UNRAVELING THE CONUNDRUM THAT IS *SHELLEY V. KRAEMER*: ENFORCEMENT OF RACIALLY RESTRICTIVE COVENANTS IS STATE ACTION

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I. INTRODUCTION

During the last ten years I have taught four law school courses: Property, Modern Real Estate, Contracts, and Trusts and Estates—an

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eclectic mix.[1] In an earlier article,[2] I characterized these four areas of law as historically developing in "Silos" with their own individualized rules and formalities to validate conveyances. My primary thesis is that these functional formalities or requirements that developed in each Silo to validate conveyances are designed to ensure that a court may later adjudicate a dispute over the validity of that conveyance with low error and adjudicative costs. As I was finalizing the article and thinking about the rules that developed in each Silo, I was struck by the fact that there is only one case that is addressed in all four courses. That case is the infamous Supreme Court opinion, *Shelley v. Kraemer*.[3]

Briefly, *Shelley v. Kramer*[4] is a case involving the enforceability of a racially restrictive covenant in a common interest community that precluded the sale of residential real estate to "Negroes" or more currently African-Americans.[5] Since the case is so well-known this canonical case would seem to naturally fit within the curriculum of a basic Property course, as well as a course in Modern Real Estate. In both cases that comprise *Shelley v. Kraemer*, the racially restrictive covenant precluded the use or occupancy of residential real estate by a non-Caucasian.[6] Since a covenant is deemed to be a servitude in Property Law, it makes perfectly legitimate sense to address the legal limits of those servitudes that restrict what an owner may do with his, hers, or their real property. Further, since Common-Interest-Communities

1. Many years ago, I taught another course, Critical Race Theory, and *Shelley v. Kraemer*, 334 U.S. 1 (1948), was taught in that course for two different reasons. First, I cited and addressed the case as one of several iconic United States cases addressing race and racial issues that were part and parcel of the Civil Rights Movement of the Fifties and Sixties of the last century. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). Second, and more importantly, I addressed the reification of the concept of race as a biological condition and its societal acceptance, as well as acceptance by the Courts. This acceptance of race as an innate biological condition is discussed in Part I. *See also*, Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547 (2009).

2. Alex M. Johnson, Jr., *Irrevocable Gift Promises: A Mandate for The Return of the Seal in Contract Law,* 98 NEB. LAW REV. 926 (2020).

3. 334 U.S. 1 (1948). See *infra* Part II, for a discussion on the Court's opinion and rationale therefore.

4. Shelley v. Kraemer, 334 U.S. 1 (1948).

5. As will be addressed in Part II, *Shelley v. Kraemer* is actually two companion cases, *Sipes v. McGhee* and *Shelley v. Kraemer*. *See Shelley*, 334 U.S. at 1–8 (combining Sipes v. McGhee, 25 N.W.2d 638 (Mich. 1947), in which the Michigan Supreme Court enforced a restrictive covenant, and Shelly v. Kraemer, 198 S.W.2d 679 (Mo. 1947), in which the Missouri Supreme Court enforced a racially restrictive covenant in St. Louis, Missouri). In 1948 both cases were consolidated and are generally referred to collectively as *Shelley v. Kraemer*. *See* Carol Rose, *Property Stories: Shelley v. Kraemer*, *in* PROPERTY STORIES 189 (Gerald Korngold & Andrew Morriss 2d. ed., 2009).

6. In *Shelley* the racially restrictive covenant provided that the house was not to be used or occupied by "any person not of the Caucasian race." *Shelley*, 334 U.S. at 5. In *Sipes*, the racially restrictive covenant precluded the use or occupancy of the residential real estate by any person except "those of the Caucasian race." 25 N.W.2d 640 (Mich. 1947).

("CIC")[7] and the enforceability of covenants by same are a primary topic addressed in Modern Real Estate, *Shelley* represents the legal limits of enforceable covenants that can be imposed by a CIC.

Similarly, a case involving a covenant, including a racially restrictive covenant, naturally fits within the doctrinal confines of the Silo known as Contract Law. A covenant is nothing more than a fancy name for a promise or contract between two or more entities. Racially restrictive covenants raise two distinct contract issues. First, can the contract or covenant be enforced by or against someone who is, or was not, in privity of contract in making the agreement?[8] In other words, who can enforce the promise and who can it be enforced against? Second, even assuming the enforceability of said promise or covenant against an appropriate party or entity, are all such promises or covenants enforceable irrespective of the content and effect of the promise or covenant on future behavior and practices? Does the promise or covenant, although otherwise enforceable, violate public policy and render the otherwise valid promise or covenant void and unenforceable?

That takes care of three of the four courses I teach. The puzzler or outlier is Trusts and Estates. Of what importance is *Shelley v. Kraemer*,[9] to any issue that is typically addressed in a course in Trusts and Estates? And that does require some explanation as the answer is not readily apparent. In most Trusts and Estates casebooks there is a discussion on the issue of the limits of the freedom of testation.[10] To what extent is the putative testator's freedom of testamentary disposition limited by courts based on public policy concerns or objections? A simple case will demonstrate my point. I think everyone would agree that a testamentary gift premised on the recipient or donee of that gift

7. *See* ALEX M. JOHNSON, UNDERSTANDING MODERN REAL ESTATE §17.01 et. seq. (4th ed. 2018). (addressing common interest communities).

8. *See infra* Part II, for greater detail.

9. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

10. The theory of freedom of testation, that the testator can leave his or her property upon death to whomever he or she wants, is an important part of Trusts and Estates Law as a positive and negative concept. As a positive concept, it means exactly that, a sane and compliant (compliant with the *Wills Act* or, more recently, the *Uniform Probate Code*) testator has the freedom to leave his or her property to any entity or individual chosen by the putative testator. *See generally* ROBERT H. SITKOFF ET AL., WILLS, TRUSTS, AND ESTATES 1–63 (Rachel E. Barkow et al. eds., 11th ed. 2022). As a negative concept, it means no individual heir has the right to claim a portion of the decedent's estate—in effect, a rejection of the claim of what is characterized as "Universal Succession" the epitome which was and is the rule of primogeniture by which the eldest surviving son succeeded to the property of his deceased father. *Id.* at 54. As an aside, although primogeniture was outlawed in Britain in 1925, the rule of primogeniture is still used in Britain to determine the line of succession for the British Crown. *See Succession to the British Throne*, WIKIPEDIA (Nov. 19, 2023, 7:08 PM), https://en.wikipedia.org/wiki/Succession_to_the_British_throne. The theory of freedom of testation, that the testator can leave his or her property upon death to whomever he or she wants, is an important part of Trusts and Estates Law as a positive and negative concept.

killing another person at the behest of the testator should and would be deemed invalid.

In most Trusts and Estates courses,[11] there is a case addressed, *Shapira v. Union National Bank*,[12] that raises a freedom of testation issue via an interesting fact pattern. In *Shapira,* a father left a substantial sum of money to his son, but only if his son married a girl "whose both parents are Jewish" within seven years of the testator's death.[13] If the son failed to do so, the gift subject to the restriction would instead go to the State of Israel per an in terrorem clause.[14] In fully addressing the case, one of the issues addressed is whether the Court's enforcement of the bequest with the in terrorem clause would constitute State Action[15] pursuant to the reasoning of *Shelley v. Kraemer.*[16]

Hence, *Shelley* must be limited to explain why the testamentary donee cannot use *Shelley* to challenge the religiously restricted covenant (the promise to give the gift only if the son marries a woman whose parents are both Jewish) contained in the father's will.[17] It also raises the related public policy issue addressed in Contract Law regarding the enforceability of *Shelley.* That is, does the restriction contained in the promise or covenant (in this case contained in the Will), even if it does not constitute State Action, does it violate public policy by impeding the son's right to marry someone of his choice and instead marrying someone whose parents are both Jewish?[18]

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11. *See* SITKOFF ET AL., *supra* note 10, at 5.

12. 315 N.E. 2d 825 (Ohio C.P. 1974).

13. Shapira v. Union National Bank, 315 N.E.2d 825, 826 (Ohio Misc. 1974).

14. *Shapira*, 315 N.E.2d at 826.

15. I capitalize State Action even though it may be contrary to Bluebook Rules because when capitalized I am explicitly referring to what Constitutional Law scholars and others refer to as the state action doctrine which means an action by a state actor that triggers a different level of constitutional review or scrutiny of the state's action when compared to the review of the same action taken by a private, non-state actor. *See infra* Part II, for greater detail.

16. The theory of the State Action doctrine is, of course, a seminal part of the thesis of this article. The State Action doctrine and the issues raised by its use in *Shelley* are addressed in Part II. *See infra* Part II. The thesis that State Action doctrine was properly used by the Court in *Shelley* and the reasons therefore are addressed in Part IV. *See infra* Part IV.

17. In other words, why the enforcement by the state court of the father's discriminatory bequest is not State Action but the enforcement by the same court of a discriminatory covenant is State Action. *See infra* notes 18–30 and accompanying text.

18. The assumption, unproven, in *Shapira,* is that the son, Daniel, must have been dating non-Jewish girls or, as they are known in Jewish, as "Shiksas" notwithstanding his father's disapproval of this practice. *Shapira*, 315 N.E.2d at 826. That assumption is premised on the irregularity and uniqueness of the restrictive gift contained in the father's will. *Id.* I have never spoken to any estate planner or will drafter who, as a regular part of their practice, make inquiries of the putative testator's issues dating or potential future marriage partners. The only way the restrictive bequest makes sense in the Will is that the father must have informed his attorney or drafter of his desire to restrict the gift in the manner addressed above. Further, most testators would not make such a request unless they had prior knowledge of the son's proclivities to date Shiksas.

All the above represents a long way of proving that *Shelley v. Kraemer* is a canonical case impacting many different issues and many different areas of the law. Of course, what is unstated thus far is that *Shelley v. Kraemer* is indeed a canonical case in basic Constitutional Law that is no doubt addressed in an overwhelming number of first-year basic Constitutional Law to address the contours and operation of the State Action doctrine. Without going into too much detail,[19] the conundrum presented by *Shelley* is that private discriminatory action is not unconstitutional. I can choose to discriminate, that is, not sell real property to a Caucasian and that action if solely motivated by my personal racial animus is not actionable.[20] It is only governmental or State Action that makes such discrimination actionable and violative of Constitutional Law. Hence, if a "state actor" like the City of Charlottesville chooses not to sell its property to a Negro or African-American, that would clearly be State Action and violative of Constitutional Law.

In *Shelley*, the Supreme Court held that even though private actors were involved in the creation and enforcement of the racially restrictive covenant, the enforceability of that racially restrictive covenant by the two state supreme courts[21] constitutes State Action, and therefore, makes that discrimination constitutionally impermissible. The problem with that conclusion is that if the use of the courts by private actors enforcing private covenants or restrictions constitutes State Action, then any enforcement of a private agreement or covenant taken to court would by definition constitute State Action. Such a result would obliterate the distinction between private and "public" State Action[22] and eliminate the conclusion that private discrimination is constitutionally permissible.

Thus, the issue of the scope and applicability of the decision and rationale in *Shelley* has been the subject of a plethora of law review articles espousing several different theories limiting the applicability of *Shelley* to the facts of the case—the enforcement of racially restrictive covenants to conveyances of real property.[23] The purpose of this article is to revisit this issue and provide a heretofore unexpressed theory that adequately and coherently explains the use of State Action in *Shelley v. Kraemer* and, more importantly, explains its limitation to the facts present in that case.

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19. See *infra* Part II, for an in depth explanation.

20. *See infra* Part II.

21. *See Shelley*, 334 U.S. at 21–23.

22. Here, I am referring to discriminatory actions taken directly by a state actor such as a County Zoning Authority or Board using racially restrictive zoning to preclude Negros, or African-Americans, from purchasing land in certain areas or neighborhoods. Carol Rose, *Property Stories: Shelley v. Kraemer*, *in* PROPERTY STORIES 190–92 (Gerald Korngold & Andrew Morriss 2d. ed., 2009) (discussing the unconstitutionality of this action).

23. *See infra* Part II.

That theory is premised on the fact that the viability of racially restrictive covenants is driven solely by the use and operation of Recording Acts in the states in question. Furthermore, those Recording Acts are the quintessential examples of State Action. As will be explained in greater detail in Part III,[24] without valid Recording Acts, no one could enforce the racially restrictive covenant who was not a party to the creation of the racially restrictive covenant. Without the use of state Recording Acts, any agreement between landowners and other landowners racially restricting their ownership of land becomes a mere contract between the two parties.[25] And if one party breaches that contract, he or she can be sued by the other party. What is vitally important is that as a contract between two parties, it cannot be enforced against or by a non-party to the agreement. Only individuals that are in privity of contract may sue on any agreement.[26]

Consequently, it is the use and validity of Recording Acts that transforms an ordinary contract into an agreement that not only binds those in privity of contract, but also those who are not with respect to their ownership of the impacted or racially restricted land. The use and validity of the Recording Acts transforms a personal covenant into an equitable servitude, or real covenant, that not only touches and concerns the impacted land (a burden on anyone who succeeds to an ownership interest in the affected land),[27] it also creates a benefit to parties not in privity of contract (a benefit) that allows that party to sue to enforce the promise or covenant.[28] As a result, it is only through the actions of the states in enacting and enforcing Recording Acts that parties can enter into a contract and subsequently have the promises or covenants contained in the contract enforced by and against parties

24. *See infra* Part IV.

25. As will be explained in Part II, the racially restrictive covenants in both cases that comprise *Shelley* were between landowners. *See infra* Part II. Today restrictive covenants are imposed on homeowners through covenants formulated and imposed by a Homeowners' Association (HOA) or some other form of a Common Interest Community (CIC).

26. *See infra* note 104.

27. Touch and concern are terms of art used in Real Property to connote a promise or covenant that will run to future owners of the property and affect them in their use of the property even though those subsequent owners were and are not in privity of contract—not party to the agreement affecting their land. *See infra* notes 160–72 and accompanying text, where the requirements for promises that touch and concern are addressed.

28. As will also be addressed in Part III, when equitable servitudes or real covenants are created, there is a benefitted side and a burdened side. The property that is subject to the restriction or equitable servitude is the burdened side and any successor (transferee or assignee) in interest to the original promisor or covenantor succeeds to the burden and is bound thereby. On the other hand, the owner of the property to whom the promise was made, the promisee or covenantee, gets the benefit of the promise or covenant and any successor (transferee or assignee) of the original promisee succeeds to the benefit. *See infra* notes 175–82 and accompanying text.

not in privity of contract perhaps several decades later.[29] It is the uniqueness of and operation of Recording Acts through the actions of the states that makes promises respecting the use of land permanent and enforceable.

Recording Acts are not the only acts promulgated and enforced by the states. Moreover, Recording Acts are not the only acts that create rights that are subsequently enforced by or against parties not part (not in privity) with whomever created the original act that is subsequently being challenged or enforced. As discussed above,[30] in *Shapira*, the son was contesting the disposition of his father's estate as directed in the father's Will. The contest challenged the Will because the son would only receive his bequest if he married a woman whose both parents were Jewish. That Will, and the subsequent lawsuit to challenge the enforceability and validity of that Will, are part and process of a probate process that is predicated on statutes or acts promulgated by the state and subsequently enforced by typically separate courts (Probate Courts) also established by the state to adjudicate those disputes.[31]

And, as addressed above, in *Shapira* the fact that the father's Will was being enforced in a state's probate court and subsequently in a court of general jurisdiction on appeal does not constitute State Action. In order for my theory to have any traction, I must explain the distinction between *Shelley* and *Shapiro*. In essence, my thesis must explain why one act or set of statutes, the Recording Acts, creates a viable claim to State Action while another set of statutes or acts, the Probate Code, does not create a credible claim to State Action.

As explained in greater detail in Part III,[32] the distinction between the two sets of statutes or acts is quite significant in that the Recording Acts allows parties using the same to create new **substantive** rights that arise and are enforceable only because of the validity of Recording Acts. On the contrary, the Probate Code or Act does not create any new substantive rights in any party. Indeed, the Probate Code or Act can be viewed as acting solely procedurally, that is, creating a process by which certain rights (in this case, postmortem rights) are enforced.

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29. What I have not addressed, and will address in greater detail in Part III, is the temporal nature of the promise or covenant that restricts the use of the promisor's use of land. As will be explained, this promise has no temporal limitation and can bind the land in perpetuity as long as there is no claim of changed conditions or the successor of the promisor can claim some equitable right to non-enforceability based on doctrines such as laches or estoppel. *See infra* notes 134–50 and accompanying text.

30. *See supra* notes 12–16 and accompanying text.

31. Most states have adopted some version of the Uniform Probate Code as the act or set of laws to regulate the transfer of assets post-mortem. *See* SITKOFF ET AL., *supra* note 10, at 68–69. I say some form because, although the original Uniform Probate Code was promulgated in 1968, it has been amended several times since and states have adopted some or all of the subsequent amendments. *Id.*

32. *See infra* notes 185–90 and accompanying text.

To prove my thesis, this article is divided into four parts. In a brief Part II, the focus is on the case that created the conundrum: *Shelley v. Kraemer*.[33] In particular, the focus is on the Constitutional Law issue created by the Supreme Court's opinion in *Shelley*. I briefly summarize several of the most prominent recent articles examining *Shelley,* arraying all of the current Constitutional Law theories that attempt to explain and limit *Shelley* to the facts of the case. By doing so, I hope to demonstrate that these explanations of *Shelley* and its inherent limitation as a result, provide no suitable theoretical basis for this very influential and canonical opinion.

Indeed, I posit that unlike many of the current theories used to explain and limit the reach of *Shelley*, that race (the fact that the enforcement of a racially restrictive covenant was at issue in the case[34]) was not the most critical factor determining the outcome in the case. Instead, I turn to the one fact that is often ignored by these public law scholars in their attempt to place the *Shelley* decision in the appropriate Constitutional Law box: Recording Acts and Property Law.

That leads to Part III where I address the confluence of Contract and Property Law that produced the current iteration of viable Recording Acts. Having fully addressed the facts of *Shelley* and the relevant theories of Constitutional Law to explain (apologize for) the case, I turn to Contract and Property Law principles and issues. I do so to first explain the precise legal issue raised by Contract Law (the enforceability of a restrictive covenant) and its resolution pursuant to Property Law principles (using the Recording Acts) to validate the same. In this Part, the principal focus is on two distinct non-public or Constitutional Law issues.

First, I focus on Contract Law to explain how a contract is formed and subsequently enforced. I pay particular attention to basic Contract Law principles like privity of contract and third-party beneficiary theory to establish which parties may sue to enforce a promise or enforceable covenant in a valid Contract. I conclusively establish that in the absence of the use of third-party beneficiary theory, normally only the parties to the Contract or covenant can sue to enforce the same. I situate racially restrictive covenants as species or types of relational contracts in which two parties enter into a long-term contractual relation.[35] Second, and more importantly, I address covenants, their creation, scope and enforceability, and how real covenants and equitable servitudes create interests in land that are extra-contractual.

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33. *See infra* Part II.

34. *See infra* notes 73–78 and accompanying text.

35. For a discussion and definition of "relational contracts," see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981).

Restrictive covenants are clearly deemed enforceable per these Contract and Property Law principles. What makes the restrictive covenant different in *Shelley* was the racially restrictive nature of the covenant and if a state actor is involved, that racial restriction is invalidated. At the conclusion of Part III, I demonstrate that the State Action involvement is supplied by the Recording Acts, the very acts that make restrictive covenants viable.

In Part IV, I turn to Recording Acts with the assumption that public law scholars who normally address the issue of State Action have little, if any, significant knowledge of how and why Recording Acts operate. Furthermore, in this section I explain how and why these Recording Acts operate to create new rights not only in the parties to a contract or agreement, but also to parties not in privity at the time the contract or agreement was executed. I also explain in some detail the temporal nature of the rights created by the operation and use of Recording Acts.

Although there are three types of Recording Acts extant in the United States, Race, Notice, and Race-Notice statutes,[36] the differences between the three are unimportant for the issue addressed herein. Instead, what unifies these three types of statutes and what will make valid to my claim that Recording Acts validate the use of State Action by the Supreme Court in *Shelley* is the effect these Acts have on the original promise made by the covenantor. The Recording Acts imbues that promise with viability beyond that provided by private Contract and Property Law. Instead, the State, through the use of Recording Acts, is supplying a vehicle pursuant to which that initial promise is enlarged and engrafted upon subsequent parties making the original promisor's promise enforceable against assignees or transferees of the promisor.

Finally, in Part V, I integrate the concepts addressed in Parts III and IV to provide a coherent theory of why the Supreme Court correctly found State Action in the enforceability of racially restrictive covenants in *Shelley v. Kraemer*.[37] In order to accomplish that, I differentiate the effect and operation of Recording Acts from other state statutes or acts that are subsequently enforced by the Courts. I pay particular attention to the facts in *Shapira v. Union National Bank*,[38] to demonstrate why the enforceability of rights created by Recording Acts are State Action, and the enforcement of other rights created by the State via laws or acts do not create State Action.

By focusing on the substantive and new rights or entitlements created by Recording Acts and engrafted on subsequent transferees

36. See *infra* notes 193–201 and accompanying text, for a definition and discussion of these statutes.

37. *See infra* Part V.

38. *See supra* notes 11–22 and accompanying text.

of the covenantee, I am able to provide a coherent, normative theory supporting the use of State Action in *Shelley,* but not in *Shapira.* The real problem is taking *Shelley* and explaining why Recording Acts constitute State Action, but the enforceability of discriminatory provisions in a Will by these same courts does not constitute State Action. My point in Part V is that *Shapira*'s enforcement of the father's Will by the probate court is not State Action because Probate Law and the use of probate courts are not necessary to effectuate the testator's intent.

II. *SHELLEY V. KRAEMER*: THE CONSTITUTIONAL LAW ANALYSIS

As someone who is admittedly ***not*** a Constitutional Law scholar, my critique of the analysis and review of *Shelley v. Kramer* by Constitutional Law scholars may be subject to dismissal or minimization. However, a caveat is in order before I begin my analysis and review. The caveat is that I am not attempting to posit some Constitutional Law theory that explains and justifies the decision in *Shelley* that held that the enforcement of privately created racially restrictive covenants by state courts is State Action. That I attempt to accomplish in Parts IV and V by analyzing Property and Contract Law and not Constitutional Law.[39]

Instead, this Part is largely aimed at educating those who are also not Constitutional Law scholars (i.e., Property and Contract Law scholars) to the Constitutional Law analysis and review of *Shelley,* by the experts in Constitutional Law as it pertains to my thesis that the operation of the Recording Acts imbues the state court's enforcement of racially restrictive covenants as State Action. As such, it is a summary of their analysis and review and not a critique of the same in order to situate my thesis within the prior Constitutional Law analysis and review. Moreover, the approach taken to my summarization of the review and debate of *Shelley* by Constitutional Law scholars is largely arrayed and organized chronologically.

A decade after the Supreme Court decided *Shelley v. Kramer*,[40] the application of a State Action rationale to court enforcement of a private covenant was met with skepticism despite general agreement with the disposition of the case.[41] In his famous commentary calling for more neutral adjudication in the Supreme Court, Professor Weschler presciently questioned whether *Shelley*'s holding would bind in other instances of private discriminatory action, such as arbitrary

39. *See infra* Parts IV and V.

40. *See supra* note 3 and accompanying text.

41. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

testamentary decisions, that would require some participation by the courts in order to be effectuated.[42] At that time it was not yet clear that the Court would decline to extend the *Shelley* rationale beyond the facts of the case, so the expansive characterization of State Action in *Shelley* was viewed with much concern. Thus began the development of an extensive and ongoing literature dedicated to interpreting,[43] dismissing,[44] celebrating,[45] and reimagining[46] the bases upon which *Shelley v. Kraemer* rests.

Scholarly commentary on *Shelley* tends to fall within several canons. Some academics are not critical of the decision in *Shelley* and seek to understand *Shelley* as it was written by taking into account the context of the opinion—the Supreme Court was protecting Common Law entitlements or rights,[47] while others limit the reasoning of *Shelley* to the particular facts of the case.[48] Other scholars dismiss the Court's reasoning in *Shelley*, and formulate a reimagined analysis that supports *Shelley* and fits well in the context of related jurisprudence.[49] Finally, some scholars try to formulate a conception of State Action that is more limited than suggested in *Shelley*, and in doing so, dismiss *Shelley* through a combination of reasoning and a showing that *Shelley*'s State Action rationale has been all but shunned by subsequent courts.

The thesis of this article draws from several camps or theorists. Although I reject the Supreme Court's reasoning—or lack thereof—that enforcement of racially restrictive covenants by state courts constitutes impermissible State Action, I do contend that State Action doctrine was the correct doctrine to apply, and that the Court came to the correct result under State Action doctrine. Under my analysis, the Court ought never to have arrived at the question of whether enforcement by the

42. *Id*. As addressed in Part V, I address why a discriminatory testamentary disposition is indeed not State Action whereas the enforcement of racially restrictive covenants by state courts is State Action. *Infra* Part V.

43. Louis Henkin, *Shelley v. Kraemer: Notes for A Revised Opinion,* 110 U. PA. L. REV. 473 (1962).

44. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 B.Y.U. L. REV. 575, 575 (2016) (casting *Shelley* as an exception to State Action doctrine rather than emblematic of State Action).

45. Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439 (2018) (proposing reform of State Action theory to support a more robust formulation of the doctrine, in line with the reasoning of the original *Shelley* opinion).

46. Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers,* 95 CAL. L. REV. 451 (2007) (grounding *Shelley* in the Thirteenth Amendment rather than the Fourteenth Amendment).

47. *See* Erwin Chemerinsky, *Rethinking State Action,* 80 NW. U.L. REV. 503, 506 (1985) ("[T]he state action doctrine is based on the anachronistic premise of a common law that is coextensive with individual liberties.").

48. *See* Henkin, *supra* note 43.

49. *See* Rosen *supra* note 46.

courts comprised State Action because a very clear application of State Action had already occurred earlier in the unfolding facts of the *Shelley* case. My contention is that the racially restrictive covenant was the unique creation of state law through the creation and enforcement of Recording Acts. As such, my paper is part interpretation of State Action doctrine, and part reimagining the *Shelley* rationale.

While Weschler criticized *Shelley* as an insupportable misapplication of State Action,[50] Professor Lewis sought to clarify the meaning of State Action by ascribing certain characteristics to ostensibly private actions which could transform them into State Action.[51] Interestingly, Professor Lewis arrives at an explanation for the holding in *Shelley* related to my own theory: ". . .when the state through statute or common law doctrines makes available machinery through which action of a governmental character may be undertaken by private persons, the state has a duty under the amendment to couple the grant of power with restrictions against discrimination."[52]

While Lewis casts the state in the role of merely "providing machinery," I posit that the state's role in the recording of a racially restrictive covenant is greater and more focused—the State Action here is the affirmative creation of a new substantive right through the Recording Acts.[53] The right-holder may employ her new substantive right by suing a non-party to the original covenant, even when the right-holder is herself a non-party to the original covenant. That this substantive right was bestowed upon a private individual for the express purpose of executing a facially racially discriminatory purpose implicates equal protection concerns.

An influential commentator, Professor Henkin, struggles with ". . .why it is not 'State Action' when a court gives effect to a restrictive covenant, but it becomes 'State Action' when a court enforces the covenant"[54] I would respond that it *is* State Action when a court "gives effect to," or records, a restrictive covenant.[55] As this was explicitly rejected by the Court, this point is where my own theory becomes a reimagining of the *Shelley* opinion. Henkin's own revised opinion for *Shelley* draws the line for State Action thus: "The question. . . is

50. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

51. Thomas P. Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

52. *Id*. at 1116.

53. For further discussion and analysis of the new substantive rights created by Recording Acts, see *infra* Part IV.

54. Henkin, *supra* note 43, at 505 n.10.

55. *See also* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 68 (1991) ("Wechsler's difficulty stems from his failure to recognize the substantive role racial domination plays in the transactions. Without racial domination, Wechsler sees only the Court's 'unprincipled' choice not to enforce a race-based property disposition.").

not whether a state has 'acted,' but whether its role in the circumstances has denied equal protection—whether because of the character of state involvement, or the relation of the state to the private acts in issue, there has been a denial for which the state should be held responsible."[56] While Henkin's description has merit, it fails to solve the practical problems raised by the application of State Action doctrine in *Shelley* because the "character" of state involvement and the state's "relation" to the private acts may be easily given factual interpretations to suit either side of an argument. Because of this, Professor Henkin's proposal lacks practical applicability.

Professor Henkin presents three bases for holding the state responsible for the actions of a private person: (1) the state is responsible for what it could, should, and fails to prevent, (2) the state is responsible for discrimination which it encourages or sanctions, and (3) the state is responsible when its courts act to render discrimination effective.[57] Of these bases, the second is most related to my own theory because it may be applied to the moment of recording rather than the moment of enforcement. It supports Henkin's second basis for finding State Action because the state "is lending sanction to the discrimination and actively encouraging it."[58] The weakness remains however, that the sanction or imprimatur of the state under many facts is rather unclear. In comparison, the creation of a substantive right, which I contend is created by the application of Recording Acts, is very clear.

Professor Henkin believes that *Shelley* was rightly decided and not a one-off, as do I, but his explanation for why his rule satisfies his own criteria of producing the right result in *Shelley* and avoiding unacceptable results in other cases is to cast bequests in Wills as a particular exception to his general *Shelley* rule.[59] The most straightforward reading of State Action in *Shelley* is that the state may not enforce a discrimination which it could not itself make. Professor Henkin believes, as do I, that this reading is flawed. Such a reading would seem to indicate that "the state could not probate, enforce, or administer many common bequests."[60] He notes the need for some "principle" which would justify *Shelley* without producing undesirable results in other cases,[61] and I respond that the creation or destruction of substantive legal rights by the state is just such a principle.

56. Henkin, *supra* note 43, at 48.
57. *Id*. at 483–86.
58. *Id*. at 485–86.
59. *Id*. at 491.
60. *Id*. at 477.
61. *Id*.

Commonly, the proposed principle is a limitation of only zoning or restrictive covenants.[62] It has even been suggested that the definitive principle may be the will (wish to discriminate or not) of the private actor.[63] Professor Henkin's assertion is that rather than *Shelley* being the odd case, *Shelley* is the rule and the bequest cases where our concern for liberty outweighs our concern for equality are the odd exceptions.[64]

One need not undertake Professor Henkin's "rights-balancing test" under my substantive rights inquiry, because the enforcement of a discriminatory testamentary instrument creates no new substantive rights.[65] Professor Henkin recognizes that his own theory, "moves the focus of the inquiry into areas from which precision may be even more removed,"[66] by introducing the question of balancing competing constitutional protections. I aim to move the discussion in a different direction by recognizing that there existed State Action in *Shelley* because the discrimination was only enforceable as a result of the creation of a new substantive right by the state.[67] I address the liberty and equality dichotomy outlined by Professor Henkin by drawing a much clearer line: on the side of party signatories to a restrictive covenant we have a bilateral contract, and liberty prevails. On the side of enforcement against non-party non-signatories, equality prevails and rejects the state's creation of a substantive right for discriminatory purpose.

Professors Glennon and Nowak take this idea further, positing that every case between private parties where State Action is implicated turns upon a contest between the rights of private persons and *is not* explained by the extent of state involvement.[68] The Court's finding of State Action, they propose, is actually based upon one party's private actions so damaging, constitutional protections are implicated.[69] This theory confusingly preserves the State Action-private action distinction, yet wholly undermines its relevance and validity.

Turning to other analysis that rejects the holding in *Shelley* that the state court's enforcement of a private discriminatory agreement is State Action, Professor Cherminsky's interpretation of *Shelley* is that the case provides further proof that the State Action doctrine is largely incoherent and that the line between state and private action

62. *See supra* note 52, at 1115–18 (1960); Henkin, *supra* note 43, at 477.

63. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 6–15 (1959).

64. *Id*.

65. See *infra* Part IV, for further and extended discussion of this contention.

66. Henkin, *supra* note 43, at 492.

67. For further discussion of this point, see *infra* Part V.

68. Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 246.

69. *Id*.

is illusory.[70] Professor Cherminsky is not alone[71] in his rejection of the division between state and private action, but this minority of scholars is fighting against the tide of an established binary norm within the U.S. system of governance.[72]

Professor Saxer has suggested that *Shelley*'s blurring of the line between state and private action is not a reason to discard the distinction, but instead a reason to discard State Action as a tool for combating private racial discrimination.[73] With the perspective lent by time, Professor Saxer has observed that the Court has rejected the expansive reading of *Shelley* that was feared in the 1950's and that lower courts are split on how to apply *Shelley* in contexts beyond racial discrimination.[74] Instead of continuing to rely upon State Action, Professor Saxer suggests that future private racial discrimination should be addressed with another option such as: (1) finding a contract unenforceable due to a violation of public policy; (2) finding an unreasonable restraint on alienation; or (3) prophylactic legislative action.[75] Although these solutions could be effective today, scholars agree they would not have been effective at the time of the *Shelley*[76] decision.

In his paper on constitutional rights in private residential communities, Professor Seigel advances a "land use" reading of *Shelley*.[77] He proposes that, "the *Shelley* doctrine does not reach every act of judicial enforcement of private agreements, but, rather, the doctrine is confined to some private covenants that control the use and occupation of land." This reading is founded upon the theory that the *Shelley* court assumed that control of land use was a sovereign function of

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70. Chemerinsky, *supra* note 47, at 503.

71. Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 S. CAL. L. REV. 208 (1957); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV.1349 (1982); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982); Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1268 (2000); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993).

72. See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 470 (2007), for a summary of this scholarship and the rebuttal to rejecting the State Action private action distinction.

73. Shelley Ross Saxer, *Shelley v. Kraemer's Fiftieth Anniversary: "A Time for Keeping; A Time for Throwing Away"?*, 47 U. KAN. L. REV. 61, 65–66 (1998).

74. *Id*.

75. *Id*.

76. Keith Sealing, *Dear Landlord: Please Don't Put A Price on My Soul: Teaching Property Law Students That "Property Rights Serve Human Values."*, 5 N.Y. CITY. L. REV. 35 (2002); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U.L. REV. 1525, 1573 (2007).

77. Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 499–501 (1998).

government, and so the covenantors had effectively usurped a state function and effected State Action.[78]

One of the most influential and thorough recent treatments of *Shelley*, by Professor Rosen, characterized *Shelley* as difficult to rationalize because it was shoehorned into the Fourteenth Amendment.[79] Rosen's article is a reimagining of *Shelley*, offering an entirely new rationale for deciding *Shelley* under the Thirteenth Amendment as an incident or badge of slavery.[80] This approach entirely removed *Shelley* from the State Action jurisprudence, as Professor Rosen characterizes finding State Action in *Shelley* a "hopeless task."[81] While Professor Rosen's analysis is comprehensive and thought provoking, it does not foreclose the value of continued analysis under the Fourteenth Amendment. My substantive rights rationalization of *Shelley* is an unexplored one, which merits application to the cases after *Shelley* where the attribution rationale of *Shelley* was not followed.

Professor Rosen also examines the limited contexts in which courts have applied *Shelley*. The attribution rationale was applied only in *Barrows v. Jackson*,[82] five years after *Shelley*. Professor Rosen correctly characterized *Barrows* as an extension of the *Shelley* attribution rationale, as in *Barrows* the Court barred enforcement of a restrictive covenant against one of the covenantors.[83] His review of cases after *Shelley* reveals no trend beyond a general indication that, "courts have been more apt to find State Action when confronted by restrictions that disallow particular classes of persons or groups from living in a place, and less apt to find State Action based on general restrictions on property use."[84]

Most recently, Saidel-Goley and Professor Singer proposed to reinterpret State Action through the lens of Property Law to find that it was not "State Action" which triggered constitutional protection, but the violation of constitutional norms.[85] Their view of *Shelley* relies upon the state's role in creating and enforcing property rights, and argues that where property rights are concerned, the state is necessarily involved. "There is no room for the state to step aside and just let things happen. When someone creates a property right, that necessarily gives that person power over non-owners."[86] It is the allocation of those rights, in their view, which may violate constitutional norms.

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78. *Id*. at 505–07.
79. Rosen, *see supra* note 46, at 453.
80. *Id*. at 455.
81. *Id*.
82. Barrows v. Jackson, 346 U.S. 249, 262 (1953).
83. *Id.*; Rosen, *supra* note 46, at 462.
84. *See* Rosen, *supra* note 46, at 468–69.
85. *See* Saidel-Goley, *supra* note 45.
86. *Id.* at 486–87.

My thesis that State Action was at issue in *Shelley* given the use and operation of Recording Acts builds upon the thesis put forth by Professor Siegel that what was important in the case was a governmental function.[87] However, my focus is on the Recording Acts and the confluence of certain Contract Law doctrines that allows private parties to use the machinery of the state to create new substantive contractual rights. It is to Contract Law, and that new substantive contractual right, that I address in the next part.

III. CONTRACT LAW AND THE CREATION AND ENFORCEABILITY OF COVENANTS

A. Contractual Issues Raised by Restrictive Covenants

In some respects, Contract Law, and the contractual issue raised in *Shelley v. Kraemer* is quite simple. Parsing *Shelley* as a Contracts case as opposed to a case raising a Constitutional Law issue, the first question or issue raised is whether there ever was an enforceable promise or contract restricting the use of one party's land to benefit someone else?[88] As even first-year law students know, in order to have an enforceable contract pursuant to modern contract law[89] there must be Consideration[90] to have an enforceable agreement, and that agreement must meet one of two tests. Although much has been written regarding the concept of Consideration in Contract Law and its normative basis,[91] that exegesis is beyond the ken of this article. Suffice it to say, modern contract law per the initial *Restatement of Contracts* (which

87. *See supra* notes 77–78 and accompanying text.

88. Note specifically that I have not stated to benefit someone in their use or ownership of some other piece of land. Although, as we will see, the promise made here was indeed made to benefit someone with respect to their ownership interest with respect in land, that is not necessarily the case and not the contractual issue raised. Instead, if the promise is to benefit one regarding an ownership interest in land, the question is whether the promise touches and concerns the land pursuant to a formula developed and regulated in Property Law. See *infra* notes 161–66 and accompanying text, for the formula of that Property principle.

89. Before modern Contract Law required a finding of Consideration to hold that there is an enforceable contract, common law courts enforced agreements that were "sealed," that is agreements in which Seals were affixed to the written promise or promises. The use of Seals and the act of Sealing, as well as my claim that the use of Seals should be resurrected are addressed in my article, *Irrevocable Gift Promises and Promises Inducing Reliance: A Mandate for the Return of the Seal in Contract Law*. *See generally* 98 Neb. L. Rev. 926 (2019).

90. I capitalize Consideration throughout to refer to the contractual doctrine that must be shown to be present at the formation stage of a contract in order to have an enforceable contract.

91. Indeed, in my article, *Contracts and the Requirement of Consideration: Positing A Unified Normative Theory of Contracts, Inter Vivos and Testamentary Transfers*, 91 N. Dak. L. Rev. 547 (2015), I analyze the normative basis of Consideration and conclude that the strongest normative basis served by Consideration is to provide functional formalities.

was in effect at the time *Shelley* was decided, had not yet been superseded by the *Second Restatement of Contracts*) required Consideration to find an enforceable agreement.

However, Consideration which is required to find an enforceable contract also must be part of the process that leads to the conclusion of the agreement. Hence, Consideration has both a substantive and remedial component: it must be an important part of the agreement and a court must later conclude that Consideration was produced as a result of the agreement (this dual role played by Consideration leads to the conclusion that Consideration is a tautology).[92] The first test deployed by modern courts to determine whether there is Consideration is the benefit/detriment test, which was the province of the first *Restatement of Contracts*.[93]

Briefly, the benefit/detriment test requires that a legal benefit be provided to one party of the agreement while the other party to the agreement incurs a legal detriment. This test, although clearly tautological,[94] is still used by many courts to determine if there is a legal agreement notwithstanding the fact that the *Second Restatement of Contracts* jettisoned the benefit/detriment test in favor of the bargain theory of Consideration.[95]

Moreover, the benefit/detriment test cannot clearly demarcate between a gift ("donative") transaction and an arms-length transaction (contract or non-donative transactions). Gifts require the intent ("I") to make a gift on the part of the donor, delivery ("D") of the subject of the gift,[96] and acceptance ("A") on the part of the putative donee.[97] What is important for the purpose of my thesis is the A prong of the requirement: acceptance. Since one cannot for good and valid reasons be forced to accept a gift, that acceptance of the subject of the gift by the putative donee, results in the conferral of a legal benefit on the

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92. *See* Alex M. Johnson, Jr., *Irrevocable Gift Promises: A Mandate for The Return of the Seal in Contract Law,* 98 NEB. LAW REV. 926, 935 (2020).

93. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS §§ 75–84 (AM. LAW INST. 1932).

94. The tautological nature of this test is exposed when one realizes that if there is an exchange of promises—even statements that do not rise to the level of a promise to do something in the future—and a court later decides, for whatever reason, that the promises or statements are enforceable, a legal benefit is then conferred on one of the parties to the agreement, and a legal detriment is imposed on the other party to the agreement. It is the court's determination that there is Consideration that creates the benefit/detriment which must be found to prove that there is Consideration and hence, an enforceable agreement. If the court decides to the contrary, that there is no enforceable promise or agreement, then no benefit is conferred and no detriment is incurred by the other party.

95. *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS §§ 75–84 (AM. LAW INST. 1932).

96. This is by far and away the most complicated and contested requirement in donative or gift cases. *See* Alex M. Johnson, Jr., *Irrevocable Gift Promises: A Mandate for The Return of the Seal in Contract Law,* 98 NEB. LAW REV. 926 (2020).

97. As indicated by the capitalized or highlighted letters, the requirements for the creation of a valid gift are known to every law school student I have taught as IDA. *Id*.

putative donor (the gift is now validated), and results in the putative donee incurring a legal detriment (giving up the legal right to refuse acceptance of the subject of the gift).[98]

The bargain theory used to establish Consideration is as tautological as the benefit/detriment test. Pursuant to the *Second Restatement of Contracts*, in order to find Consideration, the court must determine that the parties exchanged promises as part of a bargain.[99] The relationship of the parties, the setting at which the alleged bargain was made, the parties' prior relationship and dealings, and a myriad of other factors considered by the court will determine whether there is an enforceable bargain or not.[100] That means, unfortunately, that the *Second Restatement* does not actually define what is a bargain supporting the finding of an enforceable agreement or contract. There is some intimation that a promise must or does induce the reciprocal promise, but the fact that promises are exchanged does not necessarily mean that there is a bargain.

Hence, it is hornbook law that when a mother extracts a promise from her daughter to earn all "A" level grades in the first year of law school and the daughter does so as long as the mother promises to buy her a new car if the daughter succeeds in keeping her promise, that is not an enforceable bargain.[101] Instead, it is an intrafamily exchange of promises that anticipates the future gift of a car by the mother to the daughter.

If the daughter attains all "A" level grades during her 1L year, and the mother chooses not to give her the car, and if the daughter sues to enforce the mother's promise, the promise will be deemed unenforceable as not the product of an enforceable bargain. Who makes the determination regarding which promises are part of an enforceable bargain and which are not, is the court, the ultimate arbiter of whether the contract is enforceable. Hence, determining which promises are part of a bargain that supplies the mystical contractual glue of Consideration is based solely on the court's later determination that there was a bargain. If the court opts to find no bargain largely because the "promise" took place in an intra-family setting, for example, the fact

98. Giving up a legal right or incurring a detriment does not mean that the party incurring the detriment has by doing so created an act that resulted in a net loss of economic means. In other words, one can incur a legal detriment even if that legal detriment enriches the party incurring the detriment.

99. *See* RESTATEMENT (SECOND) OF CONTRACTS § 2 (AM. LAW INST. 1981).

100. *See, e.g.*, Lucy v. Zehmer, 84 S.E.2d. 516 (Va. 1954) (considering many of these factors in finding that a "deal" made at a Virginia Bar was valid and supported by Consideration given the parties' history and prior relationship as well as certain formalities undertaken by the vendee of real estate to memorialize the transaction).

101. *See, e.g.*, Joseph Perillo, *Calamari and Perillo on Contracts,* Section 4.5 (6th Ed. 2009).

that promises were exchanged is irrelevant because those promises took place outside of the necessary bargain.

Notwithstanding the tautological nature of Consideration, once Consideration is found pursuant to either of the tests addressed above, the next step is to determine what it means to have an enforceable contract. In a bilateral contract[102] when promises are exchanged between Abel and Baker, it is common for each party to make a promise to the other in order to elicit the other party's promise. Thus, when we have reciprocal promises, say between Abel and Baker, Abel as the maker of his promise, is a promisor or covenantor agreeing to do something in exchange for Baker's promise. Baker, who is the recipient of Abel's promise, is the promisee or covenantee—that is the person to whom the promise is made. Baker, of course, has made her promise to Abel and, therefore, not only is Baker a promisee or covenantee, Baker is also a promisor. That promise is given to Abel so, in addition to acting as a promisor, Abel is also the promisee.

Now that we have identified an enforceable bargain (that is, an exchange of promises establishing that there is consideration), with two parties, Abel and Baker, each of whom is both a promisor as well as a promise, the critical question becomes who can sue and be sued to enforce either or both promises. Even one not well-versed in Contract Law would intuit that Abel can sue Baker to enforce Baker's promise to Abel and that Baker can sue Abel to enforce (make Abel accomplish) his promise to Abel. One would also intuit that Abel's twin, Cabel, who was not present when the promises were exchanged nor involved in any way shape or form with respect to the promises made, should not automatically have the right to sue Baker.

What one would not intuit is the Common Law reason why Abel can sue Baker, but Cabel cannot. That Common Law reason is that Abel and Baker, as a result of their exchange of promises are in *privity of contract*.[103] Individuals are deemed to be in privity when they deal with each other personally. Privity is defined as a relationship between parties that is recognized by the law or legal system.[104] Privity of contract, then, at Common Law provides that a contract cannot confer legal rights (an entitlement or benefit) or impose obligations (a detriment) upon any person or entity that is not a party to the contract (did not voluntarily participate in negotiating or making the bargain).[105]

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102. For a discussion of the distinction between a bilateral and unilateral contract, see Frier & White, *The Modern Law of Contracts,* at 39 (4th Ed. 2019).

103. *See* Perillo, *supra* note 101 at § 17.1.

104. *Privity of Contracts*, BLACK'S LAW DICTIONARY (Revised 4th ed. (1968).

105. At this point, I am ignoring the third-party beneficiary doctrine that is used to provide contractual enforcement rights to parties not in privity of contract because that doctrine is not part of the English common law of Contracts. Instead, and as discussed

Privity of contract establishes the rule that only the parties to the contract may be able to sue to enforce their rights arising from the completion of an enforceable contract.[106] Cabel, who was not a party to the bargain reached between Abel and Baker is, therefore, not in privity of contract and has no right to sue Baker on Baker's promise to Abel. The salience of this rule to the thesis of this article becomes important when it is recognized that in cases like *Shelley,* the parties who are in privity of contract when a restrictive covenant is promulgated are usually two homeowners who are neighbors or individuals who live in the same community.[107]

However, as in *Shelley,* the party seeking to enforce the restrictive covenant or promise was not in privity of contract with the covenantor/promisor, but is typically a successor owner (subsequent purchaser) of the real property benefitted by the restrictive covenant. In plain English, someone who many years later purchased the property from either the original covenantee/promisee or someone who can trace their title (ownership interest) back to the original covenantee/promisee.[108]

In Contract Law there are two vehicles or methods by which one not party to the contract (one not in privity of contract) may later sue to enforce promises or obligations made to some other party who was in privity of contract with the covenantor/promisor. The first and most common method of creating enforceable rights in a contract in one not in privity of contract is via an express assignment or delegation (transfer) of rights from the individual or entity who is in privity of contract (has enforceable rights) to a third-party or stranger to the agreement.

An assignment of rights is easier to explain. Once the contract or agreement is reached, each party has a legal entitlement or right which it can enforce. In the absence of an express prohibition or the creation

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infra at notes 116-18 and accompanying text, the third-party beneficiary doctrine developed in the middle of the nineteenth century in America.

106. *See* Libby v. Soc'y Nat'l Bank, 651 N.E. 2d 1364 (Ohio Ct. App. 1995) (illustrating that privity of contract arises as a result of a connection or relationship between two parties or legal entities that allows those in the relationship or with the connection to sue each other and prevents third parties from suing on the agreement reached between those parties or entities). The exception to this is the third-party beneficiary doctrine, which is discussed *infra* at notes 116–18 and accompanying text.

107. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (illustrating a factual situation where the parties who are in privity of contract when a restrictive covenant is promulgated are two homeowners who are neighbors or individuals who live in the same community). Today, of course, the restrictive covenant may be made as a result of a bargain reached between the purchasing individual homeowner and the homeowners' association formed as a result of the sale of real estate in a Common Interest Community or CIC. CICs and homeowners' associations are discussed and defined in ALEX M. JOHNSON, UNDERSTANDING MODERN REAL ESTATE § 17.01 et. seq. (4th ed. 2018).

108. Tracing title or establishing a chain of title originating with the covenantee/promisee is addressed *infra* in Part IV.

of an entitlement that is deemed personal to one or both parties,[109] that right or entitlement may be freely transferred.[110] Indeed, the contract may make an explicit reference to the assignability of the right or entitlement through the use of such language as Abel, and his assigns, may purchase Blackacre (real property). However, since the law favors the free alienability of rights, such language is generally unnecessary to create transferable rights.[111] The assignment of rights may be gratuitous or for consideration. Following the assignment, the transferor of the rights is known as the assignor and the transferee of the rights is known as the assignee.[112]

It is hornbook law that "[a] delegation of duties involves a transfer and assumption of a duty to render a performance of a contract by a third party."[113] Thus, a delegation differs from an assignment of rights because it transfers to the third party the obligation to perform as opposed to the receipt of a right or entitlement created by the contract or agreement. Typically, although it is not required, when an assignment of rights occurs it is coupled with a delegation of duties so that the third-party assignee gets both the "benefit" and the "burden" of the original contract or agreement. In effect, when both the assignment of rights and delegation of duties are assigned to the same third party, the entire contract has been assigned.[114]

More difficult to explain is when a third-party can sue on a contract when that party is not in privity of contract and the contract and none of its rights have been expressly assigned by the parties who are in privity of contract. That situation is present when the third-party can claim that he or she is the "third-party beneficiary" of a contract right created by those in privity of contract. The aptly named third-party beneficiary theory is the vehicle by which a stranger to the contract may claim a contractual right at the time of contract formation.[115]

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109. *See, e.g.*, Parker v. Twentieth Century Fox Film Corp., 474 P.2d 689 (Cal. 1971). Take, for example, a contract between an actress (assume a famous actress) and a studio for the actress to perform in a movie that the studio is producing. The actress cannot assign her rights to another actress because the studio has contracted for the performance of the original actress. *Id.*

110. The law favors the transferability or alienability of rights. *See* Cooter & Ulen *Law and Economics* (4th ed. 2004) at 157–63 and DUKEMINIER ET AL., *Property* (10th ed. 2022) at 32–242.

111. See *infra* Part V at notes 257–60 and accompanying text for a discussion of the efficacy of alienability of property or entitlements.

112. *See* JEFF FERRIELL, UNDERSTANDING CONTRACTS § 17.01 (2d. ed. 2009).

113. *Id*. at § 17.01(B) (footnote omitted).

114. *Id*. at § 17.01(C).

115. *Id.* at § 16.01(A). The rights of a third-party beneficiary differ from the rights created in a third party as a result of an assignment, delegation of duties or both. With respect to the assignment or delegation of duties, the third party who is not in privity of contract is vested with some contractual right or obligation after the contract is entered into by the parties that are in privity. With respect to rights created in a third party as a

The case of *Lawrence v. Fox*,[116] established the doctrine of third-party beneficiary. In that case one Holley owed money to the ultimate plaintiff, Lawrence. Holley was a legal debtor who owed money to the creditor, Lawrence. Holley subsequently lent $300 to the defendant, Fox (Holley was the creditor in this transaction and Fox the debtor), and extracted from Fox, as a condition to making the loan, Fox's promise, as debtor, to pay Lawrence (Holley's creditor) the amount that Holley owed Lawrence (presumably $300).

Predictably enough, Fox reneged on his promise to pay Lawrence and Lawrence sued to enforce Fox's promise to Holley. Why Holley did not sue is a mystery lost in the annals of history (the surmise is that these three men were card playing gamblers and that Holley was either no longer in the jurisdiction or he no longer cared about having his obligation to Lawrence extinguished by Fox's payment).[117] However, Lawrence did sue Fox and Fox just as predictably claimed that Lawrence could not sue Fox on Fox's promise to Holley because Lawrence was not in privity of contract with Fox with respect to that promise. The court, eschewing the theory that a trust had been created to benefit Lawrence, found that Lawrence was an intended third-party beneficiary of Fox's promise to Holley and could sue as a result.[118]

Returning to our fact situation involving the creation and enforceability of restrictive covenants, that restrictive covenant arises when Abel makes a promise to Baker (mimicking the facts in *Shelley*) not to sell Abel's property, hereinafter designated as Whiteacre (pun intended), to any person not of the Caucasian race or even more explicitly not to sell the property to a Negro (then) or African-American (now). Putting aside for the moment that the terms Caucasian, Negro or African-American are indeterminate and should have independently

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result of third-party beneficiary theory, those rights arise at the time of formation of the contract. That is, no subsequent act of transfer is necessary to create rights in a third party when one is claiming a right as a third-party beneficiary. *Id*. at § 16.01(C).

116. Lawrence v. Fox, 20 N.Y. 268 (Ct. App. 1859).

117. *See* Anthony Jon Waters, *The Property in the Premises: A Study of the The Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 116–48 (1985).

118. In the terminology of the first Restatement, Lawrence was a third-party creditor beneficiary. That Restatement created three types of third-party beneficiaries, the aforementioned creditor beneficiaries, donee beneficiaries, and incidental beneficiaries. Simply put, creditors of the promisee of the contract are creditor beneficiaries. Donee beneficiaries, on the other hand, are not creditors of the promisee but typically are the intended recipient of a gift (putative donee) and the promisee of the contract is the putative donor. Incidental beneficiaries are those individuals who may gain some benefit from the enforcement or performance of the contract (say, parents of a high school student who returns to school after a strike by the local teachers union after the union ends the strike by entering into a new labor contract with the appropriate municipality), but are not creditors of the promisee (the union in my example) nor the recipient of an intended gift from the promisee (again, the Union). Incidental beneficiaries cannot sue using third-party beneficiary theory. *Id*.

served as the basis for non-enforcement of the promise,[119] and assume that Baker makes the same or reciprocal promise to Abel with respect to the property that he owns (Blueacre), the question arises regarding who can sue to enforce those promises.

Now that we have two promises, one from Abel to Baker, and one from Baker to Abel, and those promises are part of a bargain that supplies consideration, the next important question is who can sue to enforce the promise. Obviously, Abel can sue Baker if Baker enters into a contract to sell Blueacre to a Negro or African-American as Baker can sue Abel if it is Abel selling Whiteacre to an African-American in violation of his promise.

However, in the typical real estate sale or transaction (at the inception of the transfer), there is typically no intent on the part of either the seller, who is divesting herself of title, and the buyer who, along with the bank or mortgagee is lending the funds to purchase the property, to create rights in unnamed third-parties who are not privy to the transaction.[120] Hence, third-party beneficiary theory pursuant to Contract Law is inapposite to creating rights in third parties not privy to the real estate sale in which the racially restrictive covenant has been created and no case has been found holding or finding that a third-party has rights arising from the standard real estate purchase and sale.[121]

The second and more common way one of the contracting parties may transfer some legal right or entitlement created pursuant to the contract is via an express assignment. Examining again the typical agreement in which a racially restrictive covenant is created, when Abel promises Baker not to sell his property to an African-American and receives a reciprocal promise from Baker, when Abel subsequently sells (is the vendor) the property to Cara (the vendee), Abel can expressly assign his benefit as covenantee and his burden (his promise as

119. I have made the argument in several articles that racial classification and racial identification is not biological but is instead a social construct. As such, it is malleable and not capable of precise definition and enforcement. *See, e.g.*, Alex M. Johnson, Jr., *The Reemergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547 (2009).

120. One might think that the mortgagee is a beneficiary of the sale between the vendor and the vendee as a result of the creation of the mortgage. However, that would be inaccurate because the mortgagee's rights are created expressly as a result of the mortgage executed by the vendee upon purchasing the property. The vendor's sale of the property provides the opportunity for a mortgage to be subsequently executed on the purchased property, but the vendor has no intent in selling the property or conferring any benefit on any putative mortgagee. Indeed, the selling vendor normally does not care if a mortgage is executed by the vendee to purchase the property as long as the vendor receives the stated amount for the sale on the date set for closing. The source of the funds to make that happen are irrelevant from the vendor's perspective.

121. One cannot cite to a case in this situation to prove a negative. At best, one can only hope that a case disproving the negative assertion cannot be located or cited.

covenantor) as a delegation of rights (thereby effectuating a complete assignment) when the property is sold. Cara would be the assignee.

However, in the typical residential (and even commercial) real estate transaction, the property is transferred via a deed of which there are three types: (1) general, warranty or English (all synonyms and hereafter referred to collectively as a general warranty deeds) deeds; (2) special warranty deeds; and (3) quitclaim deeds. Without going into too much unnecessary details regarding real estate deeds,[122] suffice it to say that in the normal transactions employing any one of these deeds, the deed contains a set of covenants or promises in the case of general and special warranty deeds[123] and, in the case of a quitclaim deed, only the promise or covenant to convey whatever interest is owned by the vendor at the time of the conveyance to the vendee,[124] nothing more, nothing less.[125]

With respect to all three types of real estate deeds described above, there is no express assignment of any contractual rights that the vendor may have obtained during the time that he or she owned the real property that is being conveyed. Nor can the case be made that there is any implied assignment of any contractual rights owned by the vendor at the time of the conveyance. Hence, there is no reported case or theory[126] that would support the assertion that by making a real estate transfer pursuant to a standard deed (see above), the vendor is also making an express or implied assignment of some or all contractual rights retained or owned by the vendor at the time of the sale of the real property.[127]

Returning to the fact situation in *Shelley*,[128] in both cases that comprise *Shelley,* the parties seeking to enforce the racially restrictive covenant against the seller/vendor selling the property to someone who is not Caucasian were not the original covenantees seeking to sue the original covenantors.[129] In other words, the parties being sued were not in privity of contract with the entity to whom the original promises or covenant was given. Nor can it be shown that the party being sued

122. Johnson, *supra* note 7 at § 14.02, 273–79.

123. *Id*.

124. *Id*.

125. In other words, if the vendor does not own the property, the vendee cannot sue based on any promise or covenant in the deed. There are none. *Id*.

126. Again, it is very difficult to prove a negative by citation to a case. *See supra* note 121 and accompanying text.

127. Indeed, I would hazard a guess that any such claim would be viewed as preposterous by both real estate and contract lawyers and theorists. At least I would view it as preposterous having taught both subjects more than ten years.

128. *See supra* note 1 and accompanying text.

129. Kramer, who was seeking to enforce the racially restrictive covenant, was not the owner of the property when the covenant was created in 1911. *See Shelley*, 334 U.S. at 4–6.

was a third-party beneficiary of the original covenantor's promise not to sell to a Caucasian or was the recipient of an express or implied assignee of that covenantor's obligation.

That state of facts raises an interesting question: How can an individual not in privity of contract be sued to enforce another's promise when the individual being sued is neither a third-party beneficiary or an assignee, either implied or express, of the original covenantor's promise? In short, the answer is the Recording Acts which is addressed in Part IV.[130] And the primary thesis of this Article is that it is only the presence of the State-established and operated Recording Acts that allows (makes licit) the subsequent owner or real property to be sued to enforce a racially restrictive covenant by a stranger to the original agreement or contract.[131]

B. Servitudes: Turning to Property Law to Explain Racially Restrictive Covenants

However, before the conundrum that is *Shelley v. Kraemer*[132] can be unraveled, yet another puzzle must be addressed: how is it that a promise made by Abel and a reciprocal promise made by Baker can survive the sale of the property by either or both parties which, had it occurred, would make performance of the promise impossible after their respective transfers? Just as importantly, what are the temporal limits of such a promise assuming no sale or a subsequent sale or transfer of the property? How can Abel's promise be enforced decades after Abel sells the property and perhaps even several decades after Abel's death? To answer these and a host of other related questions one must have some rudimentary knowledge of servitudes, that is, how they are created, how long they last, and who is affected or impacted by the creation of servitudes.

The answer to this puzzling, enigmatic question lies not in Contract Law, but in Property Law. Property Law has established a doctrine that transforms a personal covenant or promise that binds only the covenantor/promisor into a promise that is "attached"[133] to the land and not the covenantor and results in the covenant running with the land[134] to bind (make enforceable against) third parties who were not

130. *See infra* Part IV.
131. *See infra* Part V.
132. 334 U.S. 1 (1948).
133. "Attached" means that the promise is more than just a personal promise made between the covenantor and the covenantee. Under the Property Law principles discussed *infra* regarding the creation of equitable servitudes, once a promise is attached to the land, the land and anyone who subsequently owns the land becomes the equivalent of the principal obligor with respect to the promise made by the original covenantor.
134. "Running with the land" or "runs with the land" are synonyms and if treated singularly is a term of art and means that any subsequent owner of the property that is

in privity of contract when the covenant was made. Those third parties who are bound (limited) by the original covenantor's promise are bound by that promise as a result of their status as the owner of the property that was originally bound by the covenantor who made the promise.

In other words, the promise, when made by the covenantor, not only binds the covenantor, it metaphorically "attaches" to the land and binds anyone who subsequently becomes the owner of the property irrespective of the lack of privity between that party and the covenantee or the covenantee's successors.[135] To ascertain how all this is accomplished in Property Law, a brief historical detour is warranted. At Common Law, during the Industrial Revolution, which took place in the nineteenth century, contract rights and duties were not assignable.[136] As a result, one not in privity of contract (party to the contract) could not sue to enforce any obligations arising from that valid contract.[137]

At English Law there was one exception to this rule: when the covenantor and the covenantee were in *privity of estate*.[138] When *privity of estate* was found, certain promises (those that "touch and concern"[139]) made by the covenantor were enforceable against the covenantor's assignees or successors by the covenantee or the covenantee's assignees or successors. In English Law at that time, the promises made when *privity of estate* was present were not mere covenants, they were deemed to be "Real Covenants."[140] These Real Covenants allowed parties to bind those not party to the contract. The key questions, of course, are when is *privity of estate* established and, secondly, which class of promises are deemed to attach to the land when the parties are in *privity of estate*—which promises touch and concern—and which are deemed personal and, therefore, not establishing a Real Covenant even though *privity of estate* has been established.

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the subject of the covenant or promise is bound to perform the covenant solely as a result of that parties' ownership interest in the land.

135. As will be addressed *infra* at note 148, when an equitable servitude is created that runs with the land, there is both a benefitted and burdened side with respect to the covenant made by the covenantor. The burdened side consists of any subsequent owner or successor of the original covenantor with respect to the land that the promise has attached to per the doctrine of equitable servitudes. Conversely, the benefitted side consists of any successor in interest or subsequent owner of the land of the covenantee. That successor in interest or subsequent owner of the benefitted land can sue the original covenantor or any successor in interest or subsequent owner of the land of the original covenantor to enforce the covenant.

136. *See* Perillo, *supra* note 101 and accompanying text.

137. DUKEMINIER ET AL., PROPERTY SUPRA NOTE 110 AT 893 (9th ed. 2018).

138. *Id*.

139. Touch and concern is, again, a term of art designating which class of promises are covenants run with the land to bind remote assignees and grantees. It is discussed more fully in connection with the development of equitable servitudes. *See infra* notes 161–66 and accompanying text.

140. DUKEMINIER ET AL., *supra* note 110, at 893.

Originally, the answer to the first question was quite simple, in England *privity of estate* could only be established if the covenantor and the covenantee were in a landlord-tenant relationship at the time the covenant was created.[141] Thus, certain promises—those that touch and concern—made between lessor and lessee establish Real Covenants. In the United States, that relationship also establishes *privity of estate* in order to create Real Covenants.

However, the United States "Common Law"[142] expanded the relationships in which *privity of estate* could be established. In the United States there are two alternative methods for establishing *privity of estate*. The first and least complicated method to establish *privity of estate* is by establishing that the covenantor and covenantee are in a grantor-grantee relationship.[143] The rarest and most complicated relationship establishing *privity of estate* requires that the covenanting parties must, before the covenant or covenants are exchanged, have a mutual interest in their respective properties. Thus, if the covenantor already has an easement to traverse the covenantee's land and the promise is of a certain type to "run with the land," they are in *privity of estate*.[144]

With the expansion of the definition of the relationships that suffice to create *privity of estate*, it is very easy to create *privity of estate* between, say two neighboring landowners who wish to establish or create a Real Covenant.[145] Yet, notwithstanding the ease with which *privity of estate* can be established in the United States,[146] there are almost no cases involving the enforceability of a Real Covenant.[147]

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141. *Id*. Technically speaking, it is the lessor's reversionary interest following the expiration of the term of the leasehold that connects the lessor's rights in the land with the tenant's right to possession that establishes *privity of estate* between the lessor. *See supra* notes 104–07 and accompanying text.

142. Here I am referring to various state court opinions in the United States defining *privity of estate*. *See Privity of Estate*, BLACK'S LAW DICTIONARY (Revised 4th ed. (1968)).

143. DUKEMINIER ET AL., *supra* note 110, at 893. This is called a successive relationship or successive privity. *Id*. at 895.

144. This is called mutual privity as compared with successive privity or landlord-tenant *privity of estate*. *Id*.

145. If, for example, grantor-grantee *privity of estate* is required to create a Real Covenant and the parties are not in a grantor-grantee, a grantor-grantee can subsequently be created by conveying both tracts of land to a straw person (third-party) who then conveys one of the tracts to one of the parties with the covenant appended. The other tract is then conveyed to the other party. If mutual *privity of estate* is required to establish a Real Covenant, one party should be advised to grant an easement of one inch over the other's land before the covenant is made in order to establish mutual interests in the affected parcels. *Id*.

146. *See id*. (describing grantor-grantee privity of estate and mutual and successive privity of estate).

147. *See, e.g.*, Sloan v. Johnson, 491 S.E.2d 725 (Va. 1997) (holding that the servitude is a real covenant). See DUKEMINIER ET AL., *supra* note 110, at 840–84, for a discussion on real covenants.

Real Covenants are not used to enforce servitudes or covenants involving real property for two reasons. First, and of lessor importance, is the fact that once *privity of estate* is established and a promise is made that touches and concerns the land and therefore runs with the land, the party seeking to enforce the promise must establish that there is, what we law professors call, horizontal and vertical privity.[148]

But even assuming the concepts of horizontal and vertical privity are understood and met, Real Covenants are not used to enforce restrictive covenants or servitudes because of the remedy granted if the Real Covenant is breached. Since the action to enforce a Real Covenant was enforced at Common Law on the law side of the court (not in equity), the remedy provided for a breach was and is damages.

As discussed below,[149] this remedy is vastly inferior to the equitable remedy of an injunction to enforce an equitable servitude. That fact, coupled with the ease by which one establishes an equitable servitude,[150] makes the equitable servitude the much more preferable cause of action. And it is to that concept that I now turn. Given the complexity inherent in creating and enforcing a Real Covenant, it is unsurprising that the Equitable Court would come up with a solution to the intractability of Real Covenants while providing a cause of action and remedy that was and is fair and just.

In the canonical case of *Tulk v. Moxhay*,[151] the English Court of Chancery was faced with a case in which three covenants[152] were made by a grantee to a grantor when property (property that now comprises Leicester Square in London) was transferred from the grantor (Tulk) to the grantee (Elms). Just as importantly, the deed of conveyance contained the language that the three covenants made by Elms were made "by Elms, for himself, his heirs, and assigns with [Tulk], his heirs, executors and administrators. . . ."[153] Eventually, Elms transferred the property to Moxhay who knew of the covenants made by his predecessor in interest, Tulk. Nevertheless, Moxhay decided to build on the property in violation of his predecessor's promise to maintain the square as an "open garden" and claimed he had the right to do so.

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148. The concepts of horizontal and vertical privity are highly technical and depend on whether the party being sued succeeds to the benefit (positive) of the promise or the detriment (negative) of the promise. If you are really interested in pursuing the subtle and highly technical requirements of when horizontal and vertical privity are required and met, *see* DUKEMINIER ET AL., *supra* note 110, at 895.

149. *See infra* notes 176–80 and accompanying text.

150. *See infra* notes 152–75 and accompanying text.

151. (1848) 41 Eng. Rep. 1143 (EWHC (Ch)).

152. The three promises were: 1) to maintain the square in proper repair (an affirmative covenant); 2) to maintain the square in its current open condition (a negative covenant); and 3) to provide the inhabitants of adjacent property access to the property (an easement created in third parties). *Id*.

153. *Id*. (emphasis added.)

The Lord Chancellor, concerned with the equity inherent in the situation, noted the unfairness of the situation if Moxhay was allowed to violate his predecessor's promise knowing full well that the promise had been made and relied upon by the seller, Tulk, in selling the property to Elms. As a result, the Chancellor held that Moxhay and anyone subsequently in the position of Moxhay could be sued successfully to enforce his predecessor's promise or covenant[154] as long as three requirements are met and proven by the party seeking to enforce the promise previously made. Those three requirements are *intent, touch and concern, and notice*. Each will be addressed in turn.

Intent is relatively easy to explain. Since adjacent landowners or neighbors might make many promises over the many years they are neighbors,[155] there has to be a way to distinguish promises that are personal to the promisor and promisee (only enforceable by and between those in privity of contract[156]) and those that can be enforced against subsequent purchasers of the real property originally owned by the promisor. The first place to begin is with intent. The party (assuming it is a subsequent promisee) seeking to enforce the promise against the original or subsequent promisor (by the original or subsequent promisee) must show (prove) that at the time the promise was made from the promisor to the promisee that the parties intended the promise to be enforceable against those not in privity of contract at the time the promise was made.

Thus, the fact that Elms on behalf of himself and "his heirs and assigns" proves that the promise that Elms made was not meant to bind only Elms, it also meant that Elms intended to bind his subsequent purchasers of the property who are deemed the "heirs or assigns."[157] That demonstrates an express intent on the part of the promisor, Elms, that Elms' successor in ownership interest of the property would also

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154. Technically, the predecessor in interest must be in the landowner's chain of title. *See infra* Part IV.

155. A neighbor may promise to watch his neighbor's house while the owner is away. Does that mean the neighbor-covenantor must always watch the neighbor's house when the neighbor is away? Nor does it mean that when the promisor sells to a buyer that the subsequent buyer must also watch the neighbor's house when the neighbor is on vacation years later.

156. *See* DUKEMINIER ET AL., *supra* note 110, at 840–43.

157. It is important to note at this point that by using the magic words "his assigns" that Elms was not making an assignment at that time to any person not in privity of contract when the promise was made. As discussed, an assignment, or in this case a delegation of rights, occurs in a post-contractual setting when the original obligor transfers the obligation to another person or entity. *See* Perillo, *supra* note 101 at § 18.01, 602–04 and accompanying text. Clearly no assignment is made by Elms simultaneously at the time of contracting. Nor is an express assignment made to Moxhay when Elms several years later sells to Moxhay as no words of assignment of the obligation are made by Elms as part of the sale and no words of acceptance of the obligation, which is necessary for the delegation of rights, are made by Moxhay to Elms.

be bound based on the promise that Elms made to Tulk. And that takes us to the second and perhaps most difficult requirement: touch and concern.

Consequently, even if the parties intend that the covenant will bind and benefit remote grantees (in this instance the party seeking to enforce the original promise and the person against whom enforcement is sought are, or were, grantees from the original promisor and promisee), not all such promises will bind the remote successor in interest who is being sued as the promisor to enforce the original promise. Because land or real property is in limited supply (society cannot grow more land) and is a very valuable resource (given its permanence and immobility), there are valid public policy reasons why restrictions on the alienability of the transfer of real property are limited.[158] Restrictive covenants, especially restrictive covenants that preclude the sale of real property in some fashion have the ability to restrict the alienability of real property.[159]

As a result, the court laid down a second requirement for the enforceability of equitable servitudes beyond the mere intent of the parties. The Chancellor in *Tulk* said only those promises that "touch and concern" have the capability of being enforced as an equitable servitude.[160] Although the determination of which promises touch and concern, and which do not, is somewhat subjective and incapable of definitive formulation, over time courts developed a basis for determining which promises touch and concern which was formulated and articulated in the important case of *Neponsit Property Owners' Association, Inc. v. Emigrat Industrial Savings Bank*.[161]

In *Neponsit,* the court laid down the following test to determine whether a promise or covenant touches and concerns:

> It has been suggested that a covenant which runs with the land must affect the legal relations—the advantages and the burdens—of the parties to the covenant, as owners of particular

158. *See* DUKEMINIER ET AL., *supra* note 110, at 232–34.

159. *Id*.

160. The fact that a promise does touch and concern the real property does not mean that the promise is inherently valid and enforceable. There may be numerous reasons why such a promise that touches and concerns is still not enforced. For example, the restriction, albeit, a partial restraint on alienability, may be too severe limiting the number of individuals who are able to purchase the property. *See* Mountain Brow Lodge No. 82, Indep. Ord. of Odd Fellows v. Toscano, 64 Cal. Rptr. 816 (Cal. Ct. App. 1967) (invalidating restrictive covenant limiting the rights of the seller to sell the property); s*ee, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 21–23 (1948) (illustrating that a promise may meet all the requirements of a valid equitable servitude but nevertheless be held to be unenforceable when it is a racially restrictive covenant). See *infra* Part V, for a discussion in greater detail.

161. 15 N.E.2d 793 (N.Y. 1938).

> parcels of land and not merely as members of the community in general, such as taxpayer or owners of other land.[162]

The court went on to cite language in a law review article written by Professor Bigelow in which the so-called "Bigelow Test" for determining whether a covenant touches and concerns is summarized as followed:

> [I]f the covenantor's legal interest in land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern land. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenant's performance, then the benefit of the covenant satisfies the requirement that the covenant touch and concern the land.[163]

The Bigelow Test, articulated by the court in *Neponsit,* has been criticized as circular and tautological by numerous commentators, most notably Professor Krier.[164] It is circular and tautological for two important reasons. First, the test is circular because if the promisor's covenant affects the promisor's legal relations (makes the promisor's interest in the land less valuable), the covenant by its definition touches and concerns. On the other hand, if the covenant touches and concerns, the covenant affects the promisor's legal relations (makes the promisor's interest in the land less valuable).

It is the later determination by the court that the promise touches and concerns that results in the promisor's interest in the land being made less valuable. Conversely, if the court later determines that a promise does not touch and concern, the promisor's interest in the value of the land is unaffected. Second, and as a result, the test does not identify which promises touch and concern. The court's later determination regarding the enforceability of the promise against successors in interest is what determines whether that interest is made less valuable and the Bigelow Test does not articulate a test that rationally demarcates those promises that do affect the value of land and those that do not.

A better test to determine whether a promise touches and concerns was put forth by Professor Krier in his book review of Richard Posner's legendary book, *Economic Analysis of Law*.[165] In brief, Professor Krier reviews and summarizes Judge Posner's contention that a better method to determine if a promise or covenant touches and concerns is to ask whether two rational landowners, substituted for the

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162. *Id*.

163. MICHAEL ALLEN WOLF, POWELL ON REAL PROPERTY § 60.04[3][a] (Michael A. Wolf gen. ed. 2009), *reprinted in* DUKEMINIER ET AL., *supra* note 110, at 913 n.39.

164. James E. Krier, *Book Review*, 122 U. PA. L. REV. 1664, 1679–80 (1974).

165. *Id*.

original promisor and promisee, would, in the absence of transaction costs, make the same promise or deal regarding the land at issue? If the answer is more than likely yes, then the promise touches and concerns. However, if the promise made or received is idiosyncratic to the identity of the original promisor or promisee, then the promisee does not touch and concern.[166]

Albeit a better test, it does not really matter whether one uses the Bigelow Test, or the test put forth by Judge Posner, to determine whether a covenant touches and concerns when addressing restrictive covenants limiting the alienability of the property at issue.[167] There is overwhelming support for the conclusion that such a covenant restricting the sale of land is a promise that touches and concerns and there has been no successful litigation contending that it does not.[168] Hence this requirement, touch and concern, like the requirement that the parties intend the promise to run to benefit and bind remote grantees, is usually easily met and not a serious issue as it pertains to restrictive covenants.

Of course, it seems supremely unfair to bind a successor of Elms when that successor or subsequent owner of the property is unaware of that obligation at the time he or she purchases the property many years later. Hence, the third (at least in my iteration), and some would contend the most important requirement that the promisee must demonstrate in order to enforce the promise against the promisor, or the promisor's successor in interest, is that the person against whom enforcement is sought must have notice[169] of the original promisor's promise and that promisor's intent that any successor in interest will also be bound by the promise. Of course, if the original promisor is being sued by a successor in interest to the original promisee,[170] the original promisor has Notice of the promise having made the promise to the promisee. In *Tulk v. Moxhay*,[171] notice was not an issue because

166. Posner uses as an example a promise made by a famous painter to a vain neighbor to annually paint a portrait of that neighbor. He contends that if either the identity of the promisor or the promisee changes, that same promise would not be made going forward. *Id*. Hence, the promise by the artist does not touch and concern.

167. *See supra* note 158 and accompanying text.

168. *See* ALEX M. JOHNSON, UNDERSTANDING MODERN REAL ESTATE § 16.01 et. seq. (4th ed. 2018).

169. There are three types of notice recognized by American courts: actual, constructive or record, and inquiry. *See infra* Part IV. The focus in this Part is on actual notice given the facts in *Tulk v. Moxhay* (1848) 41 Eng. Rep. 1143 (EWHC (Ch)).

170. If the original promisor is being sued by the original promisee, that is the two parties who are in privity are the parties in interest, there is no need to address principles other than Contract Law principles regarding the enforceability of the promise because those two parties were and are in privity of contract. *See supra* notes 156–58 and accompanying text.

171. *Tulk v. Moxhay* (1848) 41 Eng. Rep. 1143 (EWHC (Ch)).

Moxhay admitted that he knew of Elms' earlier promise when he purchased the property.[172]

Problems arise, however, when the original promisor is not being sued and there has been no communication between the original promisor and the successor in interest who is being sued, and who may have purchased the property several decades after the original promisor initially sold the property. Given this fact situation, it will be well-nigh impossible for the person seeking to enforce the original promise to prove that the successor in interest who is being sued has actual notice of the original promisor's promise made several decades earlier. Given the three types of "notice"[173] recognized by American courts,[174] the successor in interest may have constructive or record notice of the promisor's original promise, only if that promise is properly recorded.[175]

In the United States, if a remote grantee is sued to enforce a restrictive covenant like the one at issue in *Shelley*, the odds are more than likely that sufficient notice to satisfy the requirement of a valid and enforceable equitable servitude will be met because the successor in interest to the promisee will have record or constructive notice of the existence of the restrictive covenant made by the predecessor in interest. That promise restricting the use of land will be in the remote grantee's chain of title, and that remote grantee will be presumed or charged with that notice of the promise and its binding effect on the successor in interest with respect to his or her ownership interest in land because that original promise was recorded.

Consequently, because the promise or covenant was recorded, what was initially a contract created between a promisor and promisee validly made with consideration and enforceable against each party (assuming a bilateral contract),[176] is now a promise, an equitable servitude, that can be enforced against successors in interest or remote grantees who: (1) are not in privity of contract[177]; (2) who are not

172. *Id*.

173. *See supra* note 90 and accompanying text.

174. *See infra* Part III and note 184 (England did not have a Recording Act until 1925).

175. Given that restrictive covenants that are the subject of this Article are typically negative in nature, that is, forbidding the original promisor from doing something he or she was lawfully entitled to do, no act or action would be taken by the original promisor that would trigger inquiry Notice. See infra notes 196-200 and accompanying text for a discussion of inquiry Notice. Affirmative covenants, on the other hand, that require the promisee to do something typically will provide at least an inquiry into whether inquiry Notice is applicable (pun intended).

176. *See supra* notes 88–103 and accompanying text (discussing the requirement of consideration and note 102 for a discussion of unilateral versus bilateral contracts).

177. *See supra* notes 156–58 and accompanying text (discussing privity of contract principles).

third-party beneficiaries of the original covenanting parties[178]; and (3) without an express assignment or delegation of rights.[179] What begins as a simple contractual arrangement creating enforceable contract rights morphs into the equivalent of a *property right*[180] entitled an equitable servitude bestowing benefits and burdens on parties not privy to the original contract.

A close examination of the requirement necessary to create an enforceable equitable servitude reveals that two of the three requirements for the creation of an enforceable equitable servitude are exogenous to the successors in interest of the original promisor and promisee. The "intent of the parties" requirement which must be met at the time the promises are met or exchanged are made many years before the successors in interest appear on the scene, and therefore there is nothing the successors in interest can do later to negate that intent or requirement.

The requirement that the promise touch and concern is decided by the courts and cannot be unilaterally impacted by the successors in interest to the original promisor and promisee. The only requirement that can be negated by the successor in interest to free the land from the equitable servitude is proof by the successor in interest that no actual, inquiry, or record, notice has been imparted to that successor in interest. And since actual and inquiry are largely factually irrelevant in this setting,[181] in most cases if the successor in interest can show or demonstrate that there is no record notice, the successor in interest can defeat the claim that an enforceable equitable servitude has been made and affects the use or transferability of that property subject to same. Hence, the Recording Acts play a pivotal role in the operation and enforceability of equitable servitudes like the restrictive covenants at issue in *Shelley v. Kraemer.*[182]

178. *See supra* notes 116–18 and accompanying text (discussing third-party beneficiary theory in Contract Law).

179. *See supra* notes 100–15 and text accompanying (discussing the assignment and delegation of contractual rights).

180. As will be addressed in greater detail *infra* in Part IV, because equitable servitudes are enforceable via an injunction and other equitable remedies, *see* Johnson *supra* notes 107 at Section 16.04, 312, rather than damages, the beneficiary of an equitable servitude has a property right that cannot be compensated (bought off) with damages and creates a right that is enforceable at the sole discretion of the holder or owner of the right. In essence, Contract Rights, like that between the original covenantor and covenantee, are enforceable by the courts with the court adjudicating the damage or harm to the offended party whereas Property Rights are enforceable solely by the party owning that entitlement. *See* Robert Cooter & Thomas Ulen, *Law and Econ*. 99–107 (4th Ed. 2007).

181. *See infra* notes 219–28 and accompanying text (discussing notice imparted by recording the restrictive covenant).

182. *See generally Shelley*, 334 U.S. 1.

IV. RECORDING ACTS: THE KEY TO ENFORCEABLE EQUITABLE SERVITUDES AND STATE ACTION

To understand what record notice consists of and why successors in interest to the original promisor and promisee are bound thereby, a basic but brief primer in Recording Acts is the necessary place to begin. First, Recording Acts are present and used in all fifty-one United States jurisdictions.[183] Second, Recording Acts are a uniquely American invention and not the product of English Common Law. America did not inherit Recording Acts, the English copied American Recording Acts when they finally embraced Recording Acts in 1925.[184]

Recording Acts are vitally important to the operation of both the commercial and residential real estate markets. Recording Acts have a dyadic impact on the real estate market when real property is sold. First, Recording Acts may impact those who have interests that antedate the interest of the party who recorded their interest in the real property. In other words, it can negatively impact those whose interests are prior to the recording party. Second, and more importantly for the thesis of this Article, Recording Acts can negatively impact those whose interests postdate the recording party's interest. Simply by recording, the recording party, as a result of the operation of the Recording Acts, can alter rights of those whose interest in the property may arise decades, or even centuries, after the recording party records.

To understand, first, the effects that Recording Acts may have on interests that antedate the recording party, the place to start is with the Common Law and what happens in the absence of an applicable interest that is recordable. In other words, examine a situation assuming the absence of Recording Acts. At Common Law, both in England and the United States, when a property interest is transferred from the grantor to the grantee, i.e., fee simple title in a warranty deed,[185] the grantee is deemed the owner as a result of the transfer and the grantor no longer has an interest in the property.

Hence, if the original grantor attempts to make a subsequent conveyance to a third party later with respect to the same property, that transfer will be invalid because the grantor, having conveyed the property to the prior grantee via the deed, no longer has any interest in

183. *See* DUKEMINIER ET AL., *supra* note 110, at 676.

184. *Id*. at 661–62. In 1925 British Parliament adopted the Law of Property Act and the Land Registration Act which ushered in the modern registration system for land ownership in Britain. *See* Law of Property Act 1925, c. 20 (UK).

185. Fee simple title means absolute ownership of the property with no other future interests encumbering the property. *See* DUKEMINIER ET. AL. *supra* note 110 at 272. A warranty deed is a deed containing full, general, or English covenants of title. See *supra* note 172 and text accompanying for a discussion of the different types of deeds used in conveying real property.

that particular piece of property.[186] This is referred to by Property professors as the "first-in-time rule," and what it means is the person or entity who can prove that they qualify as first-in-time will prevail against someone who is temporally subsequent in time with respect to a grantor who has made multiple conveyances of the same real property. Consequently, in the absence of the operation of Recording Acts, the party who is first-in-time will be regarded as the owner of the property and rebuff any claims made by anyone who is subsequent temporally.

The Recording Acts can alter the first-in-time rule if the person who is subsequent temporally can qualify (meet the requirements) under the applicable Recording Act.[187] The first and most obvious requirement to qualify under an applicable Recording Act is that the party seeking protection or superiority via same must show that they qualify as subsequent. Second, in all jurisdictions with respect to the transfer of the fee or title to the property,[188] the party seeking protection pursuant to the applicable Recording Act must show they gave value.[189] In other words, the subsequent party must show that it qualifies as a bona fide purchaser for value and, as a result, that the transaction was not donative.

Third, and finally, the qualifier per the applicable Recording Act (the subsequent party) must show that it properly recorded their interest in the subject property. Properly recorded, first, means that the person seeking to qualify per the applicable Recording Act must have a recordable interest in the applicable property. Certain interests in land can only arise or be transferred by operation of law, and therefore

186. This assumes, of course, that the original grantee has not reconveyed the property to the original grantor in which case the original grantor would be the owner of the property as a result of the reconveyance and able to make a valid conveyance.

187. *See infra* notes 191–202 and accompanying text (discussing the three types of Recording Acts).

188. I note at this point that for some recordable interests in land value does not have to be given. Indeed, it should also be noted at this point that throughout the remainder of the Article I will be referring to a transfer of a fee simple interest in the property (ownership) and not the transfer of a lessor interest such as a leasehold or mortgage. In many states, due to the influence of banks and other commercial lenders, mortgagees can often qualify or attain the status of a party protected by the Recording Acts by meeting less stringent requirements than non-mortgagees. *See* DUKEMINIER ET AL., *supra* note 110, at 698–99 (noting that in many Notice and Race-Notice jurisdictions, lien priority is accomplished via pure Race principles).

189. The concept of "value" or "giving value" as it pertains to the Recording Acts is not as defined or certain like the requirement that one be subsequent. Since land is by definition unique, one cannot uniformly place a viable objective value on real property being sold or conveyed. *See* Anthony Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978). At best, giving appropriate value means that to qualify under the Recording Act, the qualifier must give more than nominal value (i.e., $100.00) for an acre of improved real property. It does not mean, however, that a qualifier must show the value given was fair market or the best value. *Id*. What the courts appear to be looking for is an arm's-length transfer which is not donative in nature in validating the subsequent purchaser as giving value. *See, e.g.*, Johnson, *supra* note 107 at § 15.04.

are not recordable. A case in point is title acquired via adverse possession.[190] The adverse possessor's ownership interest is not a recordable interest and arises because of the adverse possessor's possession of the subject property for a period of time specified by statute or judge-made law in the jurisdiction.[191] Assuming the interest owned by the subsequent party is recordable, in almost all jurisdictions, an instrument must be notarized or acknowledged in order to be validly recorded.[192] If the subsequent party meets all these requirements (gives value, is subsequent and has a recordable interest), that interest is superior to that of the prior purchaser because that subsequent party complied with the mandates or requirements of the applicable recording act.

Before turning to the impact and effect that the Recording Acts have on those who acquire an interest subsequent to the interest of the recording party, an analysis of the various types of Recording Acts is necessary to determine how they operate to provide Constructive or Record Notice. Recording Acts are grouped into three types. The first and easiest to explain (and the least used) are so-called Race Statues. With Race Statutes, the first party to record their respective interest prevails over a later party.

What this means is that inquiry and actual notice is irrelevant for the resolution of whether a party whose interest is subsequent to the recording party's interest prevails over the prior recorded party's interest. By recording first, the prior party's interest is superior to the later party's interest solely as a result of the prior recording. Hence, that prior recording provides constructive or record notice of the prior recorder's interest and establishes its superior right merely because it was recorded first (prior in time).

If that prior recorded deed or interest contains a racially restrictive covenant (as well as any other covenants that touch and concern the land), the subsequent purchaser has constructive or record notice of that covenant and, per requirements laid down by the Chancellor in *Tulk v. Moxhay*,[193] is bound thereby if the original covenanting parties intend successors in interest to be bound.[194] What is salient for Race jurisdictions is that the subsequent party's actual or inquiry notice or knowledge of the restrictive or other covenant is not relevant to the

190. *See* DUKEMINIER ET AL., *supra* note 110, at 73–97.

191. *Id*.

192. *Id*. There are some other more obvious requirements to prove than an interest in real property has been validly recorded. The recordable interest must be recorded in the county in which the property is located and if the property is located in more than one county, it must be recorded in all such counties.

193. *Tulk v. Moxhay* (1848) 41 Eng. Rep. 1143 (EWHC (Ch)).

194. See *supra* notes 154–56 and accompanying text (discussing the tripartite test laid down in *Tulk* to establish an enforceable equitable servitude).

disposition of any issue between the prior recorded owner's interest in the land and the subsequent owner's interest in the land.

What is solely relevant is whether the prior interest was recorded before the subsequent interest. If so, the prior interest prevails. If not, and the subsequent interest is recorded before the prior interest, then the subsequent interest prevails and is superior (takes free from the prior interest). With respect to racially restrictive covenants, this means is that if A promises B not to sell to anyone other than a member of the Caucasian race and that transaction or covenant is not recorded, if A sells the racially restrictive property to C and C records his or her transaction or deed before A's covenant to B is recorded, C is not bound by the covenant and can sell to someone not of the Caucasian race.

Moreover, A can sell to a "Negro" even if A informs C of the racially restrictive covenant by showing the purchaser, C, a copy of the covenant providing actual notice of the existence of the covenant. Consequently, it is only through recording (to be more precise, recording first or prior to the subsequent interest) that a racially restrictive covenant may be enforced against a subsequent purchaser or successor in interest of the original promisor establishing the existence of the racially restrictive covenant.[195] The only thing that matters in this fact situation is whether C's conveyance is of record (recorded first) before the A to B covenant is recorded.

Notice statutes represent the second type of Recording Act used in approximately half of the jurisdictions in the United States. Notice statutes, as the name implies, focus on the subsequent party's "Notice" or knowledge of the prior transaction or event creating the interest in the land that predates the subsequent party's interest. If the party with the subsequent interest, C in the example above, can demonstrate that it had no Notice of the A to B covenant at the time it gave value (purchased) for the property,[196] and meet the other requirements of the Recording Act (give value, be subsequent, and have a properly recordable interest), then C's interest will prevail over B's interest. This is true even if C does not record immediately and B records before C

195. In order to have any success in enforcing a racially restrictive covenant against one not privy to the origination of the same, the promisee or successor in interest to the promisee must rely on the operation and effect of the applicable Recording Act which is created and maintained by the State. *See infra* Part V.

196. The critical time to analyze whether one has notice of earlier events or interests in the property is when value is given, when the property is purchased, because that is the time at which the subsequent party will verify the ownership status and interests in the property. It makes no sense for the individual who will ultimately purchase the property before they are willing to buy because events occurring later but before the value is given can detrimentally impact the value of the property. It also makes no sense for C in our example to verify the ownership interests affecting the property after value is given because if something is discovered it is too late to do anything about it. *See* DUKEMINIER ET AL., *supra* note 110, at 698–99.

records.[197] Of course, C has an incentive to record, because if C fails to do so, one subsequent to C may later be able to claim that they purchased without any notice of either B or C's interest and therefore they take free of that interest.

Hence, in notice statute jurisdictions the key fact is what imports notice to someone when there is a racially restrictive covenant that has been placed on the promise due to a covenant agreed upon by A and B. As discussed previously, there are three types of notice: record or constructive, actual, and lastly, inquiry notice.[198] It is important to note that since racially restrictive covenants impose no physical or visible limitation on the restricted property, inquiry notice is irrelevant in establishing the validity of such covenants.

Moreover, those who own the burdened or servient tenement have little or no incentive to tell a buyer who is allegedly precluded from purchasing the property that they are precluded from doing so and will have to subsequently convey the property to someone of the Caucasian race. Hence, it is hard to fathom a situation in which a prior promisor has an incentive to actually notify a subsequent purchaser that the property is somehow restricted.

Further, since the identity and racial characteristics of the purchaser only become salient to neighbors and others who are the beneficiaries of the racially restrictive covenant, there is little or no way for those owners to notify the prospective purchaser of color that they are purchasing the property in violation of the racially restrictive covenant. Hence, it is an impossibility to show that the subsequent purchaser of the property had actual notice (was told of the existence of the covenant).[199]

The only viable method by which notice of the racially restrictive covenant is imparted to subsequent purchasers or successors in interest which may therefore bind them to the enforcement of said covenant is via a recording of that restrictive covenant in the triad of jurisdictions with Recording Acts: Race, Notice, and Race-Notice. It is only

197. In a Race Statute jurisdiction, B would prevail in this situation since B won the "race" by recording before C. C obviously has an incentive to promptly record in order to preclude that from happening in a Race Statute jurisdiction. *Id*.

198. *Id*.

199. I suppose it is possible that signs can be placed on each parcel of property that it may be purchased and occupied by Caucasians only so that even if the land that is the subject of the purchase has no sign (which it would not if the seller is selling to someone who is not Caucasian), the fact that such signs appeared on neighboring property would prompt some sort of inquiry on the part of the non-Caucasian purchaser, thus satisfying the requirement of inquiry notice leading to actual notice. For a discussion on inquiry notice, *Id*. at 715–16. Although possible, there is no reported case that refers to any such signage being used to impart notice to subsequent purchasers of the racially restrictive covenant. Nor is there any reported community that has signs on property limiting the ownership or use of said property to Caucasians.

through the operation of one of these three acts that an equitable servitude can be enforced.

Race-Notice Statute jurisdictions combine the elements of a Race statute and a Notice statute jurisdiction. Thus, in order to prevail in a Race-Notice jurisdiction, the party who is subsequent must demonstrate that, at the time they gave value for the property, they had no Notice of the preceding interest **and** they must first duly record. Without going into too much repetitive detail, in the several jurisdictions that employ a Race-Notice statute, C, in order to prevail over B in the hypothetical above, must again show that at the time of purchase there was no notice imparted regarding the existence of the covenant **and** subsequently record that interest before B records his interest.[200] C has to satisfy both prongs of the Race-Notice statute in order to alter the Common Law priority of first-in-time.[201]

Again, what is important to note with respect to Race-Notice Statute jurisdictions is that like Race and Notice Statute jurisdictions, what determines whether B has an enforceable racially restrictive covenant against a successor in interest like C, is whether B has recorded his or her interest before the successor in interest, C, gives value for the property. If the answer is no, then pursuant to the Recording Acts in all three jurisdictions, the racially restrictive covenants cannot be enforced as an equitable servitude.

V. A COHERENT THEORY OF STATE ACTION

To be clear, neither *Shelley*[202] or *Shapira v. Union National Bank*[203] contains a claim that the State has enacted a statute or law that discriminates against someone who is a member of a constitutionally protected class.[204] Although some statutes early in the Twentieth Century attempted to maintain racially segregated neighborhoods through restrictive zoning ordinances precluding members of the Negro race from moving into certain (what would then be and remain) white only communities,[205] those statutes were correctly deemed unconstitutional as impermissibly discriminatory State Action.

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200. B could, of course, tell C about the existence of the covenant before C gives value for the property but, as addressed previously, this is unlikely given that B will not know of the existence of C until after C has given value. At that point in time, the fact that B alerts C to the existence of the covenant is irrelevant. B's only recourse then is to win the race by recording before C.

201. *See* DUKEMINIER ET AL., *supra* note 110 at 668–69.

202. 334 U.S. 1 (1948).

203. 315 N.E.2d 825 (Ohio C.P. 1974).

204. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 J. CONST. L. 225 (2002).

205. *See* Harmon v. Tyler, 273 U.S. 668 (1927).

There is no claim that the probate process mandated by state statute requires a decedent to leave the estate's property to someone of a particular religious faith. Nor does the probate process mandate that the estate property not be left to parties based on religious faith. Similarly, no one can make the claim that in the *Shelley* fact situation and similar cases,[206] that the government, at the state or local level, was involved in the promulgation or implementation of the racially restrictive covenant. The conundrum that is *Shelley v. Kraemer*,[207] is that what was declared constitutionally impermissible in *Shelley* was private action for which enforcement was being sought in a state court.[208]

Consequently, any theory (especially a coherent one) must explain why a statute that is facially neutral[209]—does not discriminate—represents State Action simply because that private action is being enforced by a state court. A failure to do so results in private discriminatory action enforced in state court as constitutionally impermissible State Action. My contention is that *Shelley v. Kraemer*[210] does not make that case.

A. *Shelley v. Kraemer*: From Contract to Property

An examination of the facts in one of the companion cases that resulted in *Shelley v. Kraemer*,[211] will reveal the import and effect of the Recording Acts and why such acts constitute "State Action" for the purpose of the Fourteenth Amendment. In *Shelley*, the property purchased by the Shelleys (the African-Americans) in August 1945 was subject to a racially restrictive covenant that the house was not to be used or "occupied by any person not of the Caucasian race[.]"[212] The racially restrictive covenant was created by an agreement signed by thirty out of thirty-nine owners in the St. Louis neighborhood in 1911. The Shelleys were being sued by the Kraemers to enforce that 1911 agreement.[213] Neither Shelley or Kraemer owned property in the St. Louis neighborhood in 1911 and, therefore, neither party was privy to or part of the agreement that was accomplished in 1911.

Starting with the 1911 agreement and assuming its validity, that agreement established a contract right or entitlement between the

206. *See generally* Shelley v. Kraemer, 334 U.S. 1 (1948).
207. *Id*.
208. *See supra* Part II.
209. *See* Kelso, *supra* note 204 and accompanying text.
210. *See generally Shelley*, 334 U.S. 1.
211. Shelley v. Kraemer, 334 U.S. 1 (1948),
212. *See Shelley*, 334 U.S. at 4–5.
213. In the companion case, the McGhees (the Negros or African-Americans) were being sued by the Sipes when they moved into a house in a Detroit neighborhood in November, 1944. The covenant in that case restricted the use or occupancy by any person except "those of the Caucasian race." *Shelley*, 334 U.S. at 7.

thirty signatories to the agreement by which each party purportedly received a benefit (that the twenty-nine neighboring homes would not be sold or occupied by someone not of the Caucasian race) and each assumed a burden that impacted the sale of their property (they could not sell to a person not of the Caucasian race—a limited restriction on alienability). After the agreement was signed, each one of the thirty contract participants could sue the other contract participants to enforce the agreement. And, if successfully sued, each party to the agreement could be held liable for damages (presumably, the diminution in value of the property as a result of the sale by the breaching promisee of that property to someone not of the Caucasian race).

Quite simply, the agreement among the thirty neighbors created contracts rights enforceable by and against those in privity of contract and protected by a liability rule.[214] In brief, the contracting party's rights pursuant to the agreement is protected by what is labeled by many as a liability rule because the breaching party, in this case the party selling to someone who is not Caucasian, may breach at will. The breaching party cannot be forced to honor the contractual promise made in the agreement. They are, however, liable for any damages that breach of promises causes.

Flash forward some three plus decades to the companion cases that represent *Shelley v. Kraemer*.[215] In those cases, neither party was privy to the original agreement. The remedy sought in both cases, and granted by the state courts hearing same, was not money damages but an injunction prohibiting the two African-American families from occupying property they had purchased that was subject to the racially restrictive promise or covenant. The remedy of an injunction protects the benefitted party's rights with respect to the promise or covenant

214. One question that is unaddressed herein is whether the original covenanting parties can enforce their rights through a property rule rather than a liability rule. In other words, whether the original promisee can eschew a damage remedy and seek to enjoin the original covenantor promisor from breaching that promise by claiming an equitable servitude with the concomitant remedy of an injunction. Pursuant to traditional Contract Law, the answer should be no—the remedy should be limited to damages (a liability rule). However, it is problematic at best to say that a successor in interest to the promisee has a greater right (a property rule protected by an injunction) created by an equitable servitude that the original promisee cannot utilize. That would raise a very important question of how can the original promisee transfer a right greater than the one the promisee has at the time of transfer. Indeed, if the successor in interest of the original promisee can sue and seek an injunction and the original promisee can only enforce the promise via a damage remedy, the advise that must be given to every original promisee is to transfer to a straw (third-party) and have that third-party sue to enforce the promisor's promise or covenant. I contend that by recording a covenant that touches and concerns with the intent that it benefit successors in interest (*see supra* notes 159-66 and accompanying text), the applicable Recording Act transforms the contractual right protected by a liability rule into a property right (an equitable servitude) that is protected by a property rule (an injunction) in the hands of the original promisee.

215. *See generally Shelley*, 334 U.S. 1.

with what is denominated a property rule. It is called a property rule rather than a liability rule because the holder of the right cannot be forced to involuntarily sell the right to the party who made the promise at a price (damages) to be determined by a third party (the judge or other arbiter).

The holder of the benefit of the right to enforce the covenant or promise can demand that the promise be enforced or complied with by the promisor or the promisor's successor in interest. Further, if the holder of the enforceable right against the promisor or the promisor's successor in interest chooses to set an arbitrary, wholly inflated price at which they will agree not to enforce the benefit of the promise, that price must be met. This very important right is more valuable than a right protected by a liability rule which is, as noted above, is protected by money damages decided by a third party and which may either under or over-compensate the injured party because of the difficulty of valuation and the possibility of judicial error costs. By using a property rule rather than a liability rule, the holder of the right (the person seeking to enforce the racially restrictive covenant), can set the price at which the servitude will be released, if at all, and that price may be no price at all.

Consequently, one question that must be considered is how a contractual right bestowed (agreed to) by thirty individual neighboring landowners protected by a liability rule is transformed in the future into an entitlement protected by a property rule. The second, and perhaps more important question, is how can that entitlement, be it protected by either a liability or property rule (whatever its scope), be transferred and deemed enforceable by one not in privity of contract when there is no claim that the party not in privity is a third-party beneficiary[216] of the original agreement and there is no contention that there has been express assignment or delegation of duties.[217] The third and last question, albeit related to the second, is how can a contractual promise made in 1911 be enforced in 1945? What has caused the temporal scope and reach of the promise to expand and result in its enforceability, essentially in perpetuity?[218]

B. The Impact of the Recording Act on Contractual Rights

The answer to the three questions posed above is the implementation and operation of the Recording Acts and the effect the Recording

216. See *supra* notes 116–18 for a discussion of third-party beneficiary theory.

217. See *supra* notes 108–15 for a discussion of express assignment of contractual rights and delegation of duties.

218. The covenant will last as long as anyone of the thirty original promisees or their respective successors in interest obtain a benefit from the enforcement of the servitude. *See* Dukeminier et al., *supra* note 110, at 822–23 (termination of servitudes).

Acts have on the initial contractual promise. The Recording Acts are pivotal for the creation of equitable servitudes given the notice requirement that must be met to enforce an equitable servitude against the successor in interest of the original promisor.[219] Stated another way, in the absence of the existence of an applicable Recording Act, the successor in interest of the original promisee would be unable to enforce those rights as a successor in interest to the promisee as an equitable servitude because the successor in interest of the promisor would have no notice. Lacking such notice, the original promisor or the promisor's successor in interest would not be bound thereby.[220]

Consequently, when a covenant that is deemed to touch and concerns is recorded pursuant to the applicable Recording Act with the intent that it binds not only the original covenanting parties, but also successors in interest,[221] that act of recordation is transformative and creative. The Recording Act transforms what is a contract right protected by a liability rule in both the original promisee[222] and any successors in interest into a property right that runs with the land that is protected by a property rule and is enforced by an injunction via the doctrine of equitable servitudes. In effect, the Recording Acts creates a new entitlement in both the original promisee and any successor in interest.

Earlier, I noted that the State Action doctrine and the case of *Shelley v. Kramer* is also addressed in trusts and estates courses explaining that the State Action question is implicitly raised in *Shapira v. Union National Bank*.[223] In *Shapira,*[224] a father left a significant portion (one-third) of his residuary estate to his son if, within seven years, the single son at the time of the father's demise, married someone whose parents both were (are) Jewish. The State Action question raised is whether the enforcement of that religious bequest by a probate court (and clearly a state actor for the purpose of the State Action doctrine) violates the State Action doctrine.[225] The court did not address the

219. *See supra* notes 195–99 and accompanying text.

220. See *id*. for a discussion of the Notice requirement that must be met to create and maintain an enforceable equitable servitude.

221. *Id.*

222. *Id*.

223. *See* SITKOFF ET AL., *supra* note 10, at 5.

224. *Id*.

225. Here I am ignoring for the sake of clarity and ease of explication the more pertinent question not addressed by the Court in *Shapira*, that a court's determination of who is or is not Jewish and, therefore, who meets the requirement of being a daughter of parents who both are Jewish, may be an impermissible task for a State Court involving a violation of the Second Amendment of the Constitution which precludes the Government from infringing religious liberties and against establishing or preferring a religion. *See generally* Shapira v Union National Bank, 315 N.E.2d 825 (Ohio Misc. 1974). This issue, although unaddressed by the Court in *Shapiro* is, by some accounts, the issue that the Court should have addressed and concluded that such a restrictive gift was unenforceable

State Action issue directly but did decide that it could enforce the father's religiously restrictive bequest.

The assumption is that the court did not address the State Action issue because it was not raised by the son, because a finding of State Action in this context would mean that no Will or bequest could contain a bequest or directive that discriminates in any way that would violate the Constitution if made or taken by a state actor (the court). In other words, no Will or bequest could violate the usual Constitutional norms or prohibitions if taken or made by a State Actor. Hence, the Will or bequest cannot violate the Due Process clause of the Fifth Amendment,[226] made applicable to the States, through the Fourteenth Amendment.[227] That clearly is not the current constitutional law interpretation of the enforceability of Wills and bequests in probate or other courts, be they courts of limited or other jurisdictions.[228]

Wills, like other private agreements or contracts, do not constitute State Action simply because they are enforced by state or other courts that are considered state actors. Nor does the enforcement of the Will in a state court have any effect on the entitlement that is created by the Will or bequest that does discriminate. The action of the father in

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pursuant to the Second Amendment and the operation of the State Action doctrine. In this context and addressing this issue, the father or his executor or designate may give the assets in the estate to the son if he marries someone whose both parents are Jewish within seven years, but neither party can go to court, in this case the Probate Court, to enforce such a restrictive gift. Note it is not the enforceability of the restrictive gift that creates the State Action problem but the nature of the restriction (both parents who are Jewish) that creates the State Action issue. The restriction that the son marry a person whose both parents are Jewish is unaffected by seeking to enforce the promise in Probate Court. The restriction is the same and it affects the same person whether it is enforced in our out of Probate Court. For example, if the father had used a pour-over will in addition to the Will the father could accomplish his objective without State Action. See SITKOFF ET AL., *supra* note 10, at 476, for a discussion on pour-over wills. A pour-over will would "pour" (cause) his probate assets into an inter vivos trust that becomes irrevocable on the father's death. The inter vivos trust can direct the trustee to distribute the same assets to the son when the son marries someone whose parents are both Jewish within seven years of the father's death, with the determination of whose parents are both Jewish, decided conclusively by the same trustee. That religiously restrictive transfer in the trust, not involving court action, would be permissible and not constitute State Action.

226. U.S. CONST. AMEND. V.

227. U.S. CONST. AMEND. XIV.

228. Probate Courts are deemed to be courts of limited jurisdiction having their jurisdictions circumscribed to matters dealing with the transfer of assets and issues arising therefrom upon death (and sometimes incapacity) of the owner of said assets. *See* SITKOFF ET AL., *supra* note 10, at 41–43, 59. Courts of general jurisdiction, however, have unlimited jurisdiction to decide legal issues within their purview. *Id.* at 40 and 53. This is simply to note that irrespective of whether probate-related matters are decided in courts of limited or general jurisdiction, no court has determined that the enforcement of a Will or bequest is State Action simply because the enforceability of that Will or bequest is adjudicated in what is admittedly a State Actor, the Court. For a discussion of the revocation of the theory that State judicial enforcement is State Action, see *supra* Part II. Hence, the enforcement of a "discriminatory" Will is deemed to be private action just like enforcement of a discriminatory contract. *See Shapiro, supra* note 16.

Shapiro is not legally affected by the probate process undertaken in Probate Court. The executor of the estate could have legally complied with the deceased father's wishes without probating the Will because most Wills are probated to preclude later creditor claims[229] and to insure that the executor will not later be found liable in performing the duties as executor.[230] If these two issues are not a concern of the executor or the family of the decedent, then the Will does not (perhaps, should not) be probated given the cost of probate and the fees associated with the process.[231]

Just as importantly, the decedent's intent and the legal rights created thereby are unaffected as well by the probate process in the *Shapira* case.[232] No new rights or legal entitlements are created as a result of probating the father's Will in the *Shapira* case. It is undeniable that the probate process and the ensuing litigation that occurred in *Shapira* are as public as the recording process is "public" when a racially restrictive covenant is recorded. The probation of the Will provides notice to creditors regarding the decedent's death and against whom the creditor should file a claim, but it does not transfer the creditor's claim to a third party, nor does it extend the time by which the creditor may file his claim. In fact, the use of the probate process by the executor in *Shapira* may shorten the time that the creditor has a valid claim against the estate of the decedent.[233]

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229. *See*, SITKOFF ET AL., *supra* note 10, at 47, 50–51.

230. *Id*.

231. Indeed, the Uniform Probate Code has a provision acknowledging and validating the Will in the absence of probate. The difference between a probated Will and one that is not probated is that creditors are given a longer period of time in the latter situation to present their claims against the estate of the decedent. UPC §§ 3-301 & 3-801-803. *See* SITKOFF ET AL., *supra* note 10, at 43.

232. *See supra* note 10 and accompanying text.

233. One might contend that this impact on creditor claims mandating the filing of such a claim within a period of time following the receipt of notice triggered by the probate process is an alteration of the creditor's common law rights to pursue his debtor in a civil action until that claim is barred by the statute of limitation or some other common law doctrine like accord and satisfaction. To some extent, the probate process does have an extent on the creditor's claim. However, like any lawsuit or legal action adjudicating claims, that adjudication has an impact on the rights of those within the jurisdiction of the court given the case. The death of the decedent debtor is an event—a probability—that the parties might anticipate occurring at the time that the debt is entered into by the decedent. The parties can expressly address that contingency in the contract or agreement creating the debt (the debt may be deemed personal and canceled if the debtor dies). If an opera singer agrees to perform and is given an advance and dies before the date of performance, the contract may excuse the performance and not waive any claim by the creditor against the singer's estate. However, if the parties do not explicitly address the contingency of the debtor's death, the applicable state's probate process provides default rules for the collection of the debt given the occurrence of the contingency. Those default rules, which are part of the contract or agreement at the time that the debt is created are not new and do not create any new or vested legal rights or entitlements when the occurrence-the death of the debtor—triggers their operation and applicability.

Comparing the use of the probate process in *Shapira* to the use of the Recording Act by the original covenanting parties in *Shelley v. Kraemer* reveals significant differences given the process and subsequent effects created by the Recording Act. The Recording Acts, unlike the use of the probate process in *Shapira*, creates new substantive rights that arise only as a result of the use of the Recording Act. A comparison of the facts in *Shelley,* assuming no recordation of the racially restrictive covenant, versus the fact situation in *Shelley* in which the racially restrictive covenants were recorded reveals the truth of this statement.

Assuming that the racially restrictive agreements were made in *Shelley* in 1911 by thirty of the thirty-eight homeowners in the St. Louis neighborhood,[234] but that those racially restrictive agreements were never recorded in the County in which the neighborhood is located,[235] those thirty agreements legally represent thirty contracts in which one promisor (the homeowner agreeing not to sell to someone who is not Caucasian) promises twenty-nine promisees that the property will not be sold to someone who is not Caucasian. Those thirty homeowners or neighbors are in privity of contract and if the promisor does sell to someone who is not Caucasian, the promisor can be sued for breaching that covenant, and the promisees will receive monetary damages equal to the diminution in value to their properties as a result of the property's purchase by someone who is not a Caucasian.

In this situation, no real covenant is created because the parties are not in privity of estate.[236] However, even assuming that privity of estate can be manufactured prior to the formation of the agreement or contract with the exchange of covenants,[237] that real covenant does not create a right in the promisee that is protected by a property rule rather than a liability rule. The promisee's remedy for breach of a real covenant is money damages, assuming that the promisor's interest in land is transferred to someone against whom enforcement can be sought because the successor in interest is in vertical privity with the original promisor.[238]

In addition, no equitable servitude is created because it has not been established that the promise touches and concerns and, therefore, runs with land. Nor has it been established that the parties intend

234. *See supra* notes 129–30 and accompanying text.

235. *See* Johnson, *supra* note 10 at Section 15.03 (discussing the mechanics of recording that requires that the interest being Recorded be Recorded in the county in which the real property is located in order to constitute a valid recordation).

236. *See supra* notes 138–48 and accompanying text (discussing real covenants and the requirement of privity of estate).

237. *Id*.

238. *See* DUKEMINIER ET AL., *supra* note 110 at 840–43, 847 (discussing the vertical privity requirement).

that the covenant should bind and benefit remote grantees or successors in interest. But, for the sake of argument and consistency and as I have demonstrated previously,[239] it is easy to meet the requirements of intent that the promise or covenant bind and benefit remote grantees through the insertion of appropriate language in establishing the covenant. Further, and as addressed previously,[240] this type of racially restrictive covenant easily meets the requirement of touching and concerning.

However, even assuming arguendo that there is intent on the part of the original covenanting parties that the covenant bind and benefit remote grantees or successors in interest, and that the covenant is of the type that touches and concerns, the covenant cannot be enforced as an equitable servitude if it is not recorded because forty-four years later when enforcement is sought by a successor in interest to the original promisee, the successor in interest to the promisor can prove that there was no notice of the restriction.[241]

Hence, if the original promisor sells the interest in the burdened land without actually telling the purchaser or successor in interest of the restriction, that purchaser would have no notice of the restriction and not be bound. If that successor in interest opts later to sell to a person who is not Caucasian, they presumably cannot be sued for violating a covenant that it was not privy to and for which they had no notice. Moreover, and as addressed previously,[242] the mere transfer of title of residential real estate by deed will not create an express assignment of the promisor's obligation nor is there any basis to claim that the successor in interest was a third-party beneficiary of the obligation made by the original promisor.[243]

Also, the original covenanting party presumably cannot be sued when the successor in interest subsequently sells to the person who is not Caucasian. That original covenanting promisor has not breached the promise when owning the property and cannot breach the promise after conveying to a successor in interest. Hence, by failing to record the covenant, the promisee has failed to create an interest in land

239. *See Id*. and accompanying text (discussing the requirement that language in the covenant must express an intent that it binds and benefits successors in interest).

240. *See supra* notes 155–57 and accompanying text (discussing the touch and concern requirement).

241. *See supra* notes 165–72 and accompanying text (discussing the Notice requirement of equitable servitudes and the reasons why record or Constructive Notice is the only effective method of providing Notice to maintain and enforce an equitable servitude).

242. *See supra* notes 108–15 and accompanying text (discussing express contractual assignments and delegation of rights and why both of these are inapplicable in the typical residential real estate contract).

243. *See supra* notes 116–18 and accompanying text (discussing third-party beneficiary theory and why it is impossible to claim that a successor in interest to a promisor is a third-party beneficiary of the obligor's obligation when originally made).

that will bind any successor in interest to the original promisor. This contract right, protected by a liability rule, is easily destroyed by the promisor by making a subsequent transfer of the property.[244]

Furthermore, in the absence of the option of recording the promise or covenant and creating an interest in land and the ease by which the contractual obligation is destroyed as a result of a subsequent transfer, it makes little economic sense for the parties to enter into essentially an unenforceable agreement given the transaction costs associated with the reaching an agreement among thirty parties. As explained previously,[245] the mere fact that the agreement or contract concerns or affects one's use or ownership of land, does not mean that the covenant or promise creates any interest in land. It is only when the interest is Recorded and provides notice to successors in interest that the interest runs with the land and is enforceable against successors in interest.[246]

Once the racially restrictive covenant is recorded, the legal landscape and the issues raised thereby drastically change, given the changes that occur to the contractual agreement. First, the contractual agreement is no longer simply a contractual agreement. Even in the absence of privity of estate, by recording the document the contractual agreement is deemed to be one that runs with the land to benefit and bind remote grantees.[247] And, given the notice (constructive or record) that is provided by the recordation of the racially restrictive covenant, the covenant benefits and binds parties who were not privy to the original agreement. Finally, the benefit of the racially restrictive covenant is protected by a property rule rather than a liability rule allowing the person with the benefit to enforce the right with an injunction.[248]

Recording the racially restrictive covenant creates a fundamental and substantive change in the rights created originally as a result of a contractual agreement. Stated yet another way, without the operation and use of the Recording Acts, racially restrictive covenants probably would never be made[249] and if made, would not be enforced as against successors in interest to the original promisor as a property right. Property would not be burdened with an interest that can last in perpetuity and affect ownership rights of those perhaps not in existence at the time the promise comprising the racially restrictive covenant was made.

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244. See DUKEMINIER ET AL., *supra* note 110, at 401, for a discussion of transfers to a straw to destroy or eliminate contractual rights of the obligor.

245. *See supra* notes 108–15 and accompanying text.

246. *See supra* Part III.

247. *Id*.

248. *Id*.

249. See DUKEMINIER ET AL., *supra* note 110, at 84, for a discussion of the inefficiencies associated with contracting for a racially restrictive covenant when such a covenant can be destroyed by the promisor's transfer of the interest to another.

What has not been explicitly stated is why the Recording Acts constitute State Action. In other words, what is the nexus between the act of recording the racially restrictive covenant and the future effect of the Recording Act on the now recorded racially restrictive covenant that constitutes State rather than private action. Although I have addressed why the Recording Acts differ from the promulgation of a Probate Code and the establishment of a probate process that requires the state to adjudicate rights when the enforcement of a Will or other testamentary disposition is sought by one or more interested parties, I have not addressed just what it is that is embodied in the Recording Acts that constitutes State Action. It is to that issue that I now turn.

C. The Recording Acts: Actions Created by the State to Benefit the State

Legal systems can exist in which property is effectively transferred without the operation of a Recording Act. As noted previously,[250] the English legal system existed without Recording Acts until 1925. This country's early and unanimous embrace of Recording Acts, then, presents something of a conundrum. Answering definitively why the thirteen colonies embraced the Recording Acts enthusiastically is beyond the ken of this article; however, one can speculate that a number of different factors no doubt influenced the embrace of Recording Acts.

First and foremost, the thirteen colonies that originally formed the United States represented a very different type of government than the government that they were once a part of before America gained its independence from the British and the Crown. Although the Norman Conquest in 1066 set in motion a system of land ownership that we now deem feudal in nature, requiring loyalty and service to the King with primogeniture as one of its predominant features,[251] the legal systems in the thirteen colonies developed independently of feudal norms and notions of royal control following Independence.

Also, and perhaps more importantly, ownership rights in the nascent United States arose from conquest and not from some royal grant or patent of rights.[252] And, as a result, none of the thirteen original colonies developed or employed the equivalent of a Domesday Book that was produced in early feudal England that Recorded the holder of each tract of land in England and the services by which feudal land was held.[253] Instead, the thirteen colonies developed and embraced Recording Acts to determine who owned what land and against whom

250. *See supra* note 184 and accompanying text.
251. *See* Dukeminier et al., *supra* note 110, at 209–12.
252. *Id.* at 3; *see also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
253. *See* Dukeminier et al., *supra* note 110, at 209–10.

taxes could be sought as a result of that ownership interest (in this respect, taxes can be thought of as the equivalent of feudal incidents or services to the Lord).

More importantly, the United States is not an outlier in the development of a system of records designed to permit interested individuals from determining who owns what interests in a particular piece of property. Almost all modern governments have developed and operate some sort of recording system,[254] ranging from a Torrens System of Registration[255] to the three types of Recording Acts employed in the United States and discussed above.[256]

Pursuant to the economic theory of property and property rights, "the legal protection of property rights has an important economic function: to create incentives to use resources efficiently."[257] According to this theory and view of property, there are three criteria for an efficient system of property rights:

> *Universality—i.e.,* "all resources should be owned or ownable, by someone except resources so plentiful that everybody can consume as much of them as he wants without reducing consumption by anyone else. . .";[258]
>
> *Exclusivity—ownership* rights should be exclusive to one individual or entity whenever feasible (communal or multiple ownership interests in an asset raise transaction costs); and
>
> *Transferability—all* resources should be transferable or alienable because "[i]f a property right cannot be transferred, there is no way of shifting a resource from a less productive to a more productive use through voluntary exchange"[259] (allows assets to be transferred to higher value user with low transaction costs).

The focus herein is on the third criteria for the efficient and functioning system of property rights—alienability. As mentioned previously,[260] real property as a resource, right or entitlement is unique in many respects. First, its permanence makes it different from forms of personal property. By that, I mean real property that is being transferred currently is the same real property that may have been transferred at the time of the American Revolution.[261] Second, and

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254. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY (Third Ed. 2000) at § 11.9 (869).
255. *See supra* Part III.
256. *Id*.
257. RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 10-13 (1972).
258. *Id*.
259. *Id*.
260. *See supra* note 189 and accompanying text.
261. *See* JOHNSON, *supra* note 7 at § 15.03.

relatedly, land is indestructible. Third, land is immobile. Fourth, land is unique.[262] Fifth, with the exception of land adjacent to, say a riverbed which brings into play the doctrine of avulsion,[263] no new land can be created to add to the existing inventory of land.[264]

Couple these facts with an English-based property system that permits the creation of rights in that real property that can last in perpetuity like restrictive covenants or equitable servitudes,[265] creates unique problems and potential costs with possible transfers of that real property. Given the transaction costs associated with the purchase of real property,[266] and the fact that even the smallest residential real estate purchase is typically the most expensive purchase that a buyer will make in their lifetime, that investment in property must be both incentivized and protected. The incentive that must be provided by the legal system is the surety that the title to real property purchased by the vendee is legitimate and will withstand challenge by exogenous forces. The protection provided by the legal system must be in the form of information to the vendee/purchaser that the quality of the title to the asset is as represented at the time of purchase.

The most efficient vehicle to provide both incentive and protection are Recording Acts.[267] Without a state-sanctioned and regulated system of Recording, a prospective purchaser of real property would have

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262. *See* Kronman, *supra* note 189.

263. *See* DUKEMINIER ET AL., *supra* note 110, at 803. Avulsion occurs in a riverbed when land is added to the bank as a result of the deposit of silt, etc. brought to the bank as a result of the flow of the river's water. The opposite of avulsion is accretion, when the riverbank is eroded (lessened) as a result of the same flow of water. Hence, a riverbed's boundary may morph or change over time as a result of the power of nature.

264. *See This is Superfund: A Community's Guide to EPA's Superfund Program*, at http:// semspub.epa.gov/work.HQ.175197.pdf; *see also* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). I was tempted to say no new land can be created to replace land that is destroyed but the destruction of land, short of a nuclear holocaust, also cannot be accomplished physically. Real Property's value can, however, be destroyed without the physical destruction of the property. A case in point would be Real Property that is the site of a superfund cleanup. *Id.*

265. *See supra* Part II.

266. *See* Alex M. Johnson, *Preventing a Return Engagement: Eliminating the Mortgage Purchasers' Status as a Holder in Due Course: Properly Aligning Incentives Among the Parties*, 37 PEPPERDINE L. REV. 529 (2010).

267. *See supra* Part III. One can debate which type of Recording Act is the most efficient is the subject of debate and largely irrelevant to my thesis. One can contend that a Torrens System of Registering title is the most efficient method of recording interests in land and providing information to prospective vendees. *See* Johnson, *supra* note 10 at Section 15.07[A]. One can also argue that even if a Torrens Registration system is not used, a Recording Act that is based on a tract index rather than a grantor/grantee index is the most efficient type of Recording Act although the overwhelming majority of states and counties employ grantor/grantee indices. Irrespective of which Recording system is the most efficient, all such recording systems only become viable if they are implemented and enforced by the State, a State Actor. *Id.* Hence, the debate does not add or detract from my point that the system and utilization of Recording Acts creates State Action.

to engage in some other more costly method of validating the respective interests in real property before purchasing the same in order to obtain the protection (information) necessary to purchase the real property.[268] Although it is beyond the scope of this article to prove empirically that Recording Acts provide the most efficient means of securing title to real property and providing information regarding the same, the historical development of Recording Acts and their use by almost every advanced legal system provides anecdotal evidence that Recording Acts do play a vital, pivotal and efficient role in the transfer of real property.

First, as noted previously, most governments develop and operate some type of recording system that is designed to permit interested persons to discover not only who owns the property, but also what other interests have been created in that property.[269] Just as importantly and often ignored is the fact that one's ownership interest in land can only exist if it is recognized and enforced by the state. The state recognizes and enforces those interests in real property through the use and operation of a Recording Act.[270] The state validates interests in real property, and decides outcomes when there are disputes regarding ownership and other interests in real property through the use of Recording Acts.[271]

The proof provided anecdotally by a brief historical detour requires a return to English conveyancing. As noted previously,[272] England did not have a Recording Act until 1925. Prior to that time, when real property was transferred, the transfer occurred and title was proven via delivery of what was termed emoluments of title.[273] What that fancy term means is that a shoebox or some other container would be the repository of all the alleged documents affecting and demonstrating the ownership of the subject property would be delivered to the

268. One might argue that the rather costly and inefficient method of assuring title known as abstracting can exist in the absence of a Recording Act. Abstracts are title reports created by a title examiner (who may or may not be an attorney) who searches records to summarize the transfers made regarding the property to prepare an abstractor's report that summarizes the state of title based on what the search reveals. This rather inefficient method of validating title is also based on the existence of Recording Acts because it is only via a search of public records maintained as a result of the applicable Recording Act that an abstract of title can be prepared.

269. STOEBUCK & WHITMAN, *supra* note 183 at § 11.9.

270. *Id*.

271. In my Article, *supra* note 2, I contend that certain formalities are required to validate and create enforceable conveyances (transfers) in order to provide courts and arbiters with reliable information that allows the arbiter to correctly decide the dispute with low transaction and error costs. In certain respects, the Recording Acts serve a similar purpose allowing the court or arbiter to correctly decide disputes over legal interest in Real Property correctly and efficiently based on land records provided by Recording Acts.

272. *See supra* note 184.

273. *See* Johnson, *supra* note 107 at § 15.02.

attorney (Barrister?) of the prospective vendee to be examined prior to the purchase and transfer of title.

It is only through the examination of the documents comprising the emoluments of title that would prove or disprove the relevant ownership interests. Presumably the emoluments of title would prove title and the interests affecting title from the time of the current transfer back to the registration of the real property in the Domesday Book.[274] The fact that the English abandoned this system and embraced and enacted a Recording Act in 1925 provides some evidence or proof that this system is more efficacious than a system that exists without a Recording Act.

Finally, it goes without saying that the Recording Acts represent the embodiment of a state's action. The Recording Acts are created by state statute in every jurisdiction and their operation, as well as creation, and the effect they have on transactions is a matter of state statutory and judicial opinion.[275]

Moreover, each county in every state's jurisdiction (with the exception of the District of Columbia) maintains as a function of county government a County Recorder's Office or a County Registrar's Office (or both) depending on whether the county in question employs a grantor-grantee index or a tract index.[276]

D. A Brief Examination of Other Discriminatory Land Transfers

Any coherent theory explaining why the enforcement of racially restrictive covenants constitutes constitutionally impermissible State Action must address and explain other discriminatory land transfers that do not constitute constitutionally impermissible State Action. Two situations come immediately to mind. The first is when land use is restricted by the grantor. The prototypical case is *Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano*,[277] in which the grantor restricted the transfer and use of property deeded to the aforementioned Lodge with the restriction that it could not be transferred to anyone other than the Lodge and, more importantly, for this article, that it could only be used by the Lodge.[278]

The second situation is even more archaic in that through the manipulation of estates in land, in particular classifications and creations of future interests, it is possible to create an estate in land that prefers one gender over another. As will be explained below,[279] like racially

274. *See* Dukeminier et al., *supra* note 110, at 270.
275. Stoebuck & Whitman, *supra* note 183 at § 11.9.
276. *See* Johnson, *supra* note 107 at § 15.03.
277. 64 Cal. Rptr. 816 (Cal. Ct. App. 1967).
278. *Id*.
279. *See infra* notes 287–91 and accompanying text.

restrictive covenants, such sex-based discriminatory future interests remain largely viable because of Recording Acts. Hence, these sex-based discriminatory future interests look very similar to racially restrictive covenants. It is my contention, however, that these sex-based discriminatory future interests do not constitute State Action and differ from the enforcement of racially restrictive covenants for three important reasons.

In *Toscano*,[280] the owners of property located in California deeded property to the Mountain Brow Lodge of which they were members with two distinct conditions. First, the deed contained what is known as a disabling restraint precluding the transfer or alienability of property to anyone other than the Lodge. The second condition, which mirrored the first, precluded the use of the property by anyone other than the Lodge. As discussed previously,[281] the alienability of property, especially real property, is a very important attribute of a well-functioning legal system and is particularly important with respect to scarce resources like land that cannot be produced and are not fungible.[282]

As a result, the court quickly and easily came to the conclusion that an absolute restriction on the transferability of the land was void as violative of public policy. The court, however, had a harder time addressing the restriction on the use of land comparing various valid use restrictions (land donated to a city for the creation and use of a dam, to a church to be used for church purposes, and to a library association for the use of a library[283]), as creating licit defeasible fees.[284] The court in *Toscano* correctly noted that use restrictions play a vital role in real estate planning and are often used beneficially as, for example, when residential real estate is restricted to single family use in a subdivision by a homeowners' association.[285]

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280. *See supra* note 277 and accompanying text.

281. *See supra* notes 259–62 and accompanying text.

282. *See* Kronman, *supra* note 184.

283. *See, e.g.*, Paul Smith's Coll. of Fine Arts & Scis. v. Roman Cath. Diocese of Ogdensburg, 130 N.Y.S. 3rd 547 (N.Y. App. Div. 2020).

284. A defeasible fee is an estate in land that may cause the owner's interest in the fee to terminate if the property is not used as required by the creation of the estate. There are two types of defeasible fees: fee simple determinable and a fee simple subject to a condition subsequent. *See* DUKEMINIER ET AL., *supra* note 110, at 295–96. A determination of which type of defeasible fee has been created depends upon the language used in the grant. *See, e.g.*, Mahrenholz v. Cnty. Sch. Bd. of Trs, 417 N. E. 138, 141–42 (App. Ct. Ill. 1981). For the sake of simplicity, the focus hereafter will be on the fee simple determinable that is created by using language such as to the Church for so long as used for Church purposes. Once the fee simple determinable is created, title will revert back to the grantor when and if the property is no longer used for Church purposes. That reversion occurs automatically when the Church ceases to use the property for Church purposes.

285. For a discussion of Common Interest Communities ("CICs") like homeowners' associations, see Johnson, *supra* note 107, at chapter 17.

Hence, certain restrictive agreements limiting the use of property were and are deemed legal and economically viable. The court in *Toscano*,[286] however, said such restrictive covenants or use agreements must also be examined to determine their effect on alienability. Restrictions like the single-family residential use restriction imposed by a homeowners' association does not impair the alienability of the restricted. Quite the contrary, such a restriction may make the property more valuable and, hence, more alienable. Unfortunately, the use restriction in *Toscano* did not have the same effect. That restriction limited the alienability of the property to potentially one and only one buyer, the Lodge. Thus, the court ruled that the use restriction violated public policy similar to the absolute restriction on alienability.[287]

Consequently, certain use restrictions are valid and do rely on Recording Acts to provide notice to successors in interest to maintain their viability and enforceability in the future. These use restrictions, however, do not constitute State Action. The major difference between racially restrictive covenants and valid use restrictions are two-fold. First, these use restrictions do not violate any constitutional norms.[288] Consequently, their enforcement by a state court creates no State Action. Second, and just as importantly, the use of the state's Recording Act to provide Constructive or Record Notice to successors in interest or remote grantees that their purchase and use of the property is subject to the restrictive use, in no way changes the character, intent, or effect of the use restriction placed on the property by the original grantor.

Addressing sex-based discriminatory future interests, is slightly more complicated given how they are usually created. Sex-based discriminatory future interests are created by the grantor or owner of the fee simple by restricting the class of takers who can own and, as a result, use the property conveyed by the grantor. For example, a grantor can prefer his sons over his daughters and grant an estate to his son for

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286. *Toscano*, 64 Cal. Rptr. at 816.

287. *Id.* What the Court failed to address is the validity of the use restrictions discussed previously when land was donated to a city, a church, and a library association for restrictive purposes. *Id.* In those apposite situations, the land is likewise restricted to one buyer or user and its alienability is severely impaired. What the Court could have and should have said, is that the property given to the various entitles subject to use restrictions just mentioned were all deeded to entities that qualify as valid non-profit. I.R.C. § (501(c)(3) (in the argot of the Internal Revenue Code) institutions and the Lodge did not likewise qualify as a charitable or tax-exempt organization or entity.

288. The closest case would be a gift to the church with a restriction that the property be used for church purposes. As discussed, *infra* note 284 and accompanying text, these use restrictions are protected by the First Amendment of the United States Constitution. *See, e.g.*, *Paul Smith's Coll. of Fine Arts & Scis.*, 130 N.Y. S.3rd at 547.

life, then to the male issue of the son, thereby excluding any daughter or female issue of the son from taking an interest in the property.[289]

First, however, it must be acknowledged that until the latter part of the Twentieth Century, blatant discrimination based on gender was constitutionally permissible. Indeed, gender discrimination, that is discrimination against women, is still not strictly constitutionally impermissible,[290] although it is now treated as a classification requiring "intermediate scrutiny" rather than the strict scrutiny that is required if the classification involves a "suspect class" involving race, creed, or national origin.

Second, unlike racially restrictive covenants, sex-based discriminatory future interests are created by the grantor and are unaffected by Recording Acts with respect to the scope and character of discrimination. Given the example above, the fact that the grant to the son restricting the remainder to his male issue will most likely be recorded does not change the substantive nature of the grant, nor involve the state in expanding or limiting the rights of anyone associated with or affected by the grant.

Third and finally, even though Recording Acts provide constructive or record notice of the sex-based discriminatory future interest, that constructive or record notice is irrelevant to the continued validity of the sex-based discriminatory future interest because said restriction is in the direct chain of title of successor in interest (future grantee) who takes title to the property subject to the restriction.

Recall in England, where this all began, there was no recording or Recording Act until 1925,[291] yet England has for centuries preceding allowed the creation and enforceability of sex-based discriminatory future interests. Indeed, the entire system of primogeniture and the succession to the Royal Crown rules, which are based on primogeniture, are clearly discriminatory, preferring males over females.

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289. Technically this creates a life estate in the son, followed by a contingent remainder in the son's male heirs, followed by a reversion in the Grantor, if alive, or if dead, a reversion in the residuary legatee most likely. The reversion will only be given effect if the son dies without male issue and there is no qualified taker following the son's death. *See* SITKOFF ET AL., *supra* note 10, at 3–5 (discussing freedom of disposition). Given the ease of adoptions and the fact that adults may be adopted to create individuals who qualify as takers pursuant to a grantor's grant, it is highly unlikely that the son will die without male heirs or issue unless that is his choice. *See generally id.* at 93–109.

290. *See* Bill Chappell, *Virginia Ratifies The Equal Rights Amendment, Decades After The Deadline*, NPR (Jan. 15, 2020, 3:36 PM ET), https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights-amendment-decades-after-deadline#:~:text=Virginia%20became%20the%20pivotal%2038th,change%20to%20the%20U.S.%20Constitution.

291. *See* Law of Property Act 1925, c. 20 (UK).

VI. CONCLUSION

Shelley v. Kraemer[292] is a canonical case taught in several courses in a law school's curriculum. It is also a perplexing case that has befuddled scholars for decades. That befuddlement arises in large part because the case is treated and analyzed solely as a case involving what we scholars call "public law." In other words, it is often viewed solely through the lens of Constitutional Law and that narrow view of the case has limited the analysis of the case to primarily Constitutional Law principles and tenets. As a result, a plethora of scholars, deploying Constitutional Law theories have been unable to arrive at a satisfactory conclusion concerning why the Court's enforcement of racially restrictive covenants—private discrimination—is constitutionally impermissible simply because those covenants are enforced by a court—a State Actor.

As a result, the case is derided as doctrinally unsound. Either all the state enforcement of private discrimination via court action is State Action or none is State Action. If the latter, then *Shelley* was either incorrectly decided, or it represents a "one-off," an aberrational case that arose because of the confluence of nature of the covenant, the racial restriction and the timing of the decision.[293] Consequently, the State Action doctrine has evolved as though *Shelley* was never decided. However, the holding in *Shelley* that racially restrictive covenants cannot be judicially enforced remains.[294]

The problem with the analysis to date is that the lens through which the case has been viewed is too narrow. Once the analysis expands beyond Constitutional Law and theories to integrate the so-called private law or Property and Contract Law, the perspective changes. Covenants, their creation and enforceability fall within the purview of Contract Law, an area foreign to most Constitutional and Public Law scholars. Recording Acts are in the province of Property Law, an area also unfamiliar to most Constitutional and Public Law Scholars. When racially restrictive covenants are examined from the perspective of the Contract and Property Law issues raised thereby, the conundrum that *Shelley* presents quickly dissolves.

Personal covenants can only become enforceable servitudes as racially restrictive covenants only via the imprimatur created by using the state's Recording Act. Without that state-enacted law enforced and

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292. 334 U.S. 1 (1948).

293. *See supra* Part I and accompanying text.

294. Private actors can choose to abide by racially restrictive covenants and not sell to a Negro or African-American. That voluntary choice on the part of the promisor not to sell to a Negro or African-American, however, does not create a legal entitlement that is enforceable by a promisee. An unenforceable legal right is not a right recognized by society because it cannot be protected.

regulated at the county level of government, no racially restrictive covenant would be enforceable. That is quintessential State Action. Each one of the fifty-one United States jurisdictions has enacted legislation that benefits the state in maintaining and regulating ownership interests in real property, and that legislation has a substantive and vital effect on personal contracts that can create private discrimination.

Through the public legislation that embodies Recording Acts that private discrimination becomes public discrimination—discrimination made viable and actionable due to the action of the state. The enforcement of the private racially restrictive covenant by the state court is not what creates State Action. Instead, the impact that Recording Acts have on private contractual rights transforming them into transferable and perpetual property rights is what mandates an appropriate finding of State Action.