial incidents in the cities. New York had already had a major race riot in 1900, Atlanta in

\footnote{\textsuperscript{112} NEED CITE?}
1906, and other serious disturbances were to follow in the coming years, notably East St. Louis in 1917.\textsuperscript{114} Plessy v. Ferguson had permitted racial segregation for health, safety and welfare purposes on trains; why not do the same where racial mixing set off such violent forms of protest?

\textsuperscript{113}COMPARE TERMINIELLO CASE.
\textsuperscript{114}MORE INFO RE RIOTS PRIOR TO CHICAGO 1919? ESPECIALLY EARLIER? OTHER PLACES? ANYTHING MAJOR IN 1910, BEFORE BALTIMORE PASSED ORD?
Aside from the violence-prevention rationale, a considerably more disingenuous feature of these ordinances was their ostensible race-neutrality, a stance presumably taken to satisfy Plessy’s then-reigning separate-but-equal doctrine. Baltimore’s ordinance provided that members of any racial given group could move only to those streets where their racial group already constituted a majority.\footnote{See Power, supra note – at 299-300 (describing Baltimore’s ordinance).} Thus when blacks moved away from white majority streets, only whites could replace them, and the reverse was to hold when white persons left black-majority streets. Over time, presumably, every street would come to be occupied only by particular racial groups.\footnote{Buchanan v. Warley, 245 U.S. 60 (1917).} This all looked neutral on paper– blacks would have their streets, whites would have theirs. A moment’s reflection, however, reveals that this ordinance would severely curtail the quantity of real estate open to the minority groups who were then migrating to the cities. The members of any expanding minority group would be unable to settle in any block on which they had not yet established numerical dominance. Thus at a time when large numbers of African Americans had begun to move to the cities, they would have had to squeeze into the relatively few blocks open to them, the “Little Africas” where their racial group had already become dominant.
Had ordinances of this sort been upheld, cities in the United States might have come to look very different than they do today – perhaps like those of South Africa in the apartheid era, where Africans could only settle in shantytowns on the outskirts; or perhaps like those of Latin America, where the relatively well-to-do live in the city center and the poor live outside in rings of ill-served barrios, where such basic urban services as water and sewers lines do not reach. As dismal as the racially divide was to become in many American metropolitan areas—a divide that to a large extent still remains—at least minority members had the option of moving into an existing urban area, with its accompanying infrastructure. In the United States, it was the wealthier white population who left the cities, and who had to build new schools, streets and sewers for themselves in the suburbs and exurbs.

Perhaps it was a sign of things to come that the Baltimore ordinance ran into some rough sailing in the Maryland courts. The first two versions of the ordinance were invalidated, seemingly on technical grounds but with echoes of property rights concerns. The supreme courts of two other states, North Carolina and Georgia, may have been located even further south but they were more straightforward: they invalidated Winston-Salem's and Atlanta’s racial zoning ordinances, respectively, as impermissible intrusions on property rights. Meanwhile, however, Louisville,

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117 CITE BERNSTEIN RE S. AF.
118 State v. Gurry, 88 A. 546 (Md. 1913) (ordinance within police powers, but so violative of vested rights as to be presumptively outside municipal authority); cite POWER RE OTHER ORD.
119 Carey v. City of Atlanta, 84 S.E. 456 (1915) (invalidating ordinance as violation of rights of property, distinguishing Plessy on that basis); State v. Darnell 81 S.E. 338 (1914) (invalidating Winston-Salem ordinance as overstepping state law granting municipal authority, discussing
Kentucky, had passed an ordinance in 1914 that copied its Baltimore’s initial 1910 ordinance, and it was in that guise that racial zoning reached the United States Supreme Court.
The Louisville ordinance, like Baltimore’s before it, exemplified the facial neutrality—and racist character in practice—of these early ordinances. It too channeled new residents to streets where their race already constituted a majority. But the NAACP, fresh from its run-ins with the new Wilson administration’s segregationist policies, led the challenge to the ordinance. The organization adopted a pattern that would characterize much of its later litigation strategy: it found a “test case” that would let the organization showcase the issues that were of most importance to it. Indeed, in this case, the NAACP closely orchestrated the litigation, identifying both a white seller and a black buyer who disliked the ordinance. The resulting case, Buchanan v. Warley (1917), used the white seller as the plaintiff, and it gave the organization one of its early and important victories.

Buchanan was one of the Court’s few departures from Aseparate but equal@ in the early twentieth century, and the right to property was an important element in that departure. The Court relied on the Fourteenth Amendment to invalidate Louisville’s ordinance, but Plessy too had been a fourteenth Amendment case, and it had nevertheless upheld segregation in public facilities. In distinguishing the case from Plessy, the U.S. Court—like the courts of North Carolina and Georgia beforehand—emphasized most heavily the point that racial zoning impeded a person’s ability to own and dispose of substantial tangible property. Indeed, the Court seemed far less

120 For the early NAACP legal tactic of the “test case” in general see Susan D. Carle, Race, Class and Legal Ethics in the Early NAACP (1910-20), 20 L. & Hist. Rev. 97 (2002); for the Buchanan case specifically, id. at 124-28.
121 Buchanan, 245 U.S. 60.
122 Id., at 80-81.
concerned about the Fourteenth Amendment’s equal protection clauses than it was about the Amendment’s "due process" aspects – that is, the Amendment’s constraints on the ability of a state or municipality to pass such an ordinance at all, consistently with the federal requirement that states afford their residents “due process of law.”

The Court’s thinking in this respect harkened back to a line of cases that had begun roughly in 1900, where it had interpreted the Amendment’s “due process” clause to include certain substantive restraints on the states, most notably on their ability to constrain individual freedom of contract.\(^{123}\) In more modern jurisprudential thinking, these “substantive due process” cases have subjected the early twentieth century Court to much criticism; the cases seem to reflect a doctrinaire conservatism and judicial interventionism that disrupts the legislative process of reform, especially in economic matters. But to give the devil his due, the Court’s concern for economic liberties had a considerably more attractive face in *Buchanan*, where substantive due process served the African American complainants well.

To be sure, solicitude for economic liberties was already rather old-fashioned even in 1917, as governments began to gear up for the massively increased economic intervention of the World War I years. Concerns about economic rights harked back to the later decades of the nineteenth century, and tracked the trio of civil, political, and social rights that informed much of the earlier era’s thinking about rights generally.\(^{124}\) Within that trio, the right to acquire and dispose of property would certainly have fallen under the rubric of basic civil rights. The Court in *Buchanan* was by no means yet ready

\(^{123}\) CITE LOCHNER
It was consistent with the traditional civil/political/social understanding that for many years, the acquisition and disposition of property had been widely seen as a route to full civic participation by African Americans. As slaves, black men and women had been unable to own and dispose of their own property, and thus unable to get ahead except by permission of a complaisant master. But as free people, people who could enjoy the civil right of property ownership, those who could enter the cycle of earning, saving, and investing could work their way into all the privileges of the polity--or so it was thought, no doubt rather optimistically, as we might now think in hindsight. However that may be, racial zoning, as exemplified in the Louisville ordinance, would have disrupted this hoped-for cycle by operation of law, keeping otherwise willing buyers of residential properties from using the property in the most natural and suitable way--a matter that incidentally also disrupted the expectations of willing sellers of such property.

124 See Chap. 1.
Once one thinks of the right to acquire and dispose of property as a basic right, and as the foundation upon which other rights might be built, laws that separated drinking fountains or trolley seats must have seemed relative trivial matters. What really mattered to advancement was the right to own and dispose of one’s property. Thus perhaps it was not so surprising that according to the Supreme Court’s rather old-fashioned views in Buchanan, governments' police powers could not stretch so far as to curtail access to property on a racial basis. The NAACP was very much aware of the relevant “substantive due process” arguments, and in arguing Buchanan, the organization steered the Court's attention in this direction.

\[\text{NOTE RELATION TO DE SOTO}^{125}\]

\[\text{GET BRIEFS}^{126}\]
In a contribution to a 1998 symposium on Buchanan, David E. Bernstein, a modern conservative legal scholar, argued strongly that the Court’s embrace of traditionalism was exactly what advanced the cause of racial justice in Buchanan. In his view, the adherents to the then-prevalent “progressive” movement were the ones to be swayed by the era’s pseudo-scientific theories of race, and the ones who would have let African Americans down.127 Louisville had argued in favor of its ordinance on three grounds: that it maintained racial purity, that it maintained property values, and that it reduced friction between the races and thus the chances for violence. Bernstein discusses at length the legal scholarship of the time, and depressingly enough, many of the commentaries before and after the Buchanan decision did support racial zoning. Many agreed with one or more of Louisville’s points, often on what seemed to be “progressive” grounds. The racial purity argument was no doubt the least progressive, though some commentators did make it, citing contemporary “scientific” theories about the differences among the races.128 In Buchanan, however, the Court shredded this justification in the context of the Louisville ordinance, noting that the ordinance made an exemption to permit black servants to live in white blocks (and of course vice versa, just to dot the i’s and cross the t’s of the equality issue).129 Given the notorious historical patterns of sexual imposition on servants, racial purity must have seemed at best far-fetched as a rationale. The property values argument, however, attracted a number of supporters, who described racial zoning as an important element in the maintenance of

127 Bernstein, supra note —, at 799-803.
128 CHECK. WAS THIS IN ANY OF THE ARTICLES?? BERNSTEIN HAS SOME CITES. ALSO SOMETHING RE SCIENTIFIC RACISM
well-to-do neighborhoods, and who cited the ideas of the contemporary City Beautiful movement in their support. Many other commentators focused on the public interest in avoiding racial violence.\textsuperscript{130}

The Supreme Court itself acknowledged but rejected these arguments, including that of preventing racially-motivated violence, and in so doing the Justices illustrated how strongly they Justices believed in the importance of property ownership.\textsuperscript{131} They certainly must have been aware of the issue; the East St. Louis, Missouri, race riots had broken out in the summer of 1917, falling squarely between Buchanan’s oral arguments in April and the Court’s actual decision date in November. But then, the worst implications of racial violence were yet to come. Two years later, in the summer of 1919, horrific race riots racked the city of Chicago, leaving behind thirty-seven persons dead along with tremendous loss of property.\textsuperscript{132}

\textsuperscript{129} GET PAGE

\textsuperscript{130} The arguments and outcome are extensively reviewed in Bernstein, supra note C, at 836-60. \textsuperscript{131} Buchanan, at 73-74, 80-81. \textsuperscript{132} See Thomas Lee Philpott, The Slum and the Ghetto: Neighborhood Deterioration and Middle-Class Reform, Chicago 1880-1930, at 170 (1978) (describing riot damage, death figures).
By the time these events shocked the nation, of course, Buchanan had already disposed of the Baltimorean zoning plan as a means of separating the races. This is not to say that municipalities gave up on racial zoning altogether. They did not. For well over a decade, city councils continued to enforce racial zoning ordinances, attempting to tweak the Baltimore/Louisville formula in such a way as to slip past Buchanan’s strictures. Pursuant to a Louisiana statute of 1924, New Orleans passed an ordinance that forbade a black person from moving into a white neighborhood (and vice versa) without the consent of the neighbors.133 Richmond, Virginia, tried a somewhat different ploy. After Virginia’s state supreme court ruled that Buchanan invalidated a racial zoning ordinance very similar to Richmond’s,134 Richmond cleverly revamped its racial zoning ordinance: it turned to the state’s 1924 antimiscegenation law, and it prohibited anyone from moving onto a block where the majority of residences were occupied by persons whom they were prohibited from marrying.135 The U.S. Supreme Court made short work of these two evasions, in both cases citing Buchanan and ruling per curiam that the ordinances were unconstitutional.136 But still some cities kept trying: — gave up on fancy schemes to steer residents into blocks where they would join a majority of their own race. Instead, the city simply designated one area of town for white people, and the other area of blacks [with the usual exemption for servants]137 Oklahoma City

133Tyler v. Harmon, 104 So. 200 (La. 1925) (describing and upholding the ordinance); reversed per curiam Harmon v. Tyler, 273 U.S. 668 (1927).
134Irvine v. City of Clifton Forge, 97 S.E. 310 (Va. 1918).
135City of Richmond v. Deans, 37 F. Supp. 712 (1930) (briefly describing ordinance that it invalidated), aff’d per curiam, 281 U.S. 704 (1930).
136CITES
137CHECK WHAT CITY IS THIS, WHERE DID I SEE IT? BERNSTEIN?]
dropped all pretense of evading Buchanan, and well into the 1930s it simply continued to enforce an ordinance identical to the original Baltimore/Louisville racial zoning—until halted by Oklahoma’s own state supreme court.\textsuperscript{138}

Thanks to these die-hard efforts, it is not entirely accurate to say that the Buchanan decision stopped racial zoning. Just as Alabama legislatures had evaded Federal peonage decisions with ever-shifting variations to give white planters control over black labor, so did southern cities and towns continually press on the Buchanan decision, coming up with one new version of racial zoning after another. But with respect of zoning, the pattern of judicial rulings, both in the federal and the state courts, clearly illustrated that those local laws could not last forever.

This fact considerably narrowed the options for those who had hoped to use the law to maintain racial residential segregation. Nuisance, based on the general rights and obligations of property, had never got off the ground in as a means to keep out unwanted minorities. Without some specific agreement by owners, courts simply would not allow this kind of intrusion on the rights of property. Buchanan hung a guillotine over the second major option, racial zoning; the courts thought that these public ordinances too were an undue intrusion on private property rights. After Buchanan, it seemed, the only legal route that remained for residential segregation was through private agreements among owners – that is to say, racially restrictive covenants that were agreed upon by the property owners themselves, and that would somehow “run” with the land to bind future purchasers as well.

\textsuperscript{138}Allen v. Oklahoma City, 52 P.2d 1054 (1936)
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