University of Pennsylvania
Law Review

FOUNDED 1852

Formerly

American Law Register

VOL. 110 FEBRUARY, 1962 No. 4

# *SHELLEY v. KRAEMER*: NOTES FOR A REVISED OPINION*

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For the constitutional lawyer, *Shelley v. Kraemer*[1] was a portentous decision. If its immediate promise was largely for Negro rights, it cast a shadow of major consequences far beyond racial questions. The case suggested a new and far-reaching concept of "state action" and state responsibility,[2] a new and far-reaching domain of federal jurisdiction, a new and far-reaching readjustment of relationships between government and the individual. The respective constitutional responsibilities of federal and state government in regard to the individual citizen, sharply revised from the original pattern when the fourteenth amendment was adopted, faced further radical revision in the ambiguous promise of the new doctrine announced by the Court in 1948.

*Shelley v. Kraemer* was hailed as the promise of another new deal for the individual—particularly the Negro individual—, but students of constitutional law were troubled by it from the beginning. Those alert to the responsibility of the Court to afford principled decision, justified by language, history, and other considerations relevant to

* My colleague, Paul Mishkin, is not responsible for anything in this article. He has my gratitude for the clarification which our discussions have brought.

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1 334 U.S. 1 (1948).

2 This article will direct itself to the problem of state responsibility for private discrimination under the equal protection clause. Much of what is said may apply also to state responsibility for other private actions which may constitute deprivation of property or liberty without due process of law. But the problems may be sufficiently different to prevent automatic transfer.

constitutional adjudication, were disturbed by an opinion of the Court which, to them, did not "wash." They were not satisfied that the opinion provided a doctrine of decision which governed the case before the Court, dealt rationally with the past, and promised to apply to tomorrow's case. Others too, less concerned perhaps with the jurisprudence of the Court, admitted that while *Shelley* was a good decision, it was not possible to tell how far the Court would go in the next case.

Today, fourteen years later, *Shelley v. Kraemer* still weighs on critical spirits. The Court has not seized opportunities to reconsider or clarify. To professional critics of the Court's work, the case has become a citation for inadequacy in the exercise of the judicial function in constitutional cases.[3] Some, to whom the Court's opinion leaves too much to be desired, have felt compelled to conclude that the case was wrongly decided, that the Court must reverse itself or drastically limit the holding of the case. Others of us, while criticizing the opinion of the Court, insist that the case was rightly decided and that a more satisfactory opinion can be written.[4] But, particularly because the result in *Shelley* "jumps with my preconceptions" and hopes, it is not enough to declare that one can support the decision better than the Court did; we are challenged to show that sturdier foundations for the decision can in fact be laid.

There have been attempts to write a new opinion for the Court.[5] Another effort, in the pages that follow, claims justification in that the previous attempts with which I am acquainted do not seem wholly satisfactory. At best, these entail major revisions, qualifications, or limitations of the doctrine and opinion of the case; they are not changes which the Court can easily accept as its own when it faces the next case. I have expressed the belief that a more satisfactory opinion can be written, an opinion which builds on what the Court has said and follows where the Court leads. This is my attempt to write it.

## I. Criticism of the Court's Opinion

What is *Shelley v. Kraemer*? Why has the Court's opinion been found wanting?

The facts in *Shelley* are well known. Briefly, property subject to a restrictive covenant had been conveyed to Shelley, a Negro. Owners of nearby property, parties to the restrictive covenant, brought suit

[3] See, *e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 29 (1959), quoted in text accompanying notes 7 and 8 *infra*.

[4] *E.g.*, Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. Pa. L. Rev. 637, 661-62 (1961).

[5] See, *e.g.*, Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 6 (1959). Another interesting analysis is Lewis, *The Meaning of State Action*, 60 Colum. L. Rev. 1083, 1108-20 (1960). See note 24 *infra*.

to restrain Shelley from taking possession and to have his title divested and revested in the grantor. The state courts granted the relief requested. The Supreme Court reversed unanimously, three Justices not participating.

The opinion of the Court, by Mr. Chief Justice Vinson, may be summarized as follows: The fourteenth amendment addresses itself only to states, not to private persons. Private persons remain free to discriminate against others even on grounds of race and color. The restrictive covenant, per se, does not violate any constitutional prohibition. But the right to acquire, enjoy, or dispose of property is clearly protected by the fourteenth amendment from discriminatory state action. The state cannot restrict a Negro's right to property on account of his race. It could not do so by statute. It cannot do so by the actions of its courts. Judicial action is, of course, clearly "state action" for purposes of the fourteenth amendment. The courts of the state could not enforce a restrictive covenant required by statute; they can no more do so under the common law of the state. State judicial enforcement of these covenants is forbidden state action.

The Court's opinion has been analyzed and parsed and subjected to repeated scrutiny. No matter how one looked at it, it appeared that—without frankly admitting it—the Court was making new constitutional law. More serious, critics found unacceptable the reasons the Court gave for its result. The fourteenth amendment, the Court has insisted from the beginning, controls only governmental action, the action of the state and not the acts of private persons against each other. In this case the Supreme Court was overturning a discrimination which did not originate with the state but was essentially the discrimination of one private person against another. This, it was felt, was a misapplication of the intent of the amendment with grave implications for federal government under the Constitution. When the Court, eighty years ago, affirmed that the fourteenth amendment applies only to "state action," [6] it was not merely giving literal interpretation to constitutional language. The requirement of state action was an affirmation, in particular, that by this amendment the Constitution did not render relations between individuals a matter of federal concern, whether by judicial scrutiny or congressional regulation. In *Shelley*, the Court, orienting on the result desired, failed to take account of the reflections of federalism in the fourteenth amendment and invaded the individual's freedom to be irrational which the amendment had never intended to eliminate, or even to deal with.

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[6] *E.g.*, Civil Rights Cases, 109 U.S. 3, 11-19 (1883); *Ex parte* Virginia, 100 U.S. 339, 344-45 (1880).

There was also specific criticism of the Court's reasoning. Professor Herbert Wechsler, for example, said:

> Assuming that the Constitution speaks to state discrimination on the ground of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforcement of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual? That the action of the state court is action of the state, the point Mr. Chief Justice Vinson emphasizes in the Court's opinion is, of course, entirely obvious. What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make.[7]

The Court's reasons become doubly unacceptable if they lead inevitably where the Court is not prepared to go. Professor Wechsler continues:

> Again, one is obliged to ask: What is the principle involved? Is the state forbidden to effectuate a will that draws a racial line, a will that can accomplish any disposition only through the aid of law, or is it a sufficient answer there that the discrimination was the testator's and not the state's? May not the state employ its law to vindicate the privacy of property against a trespasser, regardless of the grounds of his exclusion, or does it embrace the owner's reasons for excluding if it buttresses his power by the law? Would a declaratory judgment that a fee is determinable if a racially restrictive limitation should be violated represent discrimination by the state upon the racial ground? Would a judgment of ejectment?[8]

Professor Wechsler, it appears, does not believe that the Court is prepared to hold that the fourteenth amendment prevents the state from enforcing private discrimination in every case where the state itself could not by legislation enact or require such discrimination. He does not believe, for example, that the Supreme Court would prevent the state from probating a will which left money to a white charity only, although the state could not itself require such discrimination in a bequest, or itself make such a discriminatory expenditure of funds. He does not believe that the Supreme Court would forbid a state to enforce, by police ejection or by judgment of trespass, civil or criminal, an objection by a private person to the presence of another on his

[7] Wechsler, *supra* note 3, at 29. (Footnote omitted.)
[8] *Id.* at 29-30. (Footnotes omitted.)

property, although the objection is based on the intruder's race. If some may be prepared to go where Professor Wechsler hesitates to go, even they may hesitate to conclude that the Supreme Court would prevent a state from probating a will leaving money to a group or institution of a particular religious denomination, or from enforcing exclusion, on the basis of religious difference, from church, or church membership, or cemetery, although the state itself could not make or require these discriminations.

Indeed, the difficulty may lie even deeper, as the testamentary cases would seem to prove. If *Shelley v. Kraemer* were read to hold that a state cannot enforce a discrimination which it could not itself make, the state could not probate, enforce, or administer many common bequests. The fourteenth amendment forbids discrimination not only on the basis of race or color; it also forbids state discrimination on any basis which is capricious or whimsical. But any bequest which favors *A* rather than *B* may be capricious or whimsical. In such a case, the state could not by statute require the testator to leave his money to *A*. Apart, then, from bequests to special categories, to wife and children, for example—where an argument can be made that the category is reasonable—no bequest could be enforced if the enforcement were deemed to make the state responsible for the "discrimination." Similarly, so long as an individual may capriciously decide who may, and who may not enter upon his property, the enforcement of trespass would not be possible, even where the exclusion had nothing to do with racial discrimination but was based on some other caprice. In the sale of land, too, the fact that the vendor arbitrarily contracted to sell to *A* rather than to *B* might be argued to prevent a court from enforcing the sale because the state would thereby make the arbitrary selection its own.

*Shelley v. Kraemer* obviously does not portend these extreme results. It cannot stand for a universal proposition that a court cannot enforce a private discrimination if the state could not itself make that discrimination. One must seek a different "principle" which would justify the result in *Shelley* without requiring unacceptable results in other cases. At least, the doctrine suggested by the Court must have some qualification to explain different results in some of the cases raised by the critics.

Suggested revisions have been various. The most frequent suggestion would limit *Shelley* to restrictive covenants—a kind of "zoning" for which the state is responsible even when perpetrated by private persons.[9] The most interesting suggestion is that of Professor Louis

[9] See, *e.g.*, Lewis, *supra* note 5, at 1115-18. Compare note 54 *infra*.

Pollak: he would apply *Shelley v. Kraemer* to prevent the state from enforcing a discrimination by one who does not wish to discriminate; but he would allow the state to give its support to willing discrimination without violating the fourteenth amendment.[10] With this qualification the *Shelley* doctrine would apply to the trespass and bequest cases as well.

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[10] Pollak, *supra* note 5, at 13:

> The line sought to be drawn is that beyond which the state assists a private person in seeing to it that others behave in a fashion which the state could not itself have ordained. The principle underlying the distinction is this: the fourteenth amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprise, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred.

For Professor Pollak, then, *Shelley* was rightly decided because the state had attempted to compel a would-be grantor of property, who did not wish to discriminate, to abide by a discriminatory covenant. That was forbidden state action not merely because the courts were helping to enforce a discrimination, but because, since the actor did not wish to discriminate, there would have been no effective discrimination but for the action of the state courts.

As Professor Pollak recognizes, his proposal requires important limitation of *Shelley v. Kraemer*, and raises a number of possible objections. One may argue, for instance, that while the fourteenth amendment may perhaps protect an individual's "liberty" to refuse to discriminate as it may protect another's liberty to discriminate, that hardly seems to be the focus of the equal protection clause. That clause seems designed to protect the victim against discrimination, not to protect an unwilling "actor" against being compelled to discriminate. It would seem also an eccentric constitutional provision which protected the aggrieved against involuntary discrimination by private persons but not against voluntary private discrimination. Moreover, the distinction is offered as a definition of "state action." But whether the judgment of a court enforces a voluntary discrimination or compels a no-longer-voluntary discrimination, the discrimination is private in origin; in both cases it requires a court judgment to make the discrimination effective. It is difficult to see 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 after a party repents or when one who has succeeded to rights in property does not wish to observe the discrimination. Finally, in *Shelley* itself, is it acceptable to think of the case as one in which the state was compelling discrimination by a grantor of property who no longer wished to discriminate? In essence, the state was enforcing discrimination by the other parties to the covenant who continued to insist upon the discrimination: their interest remained; the grantor was eliminating himself and would seem to have little claim to sympathy.

The suggested distinction seems even more troublesome when applied to the bequests and ejectments. (Professor Pollak expressly applies his distinction to Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228, *cert. denied*, 349 U.S. 947 (1955). Pollak, *supra* note 5, at 6-9, 11-13.) In the case of a discriminatory will, whether the executor does or does not wish to carry out the discrimination, the state is being asked to enforce the discrimination insisted upon by the deceased. One may sympathize with a person having administrative responsibility who is reluctant to carry out a directive to discriminate, but he presumably assumed the task knowing of the requirement that he discriminate. In any event, it does not seem logical that the reluctance of the executor should determine whether state enforcement is "state action," whether the discrimination will be given effect. Nor does it seem logical, as would seem to be the consequence of the proposed distinctions, that a church could discriminate or exclude on denominational grounds and invoke the aid of the courts to give effect to the discrimination, but the state court could not similarly enforce such discrimination at the behest of a staunch parishioner against deviating vestry. Compare Davis v. Scher, 356 Mich. 291, 97 N.W.2d 137 (1959). And when there is no social or religious discrimination involved, can a trustee refuse to administer a trust or bequest for the benefit of *A*, selected whimsically by the testator, because the trustee might prefer *B*?

In varying degrees all the suggestions require rejection or radical revision of the Court's opinion. All would dash some of the hopes and frustrate much of the promise of *Shelley*. Some of the proposals introduce new distinctions difficult to justify, difficult, too, to rationalize in the light of the language, purposes, and history of the fourteenth amendment; and, on the other hand, they may foreclose other distinctions which seem waranted by the Constitution. One feels that *Shelley v. Kraemer* is "correct" and should apply beyond the special case of the restrictive covenant. The feeling persists that *Shelley* should go further than Professor Pollak suggests, should bar even "voluntary" discrimination by restrictive covenant and also, perhaps, voluntary discrimination or segregation of a public character. The feeling persists, on the other hand, that *Shelley* cannot go as far as its logic leads, that restrictive covenants are different from the testamentary and "social" trespass cases, and that in some of the latter instances, at least, the state may "enforce" the discrimination whether it be willing or reluctant. The feeling persists, too, that even in the testamentary cases and perhaps in trespass cases not involving private homes, there may be a basis for distinction between racial and some kinds of religious discrimination. While "feelings" hardly decide constitutional cases, they may well reflect historical and social institutions and attitudes not irrelevant to concepts which permeate the fourteenth amendment. It remains to set forth a theory to justify these distinctions which would be consistent with the language and history of the amendment, with its philosophy of the relationship between government and individuals under our federal system, and with what the Supreme Court has said and held.

## II. The Basis for a Revised Opinion

I propose for consideration a revised opinion in *Shelley v. Kraemer*, based on the following "memorandum."

### *A. The Compass of the Fourteenth Amendment*

The fourteenth amendment is addressed to government, to state government. It does not speak to individuals; it contains no limitations upon individuals or on private action. To the states, the fourteenth amendment addresses prohibitions. Prima facie, at least, it tells the states what they must not do; it does not impose affirmative obligations upon them. The state must not deny due process; the state must not deny the equal protection of the laws.

This has been the interpretation of the fourteenth amendment, virtually without dissent. It is the interpretation to which the words

of the amendment lead. It is consistent with the philosophy of the Constitution [11] and of the fourteenth amendment.[12] The Court, in effect, reaffirmed this interpretation in *Shelley* and has abided by it since.

The fourteenth amendment, then, does not impose on any person a duty not to discriminate against another on any grounds whatever. The fourteenth amendment does not confer upon any person the right to social and economic equality. The fourteenth amendment does not cast upon the states an affirmative obligation to assure to every individual fundamental social and economic rights.

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[11] A "liberal" constitution rooted in the political thought of the 18th century, the United States Constitution, with its Bill of Rights, established limitations on government and declared "natural" rights and freedoms of the individual immune to encroachment by government. The justice it hoped to establish was, in Aristotle's terms, roughly, commutative rather than distributive. It wished to insure tranquility and secure liberty, not to achieve equality or economic security. It hoped to promote the general welfare; it did not require government to guarantee individual welfare. Unlike constitutions reflecting "welfare state" concepts of the 20th century, the United States Constitution did not declare or recognize social or economic goals and impose on government affirmative obligations to achieve, maintain, or guarantee them. It did not guarantee against hunger or slavery, against economic inadequacy or social inequality. The Constitution may have permitted, it did not require New Deal meliorism.

Of course, it may be that in view of "our whole experience," of "what this country has become," the "constitution we are expounding" may yet be read as imposing affirmative obligations on government to assure bread, work, "security." Under pressures resulting from Brown v. Board of Educ., 347 U.S. 483 (1954), courts may approach finding a constitutional right to an elementary education. The Constitution may some day be read also to guarantee rights of social equality—a covenant of rights which government must not only respect but achieve and maintain. For now, it seems, we are not yet there; the welfare state in the United States—even at minimum levels—has not yet been recognized as a constitutional requirement.

[12] While there is still controversy as to whether the Civil War amendments made applicable to the states all or many of the constitutional limitations originally applied to the federal government, there is little persuasive evidence that they represented a different philosophy, that they intended to impose on the states affirmative obligations to achieve and guarantee individual rights—obligations which had never been borne by the federal government.

The fourteenth amendment, at least, does not seem to have had that purpose. It intended a radical change in our federalism by subjecting to the control of the Federal Constitution and of a federal congress and judiciary large areas of state action and responsibility. The amendment did not intend radical changes in philosophy of government. It was not careless drafting but intentional expression of accepted political philosophy when the fourteenth amendment was written as a prohibition and not as an obligation, and the "Thou shalt not" of this amendment was addressed to government, to the state governments.

The thirteenth amendment may be different. It was directed against an institution which was not created or imposed by government; slavery was an institution of private property which enjoyed the protection of local government like other private property. In abolishing and outlawing slavery, the thirteenth amendment not only denied to slavery the protection of local law but guaranteed freedom from slavery for every human being against every other. And the agencies of government, it might be argued, were required to give effect to this prohibition, although, even as to Congress, the amendment only authorized but did not command action to make the guarantee effective.

For the suggestion that the fifteenth amendment may also be different, see note 15 *infra*.

## "State Action" and State Responsibility

When a state, in some official act, discriminates on the basis of race or some other irrational ground, the official act constitutes a denial of equal protection of the laws. The official action of the state may, of course, be judicial as well as legislative or executive. The state denies equal protection to a Negro when it convicts him of crime on the verdict of a jury from which Negroes had been systematically excluded. The state denies due process when its courts convict a person by a trial which included some fundamental unfairness.

Cases like *Shelley v. Kraemer* do not involve racial discrimination by the state or, originally at least, any other official act denying rights to anyone. These cases spring from private discrimination or the assertion of other private "rights" which impinge on another private person. Generally, the state becomes actively involved only when its aid—usually the aid of its courts—is invoked to enforce or effectuate the private discrimination. The issue in these cases is usually said to be whether there was "state action." But, at least in these cases, the phrase "state action" no longer contributes to clarity. The prohibitions of the fourteenth amendment include no reference to "action" by the state. It has long been clear that the state can violate the amendment by "inaction" as well as by "action"—by what it does not do as well as by what it does. On the other hand, there are situations where there is surely some "action" by the state but the action is not deemed sufficient to involve the state and to warrant charging it with the denial of rights. Or, while the state "acted" and is responsible for what happened, what happened is not deemed a violation of rights protected by the Constitution. The question, then, is 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.

## Bases for State Responsibility

That the question in these cases is whether the state is responsible for a denial of rights has been emphasized by the Supreme Court; the Court has also recognized the difficulty in defining the bases of state responsibility. "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' " [13] One

[13] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

can only seek guidance in what the Court has done. The state is responsible for acts of its officials which are not authorized, even where the acts were forbidden by state law.[14] The state is responsible when it delegates, authorizes, or acquiesces in the exercise by private bodies of functions that are essentially "governmental" in character, like the conduct of primary elections that are an integral part of the election process.[15] The state is responsible when it permits "a corporation to govern a community of citizens." [16] The state which owns and leases property to a private body is responsible for the conduct of its lessee, at least where the property is owned and used as in *Burton v. Wilmington Parking Authority*.[17] Government is responsible when it asserts its interest and its authority in private activity, even if it refrains from regulating it.[18] Government should be held responsible, it has been suggested, where private organizations—such as labor unions—operate pursuant to a scheme of systematic statutory regulation and encouragement.[19]

In these cases, the active discrimination or deprivation was that of a private organization or person; the state did not perpetrate the denial, require it, or participate in it—at least in the first instance. The state was nevertheless held responsible because of the special character of the private activity or some special state relationship to it; the discriminatory activities were not "strictly private." One or more of these cases might indeed provide the courts with an adequate narrow ground for holding the state responsible in some *"Shelley v. Kraemer"*

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14 United States v. Raines, 362 U.S. 17, 25 (1960); Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931). See also Screws v. United States, 325 U.S. 91 (1945).

15 Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

In the later voting cases the Court found violations of the fifteenth amendment rather than the fourteenth. Although both amendments are prohibitions on the states, it has been suggested that the fifteenth "must impose on the states a heavier affirmative duty to assure an equal franchise than does the fourteenth." Pollak, *supra* note 5, at 23.

16 Marsh v. Alabama, 326 U.S. 501, 509 (1946).

17 365 U.S. 715 (1961). See notes 22-23 *infra* and accompanying text.

18 See Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

19 See Railway Employes' Dep't v. Hanson, 351 U.S. 225, 231-32 (1956), *and* Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345, 358-59 (1961), *with* Professor Wellington's own views, *id.* at 361-75.

Mr. Justice Douglas, concurring in Garner v. Louisiana, 368 U.S. 157, 176 (1961), would find "state action" also where there is action by an enterprise "affected with a public interest," "where facilities of a public nature are involved," when a state "licenses a business." Compare Civil Rights Cases, 109 U.S. 3, 26, 37-44 (1883) (Harlan, J., dissenting).

It has been argued that state enforcement of a "custom of segregation" is invalid state action. See Garner v. Louisiana, *supra*. See also *id.* at 178-81 (Douglas, J., concurring). This suggests that the state may be responsible when it enforces segregation in Louisiana, yet not in Massachusetts. *Shelley v. Kraemer*, of course, would seem to bar state enforcement of segregation regardless of any custom.

cases.[20] In their sum, these cases and concepts may contribute to the development of a larger doctrine of state responsibility in relation to private discrimination.

The cases which concern us, we shall assume, are "strictly private." They deal with private discriminations which involve no special relationship of the state to the parties or the property, nor any organized programs in which private groups are engaged in action of a "governmental character." Neither are they cases in which the state is entirely and clearly responsible because it has legislated to require discrimination—for example, by a statute requiring segregation in places of public accommodation. We are concerned with cases of private discrimination in which the involvement of the state is only that its courts are called upon by private parties to give effect to their discriminations. In such cases, one may suggest three bases, not wholly discrete, for holding the state responsible.

1. *The state is responsible for what it could prevent, and should prevent, and fails to prevent.* State responsibility for what it tolerates

[20] The voting cases have suggested, as an alternative ground, that the state continues to be responsible for discrimination where it once sought to regulate private activity and later seeks to disengage itself. *Cf.* Smith v. Allwright, 321 U.S. 649 (1944); Pollak, *supra* note 5, at 19-22. See also Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). This offers a special possibility for deciding cases involving discrimination about which the state once legislated—say during Reconstruction—and then repealed the legislation. For example, the State of Mississippi adopted legislation forbidding racial discrimination by common carriers, innkeepers, restaurants, theaters, and others. Miss. Laws 1873, ch. 63, § 1, at 67. This was later repealed. (Similar legislation by Louisiana, also later repealed, was involved in Hall v. DeCuir, 95 U.S. 485 (1878).) There was also Reconstruction legislation not unlike the act of Congress which was construed as barring the enforcement of restrictive covenants in the District of Columbia. See Hurd v. Hodge, 334 U.S. 24 (1948). The repeal of legislation of this kind was obviously intended to authorize if not encourage discrimination like that before us. If a state continues to be responsible after it repeals invalid discriminatory regulation, Smith v. Allwright, *supra*, it would seem responsible, a fortiori, when it repeals state legislation in order to make it "lawful" for private persons to discriminate.

This possibility deserves the advocate's exploration. He will face the argument that, at least in the Reconstruction cases, the state's "engagement" was brief and terminated almost one hundred years ago. He will have to insist that disengagement is not possible even after so long, that the effect of state involvement is not yet dissipated. If "encouragement" is the important factor, courts may be reluctant to assume that the citizens of the state are effectively aware of the original legislation and of its repeal. Surely, they may conclude, any encouragement to discriminate implied in the repeal of the legislation has long ceased; there is now no greater state involvement than if such legislation had never been enacted.

The "governmental function" argument may also be invoked. Zoning—the determination of the character of neighborhoods—is a function which governments have exercised and are increasingly exercising. The state, then, is responsible for all efforts at zoning, its own or those it allows private persons and groups to effectuate. The restrictive covenant, designed to maintain the homogeneous character of residential neighborhoods and to support property values, is a private attempt at zoning for which the state is responsible. See, *e.g.*, Lewis, *supra* note 5, at 1115-16; Pollak, *supra* note 5, at 11; note 24 *infra*. The argument has greater plausibility where the facts show a widespread combination and program rather than an isolated attempt by a private person to select his neighbors. Perhaps the record did not support the argument in *Shelley v. Kraemer*.

See also note 54 *infra*.

was, in part at least, to some Justices at least, the basis for finding a constitutional violation in the voting cases.[21] *Burton v. Wilmington Parking Authority*,[22] decided at the last term of the Supreme Court, has language which carries further the concept of state responsibility for what it permits. The case did not involve the very governmental function of elections; it involved discrimination by a restaurant, privately operated for private profit, which was leased from a public authority and was part of a complex of parking and other facilities built by the state on public land, partly with public funds. The Court held the state responsible, in part because as lessor it could have insisted on preventing discrimination and failed to do so.[23] In the cases which have held the state responsible for private discrimination which it could have prevented and failed to prevent, the state had some special relationship to the function or activity involved—holding elections, governing a town, leasing a restaurant which is part of a public parking arrangement. This special relationship imposed on the state the duty to prevent the discrimination. Logically, however, one might extend the argument very far: the state is responsible whenever it could take action to prevent discrimination and fails to do so.[24] In

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21 "For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment." Terry v. Adams, 345 U.S. 461, 469 (1953) (Black, J.).

22 365 U.S. 715 (1961).

23 [T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

*Id.* at 725.

The Court speaks of "responsibilities under the Fourteenth Amendment imposed upon the private enterprise." This seems careless. The amendment, strictly, imposes responsibilities only upon the state. One of these state responsibilities may be to compel the private enterprise to desist from discriminating or for the state to desist from enforcing the private discrimination.

24 See also Steele v. Louisville & N.R.R., 323 U.S. 192, 208-09 (1944) (Murphy, J., concurring). Compare Pollak, *supra* note 5, at 20-21.

A substantially similar argument would stress that all rights of property and contract are governed and protected by law; the state is responsible for them and, therefore, for discrimination which is perpetrated under the authority of these "rights." State responsibility on this basis, like responsibility for what the state tolerates, would destroy the distinction between private and state action under the fourteenth amendment, unless one assumes that there are in fact rights which do not depend on the state but which enjoy constitutional protection. See text accompanying note 39 *infra*.

The recognition that all relations and rights are governed by state law has led others to different conclusions. See Lewis, *supra* note 5, at 1108-20. Discussing *Shelley v. Kraemer*, Professor Lewis points out that state law and the state legal system pervade and are being applied when there is a restrictive covenant, whether or not the state will enforce the covenant. If there is to be any meaning to the distinction between state and private action under the fourteenth amendment, however, the fact that state law governs is not enough to charge the state with responsibility for every private action. Nor should state enforcement be critical. Professor Lewis

*Shelley*, for example, the state could have outlawed restrictive covenants. By constitutional provision, by statute, or by development of a common-law policy, the state could have declared restrictive covenants illegal or unenforceable, whether as restraints on alienation or, as we shall see, in pursuit of equality as a legitimate public purpose under the state's "police power." Since the state could have forbidden them, it is responsible for their continued existence, surely for their enforcement.

2. *The state is responsible for discrimination which it encourages or sanctions.* A legislative enactment "authorizing discriminatory classification based exclusively on color" is "clearly violative of the Fourteenth Amendment." [25] The reason for this conclusion is not that the state is delegating a governmental function or otherwise bestowing authority which the private actor would not otherwise have.[26] Presumably, the state is responsible because it is lending sanction to the discrimination and actively encouraging it.[27] In a *Shelley* situation,

believes that "the common law scheme of restrictive covenants should be invalid apart from affirmative judicial action." *Id.* at 1114. *But cf.* note 43 *infra*. *Shelley v. Kraemer*, Professor Lewis thinks, should better stand "for the principle that the power to enter into a covenant restricting land use and occupancy on the basis of race is lacking because that part of the common law that provides the particular property rights necessary for such an arrangement is invalid." Lewis, *supra* note 5, at 1114. It is invalid because state law and state judicial machinery transform "private, individual bias into a sort of institutionalized bias" and render it a program governmental in character for which the state is responsible. *Id.* at 1118; see note 20 *supra*.

[25] Burton v. Wilmington Parking Authority, 365 U.S. 715, 726-27 (1961) (Stewart, J., concurring). Of the three dissenting Justices, Mr. Justice Frankfurter agrees that this is so "indubitably," *id.* at 727, and Justices Harlan and Whitaker "would certainly agree," *id.* at 729. The majority of the Court did not address itself to the question.

[26] *Cf.* Nixon v. Condon, 286 U.S. 73, 85, 87, 88 (1932).

[27] The reasons for invalidating legislation authorizing racial discrimination are even stronger if the Justices quoted in note 25 *supra* had in mind legislation which authorized discrimination on account of race in circumstances where other discriminations were forbidden. Compare, *e.g.*, the argument in note 54 *infra*. It was perhaps such legislation which the dissenting Justices had in mind when they suggested that there may be a constitutional difference between a statute which "authorizes" discrimination and one which merely declares the common law—say one declaring the common-law rule that a shopkeeper may serve whom he pleases. Such a statute, they imply, does not per se render the state responsible; additional state involvement might be necessary. Of course, even the "common law did not become a part of the laws of the States by its own vigor. It has been adopted by constitutional provision, by statute or decision . . . ." Western Union Tel. Co. v. Commercial Milling Co., 218 U.S. 410, 417 (1910). The Justices apparently did not consider whether the existence of common-law remedies in the state, particularly if taken together with legislation declaring the common law, might constitute sufficient encouragement or sanction to discriminate to render the state responsible. The Justices apparently did not consider either that in the particular case the legislation was adopted in 1875 and that the statute authorized discrimination not only in restaurants but in inns and hotels which at common law were not free to discriminate, see Hall v. State, 4 Del. 132, 141 (1844); note 52 *infra*, apparently for the purpose of affirming a policy of segregation of Negroes.

In *Burton*, there was no state enforcement. The state courts had refused declaratory and injunctive relief to the victim of discrimination in an action against the state

there is usually no legislation authorizing the covenant or other discrimination.[28] But if a state enforces a covenant under its common law, even if only by awarding money damages for its breach, "the result of that sanction by the State would be to encourage the use of restrictive covenants."[29] A state may not "authorize" or "encourage" discrimination by its common law and the promise of its courts that they will give it effect.[30]

3. *The state is responsible when its courts act to render discrimination effective.* Private persons may discriminate; they may even, perhaps, use self-help to enforce their discrimination. But if the state lends the support of its institutions to enforce the discrimination, the state is responsible; without the state's aid, the discrimination would not be effective.

State effectuation of private discrimination, state encouragement of private discrimination, perhaps even state toleration of private discrimination, are possible grounds for holding the state responsible for discrimination enforced by its courts.[31] If the state is responsible for the discrimination, it is, generally, violating the equal protection

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authority claimed to be responsible for the discrimination. Where there is state enforcement, the dissenting Justices would have to consider that the state may be responsible on that basis, whether the enforcement is by a remedy available at common law or one of more recent origin. One of the dissenters, Mr. Justice Frankfurter, was on the Court when it decided *Shelley*.

[28] At most there is general legislation codifying or modifying the common law concerning covenants, the enforcement of contracts, and the vindication of property rights, for example. See note 27 *supra*.

[29] Barrows v. Jackson, 346 U.S. 249, 254 (1953).

[30] One may say, indeed, that the state is more involved and does more to encourage discrimination when its courts enforce discrimination than when its legislature merely "authorizes" private persons to discriminate if they wish. *Cf.* AFL v. Swing, 312 U.S. 321 (1941). While a recent statute adopted in a particular context may exude unusual encouragement and sanction, it is questionable whether, generally, the person subject to law is more "encouraged" by a statute or whether he even distinguishes between what is permitted him by statute and what he may do "as of right" because the state has not barred it and will enforce it. Particularly if a statute authorizing discrimination is old and long-established, there seems little basis for an argument that it continues to have more sanction or offers more encouragement than that which was permitted at common law or is a more recent innovation, judicial in origin, especially if there is a history of judicial enforcement.

[31] The alternative arguments do not necessarily have the same consequences. All of them might prevent a state from taking any official action which would run contrary to its responsibility; the courts could not enforce the covenant or perhaps give it any other effect. See note 43 *infra*. But if the state is responsible merely because the state could have outlawed the covenant and did not do so, it is responsible for such contracts even if the state is not enforcing them in its courts. Compare note 24 *supra*. While there is no way to compel a state to pass legislation outlawing the covenant, Congress may be able to outlaw the discrimination under its power to enforce the amendment's strictures against the state's delinquency. The basis for congressional action is weak where the state is not enforcing the covenant if state enforcement is what constitutes the violation of the amendment. To that extent, arguments based on enforcement—like the Court's opinion in *Shelley*—are not inconsistent with the *Civil Rights Cases*. See also note 32 *infra*.

clause. In *Shelley v. Kraemer*, on the grounds given, enforcement by the state rendered the state responsible for the restrictive covenant and denied the equal protection of the laws.

### *B. The Exceptions to Equal Protection*

Without more, our emphasis on state responsibility and the grounds suggested for holding the state responsible do not escape the criticisms leveled against the Court's 1948 opinion in *Shelley*. If the state is responsible and denies equal protection whenever it enforces any private discrimination, must this not follow equally when the state enforces the discriminatory "ejections" and bequests which trouble the critics?[32] The answer, we suggest for consideration, lies in a critical qualification which the Court did not mention, perhaps because it assumed or concluded that it was not material in the case before it. The Court wrote—and the critics read—as though all enforcements are state action and all such state action denies equal protection. The holding and opinion of the Court applied to the facts before it and to other discriminations in similar relationships. The cases raised by the critics, however, may lie in an exceptional category in which state enforcement, although one may call it state action, is not state action which denies equal protection. In the terms we prefer, we suggest that those cases reflect circumstances in which a state which enforces a discrimination is yet not responsible for it; or, even if the state is responsible for the discrimination, the state nevertheless is not denying the equal protection of the laws. In those cases, we suggest, there exist, against the claim of equality, important countervailing rights of liberty and privacy that enjoy substantial constitutional protection; these important rights include a protected freedom to discriminate which the Constitution prefers over the victim's claim to equality and which the state may be constitutionally permitted—if not required—to support by judicial remedy.

### The Conflict of Liberty and Equality

Here is the crux of the problem and—we suggest tentatively—of its resolution. That there might be another claim with some constitutional title competing with the claim of equality was not mentioned in *Shelley*. Not very many years earlier, one may guess, the

[32] We assume here that all "enforcements" equally render the state responsible. Perhaps it may be argued that the role of the state in enforcing a covenant is different from its role when it probates a will or enforces a judgment in trespass. Particularly if the basis of state responsibility is that enforcement encourages the discrimination, the different enforcements may differ in the degree of encouragement they lend. See also note 43 *infra*. Compare pp. 498-500.

countervailing claim would have appeared obvious, perhaps even obviously superior. For *Shelley* and its congeners reflect, of course, the conflict of competing "rights" of individuals and the responsibilities of government in relation to this conflict. The Shelleys claim a right to equality, a right to enjoy the same opportunities as others and to be free from irrational discrimination on the basis of race or other capricious irrelevancies. The Kraemers claim basic property rights and a right of liberty, the freedom to choose one's neighbors, to make contracts and have them enforced, to deal with whom one chooses, to leave one's property as one will, to be whimsical, sentimental, irrational, capricious. And the state cannot escape involvement in the conflict. It must decide whether to encourage, authorize, permit, tolerate, discourage, or outlaw the freedom to discriminate; it must decide whether, if the discrimination is not forbidden, the agencies of government—the courts and the police—will vindicate and support the "freedom" to discriminate. But the state's choice is not entirely free; it is limited by the Constitution, particularly by the fourteenth amendment. And that amendment, which forbids the state to deny the Shelleys equality, also forbids the state to deprive the Kraemers of property and of liberty "without due process of law." [33]

No algebraic formula nor any conjuring with the words of the Constitution can define with precision the limits of the state's choices. What the fourteenth amendment requires of the state in regard to the conflicting demands of liberty and equality has appeared different at different times in the past ninety years. At one time it might have appeared that the Constitution required that the state remain "neutral." We now ask what constitutes constitutionally acceptable neutrality. We ask, again, whether government need be—or can be—"neutral." In fact, it is now established, neutrality is not required by the Constitution in all instances of this conflict. Changing views of the purpose of government have been reflected in liberal views of the meliorative ends which government may pursue. The limitations on the police

[33] To say that these are conflicting claims is not, of course, to say that they have equal merit, or that in all circumstances the same claim must prevail. The claim of liberty, even of the freedom to discriminate, would invoke credentials of "inherent rights," a birthright antecedent to governments and constitutions. Eighteenth century theories of "liberal" contractual government begin with the individual and his freedoms; government and governmental regulation in derogation of liberties must justify themselves. The Constitution, even after the fourteenth amendment, did not create or grant these liberties; it merely reconfirmed them and some protection for them from governmental infringement. The claim to social equality, on the other hand, the right not to be discriminated against by private caprice, has no "natural" origin. It had only vague and limited existence before the Constitution, and the Constitution did not create such right. Even the fourteenth amendment, we have stressed, did not confer a right of equality in the eyes of one's neighbor. The claim to equality finds constitutional support in what the Constitution requires of the states or prohibits to them in relation to this conflict.

power of the states, subsumed in notions of "substantive due process," have been increasingly pushed back. Equality has been recognized as a legitimate aim of governmental power, a public purpose overriding the asserted private freedom to be capricious. Although the Supreme Court has passed directly on only one statute—one which forbade discrimination by labor unions, organizations "functioning under the protection of the State" [34]—it now seems clear that states can actively promote racial or religious equality by forbidding discrimination in housing, employment, and public accommodation and enterprise. Mr. Justice Frankfurter, concurring in *Railway Mail Ass'n v. Corsi*, disposed of the due process clause, saying: "Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. . . . Certainly the insistence by individuals on their private prejudices as to race, color or creed, *in relations like those now before us*, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." [35]

"Neutrality," then, appears to have become the limit to which the state may go in favor of the liberty to discriminate on account of race. In regard to elections, company towns, public parking authorities, and the like, the Constitution requires the state not to be neutral, but to act to prevent inequality or other infringements. The Constitution may even require the state to act to outlaw the restrictive covenant if it becomes an instrument for organized segregated "zoning." [36] In "private" areas, the state may perhaps be neutral, but the requirements of neutrality have also changed. We now recognize that the state is favoring the liberty to discriminate and is not "neutral" when it enforces the restrictive covenant, whether pursuant to legislation or common law.

Increasing equality of the races is the direction of the Constitution. But if the Constitution today weighs on the side of equality, claims of liberty—even of liberty to discriminate on account of race—are not without constitutional protection. Abiding notions of liberty are protected up to the limit of changing notions of what is due process. If "substantive due process" has lost the force it had to frustrate economic regulation, it still has vigor to protect fundamentals of "property"; it subsumes important limitations on the power of the state to regulate "liberty." In our context, in "relations" *not* "like those now before

[34] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945).

[35] *Id.* at 98. (Emphasis added.)

[36] See notes 20, 24 *supra*. The Court declared restrictive covenants unenforceable in the District of Columbia in part because their enforcement might be contrary to "the public policy of the United States." Hurd v. Hodge, 334 U.S. 24, 34 (1948).

us" in *Corsi* or in *Shelley*, there is, we suggest, a small area of liberty which the Constitution favors above the claim to equality, even above the right not to have the state lend its support to inequality. In these special relationships, despite *Corsi*, the Constitution would even today forbid the state to outlaw private discrimination; the state would be held to be depriving the "discriminator" of liberty without due process of law, regardless of the state's purpose to create greater "equality." So, in similar if not identical relationships, we suggest, the claims of liberty may enjoy such constitutional protection or preference that the state may support them—by legislation or judicial remedy—in the face of claims to equality. If considerations of equality in this area do not constitute "due process of law" to permit deprivation of liberty, considerations of liberty in similar cases might well also be held to prevail so as to prevent inevitable insistence on equal protection.

### *C. Shelley v. Kraemer Qualified*

If the competing claims of liberty and the possibility that they may sometimes prevail are recognized, *Shelley v. Kraemer* must be given a more limited reading, and new qualifications must be made to discussions of state responsibility for discrimination. *Shelley*, we would say, holds that generally a state may not enforce discrimination which it could not itself require or perpetrate. Such enforcement is state action, makes the state responsible for a denial of equal protection. But there are circumstances where the discriminator can invoke a protected liberty which is not constitutionally inferior to the claim of equal protection. There the Constitution requires or permits the state to favor the right to discriminate over the victim's claim to equal protection; the state, then, is not in violation of the fourteenth amendment when it legislates or affords a remedy in support of the discrimination.[37] This may perhaps be viewed as a form of "reasonable classification," the traditional basis for permissible discriminations under the equal protection clause.[38] It may, instead, be viewed as the result of the inevitable need to choose between competing constitutional rights; when the equal protection clause and the due process clause conflict, the equal protection clause prevails except in the small area where liberty has its special claim.

The concept of state responsibility may afford a justification of this result in somewhat different terms. We suggested that the state

[37] See note 42 *infra*.

[38] This is not, of course, the traditional "reasonable classification" which permits the state, if it wishes to regulate, to regulate some classes and not others or to regulate different classes differently. Here the Constitution itself determines the "classes," forbids the state to enforce discrimination in most cases, and permits—or requires—the state to enforce discrimination in the special cases. Compare text accompanying note 55 *infra*; note 54 *infra*.

may be responsible when it enforces discrimination because it encourages and sanctions discrimination or renders it effective; we suggested that logically a state may even be held responsible for discrimination which it tolerates. But responsibility implies important limitations. On the extreme ground, if the basis of responsibility is state toleration, the state should be responsible for failing to act only where it can act. The state should not be responsible where it cannot prevent a particular private action or discrimination because to do so would deprive the discriminator of liberty without due process of law. Again, taking the narrower ground, the state which enforces a discrimination is not invariably "responsible" for encouraging or giving effect to the discrimination. Whether or not the state is constitutionally bound to afford a remedy for violation of "basic rights," [39] the fact that the state does afford such a remedy to the discriminator—a traditional remedy for an established right—would seem to offer very little encouragement or sanction to the discrimination. The state, we suggest, may "give effect" to such private discrimination, as it gives effect to other traditional rights of private property for which, too, the state is not "responsible," in the sense that under the Constitution the state could not freely deprive the individual of these property rights.[40]

*Shelley v. Kraemer* was not wrongly decided. It is not a special case. It need not be rejected; it need not be narrowly limited. The rule laid down by the Court in 1948 is a good rule: generally, a state may not enforce private discrimination. The special cases, we suggest, are rather those few where the state supports that basic liberty, privacy, autonomy, which outweighs even the equal protection of the laws.

### *D. The Balance of Liberty Against Equality*

The role and the responsibility of the state, we suggest, may be critically different in different situations in which the state is "en-

[39] Under the remains of Truax v. Corrigan, 257 U.S. 312 (1921), a state may be constitutionally required to afford at least some kind of remedy for the protection of some "basic" rights of property or liberty. (Compare Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Are there echoes of this in Mapp v. Ohio, 367 U.S. 643 (1961)?) The special cases where the right to discriminate is constitutionally protected may be expressions of these basic rights for which a remedy is required. Surely enforcement cannot be a constitutional violation if the Constitution in fact requires the state to enforce the discrimination. If the Constitution requires a state to afford a judicial remedy, say, to a homeowner against a trespasser, even if the latter is ejected on account of race, the state can hardly be held responsible for affording the remedy.

While the continuing authority of *Truax v. Corrigan* has been questioned, at least part of the opinion was recently invoked by the Court in NAACP v. Gallion, 368 U.S. 16, 17 (1961).

[40] We refer, of course, to the responsibility of the states—not only of the state legislatures. It is not significant, then, that a state legislature may be barred from outlawing discrimination by the state constitution. *Cf.* Smith v. Allwright, 321 U.S. 649, 654-56 (1944).

forcing private discrimination." One may begin with the principle—announced by the Court in *Shelley*—that generally the state is responsible and is violating the equal protection clause when its courts enforce private discrimination. The state is not violating that clause, we qualify, when it enforces discriminations in those few relations which are constitutionally protected from state interference, or which the Constitution requires or allows the state to prefer.

The suggested principle does not, of course, end the need of inquiry, or supply easy answers; indeed, it moves the focus of the inquiry into areas from which precision may be even more removed. What is that small area of "liberty" which prevails even over the equal protection clause? How does one balance competing claims of different constitutional protections? How much weight is to be given to the particular role which the state wishes to play in the conflict? There will be difficult cases. But the need to balance conflicting constitutional rights to determine the limits of state responsibility and power has been recognized and faced by the Court in many circumstances, some closely related to our case. "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here," said Mr. Justice Black for the Court in *Marsh v. Alabama*,[41] the Court must conclude that the circumstances are "not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute."[42] It may be difficult to decide what are the weights to

[41] 326 U.S. 501 (1946).

[42] *Id.* at 509. See also the opinion of the Court in Saia v. New York, 334 U.S. 558, 562 (1948) (Douglas, J.) ("Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here."); Craig v. Harney, 331 U.S. 367, 373 (1947) (Douglas, J.); Thornhill v. Alabama, 310 U.S. 88, 96 (1940) (Murphy, J.) ("It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality' of the reasons advanced in support of the challenged regulations. *Schneider v. State*, 308 U.S. 147, 161, 162."); *cf.* Bates v. City of Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). Compare Holmes, J., in Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908). There are differences as to how much of the balancing should be left to the states. In *Saia*, Mr. Justice Jackson disagreed "entirely" with the idea that it is the courts who must balance. "It is for the local communities to balance their own interests—that is politics—and what courts should keep out of. Our only function is to apply constitutional limitations." 334 U.S. at 571 (Jackson, J., dissenting).

The "balancing" we invoke here is not to be confused with the "balancing" in another context, in which it threatens to become a shibboleth which is held to betray an inadequate respect by those who invoke it for some liberties protected by the Constitution. There are some Justices and some critics who are concerned primarily with protecting so-called "first amendment rights" against what they deem to be too-ready infringement in the name of "balancing." Those rights are not involved here. (Indeed, the closest to a "first amendment right" is that of the person who seeks to discriminate, asserting a right of "nonassociation.") Nor are we suggesting balancing a private right against some alleged public purpose; what would be balanced are com-

be put in the balances, to determine which balance outweighs. The task and the process inhere in constitutional government and cannot be avoided. The state is always balancing and choosing between "rights." The constitutional question is whether a particular choice is permissible. The state may balance and choose between competing private claims of property or liberty, within the limits of due process of law. The state may, we suggest, choose between the liberty of one and the equality of another, within narrow constitutional limits reflecting the competing considerations underlying the equal protection clause and the "hard core" of liberty and property that remains in the due process clause. This difficult task could not be avoided if the state legislated in favor of either side in this conflict. It cannot be avoided either, we believe, if the courts, pursuant to general legislation or common law, would decide in favor of either claim.[43]

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peting private rights, where some choice is inevitable and is frequently involved, even if only tacitly. Admittedly, the state policy for a "public purpose"—say, antitrust—may frequently appear as a protection of competing private interest. *Cf.* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

As the above quotations indicate, all would admit that in many circumstances the Constitution allows—or requires—government to favor one right over another which conflicts with it. It is necessary to balance the effect on a defendant's right to a fair trial of another's right to comment on a pending trial. It is even necessary to set against *A*'s right to speak *B*'s right not to listen. It was necessary to set the Negro's right to equal, integrated schools against a white child's "right" not to associate with Negroes. Balancing does not, of course, preclude the view that the Constitution permits, or requires, giving some rights special, preferred weight.

*Thornhill* and the other picketing cases afford instructive analogy, if not precedent, as an area where a right protected by the Constitution is limited by the protected rights of others; when private rights conflict, the state must balance them and the Court will check the balance. In those cases, picketing is recognized as involving, in substantial degree, a form of communication protected by the Constitution. But the scope of the freedom of communication of the picketing employee depends, in effect, on the scope of the employees' right of association, or—described from another vantage point—on the area of protection which the state may constitutionally afford to the property rights of the one picketed. The fourteenth amendment, one should say today, does not permit a state to declare union organization for collective bargaining unlawful; it cannot therefore forbid picketing to that end. Thornhill v. Alabama, *supra*. (While the continuing authority of *Thornhill* has been put in question, see, *e.g.*, International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957), the Court decided a case on its authority in 1958. Chauffeurs Union v. Newell, 356 U.S. 341 (1958) (per curiam).) The state may, however, forbid picketing for purposes which it may declare unlawful. The fourteenth amendment, for example, does not prevent a state from declaring the secondary boycott to be unlawful, and the state may therefore outlaw picketing to that end. Giboney v. Empire Storage & Ice Co., *supra*. See also Hughes v. Superior Court, 339 U.S. 460 (1950), where the Court held that California may bar picketing designed to achieve a form of racial discrimination in employment. In effect, the picket's right to free speech is balanced against the property rights of the person picketed with different results where different degrees of right result in a different balance. A picket's right to free speech may overbalance the property rights of an employer but not the rights of one who is a stage removed from the labor dispute.

[43] The emphasis here is on the sanction and encouragement afforded by state judicial enforcement of the discrimination. One may have to consider whether all forms of "enforcement," civil or criminal, afford identical degrees of sanction. One needs to consider too whether other roles of the state, other effects which the state might give to the discrimination, constituting lesser degrees of encouragement and sanction, might yet contravene the fourteenth amendment. Even legislation of different kinds at different times in different contexts may effect encouragement or sanction

In the end, whether the freedom to discriminate may surpass the claim to equality and how "neutral" the forces of law may be in that conflict can only be decided in the light of a complex of considerations of varying import and relevance. The balance may be struck differently at different times, reflecting differences in prevailing philosophy and the continuing movement from *laissez-faire* government toward welfare and meliorism. The changes in prevailing philosophy themselves may sum up the judgment of judges as to how the conscience of our society weighs the competing needs and claims of liberty and equality in time and context—the adequacy of progress toward equality as a result of social and economic forces, the effect of lack of progress on the life of the Negro and, perhaps, on the image of the United States, and the role of official state forces in advancing or retarding this progress.

Some principles, some guides to the process of balancing, can be suggested. One begins with the principal emphases of the two competing constitutional clauses themselves. The equal protection clause has recently—in the school segregation cases—gained new significance, emphasizing the unacceptable consequences of organized, public, prominent inequalities for whose existence the state is principally responsible. "Liberty" and "property," on the other hand, have also slowly developed clearer definition in the due process dialectic; the Constitution protects against easy state encroachment in a small area of "hard-core" property rights and "preferred" liberties.

Other guidelines may be suggested. To help decide whether state courts may enforce a discrimination, one might ask, for example, whether the state could outlaw by legislation the particular discrimination. The power to legislate against a particular discrimination would be a hypothetical question, and a different constitutional question, also difficult to answer. Strictly, the constitutional question there is whether equality is sufficient "due process" to justify the deprivation of liberty; our question is whether the liberty of the discriminator is sufficient to constitute a countervailing reasonable basis to justify the state in enforcing inequality in the face of the equal protection clause. But similar considerations are relevant to both answers. And courts have had more experience in scrutinizing legislative choices and weighing them in constitutional scales.[44] Whether a state could legislate

in different degrees with different constitutional consequences. Compare notes 20, 30 *supra*; text accompanying notes 25-30 *supra*. Conflicting interests, we suggest, must be balanced in relation to what the state wishes to do about them. Of course, this adds yet another variable which may determine the result in some cases. See, *e.g.*, Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956).

[44] One might also ask whether a state could affirmatively authorize discrimination in the particular case. *Cf.* text accompanying note 25 *supra*. But that is a rare type

against the discrimination also affords some direct guidance to whether it can enforce such discrimination.[45] If discrimination could not be forbidden by legislation, one may conclude that the state is permitted to enforce the discrimination. That the state legislature could not outlaw the discrimination—in the face of the "public policy of the United States" in favor of equality,[46] the holding in *Corsi*, the Court's reluctance to invoke substantive due process, and the "presumption" of constitutionality—suggests a basic and sacred liberty. Protecting such a liberty would seem clearly reasonable for a state under an equal protection clause which generally admits of "reasonable classifications." If the legislature, on the other hand, might outlaw a particular discrimination, the state may surely refuse to enforce that discrimination. That the state is also forbidden to enforce it is not a logical corollary,[47] but this conclusion may follow from the trend of constitutional development which generally forbids the state to sanction, encourage, or give effect to racial discrimination.[48]

Different rights competing with equality will, of course, weigh differently in the balance. "Property rights" have long ceased to have meaningful meaning, and calling something a property right has long ceased, ipso facto, to invoke constitutional protection and exclude governmental regulation. But there are, and remain, property rights and property rights, and there are liberties and liberties, with claims of varying weight to preference and protection in our American, constitutional, federal legal system grown to its present form out of roots in

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of legislation, difficult for the courts to handle, and one with which they have little experience. Presumably, however, there may indeed be special instances where the state may by legislation affirmatively "authorize" discrimination—perhaps in the home, perhaps in distribution of property by will. It was perhaps such legislation which the dissenting Justices in *Burton* had in mind when they distinguished legislation "declaring the common law." See note 27 *supra*. That description seems too broad. See text accompanying notes 48, 50 *infra*.

[45] If discrimination could not be forbidden by legislation, the state might indeed be required under Truax v. Corrigan, 257 U.S. 312 (1921), to enforce the discrimination. But even if that case were not followed, or were held not to apply in the face of the equal protection clause, one might conclude that the state is permitted to enforce the discrimination. See note 39 *supra* and accompanying text.

[46] See note 36 *supra*.

[47] In fact, whether a state legislature could in given circumstances bar the right to discriminate in favor of the right to equality may pose a hypothetical question of inherent unreliability. If a legislature, it might be said, in fact reached the point of passing such legislation, the fact of legislation and the circumstances impelling the legislation may also adequately support a presumption of constitutionality. Judicial enforcement of a discrimination by a common-law remedy may not enjoy as strong a presumption of validity. Using the legislative power as a test, then, may leave a smaller area in which the power to discriminate is favored than if the conflicting rights were balanced in relation to the enforcement itself.

[48] Nevertheless, theoretically at least, there may be instances where liberty may rank high enough to permit its judicial enforcement against claims of equality, although not to withstand legislative preference for equality, unless a state may not tolerate discrimination which it can prevent. See text accompanying notes 21-24 *supra*.

the common law. History will be relevant to remind us how rooted and how cherished are some of our rights, how mistaken, on the contrary, are assumptions about the aged validity of others, how changed are the circumstances and how different therefore must be the weight to be given to some asserted rights today. It is not what we were only; sometimes it is rather what we have become—as in the protection of religious diversity and idiosyncrasy. There seems little basis, on the other hand, for the suggestion that whatever was protected "at common law," or in a particular state's common law, is immutable or invariably has great weight in the balance of the fourteenth amendment. It seems difficult to find precedent, analogy, or argument for such distinctions based on the state of the law at some time other than when the amendment was adopted. What may be distinguished are those rights, sometimes—not wholly accurately—labeled "common-law" rights, whose roots are deep in our past and which time only imbeds further, rights which in our society are fundamentals of individual autonomy and privacy.

### *E. The Revised Doctrine Applied*

We sum up: Generally, the equal protection clause precludes state enforcement of private discrimination. There is, however, a small area of liberty favored by the Constitution even over claims to equality. Rights of liberty and property, of privacy and voluntary association, must be balanced, in close cases, against the right not to have the state enforce discrimination against the victim. In the few instances in which the right to discriminate is protected or preferred by the Constitution, the state may enforce it.

### The Case of the Restrictive Covenant

*Shelley v. Kraemer* is not a close case: the state, we conclude, cannot, under the Constitution, prefer the rights of Kraemer on his contract to the right of Shelley not to have inequality imposed upon him. Kraemer is asserting rights under a covenant in support of the desire of most of the homeowners on the street to select their neighbors. They are asserting rights acquired by contract, not traditional incidents of their rights in their property. Their association is loose and imperfect. It has no intimate ties or purpose; anyone is welcome to buy and live there except Negroes and "Mongolians." The restriction serves no purpose except racial prejudice and the economic consequences of this prejudice. Shelley, for his part, asserts his right to buy and occupy a home where he can. He asserts the right not to

have Negro ghettoes created by maintaining white ghettoes.[49] He asks that the state not prefer the old contract over his new one, that it not lend support to organized zoning for an improper purpose, to a discrimination which has no basis but race and serves no purpose but prejudice.

The state, with its law of contracts, has to choose here between contracts, a later one in breach of an earlier one. As clearly as in *Corsi*, the state could, in the face of the due process clause, outlaw the restrictive covenant by statute or by common-law policy. The restrictive covenant has no special sanctity, and its enforcement is not compelled by hallowed history. States have with considerable freedom modified the bounds of the areas of contract to which they will give effect. Restraints on alienation were denied enforcement at different times and places "at common law." [50] The state cannot hide behind the individual's "liberty" of contract and encourage the discrimination by enforcing it. It cannot prefer this right of contract to this claim of equality.

## The Cases Beyond *Shelley*

*Shelley v. Kraemer*, we believe, is not affected by our qualification. Many other discriminations will, similarly, be clearly within its doctrine. Some, inevitably, will be close and difficult cases. Since the area we except depends on the balance of liberty over equality, it should not be surprising if questions of degree become critical, if businesses or organizations with small claim to liberty to discriminate fare differently from individuals, if impersonal contexts give different answers than do more intimate associations. It might even be found that discrimination against the Negro has consequences, and therefore evokes responses, different from discrimination on grounds of religion, especially if the discrimination itself has some religious basis and is not designed to perpetuate the inferior status of a weak minority. Even the liberty to discriminate on the basis of race may have better claim

[49] The residential segregation of races by the state was held unconstitutional while other kinds of segregation—in "separate but equal" facilities—were constitutionally respectable and destined to remain so for thirty-seven years more. See Buchanan v. Warley, 245 U.S. 60 (1917).

[50] While it is not entirely clear, at common law covenants restraining alienation indefinitely or for long periods were probably not enforceable. See the discussion and authorities cited in Mandlebaum v. McDonell, 29 Mich. 78 (1874), and De Peyster v. Michael, 6 N.Y. 467 (1852). The Court of Appeals of Maryland in Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1937), concluded that a covenant restraining alienation to a Negro was not enforceable at common law but that restrictions on Negro occupancy were enforceable. Even this may deserve reexamination. The rule may have developed from cases involving restrictions on noxious uses. See Foster v. Stewart, 134 Cal. App. 482, 25 P.2d 497 (Dist. Ct. App. 1933); Yoshida v. Gelbert Improvement Co., 58 Pa. D. & C. 321 (C.P. 1946).

to protection in some future day if the targets of private discrimination enjoy substantial strength and equality in the American society.

Whether one case or another will fall outside the rule of *Shelley v. Kraemer* cannot be determined in the abstract. For discussion, however, one may venture some guesses. The import of the qualification which we propose is reflected in the hypothetical cases which troubled the critics. Applying the proposed principle to those cases would not, I believe, give answers which Professor Wechsler found incredible and which Professor Pollak felt compelled to accept with his qualification.

Under today's concepts of due process, we have suggested, the state may not forbid a person to be whimsical or capricious in his social relations or as to whom he will admit to his home. One need not insist on any absolute immunity or inviolability to suggest that the home continues to enjoy major constitutional protection, that competing rights—even claims to equality—would rarely weigh comparably, that a chief function of the state is to preserve this privacy. Surely the fourteenth amendment did not intend to compel the states to change the scope of this private autonomy or to prevent the state from giving effect to traditional rights of privacy and property by its traditional common-law remedies. Even when one excludes on the basis of race, the state which helps give effect to the exclusion is implementing a general, basic, proprietary right, reaching far back into and behind the common law; the enforcement of discrimination is incidental. The victim of such discrimination, on the other hand, suffers a minor limitation and a limited and unpublic indignity.

For the state, then, to decree that one may not bar Catholics, or redheaded persons, or even Negroes from his home would, I believe, be a violation of rights of privacy—of free association and nonassociation—under the fourteenth amendment. Since the state cannot prevent the discrimination, it is not responsible for it. Since the Constitution protects that right and favors it over the victim's claim to equality, the state may surely—under laws of general applicability—give effect to these prejudices incidental to basic rights by sending its police to eject a trespasser or by lending the weight of its tort law or even its criminal law.

It may be a different matter when a storekeeper, restaurateur, or innkeeper, who opens to all, refuses entry to some on the basis of race. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it." [51] In these rela-

[51] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

tionships, the state could outlaw the discrimination. Generally, the discrimination is public, blatant, and widespread; the inequality and indignity therefore notorious and extensive, with important communal consequences. On the other scale, the relationship of owner to prospective clients and that of customers with each other are superficial, not intimate. The storekeeper is not asserting the general right to select his associates; in general, indeed, he welcomes all. Race alone is the basis of discrimination, and frequently it is not because of the caprice of the store owner but because he would cater to the caprices of the community. The economic advantages of a "restricted clientele" are part of the pattern of discrimination and would fail if discrimination disappeared. It is not a general property right which the state would be enforcing but, usually, a community pattern of racial discrimination; this the state cannot sanction, encourage, or support. The state, at common law and since, has subjected the storekeeper to innumerable regulations;[52] it cannot insist that it must leave him—and enforce—his right to discriminate. It cannot favor this right over the claim to equality.

The discriminatory bequest of an otherwise valid will may also present different situations where different rights must be balanced against the claim of equality to determine whether the state may probate the will and give effect to the discrimination. It may be that the role of the state in "enforcing" a will is different from its role in enforcing a covenant or a liability or penalty for trespass. In our system, the state's role is indispensable to giving the will any effect. Does its role constitute sufficient sanction and encouragement to discrimination to make the state responsible?

The rights involved are, of course, critical. While the power to leave property by will is hardly as sacrosanct an incident of property as is the autonomy of the home, it is a right which our society still accepts as basic to the institution of property.[53] In general, the right of testators to be capricious is an old right, commonly exercised, generally given effect. The state which administers wills is giving effect to a general right of the testator to dispose of his property as he sees fit; there will frequently be some kind of irrational discrimination

[52] The innkeeper and the carrier, at least, could not exclude on account of race at common law. See Newton v. Trigg, 1 Show. K.B. 268, 89 Eng. Rep. 566 (1691); BEALE, THE LAW OF INNKEEPERS AND HOTELS 42, 45-46 (1906); STORY, BAILMENTS §§ 475-76, 591 (9th ed. 1878).

[53] "[N]o one can compel the covenantor to sell his property in violation of his restrictive agreement or otherwise force him to desist from abiding by his covenant. To do so would be to invade *his* constitutionally guaranteed right of dominion over his own property. And, that would be no less true of Stephen Girard's trust were we to hold that . . . he has been guilty of an unconstitutional discrimination . . . ." Girard College Trusteeship, 391 Pa. 434, 453, 138 A.2d 844, 852, *appeal dismissed and cert. denied*, 357 U.S. 570 (1958).

involved. The right of the claimant to an equal benefice, even to have social discrimination eliminated from the motivations of private donors, does not cry urgently for protection. It is a small private wrong. As a rule, then, the state can give effect to this traditional aspect of property without examining the basis of the discrimination. So under the due process clause, I should guess, a state cannot prevent an individual from leaving property to *A* rather than *B*, both strangers, even if the reason is that *A* is white and *B* a Negro—at least if the state permits leaving property to strangers at all.

On the other hand, the state has from the days of the common law exercised substantial control, in the name of "public policy," over the power to bequeath. The balance may begin to shift as the testator leaves the area of private bequests and begins to discriminate institutionally. Even there the state probably cannot today prevent a testator from leaving money to a religious institution; religious association and its support today enjoy substantial constitutional protection. There might be a less weak case for saying that a state can forbid "discrimination" between white and Negro charities. Very likely, the state can prevent a testator from leaving property to a private institution, nonreligious in character, which practices religious or racial discrimination. Here giving effect to the bequest is likely to be a public, notorious fact, feeding community patterns of discrimination. The testator's interests, on the other hand, are more removed. The discrimination may not even be his own; in any event, his interest in insisting on discrimination by others against others does not appear to weigh heavily in the constitutional scale. A strong case, then, might be made for saying that the state cannot prefer the testator's right to discriminate in this manner, and so cannot probate or administer such a will. The same result can perhaps be justified in the somewhat different case of the will of Stephen Girard—a bequest to establish an institution for white students only.

Perhaps I am mistaken in these hesitant particular conclusions, conclusions which can only be reached after careful weighing of relevant facts and considerations. But an awareness of the process and the issues involved is essential, and some formula to guide those who hold the balances inevitable. The process of balancing rights and choosing between them when need be may itself be seen as a critical aspect of the due process of law.

## III. *Shelley* IN SUPREME COURT JURISPRUDENCE

The doctrine we have suggested for consideration—more tentatively than may seem from the tone of an attempt to persuade—would

reaffirm the result and the reasons in *Shelley v. Kraemer* for most cases; the obligation of the state to refrain from enforcing inequality is clear and paramount. It recognizes, however, a competing interest of liberty and privacy, including a right to discriminate, which in some circumstances has substantial constitutional protection.

The problem of *Shelley* inevitably requires the adjustment of competing constitutional claims. The proposed solution seems directed to the nature of the problem; its approach seems almost inevitable. A more exact and fixed line might be easier to apply; none has been suggested to date with better claim to relevance and consistency; none has been suggested which seems to meet the changing demands of the Constitution.[54] The particularistic answer can be avoided only by one of two "simple absolutes." Either one must hold that the state cannot enforce any unreasonable discrimination whatever, or one must overrule *Shelley v. Kraemer* (or find for it a special, narrow justification on its facts) and accept the doctrine that, although a state may not encourage or sanction discrimination by statute, it may enforce all forms of inequality regardless of the sanction and encouragement to discrimination which that entails. Both extremes seem undesirable. What seems called for is a position between the extremes, which suggests the need for a standard depending on degree, like that of due

[54] It has been suggested as a narrower alternative approach that the state may be violating the equal protection clause when it adopts a "public policy" for not enforcing some contracts and fails to invoke "public policy" to refuse enforcement of other contracts, unless there is some reasonable basis for selecting the contracts not to be enforced. Compare Truax v. Corrigan, 257 U.S. 312, 334-39 (1921). The question, then, would be whether a state which refuses to enforce, say, usury contracts can insist on enforcing restrictive covenants. The answer would depend on relevant social and political values, although perhaps not the same ones we invoke for our formula. See pp. 491-96.

This suggestion is indeed narrower and less novel. Compare note 38 *supra*. It would, however, require a complete rejection of the Court's opinion in *Shelley*. It would reaffirm that enforcement by a state, pursuant to a general principle in favor of enforcement, is not forbidden by the equal protection clause despite any sanction or encouragement to discrimination by individuals who make the discriminating choices involved. It implies also what the equal protection clause does not usually require—that, in this respect at least, even the state's common law must present a coherent and consistent pattern: a state would be required to deal with all these "evils" at the same time and consistently. A state legislature which could outlaw both restrictive covenants and usurious contracts may do one and not the other without inquiring whether there is any basis for dealing with one and not the other, and there is no violation of the equal protection clause. United States v. Carolene Prods. Co., 304 U.S. 144, 151 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937). Under this suggestion, however, the equal protection clause would bar a state from adopting a public policy of nonenforcement as to one kind of contract without doing the same for the other unless there were a reasonable basis for the selection. One might ask also whether "public policy" as a ground for nonenforcement is a "category" to which the equal protection clause applies. Must different reasons for nonenforcement of contracts be comparable? Can they not be treated as separate categories for purposes of classification under the equal protection clause?

Whether this suggestion would lead to the Court's result in *Shelley v. Kraemer* is not clear. And if it should be found to be unreasonable to enforce restrictive covenants but not usury contracts, the result might be to impel the state not to deny enforcement to restrictive covenants but to grant enforcement to usury contracts.

process. That standard in fact is the one which the Court would apply if the state legislated to regulate these same rights of liberty or property; it is the standard by which the Court would test legislation to outlaw discrimination in a particular context. A standard like this, we suggest, seems appropriate when the state steps into the conflict through its courts rather than by legislation.

*Shelley v. Kraemer*, even with the qualification we have proposed, entails important changes in the jurisprudence of the fourteenth amendment. It is, however, consistent with the theory of the Constitution and of the fourteenth amendment in particular. It does not bar private discrimination per se. The state is not required to outlaw all discrimination or to assure complete equality. There are areas of private autonomy in which the individual can continue to discriminate and the state may enforce that discrimination. The proposed formula puts responsibility on the states when they have power, not when that power is denied them. It avoids distinctions between action and inaction which have troubled the law and which have been inconsistently applied. It puts the common law of a state generally on the same footing as its legislation, rejects distinctions between the written law and the unwritten, and makes the state responsible for both. It affords, I believe, a rational explanation for many cases for which a different rationale was given by the courts. It is consistent with what the Supreme Court did, even with what it said, in *Shelley v. Kraemer*; the qualification added applies to the cases beyond *Shelley*. The doctrine proposed is also, I believe, the direction in which the law and the courts are and should be moving.

The "solution," then, appears to fit the established rubrics of constitutional law, to satisfy the demand for "neutral," general principles of adjudication, to deal logically with the cases which have arisen, and to promise consistent application to foreseeable situations. More, it affords a guide for resolving fundamental difficulties in the philosophy of our constitutional government. For behind the invocation and analysis of concepts and categories like "state action" and "state responsibility" lie the perennial dilemmas of conflicting freedoms and of the conflict of freedom and government under the Constitution. The formula we have suggested uncovers and underscores an area of competing claims and purposes for the equal protection and due process clauses. It recognizes an area of liberty which escapes the compulsions of the equal protection clause—an area analogous to, if not congruent with, the area of liberty which escapes compulsions of equality under the due process clause. It adopts the direction of constitutional development and assumes that in balancing the respective

sanctities of liberty and equality, the area of compelled equality is growing, but an area of privacy remains sacrosanct. It puts the state on the side of equality, giving advantage to the victim of discrimination and calling on him who would discriminate to show that the Constitution protects his right to discriminate, forbids the state from interfering, and permits the state to give effect to his discrimination.

The implications of the proposed approach cannot be overlooked. It may be urged that the formula provides that the state may enforce a discrimination only where it must enforce it, that it leaves no area of state neutrality—no discretion for states to experiment and differ. If this is accepted as the consequence, it may yet be justified: what we are doing is carving a limited area of exception to the generality of *Shelley v. Kraemer* that a state may not enforce discrimination. This is the consequence of the preferred weight which the Constitution gives to equality. In fact, of course, the result suggested would not necessarily follow from the formula. What is essential to it is only the recognition that in some circumstances the Constitution permits the state to enforce a private discrimination because of the favored right of the discriminator. In these circumstances the state may enforce; whether it must enforce is less clear and is not essential to the suggestion.[55] In any event, there remains for the states scope for discretion and difference as to whether and where they will make discrimination a crime or what effects they may give to the discrimination other than to enforce it.

We must also accept the implications for cases which do not involve racial and religious discrimination. *Shelley v. Kraemer*, the critics have noted, seems to assert that state enforcement renders the state responsible for any private action which it enforces. This should include as well state enforcement of a will in which a testator capriciously chooses *A* rather than *B*, state enforcement of an ejectment where the homeowner capriciously has *B* but not *A* removed from his home, state enforcement of a contract which the vendor capriciously has made with *A* in preference to *B*. If *Shelley* applies to these cases,[56] the qualification we have suggested would require us to say that here again the state may enforce because the testator's, the homeowner's, the vendor's liberties prevail over the alleged claims to equality. And

[55] Whether the state must enforce these rights depends on what Truax v. Corrigan, 257 U.S. 312 (1921), is today. See note 39 *supra*.

[56] One may perhaps argue that the doctrine of *Shelley v. Kraemer*, as qualified, should apply only to racial and religious discrimination. State enforcement of the individual, private, *ad hoc* whim or caprice does not really encourage or sanction any person to be whimsical or to adopt a particular whim; the bases for individual irrationality are too numerous to be generalized. Surely state enforcement in this kind of case does not contribute to a widespread pattern of institutionalized discrimination on a particular ground with important social and communal consequences.

indeed, their rights would seem to have sufficient constitutional favor over the rights of a might-be beneficiary, an unwelcome guest, or a would-be purchaser, who demands that the state refrain from enforcing caprice, when the caprice is not based on religion or race but on some other private whim. Perhaps one may go so far as to say that where racial or religious discrimination is not involved we may presume, generally, that the equal protection claim is flimsy, that the claim of liberty is substantial, and that the state is free to enforce the private discrimination. Even this disposition, of course, would still inject into many an ordinary will, trespass, or sale a constitutional question where before *Shelley* none appeared to exist. But, in fact, the constitutional question always existed and always exists as to every action or omission by the state. The state governs in the constant shadow of the Constitution. The due process clause in particular is ever hovering in the background, and the equal protection clause waits in the wings. We do not notice, because in the vast majority of situations the claim that the Constitution is violated is so insubstantial as no longer to be respectably raised. This is the case with the mass of state legislation, as to which, theoretically, one can raise a question of substantive due process or of equal protection. This is what we would decide if the question were raised in the cases we are discussing, even in some of the racial-religious cases mentioned above.

It must also be recognized, finally, that we are invoking "substantive due process"—or something quite like it—to form an exception or a reasonable classification under the equal protection clause. Constitutional limitations with the vague outlines of "due process of law," with the assumption of values and choice between values which that concept entails, are not favored. The trend in some areas has been to reduce the scope and impact of that limitation; the suggested approach may appear to give to substantive due process new vitality and an additional domain. But while the notion that due process implies a particular economic philosophy has been happily abandoned, the requirement of due process continues to protect even "property" to an extent; and it has had sustained, perhaps increasing, vitality for the protection of "liberty." In the suggested approach, the protection which due process would afford as against claims of equality is precisely in the area where an individual's right of "property" may be viewed as a right of "liberty," where "hard-core" property rights and the "basic" liberty of privacy and association coincide and flourish.

Of course, what we suggest will cast yet another burden on judges to scrutinize what the states—usually state judges—have weighed first. It adds another area where judges must exercise judgment, weigh the

ponderable and the imponderable, measure the measurable and the immeasurable. But the judgment demanded is not different from that already demanded in constitutional adjudication—in determining the limits of "unreasonable" searches and seizures and "cruel and unusual" punishment, of "ordered liberty" and "due" process of law, of almost every other constitutional provision although it be speciously unambiguous, of the principle and limits of growth of the "constitution we are expounding." The balancing here required is not too different from that in which judges must indulge when other constitutional rights compete or when a local interest seeks to justify some burden on interstate commerce. Sophistication and "realism" have long taught that there is no escape from—or anodyne for—the pains of judgment, of drawing lines, of weighing, balancing, distinguishing, and dividing. In constitutional exposition, as elsewhere, much "depends upon differences of degree. The whole law does so as soon as it is civilized." [57] The judge's task under our increasingly particularistic Constitution demands sadly rare judicial qualities which can only be epitomized as "wisdom"; the creative character of the Constitution cannot be denied from fear that wise judges may not be available to keep it alive.

[57] Holmes, J., partially concurring, in LeRoy Fibre Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340, 354 (1914).